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The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927

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Long before the arrival of the current “war on terrorism” renewed concerns about the collateral repression of secular, leftist radicals, and long before even the infamous persecution of communists and other leftists in the 1940s and 1950s, federal and state governments in this country embarked on an intensive campaign aimed specifically at stifling the politics of economic radicalism. During the course of this campaign, which reached its apogee in the 1910s and 1920s, men and women who dared to challenge the increasing hegemony of industrial capitalism in American society, change the social order that accompanied this development, or make militant demands within the existing economic framework, faced arrest, imprisonment, and even death at the hands of federal, state, and local government officials for whom radicalism of this sort was un-American and thoroughly unacceptable.¹

This campaign to thwart the politics of economic radicalism reached all representatives of the American left: socialists and anarchists, communists, feminists, and even liberals who strayed too far from establishment norms. But the campaign was focused on one organization above all others: the Industrial Workers of the World, or IWW. Formed in Chicago in 1905, the IWW in the 1910s and 1920s represented the most prominent organ of leftist radicalism in American life. From its inception, the IWW dedicated itself to the causes of industrial unionism, economic socialism, and radical social equality, which it advanced with militant rhetoric and confrontational tactics.² The organization sought no less than the outright abolition of capitalism as a social system.³ For prosecuting such views, the IWW and its membership paid an enormous price.

This repression took many forms. In some instances it in-

¹ See *infra* Part III.

² See *infra* Part I.B.

³ See *infra* text accompanying notes 122-33.

involved authorities' manipulation of laws of general relevance. Such was the case, for example, with the large scale and totally unfounded prosecution of IWW members for conspiracy to interfere with the war effort. In 1918, over 100 members, including most of the union's top leadership and a handful of supporters and ex-members, were convicted of these charges and, in most cases, sentenced to substantial terms of imprisonment. Hundreds of other members and affiliates were subjected to deportation and other forms of immigration-related harassment because of their links to the organization. A less intensive, though more pervasive, pattern of legal repression occurred with the use during this period of vagrancy laws, "tramp acts," and other relatively minor laws against IWW members and organizers. During the first few decades of the organization's existence, IWW members were arrested and charged by the tens of thousands with these crimes in countless incidents scattered throughout the country.⁴ Such charges were used time and again to run members out of town, initiate beatings and other indignities, and preempt organizing and strike efforts. In still other instances, the repression of the IWW during this period went beyond legal artifice and selective prosecution to entail patently extralegal practices: official lawlessness as well as official complicity in private acts of antiradical vigilantism.⁵ Countless members were beaten and on occasion even killed by American Legionnaires, Ku Klux Klansmen, private detectives, and other self-nominated protectors of "true" Americanism.⁶

The IWW obviously failed to realize its audacious project of economic equality and social justice. Few today who are not union organizers or labor academics know much about the organization, if they know of it at all. Such has been the IWW's decline. By the arrival of the New Deal, it had already surrendered its lead role in leftist politics to the Communist Party and other groups, and had largely faded from the forefront of labor organizing.⁷ By most accounts, the reasons for this are diverse:

⁴ See *infra* Part I.C.

⁵ See *infra* text accompanying notes 170-73.

⁶ See *infra* text accompanying notes 156-60.

⁷ On the IWW's decline, see MELVYN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 255-66 (Joseph A. McCartin ed., abr. ed. 2000). The rising influence of the Communist Party in the 1930s is addressed most thoroughly in FRASER M. OTTANELLI, *THE COMMUNIST PARTY OF THE UNITED STATES: FROM THE DEPRESSION TO WORLD WAR II* (1991).

the union's organizational shortcomings, ideological inadequacies, and flawed strategies; changes in economic and social structure; and, of course, the role of relentless official repression of the kinds just described.⁸ Scholars of the IWW have done much to draw out the role of these factors in undermining the IWW and reshaping the landscape of economic radicalism in twentieth-century America; they have done a good job in uncovering the important role of government and law in this process.⁹

In a very important respect, however, accounts of the role of government repression in influencing the fate of the IWW remain incomplete. Legal scholars and professional historians alike have largely ignored what is perhaps the most explicit, straightforward, and altogether remarkable effort in modern America to use the power of the state, backed by law, to stamp out a radical organization. In the late 1910s and early 1920s, almost half of American states and territories enacted criminal syndicalism laws that essentially criminalized any sort of challenge to industrial capitalism.¹⁰ These laws did this under the guise of criminalizing advocacy of "political or industrial change" by means of "sabotage," "terrorism," and other criminal conduct.¹¹ In practice, it mattered little that the targets of these laws seldom, if ever, actually advocated such conduct as means of social change, or that key terms in the statutes, like sabotage, were only vaguely and ambiguously defined. What mattered instead was the ability to use these laws to outlaw the advocacy of social change itself, a purpose for which the statutes' ambiguities were well-suited and its targets' legal innocence was irrelevant.¹²

Indeed, it was the *purpose and the function* of criminal syndicalism laws to effectively criminalize mere membership in the

⁸ On the history of the IWW and its encounters with state-sponsored repression, see generally DUBOFSKY, *supra* note 7; ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976*, at 105-91 (Univ. of Ill. 2001) (1978); WILLIAM PRESTON, JR., *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933* (2d ed. 1994); NIGEL ANTHONY SELLARS, *OIL, WHEAT & WOBBLES: THE INDUSTRIAL WORKERS OF THE WORLD IN OKLAHOMA, 1905-1930* (1998); and Robert L. Tyler, *Rebels of the Woods and Fields: A Study of the I.W.W. in the Pacific Northwest 114-43* (June 1953) (unpublished Ph.D. thesis, University of Oregon) (on file with the University of Oregon library).

⁹ See generally sources cited *supra* note 8.

¹⁰ See *infra* Part II.B and text accompanying notes 291-95.

¹¹ ELDRIDGE FOSTER DOWELL, *A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES 18-20* (Johns Hopkins Univ. Studies in Historical and Political Sci., Series 57, No. 1, 1939).

¹² See *infra* Part III.

IWW and thereby challenge its continued existence as a functioning institution. Thousands of IWW members and supporters were arrested on charges of criminal syndicalism; hundreds of these were ultimately tried and convicted, in many cases going on to serve time in state prisons. The IWW itself incurred huge costs in its efforts to provide members with legal representation at trial and on appeal, and imprisoned workers with aid and comfort.¹³ While the organization defiantly adhered to its radical ideals in the face of this campaign, in the end, such impositions played a key role in undermining the IWW, rolling back significant organizing gains made by the union in the late 1910s, and eventually reducing the IWW by the late 1920s to a shell of its former self.

Only at this point, when the IWW had lost much of its capacity as a viable agent of labor representation and radical agitation, did the enforcement of criminal syndicalism laws really recede; however, it resurfaced in the 1930s as a foil against communists, socialists, and other leftists. It was not until 1969, in *Brandenburg v. Ohio*, that the United States Supreme Court imposed real limits on how these laws could be enforced.¹⁴

Scholars have not completely neglected the role of criminal syndicalism laws in influencing the fate of the IWW and early twentieth-century radicalism more generally. However, they have come close. Despite its obvious relevance to the topic, many important accounts of the evolution of modern civil liberties ignore completely the history of criminal syndicalism.¹⁵ Those that do deal with criminal syndicalism tend to reduce the relevance of these laws to their impact on the development of rights of speech and association and to focus more on these laws' influence on the evolution of constitutional doctrine than on their social meaning.¹⁶ This perspective diminishes the fact that

¹³ See *infra* Part IV.

¹⁴ 395 U.S. 444 (1969).

¹⁵ For example, in his recent book, Geoffrey Stone discusses important criminal syndicalism cases like *Whitney v. California*, 274 U.S. 357 (1927), and *Brandenburg v. Ohio*, 395 U.S. 444 (1969), without mentioning the underlying crime at all. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 522-24 (2004). Though Stone does mention briefly the IWW, he misidentifies it as the *International Workers of the World*. *Id.* at 222.

¹⁶ Among the better examples of this—and a very useful one—is the work of speech scholar Zechariah Chafee. See ZECARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 326-54 (Atheneum 1969) (1941). The limitations of Chafee's

these were serious criminal laws concerned far more with destroying the IWW and punishing its members for their radicalism than with regulating speech and association rights in any abstractly juridical sense.

Criminal syndicalism laws are also mentioned in dedicated histories of the IWW, but typically only briefly and in a manner that subordinates their influence among instruments of legal repression to better-known phenomena like the conspiracy trials mentioned above.¹⁷ This practice ignores significant questions of legal doctrine that speak to the nature of these statutes. Equally typical of these treatments of criminal syndicalism is a tendency to assume that by the time these statutes really came into play, the IWW had already been effectively destroyed. This assumption is false. The IWW remained for quite a while active in precisely those jurisdictions that made the most aggressive use of their criminal syndicalism statutes against the organization. Moreover, the persecution of the IWW with these statutes receded in these jurisdictions only when, by the mid- and late 1920s, the IWW had obviously fallen into wholesale decline everywhere in the country.

Besides these limited engagements, the only sustained scholarly attempts to understand criminal syndicalism laws consist of a study of their legislative histories and a handful of relatively brief accounts of their enforcement in particular jurisdictions.¹⁸ While

approach are evident not only in his focus on legal doctrine to the exclusion of practical, political ramifications, but also in his naive view of the origins and functions of these statutes. Chafee takes the view, completely at odds with that developed in this Article, that these statutes, though offensive on principle, can be understood somewhat sympathetically as the frustrated reaction of agricultural interests to the supposedly real problems posed by IWW sabotage and other acts of militancy. *See id.* at 332-33.

¹⁷ For example, Melvyn Dubofsky's leading history of the IWW limits its discussion of criminal syndicalism to only a handful of scattered pages. *See* DUBOFSKY, *supra* note 7, at 218, 254, 257. The same is true of other works. *See, e.g.*, PAUL FREDERICK BRISSENDEN, *THE I.W.W.: A STUDY OF AMERICAN SYNDICALISM* 346-48, 381-86 (2d ed. 1920); JOHN S. GAMBS, *THE DECLINE OF THE I.W.W.* 29-30, 35 (1932); PATRICK RENSHAW, *THE WOBBLES: THE STORY OF THE IWW AND SYNDICALISM IN THE UNITED STATES 190-92* (Ivan R. Dee pub. 1999) (1967). Even works of scholarship focusing on the history of the IWW in regions where enforcement of criminal syndicalism laws was particularly intense, and otherwise doing a good job of highlighting the influence of government repression on the union, give relatively little attention to the role of these laws. *See, e.g.*, Tyler, *supra* note 8, at 149-55.

¹⁸ *See* DOWELL, *supra* note 11, for the study of legislative histories. Among shorter treatments, see Stephen F. Rohde, *Criminal Syndicalism: The Repression of Radical Political Speech in California*, 3 W. LEGAL HIST. 309 (1990); Robert C. Sims,

occasionally quite well researched (and quite useful to this Article), even these works leave unanswered several key questions. In particular, how were these laws enforced across jurisdictions? What effect did enforcement on this scale have in undermining the IWW and the more general cause of economic radicalism? How did IWW members contend with the hardships and frustrations inflicted on them? And what does the history of these laws add to our understanding of the nature of the modern state in the context of class conflict? In answering these questions, this Article seeks not only to develop our understanding of the history of the IWW; it also endeavors to expand our understanding of the important role of the law in shaping the American labor movement and the American left.

It should be made clear at the outset, however, that although I regard these laws as politically and morally indefensible, my aim is not really to critique them on civil libertarian grounds. On one level, the reason for this simply is that such concerns are outside the boundaries of what I want to accomplish in this Article. To adopt the kind of overtly legalistic, typically constitutional focus that is essential to any civil libertarian critique can only distract from my ambition to uncover the practical, social meaning of criminal syndicalism laws and their impact on the history of labor radicalism in this country, as opposed to using these laws, as others have, as a template for talking about the evolution of constitutional doctrine. On another, somewhat more fundamental level, my disinclination to develop a traditional civil libertarian critique stems from an aversion to the political assumptions implicit in such an approach. A typical civil libertarian argument against criminal syndicalism laws and their use against the IWW would tend to cast this episode of repression as either an aberration or an anachronism in an otherwise fairly progressive development toward more articulate and effective legal protections of speech and association.¹⁹ By this reckoning, the use of these laws

Idaho's Criminal Syndicalism Act: One State's Response to Radical Labor, 15 LAB. HIST. 511 (1974); Joseph F. Tripp, *Reform and Repression in the Far West: The Washington Legislative Response to Labor Radicalism in 1919*, 19 RENDEZVOUS 43 (1983); and Woodrow C. Whitten, *Criminal Syndicalism and the Law in California: 1919-1927*, 59 TRANSACTIONS AM. PHIL. SOC'Y (n.s.) 3 (1969). With the exception of Whitten's article, however, none of the foregoing articles is based on a particularly rigorous review of the sources; even Whitten's article is limited by its focus on California. All of this scholarship, it should be added, suffers in varying degrees from a lack of concern for matters of legal doctrine.

¹⁹ See, e.g., ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA,

against the IWW appears to be an overreaction unrestrained by adherence to sound constitutional values. This tack is problematic, in my view, in its tendency to distort the relationship among state, capital, and labor in modern society and the role of law in regulating this relationship. The history of criminal syndicalism laws itself helps to demonstrate that the repressive alignment of the state with capitalist interests, under the guise of upholding state security and protecting public safety, is in no way anomalous or anachronistic; nor is it subject to any thoroughgoing, let alone progressively more effective, limitation by law. This condition of repression is, instead, a fundamentally normal one little governed in fact by constitutional or other legal strictures, even in a supposedly open, liberal society. To a degree, law may restrain the dynamics of repression, but only where adhering to civil libertarian principles does not leave unchecked apparent threats to the existing social order. The fact that the IWW managed actually to threaten both the interests and the ideology of elites who were invested in the status quo and who also had access to organs of state power foreordained the enactment of these laws, the union's prosecution under them, and the courts' upholding of these prosecutions. Conspicuously, in this vein, the thing that ultimately tempered the use of these laws against the IWW was not a discovery (or rediscovery) of civil liberties principles by legislatures, police, or judges; instead, by the late 1920s, the IWW had withered under the enforcement of these very laws and its successors on the left (in particular, the Socialist and Communist parties) had, to varying degrees, either tempered their radicalism or were preparing to enter contingent alliances with the state.²⁰

Perhaps inevitably, the account that follows from this is much more than a legal history of criminal syndicalism focused on courts and legislatures, statutes and cases, and trials. I intend to speak to the social meaning of these laws. In order to foster a better understanding of the nature of the IWW's encounter with

1919–1920 (1955); STONE, *supra* note 15. For a reflection on this progressivist narrative as it applies to constitutional discourse generally, see, for example, Robert W. Gordon, *The Struggle Over the Past*, 44 CLEV. ST. L. REV. 123 (1996), and J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998). See also Jack M. Balkin, *Brown as Icon*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 1, 5-7 (Jack M. Balkin ed., 2001) (questioning such narrative as it relates to civil rights).

²⁰ See, e.g., OTTANELLI, *supra* note 7, at 9-80.

criminal syndicalism laws, this Article develops a picture of the social context in which the IWW came into existence and in which criminal syndicalism laws were enacted and enforced. This picture centers not only on the dynamics of capitalism, generally, but also on the particular social and political changes wrought by industrialization in the early twentieth century, including the emergence of an intense struggle between employers and workers for control of both the profits of production and sovereignty over the production process itself.

Part I of this Article begins with an account of the social developments that gave rise to the IWW and eventually inspired the enactment of criminal syndicalism laws. It shows how these forces combined to shape the IWW institutionally and ideologically as well as to prefigure the form and structure of legal devices undermining and destroying the organization. Criminal syndicalism laws embodied, of course, one way of destroying the IWW by use of the law; but they were not the only or even the first, and nor were they in any sense singularly responsible, among legal means, for the organization's eventual demise. Other repressive regimes preceded the advent of criminal syndicalism laws and were important, too, in eroding the IWW and in anticipating how criminal syndicalism laws would look, where they would emerge, and what they would be called upon to accomplish. This part also explores the most prominent of these other regimes.

Part II describes the process by which criminal syndicalism laws were enacted. First, it looks at the dominant role played by local capitalists and their ideological champions in securing the enactment of criminal syndicalism laws. Second, this part also looks at the important role played by the organization's own rhetoric and ideology in shaping these statutes.

Part III uses reported cases (of which there are several score of real relevance), newspaper accounts from the period, and other sources, both primary and secondary, to develop an account of how these laws were actually enforced, the meaning they took on in this process, and what this says about the role of police, prosecutors, and trial courts in the politics of criminal syndicalism. It divides the analysis by both region and, in one instance, by state. From this emerges a clear pattern of enforcement characterized by widespread flouting of legal rules of procedure on the part of police, prosecutors, and judges; an explicit targeting of IWW

members, particularly those actively engaged in organizing or strike activity; and an indifference to actual criminal conduct, even as defined by the broad and vague terms of the criminal syndicalism statutes. It also reveals a view of liability that equated violation of these statutes with mere membership in the IWW.

Part IV explores the role of appellate courts in reviewing the use of criminal syndicalism laws. It stresses how, even though they occasionally imposed limiting constructions on these statutes and overturned convictions from time to time, appellate courts generally endorsed the patterns of enforcement that occurred at the levels of arrest and trial. This part shows how the appellate courts frequently manipulated legal doctrine to preserve the coherence of an ideology of due process, fundamental fairness, and other notions central to the jurisprudence of liberalism and the courts' own legitimacy, while also maintaining the efficacy of these statutes as means of bludgeoning the IWW out of existence.

Part V focuses on the corrosive effect that these laws had on the IWW. It presents these laws as an important, though often overlooked, cause of the organization's demise while also emphasizing the significant ways in which the union and its members clung to their ideals in the face of this repression. It also reflects briefly on the fate of criminal syndicalism laws in the years since the demise of the IWW.

The conclusion revisits an important issue raised in this introduction: the relevance of the history of criminal syndicalism to the role of the law and the state in shaping the politics of labor and class in modern America.

I

THE IWW'S RADICAL CHALLENGE TO INDUSTRIAL CAPITALISM AND THE LANDSCAPE OF REPRESSION IN THE EARLY TWENTIETH CENTURY

On March 14, 1917, the State of Idaho enacted a statute "defining the crime of criminal syndicalism and prescribing punishment therefore."²¹ A relatively brief document, the statute described criminal syndicalism as the "doctrine which advocates crime, sabotage, violence or unlawful methods of terrorism as a

²¹ Act of Mar. 14, 1917, ch. 145, 1917 Idaho Sess. Laws 459.

means of accomplishing industrial or political reform.”²² It made the “advocacy of such doctrine” a felony and then went on to criminalize not only advocating criminal syndicalism, but also publicizing criminal syndicalism;²³ “[o]penly, wilfully and deliberately justif[ying], by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violent methods of terrorism;”²⁴ establishing or holding membership in any organization committed to teaching or advocating criminal syndicalism;²⁵ assembling to teach or advocate criminal syndicalism;²⁶ and providing a physical forum for the advocacy of criminal syndicalism.²⁷

Within a month, Minnesota enacted a very similar statute.²⁸ Over the next three years, twenty-one states and two territories, most of which were in the West or Midwest, followed suit with their own criminal syndicalism laws.²⁹ Some of these laws were virtual copies of the Idaho statute; others varied somewhat in substance and form. But all, like Idaho’s, focused precisely on the same basic ends: invoking the concept of criminal syndicalism to criminalize membership in the IWW; stopping its members’ advocacy, violent or not, of radical social change; and relieving businesses of the union’s organizing campaigns.

Those who worked to enact these laws would not be disappointed by their efforts. In the half-decade or so following Idaho’s enactment of the first criminal syndicalism law, hundreds of IWW members, known popularly and among themselves as Wobblies, were prosecuted under these laws. Many of the organization’s offices effectively closed because of these prosecutions.

²² *Id.* § 2(1), 1917 Idaho Sess. Laws at 459-60.

²³ *Id.* § 2(2), 1917 Idaho Sess. Laws at 460.

²⁴ *Id.* § 2(3).

²⁵ *Id.* § 2(4).

²⁶ *Id.* § 3.

²⁷ *Id.* § 4.

²⁸ Act of Apr. 13, 1917, ch. 215, 1917 Minn. Laws 311.

²⁹ States enacting criminal syndicalism statutes and the dates of first enactment (some statutes were subsequently amended, reenacted, or, beginning in the late 1930s, repealed) are as follows: Alaska (1919) (then a territory); Arizona (1918); California (1919); Colorado (1919); Hawaii (1919) (then a territory); Idaho (1917); Indiana (1919); Iowa (1919); Kansas (1920); Kentucky (1919); Michigan (1919); Minnesota (1917); Montana (1918); Nebraska (1919); Nevada (1919); Ohio (1919); Oklahoma (1919); Oregon (1919); South Dakota (1918); Utah (1919); Washington (1919); West Virginia (1919); and Wyoming (1919). DOWELL, *supra* note 11, app. I, at 147. For further information on the amendment, reenactment, and repeal of these statutes, see *id.* app. I, at 147-49.

The organization incurred huge burdens providing its members with bail, legal counsel, and support in prison. By the later part of the 1920s, the IWW, which at the dawn of America's entry to the Great War had captivated the nation and terrified establishment figures with what seemed then like a credible bid to organize the industrial proletariat and serve up a real challenge to the economic, political, and cultural hegemony of industrial capital, would shrink from the landscape. And while a number of other instruments of repression were also instrumental in the IWW's defeat, criminal syndicalism laws played a significant, though often forgotten, role in this tragedy.

The story of criminal syndicalism laws is inextricably intertwined with the rise of the IWW and its bold challenge to industrial capitalism. Had there been no IWW, had it not frightened the privileged and powerful with its bids to organize their workers against them and ultimately change the world, there would have been no criminal syndicalism laws. Once the IWW ceased to exist as a viable organization, criminal syndicalism prosecutions faded considerably. In fact, the relationship between the development of criminal syndicalism laws and the IWW runs even deeper than this. Criminal syndicalism laws were not only enacted as anti-IWW devices; the very substance of these laws was conditioned in various ways by repressive, anti-IWW campaigns already underway when states began to enact criminal syndicalism laws.

A. Industrialization, Labor, and the Origins of the IWW

America of the late nineteenth and early twentieth centuries was defined, above all, by the rise of industrial capitalism. Marked by an unprecedented penetration of capitalist norms and structures throughout American society, industrialization witnessed a number of fundamental social transformations encompassing class structure and the labor process. Industrialization transformed the workplace and work-life, generally, creating an enormous, largely impoverished industrial workforce, much of which was composed of unskilled (or de-skilled) and often transitory workers, and little of which was unionized at the time the IWW arrived on the scene. Industrialization eroded the relatively stable structures and norms of republican and antebellum America, leaving a domain of work and class increasingly un-governed and unmoored by traditional norms, and increasingly

dominated by the nakedly anonymous conflict of the wage-labor system. This voiding force converged with the unique features of capitalist production in the industrial context—its scale, its competitive structure, and its reliance on automation—to prompt a radical reorganization of business structure and practices, centered in the rise of the modern corporation and the advent of evermore sophisticated techniques for controlling labor and enhancing its exploitation. In these ways, industrialization set the stage for an intense, broad-ranging struggle between employers and workers for control of the production process, ownership of the fruits of production, and ultimately a dominant place in deciding the structure of the social order itself.

Broad changes swept American society in the late 1800s and early 1900s. Some were quite dramatic, reflecting a society in the midst of a chaotic transformation of culture and social structure. Overall, the country's population increased from about 50 million in 1880, to 76 million in 1900, to 106 million in 1920.³⁰ Driven in significant part by immigration, this increase was overwhelmingly concentrated in urban areas, reflecting the spatial focal point of industrial production.³¹ It occurred, too, in areas of the West and Midwest where IWW activity and criminal syndicalism enforcement would be concentrated.³²

Equally dramatic changes took hold of labor and the workplace. The total size of the workforce expanded from 17.4 million in 1880, to 29 million in 1900, to about 41.6 million in 1920.³³ Even more revealing are changes in the distribution of employment during this period. In 1880, about 3 million people over 10 years of age worked in manufacturing; by 1900 the number had

³⁰ U.S. CENSUS BUREAU, *THE STATISTICAL HISTORY OF THE UNITED STATES: FROM COLONIAL TIMES TO THE PRESENT* 8 ser. A 6-8 (1976); see also THOMAS J. SCHLERETH, *VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE, 1876-1915*, at 28 (1991).

³¹ For example, in 1880 only about 1.2 million people lived in urban areas of more than 1 million inhabitants; by 1900, this figure had leaped to 6.4 million, and by 1920, to over 10 million. U.S. CENSUS BUREAU, *supra* note 30, at 11-12 ser. A 57-72.

³² Between 1890 and 1910, the population of California nearly doubled from about 1.2 million to nearly 2.4 million; by 1920, it would reach 3.4 million. *Id.* at 25 ser. A 195-209. In Washington state, the rate of increase was even greater: the population increased from 357,000 in 1890 to 1.1 million in 1910. *Id.* at 36 ser. A 195-209. In both states, as well as in others important to the history of criminal syndicalism, this overall increase accompanied a decisive shift from rural residency to urban residency. See MELVYN DUBOFSKY, *INDUSTRIALISM AND THE AMERICAN WORKER, 1865-1920*, at 3 (2d ed. 1985).

³³ U.S. CENSUS BUREAU, *supra* note 30, at 127 ser. D 11-25.

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ballooned to nearly 6 million, and by 1920, to around 11 million.³⁴ Combined with the penetration of industrial production in other domains, this expansion in manufacturing embodied a massive process of “proletarianization” of the workforce that reached into areas of production not traditionally associated with such forms of organization.³⁵

These overall increases in industrial employment were accompanied by important qualitative changes in the nature of work. Automation, an inherent feature of industrialization, steadily reduced the efficiency of and need for large-scale employment of skilled labor, replacing such positions by the millions with unskilled ones.³⁶ Paradoxically, this very process drove an expansion in the ranks of skilled labor, too, as automation also increased the need for specialized cadres of trained, experienced technicians to keep the increasingly complicated machinery of automated production running.³⁷ One important result of this process was an increase in material disparity as well as disparity of social prestige within the ranks of industrial labor, such that while overall wages increased between 1860 and 1914, this mostly reflected the improved position of skilled workers.³⁸ A similar cleavage emerged between blue-collar, wage-earning labor and salaried, white-collar labor, as the reorganization of business in accordance with the corporate ideals of rational, bureaucratic

³⁴ *Id.* at 139; *see also* DUBOFSKY, *supra* note 32, at 3.

³⁵ For example, in 1890 agricultural laborers (as distinct from owner/operator-farmers) numbered just over three million. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1910, at 225 tbl.137 (33d ed. 1910), available at http://www.census.gov/compendia/statab/past_years.html (follow “1901-1950” hyperlink, then download “Zip” file for 1910) [hereinafter STATISTICAL ABSTRACT OF 1910]. By 1910, that number grew to almost six million. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1920, at 273 tbl.192 (43d ed. 1920), available at http://www.census.gov/compendia/statab/past_years.html (follow “1901-1950” hyperlink, then download “Zip” file for 1920) [hereinafter STATISTICAL ABSTRACT OF 1920]. For lumbermen, the increase during the same period was from about 66,000, STATISTICAL ABSTRACT OF 1910, *supra*, at 225 tbl.137, to just over 161,000, STATISTICAL ABSTRACT OF 1920, *supra*, at 273 tbl.192. For miners, the increase was from about 387,000 in 1890, to over 563,000 in 1900, STATISTICAL ABSTRACT OF 1910, *supra*, at 227 tbl.137, to nearly 1 million in 1910, STATISTICAL ABSTRACT OF 1920, *supra*, at 274 tbl.192. And for iron and steel workers, the increase was from 220,400 in 1890, to 290,500 in 1900, STATISTICAL ABSTRACT OF 1910, *supra*, at 227 tbl.137, to almost 483,000 in 1910, STATISTICAL ABSTRACT OF 1920, *supra*, at 275 tbl.192.

³⁶ DUBOFSKY, *supra* note 32, at 46.

³⁷ DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925, at 215-16 (1987).

³⁸ *See* DUBOFSKY, *supra* note 32, at 16-19.

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management of industrial production created more positions of middle-level management.³⁹ Of course, the disparities between these two ranks of labor, which were even greater than those between skilled and unskilled wage-earners, manifested themselves in the development of a distinctly bourgeois, middle-class consciousness defined in large part by an aggressively asserted distance from working-class culture.⁴⁰

In any case, the de-skilling of work that characterized the industrial age steadily deprived millions of laborers of both influence over their wages and relative social prestige.⁴¹ By making them more fungible and, thus, more easily replaceable, this process also rendered workers considerably more vulnerable to discipline (including replacement by strikebreakers), layoffs, and outright discharges.⁴² This reality was seldom lost on the workers themselves, who often focused their means of resisting employers, including strikes, slowdowns, and acts of just plain quitting the job, on maintaining the relevance of their job skills to the production process.⁴³

These practices corresponded to a more fundamental shift in the nature and structure of capitalist organization. In the late nineteenth and early twentieth centuries, an ever-greater portion of production was controlled by modern corporations, defined by their segregation of ownership and control, and by rational, bureaucratic structures of internal governance and management.⁴⁴ Many of these entities grew to unprecedented size, not infrequently to the point of wielding oligopolistic and even monopolistic control of whole industries and amassing unprecedented political power.⁴⁵ A distinctive aspect of this new business model was its displacement of management by owners with professional

³⁹ See, e.g., ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977); see also HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 293-447 (1974) (discussing the working class and relevant occupations).

⁴⁰ See STEVEN J. DINER, *A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA* 155-56 (1998).

⁴¹ See, e.g., MONTGOMERY, *supra* note 37.

⁴² See *id. passim*.

⁴³ See *id.* at 190-97, 203-13.

⁴⁴ See, e.g., ALFRED D. CHANDLER, JR., *STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE* (1962); CHANDLER, *supra* note 39; see also BRAVERMAN, *supra* note 39.

⁴⁵ See sources cited *supra* note 44.

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management, which brought to bear expertise and a certain measure of objectivity, while also enlarging the middle class.

These features gave modern businesses a unique capacity to develop and to employ rational means of control over the labor process and over labor as a class. In some respects, this assertion of control involved the deployment of naked force, often sponsored by police or other representatives of the state. Time and again, in what had become an escalating campaign of labor repression by the late 1880s, capitalists called on the services of police, private detectives, militias, and even, on occasion, regular military personnel to crush strikes.⁴⁶ From the 1880s through the 1920s, hundreds and perhaps thousands of union members and their supporters were killed in clashes like these, along with a substantial (though considerably lesser) number of strikebreakers, private detectives, and government authorities.⁴⁷ Countless other people, overwhelmingly from the labor side, were beaten, maimed, or subjected to other indignities.⁴⁸

The politics of these practices were obvious. In the words of famous socialist and IWW founder Eugene Debs, reflecting on his experience as leader of the American Railway Union in the Pullman Strike, and how “[a]n army of detectives, thugs and murderers . . . equipped with badge and beer and bludgeon” awakened him to socialism: “At this juncture there was delivered, from wholly unexpected quarters, a swift succession of blows that blinded me for an instant and then opened wide my eyes—and in the gleam of every bayonet and the flash of every rifle *the class struggle was revealed.*”⁴⁹

As crude as these methods of control might seem, they drew on an increasingly intricate and professionalized infrastructure of coercive social control that was itself a unique product of the industrial age. Police departments, which had only emerged in their modern form in the course of the nineteenth century, and earlier in more urban and eastern jurisdictions than in other

⁴⁶ See, e.g., JOSEPH G. RAYBACK, A HISTORY OF AMERICAN LABOR 196-97, 202-03 (1959); ROBERT H. ZEIGER & GILBERT J. GALL, AMERICAN WORKERS, AMERICAN UNIONS: THE TWENTIETH CENTURY 23 (3d ed. 2002).

⁴⁷ See Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in THE HISTORY OF VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 281, 287-348 (Hugh Davis Graham & Ted Robert Gurr eds., 1969).

⁴⁸ See, e.g., *id.*

⁴⁹ EUGENE V. DEBS, *How I Became a Socialist*, in EUGENE V. DEBS SPEAKS 43, 47 (Jean Y. Tussey ed., 1970).

places, were, by the dawn of the twentieth century, rapidly embracing professional, bureaucratic methods of organization.⁵⁰ But while this transformation tended to rationalize and obscure the role of the police as agents of class repression, it by no means negated this function. Several careful studies of early twentieth-century policing have shown that, if anything, the professionalization of the police in this period added an imprimatur of legitimacy to its acts of class repression while doing little to actually diminish its prerogative in this area.⁵¹ Professionalization replaced what were once crudely obvious acts of class repression with methods that could be styled as ways of punishing and preventing crime and maintaining law and order, and thus, as means of advancing a universal good.

In the course of this transformation, the overall number of police personnel nationwide increased significantly.⁵² Also important was the expansion and professionalization of public prosecutors, whose relative authority and numbers also increased dramatically during this period, and who often played an important role in mobilizing and legitimating the class-biased use of police forces.⁵³ Yet another key development in this period was a nationwide expansion in both the number and capacity of militia armories, which markedly enhanced the capacity of states and the federal government to bring to bear military force in cases of unrest.⁵⁴

⁵⁰ See generally ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920* (1981).

⁵¹ See, e.g., SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915*, at 44–45 (1983); Helen Boritch & John Hagan, *Crime and the Changing Forms of Class Control: Policing Public Order in “Toronto the Good,” 1859–1955*, 66 *SOC. FORCES* 307 (1987) (discussing how class domination remained central to policing even as policing embraced crime control as its dominant function); see also MARK NEOCLEOUS, *THE FABRICATION OF SOCIAL ORDER: A CRITICAL THEORY OF POLICE POWER* (2000).

⁵² Between 1890 and 1900, for example, the total number of “watchmen, police, firemen, etc.,” as accounted by the U.S. Census Bureau, nearly doubled, increasing from 74,629 to 130,590. *STATISTICAL ABSTRACT OF 1910*, *supra* note 35, at 226 tbl.137.

⁵³ On the development of public prosecutors see, for example, Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 *CRIME & DELINQ.* 568 (1984).

⁵⁴ The National Guard was reorganized and strengthened twice in the period that concerns us: first by the Militia Act of 1903, ch. 196, 32 Stat. 775, and then by the National Defense Act of 1916, ch. 134, 39 Stat. 166. The ability of the federal government to mobilize militias was facilitated by passage of the National Defense Act of 1916, which, among other things, created the National Guard out of state militias. See National Defense Act of 1916 §§ 58–63.

These changes among institutions of state coercion were part of a larger trend in this period toward an expanded capacity for state-sponsored social control and the construction of social order more generally. This trend, which flowered fully in the Progressive Era of the early 1900s, fed an increased appetite among many sections of society for greater order amid a looming threat of unrest evident in expressions of class conflict; in ethnic, racial, and gender interaction, especially in public spaces; and in the essential tendency of capitalist industrialization to erode or confuse incumbent social norms at the same time that it intensified the alienating dimensions of the laboring process. In other words, the desire for control was a direct response to the doubts created by industrialization. In this vein, both the overall increase in police numbers and the transformation of their apparent means of functioning can be situated alongside other overarching developments, such as the increase in civil service and the expansion of the court system, or the proliferation of Jim Crow Laws and the contemporary popularity of eugenics. These developments were all central to a quest to construct an evermore regulated society, stabilized around fairly particular notions of race, gender, class, and social order more generally.⁵⁵

To the extent that the repression of strikes might favor some greater aura of legitimacy than could be mustered by police or military intervention, employers in this period could also rely on courts to issue injunctions against strikes, which would legally authorize their repression by force.⁵⁶ From the 1870s onward, courts exercised their powers of equity to issue thousands of labor injunctions.⁵⁷ These injunctions were issued on a variety of grounds: that strikes interfered unduly with the flow of commerce, that they portended violence (a near certainty in this period), or simply that they compromised property rights.⁵⁸ Frequently, labor injunctions were issued in *ex parte* proceedings conducted without adequate notice (if any at all) and on the basis

⁵⁵ On the relationship between the rise of the regulatory state and the quest for social order and stability, see JOHN WHITECLAY CHAMBERS II, *THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1890-1920*, at 49-52 (2d ed. 1992); and DINER, *supra* note 40, at 200-32.

⁵⁶ William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1151 (1989).

⁵⁷ At least 4300 labor injunctions were issued between 1880 and 1930. *Id.*

⁵⁸ See, e.g., FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 24-46 (1930).

of entirely unreliable evidence.⁵⁹ Until New Deal labor law dramatically curtailed their use, thousands of strikers and labor activists, including on more than one occasion Eugene Debs himself, were charged with contempt of these injunctions.⁶⁰

To a considerable degree, unions in the late 1800s and early 1900s also remained subject to prosecution under the notorious labor conspiracy doctrine. A derivative of common law conspiracy doctrine, the labor conspiracy doctrine as it evolved in America tended to premise liability on the effects of union activity on employers or on the overall economy.⁶¹ Thus, a strike could be illegal and its participants criminally liable under any of several circumstances: if the strike was unlawful by statute—for example, by restraining trade in contravention of the Interstate Commerce Act of 1887; if it simply impaired the flow of commerce to an excessive degree, regardless of any statute; if it was violent; or if it was excessively coercive of employers' rights.⁶² Read in this way, the doctrine did not make criminal all strikes or other acts of labor protest, but what it surely did do was render just about any such activity on the part of labor *potentially* criminal.⁶³

Beginning in 1890, employers could also charge striking unions and their members with violations of the Sherman Antitrust Act, which provided for stiff criminal penalties as well as considerable damages to be imposed on violators (as well as offering another underpinning for conspiracy charges or injunctive proceedings).⁶⁴ This statute was not clearly intended to apply to most of the union activity it was used to deter and to punish; nevertheless in the first couple of decades of its enforcement, it was used against labor more frequently than business entities, its clearly intended targets.⁶⁵ Indeed, it mattered little to the courts or those enforc-

⁵⁹ *See id.* at 60-81.

⁶⁰ *See id.*; Forbath, *supra* note 56, at 1151, 1162-63, 1181-84, 1187. It was Debs's distinction, among others, to be the named party in the case by which the U.S. Supreme Court most clearly validated the basic practice of using injunctions to foil strike activity. *See In re Debs*, 158 U.S. 564 (1895).

⁶¹ *See* Herbert Hovenkamp, *Labor Conspiracies in American Law: 1880-1930*, 66 TEX. L. REV. 919 (1988).

