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Citation Information

Ahmed White, *Law, Labor, and the Hard Edge of Progressivism: The Legal Repression of Radical Unionism and the American Labor Movement's Long Decline*, 42 BERKELEY J. EMP. & LAB. L. 165 (2021), available at <https://scholar.law.colorado.edu/faculty-articles/1498>.

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Law, Labor, and the Hard Edge of Progressivism: the Legal Repression of Radical Unionism and the American Labor Movement’s Long Decline

Ahmed White†

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DOI: <https://doi.org/10.15779/Z389882N6N>

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INTRODUCTION

On July 22, 1917, a man named Jesse Dunning was dining in a restaurant in Bemidji, Minnesota, when the town’s chief of police, Frank Ripple, detained him on a charge of “suspicion.” Accompanied by the Beltrami county attorney and a fellow officer, Ripple took Dunning to the local headquarters of the union for which Dunning worked, the Industrial Workers of the World, or IWW. Ripple’s search of the headquarters turned up two staples of IWW literature: a pamphlet called *Sabotage: The Conscious Withdrawal of the Workers’ Industrial Efficiency*, written in 1916 by IWW organizer Elizabeth Gurley Flynn; and a small book simply called *Sabotage*, written by the French anarcho-communist, Émile Pouget. The discovery of these books confirmed in Ripple’s mind that Dunning needed to be behind bars, and Ripple took the union man to jail.¹

Dunning was one of six IWW men arrested in Bemidji around this time. Months of union activism among lumberjacks in the area had converged with wartime militarism to generate hysteria about the IWW. After a fire destroyed the local lumber mill, union people were accused of leading a campaign of sabotage. A 150-strong, club-wielding posse patrolled the streets of Bemidji and rounded up so-called troublemakers—IWW members. Most of these “Wobblies,” as the union’s members were universally called, were then deported from the area. Of those who were arrested, only Dunning was prosecuted. He was accused of violating Minnesota’s “criminal syndicalism” law, a serious charge indeed.²

The prosecution alleged that Dunning engaged in criminal syndicalism by “distributing” the books on sabotage and working for the IWW. During his trial that fall, Dunning acknowledged belonging to the IWW and working on behalf of the union. But he professed that he had not read either Flynn’s

1. Art Lee, *Hometown Hysteria Bemidji at the Start of World War I*, 49 MINN. HIST. 65, 74 (1984). See generally *Petty Political Clacquers Fall in Attacks upon Truthfulness of Pioneer*; *Here’s the Proof*, BEMIDJI DAILY PIONEER, Oct. 10, 1917, at 1 (covering the case of Jesse J. Dunning).

2. Lee, *supra* note 1, at 74-75; *Petty Political Clacquers Fall in Attacks upon Truthfulness of Pioneer*; *Here’s the Proof*, *supra* note 1, at 1.

pamphlet or the Pouget book. Dunning also denied any connection to the fire at the mill, which figured prominently in the state's case, even though there was no evidence to suggest that any Wobblies were involved in the calamity. Nevertheless, on September 29, 1917, Dunning was found guilty and, several days later, sentenced to two years in prison. And so Dunning became the first person in America ever to be convicted of this rather remarkable crime.³

Enacted only four months before Dunning's arrest, Minnesota's criminal syndicalism law forbade advocating for "political or industrial change" by means of "sabotage," "terrorism," or other criminal acts; to this end, the law barred both membership in an organization and publication of documents that promoted change by these means.⁴ In the statute's conception, "syndicalism" itself had no particular meaning, beyond an association with the IWW.⁵ Proof that a defendant himself had advocated sabotage or terrorism, let alone actually engaged in such things, was completely unnecessary. In fact, police and prosecutors could arrest and charge people like Dunning based solely on their association with the IWW and rely on judges and juries to credit their assertions that, because the union had embraced these prohibited means of social change, the defendants were guilty.

This is exactly how things were intended to work. Minnesota was one of twenty-one states to enact a criminal syndicalism law between 1917 and 1920.⁶ Like these other states, Minnesota did so with the intent to criminalize the IWW, which had been founded in 1905 around a vision to organize the whole of the working class irrespective of skill, race, ethnicity, or gender. Although committed to peaceful means, the union was a revolutionary organization. It proposed to eventually topple capitalism with a massive general strike, and in the meantime demanded that workers should command higher pay, better working conditions, and more control over the way their jobs were performed. When Dunning was arrested, the IWW was especially active among migratory workers west of the Mississippi, making the union a threat to the interests and social vision of powerful capitalists and their allies. In turn, the capitalists and their allies sought to use the law to destroy the union.

In the late 1910s and early 1920s, thousands of IWW members were arrested and prosecuted for relatively minor crimes like vagrancy, as membership in the union was sufficient proof of guilt for those crimes, too.⁷

3. See Lee, *supra* note 1, at 74; Eldridge Foster Dowell, *A History of the Enactment of Criminal Syndicalism Legislation in the United States 1072* (1936) (Ph.D. dissertation, Johns Hopkins University) (on file with author); see also *Convicted as Criminal Syndicalist*, *INDUS. WORKER*, Oct. 6, 1917, at 3 (reporting the sentencing of Jesse J. Dunning).

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

5. See, e.g., *id.*; see also Dowell, *supra* note 3 at 18-22.

6. Dowell, *supra* note 3, at 12-13.

7. See, e.g., 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, 668 (2004).

This program was also important to the effort to destroy the union. But the bid to annihilate the IWW was, for our purposes, most revealing when it relied on serious charges, which involved not only criminal syndicalism but also prosecution under the federal Espionage Act.⁸ By the end of 1917, several hundred Wobblies were on their way to being convicted of violating the federal statute, which, like the criminal syndicalism laws, was enacted in part to criminalize membership in the IWW.

This campaign to use the criminal law to destroy the IWW began before World War One and extended through the Red Scare into the 1920s. This program was sponsored by politicians, newspapermen, and elites at every level of society, in addition to powerful Western capitalists in lumber, mining, agriculture, and other industries. Conservatives played a crucial role. But Progressives—the direct ancestors of today’s liberals—were also central to this campaign. Progressives’ ranks were dominated by those who viewed the IWW’s radicalism and its militancy as unacceptable affronts to their vision of a well-ordered society and who embraced the use of the law as a means of putting the union in check. From local police like Bemidji’s Frank Ripple, to important state officials, like John Lind—the former governor of Minnesota and head of that state’s Public Safety Commission—to Woodrow Wilson himself, Progressives were at the forefront of this effort. Ultimately, their campaign resulted in several thousand IWW members being arrested and jailed and hundreds imprisoned on criminal syndicalism and Espionage Act charges.⁹

By the mid-1920s, the IWW was essentially defunct, destroyed in significant part by these prosecutions. Although it never quite disappeared and has even experienced a modest revival, the union has never recovered. Its bold vision of a world in which capitalism and wage labor is supplanted by a workers’ commonwealth survives mainly as an object of nostalgia and romance. If these were the only important consequences of the use of these laws against the IWW, its legacy would be significant. But the implications of this campaign go much further. Indeed, as this Article shows, the criminalization of the IWW is important to understanding the debased condition of the labor movement even today, over 100 years after Dunning’s arrest.

8. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217, Jun. 15, 1917.

9. On the role of Progressive figures like these in the legal persecution of the IWW, see Letter from Woodrow Wilson, President of the United States, to T.W. Gregory, Att’y Gen. of the United States (Apr. 3, 1918) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60, Records of the Office of the Pardon Attorney, Record Group 204); ERIC THOMAS CHESTER, *THE WOBBLIES IN THEIR HEYDAY* 165-66 (2014); MELVYN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 393-97 (1969); KATHRYN S. OLMSTED, *RIGHT OUT OF CALIFORNIA: THE 1930S AND THE BIG BUSINESS ROOTS OF MODERN CONSERVATISM* 122-24 (2015).

By foreclosing the kind of leftist, anti-statist, unionism that defined the IWW's approach to labor organizing and activism, the enforcement of these laws reshaped the labor movement. With the IWW driven into irrelevance, Communists, whose less skeptical views of Progressives and the role of the state in labor relations were shaped in part by the Wobblies' experience, became the standard-bearers of a new kind of labor radicalism at a crucial moment in the country's history, one that embraced both Progressives and the state. In the 1930s, unionists in this mold joined with Progressives, increasingly called liberals, to advance a vision of reformist, state-sponsored unionism that would culminate in the so-called "Popular Front" unionism of the Second New Deal period. A pillar of the New Deal, this new unionism presided over the labor movement's unprecedented growth in the 1930s and 1940s. But its vulnerabilities and limitations were quickly exposed when the Popular Front unraveled; Progressives, or liberals, resumed their opposition to labor radicalism, and the state retreated from its support for labor rights. As this new reality took shape in the postwar period, American workers were left, not only with little effective representation, but also without a viable tradition of labor radicalism. In view of this history, it seems that the movement's situation today can be only be fully understood by taking account of the kind of thing that happened so long ago to Jesse Dunning.

Of course, to make this claim in a plausible way is also to understand its limitations. Repression was not the only reason the IWW collapsed. Other factors, including internal dissension and wide-ranging opposition to its radicalism, played a significant role. Similarly, the successful repression of the IWW was certainly not the only reason that the Communist Party took up the banner of leftist industrial unionism and reshaped its meaning in the Depression and war years. Nor is a misplaced dependence on liberalism, law, or the state the only reason that the once-mighty post-war labor movement has declined so precipitously. Among the many other factors at work were unfavorable changes in demographics and political economy, as well as inadequate leadership and a tendency toward bureaucratization that drained the movement of its vitality. But running through all these developments was a set of truths about liberalism, law, and the state, and their relationship to unionism—especially radical unionism—that can only be fully understood by confronting what happened to the IWW.

This Article's account of how law, repression, and Progressivism shaped the labor movement is a new one. Much has been written about the labor movement's decline. But none of this work has traced the roots of this decline back to the criminalization of the IWW, whose demise is seen more often as the inevitable fate of a flawed experiment than as a means of understanding the labor movement's broader failure.¹⁰ Moreover, while historians have long

10. See, e.g., DUBOFSKY, *supra* note 9, at 480-84; see also PHILIP DAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 404-05 (2011).

recognized the contradictory, often anti-labor character of Progressivism,¹¹ this attitude is not common among legal scholars and, in any case, no one has yet unfolded Progressivism's role in shaping the course of labor history in the manner in which this Article does.¹² Likewise, although the rise and fall of "voluntarism," as anti-statist unionism is usually called, is an important theme in the study of American labor, the focus of scholars on this topic has been mainly on the right-wing voluntarism of the American Federation of Labor (AFL) whose relative decline in the 1930s and 1940s in the face of competition from a rival federation, the Committee for Industrial Organization (CIO), is usually presented as a positive development in labor history.¹³ This Article is not only about a different type of voluntarism; it also unfolds from the history of leftist voluntarism a different set of implications about the future of organized labor in this country.

This Article unfolds in six parts. Part II describes how the IWW's brand of labor voluntarism arose in concert with Progressivism, as both emerged from the social, economic, and political conditions created by the reign of industrial capitalism in the late nineteenth century. Part III describes the IWW's ascent in the late 1910s and explains how, as this development converged with the war and Progressivism, it led inexorably to the enactment of the criminal syndicalism laws and the Espionage Act. Part IV documents how these laws were enforced against the union. Part V reveals the complicity of the courts in this campaign, including the role of Progressive judges. Focusing on both institutional effects and the devastating consequences of prosecutions for union members, Part VI describes how enforcement undermined the IWW. Finally, Part VII develops this Article's claims about the long-term legacies of the union's repression.

I. VOLUNTARISM, PROGRESSIVISM, AND THE ROOTS OF REPRESSION

It was the IWW's fate to be born out of the same social and political conditions that would frame its destruction. By the time the union was

11. See SHELTON STORMQUIST, *RE-INVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM* (2006); CHAD PEARSON, *REFORM OR REPRESSION: ORGANIZING AMERICA'S ANTI-UNION MOVEMENT* (2016); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963).

12. One partial exception to this tendency is the criticism of the New Deal regime of labor law as insufficiently grounded in the alternative tradition of popular constitutionalism that reigned in the early twentieth century. See, e.g., James Gray Pope, *The Thirteenth Amendment and the Commerce Clause Labor and the Reshaping of American Constitutional Law, 1921-1957*, 102 COLUMBIA L. REV. 1 (2002).

13. See, e.g., William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111 (1989); JULIE GREENE, *PURE AND SIMPLE POLITICS: THE AMERICAN FEDERATION OF LABOR AND POLITICAL ACTIVISM, 1881-1917* (1998); ROBERT H. ZIEGER, *THE CIO, 1935-1955* (1995); ART PRIES, *LABOR'S GIANT STEP: THE FIRST TWENTY YEARS OF THE CIO: 1936-55* (1964). To be sure, some historians of American labor have not only highlighted the virtues of the IWW's vision of voluntarism, but also situated it in parallel with the AFL's voluntarism. See, e.g., HOWARD KIMELDORF, *BATTLING FOR AMERICAN LABOR: WOBBLES, CRAFT WORKERS, AND THE MAKING OF THE UNION MOVEMENT* (1999).

formed, industrialization had radically transformed American society. Older, more stable systems of employment, bound by tradition and often intimate social relationships, had given way to anonymous, often extraordinarily capricious and insecure relationships. Once governed by its own rhythms, the workday had become a servant of efficiency and the profit motive, with twelve-hour days and six-and-a-half and seven-day work weeks common. Work was fraught with dangers, too, as the use of ever more powerful and complex machinery converged with the profit motive and the desperation of working people. Indeed, while the advance of industrial capitalism yielded a tremendous increase in social wealth, this was distributed quite unevenly, leaving many workers in dire need and many more on a narrow precipice that separated everyday life from ruin.¹⁴

In this context, unionism emerged as a means for workers to push back, to assert control over working conditions, to increase compensation, and reduce hours of work, if not also challenge the social order. But such efforts consistently met with resistance. In the name of the “open shop”—the libertarian pretense devised by the business community to justify its strident opposition to unionism—the firing and blacklisting of strikers and union organizers was commonplace.¹⁵ So too were espionage, intimidation, and assaults of union people at the hands of company police and hired muscle.¹⁶

Unionists also had to contend with the repressive power of the state. In the late nineteenth and early twentieth centuries, courts issued thousands of injunctions against unions engaged in strikes and boycotts, and repeatedly invalidated laws that advanced labor’s interests.¹⁷ On countless occasions, police and prosecutors arrested union people, broke up their picket lines, and prosecuted them on charges ranging from disturbing the peace to murder and even treason. Governors and presidents also contributed to this repression, mobilizing state and federal troops to break strikes in the name of keeping the peace. In so doing, they abetted the killing of hundreds of union people while standing mainly silent as employers and their agents killed hundreds

14. For useful discussions of the realities of life in industrial American, see, for example, HERBERT G. GUTMAN, *WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA* (1977); MELVYN DUBOFSKY, *INDUSTRIALISM AND THE AMERICAN WORKER, 1865-1920* (2d ed. 1985); DAVID BRODY, *WORKERS IN INDUSTRIAL AMERICA* (1980).

15. SELIG PERLMAN & PHILIP TAFT, *HISTORY OF LABOR IN THE UNITED STATES, 1896-1932* 129-37 (1935); see Allen Wakstein, *The Origins of the Open-Shop Movement, 1919-1920*, 51 J. AM. HIST. 460, 460-62 (1964).

16. On the prevalence of these methods, see generally STEPHEN NORWOOD, *STRIKEBREAKING AND INTIMIDATION: MERCENARIES AND MASCULINITY IN TWENTIETH-CENTURY AMERICA* (2002); ANDREW KOLIN, *POLITICAL ECONOMY OF LABOR REPRESSION IN THE UNITED STATES* (2018); S. REP. NO. 76-6 (1939).

17. See Forbath, *supra* note 13, at 1151; FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 60-81, 24-46 (1930); GREENE, *supra* note 13, at 84; Herbert Hovencamp, *Labor Conspiracies in American Law 1880-1930*, 66 TEX. L. REV. 919, 945-58, 962-64 (1988).

more in a largely one-sided struggle that, by the turn of the century, had left the labor movement thoroughly battered.¹⁸

This grim reality shaped the evolution of the American labor movement in its early years. The state's bias against labor drove the mainstream of the labor movement, led by the AFL, and its long-serving president, Samuel Gompers, to reject the state and its political and legal systems as means of advancing labor's interests. Instead, the movement embraced voluntarism, a philosophy of labor activism marked by a strong preference for strikes, boycotts, and other forms of "direct action," rather than law and political organizing, as the primary means for advancing labor's aims. Indeed, so strong was this commitment to voluntarism that for the AFL and most of its more than one hundred affiliated unions, the law and politics were conceived mainly as means of diminishing the power of the state to limit direct action.¹⁹

The IWW emerged from this same milieu. The union was established in Chicago in the summer of 1905 by a diverse array of Socialists and left-wing dissidents from the AFL, including people associated with the Western Federation of Miners, a union of "hard rock" miners with a socialist bent and a penchant for militancy.²⁰ The IWW's founders explicitly conceived of it as a radical alternative to the AFL.²¹ Even more so than Gompers and other AFL unionists, those who led the IWW embraced direct action and saw law and the state as institutions that were destined to do employers' bidding in a capitalist society.²² Moreover, unlike the AFL, whose voluntarism was deployed in the service of a conservative vision of labor organizing—premised on "bread and butter" or "business" unionism—the IWW's voluntarism was married to a program of revolution that was premised on the destruction of capitalism.²³

Few employers went out of their way to welcome the AFL and its brand of unionism. But opposition to the IWW was something else entirely. The union's combination of ideological radicalism and tactical militancy qualified it for revulsion and certified it as a criminal organization. Never mind that the IWW generally eschewed violence, except in self-defense, and

18. Philip Taft & Philip Ross, *American Labor Violence Its Causes, Character, and Outcome, in THE HISTORY OF VIOLENCE IN AMERICA: A REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* 270 (Hugh D. Graham & Ted R. Gurr eds., 1969); Paul F. Lipold & Larry W. Isaac, *Striking Deaths Lethal Contestation and the "Exceptional" Character of the American Labor Movement, 1870-1970*, 54 INT'L REV. SOC. HIST. 167, 201 tbl. 4 (2009).

19. Forbath, *supra* note 13 at 1116, 1124-25, 1202-07; GREENE, *supra* note 13.

20. DUBOFSKY, *supra* note 9, at 76-87.

21. DUBOFSKY, *supra* note 9, at 82, 93-95; PHILIP S. FONER, *THE INDUSTRIAL WORKERS OF THE WORLD* 29, 32-33 (1965).

22. See, e.g., *INDUSTRIAL WORKERS OF THE WORLD, THE FOUNDING CONVENTION OF THE IWW: PROCEEDINGS* (New York, Merit Publishers, 1969).

23. See KIMELDORF, *supra* note 13, at 115-20 (comparing the politics and ideologies of the IWW and the AFL).

was far less inclined to resort to force than AFL unions.²⁴ From the time it was formed, the IWW was the primary target for the most aggressive forms of labor repression.

The same conditions of crisis and disorder that led to the formation of the IWW itself also helped determine the kind of repression it would face. As industrial capitalism yielded an ever-expanding array of conflicts and social problems, including a continuous upwelling of labor conflict that came to be known simply as the “labor problem,” the classical liberalism that initially served as its guiding ideology evolved into what historians have called a “new liberalism.”²⁵ This new liberalism was anchored in a handful of defining themes. Prominent among these was the enduring view that law and the state were both essential and preferred institutions for managing society and redressing the shortcomings of the social order.²⁶

Progressivism, as this new liberalism was also known until it came to be called simply “liberalism,” was never radical. Progressivism had its social roots in an expanding middle class of professionals, managers, small and medium sized capitalists, and affluent social reformers. Consistent with the interests and social outlook of these people, who were themselves products of industrial capitalism, Progressivism was always a philosophy of responsible capitalism and reconciled to the prevailing social order.²⁷ It was a philosophy geared toward acknowledging and confronting the problems of private property and capitalism without questioning capitalism’s essential precepts or forgoing what were, in the view of its supporters, its considerable virtues.²⁸

The aspiration to manage capitalism by means of state-sponsored reform manifested in a very circumspect view of labor unions—particularly those that embraced militancy and radicalism.²⁹ Some Progressives not only accepted the right of radical unions to exist but also, like the lawyer and reformer Frank Walsh and like Roger Baldwin, the founder of the American Civil Liberties Union (ACLU), defended them politically and in court.³⁰ However, most Progressives, including figures like Louis Brandeis and Theodore Roosevelt, were skeptical about unions, particularly those with

24. See DUBOFSKY, *supra* note 9, at 160-62 (discussing the IWW’s reputation for violence).

25. RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS* 216-17 (2017).

26. See PAUL D. MORENO, *THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL: THE TWILIGHT OF CONSTITUTIONALISM AND THE TRIUMPH OF PROGRESSIVISM* (2013); BRADLEY C.S. WATSON, *PROGRESSIVISM: THE STRANGE HISTORY OF A RADICAL IDEA* (2020).

27. MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA* xiv-xv, 70-71, 124-25 (2003).

28. See STORMQUIST, *supra* note 11, at 2-11 (2006); see also PEARSON, *supra* note 11; KOLKO, *supra* note 11.

29. See PEARSON, *supra* note 11, at 64-78.

30. See *id.* at 58-62, 82-86, 105; Laura Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* 183-99 (2016).

radical inclinations. A great majority of the movement's adherents viewed the IWW as a dubious organization, and many considered it an intolerable menace. Similarly, while some Progressives' suspicions about the power of the state inspired their work in building this country's first civil liberties movement, most were broadly supportive of the use of force and violence as means of governance and methods for advancing Progressivism's social vision.³¹

A prerequisite to implementing Progressives' reformist program was dispensing of force and violence in proper fashion, which is to say by the state and in due accord with the law. This expressed itself in Progressivism's consistent support for the expansion of the police functions of the state, meaning both increases in police and prosecutorial services and expansion of the criminal law.³² It likewise took form in the movement's campaign to restructure the role of police and prosecutors around the norms of professionalism and the rule of law.³³ Armed with the power of law and the state—and a legitimacy founded in its reformist critique of capitalism—the movement emerged as a particularly potent adversary of the IWW and its radical brand of industrial unionism.

II. THE RISE OF THE IWW, THE WAR, AND THE CRIMINALIZATION OF RADICAL INDUSTRIAL UNIONISM

For the first ten years of its existence, the IWW floundered. However, its membership and influence grew substantially in the lead-up to America's entry into the First World War, due to a combination of better organizing and greater demand for wartime labor. This growth was accompanied by increased hostility towards the IWW, however, and the union's antiwar stance and embrace of "sabotage" as an instrument of protest anchored a campaign of repression that culminated in the union being declared a criminal organization.

A. *The First World War and the IWW's Rise*

In the IWW's early years, the union became involved in a number of spectacular and violent struggles by insinuating itself into existing labor disputes, including strikes by miners in Goldfield and Tonopah, Nevada, in 1906 and 1907; by steel workers in McKees Rocks, Pennsylvania, in 1909; and by textile workers in Lawrence, Massachusetts, in 1912 and Paterson,

31. See STORMQUIST, *supra* note 11, at 71-76.

32. JAY STUART BERMAN, POLICE ADMINISTRATION AND PROGRESSIVE REFORM 1-14 (1987).

33. SIDNEY L. HARRING, POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865-1915, at 44-45 (1983); see Helen Boritch & John Hagan, *Crime and the Changing Forms of Social Control Policing Order in "Toronto the Good," 1859-1955*, 66 SOC. FORCES 307, 307-21 (1987).

New Jersey, in 1913.³⁴ In some of the strikes, workers won concessions. But these struggles generated no lasting gains. In fact, the union generally lost membership, as the Western Federation of Miners withdrew over strategic disputes and the IWW generally failed to recruit members of its own. So great was this loss of support that, in the wake of the Paterson strike, enrollment, which may have peaked at 60,000 in 1906, fell to somewhere between 10,000 and 30,000 by 1914.³⁵

Between 1907 and 1917, the union famously led a number of “free speech fights.”³⁶ Set mainly in western cities, these were struggles by Wobblies to vindicate their right to speak on the streets. The idea was to respond to the arrests of its street-corner speakers by overwhelming the authorities with more speakers to the point of that they could not jail them all or honor their demands for jury trials. In the course of these affairs, it was common for hundreds of Wobblies to get themselves packed into fetid jails or confined for weeks in open-air “bullpens.” Reinforced by Ku Klux Klansmen, local businessmen, and vigilantes, police often brutalized the Wobblies.³⁷ Many towns eventually conceded the Wobblies’ right to speak, but only at great cost. Moreover, the fights did relatively little to advance the union’s aim of recruiting migratory workers as they coursed through these cities and sought employment on the streets.³⁸

By 1914, the IWW failures had left it near collapse. But the union’s fortunes took a turn, primarily because of some crucial changes in its structure and strategies. In 1915, as labor demand surged in response to global war, the IWW created a Migratory Labor Bureau. That year, it also established a new union, the Agricultural Workers Organization (AWO) dedicated to organizing migratory harvest workers, particularly those who worked the wheat belt of the Great Plains. The IWW also replaced its existing organizing scheme, which relied on stationary organizers and pre-set bargaining terms, with a system that relied on “job delegates”—organizers who stepped up from the workers’ own ranks—and gave them considerable authority to decide how to recruit new members and bargain with employers.

