Carl A. Auerbach--A Tribute

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Foreword: Carl A. Auerbach—A Tribute

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[T]he social function of the intellectual is "to think, and to act in such a way that the results of his thinking are brought to bear upon the great issues of our time."

Carl Auerbach has reflected this philosophy throughout a career in law teaching and scholarship already extending over thirty-six years. In his writings and in his activities, he has demonstrated his belief that law is an instrument of practical application, capable of shaping the social order toward a desired end. Those writings and activities have occurred during an extraordinary period in our nation's history, a period in which the role of government and the law has been dramatically redefined. As one of the principal scholar-advocates of New Deal liberalism, Carl Auerbach has clearly influenced that redefinition. As we seek to assess and evaluate the New Deal's legacy, it is altogether fitting that the Minnesota Law Review dedicate this special issue to Professor Carl A. Auerbach.

Born in 1915, the son of a New York carpenter, Carl was approaching maturity as the Great Depression engulfed the country. While that tragic event was to have a significant impact on almost every American life, its effects were particularly telling on the career of Carl Auerbach. Affecting his choice of both undergraduate school and career, the Depression even more importantly left an indelible mark on his political philosophy.

Carl first experienced the tragedy of the Depression when the father of a friend jumped to his death from a Wall Street

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2. Biographical information and personal recollections were obtained from interviews with Carl Auerbach during his deanship at the University of Minnesota Law School, in Minneapolis, Minnesota (Apr. 3, 1979; Jan. 12, 1979; Aug. 21, 1978).
office window in the panic following the 1929 stock market crash. Later, the Depression intervened more directly when the layoff of his father quashed Carl’s plans to attend Cornell University and forced him to study closer to home. Following graduation in 1935 from Long Island University in New York, where he majored in history and economics, the dictates of the Depression again directed the course of Carl’s life, inducing him to forsake his ambition to become a historian in favor of the economic security of practicing a profession. He settled upon law, the discipline that seemed most closely related to his historical interests.

The study of law was unusually exciting during the period from 1935 to 1938, when Carl attended Harvard Law School, given the dramatic interplay between the United States Supreme Court and President Roosevelt’s New Deal. The conflict between “new” and “classic” liberalism played out in those years was of great significance to the emerging political perspective of Carl Auerbach.

Although Carl’s first law job was as an associate in a private Washington, D.C., law firm, a call from his Harvard professor, Calvert Magruder, soon lured him into public service. Magruder, who had recently been appointed General Counsel of the Wage and Hour Division of the Department of Labor (and was soon to begin a twenty-year tenure as a United States circuit judge), convinced Carl that a greater opportunity for public service could be found in government work than in private practice. Consequently, Carl, to the understandable displeasure of his employers, left his job of only two months and assumed a new position in the Department of Labor. Carl moved to the National Defense Commission in 1940 and, eventually, to the Office of Price Administration (OPA), where he served as Assistant General Counsel until 1943, when military service during World War II interrupted his work.

Upon his discharge from the Army in 1946, Carl returned to Washington where he assumed in quick succession the positions of Associate General Counsel of the Office of Economic Stabilization, Associate General Counsel of the OPA, and, finally, General Counsel of the OPA. Carl assisted these two agencies as they grappled first with the monumental economic dislocation wrought by five years of war and second with their own dismantlement.

As this latter task was drawing to a close in 1947, Carl received an unexpected call from Professor J. Willard Hurst of
the University of Wisconsin Law School, asking him to consider teaching at that school. The two men had become acquainted when Professor Hurst served in Washington, D.C. during World War II as staff attorney for the Board of Economic Warfare. Though he had never before thought seriously about a career in teaching, and, in fact, did not even realize the compliment he was given by the offer of an immediately tenured position, Carl, pleased by the Hurst call and without firm personal plans, decided to give it a try.

Although he abandoned government service for the halls of academe, Carl Auerbach’s extended experience in regulatory agencies left him with an enduring interest in administrative law, a strong belief in the potentials and responsibilities of active government involvement in the nation’s economy, and a respect for government service as a means of serving the public interest.3 These attributes, coupled with his Democratic liberalism, were the foundation and motivation for much of his subsequent thought and writing.

Carl served on the Wisconsin Law School faculty for fourteen years, from 1947 to 1961, and established himself as a leading scholar in administrative and constitutional law. Two research leaves, the first as a Fulbright Advanced Research Award Scholar at the London School of Economics and Political Science in 1953-54, the second as a Fellow in the Center for Advanced Study of the Behavioral Sciences at Stanford University in 1958-59, allowed Carl to deepen his understanding of the social sciences and their relationships to the legal world. As he was advancing his reputation as a scholar, Carl's involvement in the Democratic Party, along with a good deal of quasi-political writing, provided an outlet for his political interests.