⁶² *See id.* at 945-48, 952-57.

⁶³ *See id.* at 956-57; *see also* CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 36-49 (1985).

⁶⁴ *See* Hovenkamp, *supra* note 61, at 948-58, 962-64.

⁶⁵ *Id.* at 950-51.

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ing these statutes that Congress made clear with the passage of the Clayton Act⁶⁶ in 1914 its intent that the Sherman Act *not* apply to most labor union activities.⁶⁷ The antitrust statute continued to be used widely against labor unions until the New Deal.⁶⁸ In the meantime, antitrust law functioned with the labor conspiracy and the labor injunction doctrines to consign labor to what Christopher Tomlins aptly calls a “legal twilight zone,”⁶⁹ in which unions, though not explicitly illegal, verged on illegality even when functioning in the most conventional and nonviolent ways.⁷⁰

While well-suited for discouraging strikes and other overt means by which labor sought to resist employer control of the workplace, these violent methods, legal and otherwise, were not so apt at asserting employer control within the workplace itself. For this purpose, there emerged more subtle and, in many ways, more insidious methods, centered on the program of scientific management. Conceived explicitly as a means of removing control of the production process from workers to managers and intensifying the rate at which labor could be exploited, scientific management was founded on several key themes: subjecting workers to intensive and ostensibly scientific evaluation of their performance of production tasks in the workplace; measuring the performance of such tasks by detailed time and motion studies; using such measurements to subject the task to critical examination aimed at rationally identifying and replacing inefficient habits and functions; constructing a pay scheme designed to encourage workers’ compliance with the overall program; and encompassing all of the foregoing within an overarching, centralized production plan.⁷¹ The central aim of scientific management was, in the words of David Montgomery, a project of “commandeering the craftsmen’s knowledge” and of diminishing workers’ autonomy over the use of their own labor.⁷² Recognizing how this not only made work more alienating, but also made them

⁶⁶ See Clayton Act, ch. 323, §§ 6, 20, 38 Stat. 730 (1914).

⁶⁷ See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (interpreting the Clayton Act to allow injunctive relief in a typical labor dispute).

⁶⁸ *Norris-LaGuardia Act*, ch. 90, 47 Stat. 70 (1932) (establishing significant limitations on the ability of courts to grant injunctive relief in cases involving labor disputes).

⁶⁹ TOMLINS, *supra* note 63, at 33.

⁷⁰ See, e.g., *id.* at 49-51.

⁷¹ See MONTGOMERY, *supra* note 37, at 217.

⁷² *Id.* at 233.

more vulnerable, most workers despised and resisted scientific management just as thoroughly as employers idealized and embraced it.⁷³

In this respect, the scientific management revolution was but the most salient and intellectualized expression of a broader contest for control of the evolving processes of industrial production. In various ways, industrialization empowered employers to assert new forms of control within the workplace. Not only did industrialization routinize work, depriving workers of influence; the increased rationalization and capitalization of business that accompanied industrialization—the hegemony of the “Fordist” production process—also facilitated the adoption of management structures compatible with scientific management techniques as well as other forms of surveillance, supervision, and discipline.⁷⁴ At the same time, industrialization often either increased competitive pressures on employers or made existing pressures more acutely felt, in either case informing a greater urge on the part of workers to reassert control within the workplace.⁷⁵

In many ways, this battle for control of the workplace reflected a larger transformation underway in industrial society: the displacement of traditional norms and structures of production and labor relations with a more distinctly modern regime of free contract and free labor. As Marx demonstrates, this transformation was ultimately based in capitalism’s progressive reorganization of labor as *wage-labor*.⁷⁶ In the development of wage-labor inheres the redefinition of labor’s value in exclusively commodified, quantitative terms keyed to the relationship between labor’s cost as a commodity and its usefulness in the production of commodities.⁷⁷ This process reduces the social value of labor to these quantified dimensions, in the process rendering obsolete the more textured values of labor in its traditional forms. Beyond this, wage-labor invests its life-world with this meaning, creating

⁷³ See DINER, *supra* note 40, at 37-38, 53-54; see also DAVID MONTGOMERY, *WORKERS’ CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES* (1979).

⁷⁴ See, e.g., DUBOFSKY, *supra* note 32, at 84-88 (discussing the intersection of scientific management and welfare capitalism as efforts to exert control over industrial laborers).

⁷⁵ See MONTGOMERY, *supra* note 37, at 44-57.

⁷⁶ See generally 1 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 125-280 (Ben Fowkes trans., Vintage Books 1976) (1867).

⁷⁷ See *id.* at 283-306.

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by its own increasing hegemony in capitalist society a structural basis on which the cultural definitions of truth and meaning themselves become rooted more and more in anonymous, quantified terms.⁷⁸ This was Marx's key insight on this topic. It is by this more attenuated mechanism that wage-labor rewrites the moral and juridical meaning of labor itself, giving social form to the concepts of free labor and free contract.⁷⁹

Though conditioned structurally in the fashion just described, ideas can also have some autonomous force of their own. And free labor and free contract functioned ideologically and juridically to rationalize industrial labor's condition as wage-labor.⁸⁰ By offering a convenient means of "reconcil[ing] human autonomy and obligation, [of] imposing social order through personal volition,"⁸¹ free contract gave both legal and moral sanction to a social reality of industrial capitalism marked by the increasing hegemony of anonymous interactions mediated by market transactions. In like fashion, free labor validated the fundamentally unequal, exploitative, and coercive reality of the industrial labor market by casting these conditions as the embodiments of autonomy, volition, and independence.

This concept of free labor took form juridically as the doctrine of at-will employment. In theory, at-will employment expressed the mutual freedom of employers and employees, absent a contractual relationship, to terminate the employment relationship at any time and for any reason, or even for no reason at all; in practice, it embodied a largely unidirectional prerogative of employers to fire or discipline workers as they saw fit.⁸² Similarly, free labor confirmed labor's station as beyond the protections of modern statutes or case law. Along with free contract, the free labor construct was readily appropriated by government officials and especially courts in the late 1800s and early 1900s to ground an interpretation of constitutional doctrine that systematically invalidated various attempts by Congress and state legislatures to

⁷⁸ See *id.* at 125-280.

⁷⁹ See *id.*; KARL MARX, GRUNDRISSE 135-51, 457-58 (Martin Nicolaus trans., Vintage Books 1973) (1941).

⁸⁰ See AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION *passim* (1998).

⁸¹ *Id.* at 2.

⁸² On the development of this doctrine, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

enact modestly reformist labor legislation.⁸³

The contradictions of free labor ran deeper still. The freedom in free labor seldom precluded employers from resorting to force to discipline labor and maintain control of the workplace. If anything, the appeal to free labor was at its strongest when used to disparage strikes and other acts of labor protest as affronts to the rights of individual workers, or to justify the legal invalidation of even modestly protective labor regulations.⁸⁴ All of these things were said to violate a (thoroughly mythologized) vision of the employment relationship, one devoid of any real disparities in power and any intrinsic conflict, unless, of course, this condition were despoiled by labor agitators and the like.⁸⁵ Nor was the free labor construct, for all its supposed grounding in the ideology of contract, widely recognized as validating union aspirations of concerted activity and collective bargaining.⁸⁶ The appeal to the free labor concept was thus quite fraudulent; yet, as an ideological foil and legal construct, it remained potent through this period.

In important ways, the benefits conveyed to employers by free labor were self-realizing, encompassing the right to fire or discipline employees virtually at will; blacklist them if they engaged in union organizing, acts of protest, or the like; and make them enter so-called yellow dog contracts by which they foreswore union membership.⁸⁷ In other, more ideological ways, free labor conveyed benefits that had to be cultivated. One important means by which employers sought to do this was by aggressively championing the open shop, not simply as a (hoped-for) reality on their shop floors, but as a grand and worthy ideal in its very conception.⁸⁸ The open shop was promoted alike by civic groups, trade organizations, and newly created political entities, such as

⁸³ This, of course, is the juridical foundation of the so-called *Lochner* Era. On the development of free labor ideology and jurisprudence during this time, see William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767.

⁸⁴ See generally Forbath, *supra* note 56.

⁸⁵ See TOMLINS, *supra* note 63, at 36-52 (describing the development of a legal ideology that located in unions a threat to the liberty of workers and business owners alike).

⁸⁶ See STANLEY, *supra* note 80, at 61-97.

⁸⁷ See generally Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235; Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917-1932*, 30 LAB. HIST. 251 (1989).

⁸⁸ See MONTGOMERY, *supra* note 37, at 269-75.

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the National Association of Manufacturers, that were dedicated to promoting employer interests.⁸⁹ The open shop campaign cast the union-free workplace as the epitome of the free labor ideal and situated this identity at the center of a thoroughly idealized conception of American history and American values.⁹⁰

The ability of employers to control labor was abetted in still other ways by structural developments that occurred during this period. For many employers, increased capitalization not only afforded access to more elaborate, expensive means of control (for example, the services of knowledgeable, professional managers or private detectives); it also enhanced the capacity of these employers to outlast strikers.⁹¹ In other instances, increased consolidation and concentration, which characterized much of this period, provided employers with another useful means of union-busting: shifting operations around within the business to effectively replace the jobs of union workers, often regardless of whether they struck or had merely threatened to strike.⁹²

To businesses of the late 1800s and early 1900s, the essential validity of these means of controlling labor, as well as the necessity to use them, no doubt seemed self-evident. The same forces that valorized the concept of free contract and free labor gave equal sanction to self-validating myths about the virtues of competition and entrepreneurship.⁹³ Indeed, for workers this regime of employer prerogative made itself felt in very practical ways, including layoffs and unemployment, particularly during periods of economic recession.⁹⁴ Although the business cycle was a pronounced feature of capitalism from the early nineteenth century onward, it was characterized by increasingly serious recessions in the last decades of that century, a phenomenon likely attributable, in part, to industrialization's dramatic attenuation of the link between production and consumption.⁹⁵

Industrial laborers, by their penchants for direct action in the

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.* at 270-71.

⁹² *See, e.g., id.* at 206-10, 269-81.

⁹³ *See generally* Forbath, *supra* note 56.

⁹⁴ DUBOFSKY, *supra* note 32, at 23.

⁹⁵ *Id.* The late 1800s and early 1900s witnessed several quite significant panics: those of 1873-1878, 1893-1897, and 1908-1909. *Id.* In each instance, oversupply and overproduction combined with competitive dynamics to pressure employers to reduce production costs, something normally accomplished by some combination of job cuts and increased efficiency and productivity. *See id.* at 23-24.

workplace, unionism, and radical politics, provoked employers to assert control over them, thus contributing themselves to the volatile climate in the labor world. To a degree, these tendencies of workers to protest their conditions no doubt reflected an inherent, human appetite for control of the circumstances of our own labor, one that operates amid all kinds of circumstances. At the same time, the actual conditions of labor in industrial America did little to discourage them. The realities of industrial labor mentioned above—the appropriation of control over the production process by employers, often by authoritarian means, employers' forceful repression of strikes and other forms of protest, and the routinization and de-skilling of labor—were not only independent inspirations to protest. These conditions reflected themselves in a work-life that was, for many workers, nothing short of a living hell: unremunerative, physically dangerous, and devoid of any intrinsic meaning. In mines, mills, and factories throughout the country, workers toiled long hours for meager pay, often in places far too hot or cold, amid noisy machinery, suffused in noxious gasses and dust, in dank and darkness, and under the control of evermore rigorous and authoritarian structures of control.⁹⁶ This reality was overlaid by more immediate causes of dissatisfaction with the lived experience of industrial capital: chronic poverty, which was often reflected in inadequate housing, malnutrition, and exposure to disease; disenfranchisement, ghettoization, and other forms of social exclusion; and, for many, a recognition that the social and legal order was designed not to uplift and enlighten them, but to facilitate their utter exploitation.⁹⁷

One very common response of workers to these conditions was to devalue work in exactly the ways that it devalued them. Usually this meant something very simple: to quit work at a whim and look for employment elsewhere.⁹⁸ In fact, many workers submitted to, and in some cases even embraced, the employment insecurity characteristic of the new order, quitting work when it became too oppressive and accepting a hand-to-mouth existence and a life on the road as their lot.⁹⁹ In other cases, this kind of

⁹⁶ *See id.* at 20-23.

⁹⁷ *See generally* WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 47-252 (6th ed. 1998).

⁹⁸ MONTGOMERY, *supra* note 37, at 131-35.

⁹⁹ KENNETH L. KUSMER, *DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY* 35-72 (2002).

protest expressed itself in more direct forms, including absenteeism, soldiering, and, on occasion, outright sabotage of the production process.¹⁰⁰

More rational still was for workers to challenge the conditions of industrial labor by organizing labor unions capable of protesting these conditions and perhaps even wresting concessions from employers through collective bargaining. This was by no means uncommon in industrial America. Indeed, measured in raw numbers, efforts at unionization in this period were rather successful, particularly in light of all the impediments mentioned above. Between 1897 and 1905, union membership grew from less than 500,000 to over two million, reaching four million by the end of the Great War.¹⁰¹ And many of these workers were willing, in the face of all the repressive devices available to employers, to strike to achieve their aims. In nearly every year between 1888 and 1905, the Department of Labor counted at least 1000 strikes, with a peak of almost 3500 in 1903, and these involved hundreds of thousands of workers annually.¹⁰²

However, despite its evident growth and capacity for strikes, the labor movement of the late nineteenth and early twentieth centuries was limited in several key ways. First, to a considerable degree, its unions chose to survive by conforming themselves to the political realities around them, adopting fundamentally conservative agendas dedicated to achieving marginal improvements in working conditions.¹⁰³ Under the auspices of the American Federation of Labor (AFL) and its longtime leader, Samuel Gompers, the majority of the labor movement, for the most part, avoided excessively militant tactics and eschewed radical goals altogether.¹⁰⁴ This meant rejecting socialist or other audacious demands to change the economic order in favor of a program, often described as business unionism, which was built around a commitment to labor peace, a narrow focus on improving the wages and practical conditions of employment, a view of the labor contract as inviolable, and a deference to business, and to the corporation in particular, as a model for the internal organization

¹⁰⁰ DINER, *supra* note 40, at 57-58.

¹⁰¹ U.S. CENSUS BUREAU, *supra* note 30, at 178.

¹⁰² STATISTICAL ABSTRACT OF 1910, *supra* note 35, at 224 tbl.145.

¹⁰³ See generally PAUL BUHLE, *TAKING CARE OF BUSINESS: SAMUEL GOMPERS, GEORGE MEANY, LANE KIRKLAND, AND THE TRAGEDY OF AMERICAN LABOR 17-90* (1999) (discussing AFL exclusionism and antiradicalism).

¹⁰⁴ See *id.*

and overall aesthetic of the union itself.¹⁰⁵ This program also meant accepting uncritically, and in many cases actively supporting, the most odious modes of social inequality and exclusion: rank sexism, Jim Crow racism, and outright xenophobia.¹⁰⁶ Throughout the late 1800s and early 1900s, the mainstream labor movement systematically either shunted women, blacks, “Orientals,” and on some occasions even Jews and other European immigrants who were considered less white into segregated unions that enjoyed less access to high-wage jobs, or excluded members of these groups entirely from union membership.¹⁰⁷ The conservatism of the AFL also meant that its opposition to employer control within the workplace and employers’ relentless repression of strikes would never go much beyond a campaign for limitations on the state’s intervention in labor disputes combined with occasional support for modestly protective labor laws.

A second characteristic of the labor movement in this period, one that fed its reactionary tendencies, was the movement’s concentration among skilled and semiskilled workers and its accompanying craft parochialism. A centerpiece of AFL ideology as it emerged in this period was the union’s veneration of craft identity, which championed the class superiority of skilled workers in the social hierarchy of the working class and valorized bourgeois social values alongside those of whiteness, Christianity, and maleness.¹⁰⁸ A necessary corollary of this perspective was the nearly complete, and quite intentional, exclusion of low-skilled industrial workers from the ranks of organized labor. Combined with its social exclusion, this aspect of the labor movement of the late 1800s and early 1900s left largely unrepresented the most exploited, alienated, and marginalized workers who were already industrialization’s greatest victims.¹⁰⁹

¹⁰⁵ See DUBOFSKY, *supra* note 32, at 89-95.

¹⁰⁶ See BUHLE, *supra* note 103, at 39-40.

¹⁰⁷ See *id.* at 42-46. On the history of racism in the AFL, see, for example, BLACK WORKERS: A DOCUMENTARY HISTORY FROM COLONIAL TIMES TO THE PRESENT 237-373 (Philip S. Foner & Ronald L. Lewis eds., 1989) (reproducing documentary records on this issue); and Bernard Mandel, *Samuel Gompers and the Negro Workers, 1886-1914*, 40 J. NEGRO HIST. 34 (1955). On the history of sexism in the AFL, see, for example, ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 152-59, 202-09 (1982). For a recent, highly textured, analysis of gender and the AFL, see ILEEN A. DEVULT, *UNITED APART: GENDER AND THE RISE OF CRAFT UNIONISM* (2004).

¹⁰⁸ See BUHLE, *supra* note 103, at 17-19, 39-40, 46-48.

¹⁰⁹ In the first years of the twentieth century, the AFL did begin in an inconsistent way to accommodate a limited degree of industrial organization, a habit that would

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There had been in the 1880s and early 1890s an important effort to organize industrial workers and to do so in (largely) socially egalitarian ways: that of the quixotic Knights of Labor. The story of the Knights of Labor's inability to translate grassroots enthusiasm for its radical agenda and militant sensibilities into a viable, sustainable challenge to capitalist hegemony in the workplace of the 1880s is a familiar one, in which deficiencies in leadership and organization figure as prominently as cultural, economic, and political dynamics.¹¹⁰ The union achieved a maximum membership of over 700,000 before fading from the scene in the 1890s and leaving the vast majority of the industrial proletariat entirely unorganized.¹¹¹

There were other, isolated exceptions to this inability to achieve successful organization; a few industrial unions managed to establish a tenuous hold on the landscape. And it would be out of a handful of these organizations that the IWW emerged midway through the first decade of the twentieth century. Particularly significant in this regard were three unions: the Western Federation of Miners (WFM), which was founded in Butte, Montana, in 1893; an offshoot of that organization, the Western Labor Union, which emerged in Salt Lake City, Utah, in 1898; and the American Railway Union, of which only remnants existed by the turn of century.¹¹² It was not so much that these organizations gave birth to the IWW, but rather that more militant and radical elements of their ranks increasingly converged on the idea of forming a union that would adhere to those sensibilities and advance them on a broader scale across all industries.¹¹³ In this respect, antecedents of the IWW can also be located among the membership and leadership of the Socialist Party, then at the height of its influence.

Initial conversations on founding this new organization were

continue through the 1940s. See generally JAMES O. MORRIS, *CONFLICT WITHIN THE AFL: A STUDY OF CRAFT VERSUS INDUSTRIAL UNIONISM, 1901–1938* (1958). At no point until the 1930s were these efforts comprehensive or, outside of particular industries (notably coal mining), very effective. *Id.*

¹¹⁰ For the Knights of Labor's rise and fall and the role of organizational and leadership deficiencies in this process, see, for example, Kim Voss, *Disposition Is Not Action: The Rise and Demise of the Knights of Labor*, 6 *STUD. AM. POL. DEV.* 272 (1992).

¹¹¹ See KIM VOSS, *THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY* 2 n.3 (1993).

¹¹² DUBOFSKY, *supra* note 7, at 34-45.

¹¹³ *Id.* at 44-45.

held in Denver, Colorado, in 1904 at the WFM's annual convention.¹¹⁴ These conversations led to a meeting in Chicago early the next year that was attended by some twenty-two delegates, including labor and socialist activists Mary "Mother" Jones, William "Big Bill" Haywood, and Eugene Debs.¹¹⁵ The delegates agreed to meet again in Chicago that summer to found a new industrial union that would embrace the concept of class conflict, dedicate itself to the concept of revolutionary overthrow of the industrial order, and commit to an open union concept that would organize workers along industrial lines without regard to race, ethnicity, or gender.¹¹⁶ With this charge, delegates reconvened on June 27, 1905 to establish the new labor union.¹¹⁷

In launching the union, the IWW's founders conceived an organization that would transcend the AFL's class parochialism as well as its stubborn, reactionary habits of social exclusion. They imagined a union that would confront head-on the inherently exploitative and alienating nature of industrial capitalism.¹¹⁸ On one level, the aim in doing so was simply to redress the everyday miseries of industrial working class life, including rank exploitation, poverty, and unsafe, often physically abusive working conditions.¹¹⁹ On another level, the founders' ambition was to confront the totalitarian control of labor and the production process that employers were amassing by means of newer, rational management strategies and by their overall rationalization of production.¹²⁰ For the IWW's founders, both of these struggles would remain incomplete and unfulfilled unless they reached the root of the matter. Reform and accommodation would not be enough. The quest for a humane, fair, and decent existence for the working class required that the very structures of ownership, property rights, and class hierarchy be overthrown. Acutely aware of the role of the state as an agent of class repression, the IWW's founders conceived of this revolutionary mission as one that would have to be accomplished without the support of the state or its legal system.¹²¹ These attitudes and ambitions would

¹¹⁴ *Id.* at 43-45.

¹¹⁵ *Id.* at 44-45; see also NICK SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* 206-07 (1982).

¹¹⁶ See DUBOFSKY, *supra* note 7, at 43-49.

¹¹⁷ *Id.* at 46.

¹¹⁸ See *id.* at 46-49.

¹¹⁹ See *id.* at 87-88.

¹²⁰ See *id.* at 87-88, 92-94.

¹²¹ *Id.* at 89.

manifest themselves very clearly in the organization's ideology and structure.

B. The Ideology and Practice of Radical Industrial Unionism

The IWW's ideology was, above all, militantly anticapitalist. Intellectually, this perspective drew on a critique of capitalism rooted in Marxian notions of the inevitability of exploitation and class conflict and of the social priority of labor.¹²² It connected this critique to the dismal life conditions that were the lot of its intended membership, contrasting the dynamics of poverty, employer control, and violent repression with the mandate of workers' autonomy and self-realization.¹²³ From the syndicalist tradition, the IWW took on a political and social vision, a utopian aim, based not on the concept of state socialism, but on the idea of a workers' commonwealth, which would seize from capitalism and the modern state the central role in governing the social order.¹²⁴ This syndicalist orientation complemented the IWW's deep-seated antistatism, unwillingness to compromise with state power, and tendency to see an inviolable link between state power and class domination.¹²⁵ In other words, the syndicalist perspective gave intellectual grounding to the IWW's formative skepticism about the role of the state in class relationships. From its trade unionist progenitors, as well as from an overarching sense of the futility of quiescent demands for reform, the IWW also adopted a commitment to militant confrontation with capital.¹²⁶ Tactically, this entailed the concept of maintaining in

¹²² See *id.* at 86-87. This critique was, at the time, fairly well-established in American socialist circles, both historically and morally. See *id.*

¹²³ See *id.*

¹²⁴ See *id.*; see also Francis Shor, *The IWW and Oppositional Politics in World War I: Pushing the System Beyond Its Limits*, *RADICAL HIST. REV.*, Winter 1996, at 74, 76-78.

¹²⁵ DUBOFSKY, *supra* note 7, at 89-91, 95-97. The IWW's syndicalism, it must be said, entailed above all a commitment to industrial unionism as the centerpiece of revolutionary activism. This perspective set it apart from both the political activism of the Socialist, and later, Communist parties; it also distinguished the IWW from the dominant strains of European syndicalism, which often reflected a certain organizational insularity, often coming to resemble the exclusionary tendencies of craft unionism. For further discussion of the role of syndicalism in the IWW's ideology, see SALVATORE SALERNO, *RED NOVEMBER, BLACK NOVEMBER: CULTURE AND COMMUNITY IN THE INDUSTRIAL WORKERS OF THE WORLD* (1989).

¹²⁶ For an analysis that stresses the IWW's syndicalist tendencies, see, for example, SALERNO, *supra* note 125. On the connection between employer control and direct action, and on how this connection influenced IWW ideology, see, for example, MONTGOMERY, *supra* note 37, at 310-18.

the workplace a constant struggle with employers: “direct action” at the “point of production,” in the form of strikes, slow-downs, and protests, unmediated by bureaucratic discussions, unfettered by traditional collective bargaining agreements, and aimed as much at increasing membership and putting employers under constant stress as it was at simply improving wages and working conditions.¹²⁷ In this respect, direct action lent itself to the strategic goal of IWW militancy: the eventual formation of “one big union” embracing all true workers and poised to use its gigantic size and tactical militancy to wrest ownership and power from capitalists and from the capitalist state.¹²⁸

This audacious program reflected itself in various subsidiary positions and themes that would prove significant to the eventual emergence of criminal syndicalism laws and other stratagems to defeat the IWW. The organization’s anticapitalism was couched in uncompromising rhetoric. The preamble to its constitution, which captured well the union’s central ideology and political orientation, began with the following statement: “The working class and the employing class have nothing in common. . . . Between these two classes a struggle must go on until the toilers come together on the political, as well as industrial field, and take and hold that which they produce by their labor.”¹²⁹ Likewise, the IWW’s critique of state power culminated in a relentless

¹²⁷ DUBOFSKY, *supra* note 7, at 90. See generally SALERNO, *supra* note 125.

¹²⁸ DUBOFSKY, *supra* note 7, at 90-91.

¹²⁹ THE FOUNDING CONVENTION OF THE IWW: PROCEEDINGS 247-48 (1969). The preamble in its entirety reads as follows:

The working class and the employing class have nothing in common. There can be no peace so long as hunger and want are found among millions of working people and the few, who make up the employing class, have all the good things of life.

Between these two classes a struggle must go on until all the toilers come together on the political, as well as on the industrial field, and take and hold that which they produce by their labor, through an economic organization of the working class without affiliation with any political party.

The rapid gathering of wealth and the centering of the management of industries into fewer and fewer hands make the trades union unable to cope with the ever-growing power of the employing class, because the trades unions foster a state of things which allows one set of workers to be pitted against another set of workers in the same industry, thereby helping defeat one another in wage wars. The trades unions aid the employing class to mislead the workers into the belief that the working class have interests in common with their employers.

These sad conditions can be changed and the interests of the working class upheld only by an organization formed in such a way that all its members in any one industry, or in all industries, if necessary, cease work when-

contempt for law and its institutions, particularly the police and the courts.¹³⁰ “No Socialist,” said Big Bill Haywood in a typical example of IWW rhetoric on this score, “can be a law abiding citizen.”¹³¹ At root, this statement reflected an understanding, well-founded in prevailing realities, that the law and the state were fundamentally aligned with the interests of capital, and that it made no sense to expect these institutions to play a positive or even neutral role in the clash of labor and capital. At the same time, it is important to note that for the IWW, contempt for the law and the state did not equal an endorsement of criminality, at least not beyond defiance of laws and acts of authority used to limit its right to strike, organize, and peacefully agitate.¹³² As one of its newspapers editorialized, “The I.W.W. does not respect the law, but the I.W.W. keeps the law.”¹³³

Just as remarkable was the length to which the IWW went in transcending the racist, xenophobic, and sexist politics of the mainstream labor movement. The IWW was explicitly integrationist at a time of intense racism, inclusive of immigrants at a time of significant xenophobia, and remarkably committed to feminist ideals.¹³⁴ The organization also stood out for its strident appeals to workers to assert their claims against capital uncompromisingly, with pride, and with a healthy contempt for middle-class, bourgeois values of family, war and patriotism, and religion.¹³⁵ While this radical orientation on cultural matters did not

ever a strike or lockout is on in any department thereof, thus making an injury to one an injury to all.

Therefore we, the working class, unite under the following [constitutional text].

Id. The preamble was regularly reprinted in IWW publications and constantly invoked as a reminder of the union’s founding principles. *See, e.g., Preamble of the Industrial Workers of the World*, ONE BIG UNION MONTHLY, Mar. 1919, at 1, 1; *Preamble of the I.W.W. Constitution*, INDUS. WORKER, July 2, 1910, at 1; *The IWW: A Statement of Its Principles, Objects and Methods*, ONE BIG UNION MONTHLY, Nov. 1919, at 36, 36, 38.

¹³⁰ *See* DUBOFSKY, *supra* note 7, at 91-92; *Law*, INDUS. WORKER, Aug. 5, 1916, at 2.

¹³¹ PRESTON, *supra* note 8, at 49.

¹³² DUBOFSKY, *supra* note 7, at 91-92.

¹³³ *The Strike and the Law*, INDUS. WORKER, May 9, 1923, at 3.

¹³⁴ For a concise review of the IWW’s politics of inclusion and social equality, see SOLIDARITY FOREVER: AN ORAL HISTORY OF THE IWW 139-43 (Stewart Bird et al. eds., 1985) [hereinafter SOLIDARITY FOREVER].

¹³⁵ *See, e.g.,* DUBOFSKY, *supra* note 7, at 84-97; Francis Shor, “Virile Syndicalism” in *Comparative Perspective: A Gender Analysis of the IWW in the United States and Australia*, 56 INT’L LAB. & WORKING-CLASS HIST. 65, 66-67 (1999). The shining example of the union’s commitment to this vision will always be the IWW’s success-

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exclude a more immediate and practical focus on wages and other working conditions, it did define the IWW in the eyes of its members, supporters, and enemies.¹³⁶

Although its membership probably never much exceeded 100,000 at any given time, and was often quite a bit smaller, the IWW always managed to exert influence beyond its mere numbers.¹³⁷ In part, this reflected the characteristics of its membership. Comprised throughout of the rejects of craft unionism, and in particular of low-wage workers on the debased margins of the industrial system, IWW members were, by bourgeois standards, a somewhat indecorous lot.¹³⁸ The typical member was a relatively young man, impoverished and often transient, accustomed to being excluded from the cultural institutions of bourgeois life, and with a penchant for the organization's confrontational and risky tactics.¹³⁹ Indeed, the IWW assimilated the cultural realities of these life conditions into its ideology, invoking them to stress the virtues of class consciousness and solidarity, equality, and militant resistance to the status quo, as well as expectations of physical and moral courage.¹⁴⁰ In order to further this orientation, the IWW adhered throughout to policies of open membership and inexpensive dues, and a universally honored membership card.¹⁴¹ It immersed itself into the cultural forms of its members' marginal, working-class existences, setting itself up in far-flung towns, skid rows and red light districts, and impromptu hobo jungles.¹⁴² Through its books, newspapers, and songs (including the well-published *Little Red Songbook*), it preached constantly of the need for workers to take pride in their historical condition and

ful efforts under black organizer Ben Fletcher to establish an interracial longshoremen's union based in Philadelphia. See Lisa McGirr, *Black and White Longshoremen in the IWW: A History of the Philadelphia Marine Transport Workers Industrial Union Local 8*, 37 LAB. HIST. 377 (1995); see also Philip S. Foner, *The IWW and the Black Worker*, 55 J. NEGRO HIST. 45 (1970).

¹³⁶ On the union's tendency to make more immediate and practical demands, see, for example, *Our Immediate Demands*, ONE BIG UNION MONTHLY, Mar. 1919, at 17, 17.

¹³⁷ See DUBOFSKY, *supra* note 7, at 200.

¹³⁸ See 4 PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE INDUSTRIAL WORKERS OF THE WORLD, 1905-1917, at 115-23 (1965). See generally SOLIDARITY FOREVER, *supra* note 134.

¹³⁹ See 4 FONER, *supra* note 138, at 116-20, 164-66; see also Shor, *supra* note 135.

¹⁴⁰ See Shor, *supra* note 135, at 66-67.

¹⁴¹ DUBOFSKY, *supra* note 7, at 85.

¹⁴² See, e.g., Ted Grossardt, *Harvest(ing) Hoboes: The Production of Labor Organization Through the Wheat Harvest*, 70 AGRIC. HIST. 283, 289-91 (1996).

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their central importance as workers to the human condition, advance themselves intellectually and politically, and take the fight to their adversaries, whatever the odds.¹⁴³

Structurally, the IWW throughout remained true to its commitment to organize industrial workers along industrial lines. With very few exceptions, locals were organized on an industry-wide basis.¹⁴⁴ Although IWW locals were not prohibited from reaching contingent agreements with employers, the union adhered to its opposition to formal collective bargaining agreements.¹⁴⁵ According to the IWW, such agreements legitimated the subordinate condition of workers vis-à-vis management and limited workers' ability to mount effective protests.¹⁴⁶ The union also remained stridently antibureaucratic, putting most of its always-slender resources into organizing, protest, and criminal defense.¹⁴⁷ Membership and activism alike were focused in the West and the Midwest, albeit not exclusively.¹⁴⁸ Partly this reflected the location of the industries and workers on which the union focused its organizing efforts; partly it reflected the IWW's western ancestry.

The IWW was indeed a militant organization with truly radical goals. At the same time, though, it was also surprisingly committed to nonviolence and passive resistance. In line with union policy, Wobblies did not, as a rule, initiate violence or engage in serious acts of criminality.¹⁴⁹ But neither did the union nor its members shrink from the use of confrontational tactics that could and often did provoke such violent and criminal responses from its adversaries. In fact, the IWW's membership embraced such tactics and seemed, on occasion, even to relish the responses they

¹⁴³ On the IWW's basis in working class culture, see generally SALERNO, *supra* note 125; and Nicholas Thoburn, *The Hobo Anomalous: Class, Minorities and Political Invention in the Industrial Workers of the World*, 2 SOC. MOVEMENT STUD. 61 (2003). On the origins of the *Little Red Songbook* and its role in advancing IWW philosophy, see Richard Brazier, *The Story of the I.W.W.'s "Little Red Songbook,"* 9 LAB. HIST. 91 (1968). On the role of hobo jungles in developing and sustaining worker solidarity, see D.D. Lescohier, *With the I.W.W. in the Wheat Lands*, HARPER'S MONTHLY MAG., Aug. 1923, at 371. For a review of other accounts of the sociological underpinnings of IWW organization and politics, see Shor, *supra* note 124, at 89-90.

¹⁴⁴ 4 FONER, *supra* note 138, at 133-34.

¹⁴⁵ See DUBOFSKY, *supra* note 7, at 94.

¹⁴⁶ See *id.*

¹⁴⁷ See 4 FONER, *supra* note 138, at 115-23.

¹⁴⁸ 4 *id.* at 112, 116.

¹⁴⁹ DUBOFSKY, *supra* note 7, at 91-92; 4 FONER, *supra* note 138, at 164-66.

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Members aggressively practiced the tactics of direct action, including, in 1906, the country's first recorded sit-down strike.¹⁵¹ They engaged in slowdowns and strikes of all sorts.¹⁵² And for a time, beginning in 1909, Wobblies initiated a number of sensational free speech fights in cities across the West and Midwest where potential recruits seasonally congregated: Fresno and San Diego, California; Minot, North Dakota; Aberdeen and Spokane, Washington; Missoula, Montana; and Kansas City, Missouri.¹⁵³ In each case, trouble began with the arrest of a few members delivering fiery soapbox speeches.¹⁵⁴ Typically, this was met by more speeches and the arrival in town of additional IWW members, followed by more arrests, followed by more speeches and more reinforcements.¹⁵⁵ Typically, too, the Wobblies were beaten by police and vigilantes, run through gauntlets, set upon with dogs, fire hoses, and the like, and ultimately jailed under horrendous conditions in local lockups and impromptu "bullpens."¹⁵⁶ The aim from the standpoint of law enforcement, American Legionnaires, Ku Klux Klansmen, commercial clubs, and others of that sort went beyond simply preventing the utterance of radical statements, including readings from the U.S. Constitution or the Declaration of Independence, to entail as well the purging of Wobblies from their communities.¹⁵⁷ From the IWW's standpoint, the goals were to impress potential recruits and adversaries alike with its determination and the strength of its ideology and to propogate a sense of rebellious indomitabil-

¹⁵⁰ This dynamic can be seen in the "free speech" fights that Wobblies provoked in various towns in the first decade of its existence. See DUBOFSKY, *supra* note 7, at 98-113.

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¹⁵¹ This occurred in Schenectady, New York. It should be characterized, more properly, as the first recorded *nonmaritime* sit-down strike. See MONTGOMERY, *supra* note 37, at 313-14. Long before this, such strikes were common occurrences aboard ships. See MARCUS REDIKER, *BETWEEN THE DEVIL AND THE DEEP BLUE SEA: MERCHANT SEAMEN, PIRATES, AND THE ANGLO-AMERICAN MARITIME WORLD, 1700-1750*, at 97-98, 110, 205 (1989); Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 *BERKELEY J. EMP. & LAB. L.* 275 (2004).

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¹⁵² See DUBOFSKY, *supra* note 7, *passim*; 4 FONER, *supra* note 138, at 134-37, 317-47.

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¹⁵³ See DUBOFSKY, *supra* note 7, at 98-113; 4 FONER, *supra* note 138, at 191-213.

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¹⁵⁴ See DUBOFSKY, *supra* note 7, at 100.

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¹⁵⁵ See *id.* at 100-03, 105-11.

¹⁵⁶ See, e.g., *infra* note 207 and accompanying text.

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¹⁵⁷ See DUBOFSKY, *supra* note 7, at 98-113; 4 FONER, *supra* note 138, at 191-213.

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ity.¹⁵⁸ Before all was said and done, scores and sometimes hundreds of Wobblies would be arrested.¹⁵⁹ In several cases, members disappeared or were killed.¹⁶⁰ But the eventual result was almost always the same: after a few weeks, a draw based in mutual exhaustion provided the IWW at least some recognition of its right to speak and retain a presence in town, and gave the town some relief from relentless IWW agitation.¹⁶¹

These free speech fights, which defined a period in the IWW's history, certainly did much to raise the IWW's stature among friend and foe alike. But these and other confrontational tactics yielded little in the way of lasting gains in membership and organizational strength.¹⁶² Nor did the IWW's other major organizing efforts in the first ten years of its existence yield better results. The IWW attempted to coordinate and ultimately absorb membership from otherwise spontaneous and disorganized strikes by steelworkers in suburban Pittsburgh, Pennsylvania (1909); mill workers in Lawrence, Massachusetts (1912) and Paterson, New Jersey (1913); and timber workers in the piney woods of Louisiana and Texas (1911 through 1913).¹⁶³ Due to the ulti-

¹⁵⁸ See DUBOFSKY, *supra* note 7, at 104-05.

¹⁵⁹ See *id.* at 98-113; 4 FONER, *supra* note 138, at 172-213.

¹⁶⁰ See, e.g., 4 FONER, *supra* note 138, at 197-99, 201-02.

