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MEMBERSHIP CRIME VS. THE RIGHT TO ASSEMBLE

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I. ABSTRACT

The World War I (WWI) era generated the substantive First Amendment. Subsequent jurisprudence, however, has focused on the speech right and left the right to assemble underdeveloped. This is so because courts, lawyers, and scholars view the WWI cases as speech cases. In fact, these cases implicitly tested the assembly

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right more than they have been read to test the speech right because they involved "membership crime" – criminal conspiracy in federal and state courts, and criminal syndicalism at the state level. This Article uncovers the importance of the assembly right during the substantive First Amendment's generation. It therefore serves as a corrective to the law's lopsided focus on the speech right, and ultimately argues for the importance of assembly in democracy-based arguments for robust First Amendment rights.

II. INTRODUCTION

The World War I era generated the substantive First Amendment. Three 1919 cases – *Schenck v. United States*,[1] *Frohwerk v. United States*,[2] and *Abrams v. United States*[3] – are celebrated for introducing the clear and present danger test for speech rights.[4] But these cases and the broader system of federal and state case law from 1918 through 1925 implicitly tested the First Amendment's assembly right more than courts, lawyers, and scholars have read them to test the speech right. This is so because they all involved what I call "membership crime" – criminal conspiracy in federal and state courts, and criminal syndicalism at the state level.

The result has been subsequent jurisprudence that favors the speech right while leaving the assembly right underdeveloped.[5] This is a problem for historical, doctrinal, and democratic reasons. Historically, the development of First Amendment jurisprudence has been shaped by an incomplete history of the WWI era. Doctrinally, the law is distorted because it favors speech while virtually ignoring assembly. Democratically, assembly is necessary

1. Schenck v. United States, 249 U.S. 47 (1919).

2. Frohwerk v. United States, 249 U.S. 204 (1919).

3. Abrams v. United States, 250 U.S. 616 (1919).

4. A fourth case, Debs v. United States, 249 U.S. 211 (1919), is sometimes connected to this trio. But that case did not mention the clear and present danger test and, unlike the trio, was not, strictly speaking, a membership crime case.

5. *See* Susan Frelich Appleton, *Liberty's Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423 (2012); Ashutosh Bhagwat, *Assembly Resurrected*, __ TEX. L. REV. __, 1 (forthcoming 2015); Ashutosh Bhagwat, *Associations and Forums: Situating CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 543, 550 (2011); Tabitha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); Richard A. Epstein, *Forgotten No More. A Review of Liberty's Refuge: The Forgotten Freedom of Assembly by John D. Inazu*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 138 (2012); PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013); JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012); Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J.L. & PUB. POL'Y 821 (2012); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949 (2004).

because it has been individuals *combining into groups* that have driven social change. Focusing on speech rights rather than assembly emboldens soapbox orators, but inhibits democratic participation.

This Article seeks to ameliorate the speech–assembly imbalance by uncovering a set of case law much broader than the 1919 trio that reveals the importance of assembly, and the fact that WWI-era prosecutions primarily targeted that right, not speech.

To do so, this Article proceeds in eight parts. In Part II, it discusses the Alien and Sedition Acts, suggesting that membership crime's impact on First Amendment principles existed at the framing of the Constitution. In Part III, it describes the forty-year history leading up to World War I and the United States' concomitant repression of dissident groups. In Part IV, it introduces the censorship and government violence that were imposed upon dissident groups during World War I. In Part V, it discusses the First Amendment's substantive advent in the three 1919 cases. In Part VI, it describes the early conspiracy cases, which presaged the Red Scare, described in Part VII. In Part VIII, it discusses the state syndicalism cases after the start of the Red Scare. In Part IX, it notes the winding down of the Red Scare and the return to relative normalcy.

III. THE ALIEN AND SEDITION ACTS

Congress passed the Alien and Sedition Acts in 1798. At this time, Congress was composed of many of the Constitution's drafters and ratifiers, so these Acts imply the First Amendment's originalist definition. The Acts permitted the federal government to detain[6] and deport[7] aliens deemed by the President to be dangerous to the United States. They also imposed criminal liability for advising or attempting to combine with others or actually combining with others to oppose any governmental measure.[8]

The framers of the First Amendment therefore appeared to favor police power primacy over individual constitutional rights,[9]

6. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21 (2014)) (stating that during wartime, the Acts permitted the government to "apprehend[], restrain[], secure[] and remove[], as alien enemies . . . all [male, adult] natives, citizens, denizens, or subjects of the hostile nation or government").

7. Alien Act, ch. 58, 1 Stat. 571 (1798).

8. An Act in addition to the Alien Act, entitled Act for the Punishment of Certain Crimes Against the United States, ch. 74, 1 Stat. 596 (1798).

9. *See* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 632 (1994) (explaining that the key question in the 19th century was "not whether laws interfered with preferred freedoms but rather whether laws affecting liberty or property nevertheless promoted 'the general good of the whole'").

leaving little room for substantive speech or assembly rights.[10] Congress created explicit and implicit membership crimes by criminalizing not only anti-government combinations, but also by criminalizing such a broad swath of substantive activity that any association with such combinations could be the subject of criminal prosecution.

IV. THE HISTORICAL CONTEXT: 1877–WORLD WAR I

Socio-political control of unpopular groups underlay both the Alien and Sedition Acts and the use of common law criminal conspiracy in the nineteenth century against labor unions.

A. Dangerous Times

Attempts to form national trade unions began in the 1850s[11] and quickly generated a number of such unions,[12] hundreds of thousands of members,[13] and widespread[14] and massive strikes.[15] While most union activity was agitative but peaceful, potentially violent elements did emerge.[16]

Given the rise of militant labor[17] and pushback from capital and the courts, violence seemed inevitable. In 1877 the largest

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10. *Id*. at 637 ("Throughout this period the Court's approach to the nature and scope of legislative power was essentially categorical – laws either promoted the public interest or they didn't; it did not involve the modern method of 'weighing' or 'balancing' the strength of a particular right against the strength of the government's interest in infringing on the right.").

11. Deborah A. Ballam, *Commentary: The Law as a Constitutive Force for Change: The Impact of the Judiciary on Labor Law History*, 32 AM. BUS. L.J. 125, 129 (1994).

12. *Id*. at 130.

13. *See* DAVID RAY PAPKE, THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA 9 (1999) (noting that by 1886, the Knights of Labor had 730,000 members).

14. Ballam, *supra* note 11, at 143.

15. JAMES GREEN, DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA 145 (2006).

16. TIMOTHY MESSER-KRUSE, THE TRIAL OF THE HAYMARKET ANARCHISTS: TERRORISM AND JUSTICE IN THE GILDED AGE 11–13 (2011). The International Working People's Association formed in 1883, which "rejected the political and incremental methods of its socialist predecessors and instead pledged itself to immediate revolutionary change by any means." *Id*. at 11. Others in the labor movement proposed "engaging in dramatic acts of violent resistance against state authorities," which included targeting religious institutions, government, elections, courts, jails, bankers, policemen, and bosses as targets in a war of class liberation. *Id*. at 12–13.

17. Ballam, *supra* note 11, at 130 ("[L]abor militancy was alive and well."). This was evidenced by a German workers' militia, which in 1877 "could marshal four companies with several divisions (each with forty men). Its officers explained that the militiamen would act only if workers' constitutional rights were violated." GREEN, *supra* note 15, at 86.

strike up to that time in U.S. history[18] began with walkouts of railroad crews, which was followed the next day by an armed clash in West Virginia.[19] At the railroad's request, the governor deployed the state militia, which killed a locomotive fireman.[20] As news of this spread, strikers garnered support from townspeople, farmers, and two companies of the state militia.[21] President Hayes sent in federal troops; around the country 20,000 troops were on riot duty and between 200 and 400 people died.[22]

Nine years later, a huge strike for the eight-hour workday began at the McCormick Reaper Works in Chicago.[23] Two days later, police charged a line of union members, killing two and wounding others.[24] The next day, labor groups organized a rally at Haymarket Square.[25] As police approached the protesters, someone threw a bomb that killed one policeman and wounded others.[26] Police opened fire and some workers responded with gunfire of their own.[27] Several people died and scores were injured.[28]

The Haymarket bombing, and the resulting conspiracy trial of anarchist August Spies and others, created fear and political paranoia[29] and sparked the country's first red scare.[30] Courts[31] and the press[32] condemned all non-citizen labor agitators as criminals, and it appeared that the country was in a new civil war.[33] Strikes, walkouts, and boycotts were the weapons of labor, the criminality of which courts struggled to determine.[34] Labor combinations,

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18. Ballam, *supra* note 11, at 130.

