

**UP AGAINST THE LAW:  
RADICAL LAWYERS AND SOCIAL MOVEMENTS, 1960S–1970S.**  
By *Luca Falciola*. The University of North Carolina Press. 2022. \$32.95.

Reviewed by *Katherine Brausch*\*

Summer 2020: Masses of protesters filled the streets, wearing bandanas and homemade masks, fists aloft. The lime green hats of legal observers dotted the crowds, watching intently for signs of police abuses, writing down the names of those arrested when they could. In air-conditioned courtrooms, lawyers represented those protestors, defending victims of mass arrests and filing lawsuits in the wake of law enforcement violence. In 2020, the National Lawyers Guild once more rose to the occasion. The NLG, founded in 1937 as an alternative bar association in opposition to the racist and anti-New Deal ABA, has participated in every major left-wing, anti-racist social movement since. Its 2020 support of the Black Lives Matter movement contributed to the growing conversation over a lawyer’s role in confronting state violence, while the resurgence of popular left-wing politics arising with the Sanders campaign brought with it new discussions about the roles of power and political economy in the law. The NLG’s prominence at the forefront of the legal left has led to questions both within and outside the organization: What is the relationship between lawyers and social movements? What is the role of activist lawyers? The time has never been so ripe for revisiting the legacy of the National Lawyers Guild.

Luca Falciola<sup>1</sup> has ably answered the call. In *Up Against the Law: Radical Lawyers and Social Movements, 1960s-1970s*, he follows the lawyers of the National Lawyers Guild through the “golden age” of radical lawyering. The ferment of the mass movements of the 1960s and 1970s provided perfect conditions to develop “radical lawyer” as an identity, allowing for the merger of career trajectory and political conviction. The contradictions inherent in this identity prompted lawyers of this radical generation to reconsider notions of professionalism, relationships with clients, and the neutrality of the rule of law. These reconsiderations led to changes in legal

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strategies, including mass defense campaigns and militant litigation, which created structures for the individual criminal defenses of masses of protesters and brought their politics into the courtroom. Lawyers and their evolving ideas about the law supported political actors from the Civil Rights Movement to the Attica Prison uprising, representing draft resisters, Black prison intellectuals, and militant unionists. Some even assisted in clearly extra-legal ways by harboring members of the Weather Underground and helping draft resisters cross the border into Canada. Falciola underscores that at these lawyers' motivational core was not respect for formal law but the struggle for justice.

Falciola treats the 1960s and 1970s as an exceptional moment, with its political energy markedly different than what had come before. He begins with the Civil Rights Movement, showing how the Guild's Southern project revitalized a moribund NLG brought low by the Red Scare. For many white Northern lawyers of the Guild, their experience supporting activists in the South was a radicalizing one. They saw first-hand the circumstances of Black Southerners and the racism embedded into the legal system. By actively joining the political movement, speaking at churches, and attending demonstrations, the lawyers forged bonds of solidarity with the Black freedom activists. After experiencing repression from state court trial judges, they innovated, creating new useful legal strategies—in one case, unearthing the Reconstruction-era statute allowing for the removal of cases from state to federal court. Yet in the early 1960s, the Guild lawyers' approach to the law remained relatively conventional.

The Free Speech Movement at the University of California, Berkeley and the Anti-War Movement protests across college campuses spurred both more aggressive defense strategies and a stronger activist identity. The defense of the more than 700 Berkeley students who had been arrested disappointed the activists; they waived their right to a jury to avoid a lengthy series of trials, relying on the fairness of the judge, but were all ultimately convicted. From this event, Guild lawyers learned to create robust defense committees before the mass arrests occurred, to support activists throughout the whole process, and to insist on the democratizing potential of jury trials. More importantly, however, was the effect that student movements had on the many young lawyers who came of age in this moment. These lawyers began to conceive of themselves as activists first and lawyers second.

The creation of an activist identity brought with it important questions: “Was there a place for lawyers in the revolutionary process?” and “Could the law serve liberation rather than domination?”<sup>2</sup>

In grappling with these questions, radical lawyers pushed against the traditional boundaries of their profession. Loathe to uphold hierarchies in any form, they aimed to overturn the traditional lawyer-client relationship. Radical lawyers still acted in an advisory capacity but served to demystify the law rather than place legal issues above activists’ political goals. They viewed their relationship with clients as more a relationship of “co-conspirators” or “comrades in arms.” This led some lawyers in dicey directions, like the Detroit lawyer who harbored members of the Weather Underground in his Northern Michigan farmhouse. The attempt to disband professional hierarchies also led to several experiments with altering law firm structures, creating professional organizations that looked more like communes or collectives. But this too, could create problems—having trained lawyers doing secretarial duties took time and energy that some complained would be better spent on legal work.

Falciola also shows how these lawyers reconsidered their understanding of the neutrality of the rule of law. Prior generations of lawyers believed in the liberating potential of Constitutional litigation, but radical lawyers increasingly saw the results of their litigation in the Civil Rights Movement and the early years of the Anti-War Movement as “token success[es].”<sup>3</sup> Drawing on old Marxist legal ideology and the more recent thought of Herbert Marcuse, they viewed the legal system as an arm of the state’s apparatus of class- and race-based social control. This transformed their legal strategies. Instead of standard criminal defense, many lawyers moved to the model of “militant litigation” to defend their clients. Militant litigation “contextualized crime, garnered sympathetic juries, and educated the public” in the social and economic factors that contributed to the charges faced by the defendant.<sup>4</sup> Radical lawyers used these techniques in ordinary criminal trials as well as the trials of movement activists. Political education became as important, if not more important, than acquittal.