¹⁶¹ See DUBOFSKY, *supra* note 7, 98-113; 4 FONER, *supra* note 138, at 191-213.

For detailed accounts of individual struggles, see also FELLOW WORKERS AND FRIENDS: I.W.W. FREE-SPEECH FIGHTS AS TOLD BY PARTICIPANTS (Philip S. Foner ed., 1981); Glen J. Broyles, *The Spokane Free Speech Fight, 1909-1910: A Study in IWW Tactics*, 19 LAB. HIST. 238 (1978); Ronald Genini, *Industrial Workers of the World and Their Fresno Free Speech Fight, 1910-1911*, 53 CAL. HIST. Q. 101 (1974); Charles James Haug, *The Industrial Workers of the World in North Dakota, 1913-1917*, 39 N.D. Q. 85 (1971); Charles Pierce LeWarne, *The Aberdeen, Washington, Free Speech Fight of 1911-1912*, 66 PAC. NORTHWEST Q. 1 (1975); Tom N. McInnis, *Kansas City Free Speech Fight of 1911*, 84 MO. HIST. REV. 253 (1990); and Grace L. Miller, *The I.W.W. Free Speech Fight: San Diego, 1912*, 54 S. CAL. Q. 211 (1972).

¹⁶² DUBOFSKY, *supra* note 7, at 112-13; 4 FONER, *supra* note 138, at 212-13.

¹⁶³ See DUBOFSKY, *supra* note 7, at 114-56. The IWW's involvement in the effort by black and white men (and a few women of both races) to organize themselves against avaricious "timber barons" of western Louisiana and eastern Texas offers a particularly compelling example of the IWW's other organizing efforts, as well as its commitment to racial and class justice. See James R. Green, *The Brotherhood of Timber Workers 1910-1913: A Radical Response to Industrial Capitalism in the Southern U.S.A.*, PAST & PRESENT, Aug. 1973, at 161, 174-82. On the union's broader commitment to racial justice, see, for example, Frederick A. Blossom, *Justice for the Negro*, ONE BIG UNION MONTHLY, Aug. 1919, at 30, 30-31; J.A. McDonald, *Race Prejudice Akin to Race Ignorance*, INDUS. WORKER, May 6, 1916, at 4; *The I.W.W. Is for All Races and Nationalities*, INDUS. SOLIDARITY, Sept. 3, 1924, at 1; *The I.W.W. Knows No Race or Color Lines*, INDUS. SOLIDARITY, July 9, 1921, at 3;

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mate failure of these early efforts, the IWW all but disappeared as a functional organization, with membership in the mid-1910s beginning to significantly decline.¹⁶⁴ At this time, the union began to shift its focus away from its early commitment to confrontational and opportunistic organizing to the more practical and fruitful tactic of relying on roving organizers or delegates, who were often recruited from the workforce that was the target of organizing efforts, to advance its organizational goals.¹⁶⁵ By embracing this new approach, the IWW was able to make significant and steady organizing gains, particularly among migratory harvest hands in the Midwest and on the Pacific Coast, long-shoremen at certain East Coast ports, and so-called timber beasts and miners in both the Great Lakes and Pacific Northwest regions.¹⁶⁶

C. The Politics of Repression

These gains would take the IWW to its peak membership of about 100,000 in 1917.¹⁶⁷ Remarkably, they were achieved in the face of extensive and intensifying efforts at repression, much of which involved relatively unsophisticated efforts of local authorities. From the very outset, Wobblies, especially organizers and strikers, were routinely harassed, run out of town, and even forced to work by local officials armed with vagrancy, disturbing the peace, and other petty charges; this occurred even where the Wobblies were not involved in free speech fights.¹⁶⁸ Indeed, arrests on such charges became a defining feature of the Wobbly experience.¹⁶⁹ In many cases, such low-level conflict made for a

and *The Negro Worker*, INDUS. WORKER, June 11, 1921, at 3; *Why Negroes Should Join the I.W.W.*, INDUS. WORKER, July 30, 1919, at 2. On its attitude toward women, see, for example, “*Equal Pay for Equal Work?*” INDUS. WORKER, Aug. 23, 1919, at 2; *I.W.W. Women on Road to Victory*, INDUS. WORKER, Sept. 30, 1916, at 4; and *Women in the I.W.W.*, INDUS. WORKER, Feb. 25, 1928, at 3.

¹⁶⁴ See DUBOFSKY, *supra* note 7, at 166-67; 4 FONER, *supra* note 138, at 462; Steve Golin, *Defeat Becomes Disaster: The Paterson Strike of 1913 and the Decline of the IWW*, 24 LAB. HIST. 223, 242-43 (1983). The IWW’s retrenchment during this period can be understood in large part as a failure of its organizing campaigns in the East, which has in turn been understood in part as a consequence of its failure to prevail in the 1913 Paterson, New Jersey strike. See DUBOFSKY, *supra* note 7, at 153-67; Golin, *supra*.

¹⁶⁵ See 4 FONER, *supra* note 138, at 227-29, 474-75.

¹⁶⁶ See DUBOFSKY, *supra* note 7, at 169-70, 181-99.

¹⁶⁷ See *id.* at 200.

¹⁶⁸ See Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COLO. L. REV. 667 (2004).

¹⁶⁹ This experience is described in Wobbly Ralph Chaplin’s biography. RALPH

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kind of guerilla war between Wobblies and police and business interests, with many threats and beatings and the occasional homicide; it was the Wobblies who almost always paid the higher price in bruises and blood.¹⁷⁰

The line between vigilantism and police repression was often difficult to make out. The results in any case could be quite serious. In 1916, in Everett, Washington, as many as thirty Wobblies were shot and at least five killed in a waterfront ambush by deputized businessmen committed to stopping them from assembling and speaking in town.¹⁷¹ The year before, an attempt by authorities in Wheatland, California, to disrupt a peaceful assembly of Wobblies and harvest workers resulted in a melee in which two workers, a deputy sheriff, and the district attorney were killed.¹⁷² Adhering to what was by then already a common approach to labor violence, authorities seized the opportunity to prosecute the workers for the deaths.¹⁷³ One Wobbly and one former Wobbly with no apparent connection to the killings other than their presence at the event were prosecuted and convicted under a theory of conspiracy to commit second-degree murder.¹⁷⁴

Perhaps even more ominous than these developments were early hints at a campaign to invoke disloyalty, sedition, and other state security charges against the organization and its members. In 1911 and 1912, amid unrest following the free speech battle in San Diego, federal authorities bowed to business agitation and investigated a supposed bid by the IWW to extend the Mexican

CHAPLIN, *WOBBLY: THE ROUGH-AND-TUMBLE STORY OF AN AMERICAN RADICAL* 88-89 (1948).

¹⁷⁰ See DUBOFSKY, *supra* note 7, at 124-27, 168-99; Green, *supra* note 163, at 180-81, 196-98.

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¹⁷¹ DUBOFSKY, *supra* note 7, at 196-97; Donald M. Barnes, *The Everett Massacre: A Turning Point in I.W.W. History*, 1 *ORGANON* 35, 35 (1969).

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¹⁷² DUBOFSKY, *supra* note 7, at 171; see also Cletus E. Daniel, *In Defense of the Wheatland Wobblies: A Critical Analysis of the IWW in California*, 19 *LAB. HIST.* 485, 488-91 (1978).

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¹⁷³ See DUBOFSKY, *supra* note 7, at 171-73; Daniel, *supra* note 172, at 490.

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¹⁷⁴ DUBOFSKY, *supra* note 7, at 171-72; Daniel, *supra* note 172, at 491, 494-95. The IWW mounted a massive and perhaps counterproductive campaign to cause the governor to free the two defendants. Daniel, *supra* note 172, at 496-505. They were eventually paroled after more than a decade in prison. *Id.* at 506 n.47. Another example of this style of prosecution occurred in 1912, when IWW leaders Joseph Ettor and Arturo Giovannitti were indicted for murder in the death of a woman striker shot and killed, likely by the police, in a melee at Lawrence, Massachusetts. DUBOFSKY, *supra* note 7, at 144. Ettor and Giovannitti, who were eventually tried and acquitted, were nowhere near the killing. *Id.* at 144, 148; see also 4 FONER, *supra* note 138, at 335-37.

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Revolution into Southern California.¹⁷⁵ Fortunately for the Wobblies, the investigation was desultory and came to nothing.¹⁷⁶ In 1913, amid Wobbly involvement in the Paterson, New Jersey mill workers strike, a Wobbly named Alexander Scott was convicted on state charges of sedition.¹⁷⁷

This practice of charging Wobblies with violating state security provisions became increasingly commonplace in the lead-up to American involvement in World War I. One important reason for this was the IWW's rhetoric, which persistently invoked the idea of radical social change and the use of militant tactics to accomplish this end. Most significant in this regard was the concept of sabotage, which was central to IWW ideology and propaganda, and which reflected very clearly the union's resistance to accelerating attempts by employers to assert totalitarian control in the workplace. From its inception until about 1917, the union indulged a blustering, confrontational appeal to the concept of sabotage that, while never explicitly advocating destruction of property, and perhaps never intending to convey a support for destruction and violence, could be construed in such terms.¹⁷⁸ After 1917, though, the union was increasingly careful to explain that its embrace of sabotage encompassed nothing more than an affinity for tactical, on-the-job slowdowns, quickie strikes, and the like, as opposed to actual acts of violence and destruction.¹⁷⁹ Despite these attempts at disavowal, and despite the fact that even unauthorized acts of sabotage by members were probably extremely uncommon, the union's association with sabotage

¹⁷⁵ DUBOFSKY, *supra* note 7, at 111-12.

¹⁷⁶ *Id.* While the charge itself was totally preposterous, there was a tenuous link between the IWW and the Mexican Revolution: a number of Wobblies, including the famous songwriter Joe Hill, who was executed in Utah in 1915, had fought in the Revolution. See 4 FONER, *supra* note 138, at 188; RENSHAW, *supra* note 17, at 147; SALERNO, *supra* note 125, at 34-35.

¹⁷⁷ See *State v. Scott*, 90 A. 235, 236 (N.J. 1914) (discussing the proceedings below). The conviction was reversed on appeal. *Id.* at 237. Among other arrests and prosecutions stemming from this affair was the conviction and jailing of Big Bill Haywood on disorderly conduct charges. See *Half Year in Jail for W.D. Haywood*, CHI. DAILY TRIB., Apr. 1, 1913, at 17; *Plan to Welcome Haywood*, CHI. DAILY TRIB., Apr. 28, 1913, at 5.

¹⁷⁸ See 4 FONER, *supra* note 138, at 160-64.

¹⁷⁹ See, e.g., *Sabotage*, INDUS. WORKER, June 10, 1916, at 3. On the union's view of sabotage, see DUBOFSKY, *supra* note 7, at 92-93; and SOLIDARITY FOREVER, *supra* note 134, at 42-43, 194-96, 210-11. On the union's disclaimer of violence as a means of social change, see, for example, *The I.W.W. Does Not Plan Armed Insurrection; Will Control Through Job Power*, INDUS. WORKER, Nov. 4, 1922, at 2; and *Where the I.W.W. Stands on Violence*, INDUS. WORKER, Jan. 3, 1920, at 3.

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proved both durable and easy to manipulate.¹⁸⁰ More than any other, this word would provide the IWW's adversaries with a foil that they would use with great effect to secure the passage of criminal syndicalism legislation.¹⁸¹ Even more tragically for the union, its attempts to disclaim support for sabotage and violence did nothing to avert the enforcement of these statutes against IWW members based on the theory that individual culpability followed from the union's alleged support for such means of social change.¹⁸²

Aggravating this dynamic was the magnitude of IWW organizing success in the lead-up to war. Even before America's actual entry into the conflict, the war created localized labor shortages, increased demand for minerals, lumber, and grain, and disrupted European production of and access to these commodities. Combined with better organizing methods (in particular, the traveling delegate system mentioned above), these developments led the union to its peak membership levels.¹⁸³ At the same time, though, these conditions raised the ire of industrial business interests concerned about having to yield concessions to a militant and increasingly well-organized and well-positioned labor force; they also allowed these interests to present these concerns to the federal and state governments and to the public in repackaged form as a fear of IWW disruption of production in key wartime industries.¹⁸⁴ Opposition to the IWW was thus styled as a patriotic obligation in support of the war. For good measure, the organization's foes increasingly described a supposedly collusive relationship between the IWW and the Axis powers. The notion was totally preposterous on its face, but sadly, for the IWW, it was often believed by a credulous public whipped into a pro-war,

¹⁸⁰ On the meaning of sabotage for the IWW and for its adversaries, see, for example, BRISSENDEN, *supra* note 17, at 279-81; and FRED THOMPSON & PATRICK MURFIN, *THE I.W.W.: ITS FIRST SEVENTY YEARS, 1905-1975*, at 80-87 (1976). See also *Revival of Sabotage*, L.A. TIMES, Mar. 9, 1917, at II4 (discussing the way the term was used against the union).

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¹⁸¹ See DOWELL, *supra* note 11, at 37.

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¹⁸² See *infra* Parts IV and V.

¹⁸³ See DUBOFSKY, *supra* note 7, at 200; SOLIDARITY FOREVER, *supra* note 134, at 120-21. Another measure of the organization's success was a substantial increase in income during this period from dues, initiation, and other sources. See Philip Taft, *The Federal Trials of the IWW*, 3 LAB. HIST. 57, 58 (1962). Labor historian Philip Taft estimated that the magnitude of increases in income reflected the addition of 32,000 new members between April and September 1917. *Id.*

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¹⁸⁴ See 4 FONER, *supra* note 138, at 557-58; SHOR, *supra* note 124, at 75, 87-88.

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anti-German frenzy.¹⁸⁵ Of course, it did not help the Wobblies that the IWW had been stridently opposed to America entering the war, which it saw as a senseless clash of imperialist interests paid for in workers' blood.¹⁸⁶ Although the organization was increasingly careful to confine its antiwar agitation to written and spoken advocacy and took no official position urging its members to avoid the draft,¹⁸⁷ it is also clear that the union remained throughout opposed to the war in its conception.¹⁸⁸

Beginning in 1917, the federal government began to heed the call of influential businessmen and allow the use of regular army troops, as opposed to state militias, many of which were being called up for war duty, to suppress IWW strikes in western states.¹⁸⁹ At the same time, the military began a practice of taking control of western railroads, utilities, and other production facilities under the guise of forestalling enemy sabotage and espionage.¹⁹⁰ Eventually constituting a state of localized martial law, these military interventions were accompanied by the use of Army and Navy intelligence resources to spy on IWW activities.¹⁹¹

That year also saw the intensification of government use of immigration laws to attack the IWW. Drawing on the political tests explicitly ingrained in immigration statutes passed in the wake of the 1901 assassination of President William McKinley by an (alleged anarchist) immigrant,¹⁹² and invoking the concept of "ideological ineligibility," the government had already by 1912 occasionally singled out some foreign-born Wobblies for exclusion and deportation.¹⁹³ With America's entry to the war, this campaign took on a much more aggressive tenor. Armed with new legislation that was even more explicitly ideological,¹⁹⁴ the Bureau of Immigration and the Department of Justice detained

¹⁸⁵ See DUBOFSKY, *supra* note 7, at 215-27.

¹⁸⁶ See Shor, *supra* note 124, at 78-84.

¹⁸⁷ DUBOFSKY, *supra* note 7, at 203-05.

¹⁸⁸ See Shor, *supra* note 124, at 78-84.

¹⁸⁹ See PRESTON, *supra* note 8, at 103-17.

¹⁹⁰ DUBOFSKY, *supra* note 7, at 230.

¹⁹¹ See PRESTON, *supra* note 8, at 161-62; *see also* JOAN M. JENSEN, *ARMY SURVEILLANCE IN AMERICA, 1775-1980*, at 137-39 (1991); David Adams, *Internal Military Intervention in the United States*, 32 J. PEACE RES. 197, 206-07 (1995).

¹⁹² See GOLDSTEIN, *supra* note 8, at 66-68; *see also* Naturalization Act of 1906, ch. 3592, 34 Stat. 596; Immigration Act of 1903, ch. 1012, 32 Stat. 1213.

¹⁹³ See PRESTON, *supra* note 8, at 63-87.

¹⁹⁴ See Immigration Act of 1918, ch. 186, 40 Stat. 1012; Immigration Act of 1917, ch. 29, 39 Stat. 874.

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scores of Wobblies.¹⁹⁵ While relatively few were actually deported, those who escaped this fate had to struggle mightily to do so and endure huge disruptions of their lives and service to the IWW cause.¹⁹⁶ And, of course, many more who were never arrested were likely put in fear of this fate and may have come to rethink their commitment to radical industrial unionism.

All of this occurred in the context of continued vigilantism. While this undoubtedly involved hundreds of incidents all over the country, several events from the period are particularly notable. In the early hours of August 1, 1917, a leading Wobbly organizer named Frank Little was abducted from a boarding house in Butte, Montana.¹⁹⁷ His abductors beat him, dragged him behind a car until his kneecaps were scraped off, and hanged him from a railroad trestle.¹⁹⁸ Little, a leader of the IWW's more radical wing, had come to Butte to organize miners shortly before his murder.¹⁹⁹ Just before his death, he had delivered several fiery speeches in which he not only denounced the mining companies, the government, and capitalism generally, but also recounted a statement he had made to the Montana governor: "I don't give a damn what country your country is fighting, I'm fighting for the solidarity of labor."²⁰⁰ Although the crime was hardly investigated and never solved, it is pretty clear that Little was murdered by agents of the Anaconda Copper Mining Company, whose workers Little had come to help organize.²⁰¹ Little's killing was but the most serious example of a pervasive pattern of vigilante persecution directed at Wobblies under the guise, quite often, of patriotism and Americanism.²⁰²

If such events were often notable for their savagery and premeditation and, in the case of Little's lynching, the elimination of

¹⁹⁵ See PRESTON, *supra* note 8, at 181-207.

¹⁹⁶ See *id.*

¹⁹⁷ Arnon Gutfeld, *The Murder of Frank Little: Radical Labor Agitation in Butte, Montana, 1917*, 10 LAB. HIST. 177, 177-78 (1969).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 178.

²⁰⁰ *Id.* at 183-84. These statements were eventually used against Wobblies in federal conspiracy prosecutions after Little's murder. *Recite Threats and Fiery Talk of Hanged I.W.W.*, CHI. DAILY TRIB., May 24, 1918, at 9.

²⁰¹ See Gutfeld, *supra* note 197, at 184-88; see also *Butte Copper Strike Leads to Barbarous Murder*, INDUS. WORKER, Aug. 4, 1917, at 1; *Little Murder Result Long Series Assaults*, INDUS. WORKER, Aug. 8, 1917, at 1.

²⁰² For a detailed account of how this played out in a small town, see, for example, Art Lee, *Hometown Hysteria: Bemidji at the Start of World War I*, 49 MINN. HIST. 65, 71-75 (1984).

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one of the Wobblies' most capable organizers, vigilantism in Bisbee, Arizona in the summer of 1917 must stand out for its sheer scale and audacity. Amid a miners' strike, county sheriff Harry Wheeler and some 2000 so-called deputies captured at gunpoint over 1000 men and, deeming them IWWs or otherwise subversive, deported them by train to the New Mexico desert.²⁰³ Although such deportation of Wobblies was not altogether uncommon,²⁰⁴ none matched this one in size, brazenness, and just plain recklessness. Many of the deportees, it turned out, had absolutely nothing to do with the IWW or any militant positions at all.²⁰⁵ Soldiers at a nearby encampment saved the deportees from death by exposure, but most of them, including many permanent Bisbee residents, were never allowed to return to that town.²⁰⁶ In similar episodes in a number of places during this time, large groups of Wobblies were beaten, tarred and feathered, and stripped and run through gauntlets.²⁰⁷ Such assaults at the hands of police, American Legionnaires, Klansmen, and members of commercial clubs were as much a part of the Wobbly experience as arrests by the actual police.

It was in the context of this widespread repression that the De-

²⁰³ DUBOFSKY, *supra* note 7, at 220-21.

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²⁰⁴ Only a few days prior to the Bisbee affair, sixty-seven Wobblies were deported from Jerome, Arizona. Whitten, *supra* note 18, at 16. On other deportations, see, for example, Lee, *supra* note 202, at 74-75; and White *supra* note 168, *passim*.

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²⁰⁵ See DUBOFSKY, *supra* note 7, at 221.

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²⁰⁶ See *id.* at 220-23; see also *Army to Feed I.W.W. Exiles from Arizona*, CHI. DAILY TRIB., July 14, 1917, at 3; *Deported Miner's Story of Bisbee Outrage and Its Causes*, INDUS. WORKER, July 30, 1917, at 4.

²⁰⁷ In one infamous incident in November 1917, seventeen Wobblies were beaten and tarred and feathered in Tulsa, Oklahoma. See James H. Fowler II, *Tar and Feather Patriotism: The Suppression of the Dissent in Oklahoma During World War One*, 56 CHRON. OKLA. 409, 425-30 (2003); *Vigilantes Mob I.W.W. in Oklahoma*, INDUS. WORKER, Nov. 17, 1917, at 1. Actually one of many episodes of vigilantism during that period, this incident was typical (like Little's murder) of the way pro-war hysteria was exploited by business interests (in Tulsa, the oil industry) to enable the repression of IWWs. On this dynamic in Oklahoma, see SELLARS, *supra* note 8, at 119-212. Two years later, on Armistice Day 1919, armed Legionnaires launched an unprovoked attack on an IWW hall in Centralia, Washington. DUBOFSKY, *supra* note 7, at 259-60. Although the Wobblies inside fought back, killing four, one of the Wobblies, a distinguished veteran of the Great War named Wesley Everest, was eventually captured and murdered. *Id.* at 260; Tom Copeland, *Wesley Everest, IWW Martyr*, 77 PAC. NORTHWEST Q. 122, 125-26 (1986). For other examples of the mob violence perpetuated by vigilantes see, for example, *Mob Action Breaks Out Against I.W.W. in Wyoming*, INDUS. SOLIDARITY, May 13, 1922, at 1; and *8 Women Gloat While Naked Men Are Clothed in Tar and Feathers by Fiends in Barbarous California*, INDUS. WORKER, July 5, 1924, at 1.

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partment of Justice began in the summer of 1917 to consider seriously the mass prosecution of IWW members for crimes in violation of state security.²⁰⁸ Ironically, a deciding factor in this development appears to have been the IWW's own frustration over escalating persecution. Although this never entailed any widespread violent retribution—which, it must be said, would perhaps have been justified—the rhetoric of revenge fueled claims that the organization posed a real threat to state security.²⁰⁹ Likewise, IWW calls for protection by the federal government from episodes like the Bisbee affair fell on deaf ears.²¹⁰ Another factor leading to federal prosecutions was the unrelenting agitation of capitalists and their champions in the media. Fearing that vigilantism and other efforts at control had not worked and that the IWW was steadily building momentum, these interests clamored for federal action.²¹¹

That summer saw a number of elements within the Justice Department plotting the total destruction of the IWW. Ginned up, in part, by ludicrous suggestions that the IWW was holding a massive hoard of German gold that it would use to undermine the draft,²¹² the Department's campaign against the union unfolded with a series of late summer raids on IWW offices across the country.²¹³ Indictments were eventually obtained in Chicago, Omaha, Fresno, Sacramento, and Wichita.²¹⁴ About 200 Wobblies, including virtually the entire IWW leadership, were directly implicated in a vast array of conspiracies.²¹⁵ That the purpose of all of this was to destroy the union was openly acknowledged by some in the Justice Department.²¹⁶

²⁰⁸ See DUBOFSKY, *supra* note 7, at 226; PRESTON, *supra* note 8, at 194-200.

²⁰⁹ DUBOFSKY, *supra* note 7, at 222-26.

²¹⁰ *Id.* at 222.

²¹¹ *Id.* at 225. One United States Attorney said the aim was “to put the I.W.W. out of business.” Philip S. Foner, *United States of America vs. Wm. D. Haywood, et al.: The I.W.W. Indictment*, 11 LAB. HIST. 500, 500 (1970).

²¹² This ridiculous claim was refuted by the Department of Justice's own accountant, and yet still played a role in bringing about the prosecutions. See Taft, *supra* note 183, at 60.

²¹³ See, e.g., *More Breeders of Sedition Face Drastic U.S. Action*, CHI. DAILY TRIB., Sept. 7, 1917, at 2; *Raid Results: Vast Extent of I.W.W. Raids Indicated by Reports from Many Cities*, CHI. DAILY TRIB., Sept. 6, 1917, at 1; *U.S. Opens War on I.W.W. Strike: Soldiers Jail 27 as 4 States Face Tie-Up*, CHI. DAILY TRIB., Aug. 20, 1917, at 1.

²¹⁴ See Taft, *supra* note 183, at 57, 76.

²¹⁵ *Id.* at 57.

²¹⁶ Foner, *supra* note 211, at 501.

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In essence, these prosecutions involved two basic charges: conspiracy to hinder federal laws relative to the production and distribution of wartime goods and government adherence to wartime contracts; and conspiracy to thwart enforcement of the draft, encourage desertion, undermine the morale of service members, and frustrate other policies involving the mobilization of the wartime military.²¹⁷ While sabotage, threats, and the like were advanced by the government as means by which the IWW supposedly sought to complete these conspiracies, the government's theory reduced to the notion that the IWW's propensity to strike, combined with its generally militant attitude toward capitalism, the war, and the government, sufficed to prove guilt.²¹⁸ And given that the charges were all based in conspiracy doctrine, the government did not need to prove that any of these supposed means were actually brought to bear. All the government had to prove was an agreement to achieve the alleged criminal aim and the commission of some overt act in furtherance of such aim.²¹⁹

Despite the thin requirements of conspiracy liability and the inherent vagueness of these charges, there was no genuine proof of guilt in these cases. There could be none, as the organization and its members were totally innocent of the charges. As it was, the only overt acts the government could identify to support the conspiracy charges were general statements of policy, philosophy, and personal opinion, which did nothing to prove any connection between the alleged aims of the conspiracies to foil the draft and disrupt war production, and any action or belief on the part of the organization or its members.²²⁰ Equally lacking in

²¹⁷ See, e.g., *id.* at 506-30 (providing the Chicago indictment in its entirety); Clayton R. Koppes, *The Kansas Trial of the IWW, 1917-1919*, 16 LAB. HIST. 338, 343 (1975). More precisely, the core of the allegations involved conspiracies to "prevent, hinder, and delay the execution of" various federal statutes, including the Espionage Act of 1917, the Selective Service Act of 1917, and various wartime appropriations acts, as well as the Declaration of War against Germany, and various other congressional and executive policies. See, e.g., Foner, *supra* note 211, at 507-09.

²¹⁸ Typically, all manner of IWW propaganda, however hyperbolic or dated, was dredged up to show guilt in this fashion. Koppes, *supra* note 217, at 351.

²¹⁹ See PRESTON, *supra* note 8, at 119-21.

²²⁰ See *id.* at 120; Foner, *supra* note 211, at 505. The overt acts named in the Chicago indictment were limited to the following: reprinting of the preamble of the IWW's constitution with its call for the abolition of the wage labor system and the like in the IWW's newspaper, *Solidarity*; publication of other statements of general revolutionary purpose and opposition to the war in *Solidarity*; publication of pamphlets and circulars containing general statements of revolutionary purpose and op-

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every case was any real evidence of agreement to bring about the alleged aims of the conspiracy.²²¹ In fact, the basic weakness of the charges as well as their true basis in the politics of class domination can be seen in the fact that the IWW actually led far fewer strikes during the war and its lead-up than its conservative rival, the AFL.²²² Furthermore, its institutional opposition to the war was much less substantial than that of the Socialist Party, which had severed ties to the IWW as early as 1913.²²³ Nevertheless, the AFL and the Socialist Party, with the exception of a handful of left-wing figures such as Eugene Debs (who had since left the IWW), largely escaped persecution.²²⁴

In any event, when the IWW cases came to trial, most defendants were convicted.²²⁵ The only major exception was in Omaha, where the government, stalled by its own doubts about the value of the prosecution's case, eventually dropped charges against all defendants.²²⁶ Elsewhere the nature of the charges combined with biased juries and judges to ensure easy convictions.²²⁷ In Chicago, for example, the jury took fifty-five minutes to convict 100 defendants of some 400 total counts.²²⁸ The jury in the Sacramento and Fresno cases, which had been consolidated, also de-

position to the war; mailing private letters and dispatching private telegrams of revolutionary, antiwar, or pro-labor content; and various activities involving the shipment of a book by Emile Pouget entitled *Sabotage*. See Foner, *supra* note 211, at 505-06.

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²²¹ On the weakness of the charges in the Chicago trial, even by the prosecution-friendly standards of conspiracy law, see Foner, *supra* note 211, at 505-06. In fact, much of the evidence put on by the prosecution in the Chicago trial tended to demonstrate that the IWW's leadership often sought to discourage antiwar and anti-draft militancy. See Taft, *supra* note 183, at 65-68.

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²²² Shor, *supra* note 124, at 86-87.

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²²³ Taft, *supra* note 183, at 73-74.

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²²⁴ See *id.* On congenial relations between the AFL and the federal government, and likely collusion of the two against the IWW during the war, see GOLDSTEIN, *supra* note 8, at 121-25. Debs was convicted in 1918 of violating the Espionage Act of 1917 (as amended) by delivering an antiwar speech in Canton, Ohio, in June 1918. See SALVATORE, *supra* note 115, at 291-96. Of course, other groups were subjected to government persecution for their opposition to the war, but not in such great disproportion to their activities. See, e.g., H.C. PETERSON & GILBERT C. FITE, *OP-ponents of War, 1917-1918* (1957).

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²²⁵ Taft, *supra* note 183, at 57.

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²²⁶ PRESTON, *supra* note 8, at 136-38.

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²²⁷ See *id.* In the words of William Preston, the IWW conspiracy juries "turned out to be frightened, jingoistic, and vindictive, [and] all in all thoroughly sympathetic to the government's aims." *Id.* at 122.

²²⁸ See Taft, *supra* note 183, at 74; *Convict 100 I.W.W. Chiefs*, CHI. DAILY TRIB., Aug. 18, 1918, at 1. The 400 counts entailed some 10,000 allegations of criminal acts. DUBOFSKY, *supra* note 7, at 250.

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liberated for only about an hour to convict some sixty defendants.²²⁹ And in the Wichita case, where the presiding judge assisted the United States Attorney in drafting up a new indictment after the first two were found to be substantively flawed,²³⁰ the jury took all of twenty hours to deliberate, “to be sure.”²³¹

Characteristically, the IWW publicly denied that these prosecutions undermined its efforts; indeed, it argued that it was strengthened by the adversity.²³² But even before convictions were secured, the conspiracy prosecutions had a devastating effect on the organization. Most of the union’s leadership was preoccupied with defending themselves against these charges.²³³ In fact, many defendants were unable to secure bail and were held in often harsh conditions awaiting trial; five defendants in the Sacramento case died in jail before trial.²³⁴ Other members who had not been indicted lived in real fear of prosecution, particularly if they assumed any leadership roles. Moreover, government raids totally disrupted normal business functions at IWW offices across the country.²³⁵ In some instances, in fact, Wobbly offices were occupied by government agents for the duration of the prosecution.²³⁶ Records were often seized.²³⁷ Union mail was searched.²³⁸ And IWW literature was essentially barred from the U.S. Mail by the discretionary conclusion of the postmaster that the union’s literature was indecent or subversive.²³⁹ So absurd were these controls that mail using the word “sabotage” was barred, even where the word was used in correspondence *denouncing* sabotage.²⁴⁰ Amid all these disruptions and in such an overarching climate of antiradical fear, the organization

²²⁹ PRESTON, *supra* note 8, at 135.

²³⁰ Koppes, *supra* note 217, at 342-43. Notably, Judge John C. Pollock advanced the theory to the U.S. attorney that the indictment should present the IWW itself as “an unlawful organization, that is, that the organization itself constitutes a conspiracy to violate Federal laws.” *Id.* at 343.

²³¹ *Id.* at 354.

²³² See, e.g., *Wholesale Jailing of “Leaders” Causes Wave of Resentment but Fails to Quell Organization Activities*, INDUS. WORKER, Oct. 3, 1917, at 1.

²³³ PRESTON, *supra* note 8, at 141-42.

²³⁴ Taft, *supra* note 183, at 77-78.

²³⁵ See PRESTON, *supra* note 8, at 141-42.

²³⁶ DUBOFSKY, *supra* note 7, at 247.

²³⁷ *Id.*; Foner, *supra* note 211, at 501.

²³⁸ PRESTON, *supra* note 8, at 148.

²³⁹ See *id.* at 144-48.

²⁴⁰ *Id.* at 147.

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and its supporters found it increasingly difficult to raise the necessary funds to mount competent defenses, let alone sustain organizing momentum.²⁴¹ Indeed, in the words of one authority, the prosecutions reduced the IWW to a “defense rather than a labor organization.”²⁴²

In the end, about 170 Wobblies, including much of its leadership, were convicted and in most cases sent to prison, with many defendants receiving quite severe sentences. In the Chicago case, forty-eight defendants received at least ten-year sentences, another thirty-five got five-year sentences, and total fines in that case exceeded two million dollars.²⁴³ In the Sacramento case, where the majority of defendants refused to offer a defense and were not represented by counsel, all were convicted and received jail or prison terms.²⁴⁴ And in the Wichita case, all twenty-seven defendants were convicted and only one escaped a prison sentence.²⁴⁵ In the face of a significant campaign for amnesty waged by civil libertarians and leftists of various stripes, over the next five years or so all of these defendants were eventually pardoned or otherwise granted early release.²⁴⁶ But the damage had been done. The trials and convictions combined with vigilantism and other forms of repression to leave the IWW substantially weakened from its more promising position of just a few years earlier.

As all of this unfolded, the IWW was overtaken by another critical development: the Red Scare of 1919 to 1920. By 1919, currents of xenophobia and jingoism generated by official war-

²⁴¹ On the difficulties faced by the Wichita defendants in these regards, see Kopes, *supra* note 217, at 344-48. On this and other corrosive effects of the conspiracy prosecutions, see PRESTON, *supra* note 8, at 141-51.

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²⁴² *Id.* at 141. Although much of the defendants’ representation was pro bono, the defense efforts were hugely expensive. See, e.g., Taft, *supra* note 183, at 70. In addition, the drain on funds was compounded by the inability of the membership to move and speak freely and therefore to either raise money or maintain membership. PRESTON, *supra* note 8, at 141-43.

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²⁴³ Foner, *supra* note 211, at 502; see also Taft, *supra* note 183, at 75; *The Penalty: I.W.W. Members Sentenced and What Each Man Got*, CHI. DAILY TRIB., Aug. 31, 1918, at 5. Most of the convictions were upheld on appeal. See, e.g., *Haywood v. United States*, 268 F. 795 (7th Cir. 1920) (upholding conviction on most counts against Chicago defendants).

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²⁴⁴ Taft, *supra* note 183, at 78-79; see also *Find 46 I.W.W.’s Guilty in Trial at Sacramento*, CHI. DAILY TRIB., Jan. 17, 1919, at 5; *I.W.W.’s Prison Terms Run from 1 to 10 Years*, CHI. DAILY TRIB., Jan. 18, 1919, at 8.

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²⁴⁵ See Taft, *supra* note 183, at 80.

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²⁴⁶ See *id.* at 80-91. Exceptions included Big Bill Haywood, who fled to the USSR, where he died in 1926, and several other Chicago defendants, who jumped bail in 1920.

mongering dovetailed with growing anxieties, especially among government and business interests, about the Bolshevik Revolution and the threat that similar upheaval would extend to the United States.²⁴⁷ For the establishment, this sense of threat was given an extra realism by a resurgent wave of industrial discontent and radicalism (including organizations other than the IWW) that occurred in the immediate aftermath of the war.²⁴⁸ And, of course, American troops were then deployed in parts of Russia against the Bolsheviks.²⁴⁹ All of this worked against the Wobblies. Not only did they embody the essence of American radicalism and industrial protest; their organization's program of radical industrial unionism was mistaken for an appendage of Bolshevism.²⁵⁰ To a considerable degree, this reflected the rank ignorance and indifference of the organization's enemies to the IWW's institutional distinction from, and its ideological incompatibility with, the Leninist program.²⁵¹ But it also reflected the IWW's tendency to applaud the Bolsheviks' apparent victory over capitalism and feudalism, however contingent this enthusiasm may have been.²⁵²

In any event, the Red Scare also found fuel in a number of discrete episodes from this period. The year 1919 featured an enormous wave of strikes involving over four million workers.²⁵³ Strikes in the soft-coal and steel industries that year each involved over 300,000 workers.²⁵⁴ Both were defeated by management after considerable violence and amid claims of Bolshevik infiltration.²⁵⁵ Seattle was the scene of a general strike that was crushed in some part, at least, by the efforts of its mayor, Ole Hanson, who would soon after find his calling in an obsessive prosecution of Wobblies on criminal syndicalism charges.²⁵⁶ A number of bombings and bomb plots, too, characterized the year;

²⁴⁷ See generally MURRAY, *supra* note 19.

²⁴⁸ See GOLDSTEIN, *supra* note 8, at 139-63.

²⁴⁹ See MURRAY, *supra* note 19, at 44-45.

²⁵⁰ See DUBOFSKY, *supra* note 7, at 258-59.

²⁵¹ On the complex and sometimes antagonistic relationship between the IWW and the early incarnations of Bolshevism, see, for example, *Bolsheviks No More*, ONE BIG UNION MONTHLY, Apr. 1919, at 46, 46; see also Peter Cole, *Quakertown Blues: Philadelphia's Longshoremens and the Decline of the IWW*, LEFT HIST., Spring 2003, at 39.

²⁵² MURRAY, *supra* note 19, at 39.

²⁵³ *Id.* at 9.

²⁵⁴ See *id.* at 140, 158.

²⁵⁵ See *id.* at 144-52, 154-62.

²⁵⁶ See *id.* at 63-66.

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the supposed intended targets included not only Hanson, but also figures like United States Attorney General A. Mitchell Palmer and Supreme Court Justice Oliver Wendell Holmes.²⁵⁷ The authors of these plots, real or imagined, were of course invariably alleged to be radicals of one stripe or another.²⁵⁸ The problem for the Wobblies, none of whom were ever credibly linked to the plots, was that it did not really matter which stripe. Radicals of all sorts and all levels of culpability were presumed to be responsible.²⁵⁹

This climate proved especially favorable for the development of a number of pro-business, antiradical, and just plain reactionary organizations including the Klan, American Legion, National Association of Manufacturers, and many others who were inclined to merge fears of radicalism with support for reactionary politics and economic self-interests.²⁶⁰ These organizations, whose Red Scare schemes were sometimes directly abetted by AFL leaders,²⁶¹ would prove increasingly important to the enforcement of criminal syndicalism laws (some of which were already enacted) against the IWW.²⁶² Though the Red Scare itself, at least as conventionally defined, would fade by the end of 1920, a deeper current of antiradicalism would flow onward, augmented by this briefer episode.