19. ANTHONY WOODIWISS, RIGHTS V. CONSPIRACY: A SOCIOLOGICAL ESSAY ON THE HISTORY OF LABOUR LAW IN THE UNITED STATES 74 (1990).

20. *Id.*

21. *Id.*

22. *Id.* at 75.

23. GREEN, *supra* note 15, at 3.

24. *Id.* at 5; PAPKE, *supra* note 13, at 16.

25. *Id.*; PAPKE, *supra* note 13, at 16.

26. PAPKE, *supra* note 13, at 16.

27. GREEN, *supra* note 15, at 5.

28. Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASHBURN L.J. 635, 648 (2011).

29. PAPKE, *supra* note 13, at 16.

30. MESSER-KRUSE, *supra* note 16, at 4.

31. VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 70 (1993). One judge in 1886 accused non-citizen labor agitators of "socialistic crimes" that were "gross breaches of national hospitality." *Id.*

32. GREEN, *supra* note 15, at 8–9. The Chicago Tribune held "aliens" responsible for the Haymarket deaths, calling on the government to deport the "ungrateful hyenas" and exclude other "foreign savages who might come to America with their dynamite bombs and anarchic purposes." *Id.*

33. Edward de Grazia, *The Haymarket Bomb*, 18 LAW & LITERATURE 283 (2006).

34. *See* Herbert Wechsler, William Kenneth Jones, & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, Part Two*, 61 COLUM. L. REV.

however peaceful, were seen as an existential threat to the nation.

B. Fearful Times

Judicial opinions reflected this threat perception.[35] In 1887, for example, the Connecticut Supreme Court considered the legality of a conspiracy of workmen to boycott their company and distribute flyers.[36] Affirming the conviction, the court wrote, "The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more."[37] If boycotts and distribution of flyers were legal, said the court, "[t]he end would be anarchy, pure and simple."[38] Conspiracies such as these are "subversive of the rights of others, and the law wisely says it is a crime."[39] Additionally, an Ohio superior court in 1889 condemned a labor boycott as "terrorizing" a community[40] and oppressive to individuals, the community, and the social order.[41] Finally, the assumption that conspiracies posed an evil distinct from their substantive target crimes[42] appeared for the first time in an 1897

957, 957 (1961) (noting that "the early condemnation of the labor union as a criminal conspiracy and the use of the charge against political offenders").

35. Callan v. Wilson, 127 U.S. 540 (1888); Consolidated Steel & Wire Co. v. Murray, 80 F. 811 (Cir. 1897); Arthur v. Oakes, 63 F. 310 (7th Cir. 1894); In re Grand Jury, 62 F. 840 (N.D. Cal. 1894); Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 27 A. 525 (Me. 1893); San Antonio Gas Co. v. State, 54 S.W. 289 (Tex. Ct. App. 1899). *But see* United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (limiting the application of the Sherman Antitrust Act to a narrow set of conspiring companies); American Fire Ins. Co. v. State, 22 So. 99, 102 (Miss. Ct. App. 1897) (holding that conspiracies, to be punishable, must have the "effect to injure" the public); Longshore Printing & Pub. Co. v. Howell, 38 P. 547, 548 (Or. 1894) (conspiracies themselves are not indictable; only those that present a "threatened and imminent injury.").

36. State v. Glidden, 8 A. 890, 891–92 (Conn. 1887).

37. *Id*. at 894.

38. *Id.* at 895.

39. *Id.* at 896.

40. Moores & Co. v. Bricklayers' Union et al., 10 Ohio Dec. Reprint 665, 673 (1889) ("[I]t is clear that the terrorizing of a community by threats of exclusive dealing in order to deprive one obnoxious member of means of sustenance will become both dangerous and oppressive.").

41. *Id.* at 674 (quoting Crump v. Commonwealth, 84 Va. 927, 6 S.E. 620 (Va. 1888)) (reasoning such a conspiracy "will be restrained and punished by the criminal law as oppressive to the individual, injurious to the prosperity of the community, and subversive of the peace and good order of society").

42. Iannelli v. United States, 420 U.S. 770, 778 (1975); United States v. Feola, 420 U.S. 671, 693 (1975); Callanan v. United States, 364 U.S. 587, 592–94 (1961); United States v. Rabinowich, 238 U.S. 78, 88 (1915); United States v. E.C. Knight Co., 156 U.S. 1, 35 (1895); *Callan*, 127 U.S. at 556 (1888); United States v. Cassidy, 67 F. 698, 703 (N.D. Cal. 1895); State v. Setter, 18 A. 782, 784 (Conn. 1889); Commonwealth v. Judd, 2 Mass. 329, 337 (Mass. 1807); State v. Burnham, 15 N.H. 396, 401–02 (N.H. 1844); Lambert v. People, 9 Cow. 578, 598–99 (N.Y. 1827); Commonwealth v. Putnam, 29 Pa. 296, 296–97 (1857); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1315 (2003).

criminal law treatise,[43] which cited for support *United States v. Cassidy*, a conspiracy case against railway employees in the great Pullman strike of 1894.[44]

C. Social Upheaval, New Realities

Massive immigration, urbanization, and industrialization drove this fear of criminal conspiracy. Between 1880 and 1924, twenty-five million immigrants arrived in the United States,[45] contributing to a population increase from fifty million[46] to 114 million over the same time.[47] These new immigrants, primarily from eastern and southeastern Europe,[48] were distinct from both the native-born white population and first wave immigrants, who were mostly from Britain, Germany, and Ireland.[49] These first immigrants had created institutions like the Knights of Labor, political labor parties, and trade unions,[50] and erected barriers to social entry for the new immigrants.[51] While many of the new immigrants admired the assimilative successes of the first wave, others remained lonely and isolated in the new world.[52] This may have contributed to the "old-country radicalism" that led to labor radicalism, extremes of which had been on display at Haymarket.[53]

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43. EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES, VOLUME II 157 (1897*) available at* http://www.amazon.com/Treatise-Criminal-Administered-United-States/dp/1112281592/ref=sr_1_9?ie=UTF8&qid=1430951187&sr=8-9&keywords=emlin+mcclain.

44. *Id*. at 157; *Cassidy*, 67 F. 698.

45. James R. Barrett, *Americanization from the Bottom Up: Immigration and the Remaking of the Working Class in the United States, 1880–1930*, 79 J. AM. HIST. 996, 997 (1992).

46. U. S. Dep't. of the Interior, Census Office, *Statistics of the Population of the United States at the Tenth Census* i, xxxiv (June 1, 1880), *available at* http://www.census.gov/prod/www/decennial.html.

47. U.S. Census Bureau, *Historical National Population Estimates, July 1, 1900 to July 1, 1999*, *available at* http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt.

48. Gary Gerstle, *Liberty, Coercion, and the Making of Americans*, 84 J. AM. HIST. 524, 525 (1997).

49. Barrett, *supra* note 45, at 999–1000.

50. *Id.* at 999.

51. James R. Barrett & David R. Roediger, *The Irish and the "Americanization" of the "New Immigrants" in the Streets and in the Churches of the Urban United States, 1900–1930*, 24 J. AM. ETHNIC HIST. 3, 6 (2005).

52. Gerstle, *supra* note 48, at 532 (noting that some new immigrants "could not escape the loneliness, isolation, and sadness they had felt since their original uprooting. They never found in America the comfort and security they had known in the Old World.")