Using this system, the AWO surged forward, claiming somewhere between 16,000 and 20,000 members in its second year of existence.³⁹

34. DUBOFSKY, *supra* note 9, at 120-25, 227-53, 263-85.

35. CHESTER, *supra* note 9, at 227; see generally Eric Chester, *The Rise and Fall of the IWW As Viewed Through Membership Figures*, 55 ANARCHO-SYNDICALIST REV. 13, 13-18 (Winter 2011). For roughly comparable estimates, see also Data from Taft: Federal Trials, Lab. Hist. Winter ‘62 (on file with Walter Reuther Memorial Library, Fred Thompson Collection, Box 25, Folder 15).

36. DUBOFSKY, *supra* note 9, at 173-97.

37. See *id.* at 475; FONER, *supra* note 21, at 178-92, 197-99, 201-02.

38. See DUBOFSKY, *supra* note 9, at 183-84, 188-89, 196-97; FONER, *supra* note 21, at 210-13; see also David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055, 1068-75 (1994).

39. Philip Taft, *The I.W.W. in the Grain Belt*, 1 LAB. HIST. 53, 59-62 (1960).

Renamed the Agricultural Workers Industrial Union, or AWIU, in March 1917, the union quickly became among the most stable and lucrative affiliate in the IWW's history.⁴⁰ As the AWIU's fortunes improved, so did those of the entire IWW. In 1915, the IWW had a nationwide income of only \$9,208 and essentially no cash on hand at its Chicago headquarters. The following year, with 15 cents of every AWO member's 50 cents in monthly dues going straight to the IWW treasury, the union's income was about \$50,000 and its cash balance reached nearly \$19,000. Boosted by this income, in 1916 and 1917, the IWW created a number of other affiliated unions, including the Lumber Workers Industrial Union (LWIU); the Metal Mine Workers Industrial Union, of which there were several regional versions; the Construction Workers Industrial Union; and the Oil Workers Industrial Union. Each of these were focused on migratory workers, particularly in the West; each embraced the job delegate system; and each set to work expanding the union's range and its influence amid wartime increases in demand for material, construction, and labor.⁴¹

Researchers have never developed an unproblematic way of determining the exact level of membership in the IWW, not least because its ranks were always so heavy with transient workers and its recordkeeping, which was never good, was interrupted by government raids and prosecutions.⁴² Nevertheless, it is clear that the union's membership surged in the lead-up to America's entry into the First World War: in early 1917, total IWW membership reached roughly 150,000—and maybe quite a bit more than this.⁴³

Although the combination of war and better organizing rescued the union from irrelevance, the union's success stimulated a concerted campaign to destroy it. At the center of this effort was the concept that figured so prominently in Jesse Dunning's prosecution in Bemidji—sabotage.

For years, especially from 1912 to 1917, the union's characteristic celebration of militancy and working-class potency was built around the rhetoric of sabotage, which, in turn, defined the union in the eyes of its many detractors. IWW newspapers and other publications repeatedly touted at least some notion of sabotage, often accompanied by cartoon images of a wooden shoe or pensive black cat; soapbox speakers regularly endorsed the concept; and the union's songs, fundamental to the cultivation of its identity, often

40. Taft, *supra* note 39, at 53-63.

41. Minutes of the 10th General Convention of the Industrial Workers of the World 32-36 (1916) (on file with Walter Reuther Memorial Library, IWW Collection, Box 2, File 2).

42. On the effects of government repression on union records and later research, see FONER, *supra* note 21, at 10. On the challenges of determining IWW membership levels, see CHESTER, *supra* note 35, at 13-18.

43. See Dan Georgakas, *The IWW Reconsidered*, in SOLIDARITY FOREVER: AN ORAL HISTORY OF THE IWW 1, 8-9 (1985); Dowell, *supra* note 3, at 70; CHESTER, *supra* note 9 at 227.

celebrated sabotage.⁴⁴ In fact, at the union's ninth annual convention, in September 1914, the IWW's main governing body, its General Executive Board, resolved "unanimously and without debate" that members should recommend to fellow workers the tactics of "slowing down and sabotage" as means of advancing the union's goals.⁴⁵

The term "sabotage" is probably rooted in nineteenth-century French slang for inept, wooden-shoe-wearing strikebreakers of peasant origin. And it originally contemplated a practice by which workers deliberately interfered with production by working slowly or otherwise inefficiently. But by the time the IWW was formed, sabotage already had a rival connotation, based in a different etymology that located its roots in the overtly destructive practice of throwing shoes into machinery.⁴⁶

For those who opposed the IWW, the notion that it engaged in destructive sabotage was both more threatening and more useful to their aim to condemn the union as a seditious organization that endangered the war effort and threatened the social order. In fact, some Wobblies did engage in "destructive sabotage." But among the union's members, these incidents were uncommon and they almost always involved minor acts, like disabling machinery or burning a stack of wheat, rather than more serious and wonton deeds.⁴⁷ It was more common for Wobblies to practice sabotage in the older sense of the word, by soldiering, playing dumb, following incorrect or inefficient orders without question, or otherwise finding ways to "strike on the job," as the union put it.⁴⁸ But the union's growing list of enemies had little interest in drawing fine distinctions. Even before the IWW's resurgence, let alone America's entry into the war, the union's preoccupation with sabotage was becoming a source of trouble.

A key event in this development was a largely spontaneous walkout by terribly exploited hop pickers on a "ranch" in Wheatland, California. The protest descended into a deadly riot which claimed the life of the local district attorney and a deputy sheriff. There were only a few Wobblies among the two thousand strikers, and there was no evidence that the union had anything to do with the violence, which was largely provoked by the belligerent

44. DUBOFSKY, *supra* note 9, at 160-64.

45. CLOICE R. HOWD, BUREAU OF LABOR STATISTICS BULLETIN NO. 349, INDUSTRIAL RELATIONS IN THE WEST COAST LUMBER INDUSTRY 67-68 (1923).

46. See NIGEL ANTHONY SELLARS, OIL, WHEAT AND WOBBLIES: THE INDUSTRIAL WORKERS OF THE WORLD IN OKLAHOMA, 1905-1930, at 26-27 (1998); see also SALVATORE SALERNO, RED NOVEMBER, BLACK NOVEMBER: CULTURE AND COMMUNITY IN THE INDUSTRIAL WORKERS OF THE WORLD 16 (1989) (referring to "The Good Old Wooden Shoe").

47. Joseph Murphy, *Joseph Murphy*, in SOLIDARITY FOREVER: AN ORAL HISTORY OF THE IWW, *supra* note 43, at 42, 49-50, 52.

48. See, e.g., JOHN S. GAMBS, THE DECLINE OF THE I.W.W. 13, 127-28 (1966); Letter from U.S. Att'y, W. Dist. of Washington, to Att'y Gen. (Apr. 19, 1917) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60, and Records of the Office of the Pardon Attorney, Record Group 204).

actions of the ranch owner and the local authorities. Nevertheless, amid sensational claims about widespread, IWW-sponsored sabotage in the region, two men with ties to the IWW were convicted of murder in connection with the riot and sentenced to life in prison.⁴⁹

After the trial of the Wheatland defendants, there was indeed some sabotage in California's agricultural districts, mainly consisting of the burning of crops and the poisoning of orchard trees. To the dismay of the IWW's leadership, which was awakening to the dangers of such rhetoric, some union members in the area also circulated propaganda defending the tactic.⁵⁰ However, it seems that Wobblies were not responsible for much of the destruction in the region, which could usually be attributed to accidents. Moreover, to the extent there was sabotage, it seems quite likely that this was mainly the work of various rogues, whether they belong to the union or not, as well as provocateurs who had been enlisted to undermine the union.⁵¹

Nevertheless, the Wheatland affair and the events that followed bolstered demands that the IWW be destroyed. A major force behind this was the California Commission on Immigration and Housing, a powerful institution that epitomized the contradictions of early twentieth-century Progressivism. The commission was genuinely committed to improving working and living conditions among the state's growing population of migratory workers. But it had no use for the IWW's radicalism. In the wake of the tumultuous events at Wheatland, the commission developed what one historian has called an "obsession" with undermining the union.⁵² It authorized itself to develop a plan for accomplishing this and served as "coordinating agency" in the pursuit of that purpose.⁵³

The affair also gave western governors, including California's Progressive governor Hiram Johnson, the justification they felt they needed to enlist the federal government in the effort to dismantle the IWW. Prodded by powerful business interests, the governors decided that the union was at the center of a vast conspiracy, bent on the murder of government officials as well as sabotage. Working through his Secretary of Interior, the governors

49. Cletus E. Daniel, *In Defense of the Wheatland Wobblies: A Critical Analysis of the IWW in California*, 19 LAB. HIST. 485, 489-95 (1978).

50. See Letter from John W. Preston, Special Assistant to the Att'y Gen. for War Work for the N. Dist. of California, to Att'y Gen. (Apr. 29, 1919) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60 and Records of the Office of the Pardon Attorney, Record Group 204) ("[T]he Hop-Pickers Defense Committee . . . advocated . . . all kinds of sabotage.").

51. See Letter from U.S. Att'y, Dist. of Nebraska, to Att'y Gen. (Apr. 10, 1919) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60 and Records of the Office of the Pardon Attorney, Record Group 204) ("Among the number indicted there are only three or four that were active in the organization.").

52. CHESTER, *supra* note 9, at 11.

53. *Id.* at 11, 15, 133; see also GREG HALL, *HARVEST WOBBLIES: THE INDUSTRIAL WORKERS OF THE WORLD AND AGRICULTURAL LABORERS IN THE AMERICAN WEST, 1905-1930*, at 48-54 (2001).

urged President Wilson to institute a campaign of federal repression directed against the union. They were aided in this effort by the Commission on Immigration and Housing, which dispatched officers to Washington to lobby Wilson.⁵⁴

These efforts initially failed. Short on enforcement resources, Justice Department officials preferred, for the time being, to leave the IWW problem in the hands of state and local officials.⁵⁵ But as America worked its way into the war, and as the power of the federal government grew, the idea that federal officials should help destroy the IWW was incorporated into a growing program of militarism and jingoism. The cornerstone of this development was the claim that the IWW was an agent of Imperial Germany. Probably conceived by the United States Attorney of Oregon, this charge was never backed by any real evidence. Nevertheless, it was embraced by the Department of Justice, aggressively propagated by western congressmen and business interests, and breathlessly recounted in newspapers all over the country.⁵⁶

Early in the decade, the IWW had denounced the war as a senseless waste of workers' lives in the pursuit of imperialist and capitalist interests.⁵⁷ At its 1916 convention, the IWW had resolved that members should agitate against the war during peacetime and launch a general strike should the United States enter the conflict.⁵⁸ Although these antiwar positions were widely endorsed by the rank-and-file, when America's entry into the war became more certain, IWW leaders found themselves at odds about what to do. Some, including William "Big Bill" Haywood, the IWW's general-secretary treasurer and foremost leader though this key period in its history, thought it wise for the union to tone down its opposition to war, especially once the United States formally entered the conflict on April 6, 1917. Others, though, continued to urge active, though peaceful, resistance. An attempt by the union's five-member Executive Board to resolve this disagreement was unsuccessful and members were left to decide for themselves whether to dodge the draft or openly oppose the war.⁵⁹

In the meantime, President Wilson had renounced his earlier opposition to the war and had begun to aggressively promote America's entry as something essential to securing the peace and realizing Progressive values. Wilson's position was consistent with the spirit of nationalism and militarism

54. CHESTER, *supra* note 9, at 23-26, 151-54.

55. *Id.* at 25-26.

56. *Id.* at 149-51, 156.

57. See Francis Shor, *The IWW and Oppositional Politics in World War I Pushing the System Beyond its Limits*, 64 RADICAL HIST. REV. 74, 78-84 (1996); see also CHESTER, *supra* note 9, at 118-19.

58. CHESTER, *supra* note 9, at 118.

59. *Id.* at 120-24; RALPH CHAPLIN, *WOBBLY: THE ROUGH AND TUMBLE STORY OF AN AMERICAN RADICAL* 208-09 (1948).

that inhered in Progressivism's endorsement of a disciplined, unified, and well-managed society that transcended class conflict, enforced a sense of social solidarity, and embraced a functional system of social control. Wilson's stance was also consistent with the immediate interests of the AFL and the mainstream labor movement, whose supporters within the Progressive movement increasingly viewed the war as "an opportunity" to improve wages and increase regulation of economic production and labor relations.⁶⁰

B. Legislative Responses and the Criminalization of the IWW

The Progressive movement's increasing support for America's formal entry into the war not only heightened its conflict with the IWW but also put it at the center of an effort to enact legislation that could be used to crush the union. Proceeding at both state and federal levels, this campaign made effective use of the union's association with "sabotage" and its unfounded reputation for sedition and criminality. This rhetoric concealed the campaign's deeper basis in furthering the aims of powerful capitalists, whose interests lay in destroying the organization regardless of the particular concerns articulated about war and criminal acts in and about the workplace.

1. Federal Legislation

Repressive legislation geared towards criminalizing radical unionism included several bills that eventually became the Espionage Act. Drafted mainly by a Progressive legal scholar named Charles Warren, who was then serving as an assistant attorney general, this new legislation dealt with everything from the issuance of passports, to export controls and the proper conduct of diplomacy. But it also anticipated the prosecution of the IWW and other radicals on the grounds that they were interfering with the war effort. The key provisions in this regard were Section 3 of Title I, which made it a felony for anyone to "willfully make or convey false reports" with intent to interfere with the military, to "wilfully [sic] cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty" in the military, or to "wilfully obstruct the recruiting or enlistment service of the United States"; and Section 4 of that title, which made it a felony to conspire to violate Section 3.⁶¹

Despite the Act's emphasis on safeguarding military mobilization, there seemed to be little doubt in Congress that Title I would also be enforced in a way that would impinge on the rights of free speech and association—the

60. STORMQUIST, *supra* note 11, at 198-201; MCGERR, *supra* note 27, at 281-310.

61. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1224 (1983); ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 37-38 (1954).

rights of radicals in particular.⁶² Some in Congress, including both conservatives and Progressives, viewed these provisions as affronts to the principles on which the country stood, and therefore opposed the bill.⁶³ But even Progressives who worried over the new legislation's draconian implications tended to take for granted that it should be used to rein in the IWW, along with other leftists.⁶⁴ Moreover, nearly all of the debate in Congress about the Espionage Act concerned provisions other than Title I.⁶⁵

None of this debate amounted to much, at least not so far as the ultimate fate of the legislation was concerned. The House passed its bill by a margin of 259 to 107 and the Senate approved its version by a vote of 77 to 6. The bills were reconciled via a conference report, and the new statute, the Espionage Act, was signed into law by Wilson on June 15, 1917.⁶⁶

2. State and Local Legislation

Beginning in early 1917, twenty-one states, two territories, and several localities also moved to criminalize the IWW by enacting criminal syndicalism laws. Idaho was the first. As one Idaho state senator recalled, the impetus came from "the better class of citizens" who required "some kind of legislation that would give protection to parties investing their money in business enterprises in the State."⁶⁷ Worried about increasing IWW activism in lumber, which was, as the bill took shape, leading to the formation of the LWIU, the coalition left little to chance. It drafted six bills that sought, in one way or another, to criminalize radicalism and union activism.⁶⁸

Introduced in February 1917, most of this legislation went nowhere, in part because of resistance from AFL unionists and their allies who worried how such laws might affect them. The exception was a bill conceived to prohibit membership in radical groups and to bar the advocacy of radical activity. This bill gained a hearing but was met with skepticism by the state's senate judiciary committee, whose staff considered it overly broad and ambiguous and yet also "inadequate to accomplish the avowed purpose."⁶⁹ But that purpose was viewed in a positive way by many in the legislature, so the bill's champions sought help from a Boise lawyer named Benjamin Walker Oppenheim. For the purpose of rewriting the law, Oppenheim may

62. Rabban, *supra* note 61, at 1217-23; *see also* H.R. 291, 55th Cong. (1917); S. 2, 55th Cong. (1917).

63. Rabban, *supra* note 21, at 1218-23.

64. *Id.* at 1223-27.

65. PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 78-79 (1979).

66. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217; 55 CONG. REC. 1841, 2270-2271, 2207, 3498, 3557 (1917).

67. Dowell, *supra* note 3, at 141.

68. *Id.* at 137-39.

69. *Id.* at 143-44 (quoting letter from Dr. Benjamin W. Oppenheim, June 4, 1934).

have consulted a 1916 Australian sedition law that criminalized IWW agitation against the war as well as criminal anarchy statutes adopted by Wisconsin and New York in the wake of the 1901 assassination of William McKinley. Oppenheim did not copy these other statutes, though; instead he produced a bill that was specifically designed to make membership in IWW and support for its brand of “revolutionary industrial unionism” a felony.⁷⁰

Oppenheim’s bill was approved in the state house by a vote of 60 to 0 and it cleared the senate by a vote of 32 to 3.⁷¹ There was little discussion of the bill on the floor, beyond many scathingly anti-IWW speeches accompanied by the distribution of printed copies of IWW literature.⁷² On March 14, 1917, a little less than a month after it had been introduced—and about a week after the formation of the LWIU just over the border in Spokane, Washington—the statute received final approval.⁷³

The first section of Idaho’s new law defined criminal syndicalism as “the doctrine which advocates crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and declared “advocacy of such doctrine, whether by word of mouth or writing” a felony.⁷⁴ The second section of the law then defined the crime in more detail, making it a felony, punishable by up to ten years in prison and a fine of \$5,000, for a person to engage in any of an array of unlawful conduct, including written or oral advocacy of “industrial or political reform” through “crime, sabotage, violence or other unlawful methods of terrorism” or membership in an organization committed to criminal syndicalism.⁷⁵ Another section of the statute made it a felony, punishable by ten years in prison and a \$5,000 fine, for two or more people to “assemble for the purpose of advocating or teaching the doctrines of criminal syndicalism.” Yet another

70. ALBERT F. GUNNS, *CIVIL LIBERTIES IN CRISIS: THE PACIFIC NORTHWEST, 1917-1920*, at 37-38 (1983); ARCHIBALD E. STEVENSON, *REVOLUTIONARY RADICALISM: ITS HISTORY, PURPOSE AND TACTICS WITH AN EXPOSITION AND DISCUSSION OF THE STEPS BEING TAKEN AND REQUIRED TO CURB IT* 872 (1920); Robert C. Sims, *Idaho’s Criminal Syndicalism Act One State’s Response to Radical Labor*, 15 LAB. HIST. 511, 512-13 (1975).

71. Dowell, *supra* note 3, at 140.

72. *Id.* at 139-41, 146-49; *To Curb Activities of the Agitators in Northern Idaho*, EVENING CAPITAL NEWS, Mar. 2, 1917, at 6; *see also* Sims, *supra* note 70, at 512.

73. ELDRIDGE FOSTER DOWELL, *A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES* 18, n.29 (1939).

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

75. Subsection 1 criminalized the actions of 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.” *Id.* § 2(1). Subsection 2 made it a crime to print, publish, edit, circulate, sell, distribute, or publicly display “any book, paper, document, or written matter” that either advocated or contained the doctrine of criminal syndicalism. *Id.* § 2(2). Subsection 3 made it a felony to “[o]penly, wilfully [sic] and deliberately” justify, either orally or in writing, crime, sabotage, violence, or terrorism with “intent to exemplify, spread or advocate” criminal syndicalism. *Id.* § 2(3). Finally, subsection 4 criminalized organizing or helping to organize, becoming a member of, or assembling with “any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” *Id.* § 2(4).

provision made it a misdemeanor for any “owner, agent, superintendent, janitor, caretaker, or occupant of any place” to knowingly allow it to be used for such an assemblage.⁷⁶

Other states soon followed suit. The law under which Jesse Dunning was prosecuted in Minnesota was enacted in the spring of 1917, just after Idaho’s. Pushed by lumber and mining interests, it was adopted with little opposition.⁷⁷ Between the beginning of 1918 and the end of 1920, nineteen other states and two territories, including nearly every jurisdiction west of the Mississippi, had adopted criminal syndicalism laws.⁷⁸ Every one of these jurisdictions defined the crime in accordance with the basic concept that advocacy of industrial or political reform by means of crime, sabotage, violence, or terrorism was prohibited. Most, in fact, were essentially copies of the Idaho law, with variation only in the severity of punishment. Although localized animus to other unions was sometimes a factor, most of these laws were aimed primarily at undermining the IWW.

As historian Eldridge Dowell observes, criminal syndicalism laws were enacted exactly where the IWW had led or was leading contentious strikes in copper, coal, iron, oil, wheat, fruit and vegetables, shipping, and lumber.⁷⁹ In every state that adopted such a law, the political system was broadly dominated by industrial capitalists, as well as “the middle classes, the professional groups, and the large farmers”—in other words, the key constituents of Progressivism—who were all largely committed to “legislating against the unskilled and property less migratory laborer.”⁸⁰ In six states as well as in Alaska and Hawaii, syndicalism laws were enacted without a single dissenting vote; in eleven other states, there was unanimity of support in at least one house of the legislature.⁸¹ In this context, “opposition to or support of the criminal syndicalism laws cannot be explained in terms of political parties,” as Dowell observed. Rather, “economic interests” determined legislators’ positions on this issue, with the only consistent opposition to the enactment of criminal syndicalism laws coming from the small number of Socialist Party and Progressive legislators.⁸² For the most part, Republicans and Democrats joined together

76. *Id.* §§ 3-4.

77. MURPHY, *supra* note 65, at 88-89; *Criminal Syndicalism Bill Passed by Senate*, LAB. WORLD, Apr. 14, 1917, at 1.

78. Arizona, Montana, and South Dakota enacted criminal syndicalism statutes in 1918; Alaska, California, Colorado, Hawaii, Indiana, Iowa, Michigan, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Utah, Washington, West Virginia, and Wyoming, in 1919; and Kentucky and Kansas, in 1920. DOWELL, *supra* note 73, at 147.

79. *Id.* at 49-50.

80. *Id.* at 55-56.

81. *Id.* at 51-52, 87-88 (nn. 17-21).

82. *Id.* at 68-70.

in supporting these laws, lining up to fulminate from assembly floors and committee rooms about the many dangers supposedly posed by the IWW.⁸³

But not all Progressives were prepared to sacrifice liberal principles to the project of destroying the IWW. In Washington, a bill supported by lumber and agricultural interests commanded huge majorities in both houses of the legislature. However, Governor Ernest Lister vetoed the bill, though he was hardly an IWW supporter.⁸⁴ Lister was not alone among governors in opposing this kind of legislation; Arizona governor W.P. Hunt did as well, albeit to no avail.⁸⁵

It says much about the politics that gave rise to the criminal syndicalism laws that they were frequently enacted not only with broad support from Progressives but also with the support of AFL unionists, and alongside bills that instituted significant labor reforms. In the same session in which it enacted its criminal syndicalism law, the Idaho legislature enacted important laws on mine safety.⁸⁶ Utah enacted its criminal syndicalism law simultaneous with an eight-hour-a-day law for women workers.⁸⁷ When, in 1919, the Washington legislature overrode Governor Lister's veto and enacted a criminal syndicalism law, it approved legislation aimed at preventing workplace accidents, increasing compensation for workplace injuries and protecting the right of workers to picket.⁸⁸ Likewise, California, which would lead the country in the enforcement of its criminal syndicalism law, passed a criminal syndicalism law alongside "scores of measures advocated by organized labor."⁸⁹

State legislatures were not the only bodies to adopt criminal syndicalism laws. In Washington, over twenty cities, including Seattle, Spokane, and Olympia, enacted such laws.⁹⁰ In Seattle and Spokane, the ordinances were near carbon copies of the main state-level statutes. As city ordinances, however, they could only impose misdemeanor liability. For instance, the Spokane ordinance contemplated up to thirty days in jail and fines of up to

83. *See id.* at 76-79.

84. *See* Dowell, *supra* note 3, at 189-200; DOWELL, *supra* note 73, 57 n.45.

85. Message from Geo. W.P. Hunt, Governor of Arizona, to Sidney P. Osborn, Sec'y of State (July 2, 1918) (on file with Walter Reuther Memorial Library, IWW Collection, Box 124, File 1).

86. *Approval of Many Bills by the Governor*, EVENING CAP. NEWS, Mar. 14, 1917, at 7; *Bills Passed by the Legislature*, EVENING CAP. NEWS, Mar. 12, 1917, at 5.

87. *Measures to Combat Red Activities and Discourage Stock Schemes Operative*, SALT LAKE CITY TELEGRAM, May 9, 1919, at 21.

88. Joseph F. Tripp, *Reform and Repression in the Far West: The Washington Legislative Response to Labor Radicalism in 1919*, 19 RENDEZVOUS 43 (1983).

89. Michael Kazin, *The Great Exception Revisited: Organized Labor and Politics in San Francisco and Los Angeles, 1870-1940*, 55 PAC. HIST. REV. 371, 381, 393-95 (1986).

90. 4 AM. LAB. YEARBOOK 1921-1922, at 10 (Alexander Trachtenberg & Benjamin Glassberg eds., 1963); *Council Has Busy Time this Week*, WASH. STANDARD (Olympia), May 10, 1918, at 1.

\$100.⁹¹ Other municipalities to enact such laws include Wichita, Kansas; Baker and Saint Helens, Oregon; Tucson, Arizona; and Duluth, Minnesota.⁹²

III. PROSECUTING THE IWW

On the afternoon of September 5, 1917, scores of Justice Department officials, aided by local police and vigilantes, raided nearly fifty IWW offices across the country. They seized tons of material, including membership books, meeting records, letters, typewriters and other office equipment, as well as intimate personal letters and other property.⁹³ These raids, along with Dunning's arrest on syndicalism charges just a few weeks earlier, signaled the beginning of a broad-ranging campaign to use the newly enacted antiradical laws to destroy the IWW. As a review of its key features shows, this campaign made use of both federal and state prosecutions and it extended well beyond the war and the Red Scare.