On one level, the politics of these relentless efforts at repression are very clear, reflecting both the efforts of capitalists to use the state to protect their interests against those of labor, as well as the state's internalization of pro-capitalist, antiradical politics as its own. On another level, though, the politics at work in all of this are more nuanced, embodying in a complicated way the liberal, Progressive Era tendency to preserve to the state and certain reformist actors a monopoly on managing the dysfunctions of industrial capitalism.²⁶³ From this perspective, which came

²⁵⁷ *Id.* at 69-71.

²⁵⁸ *Id.* at 80-81.

²⁵⁹ *See id.* at 71-73, 78-81.

²⁶⁰ *See id.* at 87-94.

²⁶¹ *See id.* at 107-08.

²⁶² *See infra* notes 343-44 and accompanying text.

²⁶³ On the complicated, sometimes hostile relationship between early twentieth century progressive politics and labor, and, in particular, labor militancy, see Fred Greenbaum, *Ambivalent Friends: Progressive Era Politicians and Organized Labor, 1902-1940*, LAB.'S HERITAGE, Summer 1994, at 62. On the broader antiradical and, in many ways, deeply reactionary (e.g., racist) tendencies of Progressive Era politics, and on how they interacted with the movement's more enlightened tendencies, see,

into its own in the 1910s and colored the repressive politics of that period, radicalism of the sort embraced by the IWW was problematic and worthy of repression not because the lot of industrial workers was generally good, or because capitalism was beyond critique, but rather because the IWW's sort of radicalism subverted a preferred approach to redressing these problems by means of a reformist, bureaucratic regime of social control in which the aims and interests of workers themselves were suitably subordinated to the guidance of professional elites. In other words, anti-IWW repression in the first couple of decades of its existence reflected not only the naked class interests of capitalists themselves and the relatively crude ideology of their intellectual backers; it also expressed a progressive antipathy to the depth of the IWW's revolutionary aims, solidly working-class composition, and commitment to militant methods that transgressed the boundaries of bourgeois reformism.²⁶⁴ Progressives wanted very much to preserve the economic status quo and do so, if necessary, by certain acceptable methods of control.²⁶⁵ They had no inherent sympathy for the IWW's agenda.²⁶⁶ This situation had the advantage of exposing the fundamental incompatibility of IWW and liberal politics of the day and stripping away any illusions among Wobblies (if they were naive enough to have them in the first place) about the IWW's place in establishment society. Furthermore, it made it easier for those ostensibly dedicated to the principles of civil liberty to put them aside when abetting the union's destruction at the hands of the state.

This climate of repression promoted the enactment of criminal syndicalism statutes in several ways. First, the criminal syndicalism statutes were steeped in the same basic ideology as the episodes of repression just mentioned: a rabid resistance to the IWW's agenda of abolishing capitalism and its social structure by means of explicitly confrontational tactics among traditional conservative elements as well as many representatives of liberal progressivism. Second, criminal syndicalism laws also emerged amid

for example, MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920* (2003).

²⁶⁴ See PRESTON, *supra* note 8, at 55–56.

²⁶⁵ See GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916* (1963); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS* (1988).

²⁶⁶ See PRESTON, *supra* note 8, at 55–56.

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political realities that recast opposition to the IWW as an obligation of state security, and at a time when the capacity of the state to repress by legal means had become quite considerable. Third, criminal syndicalism laws emerged at a time when the IWW was being weakened by these repressive forces and left less able to resist their enactment and enforcement, if only by rhetorical means. Finally, and ironically, a major impetus in the enactment of criminal syndicalism statutes was a sense that the other means of repression in play were somehow inadequate and that state governments in particular could do more to defeat the organization.

II

THE ENACTMENT OF CRIMINAL SYNDICALISM LAWS

The Idaho criminal syndicalism statute enacted in the spring of 1917 was passed by a vote of 60-0 in the State House of Representatives and 32-3 in the Senate.²⁶⁷ Its focus on the IWW was overwhelmingly evident. State senators were given IWW literature prior to the vote; in introducing the legislation, its sponsor, Senator W.G. Walker, styled it as an anti-IWW device.²⁶⁸ The legislation was not only comprehended as a means of attacking the IWW; the legislation was also intended to repress the IWWs' challenge to employer supremacy in that state's industries.²⁶⁹ And Idaho was not alone in its adherence to this pattern. In every state that adopted a criminal syndicalism statute, the clear reason for doing so was the persecution of Wobblies with the underlying aim of protecting business interests against attempts at IWW organizing, even as such legislation was wrapped up in the rhetoric of public safety and state security.²⁷⁰

A. The Process and the Politics of Enactment

In every state that enacted a criminal syndicalism law, the supposed need to prosecute sedition and the threat of violent revolution were called on as pretexts to justify the repression of advocacy and organization toward radical social change, however

²⁶⁷ Sims, *supra* note 18, at 512.

²⁶⁸ *Id.*; see also 1 E. Foster Dowell, A History of the Enactment of Criminal Syndicalism Legislation in the United States 147 (1936) (unpublished Ph.D. dissertation, Johns Hopkins University) (on file with Special Collections, Milton S. Eisenhower Library, Johns Hopkins University).

²⁶⁹ Sims, *supra* note 18, at 512-13.

²⁷⁰ See DOWELL, *supra* note 11, at 21-23.

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peaceful. The immediate aim was the destruction of the IWW. During the conspiracy prosecutions and other exercises in anti-IWW repression, official repression remained on its face an exercise in protecting specific aspects of state security in wartime. In contrast, with criminal syndicalism the notion of radical *social* change, even of a purely economic sort, became a basis of criminal liability. This feature of criminal syndicalism embodied a self-serving conception among business interests and governments that the unrest occasioned by the activism of Wobblies inhered in the existence of radicalism itself, and not, for example, in the social conditions that such radicalism addressed.²⁷¹

The IWW was not the only target of such legislation. Other groups targeted by these statutes included, from time to time and place to place, populist farmers' organizations (in particular the Non-Partisan League, a group especially active in North Dakota and Minnesota); militant trade unions, even if not particularly radical (like the United Mine Workers of America); and, with the advent of the postwar Red Scare, Socialists and Communists.²⁷² Moreover, the local nature of these laws meant that the politics of their enactment were framed by the particular array of business interests in that state, the peculiarities of local ideology, and the way these factors tended to elevate certain threats above others.²⁷³ So it was that anti-Non-Partisan League sentiments were especially relevant in the upper Midwest and concerns about the United Mine Workers uniquely significant in the eastern coal belt.²⁷⁴ Yet, in almost every place where these laws were initially enacted, the dominant threat to business interests and the most visible specter of intolerable radicalism remained the IWW.²⁷⁵

The politics of class were not only ideologically relevant to the enactment of criminal syndicalism statutes; they were relevant in more immediate ways as well. In some instances, the politicians responsible for the enactment of criminal syndicalism laws were, as businessmen, themselves the likely beneficiaries of these stat-

²⁷¹ Dowell puts it: "The economic and social problem[s] [of the time] became an I.W.W. or Communist problem and led to an attack on unpopular doctrines and groups." *Id.* at 46.

²⁷² *See id.* at 48-49, 92-93.

²⁷³ *See id.* at 48-55.

²⁷⁴ *See id.* at 48-50, 92-93.

²⁷⁵ *Id.* at 51.

utes' destructive effect on radical labor.²⁷⁶ Even where this was not the case, legislators and governors were often social intimates of the owners and managers of business interests, who could then draw on such connections to advance these bills through the process.²⁷⁷ And, in most cases, too, the enactment of these statutes was also promoted by private groups driven by their own ideologically institutionalized class interests.²⁷⁸ These included attorneys and business leaders, business organizations like the Chambers of Commerce and the various manufacturers' associations, law enforcement organizations, and patriotic groups like the American Legion and any number of "Home Guards" and "Defense Committees."²⁷⁹ In Dowell's words:

In practically every state where a criminal syndicalism bill was passed, there is evidence of a bill having been sought by those interests and industries which were having trouble with the I.W.W., feared trouble with them, or were apprehensive concerning the effect of the I.W.W. and radical doctrines on the more conservative unions in a period of labor unrest.²⁸⁰

The passage of these statutes was also supported by the main political parties (more often Republican than Democratic) as well as the local and national press.²⁸¹

At the same time, the politics behind the enactment of criminal syndicalism laws involved more than simple repression. Instead, as with many examples of Progressive Era policy, the politics of repression were often closely married to the politics of reform. Criminal syndicalism statutes often emerged in the late 1910s as part of a more comprehensive program geared not only toward the destruction of radical labor activism, but also toward a reconciliation of conservative business interests with reformist labor politics.²⁸² It was precisely for this reason that labor organizations of such a political bent sometimes worked to secure the

²⁷⁶ *Id.* at 54-55.

²⁷⁷ *Id.* at 55-56.

²⁷⁸ *Id.* at 56-58.

²⁷⁹ *See id.* at 51-68. On the lobbying efforts of Chambers of Commerce and other business groups, see also Whitten, *supra* note 18, at 26.

²⁸⁰ DOWELL, *supra* note 11, at 51.

²⁸¹ *See id.* at 68-76.

²⁸² On the importance of this dynamic to the passage of Washington's criminal syndicalism statute, see Tripp, *supra* note 18, at 43. On this dynamic more generally, see GOLDSTEIN, *supra* note 8, at 63-101.

passage of criminal syndicalism legislation.²⁸³

In practice, the rhetoric of enactment typically featured a putative public safety and state security dimension, which took the form of a great deal of ominous hyperbole about the supposed danger of the IWW's tactics, associations, and ultimate goals. Thus, the relevant debates, if they can be called that, often came to resemble the conspiracy trials in their use of unsubstantiated, sensationalized assertions about the IWW's practice of sabotage and use of physical violence, its connections to Imperial Germany and Bolshevik Russia, and (more accurately) its support for racial justice and gender equality.²⁸⁴ Using his 1919 inaugural address to push the need for anti-IWW legislation, California's governor denounced the IWW as Bolsheviks; he called them "skulking wielders of the torch of contemptible setters of time explosions [and] bitter enemies of all honest workers [who] did all in their power to aid the enemy."²⁸⁵ With this type of rhetoric, the enactment of criminal syndicalism legislation was presented as essential to the maintenance of state security and social order *and* to preventing society's descent into an unthinkable abyss of destruction, anarchy, and economic ruin.²⁸⁶ Conveniently absent from the discussion was any confession of these laws' more genuine and immediate purpose in relieving businesses of the IWW's radical challenge to their political and economic supremacy and in preserving a social system built on inequality and exploitation.²⁸⁷

In most cases, this dynamic resulted in the swift passage of criminal syndicalism legislation, usually without the benefit of any real debate.²⁸⁸ In few cases, too, were amendments added that meaningfully narrowed the definition of culpability.²⁸⁹ In-

²⁸³ This was the case in a number of states, especially insofar as it involved the machinations of AFL unions. See DOWELL, *supra* note 11, at 63-64.

²⁸⁴ *Id.* at 76-79. Not coincidentally, the chief sponsor of Oklahoma's law is described by one historian as "[a] well-known racist and Red-baiter who urged the deportation of leftists." SELLARS, *supra* note 8, at 135. In California, supporters of criminal syndicalism legislation invoked the threat of sabotage supposedly made by Wobblies in the wake of the Wheatland episode; so twisted was the rhetoric that even serious attempts by the IWW to agitate against sabotage were construed as coded endorsements of the practice. See Whitten, *supra* note 18, at 10.

²⁸⁵ Whitten, *supra* note 18, at 22 (quoting California Governor William D. Stephens).

²⁸⁶ DOWELL, *supra* note 11, at 78.

²⁸⁷ See *id.* at 76-79.

²⁸⁸ See *id.* at 47, 78-81.

²⁸⁹ See *id.* at 81-87.

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deed, Idaho's experience in passing its law with only three dissenting votes proved typical. In six of the twenty-one states and two territories to adopt criminal syndicalism statutes, the statutes were enacted without a single dissenting vote; in eleven other states, unanimity prevailed in one or the other house; and in only six states were the votes close.²⁹⁰

To be sure, efforts to pass criminal syndicalism laws failed in a number of state legislatures as well as in Congress.²⁹¹ In every case where this occurred, the failure was, predictably, not the result of counterlobbying or agitation by the IWW or any other radical group; rather, failure was the product of either the scattered efforts of mainstream labor organizations, farmers' groups, and civil liberties organizations, or else the halfheartedness of supporters' efforts.²⁹² Equally notable is that these unsuccessful efforts at enacting criminal syndicalism laws mostly occurred in the 1920s and early 1930s, when the apparent threat posed by the IWW had receded.²⁹³

By 1921, criminal syndicalism statutes were in place in the territories of Alaska and Hawaii and in twenty-one states: Arizona, California, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, West Virginia, and Wyoming.²⁹⁴ And like Idaho's, these jurisdictions' criminal syndicalism laws were serious felony statutes poised to inflict real damage on the IWW and its cause of economic radicalism.²⁹⁵

B. The Form and Structure of Criminal Syndicalism Statutes

Idaho's statute was the work of a Boise attorney, Benjamin W. Oppenheim, who had been approached by representatives of the local lumber industry and law enforcement to write a bill that could be used to criminalize the IWW.²⁹⁶ Oppenheim was called on because his clients' previous attempts to write such a bill on

²⁹⁰ *Id.* at 87-88.

²⁹¹ *See id.* at 89-116 (discussing unsuccessful attempts to enact syndicalism laws).

²⁹² *See id.* at 111-16.

²⁹³ *Id.* at 111. In still other instances, the initial failure to enact a bill was made good by subsequent successful efforts. *See id.* app. I, at 148.

²⁹⁴ *Id.* at 18-19, app. I, at 147.

²⁹⁵ *See id.* at 18-20.

²⁹⁶ ALBERT F. GUNNS, *CIVIL LIBERTIES IN CRISIS: THE PACIFIC NORTHWEST, 1917-1940*, at 37 (1983).

their own had been greeted with some skepticism by the state's senate judiciary committee.²⁹⁷ In drafting Idaho's criminal syndicalism law, Oppenheim apparently hewed closely to a Wisconsin antianarchy statute, which was based on the antianarchy statute New York passed in 1902 in the wake of the assassination of President McKinley.²⁹⁸ Years later, he would confess that his clients' aim in getting the legislation drafted and enacted was to suppress IWW agitation.²⁹⁹

If imitation is the key measure of success, it must be said that Oppenheim did an outstanding job, because the statute he drafted for introduction in Idaho became the template for the majority of jurisdictions that adopted criminal syndicalism laws.³⁰⁰ The criminal syndicalism laws of several states and territories, including California, Hawaii, Iowa, Minnesota, Nevada, Ohio, and Washington, were (in their initial form, at least) near carbon copies of the Idaho measure.³⁰¹ Further, while other legislatures altered the language and form of Oppenheim's original bill, even they clearly drew their inspiration from it and remained true to its basic concepts and logic.³⁰²

The opening provision of the statute is an attempt to define the concept of criminal syndicalism. Section 1 provides simply that "[c]riminal syndicalism is the doctrine which advocates crime, sabotage, violence or unlawful methods of terrorism as a means

²⁹⁷ *Id.*

²⁹⁸ See *id.* at 37-38; Sims, *supra* note 18, at 513; see also GOLDSTEIN, *supra* note 8, at 68. Cf. VERITY BURGMANN, REVOLUTIONARY INDUSTRIAL UNIONISM: THE INDUSTRIAL WORKERS OF THE WORLD IN AUSTRALIA 215-28 (1995) (discussing Australian statutes passed in 1916 and 1917).

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²⁹⁹ *Id.* at 37; Sims, *supra* note 18, at 512-13 (citing Letter from Benjamin W. Oppenheim to E. Foster Dowell (June 4, 1934), in 1 Dowell, *supra* note 268, at 143-44).

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³⁰⁰ See DOWELL, *supra* note 11, at 17 & nn.22-23 (citing the Idaho criminal syndicalism statute, which was the first of its kind, for the most common definition of criminal syndicalism). Kentucky's main criminal syndicalism statute, for example, paired criminal syndicalism with sedition, and was ultimately quite a bit more elaborate than those that adhered more closely to the model statute. See Act of March 25, 1920, ch. 100, 1920 Ky. Acts 519. Likewise, West Virginia's criminal syndicalism provision was a brief passage embedded in a law banning the display of red or black flags. Act of Feb. 13, 1919, ch. 24, 1919 W. Va. Acts 153. Wyoming's statute also stands out for its brevity. See Act of Feb. 22, 1919, ch. 76, 1922 Wyo. Sess. Laws 110.

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³⁰¹ See DOWELL, *supra* note 11, at 17-19 (examining the typical structure of criminal syndicalism statutes); see, e.g., Act of Apr. 30, 1919, ch. 188, 1919 Cal. Stat. 281; Act of Apr. 29, 1919, ch. 186, 1919 Haw. Sess. Laws 253; Act of Mar. 14, 1917, ch. 145, 1917 Idaho Sess. Laws 459; Act of Apr. 25, 1919, ch. 382, 1919 Iowa Acts 493.

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³⁰² See DOWELL, *supra* note 11, at 17-19 (noting the states that modified either the definition of criminal syndicalism, the structure of the statute, or both).

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of accomplishing industrial or political reform.”³⁰³ Neither in this section nor anywhere else did Oppenheim attempt to ground the meaning of criminal syndicalism in the literal concept of syndicalism—that is, in the idea of social change by means of collective worker action organized along industrial lines. Indeed, by Oppenheim’s draft, syndicalism in this substantive sense remained doctrinally irrelevant to the question of culpability; his use of the term seems significant only as a means of identifying the crime rhetorically with the IWW.

Of somewhat greater technical significance are Oppenheim’s attempts in section 2 to lay out the specific means by which criminal syndicalism might be committed. Section 2 subsection 1 condemns as a felon any person who “[b]y word of mouth or writing, advocates or teaches the duty, necessity or propriety of crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform.”³⁰⁴ Subsection 2 criminalizes the printing, publication, editing, distribution, sale, or display of “any book, paper, document, or written matter” that either advocates or *contains* the doctrine of criminal syndicalism.³⁰⁵ Subsection 3 criminalizes “[o]penly, wilfully and deliberately justify[ing], by word of mouth or writing, the commission or the attempt to commit” criminal syndicalism.³⁰⁶ In addition, subsection 4 criminalizes the act of organizing, helping to organize, becoming a member of, or voluntarily assembling with “any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.”³⁰⁷ The penalty for committing each of these acts outlined in section 2 is fairly severe: up to ten years in prison, a fine of up to \$5000, or a combination of the two.³⁰⁸ Section 3 then provides that any “assemblage” for “the purpose of advocating or teaching” criminal syndicalism is “unlawful” and that “every person voluntarily participating therein by his presence, aid or instigation is guilty of a felony” and may be punished by up to ten years in prison, a fine of up to \$5000, or both.³⁰⁹

The essential thrust of these provisions is clear enough: Op-

³⁰³ Act of Mar. 14, 1917, ch. 145, § 1, 1917 Idaho Sess. Laws 459, 459-60.

³⁰⁴ *Id.* § 2(1), 1917 Idaho Sess. Laws at 460.

³⁰⁵ *Id.* § 2(2).

³⁰⁶ *Id.* § 2(3).

³⁰⁷ *Id.* § 2(4).

³⁰⁸ *Id.* § 2.

³⁰⁹ *Id.* § 3.

penheim's statute and all the others patterned after it essentially defined criminal syndicalism as the advocacy for, publication of, or participation in a group that seeks to advance the view that certain prohibited means (including crime, sabotage, and violence) be employed to bring about industrial or political change.³¹⁰ It did not on its face criminalize the abstract belief in or pursuit of industrial or political change; nor did it define the range of prohibited conduct (the element of advocacy, broadly construed) in terms of inherently criminal behaviors. As a result, what mattered most to the question of liability was whether these elements of the crime were linked by the defendant's invocation of the prohibited means: that is to say, where advocacy of social change entailed an appeal to the prohibited means. It was for this reason that liability would, formally speaking, turn on just what those means comprised and just what it meant to urge the use of crime, violence, sabotage, and the like as ways of achieving a change in the social order.

The inherent ambiguity of these terms made for real uncertainties about the limits of liability under this legislation and the other statutes patterned after it. Did strikes and the advocacy of strikes, for example, constitute prohibited means? Were strikes a form of sabotage on account of their disruptive effect? Or did they satisfy the element of violence or crime simply because violence and crime were frequent results of strike activity? Could the same be said about terrorism? And was the very concept of unionism criminal in the same ways? The pitfalls inherent in these ambiguities were not lost on mainstream opponents of criminal syndicalism laws, who wondered openly during the legislative process whether a statute drafted in such fashion would criminalize the activities of mainstream labor unions.³¹¹ Nor were they lost on advocates of free speech, who could hardly ig-

³¹⁰ A final provision of Oppenheim's statute, adopted in some form by a number of other jurisdictions, created a separate misdemeanor of providing a forum for the discussion of criminal syndicalism. Section 4 held that "[t]he owner, agent, superintendent, janitor, caretaker, or occupant of any place, building or room," who either knowingly permitted that place to be used by persons committing the felony described in section 3 or permitted it to be used in that fashion (presumably irrespective of actual knowledge) "after notification that the premises are so used . . . is guilty of a misdemeanor" and may be punished by up to one year in the county jail, a fine of up to \$500, or both. *Id.* § 4, 1917 Idaho Sess. Laws at 460-61.

³¹¹ On the (largely futile) expression of this concern by representatives of mainstream labor organizations, see GUNNS, *supra* note 296, at 38-41; and Whitten, *supra* note 18, at 24-25.

nore these statutes' explicit criminalization of speech and association even where unaccompanied by any other conduct.³¹²

In fact, many jurisdictions would eventually try to define more clearly the elements of the crime, in particular the concept of sabotage.³¹³ For example, in 1925 Idaho added a provision defining sabotage in part as, "improper use of materials; loitering at work; slack work; slowing down work or production; [and] scamped work."³¹⁴ In most other jurisdictions, the need to define sabotage was already anticipated when the initial statute was enacted. Minnesota's criminal syndicalism law, though enacted only a month after Idaho's, ventured to define sabotage as "malicious damage or injury to the property of an employer by an employe[e]."³¹⁵ While some jurisdictions followed Minnesota's lead by adopting similarly terse clarifying language,³¹⁶ others tackled the problem with greater verbosity. Montana, for example, defined sabotage as

malicious, felonious, intentional or unlawful damage, injury or destruction of real or personal property of any form whatsoever, of any employer, or owner, by his or her employee or employees, or any employer or employers or by any person or persons, at their own instance, or at the instance, request or instigation of such employees, employers, or any other person.³¹⁷

³¹² See, e.g., Whitten, *supra* note 18, at 25; Case Comment, *Criminal Syndicalist Act: Constitutional Law: Validity of the Act Under the Free Speech Clause*, 10 CAL. L. REV. 512, 517 (1922).

³¹³ See DOWELL, *supra* note 11, at 18, 83.

³¹⁴ Act of Feb. 21, 1925, ch. 51, § 1, 1925 Idaho Sess. Laws 75, 76. The statute was amended to avoid the narrow construction of sabotage given by the Idaho Supreme Court the previous year in *Ex parte Moore*, 224 P. 662 (Idaho 1924).

³¹⁵ Act of Apr. 13, 1917, ch. 215, § 1, 1917 Minn. Laws 311, 311.

³¹⁶ See, e.g., Act of Apr. 30, 1919, ch. 118, § 1, 1919 Cal. Stat. 281, 281 (defining sabotage "as meaning wilful and malicious physical damage or injury to physical property"); Act of Mar. 23, 1918, ch. 38, § 1, 1918 S.D. Sess. Laws 43, 43 ("Sabotage means willful and malicious damage or injury to the property of another.").

³¹⁷ Act of Feb. 21, 1918, ch. 7, § 2, 1918 Mont. Laws 14, 15. Cf. Act of Mar. 15, 1919, ch. 70, § 2, 1919 Okla. Sess. Laws 110, 111; Act of Feb. 3, 1919, ch. 12, § 2, 1919 Or. Laws 25, 25; Act of Feb. 17, 1919, ch. 127, § 2, 1919 Utah Laws 347, 347 (all using language substantially identical to that in the Montana statute). Another way that statutes departed from Oppenheim's original model was in overall length and scope. Some jurisdictions, like Wyoming, opted to condense Oppenheim's statute. The Wyoming legislature accomplished this by dropping the provisions on publication and assembly while retaining the provisions on advocacy. Act of Feb. 22, 1919, ch. 76, 1919 Wyo. Sess. Laws 110; see also Act of May 12, 1919, ch. 255, 1919 Mich. Pub. Acts 452. Indiana, for its part, adopted a statute that made no specific reference to criminal syndicalism at all; instead, it incorporated into a flag law a provision prohibiting anti-status quo conduct and advocacy only in the briefest, most general terms.

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In California, one legislator tried unsuccessfully another approach to the problem: removing the word “sabotage” entirely from the original bill.³¹⁸

None of the attempts at clarifying the meaning of sabotage did much to nail down the formal meaning of criminal syndicalism, at least not in a fashion that would be relevant at the level of police administration and prosecution. The definition of prohibited means like sabotage, violence, terrorism, and criminality remained uncertain and subject to very broad interpretation. The ambiguity that followed was compounded even further by the fact that the conduct criminalized by these statutes included not only outright advocacy of the use of the prohibited means to achieve social change, but also a number of even more passive conditions: membership in organizations committed to the use of such means of social change, assemblage for the purpose of criminal syndicalism, publication and distribution of criminal syndicalism literature, and so forth.³¹⁹ The same compounding effect followed from the terms political and industrial change.

Given these layers of uncertainty, it would inevitably fall to police, prosecutors, and judges to determine who would face liability. Thus, the antiradicalism of criminal syndicalism laws would be reflected twice: first, in their enactment, and second, in the manner of their enforcement. The statutes presented police, prosecutors, and trial judges with a dilemma of under- and over-inclusion. Interpreted narrowly, they would not criminalize much of what the IWW was actually doing, and would fail to realize their proponents’ aim. Interpreted broadly, the statutes would criminalize many organizations besides the IWW, including some that were quite conventional. These officials avoided

Act of Mar. 14, 1919, ch. 125, § 2, 1919 Ind. Acts 588, 589. Arizona also adopted such a quasi-criminal syndicalism law, embedding the essence of such a law (including advocacy, publication, and assemblage provisions) in a sabotage statute. Act of July 2, 1918, ch. 13, §§ 3-4, 1919 Ariz. Sess. Laws 51, 51-52. Kentucky chose the opposite approach, enacting in 1920 a criminal syndicalism statute of some length that incorporated several additional bases of criminal liability, including the separate crime of “sedition”; the criminalization of malfeasance by “peace officers” who failed to disperse unlawful assemblies under the act; and the addition of a felony murder component to the statute. See Act of Mar. 25, 1920, ch. 100, 1920 Ky. Acts 519.

³¹⁸ Whitten, *supra* note 18, at 14; see also *Amend Measure on Syndicalism*, L.A. Times, Apr. 19, 1919, at 14; *Assemblymen Clash on Syndicalism Bill*, L.A. TIMES, Apr. 18, 1919, at 19. The amendment was rejected, as was the bill, which did not pass that session. Whitten, *supra* note 18, at 15.

³¹⁹ See *supra* text accompanying notes 304-09.

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this dilemma in the crudest fashion: by selective prosecution. They construed the statutes broadly, such that the prohibited means could encompass all manner of labor organizing and political activity; then they applied the statutes in a transparently selective fashion, criminalizing only the conduct of the IWW and a few other radical groups. Thus did the criminal syndicalism statutes become, on a very fundamental level, devices for criminalizing membership in the IWW. In giving these statutes this effect, the authorities revealed very clearly the depth of their own complicity in the use of criminal syndicalism laws to foreclose radical challenges to the social order with little regard to technical questions of liability. The following reaction to the enactment of Michigan's statute was printed in an IWW publication: "It is not the bill itself that is any danger to us. It is the use the capitalist class are going to make of it, through their hirelings in office."³²⁰

III

THE ENFORCEMENT OF CRIMINAL SYNDICALISM LAWS

In the enforcement of criminal syndicalism laws, guilt was largely premised on the simple fact of membership in or association with the IWW, or, to be more precise, on the basis of conduct suggestive of such a relationship to the IWW. Speech in the literal sense was only infrequently a basis for arrest or prosecution. Criminal syndicalism laws were much more devices for criminalizing the radical than they were means of undermining radical speech. Moreover, the criminalization of radicalism in the enforcement of these statutes had nothing to do with preempting violent acts. No one anywhere in the available records appears to have been prosecuted under these laws for actually advocating social change by actual means of sabotage, terrorism, violence, or anything of the sort.

In the late 1910s and early 1920s, thousands of people were charged with criminal syndicalism and hundreds were convicted and sent to prison. The vast majority of this occurred in a handful of states in the West and Pacific Northwest and in scattered jurisdictions in the Central Plains and Midwest. Throughout all

³²⁰ *What an Anti-Syndicalist Law Looks Like*, ONE BIG UNION MONTHLY, Aug. 1919, at 45, 45. This sentiment was expressed elsewhere in the same IWW publication: "[A]s with so many other laws, it isn't the wor[d]ing that decides what they are, it's the motive behind them and the use they are being put to." *The Anti-Syndicalist Laws*, ONE BIG UNION MONTHLY, Apr. 1919, at 9, 9.

of these areas, too, a definite pattern of enforcement prevailed. The impetus or logic of enforcement reflected the same key dynamics that led to the enactment of these laws: an entrenched ideology that cast the IWW as a genuine danger to the social order deserving of obliteration and a more practical desire to bring the criminal law to bear in undermining the IWW's ability to organize workers against employers in particular labor disputes. Accordingly, the majority of defendants who were charged with criminal syndicalism were IWW members or organizers or were thought to be in league with the organization. Moreover, American Legionnaires, business groups, or actual businessmen with immediate interests in the use of these laws against the IWW frequently instigated enforcement.

A region-by-region review of criminal syndicalism enforcement practices in California, the Pacific Northwest states, and the Plains and Midwest states provides a sense of just how universal and pervasive this pattern of enforcement was.

A. *California*

In California, enforcement of criminal syndicalism laws was both intensive and widespread. Modeled on Oppenheim's statute, California's criminal syndicalism law cast a wide net, exposing "to arrest and charge anyone deemed by the authorities to be spreading dangerous ideas, without any serious deliberation over whether the technical prerequisites of the law itself had been met."³²¹ Of course, the technical prerequisites of the law diminished in relevance precisely because of the inherent ambiguity of the statute itself. In a period of only about five years, beginning a mere week after the statute's enactment and ending in the summer of 1924, the state formally charged over 500 defendants with criminal syndicalism and arrested or threatened countless others with arrest.³²² This enforcement campaign focused almost entirely on people connected to the IWW.

The first arrest under California's criminal syndicalism law occurred in San Francisco on May 22, 1919, only a few weeks after the statute went into effect and amid considerable but unfounded hysteria about impending IWW terror campaigns and other outrages.³²³ Initial scattered arrests in the Bay Area were followed

³²¹ Rohde, *supra* note 18, at 316.

³²² Whitten, *supra* note 18, app. at 66.

³²³ *Id.* at 26-27.

by a raid on an IWW hall in Stockton on June 29, in which nineteen Wobblies were arrested for criminal syndicalism.³²⁴ This was followed a few days later by a raid in Oakland, in which several men and a woman were arrested, and another in San Francisco, which netted several more people.³²⁵ Most of those arrested were released after a short time and never charged.³²⁶ And yet, before the summer was over, authorities in the Bay Area charged more than sixty people, all but two of whom were Wobblies or alleged Wobblies.³²⁷ In Fresno in June, the union's secretary for the state was arrested.³²⁸ Later that fall and winter, authorities in Los Angeles followed suit, launching their own campaign against the IWW.³²⁹ By February 1, 1920, the California police had arrested ninety IWW members.³³⁰

Despite their accompanying rhetoric, these enforcement campaigns were hardly spontaneous reactions to any real efforts to overthrow the social order. The real intent behind them was far more preemptory: to cleanse these areas of Wobblies.³³¹ To be sure, the arrests were backed to some extent by claims that the IWW was behind isolated bombings and threats of bombings directed at prominent people in the Los Angeles and Bay areas.³³² But these acts were never linked to the IWW, least of all in the subsequent prosecutions of some of the arrestees on criminal syndicalism charges. Such rhetoric was merely obfuscating, justificatory, and designed to negate the otherwise obvious and un-

³²⁴ *Id.* at 30.

³²⁵ *California Syndicalist Cases*, *INDUS. WORKER*, Aug. 9, 1919, at 4.

³²⁶ *Id.*; see also *California Cases of Criminal Syndicalism*, *NEW SOLIDARITY*, Sept. 6, 1919, at 3.

³²⁷ See Whitten, *supra* note 18, at 31.

³²⁸ *State I.W.W. Leader Arrested in Fresno*, *L.A. TIMES*, June 4, 1919, at 12.

³²⁹ Whitten, *supra* note 18, at 33; see also *The Gruesome Story of American Terrorism: Installment No. 4*, *ONE BIG UNION MONTHLY*, June 1920, at 37, 37 [hereinafter *Gruesome Story Installment No. 4*]; *Jails Yawn for the I.W.W.*, *L.A. TIMES*, Nov. 16, 1919, at IV14; *Urge All Citizens to Watch Radicals*, *L.A. TIMES*, Nov. 15, 1919, at 12 (describing Los Angeles authorities' appeal to citizens to report suspected radicals for criminal syndicalism prosecution).

³³⁰ *California and "Criminal Syndicalism," ONE BIG UNION MONTHLY*, Apr. 1920, at 15, 15. On California's initial campaign against the IWW, see also *Against Delay of Red Trials*, *L.A. TIMES*, Nov. 28, 1919, at II8; *Every Red an Active Criminal, Say Authorities; Arrests Started*, *L.A. TIMES*, Oct. 2, 1919, at II1; *High Price for Trouble-Making*, *L.A. TIMES*, Sept. 28, 1919, at II1; *Indicts Three Held as Reds*, *L.A. TIMES*, Oct. 16, 1919, at III2; and *Puts I.W.W. in Treason Class*, *L.A. TIMES*, Oct. 4, 1919, at III.

³³¹ See Whitten, *supra* note 18, at 28-29.

³³² See *id.* at 27-29.

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comfortable fact, which was pointed out by a contemporary critic of California's use of this law, "that the accused were, without exception, inoffensive persons [and] that in not a single instance were they as individuals shown to be a menace to the peace and order of the community."³³³

Over the next five years or so, local authorities continued to arrest Wobblies on slender evidence, if any at all, that they sought to overthrow the social order. Even where the impetus for prosecution was not rooted in a sense of the organization's overall strength in a particular locality, as in these initial campaigns, it often concerned a pending labor dispute. In many instances, these prosecutions in California were focused temporally on moments of apparent upsurge of IWW activity and, more specifically, on IWW strikes and other organizing activities. In such cases, enforcement regularly resulted in mass arrests, sometimes involving dozens or even hundreds of victims.³³⁴ Many Wobblies were charged with syndicalism after being arrested on the picket line.³³⁵

This was the case in Southern California during the early winter of 1922 at a waterfront strike in San Pedro. The strike developed when shipowners and stevedore companies blacklisted all Wobblies in an effort to prevent IWW inroads among longshoremen.³³⁶ Employers and officials "declared war" on the union. Police would eventually arrest hundreds of Wobblies and supporters, some while engaged in protests.³³⁷ Others were arrested preemptively to stop strikes by raids on union halls.³³⁸ One raid resulted in the arrest of 300 on syndicalism charges.³³⁹ Only a few of these arrestees were eventually charged with criminal syn-

³³³ GEORGE W. KIRCHWEY, *A SURVEY OF THE WORKINGS OF THE CRIMINAL SYNDICALISM LAW OF CALIFORNIA* 10 (1926).

³³⁴ Whitten, *supra* note 18, at 54-58.

³³⁵ See, e.g., *Wobbly Suspects Jailed*, L.A. TIMES, Dec. 7, 1922, at III.

³³⁶ *Shipowners to Fight I.W.W.*, L.A. TIMES, Aug. 3, 1922, at III.

³³⁷ See *L.A. Arrests Wob Pickets*, INDUS. WORKER, Dec. 23, 1922, at 1; *200 Arrests in Cal. Jury Trials Clog Up Courts; Police Mad*, INDUS. WORKER, Jan. 6, 1923 at 1; *Unjust Criminal Syndicalism Law Issue in San Pedro Fight*, INDUS. SOLIDARITY, Dec. 30, 1922, at 1; see also *No Justice for I.W.W. in Calif.*, INDUS. WORKER, Jan. 20, 1923, at 1; *Thirty-Six Reds Seized in Police Harbor Raids*, L.A. TIMES, Nov. 9, 1922, at III; *Wobblies Grip Marine Union*, L.A. TIMES, Oct. 29, 1922, at IV14.

³³⁸ *Forbid Strike Meetings*, L.A. TIMES, May 3, 1923, at I3; *Record Haul of Reds Caught in Harbor Net*, L.A. TIMES, Dec. 19, 1922, at III.

³³⁹ The arrests took place over the course of several months. See *Raids on Wobbly Nest at Harbor Net 300 Reds*, L.A. TIMES, May 15, 1923, at III.

dicalism.³⁴⁰ But in a great example of the Wobbly spirit of solidarity, fifteen of those arrested but not charged with criminal syndicalism, along with fifty other men, demanded (to no avail) to be charged with criminal syndicalism as well.³⁴¹

Thus, criminal syndicalism arrests often followed when police found Wobblies in the act of organizing or seized them in raids on union halls. However, at times, police also made such arrests on the simple basis of IWW membership.³⁴² In either case, these arrests were abetted by the work of employers, Legionnaires, or other reactionary elements.³⁴³ In one instance, the Ku Klux Klan accompanied the police on an April 11, 1924, raid on the San Pedro hall that resulted in several criminal syndicalism charges.³⁴⁴ Organizer H.M. Edwards was arrested in Fortuna on July 14, 1921, after the foreman of a lumber camp reported him to the authorities, who then found IWW literature on his person.³⁴⁵ Moreover, Wobblies were often simply arrested in the act of organizing,³⁴⁶ or when found to possess radical literature.³⁴⁷ Distributing IWW newspapers or other literature on the street frequently led to arrests as well.³⁴⁸ Still others were arrested

³⁴⁰ See Whitten, *supra* note 18, at 58.