53. Barrett, *supra* note 45, at 999. This immigration wave combined in large northern factories with a stream of Mexican migrants and the migration north of African-American former slaves to produce a new working-class population. *Id*.; David Levering, *Parallels and Divergences: Assimilationist Strategies of Afro-American and Jewish Elites from 1910 to the Early 1930s*, 71 J. AM. HIST.

Established authority responded to the new immigrants with a concerted Americanization effort. Prior to World War I, teachers, settlement house workers, and professional patriots worked to acculturate the new immigrants as part of a benign assimilative process.[54] This included efforts to inculcate capitalist values.[55] Labor unions, however, had different ideas. Their Americanization rejected surrender to the capitalist order and aimed at asserting one's personal aspirations and rights.[56] Their target was often the railways, which were vital to capitalism and the economy and were viewed as a vital part of American civilization.[57] Pushback was therefore not simply the manifestation of paranoid fears of the other; it was also a rational response to a critical situation.[58]

Early twentieth century developments contributed to this crisis, which included an increase in the female labor force;[59] cohesive efforts by women to advance their interests,[60] including the right to vote;[61] cooperation between women and African-Americans[62]; efforts of African-Americans on their own to advance their interests;[63] and the work of muckraking journalists, who publicized the poor working conditions in factories, the slums of big cities, the treatment of African-Americans in the deep South, and the growing power of trusts.[64]

At the same time, socialist and anarchist sentiments were on the rise. President McKinley was assassinated in 1901 by an anarchist, and the socialist party would gain substantial support

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543, 548 (1984).

54. *Id.*; Gerstle, *supra* note 48, at 530.

55. Barrett, *supra* note 45, at 996. At his Model T assembly plant in Michigan, Henry Ford arranged a language and civics program for his immigrant workers, culminating in a pageant in which his newly-American workers would "descend from a boat scene," and walk a gangway into a large pot depicting the Ford English School. *Id.* Teachers on either side would stir the pot, and the workers would emerge as part of one American nationality. *Id.*

56. Gerstle, *supra* note 48, at 527.

57. Mona Domosh, *Selling Civilization: Toward a Cultural Analysis of America's Economic Empire in the Late Nineteenth and Early Twentieth Centuries*, 28 TRANSACTIONS OF THE INST. OF BRITISH GEOGRAPHERS 453, 456, 461 (2004).

58. John Braeman, *World War One and the Crisis of American Liberty*, 16 AM. Q. 104, 111 (1964) (referring to the period as one of "psychic crisis").

59. Barrett, *supra* note 45, at 1013. Between 1900 and 1920, the female labor force doubled, and the Women's Trade Union League, founded in 1903, played an important socializing role for immigrant women. *Id.*

60. INAZU, *supra* note 5, at 44.

61. *Id.* at 44–45. From 1907 to 1917 the National American Woman Suffrage Association's membership grew from 45,000 to two million. *Id.* at 45.

62. In 1908, for example, prominent feminists, African-American leaders, and other Americans called for a conference to discuss "present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty." *Id.*

63. *Id.* The first National Negro Conference that followed would lead to the formation of the NAACP in 1909. *Id.*

64. Dimitri von Mohrenschildt, *Reformers and Radicals in Pre-World War I America*, 17 RUSSIAN REV. 128, 129 (1958).

across the country for its position of neutrality going into World War I.[65] These developments, in light of the Haymarket violence, led to the Immigration Act of 1903, which authorized the exclusion and deportation of anarchist aliens.[66]

Finally, the Industrial Workers of the World (I.W.W.) was founded in 1905, members of which would later become the victims of criminal conspiracy and syndicalism charges in the WWI era.[67] Three years later, the Federal Bureau of Investigation was created.[68] Initially intended to enforce only interstate commerce and anti-trust laws, it quickly came to monitor and quash political dissent. [69]

D. A Calm Before the Storm

In the years prior to WWI, there were no substantive federal disloyalty statutes, and intellectuals largely rejected complete assimilation.[70] At the same time, there was a growing realization that the First Amendment deserved more attention.[71] By around 1911, a new generation of protesters emerged who were "more radically inclined and had little faith in political reform."[72] In the same year, the Free Speech League formed,[73] which would defend many I.W.W. members ("Wobblies") in court.[74]

This was remarkable. In the 1880s, anarchists at Haymarket were convicted of killing police officers and one contributor to the *Albany Law Journal* wrote that there was "no shibboleth more absurd than the cry of free speech."[75] Yet after a period of massive

65. James Weinstein, *Anti-War Sentiment and the Socialist Party, 1917–1918*, 74 POL. SCI. Q. 215, 216 (1959).

66. The Immigration Act of 1903, ch. 1012, 32 Stat. 1213 (1903).

67. Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649, 650 (2006).

68. Federal Bureau of Investigation, *A Brief History of the FBI*, *available at* http://www.fbi.gov/about-us/history/brief-history.

69. Athan G. Theoharis, *Dissent and the State: Unleashing the FBI, 1917–1985*, HIST. TCHR. 41 (1990).

70. Lewis, *supra* note 53, at 553. The paradigm of "'Anglo-conformity' – the Wilsonian dogma that a 'hyphenated' American was an impossibility" – was rejected. *Id.*

71. Mohrenschildt, *supra* note 64, at 129. Indeed, in 1958, the historian, anti-communist, and member of the Office of Strategic Services (the forerunner to the CIA), Dmitri von Mohrenchildt, observed that "the two decades preceding World War I saw the most extensive movement of social protest this country had thus far known." *Id.*

72. *Id.* at 134.

73. Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870–1915*, 24 AM. J. LEGAL HIST. 56, 60 (1980).

74. Laura M. Weinrib, *The Sex Side of Civil Liberties:* United States v. Dennett *and the Changing Face of Free Speech*, 30 LAW & HIST. REV. 325, 334 n. 27 (2012).

75. Anderson, *supra* note 74, at 61.

immigration and fundamental social upheaval, society seemed nevertheless to be coming to terms with radicalism and even supporting their First Amendment rights. While radical groups were still monitored, the application of conspiracy law to subversive group conduct and the imperative of social control appeared to be moderating.

One reason was that conspiracy was replaced with the injunction as a tool of union control.[76] In addition, it had become clear that labor unions played an important role in society, and their legal rights had been largely defined. The harms that capital could impose had likewise been recognized, and the law limited what companies could do.[77] Looking backward, conspiracy no longer served an anti-union purpose. Looking forward, radical protesters did not yet have an antiwar cause to pursue, and so government had little need to silence them.

V. THE HISTORICAL CONTEXT: WORLD WAR I

For the first three years of WWI, German sympathizers and other radicals in the United States suffered no crackdown because the country and the Wilson administration remained staunchly neutral. The first months of 1917, however, brought German attacks on U.S. maritime interests[78] and Germany's proposed alliance with Mexico against the U.S.[79] Once Congress declared war, President Wilson announced that "censorship . . . is absolutely necessary to the public safety."[80]

The government quickly moved to censor dissenting speech, investigate dissident groups, and use conspiracy law to undermine First Amendment activities. Government and private entities combined to enforce, sometimes through violence, total national

76. HATTAM, *supra* note 31, at 39.

77. The Sherman Anti-Trust Act of 1890, which limited the right of capital to collaborate, is an example. Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1–7 (2014); See Sherman Anti-Trust Act (1890): Document Info, OUR DOCUMENTS, http://www.ourdocuments.gov/doc.php?flash=true&doc=51 (last visited July 12, 2015) (showing original document). Another is the Adamson Act of 1916, a federal law that established the eight-hour workday and overtime pay for interstate railway workers, passed to avoid an impending strike. Adamson Act of 1916, 45 U.S.C. §§ 65–66 (repealed 1996); *see also* Wilson v. New, 243 U.S. 332, 376 (1917) (Pitney, J., dissenting) (mentioning that the Adamson Act should be invalidated and that "[t]he suggestion that it was passed to prevent a threatened strike" gives it no greater legal effect).

78. *Supplement*: *Correspondence Between the United States and Belligerent Governments Relating to Neutral Rights and Commerce*: *Submarine Warfare – Germany*, 11 AM. J. INT'L L. 52, 132, 152–53 (1917).