A. Federal Prosecutions

The raids of September 5 inaugurated an extraordinary wave of federal arrests and prosecutions that would ensnare hundreds of Wobblies and put many of them in prison. More raids followed through September and later into the fall, as did a raft of indictments. Within days of sacking the union's headquarters on the city's West Side, federal prosecutors in Chicago had indicted 166 IWW members, including most of the union's top leadership.⁹⁴ Among these were not only Big Bill Haywood, but Ralph Chaplin, author of the labor ballad, "Solidarity Forever"; Ben Fletcher, the most prominent black man in the IWW and a leader of its dockworkers' union; and James Rowan, a major figure in the union's organizing efforts in lumber and wheat. About 100 other Wobblies were indicted on similar charges by authorities in Sacramento, Fresno, Omaha, and Wichita.⁹⁵

The federal raids and indictments were the result of a conspiracy of powerful people to destroy the union, at the head of which were Progressives who wielded considerable influence with Wilson and his Justice Department. They included Simon Lubin, who headed the California Commission on

91. Dowell, *supra* note 3, at 224.

92. Dowell, *supra* note 3 at 185-86; *Proceedings of the City Council*, ST. HELENS MIST (Olympia), Jun. 14, 1918, at 1; *Criminal Syndicalism Made Misdemeanor by New Tucson Ordinance*, ARIZ. REPUBLIC (Phoenix), Aug. 9, 1923, at 10; *I.W.W. Ordinance*, WICHITA DAILY EAGLE, July 31, 1920, at 5.

93. DUBOFSKY, *supra* note 9, at 406; Philip Taft, *The Federal Trials of the IWW*, 3 LAB. HIST. 60, 60-61 (1962); Property to be Returned to Defendants, *United States v. Wm. D. Haywood et al.*, No. 6215 (N.D. Ill. 1917) (on file with Walter Reuther Memorial Library, Fred Thompson Collection, Box 11, Folder 15); Order, *United States v. Wm. D. Haywood et al.*, No. 6215 (N.D. Ill. 1917) (on file with Walter Reuther Memorial Library, Fred Thompson Collection, Box 11, Folder 15).

94. DUBOFSKY, *supra* note 9, at 443.

95. Taft, *supra* note 93, at 57; DUBOFSKY, *supra* note 9, at 437; CHESTER, *supra* note 9 at 221.

Immigration and Housing, and John Lind, a Progressive Democrat and former governor of Minnesota who headed the state's Public Safety Commission.⁹⁶ Newspapers also supported the raids and the indictments. In the view of the *Minneapolis Tribune*, for instance, the guilt of the IWW "traitors" as agents of Germany was fully confirmed by the raids alone.⁹⁷ For the *Washington Post*, the raids and the indictments were "an excellent start."⁹⁸ "This snake should be scotched . . . Let its existence end at Chicago where its crushing may teach a salutary lesson in militant patriotism," the paper said.⁹⁹ Even the liberal *St. Louis Post-Dispatch* averred that the union had "gone a step too far" and now faced a proper reckoning.¹⁰⁰

The Chicago case became the largest of three mass prosecutions of Wobblies by federal authorities. Like the other cases, the Chicago prosecution was anchored in the Espionage Act but also featured charges based in other statutes. Count one alleged that the defendants had violated a general provision of the federal code by conspiring to use force to impede the execution of ten federal statutes, including the Espionage Act, as well as several presidential proclamations related to war production.¹⁰¹ Count two, which also rested on a general conspiracy provision in the federal code, alleged that the defendants had conspired to deprive businesses engaged in war production of their constitutional right to fulfill their contractual obligations.¹⁰² Counts three and four both charged the defendants with conspiring to undermine the Selective Draft Act.¹⁰³ While count three rested on a general provision in the federal code, count four invoked section 4 of the Espionage Act, the conspiracy provision.¹⁰⁴ According to the indictment,

96. See Letter from Simon J. Lubin, Comm'r, State Comm'n of Immigr. and Hous. of Cal., to Woodrow Wilson, President of the United States (Apr. 10, 1918) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60 and Records of the Office of the Pardon Attorney, Record Group 204); Letter from Simon J. Lubin, Comm'r, State Comm'n of Immigr. and Hous. of Cal., to T. W. Gregory, Att'y Gen., Dep't of Just. (Apr. 10, 1918) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60 and Records of the Office of the Pardon Attorney, Record Group 204); Letter from Woodrow Wilson to T. W. Gregory, *supra* note 9; CHESTER, *supra* note 9, at 165-66, 194; DUBOFSKY, *supra* note 9, at 393-97; OLMSTED, *supra* note 9, at 122, 124.

97. *The I.W.W. Traitors*, MINNEAPOLIS MORNING TRIB., Oct. 3, 1917, at 6.

98. *Scotch the Snake*, WASH. POST, Sept. 30, 1917, at S4.

99. *Id.*

100. *Putting Down the I.W.W.*, ST. LOUIS POST-DISPATCH, Sept. 7, 1917, at 20.

101. Philip S. Foner, *United States of America vs. Wm. D. Haywood, et al. The I.W.W. Indictment*, 11 LAB. HIST. 500, 506-24 (1970).

102. *Id.* at 524-25.

103. *Id.* at 525-27; Selective Draft Act of 1917, Pub. L. No. 65-12, ch.15, 40 Stat. 76.

104. A fifth count involved conspiring to defraud employers who had hired defense workers. However, it had little bearing on the case and was withdrawn during the trial. See Foner, *supra* note 101, at 528-30.

the overt acts common to all these conspiracies consisted only of statements, articles, policy declarations, and other verbal utterances.¹⁰⁵

The Chicago defendants were brought to trial on April 1, 1918 before an interesting figure: future Commissioner of Baseball, Judge Kennesaw Mountain Landis. A pro-war Progressive, Landis made a great show of how fair he was during the proceedings. But he allowed prosecutors to deluge the jury with mountains of inflammatory and often perjured testimony which charged the union with conspiring to undermine the war effort by means of a series of strikes and sabotage concentrated in mining and lumber in the West, and by propaganda and other inducements to men not to submit to the draft.¹⁰⁶ There was, in fact, very little proof of any of this and much to suggest that the whole narrative was entirely false. Nevertheless, after four months of trial that featured a vigorous defense, the jury took less than an hour to convict 100 defendants on over 400 separate counts.¹⁰⁷

On August 31, Landis sentenced the defendants. He released several defendants, ordered several others to serve brief jail terms, and sentenced twelve defendants to a year in prison. Then, really getting down to business, he sentenced thirty-five defendants to five years in prison; thirty-three to ten years; and fifteen, including Haywood, Chaplin, Rowan, and other top leaders, to the maximum term of twenty years.¹⁰⁸

The defendants in the Sacramento case were brought to trial in December 1918, after months of confinement with inadequate food amid a global influenza pandemic that had already killed four of them. Although the forty-six who made it to trial were mostly rank-and-file members and local organizers, their numbers included several members of the union's Defense Committee. Police raided the committee's San Francisco office seven times over a six-month period, seized all the office's documents, and, on fifteen separate occasions, arrested the secretary of the defense committee. Government agents also resorted to false pretenses to intercept union correspondence and uncover details about their cases.¹⁰⁹

Convinced that it would be futile to mount a conventional defense, forty-three of the Sacramento defendants declined to engage counsel and opted for a "silent defense." In this case, too, the evidence put on by the government was inflammatory, prejudicial, and altogether unfounded: it consisted of union literature and correspondence as well as the testimony of no fewer than

105. *Id.* at 505.

106. *See* Taft, *supra* note 93, at 62-69.

107. *Id.* at 74; CHESTER, *supra* note 9, at 178, 184-85.

108. All of the defendants who were sentenced to prison were also subject to heavy fines of up to \$30,000 each. Taft, *supra* note 93, at 74-75; CHESTER, *supra* note 9, at 184-85; DUBOFSKY, *supra* note 9 at 437; *Haywood Given 20 Year Term; 93 Sentenced*, CHI. DAILY TRIB., Aug. 31, 1918, at 1.

109. *See* Hyman Weintraub, *The I.W.W. in California: 1905-1931*, at 148-50 (Feb. 1947) (M.A. thesis, University of California, Los Angeles) (on file with author); CHESTER, *supra* note 9, at 197.

five IWW turncoats, including two thoroughly disreputable “professional witnesses,” John Dymond and Elbert Coutts.¹¹⁰ Presented with this evidence, the jury deliberated for just over an hour before convicting every one of the defendants.¹¹¹ On January 17, 1919, Judge Frank Rudkin sent the forty-three silent defenders to prison for terms ranging from one to ten years, with more than half of them getting ten years. Three other defendants received lighter sentences.

Federal prosecutors in Wichita needed three indictments before finally indicting over two-dozen Wobblies on charges of violating the Espionage Act, as well as the Lever Act of 1917, which provided for the regulation of wartime fuel and food resources, and a separate federal statute which criminalized seditious conspiracy. For the better part of two years, these defendants languished in dirty, unsanitary jails in and around Wichita, making do with unhealthy foods and dank and rat-infested lodgings.¹¹² Apprised of these conditions, Judge John Pollock moved the defendants and the case to Kansas City. But by the time trial finally opened there on December 1, 1919, one defendant had died, two had developed mental illnesses, and others suffered from tuberculosis, scarlet fever, typhoid, and influenza.¹¹³

There was no evidence that any of these defendants had entered into any kind of criminal conspiracies. It was for this reason that prosecutors’ arguments in this case were particularly focused on proving that the IWW itself was a seditious organization, and that mere membership in the union was therefore tantamount to engaging in a criminal conspiracy. To this end, prosecutors relied very much on the testimony of former IWW members, including Coutts and Dymond.¹¹⁴ These witnesses insisted to the jury that the IWW was committed to undermining war production and the draft by means of violence and sabotage, and that the defendants, being members of the IWW, had thereby conspired to achieve such criminal ends. On December 18, 1919, the jury signaled its agreement, convicting every one of the twenty-

110. See, e.g., Letter from John Murray to E.J. Costello (July 21, 1921) (on file with Princeton University, Mudd Library, The Roger Baldwin Years, 1912-1950, Correspondence-General: Amnesty: Political Prisoners, Vol. 198); Dowell, *supra* note 3, at 345.

111. CHESTER, *supra* note 9, at 197-200; WILLIAM PRESTON JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933, at 135 (1963); see also ACLU, Various Correspondence Regarding the IWW (1918) (on file with Princeton University, Mudd Library, The Roger Baldwin Years, 1912-1950, Correspondence-General: Industrial Workers of the World Vol. 86 at 42-145); Weintraub, *supra* note 109 at 156.

112. Clayton R. Koppes, *The Kansas Trial of the IWW, 1917-1919*, 16 LAB. HIST. 338, 348 (1975).

113. SELLARS, *supra* note 46, at 114; see also Letter from Thomas Whitehead, Acting Sec’y Gen., Indus. Workers of the World, to Albert DeSilver, Nat’l Civ. Liberties Bureau (Mar. 25, 1919) (on file with Princeton University, Mudd Library, The Roger Baldwin Years, 1912-1950, Correspondence-General: Industrial Workers of The World Cases, Vol. 86) (“Those who were taken to Topeka County Jail are on a hunger strike on account of the food conditions.”).

114. Coutts’ appearance was cut short by his inability to offer any relevant evidence. Koppes, *supra* note 112 at 352-53.

seven defendants who made it to trial.¹¹⁵ That same day, Pollock sent all but one of the defendants to prison to serve sentences that ranged from one to nine years.¹¹⁶

Not every group of Wobblies charged with violating the Espionage Act was convicted, though. The sixty-four Wobblies arrested by federal authorities in Omaha in November 1917 languished in jail for eighteen months. But they were never prosecuted.¹¹⁷ In April 1919, the local United States Attorney, who had repeatedly expressed his doubts about the case, first to Attorney General Thomas Gregory, then to Gregory's successor, A. Mitchell Palmer, brokered their unconditional release.¹¹⁸

B. State Prosecutions

What these Wobblies experienced at the hands of federal authorities was matched by the treatment they received from state officials across a number of western jurisdictions. An early example is the case of J.J. McMurphy, who was convicted of criminal syndicalism in Wallace, Idaho, in Shoshone County, on October 23, 1917. Picked up after giving a speech promoting the IWW, McMurphy was found to possess a good deal of union literature, including one of the books on sabotage that had helped get Jesse Dunning convicted of criminal syndicalism just a couple of weeks earlier in Minnesota. McMurphy sat mostly silent during the proceedings. He waited until he was being sentenced to a year at hard labor plus a \$500 fine to unleash on the court what an area newspaper called the “fevered battle cries” of the IWW.¹¹⁹

McMurphy's conviction was the first of thirty criminal syndicalism convictions in Idaho between 1917 and 1923. Every one of these convictions involved IWW members.¹²⁰ Most defendants were picked up either in the

115. *Id.* at 343; *see also* Transcript of Trial at 1076, *United States v. Anderson*, No. 763 (D. Kan. 1919) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60 and Records of the Office of the Pardon Attorney, Record Group 204); Dowell, *supra* note 3, at 646. Philip Taft reports that twenty-seven defendants were convicted. Taft, *supra* note 93, at 79-80.

116. ACLU, *THE TRUTH ABOUT THE I.W.W. PRISONERS* 24 (1922); Taft, *supra* note 93, at 79-80.

117. Memorandum entitled “I.W.W. Matters,” to Chicago Office (Dec. 28, 1917) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60); DUBOFSKY, *supra* note 9, at 442-43; David Wagaman, *The Industrial Workers of the World in Nebraska, 1914-1920*, 56 *Neb. History*, 295, 315, 320, 322 (1975).

118. Letters from T.S. Allen to Att’y Gen. (June 29, 1918, Apr. 10, 1919) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60 and Records of the Office of the Pardon Attorney, Record Group 204); DUBOFSKY, *supra* note 9, at 442-43.

119. *Syndicalism Law Secures its First Victim*, *EVENING CAP. NEWS*, Oct. 24, 1917, at 5; Description of Convict, State Penitentiary, Boise, Idaho (Nov. 20, 1917) (on file with Idaho State Archives, Inmate Records, Records of J.J. McMurphy).

120. On extent of military intervention, *see generally* PRESTON, *supra* note 111.

course of union-led strikes in the state's lumber producing districts or because they had been identified as job delegates.¹²¹ As was usually the case, all of the defendants were men; and all of these men, including McMurphy, served time in the Idaho State Penitentiary.¹²²

The conviction of Wobbly A.S. Embree is also illustrative of how these cases unfolded in Idaho.¹²³ Embree was a key organizer with the IWW who emerged as an important figure in the union after the federal raids and prosecutions depleted its leadership.¹²⁴ Embree was arrested in Burke, Idaho in late May 1920 by the high sheriff, who recognized Embree from his recent appearance at another criminal syndical trial, searched him, and discovered a number of IWW documents in his possession.¹²⁵

Embree's trial featured testimony from various sheriff's deputies, who professed to be experts on IWW literature, and a special agent from the U.S. Department of Justice, who attested to the union's seditious character. The prosecution's case also relied on two IWW turncoats.¹²⁶ None of these witnesses' testimony proved anything except that Embree was an organizer and that the IWW was active in the region. But as was typical in these cases, this did not matter—or, rather, this is all that did matter. After a week of trial, the jury convicted Embree. He was sentenced to one-to-ten years in prison and delivered to the penitentiary just over a week later.¹²⁷

What happened in Idaho was a portent of how criminal syndicalism laws would be used against Wobblies in other western states. In Oregon, the IWW's fate was shaped by a broader upsurge of radicalism which culminated in the January 1919 formation of a "Council of Workers, Soldiers and Sailors of Portland and Vicinity." The "Portland Soviet," as it was generally called, was by no means a creature of the IWW; leftists and unionists of many stripes participated. But it was strongly influenced by and associated with area Wobblies.¹²⁸ Its emergence made the enactment of a statewide criminal

121. See, e.g., *Labor Agitator is Guilty*, OREGONIAN, Oct. 27, 1917, at 6; *Labor Agitator is Received at the Penitentiary*, EVENING CAPITAL NEWS (Boise, ID), Nov. 15, 1917, at 7.

122. See generally Idaho State Archives, Idaho Penitentiary Inmates Catalog (1864-1947) (Inmate Records).

123. See Hugh T. Lovin, *Idaho and the "Reds," 1919-1926*, 69 PAC. NW. Q. 107, 111 (1978).

124. See Record of Conviction, Idaho v. Embree, No. 1021 (1st Dist. Ct. Idaho 1921) (on file with Idaho State Archives, Inmate Records, Records of A.S. Embree); Letter from Prosecuting Att'y to Bd. of Prison Comm'rs. (June 1, 1921) (on file with Idaho State Archives, Inmate Records, Records of A.S. Embree).

125. Transcript of Trial at 4-8, Idaho v. Embree, No. 1021 (1st Dist. Ct. Idaho 1921) (on file with Idaho State Archives, Inmate Records, Records of A.S. Embree); *Tragical Ending of Syndicalist Case*, INDUS. WORKER, Jun. 5, 1920, at 1.

126. See Transcript of Trial, *supra* note 125, at 4-123.

127. Description of Convict, State Penitentiary, Boise, Idaho (June 1, 1921) (on file with Idaho State Archives, Inmate Records, Records of A.S. Embree).

128. See Dowell, *supra* note 3, at 552-53; see generally Adam Hodges, *Thinking Globally, Acting Locally: The Portland Soviet and the Emergence of American Communism, 1918-1920*, 98 PAC. NW. Q. 116 (2007).

syndicalism law early that February inevitable. Prodded by business interests, the legislature passed the law with little dissent, alongside a suite of progressive laws, including statutes that established a statewide compensation system and limited the use of injunctions against unions.¹²⁹

Within a week of the enactment of Oregon's criminal syndicalism law, Portland police decreed it unlawful for anyone to distribute radical literature on the streets and promptly arrested nine Socialists and IWWs.¹³⁰ Within a month, both the union and the Portland Soviet had been evicted from their headquarters by landlords who feared being charged with criminal syndicalism.¹³¹ Other arrests for criminal syndicalism followed.¹³² Some of these occurred in small towns.¹³³ But many originated in Portland, where scores of Wobblies were taken into custody and where the union claimed that, from November 1919 through January 1920, more than two dozen of its members were either facing criminal syndicalism charges or had already been convicted of the crime.¹³⁴

This surge in arrests and prosecutions continued through 1919 and into the following year.¹³⁵ On July 10, 1920 the IWW published a list of pending criminal cases in the region. The document described a number of criminal syndicalism convictions in Oregon and noted that thirty-one members were still under indictment in the state.¹³⁶ Most of these cases were in Portland and almost all involved Wobblies. However, there were also prosecutions in Tillamook, Klamath Falls, and Condon Falls, and some Socialists and members of the nascent Communist movement were among the defendants.¹³⁷ These cases accounted for some of the 200 or more people, nearly all of them IWWs, who were formally charged with criminal

129. Dowell, *supra* note 3, at 532-57.

130. *City Authorities Put in Effect Oregon Criminal Syndicalism Law*, OR. DAILY J., Feb. 9, 1919, at 1; *Court Releases Suspected Reds*, OR. DAILY J., Feb. 11, 1919, at 7.

131. See Hodges, *supra* note 128, at 124-25.

132. See, e.g., *22 I.W.W. Taken in Raid on Rooms of Local Order*, OR. DAILY J., Feb. 26, 1919, at 18.

133. See *I.W.W. and Reds are Rounded Up at Fossil*, GAZETTE-TIMES (OR), Nov. 27, 1919, at 1. On enforcement in other small towns during this period, see, for example, *Three I.W.W. Held Guilty*, CAP. J. (OR), May 10, 1920, at 4.

134. *The Gruesome Story of American Terrorism*, ONE BIG UNION MONTHLY, Apr. 1920, at 12, 14; *Indict 22 Portland I.W.W. for Criminal Syndicalism*, N.Y. TIMES, Nov. 21, 1919, at 17; *22 Alleged I.W.W. Members Indicted*, CAP. J. (OR), Nov. 21, 1919, at 10.

135. See, e.g., *Charge Against Kelly Changed, Gets Five Days*, CAP. J. (OR), Dec. 30, 1920, at 1; *Test I.W.W. Case Goes to Trial*, E. OREGONIAN, Mar. 23, 1920, at 1; *Medford Man Indicted on Syndicalism Charge*, CAP. J., Feb. 21, 1920, at 12; *Faces Syndicalism Charge*, E. OREGONIAN, Dec. 9, 1919, at 4.

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

137. Northwest Defense Bulletin, INDUS. WORKER, June 5, 1920, at 1; Northwest Defense Bulletin, INDUS. WORKER, Feb. 14, 1920, at 1; see also Letter from Ernest G. Swigert, Elec. Steel Foundry, to Am. Civ. Liberties Union (June 18, 1920) (on file with Princeton University, Mudd Library, The Roger Baldwin Years, 1912-1950, Correspondence-Cases by State: Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Virgin Island, Vol. 139).

syndicalism in Oregon in the two or three years after the law was enacted.¹³⁸ By 1922, enforcement in the state had decreased significantly, but there continued to be scattered arrests through that year and into the next.¹³⁹

In Washington, enforcement followed a similar course. Events were framed not only by longstanding IWW activism in lumber and farming, but also trouble in Seattle, where activism centered on the waterfront gave rise in February 1919 to the Seattle General Strike. The strike's organizers, whose ranks included IWW members, communists of various factions, militant AFL unionists, and disaffected war veterans, managed to maintain order and essential services, despite otherwise bringing commerce in the city to a standstill. But the strike presented an opportunity for Seattle's Progressive mayor, Ole Hanson, to fulminate about the risks of radicalism and the IWW in particular, fill the streets with police and military personnel, and help bring the strike to an end.¹⁴⁰

There was plenty of appetite among Hanson and his allies to throw those who were behind this unrest, especially the IWWs among them, into prison. But Washington's new criminal syndicalism statute did not go into effect until June. In February, authorities in Seattle therefore charged two dozen Wobblies with criminal anarchy.¹⁴¹ However, despite an array of government agents and informants and breathless depictions of radical literature typical of nearly all antiradical prosecutions, the jury acquitted the first of these defendants to be brought to trial, a man named James Bruce. Prosecutors then dismissed charges against the other defendants.¹⁴²

Meanwhile, authorities in Spokane aggressively enforced their city's misdemeanor criminal syndicalism law. In January 1919, police raided the IWW's new hall, tore up the place, took six Wobblies into custody, and charged five with criminal syndicalism. A week later, these defendants were convicted and sentenced to thirty days and a \$100 fine.¹⁴³ Through the spring and into the summer, more arrests followed.¹⁴⁴ In July, fourteen Wobblies

138. GUNNS, *supra* note 70 at 42.

139. See, e.g., *Two IWW Delegates Arrested in North Bend, Oregon, Charged with C.S.*, INDUS. WORKER, Feb. 21, 1923, at 1; *Sam Holcomb Indicted*, OREGONIAN, Feb. 23, 1923, at 16; *I.W.W. Trial in Tillamook is Held Again*, ALBANY EVENING HERALD, Mar. 12, 1923, at 1; *Police to Curb I.W.W. Activity*, OREGONIAN, Apr. 25, 1923, at 1; *Two I.W.W.s Bound Over*, OREGONIAN, May 9, 1923, at 7; *Alleged Red Arrested*, OREGONIAN, Sept. 14, 1923, at 15.

140. Terje I. Leiren, *Ole and the Reds The "Americanism" of Seattle Mayor Ole Hanson*, 30 NORWEGIAN-AM. STUD. 75, 87 (1985).

141. Dowell, *supra* note 3, at 201-11; *Syndicalism Bill Passed*, SEATTLE STAR, Jan. 14, 1919, at 1.

142. *Criminal Anarchy Cases Dismissed*, THE FORGE (WA), Oct. 4, 1919, at 41 (on file with Princeton University, Mudd Library, The Roger Baldwin Years, 1912-1950, Clippings-Industrial Workers of the World Cases, ACLU Records, Volume 85).

143. *Sentence I.W.W. to Month in Jail*, SPOKANE CHRON., Jan. 30, 1919, at 16; *New I.W.W. Office Raided*, SPOKESMAN-REV. (Spokane, WA), Jan. 24, 1919, at 3; *Spokane Oppression*, NEW SOLIDARITY, Feb. 8, 1919, at 4.

144. See, e.g., *I.W.W. Wants Judge to Testify*, SPOKANE CHRON., July 9, 1919, at 3; *Born on St. Patrick's Day Plea*, SPOKESMAN-REV. (Spokane, WA), Mar. 18, 1919, at 9; *Held on Syndicalism Charge*,

were arrested at the trial of the union's secretary on vagrancy and misdemeanor criminal syndicalism charges, because they were wearing IWW buttons.¹⁴⁵ The very next day, seven more Wobblies were arrested for wearing buttons and this time charged with violating the new state criminal syndicalism law.¹⁴⁶

These were not the only occasions when Wobblies were arrested for supporting each other in court. In November 1921, three Wobblies were indicted on criminal syndicalism charges because they either attended or gave testimony at a criminal syndicalism trial in Los Angeles and, for this, were included in a group of eight convicted of criminal syndicalism the following year.¹⁴⁷ In the summer of 1922 a judge in Eureka, California, determined that a young Wobbly, who was the secretary of the union's LWIU local and had been arrested for attending the trial of another Wobbly, was guilty of criminal syndicalism and committed him to reform school.¹⁴⁸ Likewise, on September 13, 1923, five IWW members were convicted and sentenced to prison after being arrested upon leaving the witness stand during a criminal syndicalism trial in Sacramento, California, in late June of that year.¹⁴⁹

Meanwhile, arrests and prosecutions continued in Washington. In August 1919, union officials in Spokane dispatched an urgent telegram warning that "many arrests" of members on criminal syndicalism charges were occurring in and around Spokane.¹⁵⁰ In November of that year, a union newspaper reported that "[f]or the past week raid after raid on rooming houses, hotel[s] and pool rooms have taken place," resulting in approximately 120 arrests and 53 members being charged with violating the city's criminal syndicalism ordinance. In mid-November, these 53 men were tried, convicted, and then sentenced to thirty days in jail and fined \$100.¹⁵¹

SPOKESMAN-REV. (Spokane, WA), Feb. 15, 1919, at 6; *Grady Jury Disagrees*, SEATTLE STAR, Jan. 16, 1920, at 12.