³⁴¹ *Id.* at 56.

³⁴² See, e.g., *People v. Erickson*, 226 P. 637, 637 (Cal. Ct. App. 1924) (noting that the defendant was arrested by a night watchman and charged with criminal syndicalism after an IWW membership card was found on his person).

³⁴³ On the role of Legionnaires in enforcement, see *Legion Seizes "Red" Library*, L.A. TIMES, Nov. 19, 1919, at III; *Pledge All to Their Country*, L.A. TIMES, Nov. 16, 1919, at I3; *Slav, Red Papers Seized*, L.A. TIMES, Dec. 12, 1919, at III (reporting that Legionnaires raided homes armed with "search warrant"); and *To Drive Reds from the City*, L.A. TIMES, Nov. 16, 1919, at IV14.

³⁴⁴ *More Arrests in South Cal.*, INDUS. SOLIDARITY, Apr. 19, 1924, at 1.

³⁴⁵ *Criminal Syndicalism Against Live Delegate Is Charged at Eureka*, INDUS. WORKER, Aug. 20, 1921, at 1.

³⁴⁶ See, e.g., Frank Sherman, *Justice in California Meted Out to Workers*, INDUS. WORKER, Aug. 6, 1921, at 1.

³⁴⁷ See, e.g., *Charge Red Books Fill Store Here*, L.A. TIMES, Oct. 30, 1920, at III; *Japanese Arrested as I.W.W.*, L.A. TIMES, Aug. 28, 1922, at II.

³⁴⁸ See, e.g., *Arrests in Sacramento; Work Scarce Down There*, INDUS. WORKER, July 2, 1921, at 1; *Criminal Syndicalism Charge Is Dismissed; More Trials Pending*, INDUS. WORKER, Mar. 4, 1922, at 2 (describing the policy of basing criminal syndicalism arrests on the sale of IWW newspapers); *Held as Syndicalist*, L.A. TIMES, Apr. 21, 1921, at I19; *Situation in California Is Now Somewhat Better Than Twelve Months Ago*, INDUS. WORKER, Oct. 3, 1923, at 1 (noting that six members were arrested in Eureka for selling IWW newspapers); cf. *Persecution Denounced*, INDUS. SOLIDARITY, July 22, 1922, at 6 (reporting that a Wobbly was arrested for circulating a petition urging the release of federal prisoners); *Port War on I.W.W. Is Raging*, L.A. TIMES, July 7, 1922, at II2 (reporting that a suspected syndicalist leader was arrested for distributing pamphlets).

when they appeared as witnesses at criminal syndicalism trials.³⁴⁹ In fact, on more than one occasion district attorneys arrested and charged such people just as soon as they testified, on the grounds that by admitting membership under oath, they thereby confessed culpability.³⁵⁰ Similarly, the IWW press mentioned at least one case in which police raided a local IWW hall *during* a criminal syndicalism trial for the apparent purpose of frustrating defense efforts.³⁵¹ In at least one other instance (and probably more), employers advertised bounties for “arrest and evidence leading to [the] conviction of anyone violating” California’s statute.³⁵²

As is always the case with repressive enforcement of the criminal law, only some of the people arrested for criminal syndicalism in California in the late 1910s and early 1920s were ever formally charged. The number of arrests, not to mention lesser forms of official harassment predicated on the statute, certainly far exceeded the 531 people formally charged during this period.³⁵³ Not all 531 were brought to trial.³⁵⁴ Twenty-seven were never apprehended.³⁵⁵ Of the remaining 504, only about half (264) were tried, with 164 ultimately convicted and the majority of the rest (69) released on account of jury deadlock.³⁵⁶

Needless to say, neither conviction, nor formal charge, nor even arrest was necessary to accomplish the desired goal of undermining the IWW or thwarting its attempts at organizing and

³⁴⁹ See, e.g., *Convict Firey and Casdorf by Jailing the Witnesses*, INDUS. WORKER, Apr. 22, 1922, at 1; *Five More to Stand Trial in Los Angeles*, INDUS. SOLIDARITY, Dec. 17, 1921, at 5; *Sacramento Is Preparing to Have More Sacrifices*, INDUS. WORKER, Aug. 29, 1923, at 1.

³⁵⁰ Indeed, in one case, the district attorney was allowed to tell the witnesses in open court (outside the presence of the jury) that if they admitted under oath to IWW membership they would be charged with criminal syndicalism. The district attorney filed an affidavit denying defendants’ assertion that the arrests were made in the presence of the jury but admitting the threat of arrest. *People v. Casdorf*, 212 P. 237, 238 (Cal. Dist. Ct. App. 1922). For other examples of prosecution of witnesses under such circumstances, see *People v. Johansen*, 226 P. 634, 634 (Cal. Dist. Ct. App. 1924); and *Jails Witness in I.W.W. Case*, L.A. TIMES, Dec. 1, 1921, at III3.

³⁵¹ *Nine Facing Eureka Court; Free Press Fight in San Pedro*, INDUS. SOLIDARITY, Feb. 23, 1924, at 1 [hereinafter *Nine Facing Eureka Court*].

³⁵² Advertisement by Pac. Elec. Ry. Co., L.A. TIMES, Aug. 27, 1919, at II3 (offering \$250 reward).

³⁵³ This reality was related, from time to time, in the IWW press. See, e.g., *Police Brutality Under Fire in Los Angeles*, INDUS. SOLIDARITY, Apr. 12, 1924, at 6.

³⁵⁴ Whitten, *supra* note 18, app. at 65.

³⁵⁵ See *id.* (summarizing 504 apprehended of 531 charged).

³⁵⁶ *Id.* app. at 65-66.

protest. In California, the threat of arrest and prosecution for criminal syndicalism could serve, like vagrancy, as a way simply to run Wobblies out of town at little cost in officials' time and resources.³⁵⁷ Undoubtedly, the latent risk of arrest, prosecution, and possible conviction, even where not expressed, accomplished the same disruptive function. In any case, the authorities' program often seemed to be to round up every IWW member they could find, identify the organizers and charge them with criminal syndicalism, and then either release the rest or charge them with vagrancy.³⁵⁸

Judicial administration of these statutes reflected not only the antiradical bias inherent in criminal syndicalism laws, but also the degree to which prosecutors and trial courts were active in advancing these laws' antiradical purposes. The first person actually indicted under California's criminal syndicalism law was Emanuel Levin, the secretary and business manager of a San Francisco workers' school and library that was affiliated with the IWW.³⁵⁹ Levin was arrested on May 22, 1919, when he went to the Hall of Justice to arrange bail for some of his colleagues who had been arrested for vagrancy.³⁶⁰ His arrest was part of the Bay Area's initial criminal syndicalism campaign against the IWW.³⁶¹ The instrument of indictment identified no particular act or even any specific word by which Levin supposedly committed criminal syndicalism; Levin's culpability actually entailed no more than his association with the IWW.³⁶²

California's first successful prosecution of a defendant on criminal syndicalism charges began in late 1919. The defendant was James McHugo, the secretary of an Oakland branch of the IWW.³⁶³ McHugo was charged with committing syndicalism by dint of membership in the IWW, a fact he conceded.³⁶⁴ In addition to this, the State put on evidence of McHugo's possession of

³⁵⁷ See, e.g., *id.* at 33-34.

³⁵⁸ See, e.g., *600 Arrested Strikers Charged with Vag!*, *INDUS. WORKER*, May 23, 1923, at 1 (reporting that two leaders were charged with criminal syndicalism and the remainder were charged with vagrancy); see *California Syndicalist Cases*, *supra* note 325; *More Arrests in Barbarous Cal.*, *INDUS. WORKER*, Nov. 18, 1922, at 2 (reporting that nine were arrested and two were discharged).

³⁵⁹ Whitten, *supra* note 18, at 27-28.

³⁶⁰ *Syndicalism Cases in San Francisco*, *INDUS. WORKER*, July 16, 1919, at 2.

³⁶¹ Whitten, *supra* note 18, at 27-28.

³⁶² KIRCHWEY, *supra* note 333, at 13.

³⁶³ Whitten, *supra* note 18, at 41.

³⁶⁴ *Id.* at 41-42.

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IWW literature as well as the testimony of several special agents and former IWW members.³⁶⁵ Insofar as such evidence was invoked to demonstrate the IWW's supposed commitment to social change by unlawful means, it was central to the logic of proving culpability by membership. Despite a vigorous defense that with equal logic stressed the essential legitimacy of the IWW and the lack of specific evidence connecting McHugo to any crimes or acts of violence, McHugo was convicted by a jury in seven minutes and was sentenced to one to fourteen years in prison.³⁶⁶ Within a few weeks, three others were tried in the Bay Area; two were convicted and one acquitted.³⁶⁷

A similar experience awaited Charlotte Anita Whitney, a radical activist and social worker of patrician background who is remembered today as perhaps criminal syndicalism's most famous victim.³⁶⁸ Whitney was arrested in Oakland on November 28, 1919, shortly after delivering a speech before a reformist organization, the California Civic League.³⁶⁹ Though not directly connected to the IWW, Whitney was accused of being an agent of that organization.³⁷⁰ What Whitney actually did was deliver to the Civic League a speech on "The Negro Problem" of the United States in which she advocated civil rights and condemned

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 42.

³⁶⁷ *Id.*; see also *Legal Persecution Starts in the West*, ONE BIG UNION MONTHLY, July 1919, at 9, 9.

³⁶⁸ Whitney was the "descendant of generations of American patriots, the favored niece of a [United States] Supreme Court justice [Stephen Field], daughter of a state legislator and herself a well-known social reformer." Lisa Rubens, *The Patrician Radical Charlotte Anita Whitney*, 65 CAL. HIST. 158, 158 (1986). Indeed, Whitney was a person of great substance: a graduate of Wellesley; an early leader in the juvenile justice movement; a charter member of the NAACP; an advocate of civil rights, women's liberation, and civil liberties; and a founding member of the Communist Party. *Id.* at 160-65. Although a progressive and a liberal from her early years, Whitney was apparently radicalized by the Wheatland episode and the upheaval that accompanied it. *Id.* at 161-62.

Another famous person arrested for criminal syndicalism in California was socialist author Upton Sinclair, who was picked up for reading from the Constitution in public. Sinclair was never brought to trial on the charge. *Sinclair's Arrest—Stupidity in Capitalist Eyes*, INDUS. SOLIDARITY, June 2, 1923, at 5; *Upton Sinclair Arrested*, L.A. TIMES, May 16, 1923, at II1. He had earlier testified on behalf of a criminal syndicalism defendant in California. *Upton Sinclair on the Stand*, L.A. TIMES, Mar. 24, 1920, at II7.

³⁶⁹ Rubens, *supra* note 368, at 163-64.

³⁷⁰ Whitney's main connection to the IWW appears to have consisted of her playing a role in raising funds to defend the IWW defendants. *Id.* at 162-63.

the lynching of blacks.³⁷¹ Whitney's trial began early the next year.³⁷² Like McHugo and almost all other California criminal syndicalism defendants, she was charged with syndicalism by membership, although the State's assertion of Whitney's guilt was based not on membership in the IWW, but in the California chapter of the Communist Labor Party.³⁷³ The prosecution asserted that membership in that organization was culpable under the criminal syndicalism statute by virtue of its ties to *both* the Communist International and the IWW, whose criminality was presented to the jury as a given.³⁷⁴ On this basis, the prosecution submitted an enormous amount of evidence of IWW radicalism and alleged wrongdoing,³⁷⁵ much of which took the form of songs, pamphlets, and other propaganda, as well as informant testimony.³⁷⁶ Hampered by the midtrial death of her lead attorney at the hands of influenza, Whitney's defense sought vainly to sway the jury with evidence, much of which was in the form of her own testimony, of the Communist Labor Party's opposition to the use of violence, terrorism, or other prohibited means to advance its agenda of social change.³⁷⁷ The jury took six hours to convict Whitney on the main count; like McHugo, she received the statutory sentence of one to fourteen years in prison.³⁷⁸

None of the indictments or bills of information in California's criminal syndicalism prosecutions during this period spelled out the specific act by which the defendants were accused of violating the statute.³⁷⁹ In virtually every prosecution, evidence of guilt consisted of nothing more than assertions of membership in a

³⁷¹ *Id.* at 158, 163-64.

³⁷² Whitten, *supra* note 18, at 44.

³⁷³ *See, e.g., id.* at 43-44.

³⁷⁴ The prosecution's claim of a link between the Communist Labor Party and the IWW was premised on one document in which the former organization endorsed the latter. Rohde, *supra* note 18, at 320-21.

³⁷⁵ *Id.* at 321.

³⁷⁶ Whitten, *supra* note 18, at 46.

³⁷⁷ *Id.* at 45-47.

³⁷⁸ *Id.* at 47. On the circumstances of Whitney's arrest and conviction, see *Whitney v. California*, 274 U.S. 357, 363-68 (1927).

³⁷⁹ KIRCHWEY, *supra* note 333, at 13. Kirchwey explains that while the indictment or information might invoke multiple charges—criminal syndicalism by advocacy, by actual sabotage, and so forth—“in no case was any specific deed or word charged nor any mention made of the time when or the place where the alleged crime was committed.” *Id.* While the courts sometimes overturned convictions on this ground, this was by no means the usual outcome. *Id.* at 13, 20 (noting that of twenty-nine cases appealed, twenty were affirmed). In any event, the reported cases confirm Kirchwey's observation. *See People v. Welton*, 211 P. 802, 802-04 (Cal.

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prohibited organization,³⁸⁰ often augmented by evidence of possession or distribution of radical literature.³⁸¹ Similarly, California trial courts typically admitted voluminous evidence designed to demonstrate the IWW's (or, as in Whitney's and a few other cases, the Communist Labor Party's) supposed willingness to resort to sabotage, violence, and the like to change the social order. If not songs, literature, or other union documents,³⁸² this evidence usually consisted of hearsay statements by, and assertions about, other members of these organizations, all of which was supposed to demonstrate the guilt of the defendants.³⁸³ For good measure, trial courts often admitted evidence concerning the defendant's patriotic credentials, support for the war effort, or overall views about capitalism.³⁸⁴ Much of this evidence was presented not only by way of hearsay, but also by "professional," which is to say paid, witnesses.³⁸⁵ One such witness, a habitual offender named Elbert Coutts, appears to have testified in almost every one of California's criminal syndicalism trials.³⁸⁶ In

1922); *People v. Steelik*, 203 P. 78, 79-85 (Cal. 1921); *People v. Malley*, 194 P. 48, 52-55 (Cal. Dist. Ct. App. 1920).

³⁸⁰ KIRCHWEY, *supra* note 333, at 10, 13-14; *see, e.g.*, *People v. Taylor*, 203 P. 85 (Cal. 1921); *People v. Cox*, 226 P. 14, 18-20 (Cal. Dist. Ct. App. 1924).

³⁸¹ *See, e.g.*, *People v. Thurman*, 216 P. 394, 395-96 (Cal. Dist. Ct. App. 1923); *People v. Wismer*, 209 P. 259, 260 (Cal. Dist. Ct. App. 1922); *Malley*, 194 P. at 52-54.

³⁸² *See, e.g.*, *People v. McClenegen*, 234 P. 91, 95-98, 102 (Cal. 1925) (describing how "[g]reat quantities of printed matter consisting of stickerettes, posters, pamphlets, booklets, books, songs, and pronouncements advocating the teachings of the [IWW] were received in evidence" and used to convict some twenty-six defendants); *People v. Roe*, 209 P. 381, 385-87 (Cal. Dist. Ct. App. 1922) (describing the prosecution of a defendant on the basis of such evidence, following his arrest for distributing IWW literature on a Sacramento street corner); *see also* *People v. Sherman*, 209 P. 1023, 1024 (Cal. Dist. Ct. App. 1922). In at least one case, a California trial court allowed an ex-member to testify at length for the prosecution on the IWW's support for "free love" and the abolition of marriage. *People v. Wagner*, 225 P. 464, 468 (Cal. Dist. Ct. App. 1924).

³⁸³ *See, e.g.*, *People v. La Rue*, 216 P. 627, 629-31 (Cal. Dist. Ct. App. 1923) (describing the use of such testimony by trial court). On accusations of sabotage at trial, *see, for example*, *Bombs and Poisons of I.W.W. Ravagers Shown*, L.A. TIMES, Mar. 19, 1920, at II12; *Direct Action Ravages Told*, L.A. TIMES, Apr. 15, 1920, at II13; *Half Million Loss Through Reds Told*, L.A. TIMES, May 13, 1921, at II11; *Sabotage Plot Laid to I.W.W.*, L.A. TIMES, Nov. 23, 1921, at II3; and *State's Sabotage Loss Put at Fifty Millions*, L.A. TIMES, Mar. 17, 1920, at III.

³⁸⁴ KIRCHWEY, *supra* note 333, at 14-15.

³⁸⁵ *See, e.g.*, *California Cases*, INDUS. SOLIDARITY, Oct. 29, 1921, at 5 (reporting that one such witness admitted to receiving \$450 for testimony in two trials); *C.S. Trial in Los Angeles*, INDUS. WORKER, Feb. 10, 1923, at 1.

³⁸⁶ *See* KIRCHWEY, *supra* note 333, at 16-17; *California Cases Still Aggravating*, INDUS. WORKER, Jan. 12, 1924, at 1 ("Mr. Coutts, besides being a petty thief, twice convicted of burglary, [was] a vandal and arson bug and a perjurer."). Coutts testi-

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fact, Coutts and his colleagues often testified alongside each other in the same trials.³⁸⁷ Furthermore, trial courts routinely refused to grant instructions designed to clarify the statute's uncertainties regarding the conduct necessary to establish culpability—for example, on the legal definition of sabotage—and the boundary between criminal syndicalism and legal forms of protest and advocacy.³⁸⁸ The courts allowed evidence, going to IWW's alleged criminality, that predated the enactment of the statute or the defendant's membership in the organization.³⁸⁹ Further, they liberally allowed prosecutors to invoke conspiracy doctrine in enforcing the statute.³⁹⁰

For the IWW, the nature of such proceedings merely proved what the organization had long recognized: that the law and those who administered it were nothing more than tools of capital. The IWW press repeatedly called attention to what it regarded as the entrenched unfairness of these trials and prosecutions. Its writers excoriated trial judges for how they conducted these trials,³⁹¹ and certain judges became especially frequent targets of such criticism.³⁹² Prosecutors were likewise cast,

fied against Anita Whitney. *Coach Whitney Jury in Lore of I.W.W.'s*, L.A. TIMES, Feb. 12, 1920, at I5. Coutts was quite literally a professional witness: he admitted to "making his living" by testifying against the IWW. GAMBS, *supra* note 17, at 29. For mention of Coutts in the IWW press, see *Two I.W.W. Trials in California*, INDUS. WORKER, May 12, 1923, at 1. Coutts also testified for the government in the Sacramento conspiracy trial. See HARVEY DUFF, THE SILENT DEFENDERS, COURTS AND CAPITALISM IN CALIFORNIA 35-40 (IWW 1920). For an example of this type of testimony, described at some length in an appellate opinion, see *People v. Taylor*, 203 P. 85, 88-89 (Cal. 1921); see also *People v. Flanagan* 223 P. 1014, 1018 (Cal. Dist. Ct. App. 1924); *Wagner*, 225 P. at 467-68; *Roe*, 209 P. at 386-87; and *Terrorist on the Stand*, L.A. TIMES, Mar. 20, 1920, at III.

³⁸⁷ See, e.g., *Sacramento Jury Disagrees; Two Released*, INDUS. SOLIDARITY, July 14, 1923, at 1; *Trio of Stools at I.W.W. Trial in Oakland*, INDUS. SOLIDARITY, Oct. 29, 1921, at 1.

³⁸⁸ See, e.g., *People v. Stewart*, 230 P. 221, 224 (Cal. Dist. Ct. App. 1924); *People v. Thompson*, 229 P. 896, 898 (Cal. Dist. Ct. App. 1924); *People v. Bailey*, 225 P. 752, 757-59 (Cal. Dist. Ct. App. 1924); *People v. Eaton*, 213 P. 275 (Cal. Dist. Ct. App. 1923); *People v. Wieler*, 204 P. 410, 413 (Cal. Dist. Ct. App. 1922).

³⁸⁹ See, e.g., *People v. Steelik*, 203 P. 78, 84 (Cal. 1921) (upholding the admission of evidence of IWW criminality that predated defendant's membership); *People v. Wright*, 226 P. 952, 954-55 (Cal. Dist. Ct. App. 1922) (upholding the admission of evidence of IWW criminality that predated the enactment of the criminal syndicalism statute).

³⁹⁰ See, e.g., *People v. McClennegen*, 234 P. 91 (Cal. 1925); *Thompson*, 229 P. 896; *People v. Ware*, 226 P. 956 (Cal. Dist. Ct. App. 1924).

³⁹¹ *Jury in Los Angeles Trial Finds Nine I.W.W. Men Guilty*, INDUS. SOLIDARITY, Dec. 17, 1921, at 1.

³⁹² *Ask Venue Change in Red Cases*, L.A. TIMES, May 10, 1921, at II10; *Eureka*

with a significant degree of truth, as agents of industry.³⁹³ Juries were described as functionaries of local business interests.³⁹⁴ And the entire process of arrest, charge, and indictment in California was depicted as the embodiment of the entrenched bias of the State on behalf of capital and of the inevitable function of law in advancing capitalist interests.³⁹⁵

Not all judges were so uncritically disposed toward this kind of evidence. In March 1922, the IWW press related with some approval a ruling by San Francisco district court judge Sylvester McAtee that mere possession of IWW literature was not a sufficient basis for criminal syndicalism prosecution.³⁹⁶ In June 1923, the same paper had occasion to mention Judge Paul McCormick's ruling excluding hearsay testimony (by Coutts, no less) from another criminal syndicalism trial.³⁹⁷ But such scruples

Victims Go to San Quentin; 107 IWW in California's Twin Hells, INDUS. WORKER, May 7, 1924, at 2 [hereinafter *Eureka Victims*].

³⁹³ This treatment was particularly pronounced in the case of R.V. Cowan, a Sacramento-area prosecutor known for his zealous prosecution of Wobblies under the statute. *I.W.W. Faces New California Battle*, INDUS. WORKER, Aug. 27, 1924, at 2. The union's press would eventually delight in Cowan's personal problems, in particular the collapse of his marriage and his estranged wife's charges of family abandonment; for the Wobblies these developments were especially telling in light of Cowan's constant invocation of family values in the criminal syndicalism prosecutions. *William Cowan Breaks a Home*, INDUS. SOLIDARITY, Mar. 29, 1924, at 1. They also accused Cowan, quite plausibly, of using the prosecutions to further his ambition of becoming a judge. *Prosecutor of Wobs Rewarded?*, INDUS. SOLIDARITY, Jan. 12, 1924, at 6. In the IWW's view, special prosecutors replaced local district attorneys in some instances in order to ensure sufficient zealotry. See, e.g., *Eureka Court Fails to Convict 9 Wobs; Jury Out 66 Hours*, INDUS. SOLIDARITY, Mar. 1, 1924, at 1; *Powell Case Lost in Courts; Labor Must Rescue These Men*, INDUS. SOLIDARITY, Mar. 18, 1925, at 6. Some district attorneys did refuse to prosecute Wobblies simply on the basis of membership. *Sacramento I.W.W. Released from Jail*, L.A. TIMES, Jan. 21, 1923, at IV12.

³⁹⁴ *Lumber Company Jury Convicts Nine I.W.W. at Eureka; New Stoolpigeon Used*, INDUS. SOLIDARITY, Apr. 26, 1924, at 1.

³⁹⁵ The *Industrial Worker* went so far as develop a lengthy, generalized account of how a typical defendant or group of defendants went from innocently "trying to better their conditions" to finding themselves convicted of criminal syndicalism and penitentiary bound. *A Criminal Syndicalism Trial*, INDUS. WORKER, Apr. 12, 1924, at 3; see also *California Lumber Companies Establish a Reign of Terror*, INDUS. SOLIDARITY, Apr. 19, 1924, at 3 (likening the climate in California to the Spanish Inquisition); *Conviction of 9 in Eureka Was Ordered by Hammond*, INDUS. SOLIDARITY, May 3, 1924, at 4.

³⁹⁶ *Court Decision on Syndicalist Cases*, INDUS. WORKER, Mar. 18, 1922, at 2.

³⁹⁷ *Hearsay Shut Out Jury Is Doubtful*, INDUS. WORKER, June 30, 1923, at 1; cf. *Seek Fair Trial in Venue Change*, INDUS. WORKER, Apr. 12, 1924, at 1 (giving tentative credit to a trial judge considering a change of venue and vowing to conduct a fair trial).

about how prosecutors convinced juries to convict Wobbly defendants were clearly the exception and not the rule in these cases. In a number of other cases, juries simply acquitted defendants,³⁹⁸ or they were unable to agree on a verdict.³⁹⁹ In still other cases, juries sought ways to ensure that if they did convict, the defendant would receive a lenient sentence.⁴⁰⁰

The fact that any juries acquitted Wobblies in these cases speaks to the occasional success that IWW defendants had in exposing the tenuous factual bases of the State's cases, particularly given the apparent tendency of judges to qualify juries with prosecution-friendly jurors.⁴⁰¹ Almost invariably, successful arguments to juries involved an attempt to question the notion that the IWW was actually committed to the means of social change prohibited by the statute.⁴⁰² To this end, Wobbly defendants often took the stand in their own defense, proudly admitting membership while trying to underscore the union's fundamental commitment to peaceful means of change.⁴⁰³ On at least one other occasion, the IWW acknowledged the help of testimony from a "courageous liberal" in securing the acquittal of a number

³⁹⁸ See, e.g., *Acquittal at Eureka Halts Barbarous Syndicalist Law*, INDUS. WORKER, June 2, 1923, at 1; Tom Connors, *Masters Losing Their Grip in Prosecution of Workers*, INDUS. WORKER, June 13, 1923, at 1 (noting that "[d]uring the past month California has registered 30 acquittals or dismissals against six convictions"). Dismissals were not unheard of either, particularly after mistrials or the overturning of convictions. See, e.g., *Five Wob Cases Dismissed*, INDUS. SOLIDARITY, Sept. 10, 1924, at 1; *Hartline Case Now Dismissed*, INDUS. SOLIDARITY, Nov. 12, 1924, at 1.

³⁹⁹ See, e.g., *Eureka Court Fails to Convict 9 Wobs; Jury Out 66 Hours*, supra note 393; *Hung Jury at Sacramento*, INDUS. SOLIDARITY, June 9, 1924, at 6; *Jury Refuses to Convict on Townsend Testimony*, INDUS. SOLIDARITY, Nov. 4, 1922, at 1. The hung jury in the Eureka case followed the exclusion of professional witness Albert Courtt's testimony as hearsay. *Nine Facing Eureka Court*, supra note 351.

⁴⁰⁰ See, e.g., *Six Industrial Workers Who Conducted Own Case in Oakland Are Released*, INDUS. WORKER, Apr. 22, 1922, at 1 ("The jury recommended mercy, and there was some suggestion of release on parole.").

⁴⁰¹ See, e.g., "Red" *Inquiry Task of Jury*, L.A. TIMES, Feb. 22, 1920, at II2 (reporting judge's declaration that an all-male, "100 per cent American" jury was important because attempts to overthrow government were prevalent).

⁴⁰² *Jury Acquits in Sacramento Cases!*, INDUS. WORKER, Jan. 30, 1924, at 1 (describing the use of witnesses "from industry" to attest to the IWW's legitimate behavior).

⁴⁰³ See, e.g., *Defense At Bat in Los Angeles Make Good Impression in Court*, INDUS. WORKER, July 11, 1923, at 1. In particular, defendants were keen to point out that the IWW had not published a word on sabotage since 1917, and only then it had done so to denounce its literal use. *State Rests Case in Eureka Trial*, INDUS. WORKER, Feb. 20, 1924, at 1. The result in the Eureka trial was a hung jury. *C.S. Law Is Worst Brand of Tyranny*, INDUS. WORKER, Mar. 15, 1925, at 1.

of defendants.⁴⁰⁴ On another occasion, the IWW press attributed acquittals to the circulation of defense propaganda highlighting the public costs of criminal syndicalism prosecutions.⁴⁰⁵

The challenge of defending themselves under such circumstances was made all the more difficult by the problems Wobbly defendants faced in retaining good legal counsel. In some cases, the union was able to provide capable representation through the offices of sympathetic attorneys like George Vanderveer and Elmer Smith. However, this was not only expensive for the union, it was also risky for the attorneys. Smith was the target of vigilantism and disbarment proceedings and threatened with criminal syndicalism charges himself for his IWW connections.⁴⁰⁶ Given these realities, many defendants were forced to represent themselves. Additionally, although the IWW press was keen to emphasize how capably these lay attorneys performed, such self-representation probably did not work to their advantage.⁴⁰⁷ Another factor hampering defense efforts was the tendency of prosecutors to charge defense witnesses with criminal syndicalism based on their testimony on behalf of their fellow workers. On one occasion, ten Wobblies who had testified in a trial were convicted on this basis and sent to prison after juries in two previous trials had failed to reach verdicts.⁴⁰⁸

Those convicted of criminal syndicalism in California faced the possibility of an indeterminate sentence of one to fourteen years

⁴⁰⁴ *California Defendants Win Despite High-Handed Proceedings*, INDUS. SOLIDARITY, Mar. 12, 1923, at 1. The “courageous liberal” was one Fanny Bixby-Spencer, who provided bonds on the defendants’ behalf in the amount of \$14,500. *Id.*

⁴⁰⁵ *Two Are Acquitted in California Cases*, INDUS. SOLIDARITY, Nov. 5, 1921, at 2.

⁴⁰⁶ *California Legion Mob Exiles Centralia Man*, INDUS. SOLIDARITY, Apr. 3, 1922, at 5; *Elmer Smith Will Defy Mob and Handle Eureka Defense*, INDUS. WORKER, Apr. 22, 1922, at 1.

⁴⁰⁷ See, e.g., *Courageous Wobs Down Ole Hanson*, INDUS. WORKER, Dec. 3, 1921, at 1 (reporting that prosecutors had been taking advantage of self-represented defendants); *C.S. Trial in Los Angeles*, *supra* note 385 (describing the self-representation by thirty defendants in two cases); *Defendants at Oakland Convicted*, INDUS. SOLIDARITY, Nov. 5, 1921, at 1 (reporting conviction of six self-represented defendants); *Los Angeles Indictment Dropped*, INDUS. WORKER, May 31, 1924, at 1 (describing the self-representation of defendants in two other cases); *Perjury Convicts Eight Wobs in Los Angeles*, INDUS. WORKER, Mar. 21, 1923, at 1; “Red” Suspects, Facing Court, Spurns [sic] Counsel, L.A. TIMES, Nov. 11, 1921, at 116; *Return Conviction Against Wobblies*, INDUS. WORKER, Dec. 17, 1921, at 1.

⁴⁰⁸ *Ten Witnesses Start Sentence*, INDUS. SOLIDARITY, Aug. 25, 1923, at 6; *Witnesses on Trial Again at Sacramento*, INDUS. SOLIDARITY, Oct. 28, 1922, at 1; *Witnesses’ Trials Again Postponed*, INDUS. SOLIDARITY, Dec. 23, 1922, at 5.

for each count.⁴⁰⁹ Of the 164 defendants convicted in that state in the late 1910s and early 1920s, the vast majority—128—was sentenced to prison.⁴¹⁰ Most of those convicted seem to have received the full indeterminate range. Rarely, though, some unfortunate defendants were sentenced to consecutive sentences of this type.⁴¹¹ On the other hand, a few defendants were convicted and then simply told to get out town.⁴¹² On several occasions, defendants receiving their sentences reacted with a combination of pride in their radicalism and contempt for the legal process. On one such occasion in 1923, twenty-seven defendants who had just been convicted by a Los Angeles jury “indignantly refused suspended sentence[s] which [were] offered them if they would renounce the principles of the organization.”⁴¹³ A similar episode unfolded in Los Angeles a couple of years earlier when a group of defendants who were offered probation if they pleaded guilty declined outright, telling the trial judge to “do your worst.”⁴¹⁴ In Sacramento in 1923, a group of ten defendants who had just been convicted defiantly sang the “Workers’ Marseillaise” as they were led away.⁴¹⁵ Before doing so, one told the judge to “go ahead and enjoy yourself”; another took the opportunity to unmask the judge’s politics and bias:

What I say is this, that you and your hired jackals of the law have scored a temporary victory, but although you imprison our bodies, our spirits go marching on, to carry the message of the new dawn for a new justice. You and your kind have killed justice, but we who are suffering in jail are creating a new one. . . .

⁴⁰⁹ Act of Apr. 30, 1919, ch. 188, 1919 Cal. Stat. 281.

⁴¹⁰ Whitten, *supra* note 18, at 52-53. Many of those not sentenced to prison received probation or a suspended sentence; others were out on bail when their sentences were commuted or their convictions overturned. *Id.* at 53.

⁴¹¹ See, e.g., *Defense Not Afraid as Five I.W.W. Are Sentenced 28 Years*, INDUS. WORKER, Mar. 28, 1923, at 1.

⁴¹² *Northwest Defense Bulletin*, INDUS. WORKER, Mar. 19, 1920, at 1 (reporting that two Wobblies were convicted of criminal syndicalism in Eureka, likely under a local ordinance, and ordered out of the county) [hereinafter Mar. 19 *Bulletin*].

⁴¹³ *Twenty-Seven Los Angeles Men Convicted; Transport Workers Call Protest*, INDUS. WORKER, July 18, 1923, at 1; see also *Reform School for Youthful Wobbly*, L.A. TIMES, July 3, 1922, at 13 (reporting that a nineteen-year-old convicted of criminal syndicalism was being sent to reform school after refusing to renounce the IWW).

⁴¹⁴ *Veteran to Be Tried on Syndicalism Charge*, INDUS. SOLIDARITY, Oct. 15, 1921, at 3.

⁴¹⁵ *Ten I.W.W. Go Singing to Cells After Sacramento Conviction*, INDUS. SOLIDARITY, Feb. 3, 1923, at 1 [hereinafter *Ten I.W.W. Go Singing*]. In 1923, a group of twenty-seven Wobblies being taken to San Quentin sang “L’Internationale.” *Wobblies at San Quentin*, L.A. TIMES, July 13, 1923, at III.

...
... We came here for justice, and you meet us with the pariahs of our own people, to prove that we are criminals.⁴¹⁶

All ten defendants were sentenced to one to fourteen years in prison.⁴¹⁷

Interestingly, actual criminal prosecution was not the only means by which California would enforce its criminal syndicalism law. In August 1923, Judge Charles O. Busick of the Supreme Court of Sacramento County issued a temporary injunction specifically restraining the IWW and various named members from continuing to commit criminal syndicalism.⁴¹⁸ Busick was notoriously hostile to the IWW and the injunction was predictably written in a way that identified criminal syndicalism with simple membership in the organization.⁴¹⁹ This device, which was also used in several other jurisdictions, would lead to the arrest of a number of Wobblies on contempt charges.⁴²⁰

By 1923, the IWW was beginning to speculate openly that California's enforcement campaign was petering out,⁴²¹ and that this reflected the combined benefits of active legal defense and vigorous protest activity.⁴²² In the same text in which the union's writers spoke with some evident weariness of the "constant battle" around these prosecutions, they anticipated a victory over the authorities.⁴²³ Nevertheless, the use of these laws against the IWW remained quite intense through the summer of 1924.⁴²⁴ In Au-

⁴¹⁶ *Ten I.W.W. Go Singing*, *supra* note 415, at 1.

⁴¹⁷ *Id.*

⁴¹⁸ Whitten, *supra* note 18, at 58-60.

⁴¹⁹ See CHAFEE, *supra* note 16, at 326-42; Whitten, *supra* note 18, at 58-60, 66; *see also Ex parte Wood*, 227 P. 908 (Cal. 1924).

⁴²⁰ See, e.g., *Fifteen Wobs Released*, INDUS. SOLIDARITY, Oct. 29, 1924, at 1 (describing arrests of several IWW members for violating Busick's injunction).

⁴²¹ *Dismiss C.S. Case Against 19 I.W.W. in L.A. Courtroom*, INDUS. WORKER, Oct. 27, 1923, at 1.

⁴²² See, e.g., *Last Round Near in Calif. Fight for Right to Exist*, INDUS. SOLIDARITY, Apr. 19, 1924, at 6.

⁴²³ *One Constant Battle in Calif. Against Beastly Persecution*, INDUS. SOLIDARITY, Apr. 26, 1924, at 12.

⁴²⁴ This was especially true on the Los Angeles waterfront. See, e.g., *Arrests at Harbor End "Red" Rally*, L.A. TIMES, July 7, 1924, at A1; *Foil Plans for Strike at Harbor*, L.A. TIMES, Apr. 12, 1924, at A7; *Harbor Police Capture I.W.W. Labor Agitator*, L.A. TIMES, Mar. 17, 1924, at 8; *I.W.W. Open Meeting Is Put to Rout*, L.A. TIMES, Feb. 15, 1924, at A1 (describing raided Los Angeles Harbor IWW meeting); *Port Employee Held on Charge of Syndicalism*, L.A. TIMES, Mar. 28, 1924, at 17; *Port Police Take Four as I.W.W.*, L.A. TIMES, Feb. 10, 1924, at C12; *"Wobblies" Open Drive at Harbor*, L.A. TIMES, Feb. 17, 1924, at 1.

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gust 1923, one of the union's newspapers matter-of-factly described forty-three members awaiting trial for criminal syndicalism in various venues throughout the state.⁴²⁵ As of October of that year, there were at least ninety Wobblies in California convicted and in prison or jail, and forty-five others awaiting trial.⁴²⁶ There were many more prosecutions in the first part of 1924.⁴²⁷ Beginning in the latter part of 1924, though, new prosecutions did decline and an increasing number of pending cases were dismissed or dropped.⁴²⁸ However, although prosecutions did finally wind down at the end of that year, much damage had already been done to the organization and to the men and women affiliated with it. By the middle of 1925, California prisons still held more than seventy Wobblies.⁴²⁹ One was Tom Connors, who a few years earlier had been the secretary of the union's California General Defense Committee.⁴³⁰

B. *The Pacific Northwest*

If any region came close to equaling California in criminal syndicalism prosecution, it was the Pacific Northwest, which includes Washington, Oregon, and Idaho. If prosecutions in these states

⁴²⁵ *Status of California Cases*, INDUS. WORKER, Aug. 4, 1923, at 2.