79. Mary Alexander & Marilyn Childress, *Teaching With Documents: The Zimmermann Telegram*, NATIONAL ARCHIVES, http://www.archives.gov/education/lessons/zimmermann/.

80. STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 241 (2008).

loyalty.[81] Army troops broke up I.W.W. strikes in the northwest,[82] anti-union mob violence emerged,[83] and by October of 1918, a new immigration law facilitated the deportation of a handful of Wobblies. Such deportation would increase during the Red Scare a few years later.[84] The Bureau of Investigation, now a tool for monitoring dissent,[85] participated in the 1918 "Slacker Raids," which indiscriminately rounded up young men in major cities, ostensibly to enforce the war's draft law.[86] The Bureau also began to monitor politicians, judges, and anyone else perceived to be disloyal.[87] Within one year of its passage, 250 people had been convicted under the Espionage Act.[88]

VI. *SCHENCK*, *FROHWERK*, AND *ABRAMS*: SUBSTANTIVE FIRST AMENDMENT'S ADVENT

Schenck, *Frohwerk*, and *Abrams*, viewed today as seminal free speech cases, emerged from the era's "mass sedition indictments"[89] and primarily considered conspiracies, rather than completed speech. Therefore, they should be viewed as assembly cases as much as or more than speech cases.

A. Schenck v. United States *and* Frohwerk v. United States

Decided on March 3, 1919, the defendants in *Schenck*[90] had been convicted of conspiracy to violate the Espionage Act,[91]

81. *Id.* at 246–47. "Probusiness, antiunion, antialien, and anti-immigrant" groups joined with the administration, and "belligerently demanded universal conformity organized through total national loyalty . . . . [I]n hundreds of incidences, German aliens, German Americans, Socialists, pacifists, Wobblies, and other outsiders were flogged, tarred and feathered, forced to kiss the flag, and murdered." *Id.*

82. Braeman, *supra* note 58, at 106–07.

83. *Id.* at 111.

84. *Id.* at 107.

85. Theoharis, *supra* note 69, at 41–42.

86. Christopher Capozzola, *The Only Badge Needed Is Your Patriotic Fervor: Vigilance, Coercion, and the Law in World War I America*, 88 J. AM. HIST. 1354, 1380 (2002).

87. Theoharis, *supra* note 69, at 41–43.

88. Ch. 30, tit. 1, § 3, 40 Stat. 217, 219 (Comp. St. 1918, § 10212c); FELDMAN, *supra* note 81, at 248.

89. Weinstein, *supra* note 65, at 236.

90. Schenck v. United States, 249 U.S. 47 (1919).

91. *Id.* at 48–49. Section three of the Espionage Act stated:

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination,

conspiracy to use the mails for the illegal transmission of socialist political tracts, and using the mails to send the tracts.[92] Charles Schenck was the general secretary of the Socialist party, which had decided to send 15,000 leaflets to young draft-eligible men.[93] In hopes of convincing recipients to avoid the draft, the socialists invoked the Thirteenth Amendment's prohibition on slavery[94] and asked the men to "assert [their] rights."[95]

This leaflet had no effect on recruitment or the draft. Instead, the Court affirmed the conviction based on the defendants' mere hope of hindering the war effort.[96] Writing for the majority, Justice Holmes established the clear and present danger test.[97] One week later, writing again for the majority in *Frohwerk*, whose facts were functionally the same as in *Schenck*,[98] Holmes made it clear that this test offered no protection to the defendants.[99]

B. Abrams v. United States

After *Schenck* and *Frohwerk*, Holmes' friends lobbied him to recognize the importance of First Amendment rights.[100] This was probably one reason Holmes would dissent in *Abrams*, a case in which the Court affirmed the conviction of radicals for conspiracy to violate the Espionage and Sedition Acts.[101] *Abrams*, furthermore, was sufficiently different than *Schenck* and *Frohwerk* to compel Holmes to dissent. Although the *Abrams*' facts were functionally the

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> disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment services of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Espionage Act, Ch. 30, title 1, § 3, 40 Stat. 219 (1917) (codified as amended at 18 U.S.C. §792 (2011)). Section four of the Espionage Act provided that conspiracy to commit any of the offenses contained in section three was a crime. Espionage Act, Ch. 30, title 1, § 4, 40 Stat. 219 (1917)

92. *Schenck*, 249 U.S. at 48–49.

93. *Id.* at 49–50.

94. *Id.* at 50–51.

95. *Id.* at 51.

96. *Id.* at 52–53.

97. *Id.* at 52 ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.").

98. Frohwerk v. United States, 249 U.S. 204 (1919).

99. *Id.* at 208–09 (holding that the anti-war articles in a German language newspaper could be published "in quarters where a little breath would be enough to kindle a flame" that would undermine the war effort).

100. Richard M. Abrams, *Oliver Wendell Holmes and American Liberalism*, 19 REVS. AM. HIST. 86, 89 (1991); THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND – AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 158 (2013).

101. Abrams v. United States, 250 U.S. 616, 616, 624 (1919).

same as those in *Schenck* and *Frohwerk*,[102] Holmes found that they posed no danger.[103] In addition, Holmes may have understood that the excesses of the Sedition Act led to the *Abrams* prosecution, which was an effort to punish ideas, rather than a good faith attempt to thwart interference with the war effort.[104] Indeed, the list of prohibited activities in the Sedition Act created a membership crime by prohibiting almost anything that an anti-war group might have wished to do.[105]

Schenck, *Frohwerk*, and *Abrams*, like so many of the other WWI-era cases, were conspiracy cases because prosecutors were not concerned with lone radicals, speaking to passers-by on a street corner. Instead, they were concerned with groups that were perceived threats to social order.[106]

VII. THE CONSPIRACY CASES: 1918–1921

A number of specific cases in the WWI era illustrate the widespread concern with groups and the use of conspiracy law against them.

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102. The *Abrams* defendants – self-described rebels, revolutionists, anarchists, and Socialists – were convicted of printing, writing, and distributing 5,000 leaflets in New York City that opposed capitalism as the enemy of the world's workers, and appealed to American workers to arise and put down by force the government of the United States. *Id.* at 617–20. The leaflet's florid language advised readers to "spit in the face of the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war." *Id.* at 620. It admonished people: "Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight*." *Id.* at 622.

103. *See id.* at 629 (Holmes, J., dissenting) (calling the defendants "poor and puny anonymities").

104. Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1352 (1997).

105. Sedition Act of May 16, 1918, ch. 75, 40 Stat. 553 [Comp. St. 1918, § 10212c]. With the amendment, it had become a crime to say anything with intent to obstruct the sale of war bonds or government securities; say anything to obstruct the making of government loans; incite, attempt to incite, or attempt to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of the" government, the Constitution, the military, the flag, or military uniforms; use any language intended to bring these things "into contempt, scorn, contumely, or disrepute"; utter, print, write, or publish anything intended to incite, provoke, or encourage resistance to the United States; willfully display the flag of a foreign enemy; and urge or advocate any curtailment of production of any product necessary to the war effort. *Id.*

106. This was reflected in the 19th century sentiment that what one worker says or does may be legal, but that when 100 workers say or do it, it may be illegal. *See Glidden*, 8 A. 890, 895 (Conn. 1887) ("Any one man, or any one of several men, acting independently, is powerless; but when several combine, and direct their united energies to the accomplishment of a bad purpose, the combination is formidable.").