In 1961 Carl Auerbach joined the University of Minnesota Law School faculty. Consistent with his strong political inter-

3. See, for example, Auerbach, Some Comments on Mr. Nader's Views, 54 MINN. L. REV. 503, 507 (1970), where Carl Auerbach responded with a strong defense of government service to Ralph Nader's suggestion that public-minded young lawyers seek careers as independent watchdogs of both industry and government:

[It is] difficult to comprehend why Mr. Nader sees government as a hostile force to be combated by the "public interest" lawyer. Why should not young lawyers seeking to champion the public interest enter government service? . . . True, many local and state governments pay miserably and federal pay does not compare with what can be earned in the big firms. But then government service should have the extra attraction of holding out the opportunity for self-sacrifice. I hope Mr. Nader will not discourage young men and women from seizing this opportunity.
ests, part of the reason for the move was that Minnesota—the state of Hubert Humphrey—provided a congenial political home. Carl became Acting Dean during the 1972-73 academic year, and in March 1973 his appointment as the sixth dean of the Law School became permanent. Carl's deanship continued for seven years, during which he was successful in securing the legislative appropriation that made possible the Law School's award-winning new building. That new building, his highest priority as Dean, will magnificently serve the Law School for decades to come.

After stepping down as Dean in 1979, Carl spent the 1979-80 academic year at the Hoover Institute on War, Revolution and Peace at Stanford University. He returned to the University of Minnesota Law School in 1980, where he continues to teach and write, with occasional visiting semesters at such places as Uppsala University in Sweden in 1983 and the University of California—Los Angeles Law School in 1984.

During Carl's fourteen-year tenure at Wisconsin and his subsequent twenty-two years on the Minnesota faculty, he has distinguished himself as an unusually prolific and diversified writer. Within the realm of traditional legal scholarship, he has produced numerous articles in the areas of administrative law, civil rights, constitutional law, legal education, law and the


social sciences, and a variety of other topics. He coauthored two books, The Federal Regulation of Transportation—Materials Illustrating Problems of Public Utility Control and The Legal Process—An Introduction to Decision-Making by Judicial, Legislative, Executive and Administrative Agencies, and he contributed chapters to the books of others.

While the diversity of these writings alone demonstrates the unusually wide focus of his scholarship, Carl's many contributions to nonlegal periodicals further illustrate the depth of his energy and the breadth of his interests. Particularly during the 1950s, Carl offered through these writings a legal-political perspective on the issues of the day.
Carl's writings clearly reveal his strong political orientation. Many writers in the legal-academic community are content to focus upon issues of substantive legal consequence but of little political interest. Not Carl Auerbach. A founder of Americans for Democratic Action (ADA) and a lifetime "Humphrey" liberal, Carl was an active participant in the refinement of America's post-war liberalism.

Perhaps the best example of Carl's success in this role is his article, *Jury Trials and Civil Rights*, published in the *New Leader* on April 29, 1957. That article, which offered a new approach to problems then developing in the legislative consideration of civil rights legislation, is credited by some observers with supplying the formula for compromise that allowed the passage of critical civil rights legislation. At the time of publication of the Auerbach article, Congress was considering legislation authorizing the Attorney General to bring suits enjoining interference with civil rights. However, a split had developed among pro-civil-rights forces over whether alleged violators of injunctions issued under the Act were to be afforded a trial by jury. Many feared that, as a practical matter, a jury trial guarantee would reduce the effectiveness of the law by making enforcement in the South much more difficult. On the other hand, labor leaders were reluctant to endorse any proposal without a jury trial requirement for fear that this precedent might later be used to strip the labor laws of their jury protection.

In his article, Carl argued that this split in the ranks was unnecessary, largely because discussion until that time had ignored the potential use of civil, as opposed to criminal, contempt proceedings. A civil contempt proceeding, being "remedial" rather than punitive in nature, is always before a judge, not a jury. Consequently, Carl suggested, pro-civil-rights forces could compromise by allowing a jury trial requirement.
in the criminal contempt proceedings, while ensuring the law's effectiveness by liberal use of the civil contempt proceedings.

When Carl's article came to the attention of legislative drafters on Capitol Hill, his suggestion was incorporated into a compromise amendment that smoothed the way for the passage of the Civil Rights Act of 1957.\(^{14}\)

Although *Jury Trials and Civil Rights* offers a dramatic illustration of the impact of Carl's writing on the great issues of our time, it is not unique. Indeed, much of his writing addresses political as well as legal issues and advances a readily identifiable political perspective. Even law review articles, such as his work defending the constitutionality of the Communist Control Act of 1954,\(^{15}\) fit this pattern. Given Carl's close political affiliation with that Act's sponsor, Senator Hubert H. Humphrey, and the importance of the Act in demonstrating to a concerned public that the country's liberals were not "soft" on communism, Carl's defense of the Act can be viewed in a political perspective.\(^{16}\) In this, as in many other instances, Carl used his skills of legal analysis to further social and political goals.