⁴²⁶ *Criminal Syndicalism Law Goes by the Board Now Admitted Failure*, INDUS. WORKER, July 21, 1923, at 1; *One to Fourteen Years of Torture*, INDUS. WORKER, Nov. 28, 1923, at 2; *These Are Facts About California*, INDUS. SOLIDARITY, Oct. 27, 1923, at 5.

⁴²⁷ See, e.g., *California Cases*, INDUS. WORKER, Mar. 25, 1924, at 1 (describing twenty-seven members awaiting trial on criminal syndicalism charges in various cases); *California Cases*, INDUS. WORKER, Jan. 5, 1924, at 2 (describing twenty-three members awaiting trial on criminal syndicalism charges in various cases) [hereinafter Jan. 5 *California Cases*]; *California Cases Still Aggravating*, supra note 386; *California Frame-Up Artists Try Again to Get Connors*, INDUS. SOLIDARITY, May 27, 1925, at 1 [hereinafter *California Frame-Up Artists*]; *Rush Trial of Three in Sacramento*, INDUS. WORKER, Jan. 2, 1924, at 1; *Sacramento Still Forces Convictions*, INDUS. WORKER, Jan. 2, 1924, at 1; *Sacramento Trial Set for November 3*, INDUS. WORKER, July 19, 1924, at 2 (describing fourteen members awaiting trial in Sacramento); *16 I.W.W. Members Are Indicted by the Grand Jury of Sacramento*, INDUS. WORKER, Mar. 5, 1924, at 1.

⁴²⁸ See, e.g., *Five Wob Cases Dismissed*, INDUS. SOLIDARITY, Sept. 10, 1924, at 1; *Imperial Drops C.S. in Dark California*, INDUS. WORKER, Oct. 15, 1924, at 1; *One More County Quashes C.S.[.] Law*, INDUS. WORKER, Sept. 17, 1924, at 1.

⁴²⁹ *Eureka Victims*, supra note 392; *Our Imprisoned Fellow Workers*, INDUS. UNIONIST, May 2, 1925, at 4; *Xmas Presents for I.W.W. Prisoners*, INDUS. WORKER, Dec. 19, 1925, at 2; see also *Ignorant Native Defends C.S. Law*, INDUS. UNIONIST, Apr. 11, 1925, at 2.

⁴³⁰ *California Frame-Up Artists*, supra note 427; *Connors Is 40950; Prison Term Starts*, INDUS. SOLIDARITY, June 24, 1925, at 5; *Tom Connors, Defense Secretary, in Jail at Sacramento*, INDUS. SOLIDARITY, Apr. 21, 1923, at 5.

did not quite match California's in scale, they certainly matched California's in intensity. Between 1917 and 1922 in particular, Pacific Northwest states arrested and prosecuted hundreds of men (and a few women) on charges of criminal syndicalism. By the mid-1920s, their prisons, like California's, held scores of Wobblies.

These states were very much like California, too, in how they enforced their criminal syndicalism laws. Enforcement was driven by both the ideology of antiradical reaction and the interests of local business elites, and it was geared overwhelmingly to the arrest of people affiliated with the IWW who were, like their comrades in California, typically snatched off street corners and roadsides, swept up in raids, ambushed as witnesses at trials, or booked on criminal syndicalism charges after being initially arrested on lesser charges. As in California, too, those unfortunate enough to be formally charged and brought to trial faced the difficult task of overcoming a de facto presumption, backed by mountains of extrinsic (if fundamentally unreliable) evidence and engrained bias, that the IWW was actually dedicated to means of social change criminalized by these statutes and that anyone who actually belonged to such an organization therefore must be thoroughly guilty of the charge.

In the summer of 1917, Idaho authorities, armed with that state's new criminal syndicalism law, began rounding up Wobblies and other "idlers" by the hundreds and either driving them out of town or penning them up in parks and on fairgrounds to await their fate.⁴³¹ Most victims of this initial roundup were eventually deported from the jurisdiction or released after promising never to return.⁴³² A handful, though, were charged and tried on criminal syndicalism charges.⁴³³ Two of these defendants, J.J. McMurphy, an IWW organizer, and J. Otis Ellis, a supporter of the organization, were convicted and sentenced to prison.⁴³⁴ McMurphy's particular offense was giving a speech promoting the IWW and possessing IWW literature; Ellis was merely alleged on hearsay evidence to have expressed sympathy for the IWW and its tactics.⁴³⁵ This was only the beginning. In early 1920, the IWW published a list of all prisoners held nation-

⁴³¹ Sims, *supra* note 18, at 516.

⁴³² *Id.* at 517-18.

⁴³³ *Id.*

⁴³⁴ *Id.* at 516-18.

⁴³⁵ *Id.* at 519. On the conviction of these two men, see also *Criminal Syndicalism*

wide on a variety of charges.⁴³⁶ Of the 679 individuals described on the list, forty-three had been charged with criminal syndicalism in Idaho, and most of these defendants had already been sentenced to prison.⁴³⁷ From 1917 through the end of the Great War, Idaho authorities arrested hundreds of other Wobblies (for the most part) for criminal syndicalism; around 200 were eventually tried and dozens were convicted and sent to prison.⁴³⁸

Although initially drawing on pro-war hysteria, the use of Idaho's law against Wobblies continued for quite a time after the Armistice. In Idaho, as elsewhere, warmongering metastasized easily and quickly into pure and simple antiradicalism. There too, civic groups played their usual role. In 1919, the state's newly created "constabulary," aided by American Legionnaires and "special agents" charged with gathering evidence against Wobblies, undertook to prosecute every one of the union's members who dared remain in the state.⁴³⁹ Their mission was to gather evidence of violation of the act that went beyond simple membership, which the state's attorney general had anomalously decided was, alone, an insufficient basis for conviction.⁴⁴⁰ While the apparent conclusion of Idaho officials in 1920 that they had largely accomplished their mission of running the IWW out of the state was perhaps a bit too optimistic, the authorities had certainly gone a long way toward achieving that goal.⁴⁴¹ Prosecutors in Idaho did try in 1923 to prosecute Wobblies under the criminal syndicalism statute merely on the basis of their advocating strikes or slowdowns.⁴⁴² But by 1920, the bulk of enforcement activity

Cases, INDUS. WORKER, Jan. 12, 1918, at 8; and *What Is Criminal Syndicalism?*, INDUS. WORKER, Nov. 10, 1917 (page number unavailable).

⁴³⁶ *The Gruesome Story of American Terrorism: Lest We Forget*, ONE BIG UNION MONTHLY, Mar. 1920, at 5, 5-21.

⁴³⁷ *Id.*

⁴³⁸ Sims, *supra* note 18 at 521-22. That relatively few defendants were ultimately convicted apparently reflected the qualms that many Idaho jurors had about sending people to prison on evidence, often in the form of hearsay, that consisted only of proof of their ideas or utterances. *Id.* at 518; *see also* *State v. Dingman*, 219 P. 760, 762 (Idaho 1919) (noting that at trial, jury convicted only one of twenty-three defendants).

⁴³⁹ Sims, *supra* note 18, at 524; *see also* *Guarding the Jail*, L.A. TIMES, Mar. 17, 1918, at 11 (describing incident where armed citizens patrolled Idaho streets after a sheriff was assaulted by IWW members).

⁴⁴⁰ Sims, *supra* note 18, at 524.

⁴⁴¹ *Id.* On other acts of enforcement in Idaho, *see also* *Defense Witnesses Driven Out of Town*, INDUS. WORKER, Apr. 20, 1918, at 1.

⁴⁴² *The Idaho Cases*, INDUS. SOLIDARITY, Feb. 9, 1924, at 2. The prosecutions were eventually halted by the state supreme court, which ruled that the statute did

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in the region had shifted to Washington and Oregon.

Within only days of coming into effect in February 1919, Oregon's law was used to arrest several people in Portland.⁴⁴³ In April 1920, the IWW published a series of accounts of arrests in the region showing that in Portland alone from November 1919 through January 1920, twenty-nine of its members were charged with (and some already convicted of) criminal syndicalism.⁴⁴⁴ Many of these arrests, including those resulting in the November indictment of twenty-two men in Portland, were clearly retribution for a riotous melee on Armistice Day in Centralia, Washington, where four members of the American Legion and one Wobbly were killed during the Legionnaires' attempt to storm the Wobblies' union hall.⁴⁴⁵ These arrests also reflected raw class conflict between the IWW and the timber industry, rooted in the former's relentless organizing efforts and willingness to resort to strikes to advance this campaign and back its bargaining demands, and in the latter's ability to influence the enforcement of these laws.⁴⁴⁶

When one of the Portland defendants, Joseph Laundry, was brought to trial in early 1920, he faced the usual professional witness: a twenty-six-year-old former Wobbly, A.E. Allen, who had earlier been charged in Washington with criminal syndicalism but decided to turn state's evidence rather than face prosecution.⁴⁴⁷ Despite the efforts of union attorney George Vanderveer to first discredit Allen's improbable claims of having both engaged in serious acts of sabotage and advocated this practice on the union's behalf, and to further contextualize the volumes of IWW literature purported by the state to demonstrate the organization's commitment to such means, Laundry was convicted and

not contemplate such a broad application. *Ex parte Moore*, 224 P. 662, 665 (Idaho 1924).

⁴⁴³ GUNNS, *supra* note 296, at 42.

⁴⁴⁴ *The Gruesome Story of American Terrorism*, ONE BIG UNION MONTHLY, Apr. 1920, at 12, 12, 14. This account also listed charges and convictions in several other parts of the state, including La Grande, Condon, and Tillamook. *Id.*

⁴⁴⁵ In fact, these twenty-two who were arrested were said to be involved in defending the union hall from the Legionnaires' attack. *Jury in Portland Indicts 22 I.W.W.*, INDUS. WORKER, Nov. 29, 1919, at 4; *see also Posse Hunts Down I.W.W.*, L.A. TIMES, Nov. 18, 1919, at 11.

⁴⁴⁶ On IWW arrests in this context, see, for example, *Indict 22 Portland I.W.W. for Criminal Syndicalism*, N.Y. TIMES, Nov. 21, 1919, at 17; and *Legal Persecution Starts in the West*, *supra* note 367.

⁴⁴⁷ *Professional Witness Used in Portland Trial*, INDUS. WORKER, Apr. 2, 1920, at 1.

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sentenced to two years in prison.⁴⁴⁸

Laundy's trial and conviction were quickly followed by others. A list of pending cases in the Northwest published by the union on July 10, 1920, showed that besides Laundy's there had already been a number of convictions in Oregon, and that thirty-one members still faced indictments.⁴⁴⁹ While most of these defendants were charged in Portland, that city was not the exclusive venue of criminal syndicalism prosecutions in Oregon. Wobblies were prosecuted in Tillamook, Condon, and Klamath Falls as well.⁴⁵⁰ Within two years, almost 200 people had been arrested and formally charged under that state's law, and that was not quite the end of it.⁴⁵¹ In February 1923, two IWW organizers were arrested in North Bend, Oregon, while handing out literature advertising a union meeting.⁴⁵²

Enforcement activity in Oregon and Idaho was actually fairly mild in comparison to the situation in Washington. In January 1919, authorities raided the IWW defense office in Spokane, arresting six members and charging five of them with criminal syndicalism.⁴⁵³ In August of that year, the union reported via telegram that "many arrests" were being made in the Spokane area.⁴⁵⁴ By November, the union reported that in Spokane, "[f]or the past week raid after raid on rooming houses, hotel[s] and pool rooms have taken place," resulting in about 120 arrests and fifty-three members being charged with criminal syndicalism.⁴⁵⁵ In mid-November, these fifty-three Wobblies were convicted on municipal charges of criminal syndicalism, sentenced to thirty days in jail, and given a fine of \$100.⁴⁵⁶

⁴⁴⁸ *Fellow Worker J. Laundy Is Found Guilty in Portland*, INDUS. WORKER, Apr. 9, 1920, at 1; *Professional Witness Used in Portland Trial*, *supra* note 447; *see also First of Portland's I.W.W. Trials Begun*, L.A. TIMES, Mar. 23, 1920, at 11.

⁴⁴⁹ *Northwest Defense Bulletin*, INDUS. WORKER, July 10, 1920, at 1.

⁴⁵⁰ *Klamath Falls Cases Put Off*, INDUS. WORKER, Nov. 18, 1922, at 1; *Northwest Defense Bulletin*, INDUS. WORKER, June 5, 1920, at 1 (Tillamook case) [hereinafter *June 5 Bulletin*]; *Northwest Defense Bulletin*, INDUS. WORKER, Feb. 14, 1920, at 1 (Condon case) [hereinafter *Feb. 14 Bulletin*].

⁴⁵¹ GUNNS, *supra* note 296, at 42.

⁴⁵² *Two I.W.W. Delegates Arrested in North Bend, Ore., Charged with C.S.*, INDUS. WORKER, Feb. 21, 1923, at 1. Between May 1920 and 1930, this was the only attempt at prosecuting Wobblies for criminal syndicalism in Oregon. 2 Dowell, *supra* note 268, at 892.

⁴⁵³ *Spokane Oppression*, NEW SOLIDARITY, Feb. 8, 1919, at 4.

⁴⁵⁴ *Many Arrests in Spokane District*, INDUS. WORKER, Aug. 23, 1919, at 1.

⁴⁵⁵ *Vengeance of the Iron Heel in Washington*, NEW SOLIDARITY, Nov. 29, 1919, at 1.

⁴⁵⁶ *Convict 53 I.W.W. of Syndicalism*, INDUS. WORKER, Nov. 29, 1919, at 4. Al-

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By that time, a statewide campaign was underway to charge Wobblies with criminal syndicalism. On November 17, thirty-six members were arrested on criminal syndicalism charges (of the usual state felony sort) in Tacoma.⁴⁵⁷ By mid-February, the weekly "Defense Bulletin" in the union's *Industrial Worker* newspaper was reporting dozens of charges and convictions statewide, which, its editors thought, reflected a concerted campaign by state prosecutors to overwhelm the union with simultaneous prosecutions.⁴⁵⁸ By the end of that month, the *Industrial Worker* listed fifty-six defendants convicted in five different Washington cities and twenty-three defendants awaiting trial in five other cities.⁴⁵⁹ The arrests and prosecutions continued through the spring.⁴⁶⁰ Indeed, in November 1919, a group of attorneys in Spokane, Tacoma, and Seattle reported that five hundred Wobblies were then under arrest in those areas.⁴⁶¹

During the last few months of 1919 and the first part of 1920 alone, authorities throughout Washington formally charged over

though one authority suggests that Spokane was the only city in the country to enact a municipal criminal syndicalism statute, Dowell's dissertation, citing work by Roger Baldwin, identifies twenty cases where such ordinances were enacted during this period in Oregon alone. *Compare* 1 Dowell, *supra* note 268, at 221, with Tyler, *supra* note 8, at 137. Duluth, Montana, however, defined vagrancy in such a fashion as to encompass the traditional elements of criminal syndicalism. GOLDSTEIN, *supra* note 8, at 128.

⁴⁵⁷ *I.W.W. Plead Not Guilty to Charge of Criminal Acts*, INDUS. WORKER, NOV. 29, 1919, at 4; *see also Reds Overflow Tacoma's Jail*, L.A. TIMES, Jan. 3, 1920, at 13 (describing numerous arrests and convictions in both Tacoma and elsewhere on the Pacific Coast); *Tacoma Syndicalism Cases Up for Trial*, L.A. TIMES, Jan. 24, 1920, at 12.

⁴⁵⁸ On the rising tide of prosecutions, see Feb. 14 *Bulletin*, *supra* note 450; *Northwest Defense Bulletin*, INDUS. WORKER, Feb. 7, 1920, at 1; and *Northwest District Defence [sic] Bulletin*, INDUS. WORKER, Dec. 20, 1919, at 4. On the union's interpretation of these prosecutions, see *Present Status of the I.W.W. Persecutions*, INDUS. WORKER, Jan. 24, 1920, at 1.

⁴⁵⁹ *Northwest Defense Bulletin*, INDUS. WORKER, Feb. 28, 1920, at 1; *see also Jury Finds 36 I.W.W.'s Guilty of Syndicalism*, CHI. DAILY TRIB., Feb. 2, 1920, at 1.

⁴⁶⁰ *Eight Are Guilty of Criminal Syndicalism*, L.A. TIMES, Feb. 28, 1920, at 114; *N.W. Defense Bulletin*, INDUS. WORKER, May 8, 1920, at 1 [hereinafter May 8 *Bulletin*]; *N.W. Defense Bulletin*, INDUS. WORKER, May 1, 1920, at 1; *N.W. Defense Bulletin*, INDUS. WORKER, Apr. 23, 1920, at 1; *N.W. Defense Bulletin*, INDUS. WORKER, Apr. 16, 1920, at 1; *N.W. Defense Bulletin*, INDUS. WORKER, Apr. 9, 1920, at 1; *Northwest Defense Bulletin*, INDUS. WORKER, Apr. 2, 1920, at 1; *Northwest Defense Bulletin*, INDUS. WORKER, Mar. 26, 1920, at 1; *Mar. 19 Bulletin*, *supra* note 412; *Northwest Defense Bulletin*, INDUS. WORKER, Mar. 6, 1920, at 1.

⁴⁶¹ 2 Dowell, *supra* note 268, at 1055.

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150 Wobblies with criminal syndicalism.⁴⁶² Eighty-six of these people would eventually be convicted and sentenced to terms from thirty days in jail (those convicted at the municipal level) to twenty years in prison.⁴⁶³ An unknown number were arrested throughout the state and never charged. Their arrests reflected a convergence of tension surrounding particular episodes of unrest and protest, including the Centralia affair and ongoing strike activity, with raw class conflict between the IWW and the timber industry.⁴⁶⁴

Through the summer months of 1920, there were scores of additional prosecutions, many of which culminated in convictions and prison sentences. In June alone, the union reported sixteen separate convictions in six different proceedings.⁴⁶⁵ By January 1921, some sixty-four Wobblies were in Washington prisons, and others were being arrested or awaiting trial.⁴⁶⁶ Prosecutions in all of these jurisdictions ebbed quickly after 1921,⁴⁶⁷ but they did not end completely; Wobblies were still being prosecuted in Washington in 1923.⁴⁶⁸

The dynamics of enforcement in Washington, Oregon, and Idaho were essentially identical to those in California. Defendants were arrested and charged for their affiliation with the IWW.⁴⁶⁹ When brought to trial, they were prosecuted under a theory that the IWW was dedicated to the use of sabotage, vio-

⁴⁶² See *The Gruesome Story of American Terrorism*, *supra* note 444 (listing arrested Wobblies in Pacific Northwest).

⁴⁶³ GUNNS, *supra* note 296, at 42.

⁴⁶⁴ On IWW arrests in this context, see, for example, *Indict 22 Portland I.W.W. for Criminal Syndicalism*, *supra* note 446, and *Legal Persecution Starts in the West*, *supra* note 367.

⁴⁶⁵ *Northwest Defense Bulletin*, INDUS. WORKER, June 26, 1920, at 1; *Northwest Defense Bulletin*, INDUS. WORKER, June 19, 1920, at 1; *Northwest Defense Bulletin*, INDUS. WORKER, June 12, 1920, at 1 [hereinafter *June 12 Bulletin*]; *June 5 Bulletin*, *supra* note 450.

⁴⁶⁶ *Iron Heel in Northwest; Status of Cases to Date*, INDUS. WORKER, Jan. 15, 1921, at 1; see also *A.S. Embree Sentenced in Anti-Labor Court*, SOLIDARITY, June 4, 1921, at 3; *Four I.W.W. Held on Syndicalism Charge*, INDUS. SOLIDARITY, Oct. 15, 1921, at 4; *Police Stop Amnesty Meeting in Spokane*, SOLIDARITY, Apr. 13, 1921, at 1.

⁴⁶⁷ GUNNS, *supra* note 296, at 55.

⁴⁶⁸ See, e.g., *I.W.W. Wins in Spokane Trial*, INDUS. WORKER, Jan. 20, 1923, at 1.

⁴⁶⁹ In early 1919, the IWW published an interesting document relative to this practice: a letter purportedly from the Seattle district attorney to the chief of police advising the latter to "have your men at the time of arrest inquire from the defendant if he 'believes in and advocates' the doctrine of the I.W.W." *Beliefs Prohibited*, NEW SOLIDARITY, Mar. 29, 1919, at 1. This, the author continued, was important "as upon trial I can then connect the defendant with everything sent out by the Central Office of the I.W.W." *Id.*

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lence, terrorism, or some other criminal means to effect political or industrial change and that a defendant was therefore guilty of syndicalism simply by virtue of his or her membership in the organization. As in California, defendants were not inclined to deny their membership, often leaving prosecutors with the easier task of piling on evidence so as to make the criminality of the IWW seem too obvious to be denied by juries. Typically, too, this evidence took the form of hearsay, as by the admission of books, pamphlets, songs, and other expressions of IWW doctrine and propaganda.⁴⁷⁰ Professional witnesses were used in almost every case.⁴⁷¹ Another similarity to California was the attempt by at least one Washington court to ban the IWW preemptively by injunction.⁴⁷²

Defendants' lawyers also had a hard time in this region; it was in Washington in 1925 that attorney Elmer Smith was eventually disbarred for supposedly being a criminal syndicalist himself.⁴⁷³ Nevertheless, the IWW's lawyers did what they could for their clients, arguing that the IWW and its members were not in fact committed to using prohibited means to bring about social change.⁴⁷⁴ On more than a few occasions, these strategies bore fruit, with defendants gaining either acquittals⁴⁷⁵ or (with some frequency) hung juries.⁴⁷⁶ One particularly notable case featured

⁴⁷⁰ GUNNS, *supra* note 296, at 45-49. On the nature of these prosecutions and use of such evidence at trial, see also *State v. Laundry*, 204 P. 958 (Or. 1922); *State v. Passila*, 201 P. 295 (Wash. 1921); *State v. Hemhelter*, 196 P. 581 (Wash. 1921); and *State v. Hennessy*, 195 P. 211 (Wash. 1921). For a description of one such trial, see *Verdict of Labor Jury Stands "Not Guilty,"* INDUS. WORKER, Nov. 27, 1920, at 1; see also *Jury Tampering in Seattle I.W.W. Trial*, INDUS. WORKER, Sept. 18, 1920, at 1.

⁴⁷¹ As in California, these men often readily admitted being paid \$20 per day and witness fees for their services. 2 Dowell, *supra* note 268, at 1059.

⁴⁷² See *Judge Forbids I.W.W. to Exist*, NEW SOLIDARITY, Dec. 20, 1919, at 1.

⁴⁷³ *In re Smith*, 233 P. 288 (Wash. 1925); *Centralia Has Free Speech Once More!*, INDUS. WORKER, Apr. 7, 1923, at 1; *Lumber Lords Disbar Elmer Smith*, INDUS. SOLIDARITY, Mar. 4, 1925, at 1; see also *Elmer Smith Arrested in Centralia*, INDUS. WORKER, Mar. 24, 1923, at 1 (describing separate arrest of attorney Elmer Smith for public speaking). Smith had been tried for (and acquitted of) murder in Centralia for the death of a vigilante on Armistice Day 1919, a matter to which he had no real connection at all. See GUNNS, *supra* note 296, at 45.

⁴⁷⁴ GUNNS, *supra* note 296, at 46-49; see also *State v. McLennen*, 200 P. 319 (Wash. 1921) (finding prejudicial error in jury instruction defining the act of "sabotage" as per se prohibited by state laws).

⁴⁷⁵ See, e.g., *I.W.W. Wins in Spokane Trial*, *supra* note 468. "Not Guilty," NEW SOLIDARITY, Oct. 25, 1919, at 8; *Walter Smith Is Acquitted at Everett; Not Guilty of Criminal Syndicalism*, INDUS. WORKER, Dec. 11, 1920, at 1; *Wobs Freed; Jury Acquits*, INDUS. WORKER, Sept. 24, 1921, at 1.

⁴⁷⁶ On several occasions, defendants were retried multiple times after juries failed

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defendant William Moudy, a delegate arrested in Seattle in 1920. Moudy took the stand and boldly admitted his membership in and work for the IWW, and stridently defended the organization's aims. The jury took nearly eleven hours to acquit him.⁴⁷⁷ Such victories notwithstanding, scores of Wobblies were convicted and sent to prison on such charges.⁴⁷⁸

C. *The Plains and Midwest*

Criminal syndicalism laws were also rather actively enforced in several Midwest and Plains states. This is not surprising given the success the IWW enjoyed in the late 1910s organizing migratory harvest workers, timber workers, and miners in these states. Like in California and the Pacific Northwest, arrests and formal charges in this region were invariably premised on membership or organizing activity; with only a few exceptions, so too was conviction.

Some of the more notable cases occurred in Kansas, where authorities had long brought to bear every means at their disposal to arrest IWW members and organizers, especially during the harvest season and its lead-up.⁴⁷⁹ On July 8, 1920, Wobbly Harry Breen was arrested in Waukeeneey upon his admission to an undercover volunteer policeman that he belonged to the IWW.⁴⁸⁰ Breen was convicted partly on the basis of organizing materials found in his possession and sentenced to thirty years in prison.⁴⁸¹ On August 14, 1920, a former member of the IWW's executive board was convicted of criminal syndicalism in El Dorado.⁴⁸² Shortly thereafter, another Wobbly was charged in Marion.⁴⁸³ Later that fall, one member was charged with criminal syndical-

to agree on a verdict. *See, e.g.*, June 12 *Bulletin*, *supra* note 465 (describing two defendants in Spokane, Washington, being retried four times); June 5 *Bulletin*, *supra* note 450 (describing five defendants in Yakima, Washington, being scheduled for a retrial and a defendant in Tillamook, Oregon, being retried); May 8 *Bulletin*, *supra* note 460 (describing a defendant in Pasco, Washington, being scheduled for retrial); *To Try I.W.W. Fourth Time*, L.A. TIMES, Apr. 15, 1920, at I4.

⁴⁷⁷ *Moudy Acquitted of Criminal Syndicalism*, INDUS. WORKER, July 3, 1920, at 1.

⁴⁷⁸ In Washington, there were still thirteen Wobblies in prison as late as 1925. *The Roll Call: Christmas, 1925*, INDUS. WORKER, Dec. 26, 1925, at 1.

⁴⁷⁹ *See* Koppes, *supra* note 217, at 338-44.

⁴⁸⁰ *Kansas Forced to Free I.W.W.*, INDUS. WORKER, Oct. 28, 1922, at 2.

⁴⁸¹ *Id.*

⁴⁸² William D. Haywood, *General Defense*, ONE BIG UNION MONTHLY, Sept. 1920, at 58, 58.

⁴⁸³ John Martin, *Defense News*, ONE BIG UNION MONTHLY, Nov. 1920, at 54, 54.

ism in Lyons⁴⁸⁴ and two others (of a group of fourteen arrested) scheduled for trial in Kansas City.⁴⁸⁵

In one particularly notable case that was eventually reversed by the United States Supreme Court, a defendant named Harold Fiske was arrested on June 2, 1923.⁴⁸⁶ The marshal who arrested him suspected he was an IWW organizer, searched him, and discovered IWW documents and literature.⁴⁸⁷ On the basis of this evidence and his alleged admission to the sheriff that he had taken two applications for membership, Fiske was charged with criminal syndicalism.⁴⁸⁸ The evidence introduced at trial against Fiske consisted primarily of the following: membership applications, membership cards, and accounting records found in Fiske's possession; the bylaws and other records pertaining to the Agricultural Workers' Industrial Union No. 110, an IWW affiliate; the preamble of the IWW's constitution; and a copy of an IWW song, which Fiske was alleged to have sung while in jail.⁴⁸⁹ For his part, Fiske defended the IWW's program of social revolution and admitted his role as an organizer, but denied that the IWW was committed to unlawful means of change and that he had recruited workers in the county in which he was charged.⁴⁹⁰ Fiske was convicted and sentenced to one to ten years in prison.⁴⁹¹

The reported cases alone reveal a number of other Kansas prosecutions besides these. In some it is not possible to tell exactly what circumstances caused defendants to be arrested and charged.⁴⁹² In every case in which the circumstances are clear, though, it is obvious that defendants were charged with criminal syndicalism purely on the basis of their membership in, or recruitment activity on behalf of, the IWW.⁴⁹³ Such prosecutions

⁴⁸⁴ *The Defense Situation*, ONE BIG UNION MONTHLY, Dec. 1920, at 60, 60.

⁴⁸⁵ The Kansas City defendants were apparently participants in a speaking engagement concerning the issue of political prisoners. *Id.*

⁴⁸⁶ State v. Fiske, 230 P. 88, 89 (Kan. 1924).

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 89-90.

⁴⁹⁰ *Id.* at 90.

⁴⁹¹ *Id.* at 88. *But see Fiske Freed by Supreme Court*, INDUS. WORKER, May 28, 1927, at 1 (reporting that the U.S. Supreme Court overturned the Kansas decision).

⁴⁹² See, e.g., State v. Murphy, 212 P. 654, 654 (Kan. 1923) (reversing denial of defendant's motion to quash information for failure to state an offense).

⁴⁹³ See, e.g., *Ex parte* Clancy, 210 P. 487, 487 (Kan. 1922) (an IWW defendant charged with criminal syndicalism and vagrancy and convicted of the latter); State v. Breen, 205 P. 632, 632, 634-35 (Kan. 1922) (an IWW defendant charged with criminal syndicalism); State v. Berquist, 199 P. 101 (Kan. 1921) (same); *In re* Danton, 195

were still not enough, however, for the Kansas Attorney General, who in 1920 sought to enjoin the IWW from violating Kansas' criminal syndicalism statute.⁴⁹⁴

This kind of enforcement occurred in other parts of the region as well. In November 1919, for example, the governor of Nebraska ordered law enforcement officials to "take into custody any member of the I.W.W. who may be found within your jurisdiction"⁴⁹⁵ and to prosecute her or him for criminal syndicalism.⁴⁹⁶ In so doing, he followed the lead of the state attorney general, who had advocated such a campaign the prior summer.⁴⁹⁷ Indeed, even before the governor's proclamation, Scottsbluff authorities had arrested at least sixteen Wobblies, including one who had come to town to check on the fate of the others arrested before him.⁴⁹⁸ Within a few days of the governor's plea, police raided IWW offices in Omaha, arresting more than a dozen.⁴⁹⁹ That same month, in Marion, Iowa, an IWW organizer named Henry Tonn got himself in trouble by attempting to cash an IWW check; this led to his being arrested by the deputy sheriff as "suspicious," taken to jail, and subjected to searches of his person and luggage that produced other IWW documents.⁵⁰⁰ Tonn was then charged with criminal syndicalism, convicted on this evidence, and sentenced to up to three years in prison.⁵⁰¹

P. 981 (Kan. 1921) (same); *see also* State v. Dilgar, 208 P. 620, 620 (Kan. 1922) (IWW defendants challenging charges of escape while being held for criminal syndicalism).

⁴⁹⁴ *See* State *ex rel.* Hopkins v. IWW, 214 P. 617 (Kan. 1923). On this strategy in California, *see* Whitten, *supra* note 18, at 58-60.

⁴⁹⁵ *All Nebraska I.W.W.'s Are Ordered Seized*, N.Y. TIMES, Nov. 14, 1919, at 3.

⁴⁹⁶ *Id.*; *Northwest and West Will Make Red Sweep Clean*, CHI. DAILY TRIB., Nov. 14, 1919, at 3.

⁴⁹⁷ *Nebraska Prepares Terror*, INDUS. WORKER, July 23, 1919, at 4.

⁴⁹⁸ *Cronin Arrested*, NEW SOLIDARITY, Oct. 18, 1919, at 3; *Special Telegram*, NEW SOLIDARITY, Oct. 11, 1919, at 1.

⁴⁹⁹ *Capitalism Run Mad*, ONE BIG UNION MONTHLY, Dec. 1919, at 8, 8.

⁵⁰⁰ State v. Tonn, 191 N.W. 530, 532-33 (Iowa 1923).

⁵⁰¹ State v. Tonn, 180 N.W. 164 (Iowa 1920) (setting out trial court facts and requiring county to pay for transcript for appeal). The Iowa Supreme Court later reversed the trial court's conviction. *Tonn*, 191 N.W. 530; *Iowa High Court Reverses I.W.W. Syndicalism Conviction*, INDUS. SOLIDARITY, Feb. 10, 1923, at 5; "Sabotage" Defined by Iowa Supreme Court as "Destruction of Property," INDUS. WORKER, Feb. 7, 1923, at 2. November 1919 was perhaps the most important month in criminal syndicalism enforcement. Not only were Charlotte Anita Whitney and several other California defendants arrested during this period, but in that same month, authorities in Youngstown, Ohio, charged several union leaders with syndicalism for their role in organizing a strike. *Hold 3 Steel Organizers*, N.Y. TIMES, Nov. 23, 1919, at 17.

While neither Nebraska nor Iowa seemed to have hosted a great number of prosecutions beyond these, in Nebraska, at least, Wobblies were still being arrested on such charges as late as 1922.⁵⁰²

In Minnesota, amid continuing organizing efforts in both timber and small-grain agriculture, authorities lost no time charging Wobblies with criminal syndicalism. On the last day of September 1917, a lumberjack named Jesse J. Dunning, who served as secretary of the IWW local, was arrested in Bemidji.⁵⁰³ Authorities found in Dunning's possession two books, each entitled *Sabotage*.⁵⁰⁴ On this basis, it was Dunning's misfortune to be the first person in history convicted of criminal syndicalism. He was sentenced to two years in prison.⁵⁰⁵

IWW leaders in Minneapolis were charged with criminal syndicalism as they awaited transportation to Chicago to face wartime conspiracy charges.⁵⁰⁶ Authorities were active in Duluth as well. In January 1920, six Wobblies as well as the Workers' Socialist Publishing Company were indicted there for criminal syndicalism.⁵⁰⁷ St. Louis County prosecutors eventually obtained convictions of several of the Wobblies and the publishing company on the predictable grounds that they published and distributed IWW literature.⁵⁰⁸

There was also significant enforcement in Oklahoma, where IWW gains in both agriculture and oil and gas inspired vigorous anti-Wobbly activity. The State arrested its first defendants on June 15, 1919, in Enid, amid a new IWW organizing campaign among harvest workers; the arrestees were four organizers scooped up in a vagrancy dragnet of harvest hands.⁵⁰⁹ The prosecution focused from the outset on Jack Terrell, a thirty-five-year-old with only a fifth grade education who had nonetheless risen

⁵⁰² *The Spirit That Cannot Be Broken*, INDUS. SOLIDARITY, Apr. 29, 1922, at 8.

⁵⁰³ Lee, *supra* note 202, at 74-75.

⁵⁰⁴ *Id.* at 74. The two books, one by Elizabeth Gurley Flynn, the other by Emil Pouget, were the same two named in the Chicago conspiracy indictment of that same summer. *Id.*

⁵⁰⁵ *Id.*; *see also Convicted as Criminal Syndicalist*, INDUS. WORKER, Oct. 6, 1917, at 3.

⁵⁰⁶ The charges, which were probably never formalized, were apparently filed by the landlords who owned the headquarters of the union's agricultural affiliate. GREG HALL, *HARVEST WOBBLIES: THE INDUSTRIAL WORKERS OF THE WORLD AND AGRICULTURAL LABORERS IN THE AMERICAN WEST, 1905-1930*, at 139 (2001).

⁵⁰⁷ *Gruesome Story Installment No. 4*, *supra* note 329.

⁵⁰⁸ *State v. Worker's Socialist Pub. Co.*, 185 N.W. 931 (Minn. 1921).

⁵⁰⁹ SELLARS, *supra* note 8, at 135-37.

to be elected to the General Organizing Committee of the IWW's agriculture affiliate.⁵¹⁰ After Terrell's brief trial, during which he apparently surprised spectators with his speaking ability and his insistence on his and the IWW's commitment to peaceable radicalism, and during which the prosecution summoned up the usual evidence of supposed IWW outrages, he was convicted and then essentially allowed by the judge to flee the state.⁵¹¹ Terrell was later convicted of criminal syndicalism in California and sentenced to one to fourteen years in prison.⁵¹²

Another notable Oklahoma case involved the prosecution of a thirty-eight-year-old itinerate oil field and harvest worker named Arthur Berg. Originally arrested by railroad police in Haileyville on December 27, 1922, and booked on vagrancy charges, Berg was also charged with criminal syndicalism when a police search of his person turned up IWW literature, a membership book, and other documents.⁵¹³ Early the next year, Berg was formally charged with advocating criminal syndicalism and with criminal syndicalism by membership in the IWW.⁵¹⁴ While he did admit to membership in the IWW, Berg denied being an organizer.⁵¹⁵ The ensuing prosecution featured the usual claims about the IWW's radicalism, including the introduction of IWW literature and the ubiquitous preamble, combined with testimony designed to prove that Berg was in fact an organizer and not simply a member.⁵¹⁶ Berg, who was indeed an organizer, was convicted and sentenced to ten years in prison and fined \$5000.⁵¹⁷

A fate similar to Berg's befell organizer Homer Wear, who was arrested in Miami, Oklahoma, charged initially with vagrancy,

⁵¹⁰ *Id.* at 137.

⁵¹¹ *Id.* at 137-39.

⁵¹² On Jack Terrell's prosecution for criminal syndicalism, see *id.* at 133-40; see also Oklahoma "Justice," SOLIDARITY, Mar. 13, 1920, at 4. George Aldridge, one of the other organizers arrested with Terrell, somehow escaped conviction on those charges only to be charged a few months later with the murder of a railroad policeman that he did not commit. SELLARS, *supra* note 8, at 146. At some point while being held for the murder, Aldridge and his fellow suspects were apparently offered their freedom if they agreed to pay seventy-five cents for each day they had been held in custody. Haywood, *supra* note 482.

⁵¹³ See *Oklahoma Holds 2 Delegates in Pen*, INDUS. WORKER, Aug. 20, 1924, at 2.

⁵¹⁴ Von Russell Creel, *The Case of the Wandering Wobblie: The State of Oklahoma v. Arthur Berg*, 73 CHRONIC. OKLA. 404, 406 (1995).