In *Howenstine v. United States*,[107] the defendant was convicted of conspiring to violate the Espionage Act by giving to another man, who was subject to the draft, a pair of eyeglasses that would impair the man's vision, permitting him to avoid induction.[108] The Ninth Circuit observed that this gift "unquestionably would tend to cause disloyalty on [the draftee's part] and refusal of military service."[109]

In *State v. Townley*,[110] the Minnesota Supreme Court affirmed convictions for conspiracy to teach or advocate that men should not enlist in the military, or that citizens should not aid the United States in its war effort.[111] The defendants had made anti-war speeches and distributed pamphlets that were intended to dissuade people from buying Liberty Bonds; teach people that it was the poor farmers, rather than the rich, who were being drafted; show that the poor were paying for the war twice, with their lives and their tax dollars; and to oppose American autocracy at home before attempting to relieve Europeans of German autocracy.[112]

In *In re O'Connell*,[113] the California Supreme Court disbarred an attorney, finding that his conspiracy to persuade others to avoid the draft and "mak[ing] false certificates concerning liability for military service"[114] amounted to "moral turpitude."[115]

In *Sykes v. United States*,[116] members of the Church of the Living God encouraged other church members not to contribute to the Red Cross, buy Liberty Bonds, display the American flag, visit the homes of others who displayed the flag, or register as alien enemies.[117] The defendants also told their congregation that the German army represented the Lord's chosen people and would be victorious.[118] They were convicted of conspiracy to violate a number of the war-enabling acts and the Espionage Act.[119]

In *United States v. Steene*,[120] a defendant was convicted of conspiracy under the Espionage Act for distributing antiwar

107. Howenstine v. United States, 263 F. 1 (9th Cir. 1920).
108. *Id.* at 2.
109. *Id.* at 5.
110. State v. Townley, 182 N.W. 773 (Minn. 1921).
111. *Id.* at 774–75.
112. *Id.* at 776–77.
113. In re O'Connell, 194 P. 1010 (Cal. 1920).
114. O'Connell v. United States, 253 U.S. 142, 147 (1920).
115. *In re O'Connell*, 194 P. 184 Cal. at 1011–12.
116. Sykes v. United States, 264 F. 945 (9th Cir. 1920).
117. *Id.* at 946.
118. *Id.*
119. *Id.* at 946.
120. United States v. Steene, 263 F. 130 (N.D.N.Y. 1920), *rev'd*, 255 U.S. 580 (1921).

leaflets,[121] with the defendant's free speech argument ignored.[122] These leaflets, concluded the court, were "well calculated to have the effect of arousing the contempt, scorn, contumely, and disrepute which Congress has sought to prevent."[123]

Two months after *Steene*, the same result was obtained in *Schoborg v. United States*.[124] In that case, defendant Charles Schoborg, a 66-year-old immigrant from Germany who had arrived in the United States as a child, ran a cobbler's shop.[125] He had been a city policeman, marshal, a member of the board of trustees, and a city council member.[126] The local German community used his shop as a place for meeting, gossip, and conversation.[127] Frequent attendees included a 65-year-old tobacco dealer and banker, who had been born in the United States, and a 56-year-old native-born treasurer of a local brewery.[128] These men often visited the cobbler's shop "'as a loafing place' to sit down and talk and 'meet the same old crowd.'"[129]

"Desiring to know what was going on," a group of citizens hired a detective agency to wiretap the cobbler's shop.[130] Agency employees recorded some of what they heard for a period of five or six weeks.[131] Based on this information, the three loafers were indicted for conspiracy to violate the Espionage Act. The Sixth Circuit affirmed the conviction, giving short shrift to First Amendment concerns.[132]

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121. *Id.* at 132. One leaflet depicted a man and the descriptive words: "Hung by the wrists from ceiling for 8 Hours a Day. McNeil's Island, Washington." *Id.* Another depicted a man who had apparently been beaten with a club, under which appeared, "Political Prisoners Beaten with a Baseball Bat at Leavenworth Penitentiary." *Id.* Another depicted a man with a pistol and army hat, kicking a hapless victim, described as "Punishment of a Conscientious Objector in Disciplinary Barracks." *Id.*

122. *Id.* at 133.

123. *Id.*

124. Schoborg v. United States, 264 F. 1 (6th Cir. 1920).

125. *Id.* at 3.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 6–7 (noting:

> It is strenuously insisted that defendants' conduct could not be thought to have any direct tendency to cause the obnoxious "substantive evils," because what they said was spoken secretly and among themselves. However true this might be of the ordinary, casual conversation, it cannot reach the long-continued maintenance of an intensive school of disloyalty. Even if the talk had been confined to the three respondents, the cumulative effect upon each of what the others said would be to aggravate, if not cause, an extremity and recklessness in opposition to the war and favor to the enemy which would be an incitement to direct obstruction and injury in the many ways open to the evil disposed in that vicinity. But the talk was not confined to these three. Several others were

Four days before the decision in *Schoborg*, the Supreme Court issued its opinion in *Pierce v. United States*.[133] In that case, the Court affirmed a conviction for an Espionage Act conspiracy based on a distribution of a Socialist anti-war pamphlet called "The Price We Pay."[134] The lower court had given deference to the jury to determine the probable effects of the leaflet's distribution and the defendants' intent.[135] While the jury can determine such questions of fact, Justice Brandeis in his dissent protested that the trial court had given to the jury questions of law to decide.[136] To Brandeis, the trial court should have directed a verdict for the defendants because the pamphlet could have no criminal effect, and therefore was protected by the First Amendment.[137]

A. The Role of Conspiracy

Conspiracy not only provided a mechanism for prosecuting people who only spoke, and did not act, but it also provided a work around nascent First Amendment rights. Because prosecutors had to find legal justifications for prosecutions arising out of defendants' exercise of First Amendment protected activity, there were limits to what conspiracy law could justify. *United States v. Strong*[138] was an exceptional case that demonstrates the rule. In *Strong*, a Washington District Court dismissed an Espionage Act charge, predicated upon the publication of an editorial in the *Union Record*, charged to be disloyal, scurrilous, and abusive toward the U.S. government.[139] The court observed that mere advocacy of anarchy or sedition could not be a crime, unless it comprised an actual conspiracy.[140]

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present more or less, and that the influence of such a center would radiate through an appreciable part of the community is too sure for doubt.).

133. Pierce v. United States, 252 U.S. 239 (1920).

134. *Id.* at 241. Issued by the Socialist party in Chicago, the antiwar pamphlet advised readers that draftees would be given guns and taught not to think but obey, and "shipped thru [*sic*] the submarine zone by the hundreds of thousands to the bloody quagmire of Europe . . . . [B]lack death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark." *Id.* at 245–46. It went on to assert that the entry into the war was "determined by the certainty that if the Allies do not win, J. P. Morgan's loans to the Allies will be repudiated, and those American investors who bit on his promises would be hooked." *Id.* at 247.

135. *Id.* at 244, 249–50.

136. *Id.* at 269–71.

137. *Id.* at 272 (Brandeis, J., dissenting) (noting that the pamphlet "was not distributed under such circumstances, nor was it of such a nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces.").

138. United States v. Strong, 263 F. 789 (W.D.Wash. 1920).

139. *Id.* at 789.

140. *Id.* at 791–92 ("[T]he advocacy of anarchy and sedition, or overthrow of government, is no crime, under the general statutes or law as presently enacted,

But advocating sedition or overthrow of the government could easily be seen as an Espionage Act violation! The court certainly knew this, and so it was not making a statement regarding the statutory law. Rather, it was possible that the court was making a statement that the First Amendment protected such advocacy *despite* the law. However, even this progressive and speech-protective statement highlighted conspiracy's usefulness as a work-around: one could not be charged directly with advocacy, but one *could* be charged with conspiracy, which, to the court, was on par with treason and rebellion.

B. The House that Jack Built

In addition to conspiracy as a First Amendment work-around, conspiracy could also be used to reach unpopular people far removed from criminality. On review of an I.W.W. conspiracy conviction,[141] the Seventh Circuit observed what it called the "house that Jack built" problem.[142] The defendant had been convicted for interfering with the operations of private companies that had contracted to provide war munitions to the government.[143] Questioning whether Congress intended that a law that criminalized conspiracies to "use force to prevent, hinder, or delay the execution of any law of the United States" should reach conduct so attenuated from substantive crime, the court observed:

> The Government Printing Office is conducted under laws directing, and making appropriations for, its operations. Any direct interference by force with its operations might possibly be held to be a forcible prevention of the execution of laws of the United States . . . . But the printing office cannot operate without paper. Suppose the workmen in a paper mill that has a contract to supply paper to the printing office, with knowledge of the contract and with intent to prevent the mill from fulfilling it, go on strike and forcibly prevent the running of the mill. Suppose that workmen in a hemlock forest, whose owner has a contract to supply paper to the printing office, with knowledge of those contracts and with the intent to prevent their execution, go on strike and forcibly stop the timberman's operations. And so on, along the whole imaginable line of "the house that Jack built."[144]

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unless the acts amount to treason, rebellion, or seditious conspiracy; nor is advising or advocating unlawful obstruction of industry, or unlawful or violent destruction of private property, a crime under the laws of the United States.").