145. *Buttons Undo Wobblies*, SPOKESMAN-REV. (Spokane, WA), July 9, 1919, at 6.

146. *Wear I.W.W. Badge, Jailed*, SPOKESMAN-REV. (Spokane, WA), July 10, 1919, at 6.

147. *Witness in I.W.W. Trial Nabbed as He Leaves Court*, L.A. HERALD, Nov. 30, 1921, at A3; Claude Erwin, Record of California Criminal Syndicalism Convictions 1, 11 (Dec. 22, 1938) (on file with Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 135, File 1); California Prison and Correctional Records, San Quentin State Prison, Book No. 10, Inmate No. 36502; California Prison and Correctional Records, Folsom State Prison, Inmate No. 12540.

148. *California Has First Minor in Political Case*, N.Y. CALL, July 31, 1922 (on file with Princeton University, Mudd Library, the Roger Baldwin Years, 1912-1950 Collection, Correspondence-Cases by State: Alabama, Arizona, Arkansas, Colorado, Florida, Idaho Vol. 208 at 34).

149. IWW GEN. DEF. COMM., PHOTOSTAT OF DIGEST OF CRIMINAL SYNDICALISM CASES 51 (1926) (on file with University of Michigan, Manuscript Collection, Ralph Chaplin Papers, 1909-1948, Box 1).

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

151. *Convict 53 I.W.W. of Syndicalism*, INDUS. WORKER, Nov. 29, 1919, at 1. On prosecutions under the city's ordinance, see also Letter from Albert Streieff to ACLU (Feb. 14, 1919) (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence-General: Industrial Workers of the World Cases, Vol. 86 at 198).

In mid-January 1920, Spokane authorities prosecuted forty IWWs at once on municipal criminal syndicalism charges. These forty defendants were ultimately acquitted, but only after experiencing great difficulty acquiring legal representation.¹⁵² This was not an uncommon problem, in part, because the lawyers who dared represent the defendants faced real risks. For instance, in June 1918, a lawyer named Edward Hofstede was disbarred in Washington on account of his earlier conviction on the dubious charge of counseling others not to register for the draft—for which he served some months in prison. In July of that year Hofstede was convicted of misdemeanor criminal syndicalism in Spokane and sentenced to serve thirty days in jail.¹⁵³

In fact, the Washington Bar Association resolved that none of its members should represent Wobbly defendants.¹⁵⁴ In the summer of 1923, the Washington State Board of Law Examiners notified lawyer Elmer Smith that it was seeking his disbarment because he represented many Wobblies on the West Coast. The main basis of this charge was that Smith, knowing the nature of the IWW and being aware of the criminal syndicalism law, “has advocated and approved the principles as announced by the Industrial Workers of the World”; made speeches in support of the organization; aided its recruitment efforts; and otherwise “used his talents and energies in furtherance of the cause of the Industrial Workers of the World, and other similar organizations.”¹⁵⁵ Smith was disbarred and lost his appeal to the Washington State Supreme Court. In its ruling, the court frankly concluded that anyone who advocated the IWW’s principles was “unworthy of the office of attorney at law.”¹⁵⁶

By 1921, the pace of arrests and prosecutions of Wobblies began to diminish in Washington. The following year, there was no enforcement of the felony criminal syndicalism law, although 1923 brought something of a

152. *Discharge Jury in Wob Trial*, SEATTLE CHRON., Jan. 24, 1920, at 5; *Donovan Won't Defend I.W.W.*, SEATTLE CHRON., Jan. 14, 1920, at 6; *Prejudice Plea Lets Jurors Off in I.W.W. Trial*, SPOKANE CHRON., Jan. 16, 1920, at 6.

153. *Hofstead, I.W.W. Lawyer, Sent Up for Thirty Days*, SPOKESMAN-REV. (WA), Jul. 19, 1918, at 6; *Halts I.W.W. Lawyer*, SPOKESMAN-REV. (WA), July 15, 1918, at 6.

154. Dowell, *supra* note 3, at 1058.

155. Complaint, In the Matter of the Proceeding for the Disbarment of Elmer S. Smith, State Board of Law Examiners, State of Washington (1923) (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 126, File 26); Notice of Hearing, In the Matter of the Proceedings for the Disbarment of Elmer Smith, State Board of Law Examiners, State of Washington (1923) (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 125, File 25); *see also* Disbarment Proceeding Against Workers Attorney Checked (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection Box 16, File 1).

156. In re Smith, 233 P. 288 (Wash. 1925); *see also* Brief on Behalf of Defendant Elmer Smith, In re Smith, 233 P. 288, (Wash. 1925) (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 126, File 27). Smith would get his license back—in 1930, five years after he lost it. *Elmer Smith Dead*, BELLINGHAM HERALD (WA), Mar. 21, 1932, at 1; *Elmer Smith Reinstated After Abandoning His Radical Beliefs*, OREGONIAN, Mar. 20, 1930, at 1.

resurgence in both felony and misdemeanor charges.¹⁵⁷ It also took a while before this reduction in enforcement cleared the state's prisons of Wobblies. In January 1921, sixty-four Wobblies were in Washington's prisons; the last IWW held on criminal syndicalism charges was not freed until September 1928.¹⁵⁸

Enforcement in California unfolded in a similar manner, albeit on a much larger scale. The state's powerful open shop interests, which were concentrated in Los Angeles and the Bay Area but extended across the state, botched their initial effort to enact a criminal syndicalism law in 1917. Two years later, they succeeded when their attempts to paint the IWW as a criminal threat were aided by a string of deadly bombings. Beginning in 1910 with the destruction of the Los Angeles Times Building at the hand of several left-wing unionists, the incidents also included a deadly attack on a Preparedness Day Parade in San Francisco in 1916, probably by Anarchists, and culminated with a nationwide letter-bombing campaign in the spring of 1919 that targeted some thirty-five prominent industrialists and federal and state officials.¹⁵⁹ Among those targeted in this campaign were not only John D. Rockefeller, Oliver Wendell Holmes, and Attorney General Palmer, but also Charles Fickert, the district attorney of San Francisco. Fickert is notable for conspiring, perhaps to the point of orchestrating, the mysterious bombing of the California Governor's Mansion in the fall of 1917 to ensure that federal officials prosecuted Wobblies for violating the Espionage Act in that state.¹⁶⁰ The IWW had nothing to do with any of these affairs, beyond the fact that the two men who were falsely convicted of the Preparedness Day Bombing, Tom Mooney and Warren Billings, were former Wobblies.¹⁶¹ But this did not matter to newspapers, open shop propagandists, and California legislators, who were very happy to lump all radicals together when it suited their purposes.

The first arrest under California's new criminal syndicalism law occurred in San Francisco in late May 1919, amid a series of raids on union

157. GUNNS, *supra* note 134 at 55; *I.W.W. Wins in Spokane Trial*, INDUS. WORKER, Jan. 20, 1923, at 1.

158. *Iron Heel in Northwest; Status of Cases to Date*, INDUS. WORKER, Jan. 15, 1921, at 1; *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. On the release of the last IWW prisoner, a man named John Nash, see Dowell, *supra* note 3, at 1063.

159. See generally JEFFREY J. JOHNSON, *THE 1916 PREPAREDNESS DAY BOMBING: ANARCHY AND TERRORISM IN PROGRESSIVE ERA AMERICA* (Routledge, 2017).

160. ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920*, at 67-81 (1955); Jeffrey P. Simon, *The Forgotten Terrorists: Lesson from the History of Terrorism*, 20 TERRORISM & POLITICAL VIOLENCE 195 (2008); Weintraub, *supra* note 109, at 145-46.

161. See generally RICHARD FROST, *THE MOONEY CASE* (1968); CURT GENTRY, *FRAME-UP: THE INCREDIBLE CASE OF TOM MOONEY AND WARREN BILLINGS* (1967); JEFFREY J. JOHNSON, *THE 1916 PREPAREDNESS DAY BOMBING: ANARCHY AND TERRORISM IN PROGRESSIVE ERA AMERICA* (2017).

offices and gatherings in the Bay Area. Arrests rapidly escalated across the state through the summer and fall of that year.¹⁶² The first conviction occurred in late 1919, when a union official named James McHugo was brought to trial in Oakland. As was typical in these cases, McHugo's guilt was premised on his membership in and work with the IWW. Because he readily admitted this, the state's case against McHugo actually turned on the prosecution's use of a great deal of IWW literature and the testimony of two special agents of the U.S. Justice Department, as well as that of former IWW members and professional witnesses Dymond and Coutts. Their testimony implicated the IWW in an array of criminal practices, including bombings and sabotage, to show that the union was a criminal syndicalist organization.¹⁶³

For several years following the McHugo trial, Dymond and Coutts would appear as witnesses in many dozens of criminal prosecutions in California and surrounding states, delivering the same kind of dubious, but effective, testimony that they provided in that case. They almost never testified about the actions of anyone then on trial. Nearly always, it was someone not present who they said had engaged in violence or sabotage to prove the union's culpability. In this clever way, these witnesses inculcated the defendants who were standing trial while avoiding contradiction and impeachment.¹⁶⁴

Despite a vigorous defense by a lawyer named William Cleary who, by the mid-1920s, would help prosecute radicals, the jury took somewhere between five and seven minutes to convict McHugo, and the judge sentenced him to one-to-fourteen years in San Quentin.¹⁶⁵ According to Woodrow Whitten, McHugo's four-week trial, which was itself patterned after the Sacramento Espionage Act trial, would in turn serve as "a model" for subsequent criminal syndicalism prosecutions in California.¹⁶⁶ Under this

162. Woodrow C. Whitten, *Criminal Syndicalism and the Law in California 1919-1927*, 59 TRANSACTIONS OF THE AM. PHIL. SOC'Y 3, 31 (1969); PHOTOSTAT OF DIGEST OF CALIFORNIA CRIMINAL SYNDICALISM CASES, *supra* note 149, at 12-15; *see also* 40 *Are Quizzed in L.A. Probe of I.W.W.*, Oct. 6, 1919, at 1; *Latest News*, L.A. HERALD, Nov. 11, 1919, at 1.

163. Erwin, *supra* note 147, at 1; Labor Defense League of California, News Bulletin No. 2 (Nov. 17, 1919) (on file with Princeton University, Mudd Library, ACLU Papers, Correspondence-General: Legal Defense Requests: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Vol. 90 at 94-95); California Prison and Correctional Records, San Quentin State Prison, Book No. 10, Inmate No. 33280.

164. CALIFORNIA BRANCH OF THE GEN. DEF. COMM., I.W.W., OUT OF THEIR OWN MOUTHS: STATEMENTS OF THE THREE MEN WHO SENT ONE HUNDRED MEN TO PRISON UNDER THE CRIMINAL SYNDICALISM LAW (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 169-O); GEN. DEF. COMM., I.W.W., CALIFORNIA THE BEAUTIFUL AND THE DAMNED 16-29 (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 158-C).

165. Whitten, *supra* note 162, at 41-42; *Legal Persecution Starts in the West*, ONE BIG UNION MONTHLY, July 1919, at 9; *Jury Convicts James McHugo of Syndicalism*, S.F. CHRON., Dec. 4, 1919, at 1.

166. Whitten, *supra* note 162, at 42.

model, which actually differed little from enforcement in other states, police and prosecutors often charged defendants after raids and planned dragnets.¹⁶⁷ Some were singled out for arrest because they were leaders of the organization, or were found actively organizing.¹⁶⁸ Some were arrested because local capitalists, American Legionnaires, or other influential elites demanded that they be charged.¹⁶⁹ Others were charged when some relatively insignificant police contact, like a vagrancy arrest, revealed their membership in the IWW; or when police, having just snatched them up, turned their pockets out, and found membership cards or union material.¹⁷⁰ Some were arrested while giving speeches.¹⁷¹ Still others were charged during outbreaks of labor conflict, including large-scale episodes like IWW-led strikes among construction workers on the massive Hetch Hetchy and Big Creek water projects in the central part of the state, and on the San Pedro waterfront in the spring and summer of 1923, when hundreds were arrested and dozens prosecuted for criminal syndicalism.¹⁷²

McHugo was not only the first man convicted of criminal syndicalism in California, he was also the first to be imprisoned. Three weeks after his conviction and three days before Christmas, 1919, he arrived at San Quentin to begin serving his term. There he would remain for two years, joined by a steady stream of other Wobblies who had all been ordered to serve between two and five years of their one-to-fourteen-year or two-to-twenty-eight-year sentences. The Wobbly inmates' numbers steadily grew until, by the fall of 1923, there were over one hundred of them in prison, even though dozens of defendants convicted at the outset of the campaign had since been released.¹⁷³ Soon California led all states in felony criminal syndicalism enforcement. By

167. See, e.g., *Eleven Alleged Wobblies Taken in Police Raid*, SACRAMENTO UNION, Oct. 25, 1922, at 2.

168. See, e.g., *Test is Planned of I.W.W. Law*, SACRAMENTO UNION, Apr. 9, 1922, at 1; *Fisherman's Union Man Nabbed as Red*, L.A. HERALD, May 2, 1921, at A7; *Red Propagandist is Held to Answer to Superior Court*, SACRAMENTO UNION, Aug. 18, 1921, at 8.

169. See, e.g., *I.W.W. Convicted by Yolo Jurors*, SACRAMENTO UNION, Dec. 17, 1921, at 5; *To Investigate I.W.W. Charges*, SACRAMENTO UNION, June 19, 1921, at 15.

170. See, e.g., *I.W.W. Delegate Is Arrested Here*, SACRAMENTO UNION, Nov. 7, 1922, at 3; *2 Alleged Members of I.W.W. Are Indicted*, SACRAMENTO UNION, Aug. 11, 1922, at 1; *Alleged I.W.W. Indicted*, SACRAMENTO UNION, June 9, 1922, at 3; *I.W.W. Organizer is Under Indictment*, SACRAMENTO UNION, Nov. 22, 1921, at 3; *Police Arrest Two Men as Radicals*, L.A. HERALD, Aug. 2, 1921, at 1; *Two Alleged Radicals Held*, SACRAMENTO UNION, Jan. 25, 1921, at 5; *I.W.W. Propagandists Released on Bail*, SACRAMENTO UNION, Jan. 18, 1920, at 11; *To Make Criminal Syndicalism Charge*, SACRAMENTO UNION, Jan. 5, 1920, at 6; *Held for Criminal Syndicalism*, SACRAMENTO UNION, Nov. 23, 1919, at 11.

171. See, e.g., *Man Arraigned on Syndicalist Charge*, L.A. HERALD, Sept. 26, 1921, at A7; *Man Held for Trial on 2 I.W.W. Charges*, L.A. HERALD, Jan. 20, 1921, at A3.

172. *Men Held as Radicals*, SACRAMENTO UNION, Oct. 31, 1922, at 11; see also *Oil Field Bombing Suspect Nabbed*, L.A. HERALD, Nov. 4, 1919, at 1.

173. Bulletins, California Branch of the General Defense Committee, I.W.W. (April 1923-July 1923) (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World, Seattle Joint Branches Records, 189-1965, Box 4).

1924, authorities there had tried 264 defendants on this charge in 94 separate proceedings and had convicted 164.¹⁷⁴

By the end of 1923, the arrest and prosecution of Wobblies on criminal syndicalism charges had largely ended everywhere, but not before the law caught up with union men in other states, including Kansas.¹⁷⁵ Enacted in 1920 at the behest of powerful wheat and oil interests, Kansas' law was a copy of Oregon's. Among its more tragic victims was Joe Neil, a Wobbly arrested in Hutchinson, Kansas in May 1922 after trying to solicit 25 cents from a man on the street. Neil was arrested for vagrancy, but when it emerged that he was an IWW, the charge was raised to criminal syndicalism.¹⁷⁶ Brought to trial on October 7, Neil was convicted that same day of advocating criminal syndicalism "by word of mouth and by writing." The jury recommended that Neil, who was a native of Austria, be deported instead of imprisoned. But the judge immediately imposed a sentence of one-to-ten years and sent him off to Lansing. Neil would serve six years, longer than any other Wobbly convicted of criminal syndicalism or, for that matter, under the Espionage Act.¹⁷⁷

The last IWW prosecuted in Kansas was a man named Harold Fiske, arrested in the summer of 1923, in Geneseo.¹⁷⁸ Fiske was charged with criminal syndicalism and brought to trial in nearby Lyons that September. In those proceedings, the organizer took the stand and admitted to his work with the IWW and the AWIU. Fiske also defended the IWW's revolutionary program, while denying that the organization was committed to violence. But prosecutors countered with membership applications, accounting records, bylaws, and other documents pertaining to the AWIU, all of which police had seized from Fiske. Alongside these documents, the prosecution presented IWW literature and the lyrics to a pro-IWW song, which Fiske composed and

174. PHOTOSTAT OF DIGEST OF CALIFORNIA CRIMINAL SYNDICALISM CASES, *supra* note 149, at 72; Whitten, *supra* note 162, at 65-66 app. C.

175. *See, e.g.*, State of Facts by the Court and County Attorney, State v. Breen, No. 1820 (Trago County Ct. 1920) (on file with Kansas Historical Society, Kansas State Penitentiary at Lansing Records, 1861-1952); Opening Brief and Argument of Appellant, State v. Breen, 205 P. 632, No. 23954 (Kan. 1922) (on file with Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 126, File 12); *I.W.W. Pleads Guilty, Fined by Fairchild*, HUTCHINSON GAZETTE (KS), Dec. 14, 1921, at 1.

176. Prisoner Interview, Joe Neil, No.7950 (Jan. 18, 1923) (on file with Kansas Historical Society, Kansas State Penitentiary at Lansing Records, 1861-1952).

177. Records of Joe Neil, No. 7950 (on file with Kansas Historical Society, Kansas State Penitentiary at Lansing Records, 1861-1952); Minutes of the 14th General Convention of the Industrial Workers of the World 23 (1922) (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 3, File 2); *Joe Neil Released, Rearrested*, INDUS. WORKER, Jun. 30, 1928, at 1; *Paulen Paroles* 38, EMPORIA GAZETTE (KS), Jun. 19, 1928, at 6.

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

sang while in jail. This was enough to convict Fiske, who was sentenced by the judge to one-to-ten-years in prison.¹⁷⁹

In Oklahoma, where a criminal syndicalism law was enacted in March 1919 with the strong support of Progressive governor J.B.A. Robertson, and where antipathy to the IWW was likewise anchored in the oil and wheat industries, there were also a handful of felony criminal syndicalism convictions.¹⁸⁰ Prominent among these was the conviction of Jack Terrell, an AWIU job delegate arrested in Enid in June 1919. Despite the testimony of Terrell, who astounded courtroom spectators with his articulate defense of himself and the IWW, the jury took only thirty minutes to reach a guilty verdict. Sentenced to seven years in prison, Terrell was allowed to go free while his appeal was pending. When his case finally came before the Oklahoma Criminal Court of Appeals, Terrell was already in prison in California, having been convicted of criminal syndicalism there in the summer of 1923.¹⁸¹

The IWW encountered trouble with the law in other states, too. There were criminal syndicalism arrests and occasional convictions in Nebraska,¹⁸² South Dakota,¹⁸³ and Minnesota,¹⁸⁴ as well as a handful of state sedition

179. Transcript of Record at 3, 9, 19-21, *Fiske v. Kansas*, 274 U.S. 380 (1927); see also *State v. Fiske*, 230 P. 88, 89 (Kan. 1924); Abstract of the Record at 7, *Fiske v. Kansas*, 274 U.S. 380 (1925).

180. DOWELL, *supra* note 73, at 52 n.20; Dowell, *supra* note 3, at 521-22; SELLARS, *supra* note 46, at 134.

181. SELLARS, *supra* note 46, at 137-39, 170-73; see also *Oklahoma "Justice"*, SOLIDARITY, Mar. 13, 1920, at 4.

182. On arrests in Nebraska, see, e.g., *Cronin Arrested*, NEW SOLIDARITY, Oct. 18, 1919, at 3; *Special Telegram*, NEW SOLIDARITY, Oct. 11, 1919, at 1. But there was only one conviction. In November 1922, a Wobbly named William Powell who had set about organizing workers in the sugar beet industry was convicted in Scottsbluff County, his prosecution subsidized by "citizens of the county." Powell was run out of town in lieu of imprisonment. *Guilty of Syndicalism*, LINCOLN JOURNAL STAR, Nov. 24, 1922, at 5-6; *Charge Him as a Wobbly*, LINCOLN EVENING J., May 28, 1923, at 8. On this and other Nebraska cases, see ACLU, *Civil Liberty Cases*, Vol. V-c, ch. 24 (1923) (on file with Princeton University, Mudd Library, ACLU Records, The Roger Baldwin Years 1912-1950, Clippings-Cases by State: Michigan, Missouri, Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, Vol. 239 at 114-16).

183. Authorities in South Dakota arrested and prosecuted, but did not convict, a handful of Wobblies. *I.W.W. Members Are Escorted from Town by Sheriffs Posse*, ABERDEEN J. (SD), Jul. 17, 1921, at 1; *An Advocate of Syndicalism is Lodged in Cell*, ABERDEEN (SD) J., Jul. 15, 1921, at 1; *In the Courts*, NW. SQUARE DEAL (SD), Aug. 25, 1920, at 8; *Municipal Court*, ABERDEEN DAILY NEWS (SD), Aug. 18, 1920, at 18; *"Yours for Revolution" is Signature of Casey; Defended by Tom Arnold*, ABERDEEN DAILY NEWS (SD), Jul. 26, 1921, at 1; *Lawyer from Chicago for Alleged I.W.W.*, ABERDEEN J. (SD), Jul. 22, 1922, at 4; *I.W.W. Deny Making Any Vicious Talks*, DAILY DEADWOOD PIONEER-TIMES (SD), Jul. 29, 1922, at 2; *Two I.W.W. Are Arrested Here for Criminal Syndicalism*, ARGUS-LEADER (SD), Jul. 26, 1921, at 1; *In Circuit Court*, ARGUS-LEADER (SD), Nov. 16, 1921, at 5; *Bosinger's Jury Is Dismissed*, ARGUS-LEADER (SD), Nov. 7, 1921, at 2.

184. On prosecutions in Minnesota, which produced a handful of convictions, see *Judge Reads Papers, Hangers-On' Doze in I.W.W. Ouster Suit*, STAR TRIB. (MN), Oct. 19, 1917, at 16; *Headquarters of Order Under Fire*, STAR TRIB. (MN), Oct. 10, 1917, at 12; *Harry Lisk Arrested*, DULUTH NEWS-TRIB., Oct. 26, 1917, at 5; *Hater of America Gets 60-Day Term*, DULUTH NEWS-TRIB., Jul. 12, 1917, at 5; *Look Out, Agitators*, DULUTH NEWS-TRIB., Jul. 10, 1917, at 5; *Lehtonen Acquitted*, DULUTH NEWS-TRIB., Aug. 31, 1917, at 5. *Gruesome Story Installment No. 4*, ONE BIG UNION MONTHLY, June 1920, at 37; *State v.*

prosecutions of Wobblies in Montana,¹⁸⁵ New Mexico,¹⁸⁶ Colorado,¹⁸⁷ and Alaska.¹⁸⁸ But most of these occurred either during the war or shortly afterwards. By 1924, the only state still prosecuting Wobblies for criminal syndicalism (or sedition) was California. Even in California, only a small handful of criminal syndicalism cases went to trial that year. Two of the cases in 1924 resulted in convictions for which ten men received prison sentences. But at least nine other cases involving over three dozen defendants ended in acquittals, mistrials, or dismissals.¹⁸⁹

IV. THE COURTS AND THE JURISPRUDENCE OF PROGRESSIVE REPRESSION

With few exceptions, trial judges acquiesced in prosecutions of IWW members. As many of the cases we have seen suggest, only rarely did a judge dismiss charges over the objections of prosecutors, limit the use of prejudicial or perjured evidence to convict Wobblies, or show lenience in sentencing. But passive acquiescence was not the only way that judges endorsed state repression of the IWW. Judges, at both the trial and appellate levels, worked actively to make membership in the union a crime and to justify the state's exercise of authority to drive the IWW out of existence.

A. Injunctions

Among the most revealing ways that courts participated in the persecution of Wobblies was their use of injunctions to circumvent some of the important procedural requirements of criminal punishment and lock up IWW members without so much as an indictment, let alone a trial. On January 5, 1920, Judge R.M. Webster of Spokane, Washington issued an

Worker's Socialist Publishing Company, 185 N.W. 931 (Minn. 1921); Dowell, *supra* note 3, at 1074; State v. Worker's Socialist Publishing Company, 185 N.W. 931 (Minn. 1921); *see also* REPORT OF THE ATTORNEY GENERAL TO THE GOVERNOR OF THE STATE OF MINNESOTA, 1919-1920, at 21 (Minneapolis, MN: Syndicate Printing Company); REPORT OF THE ATTORNEY GENERAL TO THE GOVERNOR OF THE STATE OF MINNESOTA, 1917-1918, at 26 (Minneapolis, MN: Syndicate Printing Company).