⁵¹⁵ *Id.* at 414.

⁵¹⁶ Berg v. State, 233 P. 497, 499 (Okla. Crim. App. 1925); Creel, *supra* note 514, at 404.

⁵¹⁷ See Creel, *supra* note 514; see also Berg, 233 P. at 503.

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charged subsequently with and convicted of criminal syndicalism, and then sent to prison.⁵¹⁸ The next summer, authorities in Quapaw, Oklahoma, arrested yet another Wobbly organizer, Oscar Citron.⁵¹⁹ Like Berg and Terrell, Citron was initially arrested for vagrancy and later charged with criminal syndicalism when authorities claimed—somewhat dubiously, as the document may well have been a forgery—to have discovered on his person a handwritten handbill obliquely advocating violence against mine owners.⁵²⁰ Citron was convicted and sentenced to six years in prison and fined \$650.⁵²¹

IV

CRIMINAL SYNDICALISM LAWS IN THE APPELLATE COURTS

Appellate courts at the state and federal levels heard dozens of cases involving criminal syndicalism prosecutions of Wobblies in the late 1910s and 1920s. While the outcomes of these cases were quite varied, a review of them supports several generalizations. First, some courts, particularly at the state level, were uncomfortable with the kind of evidence used to convict at trial; in particular, they disfavored the resort to uncorroborated hearsay and the reliance on membership as such to establish culpability. Second, the tendency to overturn convictions on such grounds was more common among intermediate courts of appeal than supreme courts. Third, no courts questioned the essential legality of the criminal syndicalism concept, whether on constitutional or any other grounds. In this respect, too, no courts ever really questioned the basic idea that the IWW was properly seen by legislators and trial courts as embodying the crime of syndicalism.

In these respects, the courts' opinions reflect a distinctive ideology that assumed the essential criminality of the IWW and its program of economic radicalism while—at least on occasion—adhering to and upholding norms of procedural propriety. For those convicted of criminal syndicalism, this could mean an opportunity to leave prison. In some instances, the courts' scruples

⁵¹⁸ *C.S. Charge in Oklahoma*, INDUS. SOLIDARITY, Sept. 1, 1923, at 6.

⁵¹⁹ SELLARS, *supra* note 8, at 171-72.

⁵²⁰ *Id.* at 172.

⁵²¹ *Id.* at 171-72. There would be a few other criminal syndicalism prosecutions in this period in other jurisdictions. Dowell describes, for example, a few Wobblies being arrested in Nevada in the 1920s and Ohio in the late 1920s and early 1930s, but few of these cases actually resulted in formal charges, much less trial and conviction. 2 Dowell, *supra* note 268, at 971-74, 982.

even altered actual enforcement practices. Ultimately, however, the appellate courts did not significantly diminish the ability of authorities to use these laws to harass the IWW and visit enormous hardship on a huge number of its members and supporters. By this approach, the courts were able to maintain their opposition to the IWW, both practically (by upholding the basic utility of the statutes as anti-IWW devices) and ideologically (by affirming, and even augmenting, the statutes' condemnation of the IWW), while also preserving their own legitimacy as arbiters of procedural fairness and the legitimacy of a system nominally bound by legal rules.

A. *The State Courts*

By 1918, state appellate courts were already deciding the legality of criminal syndicalism convictions. By the mid 1920s, there would be more than fifty reported cases of this type, most of which originated in the states of most intensive enforcement: California, the Pacific Northwest states, Kansas, and Oklahoma. The legal issues presented to these courts were quite diverse, including all manner of very technical claims of the sort that, on the surface, revealed little of the courts' overall attitudes toward the criminal syndicalism question.⁵²² At the same time, though, many of the cases did tend to revolve around a relatively narrow set of issues that concerned, on a rather basic level, how these laws were being enforced. In this more readily revealing category are six main types of claims: constitutional claims involving both vagueness or other shortcomings in the definition of essen-

⁵²² Many examples of this type involved claims of some sort of formal defect in the information or indictment, including charging too many offenses jointly, or failing to identify the alleged crime with sufficient specificity. On claims involving a lack of specificity in the indictment or information, see, for example, *People v. Steelik*, 203 P. 78, 82 (Cal. 1921); *People v. Taylor*, 203 P. 85, 86-87 (Cal. 1921); *People v. Malley*, 194 P. 48, 49-50 (Cal. Dist. Ct. App. 1920); *Wear v. State*, 235 P. 271, 272 (Okla. Crim. App. 1925); *State v. Hennessy*, 195 P. 211, 214 (Wash. 1921); and compare *People v. Ruthenberg*, 201 N.W. 358, 362 (Mich. 1925) (defendant prosecuted for Communist Party affiliation). On claims involving the inclusion of multiple counts in the same indictment, see, for example, *Steelik*, 203 P. at 80-81 (holding that inclusion of such counts that are inherent in charge of criminal syndicalism crime and can be committed in multiple ways constitutes irreversible error); *State v. Dingman*, 219 P. 760, 762 (Idaho 1923) (same); *Hennessy*, 195 P. at 212-13 (same). Other issues of this kind included complaints about the nature of jury instructions given or the failure of the court to give instructions requested by the defendant. See, e.g., *Taylor*, 203 P. at 90-91 (affirming trial court refusal to instruct jury on "[t]he general right of the masses to strike, and the propriety or impropriety of extending sympathy to the soviet government of Russia").

tial concepts like sabotage and syndicalism; sufficiency of evidence claims, which were often closely related to the vagueness issue; constitutional claims premised on the use of these statutes to criminalize speech and association; constitutional claims that these statutes were an impermissible form of class legislation; evidentiary claims regarding the use of hearsay evidence to obtain convictions; and the related issue of whether proof of membership alone would suffice to establish culpability.

The argument that these statutes offered an inadequate definition of key terms like sabotage was raised in the earliest reported case and continued to be raised throughout the period discussed in this Article. In line with modern void-for-vagueness doctrine, the argument was typically that defendants had no way of reliably determining whether or not their conduct was actually prohibited by the jurisdiction's statute. On each of these issues, the courts consistently decided against defendants. They held that terms like sabotage had an obvious meaning, one embedded in common knowledge if not also adequately elaborated by the statutes themselves.⁵²³ Indeed, in several instances, the courts went so far as to cite popular dictionary and encyclopedia definitions of these terms, in particular, definitions that conveniently defined sabotage with specific reference to the IWW.⁵²⁴ In other cases, the courts' strategy was to shift the focus of the analysis from inherently uncertain terms, like sabotage or terrorism, to crime, which then allowed these courts to present the means of social change prohibited by the statutes as self-evident.⁵²⁵ In yet another instance, the Washington Supreme Court simply declared that the uncertainty argument proved too much and that "it would be easy to find many statutes now on the books which are open to the object of uncertainty, but which have heretofore never been suspected of that fault."⁵²⁶ In the few cases in which

⁵²³ See, e.g., *Steelik*, 203 P. at 83-84; *People v. Wieler*, 204 P. 410, 411-12 (Cal. Dist. Ct. App. 1922); *State v. McLennen*, 200 P. 319, 320 (Wash. 1921).

⁵²⁴ See, e.g., *Dingman*, 219 P. at 762-64; *McLennen*, 200 P. at 320 (ordering a new trial on other grounds).

⁵²⁵ See, e.g., *Steelik*, 203 P. at 83; cf. *Ruthenberg*, 201 N.W. at 361 (defendant prosecuted for Communist Party affiliation).

⁵²⁶ *Hennessy*, 195 P. at 216 (quoting *State v. Brown*, 182 P. 944 (Wash. 1919)). The court's basis for this statement was that the criminal syndicalism statute, like the others invoked, was certain in the results that it prohibited, though not in the acts, and that this must suffice lest a contrary rule call into question much of the criminal code. *Id.* at 215-16. There are several problems with this reasoning. Besides the fact that the other crimes mentioned, including vagrancy, malicious mischief, and

defendants were able to prevail on grounds involving how terms like sabotage were defined, this was not because of the inherent uncertainty of such terms, but rather because the trial courts had embellished the meaning of these terms in their instructions to the jury.⁵²⁷ In other cases, though, the denial of requests for instructions that clarified such terms to the jury by trial courts was upheld. This included cases in which defendants asked for instructions requiring the jury to actually find that the IWW itself was committed to using means of social change prohibited by the statutes.⁵²⁸

Embedded in such arguments about the inadequate definition of terms like sabotage was often an ancillary evidentiary claim about the sufficiency of the evidence offered to prove that the IWW was actually committed to using the prohibited means of social change, and that the defendants were thereby properly convicted based on their affiliation with the IWW. In weighing such claims, the courts were equally unsympathetic to defendants. In some instances, they again invoked dictionaries and encyclopedias to uphold juries' conclusions on this question.⁵²⁹ The courts also confirmed the value of IWW literature, songs, and the like as bases for affirming its commitment to criminal tactics.⁵³⁰

“willfully disturb[ing] any religious meeting,” *id.* at 216 (quoting *Brown*, 182 P. 944), might also be problematic, these crimes are also minor offenses, quite unlike the criminal syndicalism statute. Moreover, terms like sabotage and terrorism proved especially vague and ambiguous in actual practice. Finally, the true result element of the crime was not sabotage or the like, but rather the bringing about of industrial or political change. *Id.* at 212.

⁵²⁷ There are several examples of this. In a habeas case, the Idaho Supreme Court ruled that the criminal syndicalism statute's prohibition of sabotage did not encompass simply advocacy of striking. *Ex parte Moore*, 224 P. 662, 665 (Idaho 1924). The court noted that nothing prevented the legislature from defining sabotage more explicitly to include advocacy of strikes. *Id.* Indeed, that is exactly what the Idaho legislature did; early in 1925, it redefined sabotage under the statute to include, among other things, “loitering at work; slack work; [and] slowing down work or production.” Act of February 21, 1925, ch. 51, 1925 Idaho Sess. Laws 76; *see also* *State v. Tonn*, 191 N.W. 530, 538 (Iowa 1923); *State v. Aspelin*, 203 P. 964, 965 (Wash. 1922) (reversing a criminal syndicalism conviction for overembellishment of the meaning of sedition in instructions).

⁵²⁸ *See, e.g.*, *People v. Eaton*, 213 P. 275, 276-77 (Cal. Dist. Ct. App. 1923) (affirming trial court's refusal to instruct jury that, in order to convict, they must find that the IWW advocated and taught criminal syndicalism).

⁵²⁹ On such references to dictionaries and encyclopedias, *see, for example*, *Dingman*, 219 P. at 762-63 (Idaho 1923). *But see* *People v. Ware*, 226 P. 956, 959-60 (Cal. Dist. Ct. App. 1924) (rejecting such evidence as impermissibly expanding the notion of culpability).

⁵³⁰ In *People v. Taylor*, 203 P. 85 (Cal. 1921), for example, the California Supreme

Similarly, the courts were quite comfortable with the practice of allowing juries to infer individual culpability from the acts attributed (usually by professional witnesses and other modes of hearsay) to the IWW.⁵³¹ Indeed, in several instances, courts upheld this practice even where the evidence of IWW wrongdoing predated the enactment of the relevant criminal syndicalism statute.⁵³²

Perhaps the most familiar legal argument against criminal syndicalism prosecution involved claims that these laws unconstitutionally impinged on rights of speech and association. Indeed, such claims appear fairly frequently in the case law. However, in not a single reported case from this period did any state court overturn a criminal syndicalism conviction because of its impairment of speech or association rights. Even in rejecting such claims, the courts were consistently perfunctory and even dismissive. On the few occasions that the courts acknowledged some abstract right to speech or association, they were quick to declare the IWW and its affiliates beyond the purview of such right. The California Supreme Court explained in its 1921 decision *People v. Taylor* that such rights have “no application to a statute such as ours, which denounces organizations formed for the purpose of committing crimes against persons and property in furtherance of political or industrial changes.”⁵³³

Court reviewed at length an array of such evidence in the course of pronouncing it sufficient to justify the jury’s determination that the organizations—in this case, the IWW and the Communist Labor Party—were dedicated to the means of social change prohibited by the statute. *Id.* at 87-89. This court, like most others, usually saw no problem in the fact that on this very question, the evidence was, at best, highly equivocal. *See id.*; *see also* *People v. Lesse*, 199 P. 46, 47 (Cal. Dist. Ct. App. 1921). *But see* *People v. Erickson*, 226 P. 637, 637 (Cal. Dist. Ct. App. 1924) (stating that literature introduced into evidence was too vague on the use of prohibited means to accomplish social change to support a conviction); *People v. Leonard*, 225 P. 461, 462 (Cal. Dist. Ct. App. 1924) (determining that possession of IWW button and literature was insufficient to sustain conviction).

⁵³¹ *See, e.g.*, *People v. Stewart*, 230 P. 221, 224 (Cal. Dist. Ct. App. 1924) (stating that defendant’s own disbelief in prohibited means was irrelevant in face of evidence of IWW’s dedication to such means); *People v. Roe*, 209 P. 381, 383-84 (Cal. Dist. Ct. App. 1922).

⁵³² *People v. Powell*, 236 P. 311, 314 (Cal. Dist. Ct. App. 1925); *Roe*, 209 P. at 384. *But see* *Ware*, 226 P. at 959.

⁵³³ *Taylor*, 203 P. at 88; *see also* *People v. Steelik*, 203 P. 78, 84 (Cal. 1921) (“The right of free speech does not include the right to advocate the destruction or overthrow [of] the government or the criminal destruction of property.”); *People v. Cox*, 226 P. 14, 15-16 (Cal. Dist. Ct. App. 1924); *People v. Wagner*, 225 P. 464, 466-67 (Cal. Dist. Ct. App. 1924); *State v. Hennessy*, 195 P. 211, 216 (Wash. 1921); *cf. Peo-*

A similar fate befell arguments that such laws constituted an unconstitutional brand of class legislation. The idea was that these statutes impermissibly singled out for criminalization those who sought by the prohibited means to bring about a change in the industrial or political order, while failing to criminalize those who used the very same means to preserve the existing industrial or political order. On its face, this idea was not without merit; the very Wobblies who were prosecuted under these laws were far more likely to be victims of violence and the like at the hand of reactionary vigilantes and public officials than they were ever to use these means to advance their radical ideas.⁵³⁴ But for the courts, this equal protection-type argument was without merit. Employing a kind of vanguard notion of rational relation scrutiny, the courts simply declared that the distinction in the statute between proponents of revolution and reaction was rational and therefore constitutional.⁵³⁵

One kind of claim that did with some frequency result in criminal syndicalism convictions being overturned was the assertion that the trial court prejudiced the defendant by admitting hearsay evidence. Even in these cases, the courts were seldom troubled by the admission of literature, songs, and other IWW documents. Such evidence was regularly regarded as acceptable proof of the organization's supposed commitment to sabotage and other prohibited means of social change, particularly where the state distinguished this use from the more problematic idea of using such evidence to impute actions to the defendant himself.⁵³⁶ In other cases, the admission of objectionable hearsay was nonetheless deemed harmless error.⁵³⁷ The kind of hearsay evidence whose

ple v. Ruthenberg, 201 N.W. 358, 360 (Mich. 1925) (defendant prosecuted for Communist Party affiliation).

⁵³⁴ This emerges clearly from any review of the history of the IWW. See generally DUBOFSKY, *supra* note 7.

⁵³⁵ See *People v. Wieler*, 204 P. 410, 411 (Cal. Dist. Ct. App. 1921); *State v. Dingman*, 219 P. 760, 764 (Idaho 1923); *Hennesy*, 195 P. at 215.

⁵³⁶ See *Taylor*, 203 P. at 90; *Dingman*, 219 P. at 766-67. In many of these cases, including *Dingman* and *Taylor*, this evidence consisted in part of two books entitled *Sabotage*, one by Elizabeth Gurley Flynn and the other by Emil Pouget, that had been named in earlier cases against the IWW, including the 1917 Chicago conspiracy indictment. See, e.g., *State v. Tonn*, 191 N.W. 530, 537 (Iowa 1923) (deeming letter addressed to defendant properly admitted where offered to prove defendant's connection to IWW, not his belief in underlying ideas); *State v. Payne*, 200 P. 314, 315-16 (Wash. 1921) (same); see also *Powell*, 236 P. at 313-14; *Cox*, 226 P. at 17-18; *People v. Lesse*, 199 P. 46, 47 (Cal. Dist. Ct. App. 1921).

⁵³⁷ On hearsay as harmless error in these cases, see, for example, *Cox*, 226 P. at 17

admission the courts did find unacceptable with some regularity was that which consisted of oral testimony, especially where, as was often the case, such testimony had no direct connection to the defendant.⁵³⁸ Likewise, on occasion, the courts rejected hearsay derived from unofficial sources.⁵³⁹ Some courts found the use of such testimony particularly troubling in the light of trial courts' habit of excluding precisely the same kind of testimony where offered by defendants to disprove allegations about the IWW or their affiliation with it.⁵⁴⁰

Another issue on which the courts sometimes sided with defendants was whether membership alone (or something akin to it) could suffice for conviction. This was an important question because it concerned the dominant theory on which defendants were charged under the statutes. Generally, courts had no problem with convictions premised merely on affiliation or association with, employment by, or membership in the IWW, and not actual advocacy or proof of a connection between the fact of membership and the organization's purported commitment to criminal means of social change.⁵⁴¹ Even courts that recognized a need to modify the element by a mens rea standard—to require proof of knowledge of the nature of the organization or membership in it—were often easily satisfied that this subjective element could be inferred, circularly, from the circumstances of membership.⁵⁴² Nevertheless, a number of intermediate courts overturned convictions on grounds that guilt could not be premised on such evidence alone. In *People v. Thornton*,⁵⁴³ for example, California's Second District Court of Appeals overturned a conviction premised on a defendant's membership in the IWW where the state failed to show any nexus between the defendant's membership and the supposedly criminal orientation of the

(finding that defendant's inability to cross-examine a professional witness on his past was harmless, despite appellate court's admission that the witness was "one of the most reprehensible characters thinkable"); *Wagner*, 225 P. at 467-68; *People v. La Rue*, 216 P. 627, 630-31 (Cal. Dist. Ct. App. 1923).

⁵³⁸ See, e.g., *Dingman*, 219 P. at 769-70; *State v. Pettilla*, 200 P. 332, 333 (Wash. 1921); *State v. Gibson*, 197 P. 611, 611-12 (Wash. 1921).

⁵³⁹ See *People v. Flanagan*, 223 P. 1014, 1017-19 (Cal. Dist. Ct. App. 1924).

⁵⁴⁰ See, e.g., *Dingman*, 219 P. at 769-70.

⁵⁴¹ See, e.g., *Taylor*, 203 P. at 89-90.

⁵⁴² See, e.g., *Cox*, 226 P. at 16; *Wagner*, 225 P. at 470-71 (determining that vague instructions on scienter requirement were not grounds for reversal); *Flanagan*, 223 P. at 1015-16.

⁵⁴³ 219 P. 1020 (Cal. Dist. Ct. App. 1923).

IWW.⁵⁴⁴ A few courts took a similar attitude toward evidence of defendants' production and possession of IWW documents, holding that such evidence alone could not satisfy a theory of culpability premised on organizing.⁵⁴⁵

In addition to these arguments, other, less typical claims were raised from time to time. Among these were allegations of prosecutorial misconduct;⁵⁴⁶ objections sometimes invoking the ex post facto clauses to the admission of evidence of IWW rhetoric prior to the enactment of the criminal syndicalism statutes;⁵⁴⁷ and even arguments that punishment under these statutes was unconstitutionally cruel and unusual.⁵⁴⁸ These arguments were generally rejected by the courts.⁵⁴⁹ So too was the claim that defense witnesses were unfairly intimidated by the threat of prosecution⁵⁵⁰ or that such witnesses were wrongly convicted based on their testimony.⁵⁵¹ On the other hand, in a few cases defendants also had their convictions overturned on grounds of jury bias or other disqualifications.⁵⁵² In other cases, defendants raised constitutional claims about the manner in which evidence was obtained by searches of their person or property.⁵⁵³ In still other

⁵⁴⁴ *Id.* at 1021-22. *But see Flanagan*, 223 P. at 1015 (deciding that knowledge of organization's alleged criminality was properly inferred from membership and reversing the conviction on other grounds).

⁵⁴⁵ *See, e.g., People v. Thurman*, 216 P. 394, 396-97 (Cal. Dist. Ct. App. 1923).

⁵⁴⁶ *People v. Steelik*, 203 P. 78, 84-85 (Cal. 1921).

⁵⁴⁷ The use of such evidence was routinely sustained by courts on the grounds that it was offered to show the character of the IWW and not the criminality of the defendant prior to the enactment of the statute. *See, e.g., Steelik*, 203 P. at 84; *State v. Tonn*, 191 N.W. 530, 537-38 (Iowa 1923).

⁵⁴⁸ *See, e.g., State v. Hennessy*, 195 P. 211, 215 (Wash. 1921) (rejecting argument that statute was imposing cruel and unusual punishment by not sufficiently fixing the possible sentence); *see also State v. Dingman*, 219 P. 760, 764-65 (Idaho 1923) (rejecting arguments that statute was unconstitutional on several grounds, including cruel and unusual punishment).

⁵⁴⁹ *See, e.g., Dingman*, 219 P. at 765; *Hennessy*, 195 P. at 215.

⁵⁵⁰ *People v. Casdorf*, 212 P. 237, 238 (Cal. Dist. Ct. App. 1922).

⁵⁵¹ *People v. Johansen*, 226 P. 634, 636 (Cal. Dist. Ct. App. 1924) (rejecting a claim that county lacked jurisdiction over defendant where jurisdiction was premised on involuntary, subpoenaed presence in jurisdiction).

⁵⁵² *See, e.g., People v. Sullivan*, 211 P. 467, 468-69 (Cal. Dist. Ct. App. 1922) (holding that prejudicial error resulted from the trial court's disallowing of defendant's challenges to jurors for actual bias); *People v. Wismer*, 209 P. 259, 261 (Cal. Dist. Ct. App. 1922) (reversing where one juror served in an earlier criminal syndicalism trial).

⁵⁵³ In *State v. Tonn*, 191 N.W. 530 (Iowa 1923), for example, the Iowa Supreme Court ruled that the evidence obtained in the course of the unlawful search of a Wobbly's luggage was nonetheless admissible because the Wobbly waived his right to exclude evidence otherwise unlawfully obtained by failing to object at the time

cases, defendants argued that criminal syndicalism convictions were invalid as “constructive treason”—that is, as impermissible attempts by states to usurp the exclusive authority of the federal government to punish treasonous behavior.⁵⁵⁴

These decisions by the state courts are not remarkable for their jurisprudential insights. Rather, they reveal something more basic about the role of the courts in this affair. Defendants put before these courts a number of legal claims that the courts could have used to limit the use of these laws to punish mere association with the IWW, irrespective of any real evidence involving the advocacy of violence, sabotage, or the like. With only a few exceptions involving rather technical procedural or evidentiary issues, the courts refused to endorse these claims. The result was to leave these laws and most of the enforcement and prosecutorial techniques developed to enforce them quite intact, but only after giving the appellants their day in court.

B. The United States Supreme Court

In the course of the 1920s, the United States Supreme Court decided three cases concerning the legality of convictions under criminal syndicalism laws. Two of these, *Whitney v. California*⁵⁵⁵ and *Fiske v. Kansas*,⁵⁵⁶ involved prosecutions directly under the respective states’ laws.⁵⁵⁷ The third, *Burns v. United States*,⁵⁵⁸ indirectly concerned California’s law as it involved the enforcement of that law under a federal statute that imported state criminal law to conduct in Yosemite National Park not otherwise addressed by federal law.⁵⁵⁹ While the convictions in *Whitney* and *Burns* were upheld, the defendant in *Fiske* prevailed and had his conviction overturned. Yet in all three cases, the general thrust of the Court’s reasoning was to uphold the essential legality of criminal syndicalism laws as well as their enforcement on the basis primarily of membership in or affiliation with the IWW.

and because he had a remedy in a trespass action against these authorities. *Id.* at 532-36; see also *Hennessy*, 195 P. at 218 (holding that defendant’s objection to lawfulness of seizure not timely raised); cf. *People v. Ruthenberg*, 201 N.W. 358, 362-63 (Mich. 1925) (stating that defendant prosecuted for Communist Party affiliation waived right to examine evidence produced at trial).

⁵⁵⁴ This claim was rejected out of hand. *Hennessy*, 195 P. at 214-15.

⁵⁵⁵ 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁵⁵⁶ 274 U.S. 380 (1927).

⁵⁵⁷ See *Fiske*, 274 U.S. at 381; *Whitney*, 274 U.S. at 359.

⁵⁵⁸ 274 U.S. 328 (1927).

⁵⁵⁹ *Id.* at 330.

In other words, the Court followed most of the state courts in endorsing the notion that involvement with the IWW could be criminalized in the absence of any credible proof of its actual engagement in or commitment to violent or criminal means of social change.

The defendant in *Fiske* prevailed on grounds that his conviction constituted a denial of due process in that it was based upon insufficient evidence of guilt. In particular, the Court ruled unanimously that the introduction of the IWW's preamble, which constituted the state's only evidence of the union's commitment to criminal syndicalism, was insufficient evidence of guilt, particularly given Fiske's testimony at trial in contradiction of this very notion.⁵⁶⁰ This ruling did not, however, reflect anything in the way of a more skeptical view of how criminal syndicalism statutes were being enforced. *Whitney* and *Burns* clearly demonstrated that the *Fiske* decision reflected a concern for the quantitative sufficiency of evidence, not the qualitative sufficiency of IWW rhetoric, membership, or affiliation as bases for prosecution and conviction.

William Burns was an IWW member who had spent time as a logger, construction worker, and deep-water sailor. He was arrested in Yosemite in April 1923 while walking through the park on a railroad track on his way to a lumber job and possessing IWW credentials and literature.⁵⁶¹ Procedural issues aside, the key distinction between the circumstances of Burns's conviction and Fiske's was that, in prosecuting Burns, the government not only introduced evidence of the defendant's IWW membership and work as an organizer and introduced the preamble; it also put into evidence other IWW documents as well as the testimony of a witness (who was clearly paid) who testified at some length as to what he had read and heard in speeches about the IWW's supposed willingness to use sabotage to advance its agenda of social change.⁵⁶² The accusations of sabotage were mostly to do

⁵⁶⁰ *Fiske*, 274 U.S. at 383-87.

⁵⁶¹ *Conviction of Bill Burns Upheld by U.S. Supreme Court; Arrested While Hiking on Railroad Track*, INDUS. WORKER, May 28, 1927, at 3 [hereinafter *Burns Conviction Upheld*]; *Strange Case of Wm. Burns*, INDUS. SOLIDARITY, Nov. 19, 1924, at 1; *Worker Waits 18 Months for Trial*, INDUS. WORKER, Oct. 18, 1924, at 2. A few months after Burns was arrested and charged in this fashion, so was "Fellow Worker" William Rackle. *More Persecutions in California*, INDUS. WORKER, Dec. 1, 1923, at 2. It appears the Rackle was indicted, but the matter was eventually dropped. Jan. 5 *California Cases*, *supra* note 427.

⁵⁶² *Compromise Ends Burns C.S. Trial*, INDUS. WORKER, Nov. 29, 1924, at 1;

with tactics of disruption and inefficiency, not actual violence or destruction; Burns himself was never in any way directly implicated in the use of any of these tactics.⁵⁶³ Moreover, in upholding Burns's conviction, the Court found no fault at all with the fact that he was charged for being a member and an organizer and convicted by a jury that had been invited in the trial judge's instructions to associate striking with sabotage.⁵⁶⁴ That the California statute itself limited the meaning of sabotage to the "wilful and malicious physical damage or injury to physical property"⁵⁶⁵ was, as Justice Louis Brandeis noted in his dissent, essentially irrelevant to the Court in its rejection of Burns's central claim that the statute was applied to him in a manner unauthorized by the text.⁵⁶⁶

Whitney is not only the most notorious of these decisions; it is also the one in which the Court reveals most clearly its essential agreement with the concept of criminal syndicalism and its use as a means of criminalizing membership in, and affiliation with, the IWW. Unlike *Burns* and *Fiske*, which the Court disposed of on the basis of one or two fairly narrow issues, *Whitney* decided an array of issues, many of which had been rehearsed by state courts in earlier cases. Before speaking to these issues, the Court revisited the facts adduced at trial and did so in a manner that made clear from the outset its view that *Whitney* was somehow closely tied to the IWW—which was not actually true—and that both the IWW and *Whitney's* conduit to it, the Communist Labor Party, were committed to the methods of social change proscribed by California's criminal syndicalism act.⁵⁶⁷ Although the Court cannot be criticized for embracing facts established at trial, the confident manner in which it presented them as unquestionably true made clear how it would decide the legal questions.⁵⁶⁸

Burns Conviction Upheld, *supra* note 561; *Prosecutor Rests in Burns' Trial*, INDUS. WORKER, Nov. 26, 1924, at 1.

⁵⁶³ See sources cited *supra* note 562.

⁵⁶⁴ *Burns*, 274 U.S. at 331-34. The Court was clear in its view that "[s]abotage, as the evidence indicates it to have been advocated and taught by the organization, is not confined, as in the definition contained in the Act, to physical damage and injury to physical property." *Id.* at 333. It then pointed to IWW literature introduced at trial that reflected the organization's own ambiguous and blustering understanding of the concept. *Id.* at 333-34. In this light, it concluded, the defendant's conviction on the instructions given was not constitutionally problematic. *Id.* at 336.

⁵⁶⁵ *Burns*, 274 U.S. at 338 (Brandeis, J., dissenting).

⁵⁶⁶ *Id.* at 338-41.

⁵⁶⁷ *Whitney v. California*, 274 U.S. 357, 363-66 (1927).

⁵⁶⁸ *Id.* at 359-61.

The Court rejected each of the defendant's claims of error. Whitney's claim that her participation in the founding of the Communist Labor Party could not fairly render her culpable for the party's subsequent endorsements was rejected as both a factual question improper for reconsideration on appeal *and* as inconsistent with what the Court took to be the clear facts of the case.⁵⁶⁹ For Justice Edward Sanford, the proof of this was not only that Whitney could have left the party; in his view, her advocacy within the party of nonviolent means of protest, which had been established at trial, was irrelevant in that it did not advance this position "to the exclusion of violent or unlawful means."⁵⁷⁰ In other words, Whitney's factual guilt was rooted in her failure to sufficiently repudiate the party's ideology and (presumably, as the Court did not explicitly discuss this aspect of the state's case) the party's brief endorsement of the IWW.⁵⁷¹

The Court was equally clear that the statute presented no due process difficulties because of its vagueness or "uncertainty of definition."⁵⁷² Indeed, Sanford concluded from the outset that the statute's definition of criminal syndicalism was both "clear" and "specific," adequately informing those at risk of prosecution, and not so vague as to be insusceptible to interpretation by those of common intelligence.⁵⁷³ Sanford based this conclusion not on actual reflection on the text of the statute, but rather on recitation of the applicable legal doctrines combined with examples of state court cases that held similar criminal syndicalism statutes not to be void for indefiniteness.⁵⁷⁴

Just as perfunctory was the Court's disposition of Whitney's equal protection claim. Hewing to the class legislation argument made by a number of defendants in state courts, Whitney had argued to the Court that the statute offended the Equal Protection Clause by criminalizing the words and actions of those who sought to change the prevailing political and industrial conditions, while not in any way criminalizing the same kinds of words or actions directed at preserving the status quo.⁵⁷⁵ The argument was by no means implausible, but for the Court, this was simply a

⁵⁶⁹ *Id.* at 367.

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.* at 366-68.

⁵⁷² *Id.* at 368.

⁵⁷³ *Id.* at 368-69.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.* at 369.

nonissue. A state may freely make such distinctions, it said, so long as they are at least rational.⁵⁷⁶ Moreover, in Sanford's words, there was "nothing indicating any ground to apprehend that those desiring to maintain existing industrial and political conditions did or would advocate such methods."⁵⁷⁷

Finally, the Court came to terms with Whitney's arguments that the statute unconstitutionally criminalized speech and association. For Sanford, the issue was very clear. The Constitution, he said, "does not confer an absolute right to speak, without responsibility, whatever one may choose."⁵⁷⁸ A state may therefore "punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means."⁵⁷⁹ Further, for a state to criminalize membership in an organization found to embody such abuses was equally within its prerogatives.⁵⁸⁰ Indeed, for Sanford, "every presumption is to be indulged in favor of the validity"⁵⁸¹ of such a statute.⁵⁸²

While Justice Brandeis did not dissent in *Whitney*, he wrote a concurring opinion, in which he was joined by Justice Holmes. In a fashion typical of his and Holmes's First Amendment jurisprudence, Brandeis's concurrence goes on at great length about the virtues of freedom of speech and association and the need for the Court to confine the regulation of speech and association to that which presents an imminent danger to the legitimate interests of public safety or state security.⁵⁸³ Yet, for Brandeis, the evidence was clear enough that the IWW did indeed constitute just such a danger, making Whitney's support for the organization, however attenuated, adequate grounds for her conviction.⁵⁸⁴ In this respect, Brandeis's concurrence serves as a reminder of just how thoroughly ambivalent and even hostile he (like Holmes) was toward the actual practice of radical social change,⁵⁸⁵ despite the attempt by some to cast both Brandeis and Holmes as voices of

⁵⁷⁶ *Id.* at 370.

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.* at 371.

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* (citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)).

⁵⁸² *Id.*

⁵⁸³ *Id.* at 372-79 (Brandeis, J., concurring).

⁵⁸⁴ *Id.* at 379-80.

⁵⁸⁵ On the hostility to the IWW and other radical causes that underlay Brandeis's

reason and justice on the criminal syndicalism issue.⁵⁸⁶

Brandeis's rhetoric is a stark demonstration of something evident throughout the jurisprudence of criminal syndicalism in this period: that, contrary to any progressivist reading of the development of the law in this area that would explain these decisions by the immaturity of civil libertarian doctrine, judges at all levels were not without ample grounds in established jurisprudence from which to substantially limit the way these laws were being used against the IWW. These grounds were available. The courts, for the most part, simply refused to accept them, resorting to legal rhetoric or factual axioms dripping with class biases to obscure what was really going on: their complicity in the use of criminal syndicalism laws to destroy the IWW.

V

THE IMPACT OF CRIMINAL SYNDICALISM LAWS ON THE IWW

It is not possible to quantify the effect that criminal syndicalism laws had on the IWW. Nor is it feasible to assert in too broad terms the impact these laws had on the organization's fate; for example, one cannot likely argue that but for criminal syndicalism laws, the IWW would have realized its radical social agenda. What is clear, though, is that criminal syndicalism laws played a key role in eroding the IWW's viability as a labor organization and advocate of radical economic change.

Criminal syndicalism accomplished this destructive effect in several ways. First, the enforcement of criminal syndicalism laws made it much more difficult for IWW organizers to recruit members, propagandize, and manage the organization's business affairs. In some instances, the union was ousted from its local halls by landlords fearful of being prosecuted.⁵⁸⁷ Worse for the union, these laws struck at the very heart of the traveling delegate system that was crucial to the organization's recruitment efforts. Recruiting in this fashion required organizers to travel around, meeting workers at their workplaces and on the streets, carrying with them membership cards, union propaganda, and other docu-

limited view of civil liberties, see, for example, DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 359-63 (1997).

⁵⁸⁶ See, e.g., Rohde, *supra* note 18, at 329-38 (discussing Brandeis's concurrence in *Whitney*).

⁵⁸⁷ *Portland I.W.W. Are Ousted by Landlord*, L.A. TIMES, Mar. 2, 1919, at 11.

ments identifying them as committed members of the organization. All of this exposed these delegates to criminal syndicalism prosecution. They were arrested while organizing workers or occupying union halls, selling newspapers, and traveling between locations; when arrested even on minor charges, the discovery of union papers on their persons frequently led to criminal syndicalism charges. Arrests were also made in union halls, at job sites, on picket lines, and in other places where the disruptive effect on union activities was magnified. There is ample reason to think, and some evidence in the record to suggest, that all of this tended to drive Wobblies out of certain areas.⁵⁸⁸

To be arrested and taken to jail was, of course, a huge source of disruption in its own right, even if the case was never brought to trial. Arrests that took Wobbly organizers off the streets and worksites and out of union halls obviously compromised those Wobblies' abilities to do the union's work. Moreover, arrested Wobblies had to be bailed out if possible, which cost the union considerable money and effort.⁵⁸⁹ Those who were charged had to be defended and represented on appeal, often costing the organization even more resources, and exposing both witnesses and attorneys to the risk of being charged themselves. An indication of the magnitude of these expenses is evident in the union's claim that by April 1920, it had already spent \$10,000 on defense in California alone.⁵⁹⁰ The union repeatedly issued desperate pleas for money to use for defense purposes.⁵⁹¹

Many Wobblies who were brought to trial on these charges were convicted. All told, the number meeting this fate ran into the hundreds. Most of those convicted were sent to prison—over

⁵⁸⁸ See, e.g., *Throws Scare into Wobblies*, L.A. TIMES, Apr. 19, 1920, at I19 (describing Wobblies leaving western towns in the wake of court decisions and arrests).

⁵⁸⁹ Bail amounts could be quite large for the time. See, e.g., *Criminal Syndicalism Laws in California Persecute I.W.W.*, NEW SOLIDARITY, June 21, 1921, at 1 (reporting that thirteen defendants' bail was set at \$500 cash or \$1000 property each); *Wear Released on Bond*, INDUS. SOLIDARITY, May 22, 1925, at 1 (stating that Oklahoma defendant Homer Wear was released on \$500 bond).

⁵⁹⁰ *California and "Criminal Syndicalism," supra note 330.*

⁵⁹¹ See, e.g., *I.W.W. in California to Stay!; Funds Must Be Rushed to California to Win the Many Cases Being Fought*, INDUS. WORKER, Apr. 23, 1924, at 1; *Urgent Need of Funds in California to Beat Down Criminal Syndicalism*, INDUS. WORKER, Dec. 12, 1923, at 2. Money was required for appeals as well as trial defense. *Criminal Syndicalism*, ONE BIG UNION MONTHLY, Sept. 1920, at 7, 7; *I.W.W. Active Despite Arrests; Defense Is Needed for Imprisoned Men*, INDUS. WORKER, Oct. 3, 1917, at 1.