141. Haywood v. United States, 268 F. 795 (7th Cir. 1920).

142. *Id.* at 800.

143. *Id.* at 799.

144. *Id.* at 800.

VIII. THE RED SCARE: 1920

On June 2, 1919, a bomb exploded at the home of Attorney General A. Mitchell Palmer, the architect of the Red Raids that would follow only five months later.[145] This attack, joined with Palmer's concern over leftist disloyalty, discriminatory FBI investigations, and the formation of the Lusk Committee in 1919 provoked investigation of people and groups for sedition.[146] The Socialist party, furthermore, had been marginalized and with the war over and wartime production no longer an imperative, the labor unions had lost the leverage that they had recently enjoyed. Soaring prices in 1919, however, compelled them to ask for higher wages, which led to strikes and violence.[147] The country was also worried about the effects of the Bolshevik revolution and Soviet Russia's intent to spread communism throughout the world.

November 1919 saw the first of the Red Raids, during which federal and local authorities would raid meeting places, close down presses, seize records, and jail or deport immigrant activists.[148] Mainstream political figures were targeted for investigation.[149] Others who favored various causes, such as "Irish-Americans who favored Irish independence, Jews who advocated the establishment of a national homeland in Palestine, civil libertarians who defended the rights of dissidents, and anyone who argued that the United States should recognize the Soviet Union," were investigated.[150]

On January 2, 1920, the Red Raids reached their peak. On that Friday night, FBI agents and local police in thirty-three cities arrested as many as 10,000 people. While the targets were members of the Communist or Communist Labor parties, others were arrested simply because FBI Director Hoover regarded them as subversive.[151]

In *Colyer v. Skeffington*,[152] a group of twenty aliens had been arrested on January 2 in Boston simply for their membership in the

145. Braeman, *supra* note 58, at 108–09.

146. John Lord O'Brian, *Restraints Upon Individual Freedom in Times of National Emergency*, 26 CORNELL L. Q. 523, 525 (1940–41).

147. Braeman, *supra* note 58, at 108–09.

148. Barrett, *supra* note 45, at 1019.

149. David Williams, *The Bureau of Investigation and Its Critics, 1919–1921: The Origins of Federal Political Surveillance*, 68 J. AM. HIST. 560, 572 (1981). Even Zechariah Chafee, Felix Frankfurter, and others – Holmes' friends who convinced him of the value of individual speech rights – were investigated as subversives. *Id*.

150. *Id.* at 577.

151. *Id.* at 561 ("[M]any persons not affiliated with communist parties and not mentioned in arrest warrants were seized simply because they had attended lawful political or social functions that [BI Director] Hoover and his staff regarded as subversive.").

152. Colyer v. Skeffington, 265 F. 17 (D. Mass. 1920), *rev'd on other grounds*, 277 F. 129 (1st. Cir. 1922).

Communist or Communist Labor party.[153] Leaders of the targeted organizations were supposed to have instructed their members "to destroy all evidence of membership or affiliation with their respective organizations."[154] Agents were therefore ordered "to ascertain the location of all of the books and records of these organizations" and obtain admissions that the targets were group members.[155] 306 arrest warrants were drawn up,[156] with "charges pertaining to [Communist Party] membership merely."[157] Evidence of membership, therefore, was particularly important, which included "individual tenets, beliefs and practices."[158] It was clear that they were targeting group membership, and not criminal activity.[159]

The judge on the case called the government agents "a mob"[160] that acted with a "disregard of law and of properly verified facts."[161] For example, authorities arrested and held overnight thirty-nine people in Lynn, who were meeting to discuss forming a co-operative bakery.[162] The court questioned the reliability of arresting so many people simply for group conduct.[163] Indeed, the judge's prior experience as a United States Attorney

> taught him that "99 percent of the spy plots were pure fake" . . . [that g]uilt . . . was personal, and the government could not deport persons because of membership in certain political or labor organizations . . . [g]uilt by association . . . had no place in American society.[164]

IX. THE STATE SYNDICALISM CASES: 1921–1925

While the Espionage Act, Sedition Act, and other war enabling acts were being used to charge dissidents with conspiracy at the federal level, an equally impactful system of repression was emerging state by state. States began passing criminal syndicalism

153. *Id.* at 21.
154. *Id.* at 31.
155. *Id.*
156. *Id.* at 33.
157. *Id.*
158. *Id.* at 34.
159. *Id.* at 31–32 (noting that the directive from Washington was to obtain "documentary evidence proving membership," and "particular effort [should be] given to finding the membership book").
160. *Id.* at 43.
161. *Id.*
162. *Id.*
163. *Id.* at 47 ("[M]any of these aliens were arrested in boarding houses or halls in which were found large quantities of literature and pamphlets, the origin and ownership of which were necessarily largely matters of guesswork. In cases of doubt, aliens, already frightened by the terroristic methods of their arrest and detention, were, in the absence of counsel, easily led into some kind of admission as to their ownership or knowledge of communistic or so-called seditious literature.").
164. Williams, *supra* note 150, at 565–66.

statutes around 1917, and by 1921 the majority of the states had nearly identical laws.[165] The Oregon Supreme Court likened these laws to conspiracy law and observed that they received their primary principles from it, including their use for socio-political control.[166]

California's law was applied more than any other state's syndicalism law, and was virtually identical to those states' syndicalism laws.[167] It defined syndicalism as advocating or teaching crime, sabotage, or other illegal acts to achieve industrial or political change,[168] and it criminalized organizing, assisting in organizing, or membership in a group that organized or assembled to advocate or teach syndicalism.[169]

Syndicalism statutes created a new type of broad membership crime. Whereas traditional conspiracy law required an agreement to commit a crime, an overt act in furtherance of it, and intent to both agree and to commit the substantive crime,[170] syndicalism statutes required mere membership. In essence, they criminalized any association with certain groups, especially the I.W.W.

A. The Cases

The first syndicalism conviction, affirmed by the Minnesota Supreme Court, was probably *State v. Moilen*.[171] The defendant had posted around town tiny signs supporting the I.W.W. and warning of sabotage.[172] Sabotage was the Court's major concern, which it referred to as "terrorism,"[173] even though the Court offered that it had innocent meanings as well, which the posters might have advocated.[174] Based on this benign potential, the Court might have vacated the conviction because the state had failed to prove advocacy of any crime.[175] The Court, however, shifted the burden to

165. People v. Lloyd, 136 N.E. 505, 537 (Ill. 1922) (Carter, J., dissenting).

166. State v. Boloff, 7 P.2d 775, (Or. 1932) (These crimes are "the quicksands of the law . . . too frequently . . . subject to the shifting public sentiment which always affects matters pertaining to government.").

167.

168. People v. McClennegen, 234 P. 91, 93 (Cal. 1925).

169. *Id.*

170. *See* Windsor v. United States, 286 F. 51, 54–55 (6th Cir. 1923) (delineating the elements of criminal conspiracy).

171. State v. Moilen, 167 N.W. 345 (Minn. 1918).

172. *Id*. at 348. He posted four types of 1x2-inch "posters," proclaiming, "Beware Sabotage," "Join the One Big Union," "Industrial Unionism, Abolition of the Wage System, Join the I.W.W.," and "Sabotage means to push back, pull out or break off the fangs of Capitalism." *Id.*

173. *Id.* at 347.

174. *Id.* at 348–49 ("[T]he posters which [the] defendant distributed and caused to be publicly displayed do not attempt to limit the sabotage thus advocated.").