185. *A Busy Day in District Court*, ANACONDA STANDARD (MT), May 19, 1918, at 15; *Ranch Hand Arrested in Reviling County*, GREAT FALLS TRIB. (MT), Jun. 26, 1918, at 3; *Cason Faces Charge of Seditious Utterance*, DAILY MISSOULIAN (MT), Apr. 23, 1918, at 3; *Fergus Prisoners Get Out of Jail*, GREAT FALLS TRIB. (MT), Nov. 10, 1918, at 4; *Seditious Spouter Is Arrested in Lewiston*, GREAT FALLS TRIB. (MT), Aug. 1, 1918, at 2.

186. State v. Diamond, 202 P. 988, 989 (N.M. 1921).

187. Dowell, *supra* note 3, at 407. *Nome Editor Found Guilty of Sedition*, L.A. TIMES, Jan. 12, 1918, at 11; *Editor Indicted*, BELLINGHAM HERALD (WA), Apr. 11, 1918, at 5.

188. FRED THOMPSON, THE I.W.W.: ITS FIRST FIFTY YEARS 38, 48 (1955); *Nome Editor Found Guilty of Sedition*, L.A. TIMES, Jan. 12, 1918, at 11; *Editor Indicted*, BELLINGHAM HERALD (WA), Apr. 11, 1918, at 5; *John Smith Is Found Guilty*, DOUGLAS ISLAND NEWS (AK), May 21, 1920, at 1; DOWELL, *supra* note 73, at 310-12, 408, 409; *John Smith Is Found Guilty*, DOUGLAS ISLAND NEWS (AK), May 21, 1920, at 1.

189. PHOTOSTAT OF DIGEST OF CALIFORNIA CRIMINAL SYNDICALISM CASES, *supra* note 149, at 52-56.

order which prohibited a particular group of Wobblies “and all others not now known, whose names and identity may hereafter be disclosed, from associating, confederating, affiliating, and acting in concert with said named defendants.”¹⁹⁰ Webster’s order also barred these people from remaining members of the IWW, or remaining in the jurisdiction if they stayed in the union, and from “advocating, advising, teaching, or promulgating the said theories, doctrines, practices, and alleged principles” of the IWW.¹⁹¹ Working with local prosecutors, Judge Webster jailed a number of Wobblies for contempt of this edict.¹⁹²

In 1920, a judge in Butler County, Kansas, also moved to preemptively criminalize the IWW—in the name of “public health”—by granting the Kansas attorney general’s petition to enjoin the IWW and its affiliates in wheat and oil from operating in the state.¹⁹³ Within a month of the injunction’s issue, twenty-five IWW “agents” had been arrested.¹⁹⁴ “The I.W.W. did not have any success operating in Kansas this year,” enthused one local paper.¹⁹⁵ The attorney general claimed that the order, which remained in effect the next year, “greatly assisted the state in curbing the unlawful activities” of the IWW.¹⁹⁶

Even more aggressive were the actions of Judge Charles Busick of the Superior Court of Sacramento County. In August 1923, Busick, who on another occasion had a group of Wobblies arrested for testifying in behalf of their fellow workers, enjoined the IWW, its General Executive Board, its defense bodies, and some thirty individual officials as well as “their servants, agents, solicitors and attorneys and all others” from engaging in any activities in the state. In issuing the injunction, Busick drew on an affidavit by Elbert Coutts that catalogued IWW schemes and outrages, as well as the rationale that individual Wobblies were all insolvent and immune to conventional civil

190. State ex rel. Lindsley v. Wallace, 195 P. 1049, 1049 (Wash. 1921).

191. *Id.* at 1050.

192. On the implication for the relator, see State ex rel. Cody v. Superior Court, 192 P. 935, 936 (Wash. 1920). On other instances of enforcement, see, e.g., ex parte Parent, 192 P. 947 (Wash. 1920); State ex rel. Lindsley v. Wallace, 195 P. 1049 (Wash. 1921); State ex rel. Lindsley v. Grady, 199 P. 980 (Wash. 1921); William Haywood, *General Defense*, ONE BIG UNION MONTHLY, Sept. 1920, at 58.

193. See State ex rel. Hopkins, 214 P. 617, 617 (Kan. 1923); Appellants’ Brief before Kansas Supreme Court at 1, State ex rel. Hopkins, 214 P. 617 (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 126, File 10); see also *A Hunt for I.W.W. Agents*, HUTCHINSON (KS) NEWS, Jun. 24, 1920, at 1.

194. *I.W.W. Jailed*, CHANUTE WEEKLY TRIB., Jul. 16, 1930, at 8; *I.W.W. Again in Court*, LAWRENCE DAILY JOURNAL-WORLD (KS), Jul. 22, 1920, at 1; *Sentence a Kansas I.W.W.*, MORNING CHRON. (KS), Jul. 26, 1920, at 7.

195. *Kansas Vigilance Check Mates Efforts of Wobblies in Harvest*, HUTCHINSON GAZETTE, Aug. 8, 1920, at 1.

196. TWENTY-FIFTH BIENNIAL REPORT OF THE ATTORNEY GENERAL OF KANSAS, 1921-1922, at 18 (Topeka, KS: Kansas State Printing Plant, 1922).

lawsuits.¹⁹⁷ So extreme was Busick's injunction that the editors of the mainstream *Sacramento Union*, which did not make a habit of defending Wobblies, condemned the measure as a threat to rights of free speech and trial by jury.¹⁹⁸ This did not deter Busick, who made his order permanent. Only a handful of Wobblies were ultimately arrested for violating his injunction. But Busick's decree apparently provoked considerable anxiety and conflict among union members who were already having trouble enough with arrests and prosecutions under conventional charges.¹⁹⁹

B. State Appeals

A more common kind of complicity among judges was evident in the frequency with which they upheld the convictions of Wobblies. This was certainly true of state appellate judges, beginning with a case in Minnesota that followed soon after Jesse Dunning's conviction. In late April 1917, several weeks before Dunning was arrested in Bemidji, four Wobblies were arrested for criminal syndicalism in Biwabik after they were found posting IWW "stickerettes" in public places. One of the men, Elias Maki, was convicted in a separate trial in late September around the time of Dunning's trial. At Maki's request, the judge in that case put off further proceedings, including sentencing, and asked the Minnesota Supreme Court to certify whether the state syndicalism statute was valid. Maki's lawyer claimed that the statute violated the U.S. Constitution because it failed to adequately define the meaning of sabotage, because it constituted cruel and unusual punishment, and because it constituted an impermissible, discriminatory form of "class legislation" which violated the Equal Protection Clause. The state supreme court rejected all of these claims.²⁰⁰ This left the trial court free to confirm Maki's conviction and sentence him to six months of jail or a \$1,000 fine; the other defendants, convicted later, got three months or \$500.²⁰¹

The Minnesota Supreme Court case, *State v. Moilen*, was the first of a great number of cases in which appellate courts upheld defendants' convictions for violating criminal syndicalism laws.²⁰² An example of the way in which courts justified these decisions—as well as of how defendants got convicted in the first place—is the case of defendants Robert Dilgar and

197. *People v. IWW et al.*, No. 31125 (Super. Ct., Sacramento County, 1923) (on file with Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 125, File 5).

198. Whitten, *supra* note 162, at 59.

199. Weintraub, *supra* note 109, at 187; *Fifteen Wobs Released*, INDUS. SOLIDARITY, Oct. 29, 1924, at 1.

200. *State v. Moilen*, 167 N.W. 345, 346 (Minn. 1918).

201. Dowell, *supra* note 3, at 1072-73; *Criminal Syndicalism Law Test Asked Here*, MINNEAPOLIS STAR TRIB., Dec. 15, 1917, at 25.

202. There were, to be sure, other rulings, but these tended to involve technical questions about criminal anarchy statutes. *See, e.g.*, *Von Gerichten v. Seitz*, 94 A.D. 130 (4th Dept. 1904).

the well-named Thomas Paine. The two men were charged with criminal syndicalism in Trego County, Kansas in 1920. In a trial nominally centered on an attempted escape from the local jail, which in fact was essentially a criminal syndicalism prosecution, Dilgar and Paine were convicted and sentenced to two years in prison.

In their appeal to the Kansas Supreme Court, Dilgar and Paine argued that the escape conviction was unfounded because their confinement had been illegal in the first place: the bill of information under which they were arrested “was not sufficiently definite or specific to inform the accused of the nature and cause of the accusation against them.”²⁰³ The issue was not at all a trivial one; criminal syndicalism statutes were monuments to vagueness and ambiguity, particularly with regard to the meaning of “sabotage” and “terrorism.” But this seldom troubled the courts. The court in the case involving Dilgar and Paine, which upheld their convictions, never decided the matter.²⁰⁴ For its part, the *Moilen* court concluded, in the face of a reality that very much held otherwise, that the meanings of terms like sabotage and terrorism were “matters of common knowledge.”²⁰⁵

Many other courts agreed that syndicalism statutes were not unconstitutionally vague. Some resorted to dictionary and encyclopedia definitions: in 1923, for example, the Idaho Supreme Court invoked a text which in a circular way conveniently defined sabotage as something the IWW was known for practicing.²⁰⁶ Still other courts took advantage of the way that criminal syndicalism laws were written, satisfying themselves that, even if terms like sabotage or terrorism might be uncertain, the concept of prohibiting social change by means of unlawful acts—which also qualified as “criminal syndicalism”—was, of its nature, not unclear, and therefore upheld these syndicalism laws and the convictions under them.²⁰⁷ In 1921, the Washington State Supreme Court took a somewhat different approach; it concluded that the vagueness argument was invalid because there were “many statutes now on the books which are open to the objection of uncertainty,” such as vagrancy and malicious mischief, which were widely accepted and not subject to challenge on vagueness grounds. Never mind that

203. Brief of Appellants at 3, *State v. Dilgar*, 208 P. 620 (Kan. 1922) (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 126, File 17).

204. *State v. Dilgar*, 208 P. at 621.

205. *State v. Moilen*, 167 N.W. 345, 346 (Minn. 1918).

206. See, e.g., *State v. Dingman*, 219 P. 760, 762-64 (Idaho 1923); Brief of Appellant at 6, *State v. Dingman*, 219 P. 760 (Idaho 1923) (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 127, File 5).

207. See, e.g., *People v. Ruthenberg*, 201 N.W. 358, 361 (Mich. 1925); *People v. Steelik*, 203 P. 78, 83 (Cal. 1921).

that these statutes were also invoked to repress unionists and working people.²⁰⁸

On some occasions, defendants' appeals of their convictions under syndicalism laws were successful. In January, 1924, the Idaho Supreme Court ruled in *Ex Parte Moore* that the state's criminal syndicalism statute did not criminalize occasions when workers slowed down on the job or engaged in other nonviolent forms of "direct action."²⁰⁹ The ruling, which was based on a straightforward reading of the statute's text, seemed like a blow to the union's adversaries, given that Idaho police and prosecutors had often enforced the statute under exactly those circumstances set aside by the court. But, aside from coming at a time when the IWW was already very much in decline in Idaho and elsewhere, *Ex Parte Moore* was quickly overturned by the legislature. At the urging of Governor Charles Moore, within days of the decision the legislature amended the statute to criminalize not only destructive forms of sabotage and the like, but also "slack work" and "work done in an improper manner."²¹⁰

In a few other cases, defendants did manage to get their convictions overturned because trial courts had erred in explaining the meaning of terms of like sabotage in their jury instructions.²¹¹ But successful claims of this kind were uncommon. Other courts expressly rejected proposed instructions that would have required juries to find that the organizations defendants belonged to were actually committed to prohibited means of industrial or political change.²¹²

Similarly, state appellate courts consistently approved of allowing juries to base individual defendants' culpability on the acts of the IWW, even where there was no evidence to show that the individual defendants endorsed such acts.²¹³ In fact, as described in Part III.B, this was the principle upon which the criminal syndicalism laws were conceived. Appellate judges relied on this principle of guilt by association to uphold even convictions where a defendant's involvement with the IWW predated the enactment of the criminal syndicalism statute.²¹⁴ A few courts did seem concerned that, if defendants were to be convicted based only on membership in the IWW,

208. *State v. Hennessy*, 195 P. 211, 216 (Wash. 1921); *see also* Appellants Opening Brief at 3-4, *Hennessy v. Washington*, 195 P. 211 (Wash. 1921) (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 126, File 20).

209. *Ex parte Moore*, 224 P. 662 (Idaho 1924).

210. Dowell, *supra* note 3, at 156-65.

211. *See, e.g., ex parte Moore*, 224 P. at 665; *State v. Tonn*, 191 N.W. 530, 538 (Iowa 1923); *State v. Aspelin*, 203 P. 964, 965 (Wash. 1922).

212. *See, e.g., People v. Eaton*, 213 P. 275, 276-77 (Cal. Dist. Ct. App. 1923).

213. *See, e.g., People v. Powell*, 236 P. 311, 314 (Cal. Dist. Ct. App. 1925); *People v. Stewart*, 230 P. 221, 224 (Cal. Dist. Ct. App. 1924); *People v. Roe*, 209 P. 381, 383-84 (Cal. Dist. Ct. App. 1922).

214. *People v. Steelik*, 203 P. 78, 84 (Cal. 1921) (the Steelik is alternately spelled as Steelink, though there is some dispute as to which spelling is correct).

there should be proof that they knew at least something about the nature of the organization that they belonged to. But even these courts were usually satisfied that this knowledge could be inferred from membership.²¹⁵

Although some state appellate courts took the view that defendants' possession of radical documents was not enough, by itself, to justify conviction,²¹⁶ most courts endorsed the use of IWW literature, songs, and other propaganda to prove the IWW's criminality and, therefore, the guilt of individual defendants, even when there was not much more to the state's case.²¹⁷ On this point, too, the Minnesota Supreme Court's reasoning in *Moilen* was typical. The stickerettes that the defendants posted—and which, aside from membership in the IWW, were the only evidence against them—did not specifically condone sabotage. But the court determined that, with their “snarling black cat,” the stickerettes created an “atmosphere...of intimidation, indicative of a purpose to incite fear in the employers of labor and to compel submission to labor demands.”²¹⁸

Not surprisingly, defendants also challenged prosecutors' use of unreliable testimony from witnesses like Coutts and Dymond.²¹⁹ They raised exceptions based on prosecutorial misconduct.²²⁰ They also claimed that their right to a fair trial was impeded by the intimidation of witnesses with threats of prosecution.²²¹ But these claims went nowhere.²²² Arguments that imposing such stiff penalties for mere speech and association constituted cruel and unusual punishment in violation of the Eight Amendment of the U.S. Constitution were also unsuccessful.²²³ Indeed, the only grounds on which defendants prevailed with any regularity were procedural or technical,

215. For example, in the 1924 case *People v. Cox*, the California District Court of Appeals held that where one became a member of the IWW, knowledge of its advocacy of illegal acts “is imputed and would exist in fact just as much as though it were specifically set forth and denominated in the act of the Legislature condemning such organization.” *People v. Cox*, 226 P. 14, 16 (Cal. Dist. Ct. App. 1924).

216. See, e.g., *People v. Thornton*, 219 P. 1020 (Cal. Dist. Ct. App. 1923).

217. See, e.g., *People v. Taylor*, 203 P. 85, 87-89 (Cal. 1921); *People v. Lesse*, 199 P. 46, 47 (Cal. Dist. Ct. App. 1921). Some courts did take exception to this practice. See, e.g., *People v. Erickson*, 226 P. 637, 637-38 (Cal. Dist. Ct. App. 1924); *People v. Leonard*, 225 P. 461, 462 (Cal. Dist. Ct. App. 1924).

218. *State v. Moilen*, 167 N.W. 345, 348-49 (Minn. 1918).

219. *State v. Tonn*, 191 N.W. 530, 537-38 (Iowa 1923); *People v. Steelik*, 203 at 84-85.

220. *People v. Steelik*, 203 P. at 83-85.

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

222. See *People v. Steelik*, 203 P. at 84-85; *State v. Tonn*, 191 N.W. at 537-38; *People v. Casdorf*, 212 P. at 238 (Cal. Dist. Ct. App. 1922). For an example of how such claims were framed, see Appellants' Opening Brief at 5-12, *People v. La Rue*, 216 P. 627, No. 684 (Cal. Dist. Ct. App. 1923) (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World, Seattle Joint Branches Records, 1890-1965, Box 2).

223. Here, too, other appellate courts found a solid precedent in *Moilen*, which held that this provision of the Constitution governed only the type of punishment that could be imposed on defendants, not its severity. *State v. Moilen*, 167 N.W. at 347; cf. *State v. Hennessy*, 151 P. 211, 215 (Wash. 1921).

including arguments based on jury bias, improper juror selection, or the use of inadmissible hearsay in grounding convictions.²²⁴

By contrast, no state appellate court overturned a criminal syndicalism conviction on the relatively infrequent occasions when IWW defendants directly challenged their convictions as substantive violations of their rights of free speech and association.²²⁵ Instead, appellate courts usually dismissed these arguments out of hand.²²⁶ Even when the courts did acknowledge that some right of speech or association might be at stake, they often decided that IWW defendants deserved no such protections anyway. This was typified by the California Supreme Court's holding that "[t]he right of free speech does not include the right to advocate the destruction or overthrow the government or [undertake] the criminal destruction of property."²²⁷ Some defendants contended that criminal syndicalism laws were an unconstitutional brand of "class legislation," meaning that they violated the principle of equal protection by punishing radicals for seeking to use prohibited means to change the industrial or political order while not treating vigilantes, police, and others the same way when they used such means to preserve the social order.²²⁸ This argument made interesting use of a bedrock principle of Progressive ideology—the idea of formal equality—while simultaneously appealing to a concept the business community and its allies had used very

224. Dowell, *supra* note 3, at 1060-61; *see, e.g.*, *People v. Sullivan*, 211 P. 467, 468-69 (Cal. Dist. Ct. App. 1922); *People v. Wismer*, 209 P. 259, 261 (Cal. Dist. Ct. App. 1922). In line with this judgment is a report developed by the head of the California Branch of the IWW's General Defense Committee. It documented that as of March 15, 1926, California's appellate courts had affirmed 141 convictions while overturning only 55, and that all but two of the reversals were obtained before the state's intermediate appellate courts, which typically address more technical or procedural questions. *See* PHOTOSTAT OF DIGEST OF CALIFORNIA CRIMINAL SYNDICALISM CASES, *supra* note 149, at 72.

225. In 1918, the New Mexico Supreme Court did overturn the sedition conviction of Wobbly Jack Diamond on such grounds. *See State v. Diamond*, 202 P. 988, 993 (N.M. 1921). A few other state courts also overturned sedition conviction on grounds of their infringement on free speech and rights of association, but these cases did not involve Wobblies. *See, e.g.*, *State v. Gabriel*, 112 A. 611 (N.J. 1919).

226. *State v. Berg*, 233 P. 497, 501 (Okla. Ct. Crim. App. 1925); *see also People v. Steelik*, 203 P. at 84 (Cal. 1921); *People v. Taylor*, 203 P. 85, 88 (Cal. 1921); *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).

227. *People v. Steelik*, 203 P. at 84. That same year, the California Supreme Court also rejected the appeal of John Taylor. A former Wobbly, Communist Labor Party member, and state secretary of the Socialist Party, Taylor had been convicted of two counts of criminal syndicalism by an Oakland jury in May 1920. In *People v. Taylor*, the court held that the case law on free speech had "no application to a statute such as ours, which denounces organizations for the purpose of committing crimes against persons and property in furtherance of political or industrial change." *People v. Taylor*, 203 P. 85, 88 (Cal. 1921). The court also rejected Taylor's claim that the trial court erred in refusing to instruct the jury as to the "general right of the masses to strike, and the propriety or impropriety of extending sympathy to the soviet government of Russia." *Id.* at 90-91.

228. *State v. Dingman*, 219 P. 760, 764 (Idaho 1923); *State v. Moilen*, 167 N.W. 345, 346-48 (Minn. 1918); *State v. Hennessy*, 195 P. at 215; *State v. Laundry*, 204 P. 958, 963 (Or. 1922).

successfully to invalidate reformist labor legislation.²²⁹ But courts were generally unmoved. They either concluded that because these statutes criminalized individual acts, they could not constitute a form of class legislation, or simply decided that the distinction between revolutionaries and reactionaries was rational and therefore constitutional.²³⁰

C. Federal Appeals and First Amendment Doctrine

The state court decisions upholding convictions of IWW members were decided against a backdrop of what David Rabban describes as “a pervasive tradition of judicial hostility to free speech.”²³¹ For reasons that had much to do with the evolving nature of First Amendment law at the time, this hostility was most evident in the way the federal courts resolved the appeals of Wobblies and their fellow leftists in this period. In these cases, courts reconciled their endorsement of antiradical prosecutions with an emerging jurisprudence that appeared to be progressive, liberal, and against state repression. In fact, a review of federal cases involving the prosecution of Wobblies and other leftists reveals a striking consensus among judges that the Espionage Act and the criminal syndicalism laws were entirely valid forms of suppression, even as federal courts purported to expand the Constitution’s protections of free speech.

Central to this story is the role of the “clear and present danger test,” a doctrine developed by Oliver Wendell Holmes and embraced by the Supreme Court in its 1919 decision *Schenck v. United States*.²³² *Schenck* was one of a trio of cases the Court decided that term which upheld convictions under the Espionage Act of two years prior.²³³ The clear and present danger test implied that speech and association could only be limited when they “threatened to create a clear and present danger” that “substantive evils” which the government “has a right to prevent” might come about.²³⁴ Despite framing this test as a protection against repression, the Court demonstrated the ease by which the test could be manipulated when it concluded that clear and present dangers were indeed present in the cases before it, even though these

229. On this tradition in American jurisprudence, see Claudio J. Katz, *Protective Labor Legislation in the Courts: Substantive Due Process and Fairness in the Courts*, 31 L. & HIST. REV. 275 (2013).

230. See, e.g., *People v. Wieler*, 204 P. 410, 411 (Cal. Dist. Ct. App. 1921); *State v. Dingman*, 219 P. at 764; *State v. Hennessy*, 195 P. at 215. In *Moilen*, the court drew on the logic of Progressivism to subvert the defendants’ claim, by asserting—rather counterfactually—that because class legislation in favor of workers had “been sustained by courts with few exceptions,” the authority of states to regulate “the relation of master and servant” was “thoroughly settled,” and that there was therefore no basis for claiming that the criminal syndicalism statutes were discriminatory and unconstitutional. *State v. Moilen*, 140 Minn. at 116.

231. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1208 (Fall 1983).

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

233. Rabban, *supra* note 231, at 1211.

234. *Schenck v. United States*, 249 U.S. at 48.

cases involved nothing more than peaceful, verbal agitation against war and the draft.

The conclusion that the state has a right to shut down radical dialogue is consistent with Justice Holmes' overall jurisprudence and social vision. Like more than a few other Progressives, Justice Holmes was a Social Darwinist, a devotee of Thomas Malthus, and a champion of the need for a firm program of social control.²³⁵ Justice Holmes made no secret of his deep antipathy to radicalism and had earlier made clear his view that the prerogative to speak freely was very much a privilege and not a broad right.²³⁶ He also believed, like most Progressives, in expanding the use of the law to achieve his purposes. Consequently, Justice Holmes had no trouble embracing the idea of punishing people who promoted deviant ideas and using the law to wage what he conceived of as a war for social supremacy.²³⁷

From this vantage point, it is easier to appreciate Rabban's judgment that the clear and present danger test allowed Justice Holmes to codify a "deference to community will" that "derived from his Social Darwinism."²³⁸ In Richard Sklar's words, the test Holmes authored "did not stem from any tenderness toward free speech" but rather from an effort by the Justice and his colleagues on the Court to validate Congress's power to punish speech. Given the way the Constitution limited Congress's authority to do so, validating this power meant requiring that legislation aimed at limiting speech address "proximate" evils.²³⁹ As Sklar explains, by making the reach of the Constitution's protections contingent on the subjective intent of the defendant, the test allowed jurors and judges to infer that intent from the defendant's political positions.²⁴⁰

In *Abrams v. United States*, decided later in 1919, the Supreme Court upheld the Espionage Act convictions of five radicals, all Jewish immigrants from Russia, who had been prosecuted for publishing leaflets that criticized America's military intervention against the Russian Revolution.²⁴¹ Justice John Clarke, who wrote the majority opinion, did not invoke Holmes' clear and present danger test.²⁴² Instead, he seemed to resurrect an earlier-formulated doctrine, the amorphous "bad tendency" test.²⁴³ But this was of little consequence; the bad tendency test, though on its face somewhat more

235. Rabban, *supra* note 231 at 1210, 1268-71, 1319.

236. Rabban, *supra* note 231, at 1210; *Patterson v. Colorado*, 205 U.S. 454 (1907).

237. Rabban, *supra* note 231, at 1268-70.

238. *Id.* at 1278.

239. Richard L. Sklar, *The Fiction of the First Freedom*, 6 W. POL. Q. 302, 305 (June 1953).

240. *Id.* at 305-06; *see also* Rabban, *supra* note 231, at 1212, 1265-83.

241. *Abrams v. United States*, 250 U.S. 616, 617 (1919).

242. *Id.* at 616-24.