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2. P. 7.

3. P. 75.

4. P. 117.

Ultimately, however, the identity of “radical lawyer” relied upon the existence of the movements they supported. Falciola ends his history in the late 1970s, tracking the decline of the movements which provided the energy for this “golden age.” The final chapter ends in 1977, with the Guild filing a complaint against the federal government for the surveillance that had taken place throughout the entirety of its existence. Though the complaint was dismissed in 1983, the Guild received 400,000 pages of surveillance files from the FBI. The scale of government surveillance targeting the Guild suggests to Falciola two things: one, that their identity as radicals meant that government power would be arrayed against them, but two, that their identity as lawyers, most of whom were white and middle-class, meant that this power would be tempered somewhat in comparison with the repression that many of their clients experienced. As the energy of the movements ebbed, the tension that existed in the dual identities of activist and lawyer evaporated. In the absence of the movement, only the lawyer remained.

Luca Falciola tells an excellent history of radical lawyering in an exceptional moment. But hidden within *Against the Law's* narrative of disjunction is a story of continuity which, if drawn out, would further support his argument about the exceptional nature of the moment. Instead of delineating a line between the Old Left and the New, the continuity narrative suggests a bleeding through. The militant litigation and mass defense campaigns are little more than an updated version of a labor defense strategy as practiced by Communist-affiliated organizations like the International Labor Defense and the Civil Rights Congress. Many of the strategies described were attempted unsuccessfully in *United States v. Dennis*,<sup>5</sup> the 1949 trial of the Communist Party leadership for violations of the Smith Act. In *Dennis*, defense attorneys challenged the jury composition and demanded a more representative jury; like the defense of the Chicago Seven, they participated in political courtroom theater, claiming repression based on political belief; they pointed out the judge's racist behavior and argued that the Smith Act was a step on the road toward fascism.

These strategies failed because of the political and historical context in which they were attempted. The Second Circuit justified upholding the at-

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5. 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).

torneys' contempt charges citing, in part, their jury challenge and the disrespect they accorded to the federal judge by calling him racist, and stated that with their generally disrespectful behavior the defense attorneys intended to undermine the authority of the legal system and the government as a whole.<sup>6</sup> The Supreme Court upheld the contempt citations in 1952, sending these attorneys to federal prison for terms of between one and six months. Two of them were subsequently disbarred. By comparison, when a Detroit trial judge charged Kenneth Cockrel with contempt for calling him a "racist honky," "racial bandit," and a "fool," Cockrel was able to mobilize such support that both the contempt charges and the state bar's disciplinary proceeding against him were dismissed, while the defendants he represented were ultimately acquitted.<sup>7</sup> As these examples show, remarkably similar legal strategies could generate utterly different results. What changed? Without delving into these earlier experiments in radical lawyering, *Up Against the Law* misses an opportunity to explain why the same inventive strategies failed in one era and transformed the law in another. Such comparisons would prove useful to both historians of social movements and politically engaged lawyers operating today.

By using the National Lawyers Guild as a proxy for radical lawyer, Falcicola also obscures important ideological complexities. Radical lawyer as an identity was a crucial part of this era's social movement lawyering, and radical lawyers fueled the massive expansion of the NLG. However, not every Guild member active in social movement lawyering would have accepted this identity. Detroit's Ernest Goodman was a left-wing lawyer. He ran for office under the Communist-backed Progressive Party ticket in 1948 and made his name representing the politically contentious—Communists, Black Panthers, and Attica Brothers, among many others. However, he also eschewed courtroom political theater, and with his litigation explicitly attempted to bolster American democracy through the defense of civil liberties, with a more conventional approach to trial strategy and relationship with his clients.<sup>8</sup> The legal work that he did was materially the same as that

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6. *United States v. Sacher*, 182 F.2d 416, 421 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952).

7. See pp. 1, 268; Heather Ann Thompson, *Whose Detroit? Politics, Labor, and Race in a Modern American City* 130-32 (2017).

8. See generally Steve Babson et al., *The Color of Law: Ernie Goodman, Detroit, and the Struggle for Labor and Civil Rights* (2010).

practiced by radical lawyers, but his approach and attitude differed. These differences cannot simply be explained by generational comparisons. By failing to disaggregate the political heterogeneity of the Guild's lawyers, Falcicola misses the chance to engage with the full complexity of the Guild and with scholars interested in more granular political-legal analyses.

*Up Against the Law* should appeal particularly to historians of social movements and lawyers interested in serving modern social movements. Scholars of social movements will gain an important understanding of another facet of the political moment of the 1960s and 1970s. Today's radical lawyers and NLG members may find their predecessors' responses useful when navigating the tension between political activism and the constraining requirements of the legal profession. However, this text may be of less interest to legal scholars, as political questions take precedence over legal. Overall, Falcicola presents an excellent and much-needed exploration of an important moment in the history of the National Lawyers Guild and American social movements, providing a strong jumping off point for further research.