A second and perhaps related trait reflected in Carl's writing is his readiness to engage in adversarial discourse. A number of Carl's shorter works have been responses to and critiques of the writings of others. Carl has, for example, responded to Ralph Nader's criticism of law schools,\(^{17}\) William F. Buckley Jr.'s analysis of the House Un-American Activities Committee,\(^{18}\) Theodore J. Lowi's criticism of the administrative process,\(^{19}\) Laurence Silberman's critique of lawyering in demo-


\(^{16}\) Interpretations of the intent and effect of this article have differed. In a 1978 article, Max Kampelman concluded that the article offered strong support for "the philosophy and purpose of the Humphrey legislative effort." Kampelman, *Hubert H. Humphrey: Political Scientist*, *PS*, Spring 1978, at 228, 235. Dean Auerbach took issue with that interpretation in a subsequent letter to the editor of the journal in which the Kampelman article appeared, pointing out that he thought the Communist Control Act was unwise legislation. See Auerbach, *Letter to the Editor*, *PS*, Summer 1978, at 452. In an accompanying letter, Kampelman defended his interpretation. See Kampelman, *Letter to the Editor*, id. at 452.

\(^{17}\) Auerbach, *Some Comments on Mr. Nader's Views*, supra note 3.


\(^{19}\) Auerbach, *Pluralism and the Administrative Process*, supra note 4.
ocratic capitalism,20 and Professor J.H. Skolnick's suggestions for studies in sociology and the law.21 Carl's responsive writings often carry the sharply critical tone of an opposing brief, drawing attention to weaknesses in the opponent's position. Carl's participation in these pointed debates demonstrates his commitment to intellectual integrity as well as his adversarial skills.

The prodigious volume of Carl's writing also demonstrates an overwhelming concern with the need for a closer relationship between law and the social sciences. He has repeatedly called upon lawyers to use social science doctrine and methodology to understand the way the law functions in our society. At the same time, Carl has urged social scientists to address questions of law in a way that would permit their research to be put to practical use by lawmakers:

The call for studies of the social impact of particular judicial, legislative, administrative and executive rules, decisions and practices is sounded sporadically and acted upon but rarely. To read the recent decisions of the Supreme Court of the United States overruling established precedents in many areas of constitutional law is to catalogue a long list of missed opportunities for social scientists.22

This emphasis on the potential for interdisciplinary cooperation between law and the social sciences has placed Carl Auerbach's work solidly among the legal realist writers of the twentieth century.

Perhaps the best example of Carl's position on the nature of law is the following:

It is the beginning of wisdom in law, as in ethics, to accept the impossibility of deriving legal or ethical rules from statements of fact by any logical process. . . .

. . . .

The difficulties facing the legal philosopher may not be as great as those encountered by the moral philosopher, because the function of law is to serve practical ends, and its concern, therefore, is primarily with instrumental, not intrinsic, goods. Thus, even if we grant that reason is powerless to settle conflicts about the ultimate ends of life, these are not the conflicts the legal order is called upon to resolve.23

If, as the quotation suggests, law is no longer considered a principle of nature but rather an instrument designed to achieve certain social objectives, then the basis for legal deci-

sions ought to be predictions of their actual effect rather than inquiries concerning their conformity with certain philosophical precepts.

Carl's concern with fostering cooperation between lawyers and social scientists has led him to an active role in several associations dedicated to this objective. He served as a member of the National Research Council and the Executive Committee (1969-73) of the Assembly of Behavioral and Social Sciences; a member of the Board of Trustees of the Law and Society Association (1966-69; 1978-81); and as an Associate Editor (1968-73) of the Law and Society Review. Carl has served since 1976 as a member of the Editorial Advisory Board of the American Bar Foundation Research Journal, and is a Fellow in the distinguished American Academy of Arts and Sciences. He has been a member of the American Law Institute since 1966.

A tribute to Carl Auerbach would not be complete without recognizing the important intellectual and inspirational role of his wife, Laura Auerbach, who has supported his work and made major contributions of her own.

I would like to conclude with a personal comment. I have had the good fortune of serving as a colleague of Carl's for almost twenty years. My faculty colleagues and I have been challenged by Carl's intellect, inspired by his integrity, and led by his example. For this, and more, we thank you, Carl.