243. On the scope and meaning of the bad tendency test, *see generally* Edward J. Bloustein, *The First Amendment "Bad Tendency" of Speech Doctrine*, 43 RUTGERS L. REV. 507 (1990-1991).

generous to the government, was not that different from the clear and present danger test in practice.²⁴⁴

Clarke's opinion in *Abrams* actually cited *Schenck* and the other two Espionage Act cases decided a week after it: *Frohwerk v. United States* and *Debs v. United States*. In *Debs*, Justice Holmes disposed of the appeal of Eugene Debs' 1918 conviction for a speech the Socialist leader had given in Canton, Ohio, that year. Justice Holmes characterized Debs' failure to condemn the war that day as somehow constituting proof of his intent to violate the law.²⁴⁵ Like *Schenck*, *Debs* and *Frohwerk* were both unanimous decisions authored by Justice Holmes that met with no objections from Justice Brandeis or his relatively progressive colleagues on the Court: Joseph McKenna, William Day, and Edward White. Together with *Schenck*, these cases bolstered the *Abrams* Court's conclusion that the defendants presented enough of a danger to warrant conviction.²⁴⁶

Abrams was the first of series of cases in which Justices Holmes and Brandeis dissented from majority rulings that upheld restrictions on speech. Justice Holmes's dissent has been described as a "landmark" and "turning point" for these justices, marking their evolution into earnest supporters of civil liberties who eventually set the Supreme Court on a more libertarian path.²⁴⁷ In reality, Justice Holmes's willingness to set aside the conviction fit very well with his Social Darwinist tendencies, as he cast the defendants as "poor and puny anonymities" who had published a "silly leaflet" and suggested that, if their speech was worth protecting, it was because it was not worth much at all.²⁴⁸

The Supreme Court declined to review any of the IWW's appeals of its members' Espionage Act convictions.²⁴⁹ But its decisions in *Abrams*, *Frohwerk*, and *Debs*, and had already made clear how the circuit courts would treat such appeals. In October 1920, the Seventh Circuit overturned counts one and two of the Chicago convictions: count one because it duplicated count three, and count two because the charge, "conspiring to interfere with rights or privileges secured by federal law to various businesses by preventing them from producing and selling goods to the government," rested on the improper assumption that these rights were guaranteed by federal law. The decision affected the amount of fines that some defendants were liable for, but otherwise had no practical consequence. The other two

244. Rabban, *supra* note 231, 1258-65.

245. *Debs v. United States*, 249 U.S. 211, 212-13 (1919).

246. Rabban, *supra* note 231, at 1257-65.

247. *Id.* at 1303, 1305-06; *see also* THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (New York: Metropolitan, 2013).

248. *Abrams v. United States*, 215 U.S. 616, 628-29 (1919).

249. *Haywood v. United States*, 256 U.S. 689 (1921); *Anderson v. United States*, 257 U.S. 647 (1921); *Gilmore v. United States*, 255 U.S. 576 (1921).

counts, one of which invoked the Espionage Act, withstood a great number of challenges regarding the sufficiency of the evidence and the way the charges were framed in the indictments and jury instructions.²⁵⁰

The appeals in other Espionage Act cases fared no better. The Ninth Circuit cited *Frohwerk*, among other opinions, in a decision that upheld all counts in the Sacramento Case.²⁵¹ The Eighth Circuit did overturn the Kansas City defendants' convictions on count one, which charged them with seditious conspiracy, because the court determined that the charge had not been properly defined for the jury.²⁵² But it cited *Schenck* and *Frohwerk* to uphold the convictions on counts two and three, which charged conspiracy to impede the draft and create dissension in the armed forces, as well as count four, which charged the defendants with conspiring to violate the Lever Act.²⁵³

The Supreme Court did not decide the constitutionality of any cases arising from state criminal syndicalism prosecutions until 1927, when it disposed of three in a single day. First was the appeal of Harold Fiske, whose conviction the Court overturned due to inadequate evidence and lack of due process.²⁵⁴ A second involved the appeal of Wobbly William Burns, convicted in 1923 of violating various California laws, including California's criminal syndicalism statute.²⁵⁵ In this case, the Court considered whether the trial judge's instruction to the jury properly defined the meaning of sabotage. For Justice Pierce Butler, the instruction might have been overly broad, but this was irrelevant in the face of the evidence showing that Burns was a member of and organizer for the IWW, which was in every way committed to the practice of sabotage, however it might be defined.²⁵⁶ Responding to the contention of Burns' lawyers that California's statute was "void for uncertainty," Butler merely pointed to the Court's "adverse" decision in

250. *Haywood v. United States*, 268 F. 795, 799, 805-08 (7th Cir. 1920). The defendants' sentences remained unchanged and those who had since been released on bail pending appeal were returned to prison. *See* DUBOFSKY note 9 at 459.

251. *Anderson v. United States*, 269 F. 65 (9th Cir. 1921); Koppes, *supra* note 112 at 356.

252. *Anderson v. United States* 273 F. 20, 21-27 (8th Cir. 1921).

253. *See id.* at 28-30; Koppes, *supra* note 112 at 357-58. Because of how the defendants' sentences had been determined, this ruling resulted in the release of nineteen of the defendants, who had served all the time they received under the remaining counts. However, the others remained in prison.

254. In this regard, the Court was particularly troubled by the fact that the only real proof of Fiske's belief in criminal syndicalism consisted of the presentation to the jury of the preamble of the IWW's constitution—a document that was used to convict many other Wobblies. *See Fiske v. Kansas*, 274 U.S. 380, 383-87 (1927).

255. Burns was put on trial in December 1923 on criminal syndicalism charges, after he rejected an offer from the federal prosecutor to walk free if he renounced the IWW. *See Burns v. United States*, 274 U.S. 328 (1927); *Bulletins*, California Branch of the General Defense Committee, I.W.W. (May 6, 1923, July 11, 1923, Nov. 24, 1923, Oct. 18, 1924) (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World, Seattle Joint Branches Collection, Box 4); *PHOTOSTAT OF DIGEST OF CRIMINAL SYNDICALISM CASES*, *supra* note 149, 51-54.

256. *Burns v. United States*, 274 U.S. at 331-37.

Whitney v. California, the third criminal syndicalism case decided that day.²⁵⁷

Whitney involved the 1920 prosecution and conviction of Charlotte Anita Whitney. A child of great privilege, Whitney had lived much of her life as a Progressive, before moving further to the left and passing “over the line, the invisible line,” as she put it, “which divides mankind into two different groups.”²⁵⁸ During the early 1910s, Whitney supported Wobblies implicated in the Wheatland Affair and was later active in aiding the legal defense of Mooney and Billings, the two former Wobblies who had been wrongly convicted of the Preparedness Day Bombing.²⁵⁹ A member of the Socialist Party since 1914, Whitney was one of many left-wing party members who supported the reformation of the state Socialist Party into a state chapter of the Communist Labor Party, or CLP, in November 1919.²⁶⁰

Whitney was arrested and charged with criminal syndicalism in Oakland, on the evening of November 28, 1919, just after she delivered a speech before 150 members of the California Civic League on “The Negro Problem in the United States.”²⁶¹ Whitney was convicted on February 20, 1920, after prosecutors had argued that Whitney’s membership in the CLP made her guilty of criminal syndicalism, because the CLP was but a “political adjunct of the I.W.W.”²⁶² Several days after her conviction, Whitney was sentenced to one-to-fourteen years in prison, jailed for eleven days, and then freed pending appeal.²⁶³

Seven years later, the Supreme Court upheld her conviction. Writing for the Court’s majority, Justice Edward Stanford, who was no Progressive, dismissed every one of the arguments advanced by Whitney’s lawyers.²⁶⁴

257. *Id.* at 331-32.

258. Lisa Rubens, *The Patrician Radical Charlotte Anita Whitney*, 65 CAL. HIST. 3, 158, 160-61 (Sept. 1986); Beth Slutsky, *Parlor Pink Turned Soapbox Red: The Trial of Charlotte Anita Whitney*, 9 AM. COMMUNIST HIST. 35, 38-41 (2010).

259. Slutsky, *supra* note 258, at 41-42.

260. Ralph E. Shaffer, *Formation of the California Communist Labor Party*, 36 PAC. HIST. REV. 59, 73-78 (Feb. 1967).

261. GLENDA E. GILMORE, *DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919-1950* (2009).

262. This assertion was neither entirely true nor completely false. The CLP was not an appendage of the IWW, but it was closely connected to the union. Composed of many westerners like Whitney, the dissident left-wing delegates to the Socialist Party’s national convention in Chicago who founded the CLP in early September 1919 had some IWWs in their ranks. They also devised a program that focused on labor organizing, industrial unionism, and “direct action.” Shaffer, *supra* note 260, at 59, 71. The prosecution also relied on the testimony of Coutts and Dymond, who drew a very tenuous link between Whitney and the dubious story of a bombmaking laboratory on a houseboat in Stockton that was used to convict a number of Wobblies. Whitten, *supra* note 162, at 46; *see also* Slutsky, *supra* note 258, at 46-48; Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 658-59 (1988).

263. Whitten, *supra* note 162, at 47; Slutsky, *supra* note 258, at 49.

264. *Whitney v. California*, 274 U.S. 357, 367-70 (1927).

Citing his own majority opinion in *Gitlow v. New York*, which upheld the conviction of another Socialist-turned-Communist under New York's criminal anarchy law while also affirming the "incorporation" of the First Amendment against the states, Justice Stanford averred that California was within its rights to "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."²⁶⁵

More famous than Sanford's opinion in *Whitney*, though, is the concurrence written by Justice Brandeis and joined by Justice Holmes. Justice Brandeis believed very much in the quintessentially Progressive need to manage modern, capitalist society.²⁶⁶ But he also retained a great faith in capitalism's value as a fount of freedom, economic advancement, and individual self-fulfillment.²⁶⁷ Moreover, Justice Brandeis had little truck with radicalism, least of all the kind promoted by the IWW, even though he had mentored a young Roger Baldwin, the one-time Wobbly and Harvard man who founded the American Civil Liberties Union.²⁶⁸ As David Rabban contends, although Justice Brandeis was often sympathetic to conventional unionism, he loathed and feared the IWW, which he saw as a source of disorder and a threat to capitalism, and supported the government's prerogative to rein it in.²⁶⁹

Justice Brandeis's opinion in *Whitney* is often lauded as an elegant paean to the virtues of free speech and association.²⁷⁰ The concurrence is notable for its insistence that free speech and association are "fundamental rights"; its conclusion that those who "won our independence by revolution were not cowards," but rather people who sought to preserve "liberty"; and its argument that "it must remain open to a defendant to present the issue whether there did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction imposed by the Legislature."²⁷¹ Justice Brandeis condemned Whitney's lawyers for failing to put the clear and present danger test, or evidence to support her claims under it, before the jury

265. *Id.* at 371.

266. *Id.* at 370-80; Rabban, *supra* note 231, at 1321-23.

267. Rabban, *supra* note 231, at 1323-25.

268. *Id.* at 1325-26, 1328 n.763.

269. *Id.* at 1323-25.

270. See, e.g., Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 904 (1986) ("the most powerful judicial discussion of first amendment freedoms ever written"); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE, 489 (2012) ("in some cases his writing rose to the level of elegance; there are few cases in American constitutional law that can match the powerful rhetoric of his opinion in the Whitney case"); JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 123 (2016) ("Brandeis's opinion represents the most important defense of freedom of thought and opinion since Jefferson's First Inaugural")

271. *Whitney v. California*, 274 U.S. at 373-74, 379.

and the trial court, but also concluded that “there was evidence on which the court or jury might have found that such a danger existed.”²⁷² Indeed, Justice Brandeis asserted that “there was other testimony which tended to establish the existence of a conspiracy on the part of members of the Industrial Workers of the World to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society [the CLP] of which Miss Whitney was a member.”²⁷³ “Under these circumstances,” Brandeis concludes, “the judgment of the State court cannot be disturbed.”²⁷⁴

What Justice Brandeis actually articulated with his opinion in *Whitney* was a jurisprudence—not unlike that evinced by Justice Holmes in his *Abrams* dissent—that defended radicals and other dissidents only when they were weak and unlikely to be of any consequence. A superficial reading of this opinion might lead one to support lauding Justice Brandeis as a defender of the “oppressed”²⁷⁵ or, along with Holmes, as a “champion of free expression.”²⁷⁶ However, the concurrence did little more than Holmes’ dissent in *Abrams* to suggest limitations on the discretion of judges to determine when speech or conduct is dangerous.²⁷⁷ Ultimately, the clear and present danger test subjects the rights of freedom of speech and association to the power of police and prosecutors to foment fears and anxieties, to cultivate threats, and to impugn radicals as dangerous people. This underlay not only Whitney’s conviction, but those of hundreds of Wobblies.²⁷⁸

V. LAW, PUNISHMENT, AND THE DESTRUCTION OF THE IWW

Nationwide, from the middle of 1917 through the end of 1924, it is likely that between 1,500 and 2,000 people were arrested and charged, at least informally, with criminal syndicalism. The majority of these were released or had charges dismissed at trial, but a very significant number of defendants went to prison—131 in California, 30 in Idaho, about 100 in Washington and

272. *Id.* at 379.

273. *Id.* at 373-74, 379.

274. *Id.* at 357, 379.

275. On this characterization of Brandeis, see Rabban, *supra* note 231, at 1321.

276. MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 545 (2012).

277. For this critique of the clear and present danger test, see generally William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107-50 (1982).

278. It is worth pointing out that state appellate judges followed the same essential reasoning when they denied defendants’ appeals. None of the state courts that ruled in these cases embraced the clear and present danger test, but they adopted its logic, invoking the speculative threat radicals posed to the state and the social order, impugning their motives, and validating the authority of legislatures, prosecutors and police, trial judges, and juries to do exactly the same. *See, e.g.*, *People v. Taylor*, 203 P. 85, 87-88 (Cal. 1921); *State v. Hennessy*, 195 P. 211, 214-15 (Wash. 1921); *People v. Cox*, 226 P. 14 (Cal. Dist. Ct. App. 1924).

Oregon, and smaller numbers in other states, for a total of 300.²⁷⁹ How many served jail time on misdemeanor charges is impossible to determine with any accuracy, but a rough estimate of several hundred seems reasonable. And, of course, in addition to these were the nearly two-hundred IWW members who were sentenced to prison in the Espionage Act cases.²⁸⁰ This torrent of punishment played a crucial role in the destruction the IWW, not only by what it did to these individuals but also by what it cost the union and its supporters trying to get them out.

A. *The Long Journey to Freedom*

With opportunities for successful appeal so limited, the only chance that most IWW inmates had to leave prison early was through some kind of discretionary release. At the federal level, this involved an “amnesty” campaign which, by the early 1920s, highlighted the support the union received from left-leaning Progressives who had rejected the prosecutions from the outset or had more recently come to think that the prosecutions had either gone too far or, with the war over, served their purpose.²⁸¹

The amnesty campaign sought the release of all Espionage Act prisoners, not just the Wobblies. Altogether, some 1,055 people were convicted during and just after the war of violating sections 3 or 4 of the Espionage Act.²⁸² Besides IWWs, their ranks included hundreds of Socialists and religious objectors to the war, as well a fair number of Anarchists, black nationalists, and other victims of this period’s consuming authoritarianism and militarism.²⁸³ Some fifty members of Congress joined to demand their

279. On the number of imprisonments in California, see PHOTOSTAT OF DIGEST OF CALIFORNIA CRIMINAL SYNDICALISM CASES, *supra* note 149, at 72; Whitten, *supra* note 162, at 65-66 app. C. On the number in Idaho, see INMATES OF THE IDAHO STATE PENITENTIARY, 1864-1947: A COMPREHENSIVE CATALOG vii (Rachel S. Johnstone, ed. 2008). The figure for Oregon and Washington is a rough estimate based on various sources, including ALBERT F. GUNNS, CIVIL LIBERTIES IN CRISIS: THE PACIFIC NORTHWEST, 1917-1920, at 42 (1983); Dowell, *supra* note 3, at 1063; *Iron Heel in Northwest; Status of Cases to Date*, INDUS. WORKER, Jan. 15, 1921, at 1; *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.

280. HARRY N. SCHREIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES 58 (1960); *Amnesty and Pardon for Political Prisoners Hearings on S.J. Res. 171 Before Subcomm. of the Comm. On the Judiciary*, 66th Cong. 69-75 (1921) (testimony of A. Mitchell Palmer); *Amnesty and Pardon for Political Prisoners Hearings on H.J. Res. 60 Before Comm. on the Judiciary*, 67th Cong., 1-2 (testimony of Albert De Sliver).

281. In the former category was U.S. Senator William Borah, who, in 1906, in one of the great trials in American history, had unsuccessfully prosecuted Big Bill Haywood for complicity in the murder of the former governor of Idaho. J. ANTHONY LUKAS, *BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA* (Simon & Schuster 1998). A critic of the Espionage Act who voted against the law on final passage, Borah worked hard on behalf of the people convicted under this law. CHAPLIN, *supra* note 58, at 332.

282. SCHREIBER, *supra* note 280, at 78.

283. STEPHEN M. KOHN, *AMERICAN POLITICAL PRISONERS: PROSECUTIONS UNDER THE ESPIONAGE AND SEDITION ACTS* (1994).

release, along with a fair number left-leaning Progressive activists.²⁸⁴ So did some unions, including the United Mine Workers, the International Association of Machinists, and dozens of local labor federations.²⁸⁵ The defendants also had the support of liberal churches, especially those associated the Federal Council of Churches, as well as some of the big newspapers, which had taken to questioning Congress's failure to repeal the Espionage Act after the war.²⁸⁶ Most helpful of all was the American Civil Liberties Union, an organization founded in 1920, primarily by Roger Baldwin, two years after Baldwin initiated his own brief membership in the IWW following his six-month imprisonment for violating the Selective Draft Act.²⁸⁷ Baldwin constructed the ACLU from the National Civil Liberties Bureau, founded by him and radical feminist Chrystal Eastman in 1917.²⁸⁸

Nevertheless, the drive to secure the prisoners' release met plenty of resistance from American Legionnaires, right-wing clergy, government officials, and much of the mainstream press, who—as the Red Scare overtook the war in justifying their hostility to the people—insisted that the defendants remain behind bars.²⁸⁹ And then, too, there were the Wobblies themselves. A majority of IWW prisoners initially rejected the government's demand that they apply individually for clemency²⁹⁰ Many also refused to agree to the conditions sought to be imposed on their release, including the requirement, proposed as a condition of parole, that they admit their guilt or renounce the union. Some who did accept clemency were troubled by what this entailed. For instance, a group of eight Wobblies who left prison in mid-1922 were sufficiently distressed by the experience to declare that “there is something about our freedom that hurts.”²⁹¹ Others, though, were more eager to accept early release, and found themselves on the other side of a conflict that split the inmates into two increasingly hostile camps.

In mid-1922, by which time most Espionage Act defendants who were not IWWs had been released, 95 Wobblies remained in prison for violating the Espionage Act. By the first part of the following year, there were still

284. William Seraile, *Ben Fletcher, I.W.W. Organizer*, 46 PA. HISTORY: A JOURNAL OF MID-ATLANTIC STUD. 212, 224 (1979).

285. ACLU ANNUAL REPORT NO. 2, 9-16 (1923).

286. See, e.g., *Mercy for 50 Prisoners*, WASH. POST, May 9, 1919, at 6; *The Superfluous Espionage Act*, BOSTON DAILY GLOBE, Feb. 10, 1919, at 6.

287. WEINRIB, *supra* note 30 at 80-102 (2001).

288. WEINRIB, *supra* note 30, at 52-57, 67-70, 108-10.

289. ACLU, *Civil Liberties Issues In General* (1923) (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Clippings-General: Propaganda for Civil Liberties, Amnesty Campaign, Release of State Political Prisoners, Vol. 233).

290. CHESTER, *supra* note 9, at 217.

291. ACLU, *General Material*, Vol. II-E, *Amnesty Political Prisoners*, Section XIII-A 180 (1922) (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Clippings-General: Amnesty: Political Prisoners, Vol. 199, at 60, article entitled, “Eight Men Just Out of Prison Write to You”).

some 50 in custody. In the summer of 1923, when President Warren Harding's administration floated another offer of clemency, this one saddled with fewer conditions, all but eleven of the remaining IWW inmates accepted it.²⁹² Ten days before Christmas that year, President Calvin Coolidge removed the remaining conditions, and these hold-outs finally gained their freedom.²⁹³

Many criminal syndicalism defendants had done their best to get sent to prison in the first place, disdaining trial judges' offers of probation or leniency if they renounced the IWW, sometimes celebrating their convictions, and in some cases even demanding to be incarcerated.²⁹⁴ It is therefore not surprising that many were not eager to leave prison, particularly if this implied a compromise of their principles. For several years, five Wobblies serving prison sentences for criminal syndicalism in Washington observed the same principle as many Espionage Act defendants and refused the governor's offer of parole. The men would only accept a pardon, and only on the condition that other Wobblies serving time were also released.²⁹⁵ On November 7, 1923, forty-one Wobbly inmates at San Quentin State Prison in California endorsed a resolution "reaffirming" their opposition to parole.²⁹⁶ In fact, in a way that courageously confirmed both the truth of their own judgment about the nature of the state and its legal system and the deep, moral foundations of their voluntarist beliefs, many other defendants declined trial judges' offers to impose probation in lieu of prison, or to help with parole, if they renounced their radicalism.²⁹⁷

B. *The Realities of Confinement*

At least two Wobbly defendants committed suicide while in custody on criminal syndicalism charges.²⁹⁸ Scores of Wobblies were held in solitary

292. CHESTER, *supra* note 9, at 216-21; *Amnesty and Pardon for Political Prisoners Hearings on H.J. Res. 60 Before Comm. on the Judiciary*, 67th Cong., 1-4 (testimony of Albert De Sliver).

293. Taft, *supra* note 93, at 80-91.

294. See, e.g., *Radicals Are Sent to Prison*, L.A. TIMES, Mar. 22, 1923, at III; *9 I.W.W.'s Yell and Cheer at Sentence*, L.A. HERALD, Dec. 9, 1921, at 3; *Oakland I.W.W. Spurns Judge's Offer to Pardon*, INDUS. SOLIDARITY, Dec. 31, 1921, at 5.

295. *Criminal Syndicalism Prisoners Refuse to Leave Centralia Boys*, INDUS. SOLIDARITY, Apr. 29, 1925, at 3.

296. *San Quentin Bunch on Record against Parole*, INDUS. SOLIDARITY, Aug. 1923 (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Clippings-General: Propaganda for Civil Liberties, Amnesty Campaign, Release of State Political Prisons, Vol. 233, at 384).

297. See, e.g., *He Prefers Jail to Renouncing His Beliefs*, PRODUCERS NEWS (MT), Oct. 20, 1922, at 1; see also *Oakland I.W.W. Spurns Judge's Offer to Pardon*, INDUS. SOLIDARITY, Dec. 31, 1921, at 5; *Pardon, Never Offered, Refused*, OAKLAND TRIB., Dec. 23, 1921, at 2; *Twenty-Seven Los Angeles IWW's Convicted; Transport Workers Call Protest*, INDUS. WORKER, Jul. 18, 1923, at 1.

298. ACLU, American Civil Liberties Cases, States, Correspondence, California 43-47 (1925) (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence-Cases By State: California, Vol. 284C, at 32-34); California Prison and Correctional

confinement, locked up in prison units with names like the “dungeon,” the “dark hole,” or the “slaughter house,” or given debilitating jobs in prison mills. Hundreds languished in squalid jails for weeks or months, awaiting trial but unable to raise bail.²⁹⁹ A large number were beaten and sometimes seriously injured by police, jailors, and fellow inmates. About a dozen defendants died while in custody while others had their lives shortened by what they endured.

Such treatment often led, eventually, to more brutality. Consider the case of eight Wobblies who, in the summer of 1923, went on strike at California’s San Quentin, refused to work, and were also “thrown into the dungeon and placed on a bread-and-water diet.”³⁰⁰ They struck to support another Wobbly inmate who had been sent to the dungeon after he refused to work.³⁰¹ In October 1923, 58 out of 74 Wobblies confined at San Quentin were briefly thrown into solitary confinement after striking to protest the beating of one of their men by a guard and his subsequent confinement in the “dungeon.”³⁰² The next month, 71 Wobblies struck to protest another beating of a fellow worker and were placed in the dungeon and in solitary.³⁰³

What defendants endured in federal confinement was no better. Inmates were regularly punished for petty violations, which included insolence, speaking without permission, leaving food on their plates, loafing or doing slack work, reading or smoking without permission, or saying too much about life in prison in their letters. Often these violations resulted in “restricted diet,” downgrading of their work assignments, loss of privileges,

Records, San Quentin, Book No. 10, Inmate No. 33739; *In Jail, Cuts His Throat*, EAST OREGONIAN (OR), Mar. 5, 1920, at 11; *Tragical Ending of a Syndicalist Case*, INDUS. WORKER, Jun. 5, 1920, at 1.

299. See, e.g., Letter from Pay Boyd to ACLU, December 6, 1920 (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence-Cases by State: Washington, West Virginia, Wisconsin, Vol. 140, at 38-40).

300. *Convicts on Strike; Lonesome*, L. A. TIMES, Aug. 2, 1922, at 1; *Prisoners at San Quentin Go on Strike*, S.F. CHRON., Aug. 2, 1925, at 2; *No Work Strike Is Conducted by Quentin Inmates*, SACRAMENTO UNION, Aug. 2, 1922, at 1.

301. *Wobblies in Solitary*, L.A. TIMES, Jun. 23, 1923, at 1.

302. *End San Quentin Strike*, INDUS. WORKER, December 12, 1923 (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Clippings-Cases by State: Colorado, Connecticut, Delaware, California, Vol. 236, at 97); *Syndicalism Prisoners on Another Strike, Is Rumor*, PENN-CENTRAL NEWS, Oct. 27, 1923 (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Clippings-General: Propaganda for Civil Liberties, Amnesty Campaign, Release of State Political Prisoners, Vol. 236, at 353); *Bulletin*, California Branch of the General Defense Committee, I.W.W. (Oct. 6, 1923) (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World Seattle Joint Branches Collection, Box 4).