200 in California, Washington, and Idaho combined.⁵⁹² Those sent to prison often languished for years, enduring barbaric conditions before eventually being freed.⁵⁹³ This undoubtedly had a powerful deterrent effect. Though decentralized and resistant to the bureaucratic tendencies that afflicted other labor unions, the IWW did have several levels of leadership, from top level leaders like Haywood and top-notch organizers like Little, to its corps of ground-level organizers (its traveling delegates) and local leaders, to its rank and file.⁵⁹⁴ While the other main expressions of official repression, the conspiracy prosecutions, were focused almost entirely on the top leadership, the criminal syndicalism prosecutions had a far more democratic effect.⁵⁹⁵ Victims were typically from the organization's lower rungs—if not traveling delegates like Jack Terrell, then local leaders like Tom Connors as well as rank-and-filers. While this focus had a certain beneficial effect in sparing the top leadership further ravages, it also worked to the union's disadvantage. These arrests served as a clear warning to others of the risks of involvement with the IWW, to the point that it apparently became a common, tongue-in-cheek saying among members in California, when asked about the entitlements of a membership card, that, "If they catch you with it, it entitles you to two to fourteen [years] in San Quentin or Folsom [sic]."⁵⁹⁶

Imprisonment was also a reminder to the organization itself that many of its members were, in effect, held hostage by the state and its backers in business. The union appeared to worry

⁵⁹² In his dissertation, Dowell counted 135 imprisoned in California, 52 in Washington, and 31 in Idaho. 2 Dowell, *supra* note 268, at 935, 1010, 1063. By Whitten's count, the number in California should be 128. Whitten, *supra* note 18, at 52-53.

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⁵⁹³ Several Wobblies were confined to asylum wards while in prison. See, e.g., *Joe Neil Released-Rearrested*, INDUS. WORKER, June 30, 1928, at 1. Others were in solitary confinement. See, e.g., *Convicts on Strike, Lonesome*, L.A. TIMES, Aug. 2, 1922, at 11 (reporting that eight San Quentin convicts were in solitary for refusing to work). In several cases, this was punishment for attempts to support fellow Wobblies in prison. See, e.g., *Dungeon for Wobblies*, L.A. TIMES, Oct. 3, 1923, at 11; *Wobblies in Solitary*, L.A. TIMES, June 23, 1923, at 11. Those jailed awaiting charge or trial were subjected to barbarous treatment. See, e.g., *Jail Conditions Inhuman*, INDUS. WORKER, Jan. 10, 1920, at 1 (reporting overcrowded cells); *Police Use Clubs on 22 Jailed Wobs!*, INDUS. WORKER, Mar. 19, 1924, at 1 (reporting beatings at the Los Angeles city jail).

⁵⁹⁴ DUBOFSKY, *supra* note 7, at 49, 198-99; 4 FONER, *supra* note 138, at 133-34, 144-45.

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⁵⁹⁵ See *supra* text accompanying notes 215-46 and Part IV.

⁵⁹⁶ SOLIDARITY FOREVER, *supra* note 134, at 43 (recollections of Wobbly Joseph Murphy).

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that the fate of imprisoned members might be affected by the union's level of activism.⁵⁹⁷ With those in prison at the mercy of discretionary relief, usually at the hands of state governors (something from which many ended up benefiting), this was not at all an unreasonable concern. Moreover, taking care of imprisoned members, a function to which the organization was admirably dedicated, imposed a huge cost on the organization, both financially and administratively, leaving fewer resources for activism and organizing work.⁵⁹⁸

The IWW was well aware of the corrosive effect of criminal syndicalism laws on its organization and well aware, too, that this was precisely the purpose of these statutes. Particular accounts of members being arrested, convicted, and sentenced reflected a practical awareness that the union was absorbing an accumulation of real blows. At the same time, the union and its members were often circumspect about whether criminal syndicalism had such deleterious impacts on the organization, a position clearly couched in the IWW's stridently defiant stance in the face of authority. A common reaction in the union's newspapers to the overall campaign of criminal syndicalism enforcement was one of disdain accompanied by the view that these laws had actually made the organization stronger.⁵⁹⁹ Only in more oblique ways did the IWW come to acknowledge how difficult these laws made it for the union and its members to prosecute their campaign of industrial unionization and radical social change.⁶⁰⁰ Indeed, defi-

⁵⁹⁷ As an editorial in one of the union's papers put it, imprisonment of members on such charges "enable[d] the bandits of big business not only to rob the worker, but to hold him for ransom." *California C.S.—Tragedy*, *INDUS. WORKER*, Feb. 28, 1923, at 3.

⁵⁹⁸ The union did its best to provide Christmas gifts (usually \$25) to members imprisoned on criminal syndicalism charges. *Christmas Funds Must Be Got for the Men in Masters' Jails*, *INDUS. SOLIDARITY*, Nov. 5, 1924, at 4; *Class War Prisoners Get \$25 Apiece for Christmas*, *INDUS. SOLIDARITY*, Dec. 24, 1924, at 1; *Xmas Presents for I.W.W. Prisoners*, *supra* note 429. For this and other support the inmates expressed great appreciation. *Boys Still Imprisoned Send Greetings to Those Outside*, *INDUS. SOLIDARITY*, Jan. 12, 1924, at 3; *Class-War Prisoners Write to Thank Workers Who Gave to Christmas Fund*, *INDUS. SOLIDARITY*, Jan. 13, 1926, at 6; *More Letters from the I.W.W. in Prison to Those Outside*, *INDUS. SOLIDARITY*, Jan. 19, 1924, at 4.

⁵⁹⁹ See, e.g., *Criminal Syndicalism Law Fails to Stem Tides of Revolutionary Industrial Unionism*, *INDUS. SOLIDARITY*, Apr. 14, 1923, at 1; *I.W.W. Booming in Cal.; Wobblies 500 Per Cent Stronger in L.A. District in Spite of Persecution*, *INDUS. WORKER*, Sept. 8, 1923, at 1.

⁶⁰⁰ Wobblies themselves mention these laws as a factor that undermined their efforts in the 1910s and 1920s, but only (in the available records) in fairly casual ways.

ance aside, by 1927 or so the union’s organizing efforts had essentially collapsed in all the states where its members faced criminal syndicalism enforcement. While this was part of a nationwide trend influenced undoubtedly by other factors, such as conspiracy trials, vigilantism, and the like, it was also the case that the IWW had been in the late 1910s and early 1920s most active and vital in precisely those states where criminal syndicalism laws were enacted and where the most intensive enforcement occurred.⁶⁰¹ It is in this respect that one of the most salient and destructive features of criminal syndicalism manifested itself: the ability of the authorities armed with these laws to focus repression spatially where the greatest threats to class interests and social order seemed to appear.

The IWW did not simply roll over in the face of this repression. Instead, the organization fought back, both legally and by activist means; when this failed and defendants were convicted, members responded with an impressive level of solidarity and ideological resilience. If anything, criminal syndicalism enforcement seemed to have bolstered the organization’s critical—and contemptuous—understanding of the nature of state and law in capitalist society.⁶⁰²

Convicted Wobblies exalted a spirit of defiance by repeatedly failing to surrender their principles in exchange for more lenient treatment. Wobblies often defied the courts upon conviction or sentence. A similar thing occurred among members in prison or on their way to prison. On several occasions, convicted Wobblies rejected offers of pardon or commutation on the grounds that this would have either implied or required outright a confession of guilt or would have required them to leave behind their fellow workers.⁶⁰³ In December 1921, for example, Howard Welton,

This can be taken, though, as either a suggestion of disinterest in or unawareness of their effects, but it can also be read as a reflection of how much the victims took for granted the destructive impact of these laws. *See, e.g.,* SOLIDARITY FOREVER, *supra* note 134, *passim*.

⁶⁰¹ One of the few authorities to draw an explicit connection between this collapse of IWW organizing strength and the role of criminal syndicalism prosecutions is Nigel Sellars, who attributes the mid-1920s collapse of the IWW in Oklahoma to the combined effects of such prosecutions as well as internal schisms and intensified vigilantism. SELLARS, *supra* note 8, at 163-84.

⁶⁰² *See, e.g.,* *The I.W.W. and the Law*, INDUS. WORKER, Mar. 3, 1923, at 3.

⁶⁰³ *See, e.g.,* *Criminal Syndicalism Prisoners Refuse to Leave Centralia Boy*, INDUS. SOLIDARITY, Apr. 29, 1925, at 3; *Walla Walla Men Scorn Parole Offer*, INDUS. WORKER, July 9, 1924, at 2.

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imprisoned at California's San Quentin prison, rejected the trial judge's offer of clemency, even if granted unconditionally, on the grounds that "asking for, or accepting a pardon implies, to my mind, the admission that one has committed some crime."⁶⁰⁴ Further, Welton told the judge that he could not in good conscience leave behind his fellow Wobblies who were "no more guilty of any crime than I am."⁶⁰⁵ While he went to great lengths to disclaim any insult, Welton also offered the judge this statement:

You are today, Your Honor, a Judge in the Superior Court; well-to-do, respected, and honored. I am a convicted felon, poor, and in the eyes of many people, disgraced and an out-cast, and yet had I the power to do so, I would not today change places with you. . . .

. . . By your refusal to grant us an arrest of judgment, or at least a new trial, in the face of the ludicrous, preposterous verdict rendered by the jury, I consider that you have definitely aligned yourself with the forces of reaction and repression. While as for myself, it is my firm conviction that I am fighting together with millions of . . . men and women . . . in a great fight for human happiness and betterment⁶⁰⁶

Although the IWW stood by while liberals and civil libertarians attempted unsuccessfully to repeal California's statute, the union did attempt to bring pressure to bear on state and local authorities in California by engineering a boycott of the state's products.⁶⁰⁷ The IWW also redoubled its efforts, already begun in the face of the conspiracy prosecutions, to clarify its ideology to the public and to imprint in its public face that the organization was not actually committed to the use of sabotage, violence, or other prohibited means to achieve its goal of social revolution.⁶⁰⁸

Mostly, though, the IWW and its members suffered through

⁶⁰⁴ *Oakland I.W.W. Spurns Judge's Offer to Pardon*, INDUS. SOLIDARITY, Dec. 31, 1921, at 5.

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.*

⁶⁰⁷ See DOWELL, *supra* note 11, at 122-23; *California's Persecution of Union Men Can Be Stopped by the Boycott*, INDUS. WORKER, Mar. 12, 1924, at 1. The union's press also proposed to use direct action—strike activity—to gain its members' release. *General Strike Agitation Should Be Made for Release of IWW in Prisons*, INDUS. WORKER, Apr. 12, 1924, at 2. Neither of these efforts appears to have yielded much direct benefit. See *Labor Men Rise Against I.W.W. Boycott of State*, L.A. TIMES, Apr. 19, 1925 at B1.

⁶⁰⁸ See, e.g., *The I.W.W. and the Law*, *supra* note 602.

these prosecutions and the prison sentences that often followed. Fortunately, sentences at that time were far more subject than they are today to reduction by parole, commutation, and other forms of discretionary release.⁶⁰⁹ In addition, the union's own receding influence in the mid- and late 1920s gradually reduced the fear of its ideology and its organizing threats. And so it was that by the middle of the decade, official animosity toward the organization faded considerably and the number of Wobblies serving time on criminal syndicalism charges began to diminish. By 1926 and 1927, the state prisons finally began to empty of Wobblies convicted of criminal syndicalism.⁶¹⁰ By the time they were released, some of these people had served upward of seven years in prison.⁶¹¹ The last member in prison for criminal syndicalism, Leo Ellis, who had been convicted by a California jury eight years earlier, was released on September 29, 1928.⁶¹²

VI

CRIMINAL SYNDICALISM ENFORCEMENT IN THE LATER TWENTIETH CENTURY

Ellis's release would not mark the end of criminal syndicalism enforcement. The use of these laws against radicals continued through the 1930s and 1940s. What changed was the identity of their victims. Instead of Wobblies, the ranks of defendants in this period were comprised of communists or socialists, populist farmers,⁶¹³ and, on occasion, fascists.⁶¹⁴ Such prosecutions oc-

⁶⁰⁹ See, e.g., *Five I.W.W. Prisoners Free Again*, L.A. TIMES, Feb. 1, 1922, at 11.

⁶¹⁰ See, e.g., *Fellow Workers Leave Prisons in Syndicalism State*, INDUS. WORKER, Apr. 2, 1927, at 2; *John Bruns Is Out of Quentin*, INDUS. SOLIDARITY, Nov. 23, 1927, at 1; *Membership Must Not Forget Prisoners of the Class War*, INDUS. SOLIDARITY, Sept. 15, 1926, at 1 ("From Two to Nine I.W.W. Released Each Month from California Bastiles."); *More Class War Prisoners Leave California Pens*, INDUS. WORKER, Feb. 26, 1927, at 4.

⁶¹¹ See, e.g., *Frank Nash Completes Long Prison Sentence*, INDUS. SOLIDARITY, Oct. 6, 1925, at 1 (reporting prisoner's release after seven years).

⁶¹² *Last Cal. C.S. Prisoner Freed*, INDUS. WORKER, Sept. 29, 1928, at 1.

⁶¹³ See, e.g., *Michigan Farmers Held*, N.Y. TIMES, Mar. 14, 1933, at 6 (reporting arrests of seven farmers for demonstrating at an auction); *Ten Farmers Held in Iowa Outbreaks*, N.Y. TIMES, Apr. 30, 1933, at 3 (reporting arrests of ten farmers "for alleged participation in farm riots").

⁶¹⁴ *Black Legion Head Surrenders in Ohio*, N.Y. TIMES, Dec. 4, 1937, at 6; *19 Black Legion Men Face Trial for Syndicalism*, CHI. DAILY TRIB., Dec. 12, 1936, at 9; *22 Indicted for Syndicalism in Terrorist Quiz*, CHI. DAILY TRIB., Aug. 22, 1936, at 14; *22 Raiders Seize Bund Chief and Anti-Jewish Circulars*, N.Y. TIMES, Jan. 16, 1939, at 6.

curred in many of the jurisdictions that were at the forefront in the persecution of Wobblies: California, Oklahoma, and Oregon.⁶¹⁵ In fact, the early 1930s saw fairly considerable use of criminal syndicalism laws against labor activists in California's farming regions.⁶¹⁶ Other notable prosecutions occurred amid labor unrest in the coal mining regions of Ohio and Kentucky.⁶¹⁷ Some of these cases were rather infamous. In 1931, novelists Theodore Dreiser and John Dos Passos were indicted for criminal syndicalism in Kentucky, where they had gone to support striking coal miners.⁶¹⁸ However, neither was ever brought to trial.⁶¹⁹ In 1932, William Z. Foster, chairman of the Communist Party (and onetime Wobbly, already the subject of one criminal syndicalism prosecution) was charged with criminal syndicalism in Los Angeles.⁶²⁰ Later in the decade, California authorities briefly linked actor James Cagney to a group of Communists who were tried and convicted of criminal syndicalism.⁶²¹ In a few other cases, Congress of Industrial Organizations (CIO) leaders

⁶¹⁵ See, e.g., *De Jonge v. Oregon*, 299 U.S. 353 (1937); *People v. Chambers*, 72 P.2d 746 (Cal. Dist. Ct. App. 1937); *People v. Horiuchi*, 300 P. 457 (Cal. Dist. Ct. App. 1931); *State v. Denny*, 53 P.2d 713 (Or. 1936); *State v. Boloff*, 4 P.2d 326 (Or. 1931); *Asserted Red Chiefs Jailed*, L.A. TIMES, Jan. 20, 1931, at A1 (reporting arrests in Los Angeles); *Communists Get Prison Terms*, N.Y. TIMES, Apr. 11, 1935, at 3 (reporting California convictions); *Held for Syndicalism: 8 Men, 4 Women in Oklahoma City Face Prison as Reds*, N.Y. TIMES, Aug. 21, 1940, at 21; Richard L. Neuberger, *Oregon's Syndicalism Fight Revived*, N.Y. TIMES, Jan. 10, 1937, at 67; *Oklahoma Jury Decries Prison for Communist*, CHI. DAILY TRIB., Oct. 12, 1940, at 10; *Raiders Press Hunt for Reds in California*, CHI. DAILY TRIB., July 21, 1934, at 2; *"Red" Guilty in Oklahoma*, N.Y. TIMES, Oct. 12, 1940, at 10; *Red Sentenced for Ten Years*, L.A. TIMES, Mar. 3, 1931, at 1 (reporting conviction in Portland, Oregon); *Syndicalism Is Charged*, N.Y. TIMES, July 22, 1934, at 2 (reporting criminal syndicalism charges in Portland, Oregon).

⁶¹⁶ See, e.g., *El Centro Convicts Nine Reds*, L.A. TIMES, June 14, 1930, at 1; *Nine Radicals Sentenced*, L.A. TIMES, June 17, 1930, at 10.

⁶¹⁷ See, e.g., *Eight Are Arrested at Pineville*, N.Y. TIMES, Jan. 5, 1932, at 18 (reporting Kentucky arrests); *Jail 13 in Mine Strike; Officers in Ohio Charge Five with Criminal Syndicalism*, N.Y. TIMES, June 26, 1931, at 14; *Mine Reds Warned by Kentucky Judge*, N.Y. TIMES, Aug. 18, 1921, at 16; *New Clashes Mark Ohio Miners' Strike*, N.Y. TIMES, June 18, 1931, at 14.

⁶¹⁸ *Dreiser Indicted for Syndicalism*, N.Y. TIMES, Nov. 17, 1931, at 14; *Indict Dreiser, Aids on Charge of Syndicalism*, CHI. DAILY TRIB., Nov. 17, 1931, at 18.

⁶¹⁹ *Dreiser Indictments Dropped*, N.Y. TIMES, Mar. 2, 1933, at 15 (reporting that cases were later dropped).

⁶²⁰ *Foster, Communist Candidate, Seized by Los Angeles Police*, CHI. DAILY TRIB., June 29, 1932, at 4; *Foster, Leader of Reds, Jailed*, L.A. TIMES, June 29, 1932, at A1.

⁶²¹ *Actor Named in Red Trial*, L.A. TIMES, Jan. 23, 1935, at 3; *Police Involve James Cagney with Red Cause*, CHI. DAILY TRIB., Aug. 18, 1934, at 3.

were also charged with, and sometimes convicted of, criminal syndicalism.⁶²²

Though they worked considerable hardship on their victims, who were often as innocent as the Wobbly defendants before them, these and scattered prosecutions elsewhere were never as extensive or as focused as was the earlier campaign against the IWW. By the 1950s and 1960s, criminal syndicalism prosecutions had become truly sporadic, with only the occasional rightist or civil rights worker facing charges.⁶²³ And yet, through all of this, there remained no clear reason to question the basic constitutionality of these laws.⁶²⁴ Not until 1969 in *Brandenburg v. Ohio*⁶²⁵ did the United States Supreme Court finally rule that the criminalization of mere advocacy of radical change, absent the actual threat of “imminent lawless action,” could not be reconciled with the First Amendment.⁶²⁶ *Brandenburg* followed on the heels of a number of lower courts’ decisions that invoked a similar logic to invalidate the use of criminal syndicalism laws against civil right activists.⁶²⁷

Most states that enacted criminal syndicalism laws in the 1910s and 1920s have since repealed their statutes.⁶²⁸ This includes the

⁶²² *C.I.O. Red Found Guilty in Strike; Faces Ten Years*, CHI. DAILY TRIB., Oct. 7, 1939, at 11. The unionist convicted in this case, William Sentner, was a CIO regional director. His conviction, which was overturned by the Iowa Supreme Court, stemmed from his role in a sit-down strike at a Maytag plant. *Iowa v. Sentner*, 298 N.W. 813 (Iowa 1941).

⁶²³ See, e.g., *Negro Arraigned as ‘Revolutionist,’* L.A. TIMES, Sept. 22, 1966, at 3; *20 Negroes in Jail*, N.Y. TIMES, Sept. 25, 1964, at 26 (reporting criminal syndicalism charges against civil rights workers in Mississippi).

⁶²⁴ In 1937, the United States Supreme Court held unconstitutional the conviction of a Communist, Dirk De Jonge, under Oregon’s amended criminal syndicalism law. However, it did so essentially on the grounds that the defendant’s conviction was premised almost entirely on his attendance at a Communist Party meeting, and without there being adequate evidence of either the meeting’s endorsement of criminal syndicalism or De Jonge’s advocacy of prohibited means of social change. *De Jonge v. Oregon*, 299 U.S. 353, 365-66 (1937). The Court did not answer the question whether such advocacy, if shown, could provide a basis of culpability, or if De Jonge’s membership in the Party, if made an element of the crime, would suffice either.

⁶²⁵ 395 U.S. 444 (1969).

⁶²⁶ *Id.* at 447.

⁶²⁷ See, e.g., *Barber v. Kinsella*, 277 F. Supp. 72 (D. Conn. 1967); *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967). In fact, the case responsible for the so-called Younger Abstention Doctrine, *Younger v. Harris*, 401 U.S. 37 (1971), involved a three-judge panel’s injunction of a local prosecutor’s attempt to prosecute a civil rights activist, *id.* at 40.

⁶²⁸ Only a few states still have criminal syndicalism laws on the books. See MISS. CODE ANN. §§ 97-7-21, 97-7-23 to -27 (2005); NEV. REV. STAT. § 203.117 (2006);

states where major use was made of these laws such as California. There remain a few holdouts, however; contemporary prosecutors still attempt from time to time to charge and convict people of criminal syndicalism. Often these defendants have been radicals of the right, including, for example, the so-called Montana Freeman, several of whom were charged with, and in some instances convicted of, syndicalism in the mid-1990s.⁶²⁹ On another relatively recent occasion, a labor activist was targeted as well.⁶³⁰ In any case, the issue that bears reflection is not whether we will see a return to widespread enforcement of criminal syndicalism laws as such against radicals of whatever stripe, but rather whether the concept of antiradical repression embodied in these statutes endures in contemporary society, despite the apparent advances in constitutional jurisprudence.

CONCLUSION

This Article tells the story of a conflict between capital and labor in which the state (in its various jurisdictional forms), armed with the authority of the law, intervened decisively on the side of capital, advancing the interests and the ideology of employers against those of a radical union. Armed with criminal syndicalism laws, the state set out to smash the IWW, punish its members and supporters, and articulate very clearly an official

OKLA. STAT. ANN. tit. 21, §§ 1261-1264 (West 2002); UTAH CODE ANN. §§ 76-8-901 to -904 (2003). Two other states still maintain "criminal anarchy" statutes, which are similar. See LA. REV. STAT. ANN. § 14:115 (2004); N.Y. PENAL LAW § 240.15 (McKinney 2000). Although it provides a rare example of a major strike won by labor in the last twenty years, the 1989 to 1990 Pittston coal strike offers a telling example of the highly intrusive and coercive role that the law and the police play in contemporary labor disputes. See RICHARD A. BRISBIN, JR., *A STRIKE LIKE NO OTHER STRIKE: LAW AND RESISTANCE DURING THE PITSTON COAL STRIKE OF 1989-1990* (2002). For an in-depth description of another relatively recent strike in which the enforcement of limits on strikers' behavior played an important role, see DAVE HAGE & PAUL KLAUDA, *NO RETREAT, NO SURRENDER: LABOR'S WAR AT HORMEL* (1989).

⁶²⁹ See Lawrence F. Reger, Note, *Montana's Criminal Syndicalism Statute: An Affront to the First Amendment*, 58 MONT. L. REV. 287 (1997); Brad Knickerbocker, *Taxes, Rights Fuel Montana's Militant Groups*, CHRISTIAN SCI. MONITOR, Mar. 29, 1996, at 1; see also *Montana v. Holland*, 955 P.2d 1360 (Mont. 1998); Jim Beck, *Conviction of Shirley Holland Upheld*, EVANSVILLE COURIER (Ind.), Nov. 13, 1998, at A10.

⁶³⁰ Conrad Defiebre, *The Hormel Strike: Rogers Is Cleared but Back in Jail on New Charges*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Apr. 12, 1986, at 5B (reporting district judge's ruling of state criminal syndicalism law unconstitutional and dismissing charge against a union strategist). Minnesota subsequently repealed its statute.

denunciation of the IWW's radical challenge to industrial capital. It did all of that and more, in the name of peace and security, and with the full knowledge that none of the victims of these laws actually violated them, let alone constituted any threat to state security or public safety.

That this campaign against the IWW represented proof of the state's fundamental class bias is beyond dispute. What remains to be pondered is whether this bias persisted beyond the 1920s—whether, in some sense, this business of criminal syndicalism should be understood as an archaic expression of the class politics of state and law, no longer typical of modern practices; or whether something more enduring is reflected in this history of criminal syndicalism. On one level, the answer to this seems obvious. The state's biased resort to explicitly repressive practices in the context of labor disputes faded dramatically in the middle decades of the last century. In fact, since the 1930s, the rights of labor have been protected by law. Most workers nowadays enjoy the legal rights to organize unions free of employer interference, provoke collective bargaining with employers, and (in limited ways) engage in strikes and other acts of collective protest. These rights exist alongside an array of other legal protections in the workplace involving minimum wage and overtime, health and safety, and the prohibition of racial, gender, and other forms of discrimination, among other issues. All this has been accompanied by a series of apparently dramatic civil libertarian reforms in criminal procedure, particularly in the 1950s and 1960s.⁶³¹

The weight given to these changes in comparing the era of criminal syndicalism to the present day must be qualified, however. The right to strike exists subject to employer prerogative to permanently replace—in effect, to fire—strikers, provided only that the strikers are not engaged in protest of illegal activity on the part of the employer.⁶³² This rule, which is not at all mandated by the literal terms of the National Labor Relations Act, was made clear by the courts very soon after the statute's enactment.⁶³³ Furthermore, by amendment to the Act as well as court and administrative decisions, the law identifies a number of cir-

⁶³¹ See, e.g., DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* 27-70 (2003).

⁶³² The doctrine has its origins in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938).

⁶³³ For a description of this doctrine and a critique of its bases in the statute, see,

cumstances under which strikes may be unprotected from employer reprisal or even illegal if they have an improper object or are conducted in an improper fashion (even if not violent or otherwise criminal).⁶³⁴ The right to strike is likewise significantly limited by interpretations of the law of collective bargaining agreements, under which the courts have assumed the authority to compel arbitration of disputes (even where not expressly agreed by the parties) and to enjoin strikes in defiance of this requirement. Similarly, labor and employment laws are widely underenforced and carry inadequate remedies, leaving employers with a significant, unremedied prerogative simply to ignore their requirements.⁶³⁵ Moreover, laws and the administrative structures for enforcing the rights provided by these laws are accorded to workers in lieu of other rights either left unprotected by law or explicitly denied to workers. That is to say, workers may be thought to have ceded many of their prerogatives in exchange for the protections of the law, even though those protections are substantially ineffectual. At the same time, when it comes to policing against illegal strikes, the state has never been more willing to act or capable of acting with decisive force; an illegal strike nowadays *will be ended* by whatever means prove necessary.⁶³⁶ Not that this has been necessary, either. In the midst of these realities, strikes, overall labor activism, and union membership have all declined steadily and significantly since the middle part of the last century.⁶³⁷

In light of these realities, a number of scholars have described post-New Deal labor law as a fundamentally conservative re-

for example, JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 21-24 (1983).

⁶³⁴ See James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 527-34 (2004).

⁶³⁵ See, e.g., RICHARD N. BLOCK ET AL., *LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE CHOICE: THE STATE OF THE WORKPLACE IN THE 1990s* 79-93 (1996); WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 151-204 (1993).

⁶³⁶ Unions and their members are subject to a number of forms of criminal and civil liability for incidents stemming from illegal strikes, including liability for committing unfair labor practices, conspiracy, assault and battery, and trespass. See, e.g., J.R. Carby-Hall, *Industrial Conflict: The Criminal Liability and Statutory Immunities of Trade Unions and Their Officials*, 29 MANAGERIAL L. 2 (1987) (describing potential liability under the common law in England). Illegal strikes may also be enjoined and the injunction enforced by contempt proceedings.

⁶³⁷ On the critique of the antilabor functions of modern labor law, see, for example, Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

gime, one that funnels labor conflict into institutional mechanisms that mute the voice of protest and limit the range of possible reformist, let alone revolutionary, outcomes⁶³⁸—and that remains quite capable of redressing the kind of militancy and radicalism that the IWW practiced, even if the risks are likely to involve a so-called fair trial on charges far less crude than criminal syndicalism. Others have been equally keen to qualify the meaning of criminal procedure reforms, in some cases casting these reforms as covertly reactionary devices that have legitimated the authority of the criminal justice system without much limiting the habits of the state.⁶³⁹ To this circumspect view of criminal procedure reforms must be added a critical reflection on the massive expansion of the criminal justice system as a vehicle of social control—measured, for example, in cases, sentences, and people incarcerated—as well as its own obvious function (if not intended design) as a means of containing the socially marginalized.⁶⁴⁰ Taken together, these critiques suggest that, in the transition from a realm of criminal syndicalism prosecutions and labor injunctions to that of unfair labor practices, government-sponsored elections, and arbitration proceedings, the state may have become, not less class-repressive, but repressive in more rational, legally bound, and (in the modern context) politically legitimate ways.

To the extent that this depiction of the continuity of the state's class-repressive function is accurate, it closely validates the Wobblies' critique of a state-sponsored regime of labor relations grounded in positive legal rights and of the inherent bias of the state generally in matters of class conflict. Considered alongside the history of criminal syndicalism laws, it also suggests something important about the nature of the modern state and its legal system: namely, how little these realms have changed over the last eighty or ninety years.

⁶³⁸ See, e.g., TOMLINS, *supra* note 63 at 247-328; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Holly J. McCammon, *From Repressive Intervention to Integrative Prevention: The U.S. State's Legal Management of Labor Militancy, 1881-1978*, 71 SOC. FORCES 569 (1993).

⁶³⁹ See, e.g., Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361 *passim* (1986).

⁶⁴⁰ The literature on this issue is extensive. For helpful reviews, see, for example, CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* (2000); PRISON NATION: *THE WAREHOUSING OF AMERICA'S POOR* (Tara Herivel & Paul Wright eds., 2003).

In the *Communist Manifesto*, Marx famously described the executive of the modern state simply as a committee of the bourgeoisie.⁶⁴¹ The implication is, of course, that the modern state and its legal system not only act as agents of capitalist interest, but also serve this function in a manner unmediated by their own institutional identity or ideological norms. The metaphor suggests a notion of the state as a comprehensive conspiracy on behalf of capitalist interest, which may be true on occasion, but is difficult to reconcile with the complexity of modern state action. In fact, the *Manifesto*'s forceful rhetoric aside, it is quite clear that the relationship between state (and law) on the one hand, and capital on the other, is rather more nuanced. However strong the bias of state and law toward the interests and ideology of capital and against those of labor, this relationship is also mediated to a considerable extent by the state's own institutional interests and ideological commitments. Both the state and the law, in other words, are independent, at least in a relative sense, from capital, at the same time that they are aligned with it via shared ideology, interests, personality (in the literal sense), financial influence, and broad-ranging economic interdependency. By this view, the state is not simply a committee of the bourgeoisie—at least, not usually—so much as it is a staunch, reliable, semiautonomous ally in this class' struggle to maintain its advantages over labor.

Through this relationship with the state, capitalists dominate the state and its legal system without exercising absolute control over either. This leaves the modern state, at least in its liberal iterations, able to function as a forum of debate and discourse, in which more or less democratic decisions are reached. The state can thus accommodate conflicts and rivalries among capitalists, or between capitalists and other groups. It can advance capitalist interests about which the capitalists themselves are ignorant or indifferent. This includes redressing the various tendencies toward crisis and disorder that inhere in capitalism itself by ameliorating the effects of poverty, maintaining law and order, managing banking and monetary policy, and funding research projects and other such things. In accomplishing these ends, the state can compromise the interests of capitalists for something approximating a greater good, as by the imposition of taxes or

⁶⁴¹ KARL MARX, *THE COMMUNIST MANIFESTO* 57 (Frederic L. Bender ed., 1988) (1848).

regulatory regimes. On occasion, these functions can go so far as to involve according limited advantages to labor in the form of statutory labor standards and other kinds of protective legislation, such as that just mentioned.⁶⁴² But in every case, such actions remain within the bounds of the established order, leaving intact existing social hierarchies and the interests of economic elites.⁶⁴³

In fact, nothing about the current liberal state suggests a fundamental repudiation of the kind of class politics evident in the time of criminal syndicalism. Critical theorist Franz Neumann wrote that the modern, liberal state is far from weak; in his words, "The liberal state has always been as strong as the political and social situation and the interests of society demanded. . . . It has been a strong state precisely in those spheres in which it had to be strong and in which it wanted to be strong."⁶⁴⁴ Neumann went on to locate the areas in which this strength has mattered: maintaining order, advancing imperial aims, and breaking strikes.⁶⁴⁵ What Neumann means to say is this: first, the modern state enjoys considerable powers of repression within its normal, legitimate framework. It can act in ways that are both repressive and biased in the interests of capital and compatible with rule of law and civil libertarian norms, democratic commitments, and so forth. The modern state can sustain its commitments to capital in ways that are perfectly legal and normative and that benefit from the legitimacy accorded by operating in this fashion.

Neumann's second point is that there also remains for the state the possibility simply of flouting the rule of law, civil liberties, and democracy in the course of protecting its own interests or those of capital. The state can invoke exceptional circumstances, or emergencies, under which normal constraints on its power, whether legal, moral, or political, are held to no longer apply. There is often a greater price to be paid, of course, by this route,

⁶⁴² Claus Offe has aptly called the state's discharge of its "crisis management" role, evident for example in the state's provision of social welfare, as a means of warding off social disorder. See CLAUS OFFE, *Crises of Crisis Management: Elements of a Political Crisis Theory*, in *CONTRADICTIONS OF THE WELFARE STATE* 35, 35-36 (John Keane ed., 1984).

⁶⁴³ On this account of the state, see RALPH MILIBAND, *THE STATE IN CAPITALIST SOCIETY* (1969).

⁶⁴⁴ Franz L. Neumann, *The Change in the Function of Law in Modern Society*, in *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER* 101, 101 (William E. Scheuerman ed., 1996).

⁶⁴⁵ *Id.* at 101-03.

a price accounted mainly in the diminution of legitimacy that tends to follow when the state uncloaks its authority. But just as surely, there can be significant advantages for the state to take this course against its enemies or the enemies of a constituency with which it is closely allied.

These reflections on the nature of state and law illuminate much about the history of criminal syndicalism and the IWW. In particular, they call into question a tendency among some scholars, especially civil libertarians, to cast this episode in aberrational terms: as part of the post-Great War Red Scare, infected with the hysteria of anti-Bolshevism; as an overreaction to IWW bluster; as the work of overzealous, career-minded prosecutors; as the product of an era not yet in possession of a well-developed concept of First Amendment doctrine and other notions of civil liberty; or as anything but a normal exercise of modern state power. Such a view is hardly warranted, let alone necessary. One can see the persecution of the IWW by means of criminal syndicalism laws as fundamentally normal in the sense that it represented something that the modern state quite typically does and that the contemporary state may well remain poised to do: stamping out challenges to the reign of capital and to its own authority. The fact that, in carrying out its campaign against the IWW, the state flouted established norms of civil liberty and criminal justice was, too, an unremarkable and thoroughly normal occurrence, as was the acquiescence of the courts in this campaign. At the end of the day, to speak in Neumann's terms, the state needed to be stronger in responding to the IWW than conventional, liberal conceptions of the limits of its power suggested. It employed radical means of repression not because it did not know better, so to speak, but because it perceived a radical threat to its interests and to those of its constituents.

When, by the late 1920s, the enforcement of criminal syndicalism laws against the IWW faded, this was not due to the discovery or rediscovery of civil libertarian principles or First Amendment doctrine; nor did it reflect the prevailing of "cooler heads" or "more reasonable" minds, as some have suggested. What this more likely reflected, instead, was the essential success of the state's project of destroying the organization, which made further enforcement efforts seem less necessary, and, in turn, paved the way for a gradual repudiation of these laws in official circles, culminating in the *Brandenburg* decision. Of course, this

repudiation has not been entirely complete. Despite *Brandenburg*, prosecutors still attempt, from time to time, to use these laws against radicals of one sort or another. This suggests, rather ominously, something of Neumann's other insight: for all its rhetoric about the rule of law and free society, the modern state remains poised to embark on the most aggressive course of class repression. This observation is extremely relevant in the context of the current war on terrorism.

In the end, it was not merely a labor organization or a set of ideas that were sacrificed to these laws. The victims of criminal syndicalism laws were people, men and women who endured enormous hardship because of their commitment to their union and their ideals, and who risked and often surrendered the best years of their lives for their dedication to equality, social justice, and the moral claim that those who toil in society deserve to enjoy the fruits of their labor and exercise some sovereignty over their own work. And yet the human story of these laws is not merely one of victimization and passive oppression. It is also a story of the triumph of courage and principle in the face of these realities. Those Wobblies and their supporters who were prosecuted and imprisoned under these statutes clung tenaciously to their political beliefs and to a spirit of resistance and rebellion even as they suffered in prison. They showed real solidarity in their support for one another, often at great costs. These victories cannot be ignored even as the destructive effect of these statutes on these people and their cause is tolled up, not least because this underlying spirit of resistance has perhaps proved to be the Wobblies' most enduring legacy to the American experience.

This genuinely tragic convergence of hardship and triumph, of repression and resistance, is perhaps nowhere better expressed than in the text of a letter by a Wobbly named Joe Neil that was published in the union's *Industrial Worker* newspaper in 1928, upon Neil's release after six years in a Kansas prison. An Austrian by birth, Neil had joined the IWW in the late 1910s. He had already been jailed several times on minor charges related to his membership and deported by federal authorities before being arrested for asking a man for a quarter while looking for work in Hutchinson, Kansas, in the summer of 1922. When police discovered he was a Wobbly, Neil was charged with, and eventually convicted of, criminal syndicalism. He was then sent to prison,

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where he spent part of the time in the asylum ward.⁶⁴⁶ In his letter, Neil first thanked the union's General Defense Committee for its efforts on his behalf, and then politely complained that he had not received enough mail from his fellow workers and had been left without "rest from the extreme brutality which I endured."⁶⁴⁷ But he said this, too: "One who goes to prison for the I.W.W. should be proud of his sacrifice for the principle of industrial unionism, and I am justly proud of mine."⁶⁴⁸

⁶⁴⁶ *Joe Neil Released-Rearrested*, *supra* note 593.

⁶⁴⁷ *Joe Neil Thanks Fellow Workers*, *INDUS. WORKER*, July 14, 1928, at 1.

⁶⁴⁸ *Id.*