175. *Id.*

the defendant to prove his innocence.[176] The Court, furthermore, found sufficient evidence to convict because one of the posters depicted a "snarling black cat."[177]

While *Moilen* was not a membership crime case, it did share with such cases two elements. First was the *a priori* assumption of the criminal nature of certain groups and the meaning of vague words like "sabotage." Second was the apparent need of the Court to affirm a socially and politically popular conviction. Unusual burden shifting and *a priori* assumptions were necessary to this end because criminal syndicalists virtually always engaged in the most minor of conduct.

In *People v. Lesse*,[178] for example, the California Appellate Court affirmed a conviction for I.W.W. membership. The evidence against the defendant was an I.W.W. book[179] that set forth the group's doctrine.[180] The defendant had nothing to do with this book, and its contents were not described.[181] Instead, it was used merely to connect the defendant to the I.W.W., of whose criminal nature the court took judicial notice.[182] In addition, the trial court permitted jurors to sit who had the same *a priori* assumption.[183]

In another California case,[184] the defendant pointed to this *a priori* assumption, and argued unsuccessfully that criminalizing membership in the I.W.W. was "an attempt to create the crime of constructive conspiracy in violation of the constitutional right of personal liberty."[185]

B. Conspiracy, the First Amendment, and Group Criminality

People v. Lloyd displayed the role that conspiracy and substantive First Amendment rights played in bolstering the assumption of group criminality.[186] In *Lloyd*, the Illinois Supreme Court affirmed a syndicalism conspiracy conviction of eighteen

176. *Id.* at 349 ("If [the] defendant intended some innocent phase of the doctrine of sabotage he should have made it appear on the face of the posters.").

177. *Id.* at 348.

178. People v. Lesse, 199 P. 46, 48 (Cal. Dist. Ct. App. 1921).

179. *Id.* at 47.

180. *Id.*

181. *Id.*

182. *Id.* ("[T]he purposes of the I.W.W. are a part of the current history of the day – a part of the history of the times. We are informed by the magazines, encyclopedias, and dictionaries of the day that the organization advocates criminal syndicalism, revolutionary violence, and sabotage.").

183. *Id.* at 47–48 (Although "[s]everal jurors stated on their *voir dire* that they entertained unfavorable opinions of the I.W.W. . . . [A]ll jurors who read must know in a general way all about the I.W.W. Those who cannot read are not competent jurors anyway.").

184. People v. Thompson, 229 P. 896 (Cal. Dist. Ct. App. 1924).

185. *Id.* at 897.

186. People v. Lloyd, 136 N.E. 505 (Ill. 1922).

members of the Communist Labor party.[187] The court rejected the defendants' First Amendment argument, observing that criminal liability might not attach for minor and non-dangerous *acts*, but that it could attach for mere *advocacy* of such acts.[188] Where the charge was conspiracy, the First Amendment had no traction because conspiracy is complete upon agreement, however non-dangerous it might be.[189] In dissent, Judge Carter recognized the membership crime work-around of the First Amendment, observing that the Illinois syndicalism law was not passed for public safety, but for socio-political control.[190]

C. Career Government Witnesses

To prove up tenuous syndicalism charges against the I.W.W., prosecutors often called group members, who had supposedly rejected their criminal pasts, to testify. In the California syndicalism cases, Elbert Coutts was a regular government witness.[191] A former Wobbly, he made his living first by stealing,[192] and then as a professional witness against I.W.W. members.[193] Coutts and other former I.W.W. members testified at at least two trials that the I.W.W. had been responsible for a series of mysterious haystack burnings.[194] In fact, Coutts himself participated in setting fires.[195] The I.W.W., furthermore, had never committed any crime, but the conceit was that *individual* members, by virtue of their membership, were dangerous criminals.[196]

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187. *Id.* at 537.

188. *Id.* at 512 ("[I]f the acts are too trivial for the law's notice, and create no apparent danger and no perturbation in the peaceful order of things, then no crime is committed; but if the means advocated are apparently adapted to the end, then the public peace, so far as advocacy is concerned, is as much disturbed as if they should be so actually.").

189. *Id.* at 515.

190. *Id.* at 109, 112 (Carter, J., dissenting) (The law was designed to "forbid[] any person who held opinions distasteful to the majority of our citizens to express those opinions." If strictly enforced, the law could be used to punish not only disloyal acts but also "to punish citizens because they are thought to be disloyal at heart, or not in sympathy with the policies of the government.").

191. JOHN S. GAMBS, THE DECLINE OF THE I.W.W. 29 (1966).

192. AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 63 (1995).

193. *Id.* (recounting that after Coutts left the Wobblies, "his chief source of income was the $250 per case, above expenses, he got from the government for his testimony in more than 40 trials of I.W.W. members").

194. People v. Wright, 66 Cal.App. 782, 786 (Cal. Dist. Ct. App. 1924); People v. Roe, 58 Cal.App. 690, 700 (Cal. 1922).

195. People v. Wright, 226 P. 952, 953 (Cal. Dist. Ct. App. 1924).

196. People v. Roe, 58 Cal.App. 690, 700–01 (1922) (former Wobbly, John Dymond, testified that the "wholesale destruction of property was caused by the direct acts of members of the I.W.W.," and that "while no specific action was ever taken by the organization," one of the I.W.W.'s rules was that its members should "act on their own initiative whenever they thought it necessary to accomplish" the goals of the organization).

Joe Arada, another regular government witness, added his own fanciful story. In numerous cases,[197] Arada testified that he had been employed on a potato farm.[198] On one particular day, a group of workers showed up, worked, and slept in the laborers' bunkhouse with Arada and others.[199] They left early the next day, before the others awoke, without taking their breakfast or asking for their day's pay.[200] Later, in the fields, Arada's feet started to burn.[201] This was a result, he claimed, of the potassium hydroxide that had been placed in his shoes by Wobbly saboteurs.[202] I.W.W. papers, he would testify, were found in the bunkhouse the morning the mysterious laborers left, which had not been there before.[203]

No specific defendant was ever connected to any crime, and no evidence emerged that the I.W.W. in fact ordered its members to engage in crime. The assumption, however, was that the group was a persistent, shadowy criminal enterprise, which drove the admission of what today would be considered non-probative[204] and unfairly prejudicial evidence.[205]

D. Defining Groups, Ensnaring Individuals

Under syndicalism and conspiracy laws, the I.W.W. became a great amorphous bogeyman, a stand-in for people's greatest inchoate fears.[206] The law could be applied to any unpopular group

197. *Wright*, 226 P. 952 at 953; People v. La Rue, 216 P. 627, 630 (Cal. Dist. Ct. App. 1923); *Roe*, 209 P. at 383–84.

198. *Wright*, 226 P. 952 at 953–54.

199. *Id.* at 954.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. In *People v. Bailey*, some of the I.W.W. literature introduced to prove the group's criminality was of "ancient vintage," published prior to the passage of California's syndicalism act. 225 P. 752, 756 (Cal. Dist. Ct. App. 1924). "[S]ome of it advocated, though in an indirect way, the resort to unlawful activities to carry out its great central idea." *Id.*

205. Again in *Bailey*, the California district court considered the testimony of Coutts and another unreliable former Wobbly, W.E. Townsend. *Id.* at 754. The court held this evidence admissible "upon the theory that the Industrial Workers of the World constituted a confederation or combination whose purpose was to accomplish its objects by unlawful or criminal means, and that it is a continuing conspiracy, and will remain so until its ultimate objects are accomplished." *Id.* at 756.

206. *See* Krulewitch v. United States, 336 U.S. 440, 446–47 (1949) (Jackson, J., concurring). (alluding to this problem, Supreme Court Justice Robert Jackson observed in 1949, "The modern crime of conspiracy is so vague that it almost defies definition . . . . [c]hameleon-like, [conspiracy] takes on a special coloration from each of the many independent offenses on which it may be overlaid"). And the first-ever critical treatment of conspiracy law offered "[a] doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought." Francis B. Sayre,

du jour; once applied, courts' and jurors' *a priori* assumption of the I.W.W.'s criminality virtually ensured a guilty verdict.