303. *Bulletin*, California Branch of the General Defense Committee, I.W.W. (Nov. 24, 1923) (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World Seattle Joint Branches Collection). By the end of 1924, there had been nine strikes like this at San Quentin, and each one had resulted in severe punishment. *Bulletin*, California Branch of the General Defense Committee, I.W.W. (June 7, 1924) (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World Seattle Joint Branches Collection, Box 4); Weintraub, *supra* note 109, at 194-95.

or “isolation.”³⁰⁴ During their first months at Leavenworth, a group of some thirty Wobblies who were charged with fomenting a “general strike” during a coal-moving job ended up chained seven hours a day for weeks on end to the doors of the isolation cells, their arms pulled up over their heads. In April 1919, a number of Wobblies at Leavenworth were charged with instigating a riot in the cafeteria and thrown into the “dark hole,” where they were beaten senseless by club-wielding trustees.³⁰⁵

C. *The Costs of Repression*

When Wobbly Nicholas Steelink left San Quentin, he found he “was still under surveillance by the government.” He was a “veteran soldier,” he said, and remained committed to the cause and optimistic about the IWW’s prospects: “I thought that if we had a hundred individuals like myself, we could make an impact.” But he came to see how wrong he was about this. “We still had IWW members conducting strikes, but the movement made from 1910 to 1920 had been destroyed. We didn’t have enough workers to carry on.”³⁰⁶ After his time in prison, Steelink reflected that he “could not be the same IWW that I was before.”³⁰⁷

The *Los Angeles Times* had touted Steelink’s sentencing as an event that “throws scare into [the] Wobblies” and had likely caused a number of IWW members “to fold their tents like the Arabs [sic] and silently steal away to umbrageous parts far removed from the strife of the law abiding in arms against the lawless.”³⁰⁸ Certainly it had. Those members who did abandon the IWW returned to the union, like Steelink, not only beaten down but forced to reckon with the toll that repression had taken on the organization itself. Reflecting on the progress the union had made in the late 1910s, and what it had continued to face as repression accelerated, Wobbly Jack Miller recalled that “[w]hat hurt us the most was the defense trial they kept putting us through. We had to continuously raise money for the trials instead of

304. See also Record of James Quinlan, No. 13579, United States Penitentiary, Leavenworth, KS (on file with National Archives, Washington D.C., Records of the Office of the Pardon Attorney, Record Group 204, Pardon Attorney Sacramento Case Files-James Quinlan, 002366-013-0690); Record of G.J. Bourg, No. 13118, United States Penitentiary, Leavenworth, KS (on file with National Archives, Washington D.C., Records of the Office of the Pardon Attorney, Record Group 204, Pardon Attorney Chicago Case Files-G.J. Bourg, 002366-012-0303); Record of Alexander Courmos, No. 13123, United States Penitentiary, Leavenworth, KA (on file with National Archives, Washington D.C., Records of the Office of the Pardon Attorney, Record Group 204, Pardon Attorney Chicago Case Files-Alexander Cousmos, 002366-012-0394); Record of William Hood, No. 13573, United States Penitentiary, Leavenworth, KS (on file with National Archives, Washington D.C., Records of the Office of the Pardon Attorney, Record Group 204, Pardon Attorney Sacramento Case Files-William Hood, 002366-013-0401).

305. Chaplin, *supra* note 59, at 257; CHESTER, *supra* note 9, at 210-11.

306. Nicolaas Steelink, *Continued Repression and Decline*, in *SOLIDARITY FOREVER: AN ORAL HISTORY OF THE IWW*, *supra* note 43, at 201.

307. *THE WOBBLIES* (Docurama 1979) (1:23:23-33).

308. *Throws Scare into Wobblies*, L.A. TIMES, Apr. 19, 1920, at I19.

organizing.”³⁰⁹ Miller’s comment is consistent with the judgment of historians who conclude that prosecutions reduced the union to “a defense rather than a labor organization, and drained off its leadership, militancy, and finances in a fruitless defense.”³¹⁰

Besides deterring and demoralizing the IWW’s membership, the prosecutions decapitated the organization. For a time in the late 1910s and early 1920s, nearly all of the union’s leadership was locked up. Normal union business came to a standstill, with some union offices physically occupied by federal agents for months and some raided again during the trials. Inexperienced volunteers had to take over at headquarters. Under the authority of the Espionage Act and its temporary amendment, the 1918 Sedition Act, huge amounts of union mail were intercepted or banned from the mails, including fundraising and defense materials,³¹¹ making it very difficult for the IWW to function.³¹²

The prosecutions also cost the union a great deal of money. In the two years leading up to 1920, the IWW raised an astounding \$400,000 for general defense and \$500,000 for bail, spending all of it.³¹³ In the five years that followed, it spent another \$500,000 in legal costs.³¹⁴ Assistance from the ACLU, which raised considerable funds from sympathetic professionals and wealthy individuals, was crucial. But adequate fundraising also depended on the generosity of fellow workers, whose spirit of solidarity often exceeded their financial resources.³¹⁵

Inevitably, the IWW’s constant struggle to cover costs converged with the more immediate effects of all the arrests and convictions to drive the union into crisis. Federal agent Edward Morse’s reports made from San Francisco in 1921 about the “IWW situation” in the Bay Area recounted the union’s struggles to gather a quorum at its meetings and recruit new

309. Jack Miller, *Jack Miller*, in *SOLIDARITY FOREVER*, *supra* note 43, at 114.

310. PRESTON, *supra* note 111, at 141.

311. On the Post Office’s interference with union fundraising, see CHESTER, *supra* note 9, at 173-75.

312. GAMBS, *supra* note 48 at 53.

313. WILLIAM HAYWOOD, *THE AUTOBIOGRAPHY OF BIG BILL HAYWOOD* 344-45 (1966); GEN. OFFICE, I.W.W., *FINANCIAL STATEMENTS OF THE IWW* (Feb. 1, 1920) (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 28, Files 1-4); I.W.W., *General Office Bulletins (1921-1922)* (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 31, Files 1-5).

314. On the union’s defense-related expenditures, see *FINANCIAL STATEMENTS OF THE IWW*, *supra* note 313; I.W.W., *MINUTES OF THE 13TH GENERAL CONVENTION OF THE IWW* 31-32 (1921) (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World Seattle Joint Branches Collection, Box 1, Folder 13); I.W.W., *FINANCIAL STATEMENT FOR THE FISCAL YEAR OCTOBER 1, 1923 - OCTOBER 1, 1924* (on file with the Walter Reuther Memorial Library, Industrial Workers of the World Collection, Box 28, File 7). On the union’s actual litigation costs, see WEINRIB, *supra* note 30, at 101.

315. See, e.g., California Branch of the General Defense Committee, *Financial Reports* (on file with University of Washington Libraries, Special Collection, Industrial Workers of the World Seattle Joint Branches Collection, Box 4).

members, as well as its inability, being “practically out of funds,” to muster the \$10,000 needed to bail out five of seven members arrested in Oakland. Wobblies in the area were “very much demoralized,” he related, and more arrests would “no doubt materially increase their discomfort.” Indeed, the Wobblies were in “a very confused condition, as the Defense Treasury is nearly exhausted and they are at a loss where to turn for funds to defend the men who are now in jail.”³¹⁶

D. *The Demise of the IWW*

By 1925, the IWW was largely defunct. Its decline was the product of a number of factors aside from the immediate effects of repression, including the rise of Communism. Although it vacillated a bit on the question, the union—built around a congenial opposition to the statism that inhered in the Bolshevik movement, and intent on preserving its independence—resisted repeated appeals to join the world Communist movement.³¹⁷ But individual Wobblies did answer the Communist call. Big Bill Haywood headlined the exodus of approximately two thousand members, including many capable leaders, who found their way into one or another of the Communist parties that emerged in the United States from the summer of 1919 into the early 1920s.³¹⁸

Even more influential in the union’s ultimate demise was a great internal schism, the culmination of a number of smoldering factional disagreements, which fully unfolded at the union’s 1924 convention and left behind it two rival organizations, neither of which was viable.³¹⁹ The schism was in many ways as much a culmination of the union’s problems as it was an independent cause of its demise. When the 1924 convention opened, the IWW was already divided into two factions. One, whose stance on Bolshevism was relatively open and pragmatic, was concentrated in Chicago and on the Great Plains, and strongly associated with the AWIU; it favored a culture of centralized control of the union. The other, staunchly anticommunist and concentrated among lumber workers in the Northwest, was more strongly anti-statist and rejected centralized control of local factions, particularly in regard to the license of workers to go out on strike. But this rupture was also shaped by repression. Bitter disputes that had arisen out of the clemency disputes among federal prisoners remained points of dissention. The “decentralizers,” their

316. Edward Morse, Report, I.W.W. Matters - San Francisco District - Eighth Division, (June 11, 1921) (on file with National Archives, Washington D.C., General Records of the Department of Justice, General Correspondence, Record Group 60, 002366-007-0361-0372); *see also* Bulletin, California Branch of the General Defense Committee (April 22, 1923) (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World Seattle Joint Branches Collection, Box 4).

317. GAMBS, *supra* note 48, at 77.

318. CHESTER, *supra* note 9, at 204-06; GAMBS, *supra* note 48, at 182-83.

319. FRED THOMPSON, THE I.W.W., ITS FIRST FIFTY YEARS 150 (1955).

ranks replete with those who resisted early release, still very much resented those who had left prison early.³²⁰

The schism had also been inflamed by a shortage of funds as well as myriad disagreements surrounding them: disagreements about how they were raised and spent, about payments due to lawyers and bondsmen, about whether legal defense work was a worthwhile alternative to organizing work and direct action, and, circling back to the question of centralized versus decentralized control, about who should decide these questions.³²¹ At the union's 1924 convention, one of the many raging arguments was whether, in fighting the criminal syndicalism laws, the union should have expended so many resources in trying to prove that the IWW was a legitimate union in the first place, as opposed to embracing its fate as an outlaw organization.³²²

In fact, it seems clear that in all these ways—by worsening the schism, by draining the union's resources, by disrupting its operations, by demoralizing its members—repression was indeed a leading reason behind the IWW's demise. But contrary to the suggestions of some scholars, it took some time for the effects of repression to take hold. The many prosecutions during the war certainly left the union damaged. But they did not destroy the organization, whose membership and influence rebounded in the early 1920s.³²³ Nevertheless, there were more arrests and prosecutions to come, particularly west of the Mississippi, where the union seemed positioned to hold its ground. The union simply could not withstand all of this, and by 1925 it had largely collapsed, surviving only as a band of several thousand die-hards who found security from further repression only through their own irrelevance.³²⁴ To be sure, the IWW is still around today, but it remains, as it has been since the 1920s, only a shell of what it once was.

320. Chester, *supra* note 35, at 221-24; *cf.* DUBOFSKY, *WE SHALL BE ALL*, *supra* note 9, at 457-68. On the role of the schism and the argument that the conflict was centered on a debate over centralization, see GAMBS, *supra* note 48, at 100-08, 164-67.

321. See MINUTES OF THE 16TH GENERAL CONVENTION OF THE IWW 88-89 (on file with University of Washington Libraries, Special Collections, Industrial Workers of the World Seattle Joint Branches Collection, Box 1, Folder 13).

322. Weintraub, *supra* note 109, at 249-50.

323. On the union's rebound after the war, see Fred Thompson, *They Didn't Suppress the IWW*, 1 *RADICAL AM.* 1, 2-5 (Sept./Oct. 1967); HALL, *supra* note 53, at 206; THOMPSON, *supra* note 188, at 111, 129-31. On the argument that the wartime repression destroyed the union, see, e.g., Chester, *supra* note 35.

324. DUBOFSKY, *supra* note 9 at 467-68, 475-78; see also Chester, *supra* note 35, at 209-10; Data from Taft: Federal Trials (on file with the Walter Reuther Memorial Library, Fred Thompson Collection, Box 25, Folder 15).

VI. THE RISE AND FALL OF COMMUNIST UNIONISM AND THE LEGACIES OF ANTI-IWW REPRESSION

This story of how repression destroyed the IWW is a revelation about the politics of Progressivism, the liberal state, and its legal system. In this regard, what happened to the IWW was in many ways the clearest validation of a thesis that defined the IWW from the time of its founding: the union was destined to be persecuted, and this persecution was bound to feature Progressives and the law, no matter how peaceful the union's methods might have been. Ironically, it was an appreciation of this that informed the union's voluntarist vision, even if, in the end, the clearest foresight afforded the IWW no way of avoiding its fate.

At the same time, what befell the IWW turned the page on another chapter in the history of labor relations in the United States, one that reveals other important and related truths about Progressivism, law, and the state, and their bearing on labor. The destruction of the IWW cleared the way for the rise of a new and very different tradition of left-wing unionism, this one defined not by voluntarism but by a marked faith in the state and its legal system and a close alliance with liberal reformers. At the center of this new tradition was the Communist Party, which in the 1930s became both the primary sponsor of this new unionism and the curator of its collapse later in the century.

A. *The "Third Period" and the Advent of Communist Unionism*

The birth of the Communist Party in the United States can be traced to 1919, when a wide-ranging rebellion of left-wing dissidents within the Socialist Party resulted in the formation of several Communist organizations.³²⁵ Well into the 1920s, the movement also remained fractured by sectarian disputes and unable, despite its founder's ambitions, to exert much influence on the labor front.³²⁶ But by 1927, as a result of many intrigues and internal struggles, both in the United States and in the Soviet Union, the Party had become a more or less centralized organization.³²⁷ The following year, in line with instructions from the Comintern, or Communist International, which the Bolsheviks had established in 1919 for the purpose of extending communism beyond Russia, the Party declared that capitalism

325. JACK ROSS, *THE SOCIALIST PARTY OF AMERICA: A COMPLETE HISTORY* 216-19, 226-31 (2015).

326. On the party's efforts on this front, see THEODORE DRAPER, *THE ROOTS OF AMERICAN COMMUNISM* 198-200, 314-19, 321-22 (1957). On these efforts and their shortcomings, see BERT COCHRAN, *LABOR AND COMMUNISM* ch. 2 (1977). For a more nuanced, but still ultimately negative, review of the party's work in this period, see MICHAEL GOLDFIELD, *THE SOUTHERN KEY: CLASS, RACE, AND RADICALISM IN THE 1930S AND 1940S*, at 333-42, 361 (2020).

327. DRAPER, *supra* note 326, at 340-41.

had entered a “third period” in its journey toward crisis and destruction.³²⁸ This warranted a dramatic change in strategy; the Party abandoned efforts to advance its cause by “boring into” existing AFL unions, which had proven ineffective anyway, in favor of a different approach premised on organizing its own unions.³²⁹

Within a short time, Party activists set out to effectuate the new program. Among the most salient examples of how their efforts played out can be found in agriculture. In 1929, a group of Communist unionists set up something called the Agricultural Workers Industrial League, and attempted to organize hard-pressed, mainly Hispanic agricultural workers in California’s Imperial Valley.³³⁰ When they did so, they were warned by some old Wobblies that they would never succeed.³³¹ Indeed, they did not succeed, in spite of the organizers’ heroic efforts. Just as the Wobblies had said would occur, repression beat back the Communists’ efforts. Beatings and intimidation were commonplace; dozens of these organizers and their supporters were arrested on vagrancy and other charges, and nine were convicted and sent to prison for criminal syndicalism.³³²

In the late 1920s and early 1930s, attempts by Communists to organize in other industries, particularly coal, steel, and textiles, produced the same response. Hundreds of party members were arrested and jailed on vagrancy charges, and dozens for criminal syndicalism or sedition, in Pennsylvania,³³³

328. JACOB A. ZUMOFF, *THE COMMUNIST INTERNATIONAL AND U.S. COMMUNISM, 1919-1929* 39-48 (2014); DRAPER, *supra* note 326, at 244-45.

329. FRASER M. OTTANELLI, *THE COMMUNIST PARTY OF THE UNITED STATES FROM THE DEPRESSION TO WORLD WAR II 18-21* (1991); Victor Devinatz, *The CPUSA’s Trade Unionism during Third Period Communism*, 18 AM. COMMUNIST HIST. 1 (2019).

330. *Investigation of Communist Propaganda Hearings Before Special Comm. to Investigate Communist Activities in the United States*, 71st Cong. Pt. 5:3, 258 (1930) (Testimony of Elmer W. Heald); MCWILLIAMS, *FACTORIES IN THE FIELD* 213 (1999); Cletus E. Daniel, *Radicals on the Farm in California*, AGRIC. HIST. 629, 642 (Oct. 1975).

331. *Interviews on the Organization of the Cannery and Agricultural Workers’ Industrial Union in California in the 1930s Pat Chambers*, CALIFORNIA REVEALED (1972) (approx. 1:00f., 4:30f.); *Interviews on the Cannery and Agricultural Workers’ Industrial Union in California in the 1930s Caroline Decker Gladstein*, CALIFORNIA REVEALED (1972) (approx. 21:00f).

332. *People v. Horiuchi et al.*, 300 P. 457, 460-64 (Cal. 1931); *Nine Radicals Sentenced*, L.A. TIMES, Jun. 17, 1930, at 10; Letter from R.W. Henderson to the International Labor Defense, Jun. 16, 1930 (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence-Cases By State: California, Vol. 417, at 27-28); *A Strike Is Criminal Syndicalism—In California* (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence-Cases By State: California, Vol. 478, at 20-21); FRANK SPECTOR, *THE STORY OF THE IMPERIAL VALLEY* 28 (1931).

333. On sedition cases in Pennsylvania, see *Court Hears Plea in Sedition Case*, PHILA. INQUIRER, Nov. 22, 1931, at 59; *Two Raids Reveal Nerve Center’ of Phila. Communists*, PHILA. INQUIRER, Mar. 26, 1932, at 1; Report on Civil Liberty Situation for January 1931 (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence Cases-Organizational Matters, Vol. 452, at 50-52).

Ohio,³³⁴ and Oregon.³³⁵ In Kentucky, activism by the Party's National Miner's Union in 1931 and 1932 resulted in hundreds of arrests of strikers and their supporters for vagrancy and criminal syndicalism. Among those who faced charges were the great novelists Theodore Dreiser and John Dos Passos, leaders of a group of leftist intellectuals who were indicted for criminal syndicalism after visiting the region in support of hungry and persecuted strikers.³³⁶ To be sure, poor organization and sectarianism were also major, and often debilitating, reasons for failure, as was frequently venomous competition from AFL unions.³³⁷ Nevertheless, repression clearly played a critical role.

B. *The Popular Front and the Heyday of Radical Unionism*

Although they were by most measures unsuccessful, efforts by Communists to organize their own unions had important consequences for the future of the American labor movement. Communist unionists during this Third Period made important inroads on racial discrimination in the labor movement while also cultivating or, particularly in places where the IWW had been active, reviving radical ambitions and a spirit of militancy among workers that had waned though much of the 1920s.³³⁸ Their activism was likely an important impetus to the enactment of reformist labor legislation in

334. On criminal syndicalism cases in Ohio, see Report of Cases Handled by the International Labor Defense to the Forth Regional Conference, at 8 (on file with the Elmer Holmes Bobst Library, Tamiment Library and Robert F. Wagner Labor Archive, Community Party of the United States of America Records, Box 170, Folder 9); *Red Demonstrators Freed*, N.Y. TIMES, May 25, 1930, at 32; 3 *Ohio Communists Ask for New Trial*, CANTON REPOSITORY, Nov. 24, 1929, at 32; 9 *Jailed for Young Reds' Council Raid*, CLEVELAND PLAIN DEALER, Dec. 3, 1929, at 1; *Girl Communist Fires Marchers*, CLEVELAND PLAIN DEALER, Mar. 7, 1930, at 4; *Idle Will Gather Again in Cleveland*, CANTON REPOSITORY, Feb. 13, 1930, at 5; Letter from Alfred Bettman to Joseph Silbert, Feb. 2, 1931, & Memorandum on Repeal of the Ohio Criminal Syndicalism Law (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence-Cases by State: North Carolina, Ohio, Oregon, Pennsylvania, Vol. 494, at 205, 206-07).

335. On criminal syndicalism cases in Oregon, see IRVIN GOODMAN, *THEY WERE CALLED REDS* 40 (unpublished manuscript) (on file with Oregon Historical Society, Irvin Goodman Papers, F7); AMERICAN CIVIL LIBERTIES UNION ANNUAL REPORT NO. 11 (New York: ACLU, 1932), at 20; *Boloff Guilty, Jury Announces*, MORNING OREGONIAN, Feb. 25, 1931, at 1, 7-8; *State v. Boloff*, 7 P.2d 775 (Or. 1932); *State v. Boloff*, 4 P.2d 326 (Or. 1931); Various Correspondence (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence-Cases by State: North Carolina, Ohio, Oregon, Pennsylvania, Vol. 494, at 147-54); *Ben Boloff Succumbs*, MORNING OREGONIAN, Oct. 14, 1932, at 14; *First C.S. Defendant Contracts T.B. in Prisoner*, W. WORKER, Aug. 15, 1932, at 2; *Deportations, Prison Terms in Portland*, LAB. DEFENDER, Jan. 1931, at 9.

336. JOHN W. WEVENER, *WHICH SIDE ARE YOU ON? THE HARLAN COUNTY COAL MINERS, 1931-1939*, at 33-88 (1978); Tony Bubka, *The Harlan County Coal Strike of 1931*, 11 LAB. HIST. 41-57 (1970); see also ACLU, *Civil Liberties Cases: Clippings (1931)* (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Clippings-Cases By State: Kentucky, Vol. 472).

337. GOLDFIELD, *supra* note 326, at 348-49.

338. GOLDFIELD, *supra* note 326, at 343-51; Staughton Lynd, *The Possibility of Radicalism in the Early 1930s: The Case of Steel*, 6 RADICAL AM. 37 (1972).

this period.³³⁹ Moreover, the Party itself profited by these efforts. Membership, which had plummeted from as many as 30,000 or 40,000 when the movement first emerged to fewer than 10,000 at the advent of the Great Depression, reached about 25,000 in 1934.³⁴⁰ But in the face of repression and continued conflict and competition with AFL unions, the Party's unions were never able to establish a firm footing anywhere or permanently organize the industrial and agricultural workforce, which remained almost entirely under the dominion of the open shop. When, driven by the Soviet Union's own emerging interests in rapprochement with liberal, western governments, and in forging a common front against fascism, the Comintern announced a new policy of compromise, the Party again altered course and adopted what came to be known as its "Popular Front" program.

The Popular Front can be understood not only as an act of compliance with dictates from Moscow, but also a product of the Party's domestic situation. Even though "boring into" AFL unions had not produced many lasting results in the 1920s, the strategy had deep roots in the Party's identity and in the outlook of important figures like William Z. Foster, a former Wobbly who, by the 1930s, had emerged as one of the Party's foremost leaders.³⁴¹ Moreover, if the Popular Front can be understood on the international stage as a strategy for facing the rising threat of fascism, it should also be understood domestically as, in part, a way evading the kind of repression they faced in the Third Period and that the Wobblies had endured in the 1910s and 1920s.

Initially defined by a less hostile and competitive relationship to other leftist organizations, the Popular Front quickly went beyond this, evolving into a partnership with liberal elements of the New Deal and the labor movement.³⁴² As Michael Goldfield has put it, the change that this entailed in Party politics was dramatic, as the Party not only "dropped its revolutionary slogans" but also "in most cases even failed to criticize" its new "allies."³⁴³ This "slavish" subordination to capitalist politics and interests, as he described it, coincided with further increases in Party membership and an unprecedented level of political influence and legitimacy.³⁴⁴

339. See Michael Goldfield & Cody R. Melcher, *The Myth of Section 7(a) Worker Militancy, Progressive Labor Legislation, and the Coal Miners*, 16 LAB. STUDIES IN WORKING-CLASS HISTORY OF THE AMERICAS 49 (2019).

340. NATHAN GLAZER, *THE SOCIAL BASIS OF AMERICAN COMMUNISM* 92 (1961); DRAPER, *supra* note 326, at 189-90.

341. JAMES R. BARRETT, *WILLIAM Z. FOSTER AND THE TRAGEDY OF AMERICAN COMMUNISM* 41, 163-225 (2001); see generally EDWARD P. JOHANNINGSMEIER, *FORGING AMERICAN COMMUNISM: THE LIFE OF WILLIAM Z. FOSTER* (1994).

342. GOLDFIELD, *supra* note 326, at 355-60.

343. *Id.* at 356-57. On debates about the nature of the Popular Front, see James A. Barrett, *Rethinking the Popular Front*, 21 RETHINKING MARXISM 531 (2009).