The *mens rea* required in such cases was always set at a low bar. Some courts required that the defendant knowingly belong to an organization "which in its nature was a criminal conspiracy."[207] Others rejected *any mens rea* requirement.[208] Still others interpreted syndicalism to be a strict liability crime.[209] For example, the Oregon Supreme Court held that membership in the I.W.W. alone was sufficient for liability.[210]

Prosecutors' goal, therefore, was to damn the group and ignore the individual. In *Burns v. United States*, for example, the U.S. Supreme Court affirmed a syndicalism conviction, which had been based on evidence primarily intended to establish the nature of the I.W.W., not the defendant's conduct.[211] Justice Brandeis, dissenting, noted that the evidence regarding the group related mainly to acts of individuals unrelated to the defendant.[212] Guilt by alleged association operated,[213] leading to criminal liability in some absurd circumstances.

People v. Wright[214] was such a case. It is commonly believed that criminal conspiracies operate in secret.[215] This makes sense, for if they were overt, they would not succeed and the conspirators

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Criminal Conspiracy, 35 HARV. L. REV. 393 (1922).

207. People v. Steelik, 203 P. 78, 84 (Cal. 1921).

208. *McClennegen*, 234 P. at 101.

209. State v. Hennessy, 195 P. 211, 217 (Wash. 1921).

210. *Boloff*, 7 P.2d at 777.

211. Burns v. United States, 274 U.S. 328 (1927).

212. *Id.* at 340 (Brandeis, J., dissenting).

213. In *Whitney v. California*, Justice Brandeis voted to affirm a syndicalism conviction even though syndicalism, he wrote,

> [I]s a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime . . . The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

274. U.S. 357, 372–73 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

Similarly, in *State v. Boloff*, a dissenting Judge Belt described the extent to which conspiracy law could be applied. 7 P.2d at 791–92. By showing that the defendant was a Communist Party member, the state would hold him responsible for "all of the strange doctrines and teachings that any member of such organization ever advocated." *Id.* at 791 (Belt, J., dissenting). He observed,

> Applying the same logic, if some Democrat should go so far as to assert in a public speech that all Republicans should be shot at sunrise, then every member of the Democratic Party would be guilty of crime. The doctrine of criminal conspiracy, when thus extended, leads to absurdity.

Id.

214. People v. Wright, 226 P. 952 (Cal. Dist. Ct. App. 1924).

215. Grunewald v. United States, 353 U.S. 391, 402 (1957) ("[E]very conspiracy is by its very nature secret.").

would be caught easily. *Wright*, however, subverted that model. In that case, agents raided a house, on the front of which hung a sign proclaiming, "I.W.W. Office." An I.W.W. member who had not been in the house when the raid commenced approached an officer, delivering to him his I.W.W. membership card.[216] He was then arrested. The usual career witnesses testified for the prosecution.[217] It was, in fact, at this trial that Coutts admitted to being an arsonist.[218]

People v. Johansen was another absurd case.[219] The defendants had been arrested and convicted of syndicalism for being I.W.W. members in Sacramento County. They resided in other counties, but had been subpoenaed to testify at another I.W.W. trial, which was taking place in Sacramento County.[220] They obeyed the subpoena, appeared and testified, and then were arrested and indicted.[221] The court affirmed their second conviction because their membership was a conspiracy, and therefore an ongoing crime.[222] The court noted that the defendants could have escaped criminal liability by ending their association with the "unlawful organization" prior to entering Sacramento County.[223]

X. WINDING DOWN THE RED SCARE

By the mid-1920s, state syndicalism and federal conspiracy prosecutions began to wane because the anarchist threat never materialized,[224] antisocialism laws were recognized as excessive and led to false convictions,[225] and deportations of Wobblies were deemed abusive,[226] because the I.W.W. never posed any threat[227] and rejected violence.[228] It was, in fact, authority entities that were responsible for most of the violent incidents surrounding the Red

216. *Wright*, 226 P. at 953.
217. *Id.*
218. *Id.*
219. People v. Johansen, 226 P. 634 (Cal. Dist. Ct. App. 1924).
220. *Id.* at 634.
221. *Id.*
222. *Id.* at 635.
223. *Id.* at 636.
224. Mohrenschildt, *supra* note 64, at 134.
225. Williams, *supra* note 141, at 571.
226. Braeman, *supra* note 55, at 107.
227. *See* Fiske v. Kansas, 274 U.S. 380, 387 (1927) (holding that the conviction of the defendant under the Syndicalism Act was a violation of the defendant's due process because his organization never advocated for crime, violence, or unlawful acts); *Colyer*, 265 F. 17, at 63 (explaining it was Congress's intent to "expel aliens who advocate force and violence"); People v. Thornton, 219 P. 1020, 1022 (1923) (noting the attenuated nature of the evidence produced by the prosecution in a criminal syndicalism trial).
228. Joseph R. Conlin, *The IWW and the Question of Violence*, 51 WISC. MAG. HIST. 316, 323 (1968).

Scare.[229] For example, the I.W.W.'s reputation for violence was created by *agents provocateurs*, sometimes enlisted by employers to discredit workers' unions.[230]

At the state level, in *De Jonge v. Oregon*,[231] the Supreme Court reversed a syndicalism conviction based on the defendant's participation at an open Communist Party meeting.[232] The Court recognized the problem of guilt by association, highlighting the law's poor track record of distinguishing between actual conspiracies and "participation in . . . peaceable assembl[ies]."[233]

At the federal level, perhaps the last Espionage Act case of its kind was *Dickson v. Young*.[234] Dickson had been arrested during the Palmer raids and charged with seven Espionage Act counts[235] for not contributing enough to the Red Cross.[236] He was acquitted of six of the charges, and an appellate court reversed the remaining conviction.[237]

XI. CONCLUSION

The period from 1918 to 1927 witnessed the widespread use of membership crime, out of which substantive First Amendment rights emerged. While robust speech rights would ultimately result, assembly was most often at issue. The WWI-era history of membership crime and the First Amendment, which this Article has retrieved, justifies an invigorated assembly right, responds to emerging scholarship on that right,[238] and is a corrective to subsequent jurisprudence, which has discounted the right.[239]

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229. Michael Stohl, *War and Domestic Political Violence: The Case of the United States 1890–1970*, 19 J. CON. RESOL. 379, 396 (1975).

230. Conlin, *supra* note 227, at 324.

231. De Jonge v. Oregon, 299 U.S. 353 (1937).

232. *Id.* at 362.

233. *Id.* at 365.

234. Dickson v. Young, 221 N.W. 820 (Iowa 1928); Dickson v. Young, 210 N.W. 452 (Iowa 1926); Dickson v. Young, 200 N.W. 210 (Iowa 1924).

235. *Dickson*, 200 N.W. at 211.

236. *Dickson*, 221 N.W. at 821 (Dickson allegedly "was not doing his part in the matter of contributions to the Red Cross and other war necessities and in other respects.").

237. *Dickson*, 200 N.W. at 211.

238. John D. Inazu has argued that "the freedom of assembly has been at the heart of some of the most important social movements in American history." INAZU, *supra* note 5, at 1. Paul Horwitz rejects the primacy of "the lone pamphleteer or soapbox speaker," and argues that "the most important aspects of the lived world of First Amendment activity take place through *institutions*." HORWITZ, *supra* note 5, at 8–9. Roscoe Pound viewed the speech right "not so much as an individual right but as a social interest in individual expression." FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 41 (1982). Frederick Schauer similarly observed that the "values underlying the arguments from truth and democracy are more social than individual." *Id.* at 60.

239. Inazu argues that the Supreme Court took wrong turns, first by

recognizing an atextual freedom of association in 1958, and then applying association jurisprudence to the detriment of the now-moribund right of assembly. INAZU, *supra* note 5, at 1–2. Horwitz observes that the current speech rights approach to the First Amendment "routinely exphasize[s] the individual and deemphasize[s] the institutional." This is a problem because institutions are "places in which public discourse is *formed* and *disseminated*." HORWITZ, *supra* note 5, at 14, 27. Jason Mazzone is blunter, writing, "The assembly and petition clause is today largely ignored in First Amendment analysis." Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 646 (2002). This is historically interesting because in the past, "the rights to assemble and petition were . . . core political values (to which freedom of speech was often quite secondary)." *Id*. at 646–47 (2002).