344. GOLDFIELD, *supra* note 326, at 357.

The compromises of the Popular Front period earned the Party an immunity from persecution that the Wobblies could not have dreamed of during their heyday, and that many of the Party's own members would no doubt have had difficulty imagining a few years earlier. Although prosecutions of Communists for criminal syndicalism and similar crimes did not cease entirely, after 1935 they became much less common.³⁴⁵ Indeed, Oregon and Washington repealed their criminal syndicalism laws.³⁴⁶ Likewise, it was in this period that the courts finally retreated somewhat from their practice of endorsing the almost unfettered use of criminal syndicalism and similar laws to persecute radicals. This shift in the courts was underscored in 1937, when, without overturning *Whitney*, the Supreme Court set aside the convictions of Communist activists in two separate cases that had arisen earlier in the decade.³⁴⁷

The new arrangement was of enormous benefit to the Party's liberal allies as well as to many workers. The infusion of untold thousands of Communist organizers, many with significant experience, considerable credibility, and enormous dedication, was central to the remarkable rise of the CIO.³⁴⁸ The new federation emerged out of the AFL in 1935.³⁴⁹ By the summer of 1936, the CIO was independent of the AFL.³⁵⁰ And by the end of that year, it was at the center of an extraordinarily ambitious, often violent, and remarkably successful attempt to organize the industrial workforce. Working through the CIO, Communists played a crucial role in the great and tumultuous strikes and organizing drives of the 1930s, including titanic struggles in automobiles, steel, rubber, glass, and maritime transport.³⁵¹

Popular Front unionists, Communists and otherwise, embraced the idea of strikes and direct action. It is no accident, for instance, that the dramatic 1936 to 1937 General Motors Sit-Down Strike, which propelled the CIO to a broad string of victories over the open shop, was primarily organized by Communist unionists.³⁵² Nor is it a coincidence that 1937, during the first half

345. See SHIRLEY A. WIEGAND AND WAYNE A. WIEGAND, *BOOKS ON TRIAL: RED SCARE IN THE HEARTLAND* (2007); see, e.g., *Defiant Leader Jailed*, S.F. CHRON., May 7, 1939, at 83; Clarence McConnell, *1,200 Warrants out for Strikers as Flint Grows Calm after Riot*, DETROIT FREE PRESS, Jan. 13, 1937, at 1; *Women Red Suspects Seized on Battleship*, L.A. TIMES, Feb. 24, 1936, at 1.

346. Letter to Lucille Milner, Sec'y of the ACLU, from Irving M. Clark (May 20, 1937) (on file with Princeton University, Mudd Library, ACLU Papers, The Roger Baldwin Years, 1912-1950, Correspondence-Cases by State: Utah, Vermont, Virginia, Washington, Wisconsin, Vol. 1061, at 93).

347. See *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937); *Herndon v. Lowry*, 301 U.S. 242, 262 (1937).

348. GOLDSFIELD, *supra* note 326, at 356; OTTANELLI, *supra* note 329, at 138-52.

349. IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF AMERICAN WORKERS, 1933-1940*, at 400-27 (1969).

350. BERNSTEIN, *supra* note 349, at 427-29.

351. OTTANELLI, *supra* note 329; see generally ROBERT H. ZIEGER, *THE CIO, 1935-1955* (1995).

352. OTTANELLI, *supra* note 329, at 144-46; ROGER KEERAN, *THE COMMUNIST PARTY AND THE AUTO WORKERS UNIONS 148-85* (1980).

of which the CIO made its most dramatic inroads against open shop employers, was also one of the great strike years in American history. In 1937, the federal government counted a total of 4,740 strikes involving one out of every fifteen workers.³⁵³ Despite the fact that the CIO had gained its independence from the AFL just a year earlier, the strikes it led in 1937 accounted for 60 percent of workers on strike that year. Moreover, despite the concentration of CIO strikes in open shop strongholds, the majority of its strikes that year were successful.³⁵⁴

But—unlike anything contemplated by the IWW—the success of Popular Front unionism relied on much more than direct action. Reflecting the remarkable degree to which this new iteration of left-wing unionism had repudiated the voluntarism that defined the IWW, the CIO's success was simultaneously premised on cooperating with New Deal politicians and working within mainstream political institutions.³⁵⁵ Of course, the scale and intensity of workers' struggles in this period must also be taken into account. At no point in its history did the IWW ever come close to mobilizing workers on such a scale, even during the fateful period in 1917 that gave rise to escalating attempts to destroy the union.

The new mode of unionism involved an alliance between leftist unionists and the political successors of the same movement—Progressivism—whose members had taken a leading role in the prosecution of their radical predecessors not two decades earlier. Popular Front unionists courted the favors of New Deal politicians at every level of government, from Franklin Roosevelt and his capable but consummately moderate Secretary of Labor, Frances Perkins, down to governors, state attorneys general, judges, and other officials.³⁵⁶ They also embraced New Deal institutions, particularly the National Labor Relations Act, or Wagner Act, enacted in the summer of 1935, and the National Labor Relations Board, which Congress established to enforce the new labor law. In the late 1930s and 1940s, the Wagner Act and the NLRB were crucial weapons in Popular Front unionists' battles against open shop employers.³⁵⁷ This reliance on the state deepened during the Second World War, when Communist unionists, in line with further direction from Moscow as well as the practical advantages of a broader

353. Of all the strikes that year, a remarkable 2,728 were rooted in efforts to organize workers and secure recognition from employers. This proportion, 57 percent, has never been equaled in any other year; and the total number of organizing strikes is also absolutely unrivaled. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 179, series D 970-985 (Washington, DC: GPO, 1975).

354. *Industrial Disputes*, 46 MONTHLY LAB. REV. 1179, 1185, 1201 (May 1938).

355. GOLDFIELD, *supra* note 326, at 357-60.

356. GOLDFIELD, *supra* note 326, *passim*; OTTANELLI, *supra* note 329, *passim*; KRISTIN DOWNEY, THE WOMAN BEHIND THE NEW DEAL: THE LIFE AND LEGACY OF FRANCES PERKINS, SOCIAL SECURITY, UNEMPLOYMENT INSURANCE 216-17, 270-74 (2010).

357. JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD (1982); BERNSTEIN, *supra* note 349, at 727-28, 741-47, 788-90.

system of regulating wartime production that aided union organizing efforts in return for their support in ensuring “labor peace,” joined with CIO leaders in harshly enforcing a “no-strike pledge” to which they had agreed—without the endorsement of rank-and-file workers—with representatives of the federal government.³⁵⁸

By entering these arrangements, leftists in this movement shared in a degree of organizing success that far exceeded anything that IWW had ever achieved. In 1937 alone, union membership increased by an extraordinary 80 percent, growing from 3.9 million to 7 million men and women, which represented an increase from 13.7 percent of the non-agricultural workforce to 22.6 percent of that population of workers.³⁵⁹ According to one measure, at least, by 1939 the CIO unions they helped to found only a few years earlier could count 4 million members—as many as the AFL.³⁶⁰ Needless to say, the IWW achieved nothing like this. But unlike IWW unions, with only a few, relatively small exceptions, like the International Fur and Leather Workers Union, the Farm Equipment Workers Union, and the International Longshoremen and Warehouse Workers Union, the CIO unions that emerged during time were not under the control of radicals.

This was true in two ways. First, even if the Party’s prominence within the CIO gave it significant influence over 40 percent of CIO members in the late 1930s, as one authority suggests, the Party itself—along with most of the unions in helped build—was no longer particularly radical.³⁶¹ Second, as many leftist unionists associated with the Party would soon come to see, most of the unions they helped build, including the United Automobile Workers and the United Steelworkers, as well as the CIO itself, remained firmly in the hands of liberal (and sometimes not so liberal) leaders like Walter Reuther and Philip Murray.³⁶² Such leaders not only scorned the Communists’ avowed commitment to toppling capitalism, but also, beginning in the late 1930s and extending into the 1940s and beyond, showed themselves very quick to purge their unions of Communist influence and organizers whenever it suited their needs.³⁶³ Significantly, among the first organizers to be purged were those whose appetites for strikes and other forms of direct action

358. NELSON LICHTENSTEIN, *LABOR’S WAR AT HOME: THE CIO IN WORLD WAR II* 158, 180-82 (1982).

359. HISTORICAL STATISTICS OF THE UNITED STATES, *supra* note 353, at 178, series D 946-951.

360. Between 1936, when the CIO began organizing in earnest, and 1947, the number of union members in the United States more than tripled, from just of 4 million to almost 15 million. Although the growth of AFL represented a significant share of this increase, roughly 50 percent of the increase was attributable to the rise of the CIO and, to a lesser extent, independent unions. HISTORICAL STATISTICS OF THE UNITED STATES, *supra* note 353, at 177, series D 927-939.

361. GOLDFIELD, *supra* note 326, at 357-58.

362. *Id.* at 173-79; NELSON LICHTENSTEIN, *WALTER REUTHER: THE MOST DANGEROUS MAN IN DETROIT* 183-84, 251-52, 400-01 (1997).

363. GOLDFIELD, *supra* note 326, at 138-58, 216-25.

entrenched upon the CIO's plans to work with government officials to build their unions.³⁶⁴

Nor was this the only price that leftists would pay for their turn to this new kind of unionism. By the late 1930s, courts had already set about dramatically limiting labor militancy. In the late 1930s and early 1940s, courts construed the Wagner Act to prohibit sit-down strikes; endorsed the use of replacement workers, including permanent replacement workers, even without any particular justification on the part of the employer; opened the door to aggressive regulation of picketing by local and state police and courts; and in various ways, began to affirm idea that collective bargaining agreements limited the extent of the right to strike.³⁶⁵

This all fit very well with what historian Irving Bernstein, who generally supported this new regime, described as a process by which the "machinery" of government regulation of labor conflicts came to "substitute" for strikes and other forms of direct action and collective bargaining came to be "legalized."³⁶⁶ In the less generous view of many more critical scholars, this new system of labor relations that emerged out of the New Deal was, in its conception, a kind of covenant in which workers gained limited rights to organize, strike, and engage in collective bargaining, at the expense of forfeiting the prerogatives to resort to militant tactics or pursue radical aims.³⁶⁷ This new regime was consolidated in parallel with political changes that saw the acquiescence of Roosevelt and other New Deal politicians in an extraordinary purge of union-friendly board members and officials at the NLRB.³⁶⁸ Unfolding in the late 1930s and early 1940s, this development was justified as necessary to correct a bias in favor of militant and radical unionists and CIO organizations in particular.³⁶⁹

364. *Id.* at 216-25.

365. See, e.g., Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 26-60 (2010); 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).

366. BERNSTEIN, *supra* note 349, at 788-89.

367. See, e.g., RHONDA F. LEVINE, *CLASS STRUGGLE AND THE NEW DEAL: INDUSTRIAL LABOR, INDUSTRIAL CAPITALISM, AND THE STATE* (1988); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985); Joel Rogers, *Divide and Conquer Further Reflections on the Distinctive Character of American Labor Laws*, 1990 WIS. L. REV. 1 (1990); Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); see also Richard McIntyre & Michael Hillard, *Capitalist Class Agency and the New Deal Order Against the Notion of a Limited Capital-Labor Accord*, 45 REV. RADICAL POL. ECON. 129 (2012).

368. GROSS, *supra* note 357, *passim*.

369. *Id.*

C. The Demise of Radical Unionism and the Crisis of the Labor Movement

By the late 1930s, a broad coalition was actively trying to amend the Wagner Act and transform labor policy in ways that would foreclose even the already-constrained militancy and radicalism that characterized unionism during the Popular Front period. These efforts, which extended through the war, finally came to fruition in 1947 with the enactment of the Labor Management Relations Act, or as it is generally known, the Taft-Hartley Act, which significantly amended the Wagner Act.³⁷⁰ Although the new law was mainly conceived by conservative politicians and enacted by a Republican-controlled Congress, it codified changes that in many cases had been instituted earlier, with the support or acquiescence of many liberals, who likewise never honored their promise to the labor movement to get that law repealed.³⁷¹ Among these were new means for punishing unions and workers that engaged in sit-down strikes or used mass picketing or sympathy strikes to pressure employers.³⁷²

Although a bitter pill for many in the labor movement to swallow, this shift in labor law and policy was also entirely consistent with the overall course of American politics and American liberalism in the postwar period. As scholars like Jefferson Cowie have argued, the Depression years were an historical aberration that rested on an economic crisis which made the capitalist class and its supporters in government uniquely—but temporarily—open to a measure of compromise and reform.³⁷³ Likewise, during the war, hostility to Communism was muted by the country's military alliance with the Soviet Union.³⁷⁴ But by the late 1940s, things had changed. The war not only ended the Depression; it also restored the wealth and power of the business community and renewed their willingness to challenge unions and radicals and to oppose reform. And when the war drew to a close amid an extraordinary wave of strikes, the Popular Front gave way to the Cold War.³⁷⁵ Under these conditions, liberalism resumed its hostility to radicalism, which it wrapped up in professed concerns about state security and threats of

370. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 401-531 (2006)).

371. On the changes in law and policy that preceded Taft-Hartley, see HARRY A. MILLIS & HENRY CLARKE BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY (1950); GROSS, *supra* note 357.

372. See Ahmed White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 59 (2014).

373. See JEFFERSON COWIE, THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS (2017).

374. LARRY CEPLAIR, ANTI-COMMUNISM IN TWENTIETH-CENTURY AMERICA: A CRITICAL HISTORY 64-74 (2011); see generally M.J. HEALE, AMERICAN ANTI-COMMUNISM: COMBATING THE ENEMY WITHIN, 1830-1970 (1990).

375. *Postwar Work Stoppages Caused by Labor-Management Disputes*, 63 MONTHLY LAB. REV. 872, 872 (1946).

sedition, that harkened back to the way Progressives had treated the IWW in the 1910s and 1920s.³⁷⁶

Remarkably, the renewal of repression occurred with the initial support of the Communist Party. In 1940, when it was still closely allied with the CIO and the New Deal, the Party supported the prosecution and conviction of eighteen Trotskyist unionists under a provision of the federal Alien Registration Act of 1940 that was essentially a criminal syndicalism statute.³⁷⁷ Beginning in 1949, though, the Communist themselves felt the brunt of this repression as a sustained wave of Cold War repression supplanted the “Little Red Scare.” By 1956, over 100 Communists, including virtually all of the Party’s leadership, were prosecuted and, in most cases, imprisoned under this very statute.³⁷⁸ Notably, their convictions were consistently upheld by courts that made ready use not only of precedential cases like *Abrams* and *Whitney* but also of the clear and present danger test, and even Justices Holmes and Brandeis’s reasoning in formulating and describing that doctrine.³⁷⁹

The legal assault on organized labor occurred in a context in which the Party had already, as a result of its faith in the Popular Front, lost its footing within the labor movement. By the time it merged back into AFL in the mid-1950s, the CIO had long since purged itself of many thousands of Communist unionists and pushed out or lost the allegiance of entire unions with a strong leftist orientation, like the Fur Workers, the Farm Equipment Workers, the ILWU, and the United Electrical, Radio and Machine Workers. These developments comported with the politics of the time and cynical calculations of labor leaders. But they were also to some degree mandated by the labor law itself: section 9(h) of the Taft-Hartley Act effectively required that the unions purge themselves of Communists.³⁸⁰

For a time, the broader consequences of these developments for the labor movement remained unclear. Although no longer growing as it had in the 1930s and 1940s, overall membership remained both historically very

376. This hostility to radicalism was a defining feature of Cold War liberalism. ROBERT J. GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO 1976*, 360-69 (2d ed., 2001). See generally MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES*, 37-41 (1977).

377. *Dunne v. United States*, 138 F.2d 137 (8th Cir. 1943); Thomas L. Pahl, *G-String Conspiracy, Political Repression or Armed Revolt? The Minneapolis Trotskyite Trial*, 8 LAB. HIST. 12 (1967).

378. BELKNAP, *supra* note 376.

379. See, e.g., *Dennis v. United States*, 341 U.S. 494, 505, 508 (1951); *Dennis v. United States*, 183 F.2d 201 (2d Cir. 1950).

380. ELLEN SCHRECKER, *Labor and the Cold War: The Legacy of McCarthyism*, in ROBERT W. CHRENEY ET AL., EDS., *AMERICAN LABOR AND THE COLD WAR: GRASSROOTS POLITICS AND POSTWAR POLITICAL CULTURE* 7, 10-14 (2004); ELLEN W. SCHRECKER, *McCarthyism and the Labor Movement: The Role of the State*, in STEVEN J. ROSSWURM ED., *THE CIO’S LEFT-LED UNIONS* 139 (1992); see generally MAX M. KAMPELMAN, *THE COMMUNIST PARTY VS. THE CIO: A STUDY IN POWER POLITICS* (1957); HARVEY LEVENSTEIN, *COMMUNISM, ANTI-COMMUNISM, AND THE CIO* (1981).

extensive and stable, reaching about 35 percent of the non-agricultural workforce in the mid-1950s.³⁸¹ Equally impressive—for a time, at least—was the political and economic power of the unions themselves, as labor leaders became important players in American politics.³⁸² While the number of strikes per year also remained high through the 1960s, these tended to be much tamer affairs than in the 1930s and 1940s, usually aimed at bolstering unions' positions in collective bargaining rather than organizing, let alone promoting some kind of revolutionary purpose.³⁸³

Although the extent of postwar consensus or *détente* between labor and capital has been exaggerated, it did seem that some kind of *modus vivendi* prevailed.³⁸⁴ Union influence remained significant, if not overwhelming, both in politics and in collective bargaining, and labor standards gradually improved. But by the early 1970s, a new and grim reality began to set in as a changing liberalism, operating in a shifting economic environment, found that it no longer had much use for this kind of arrangement, or even for a strong relationship to the working class.³⁸⁵ Under increasing pressure from business groups, the state gradually abandoned all but a pretense of supporting organized labor, the labor law devolved into a system that does as much to restrain labor rights as to advance them, and the relationship between the labor movement and the Democratic party—a key legacy of the New Deal and the Popular Front—evolved into what Mike Davis memorably described as the “barren marriage,” wherein the labor movement served as a fundraising and get-out-the-vote organization for a party that somehow managed never to deliver even the most conventional kinds of reforms.³⁸⁶

While conservatives went on an open offensive against labor, railing about corrupt union bosses, coercive labor laws, and the debilitating inefficiencies of collective bargaining,³⁸⁷ liberals adopted a different approach, one that can be seen in the politics of Democratic Presidential administrations from Jimmy Carter's through Bill Clinton's and Barack

381. HISTORICAL STATISTICS OF THE UNITED STATES, *supra* note 353, at 178, series D 946-951.

382. On the position of the labor movement in the postwar period, see JEFFERSON COWIE, *STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* (2012); NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 188-90* (2013).

383. HISTORICAL STATISTICS OF THE UNITED STATES, *supra* note 353, at 179, series D 970-985.

384. LICHTENSTEIN, *supra* note 382 at 98-140.

385. See COWIE, *STAYIN' ALIVE*, *supra* note 382, at 230-32; LICHTENSTEIN, *supra* note 382, at 98-140, 229-30; JUDITH STEIN, *PIVOTAL DECADE: HOW THE UNITED STATES TRADED FACTORIES FOR FINANCE IN THE SEVENTIES* (2011).

386. Mike Davis, *The Barren Marriage between Labour and the Democratic Party*, 124 *NEW LEFT REV.* 42, 54-56 (1980); see also Michael Eisenscher, *Is the Secret to Labor's Future in Its Past?*, 3 *WORKINGUSA* 95 (2002).

387. LANE WINDHAM, *KNOCKING ON LABOR'S DOOR: UNION ORGANIZING IN THE 1970S*, at 58-64, 77-81, 146-50 (2019). For overviews of the conservative counteroffensives that labor faced beginning in the 1970s and 1980s, see LICHTENSTEIN, *supra* note 382, at 212-45; PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 616-76 (2010).

Obama's. These liberals continued to pander to labor, in the fashion of every Democratic administration since the New Deal. Backed by their party's leaders in Congress, these presidents endorsed, respectively, the Labor Reform Act of 1977, the replacement worker bills of the early 1990s, and the Employee Free Choice Act of the late 2000s.³⁸⁸ But neither they nor their colleagues in Congress secured the passage of these bills, which all failed. At the same time, while each of these presidents made somewhat more reasonable appointments to the NLRB, they also endorsed economic programs that contributed to the labor movement's continued demise.³⁸⁹

In the meantime, as liberals turned against even the mainstream of the labor movement, there was no resurgence of radical unionism of the sort that brought the IWW or the Popular Front to prominence. Among the many factors that account for this was the Cold War, whose consuming politics undermined the legitimacy and, at times, legality of every kind of leftism. But the lack of any rebirth of labor radicalism was also the result of postwar liberalism's antipathy to this kind of unionism; indeed, as the IWW's experience confirmed, such an aversion was fundamental to the entire project of Progressivism. With the desperation and uncertainty of the Depression and war years rapidly fading, postwar liberals, including mainstream labor leaders, saw no need to set aside this antipathy and ally with, let alone cultivate, a new generation of radicals. And what passed for radicalism also changed, evolving in the 1960s into a "New Left" defined by its diminished interest in class and ambivalence about organized labor, which, ironically, had a significant basis in the labor movement's anticommunist politics.³⁹⁰ Ironically, too, the faded relevance of the kind of radicalism that the Communist Party preached also cleared the way for the Supreme Court to finally to overturn *Whitney* in 1969 and impose significant limits on the enforceability of criminal syndicalism and similar statutes.³⁹¹

The significance of the labor movement's distance from the left became more evident as the crisis which washed over it in the 1970s extended through the following decades. Crippled by inertia and a lack of vision, the labor movement's response never involved much beyond a combination of

388. Employee Free Choice Act of 2009, H.R. 1409, 111st Cong., 1st Sess. (2009); Workplace Fairness Act, S. 55, 103d Cong., 1st Sess. (1993); Cesar Chavez Workplace Fairness Act, H.R. 5, 103d Cong., 1st Sess. (1993); Labor Reform Act of 1977, S. 8410, 95th Cong., 1st Sess. (1977).

389. See STEIN, *supra* note 385, at 185-90; Martin Halpern, *Jimmy Carter and the UAW: The Failure of an Alliance*, 26 PRESIDENTIAL STUDIES Q. 255 (Summer 1996); Richard A. Epstein, *Obama's Welcome Silence on the Employee Free Choice Act*, FORBES, Feb. 10, 2009; Mike Elk, *Abandoning EFCA Is Obama's Political Suicide: Lessons From Three Presidents on Workers' Rights*, HUFFINGTON POST, Mar. 18, 2010.

390. On the New Left's relationship to the labor movement and the question of labor more broadly, see generally JEFFREY W. COKER, *CONFRONTING AMERICAN LABOR: THE NEW LEFT DILEMMA* (2002). On the complexities of this relationship, see generally PETER B. LEVY, *THE NEW LEFT AND LABOR IN THE 1960s* (1994).

391. *Brandenburg v. Ohio*, 394 U.S. 444 (1969).

disbelief, disappointment, and desperate attempts to resurrect—through attempts at statutory reform, for example—the old arrangements that had been forged in the 1930s and 1940s and that had carried the movement through the postwar period. Most of the gains that labor movement made since the 1930s have been lost. Union density in the private sector has sunk to about 6 percent, strikes have become extraordinarily uncommon, even as labor standards continue to deteriorate, and unions' political influence has diminished to negligible levels.³⁹² Under these circumstances, both the mainstream of the labor movement and the movement's radical supporters are left to reckon not only with the true nature of the bargain their predecessors struck decades ago with liberals and the state but also with the fate of a union whose destruction at the hands of Progressives and the state presaged these more recent developments.

CONCLUSION

Over forty years of unremitting crisis and decline have led many to argue that labor needs a resurrection of the kind of radicalism, or at least robust reformism, that so often characterized the movement in the early twentieth century, as well as a fundamental change in the nature of the debate about what unions are, where they stand in the world, and how they should function.³⁹³ Those who favor such a turn must confront the obvious impediments to accomplishing this, which, as this Article suggests, include the challenge of successfully navigating a political and legal culture in which not only conservatives but also Progressives or liberals are apt to stand in the way of reform.

Indeed, the IWW's experience confirms the essential truth of its own commitment to voluntarism, which is that the state and its legal system simply could not be trusted to serve as a custodian of workers' interests, at least not when those interests impinged in a serious way on those of powerful capitalists and their champions in law and government. At the same time, what happened to the IWW's successors during the Popular Front period and to the labor movement more broadly through the postwar years, when unionists retreated from voluntarism in the hope of reaching some enduring accommodations with the state and its legal system, lends great support to

392. U.S. DEP'T OF LAB., UNION MEMBERS SUMMARY, January 22, 2020, <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/UDW4-KGNW>].

393. Indeed, lamenting this state of affairs has long been a preoccupation of scholars and commentators. See, e.g., Benjamin Day, *Organizing for (Spare) Change? A Radical Politics for American Labor*, 8 WORKINGUSA 27 (2004); David Bacon, *Labor Needs a Radical Vision*, 57 MONTHLY REV. 38 (2005); STAUGHTON LYND, ON E.P. THOMPSON, HOWARD ZINN, AND REBUILDING THE LABOR MOVEMENT FROM BELOW (2014); Victor G. Devinatz, *Struggling Under U.S. Labor's Decline Under Late Capitalism*, 76 SCI. & SOC'Y 393 (2012).

the Wobblies' skepticism of this kind of activism, even when Progressives or liberals are in control.

In these respects, this Article's story of repression has immediate relevance, as it raises troubling questions about the feasibility of the kind of unionism that came to prominence in the Popular Front period, and that many left-leaning reformers today hope to resurrect.³⁹⁴ With a zeal that is quite understandable in light of the great gains that labor made during the 1930s and 1940s, these reformers dream of a renewed Popular Front, based in functional alliances between workers and Progressives, and backed by the authority of the law and the state. Like many Popular Front unionists, they see what the IWW endured a century ago as further reason to put aside that union's voluntarism, move beyond its thrilling but implausible attempt to repudiate law and the state, and instead embrace what surely seems like a more reasonable and practical way of improving labor's position. But these reformers would be wise to confront perhaps the most important truth in the story, which is that only in the wake of the very kind of distant revolution that the IWW vainly sought to bring about are efforts to fundamentally reform the condition of labor in society likely to escape for long the reprimands, not only of conservatives who straightforwardly reject labor's demands, but of Progressives and liberals who stand ready to declare that labor's demands go too far.

394. For a good example of this tendency in a popular and excellent introduction to labor history, see ERIC LOOMIS, *A HISTORY OF AMERICA IN TWELVE STRIKES* 129, 206 (2018). For a broader review and critique of this kind of work, see McIntyre & Hillard, note 367.

