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POLITICAL CRIMES: II†

ELMER M. MILLION*

The several states have been far more active than the Federal Government in enacting legislation against the advocacy of radical doctrine. Like the federal laws, however, these statutes have been passed largely during crucial periods, in times of war, industrial unrest, or economic difficulties. Most of these statutes were passed during the tense days during and immediately after the World War, and while the world still reeled with news of a bloody revolution in Russia. Most of them fall into one of three general categories:

1. Criminal Syndicalism.

A typical statute of this type provides:

> "Criminal syndicalism is the doctrine which advocates crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing, is a felony. . . ."[138]

Statutes of this type, occurring mostly in western states, were framed to combat the Industrial Workers of the World, the I. W. W., an organization advocating syndicalism and for a time enjoying a large membership.

2. Criminal Anarchy.

Apparently prompted by the assassination of President McKinley,[139] these statutes occur as frequently in the east as in the west. A typical statute reads:

> "Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or . . . officials of government, or by any

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†Continued from the preceding issue, 5 MO. LAW REV. 164. This and the preceding installment are based on research done as a Sterling Fellow at Yale University School of Law.

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138. IOWA CODE (1931) § 12906. For citations to the statutes of seventeen states having syndicalism statutes, see Legis. (1936) 84 U. OF PA. L. REV. 390, 392.

139. CHAFEE, FREEDOM OF SPEECH (1920) 187 *et seq.*

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unlawful means. The advocating of such doctrine either by word of mouth or writing is a felony."[140]

A not uncommon provision of syndicalism and anarchy statutes makes punishable membership in any organization advocating the proscribed doctrines.

3. Sedition.

The scope covered by this type of statute differs considerably in some states, but the following are rather typical:

"Any person who advocates . . . the overthrow by force or violence of the government of the United States and/or of any state . . . is guilty of a felony."[141]

"Any person who shall speak, or write . . . or who shall publicly exhibit . . . any disloyal, scurrilous or abusive matter concerning the form of government of the United States, its military forces, flag or uniforms, or any matter which is intended to bring them into contempt or which creates or fosters opposition to organized government, shall be fined not more than five hundred dollars or imprisoned not more than five years or both."[142]

The provisions of the latter sedition statute cover many offenses created by so-called "Loyalty Acts", "Loyalty Oath Bills,"[143] but the

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140. ALA. CODE ANN. (Michie, 1928) § 3208. For citations to similar statutes in nine other states, see Legis. (1936) 84 U. OF PA. L. REV. 390, 393.

141. Mich. Public & Local Acts 1935, No. 168. Anarchy and sedition are defined by the same provision, an accompanying provision specifically attaching to them the doctrine of felony murder, in COLO. STAT. ANN. (Courtright, 1930) §§ 1893a, 1893h. The Florida statute survives from 1866, so includes insurrection, FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 7133.

142. CONN. GEN. STAT. (1930) § 6039. For citations to statutes of twenty-one states having such provisions, see Legis. (1936) 84 U. OF PA. L. REV. 393, n. 26, 27.

143. The Texas "Disloyalty Act" of 1918 made it a felony for anyone to use "in the presence of another during war time, disloyal language which is calculated to bring the United States . . . into disrepute, or is of such nature as to be calculated to provoke breach of peace, if said in the hearing of a United States citizen. . . ." Its treatment by the Texas Court of Criminal Appeals is surprising but enlightening. The first decision, in April of 1919, sustained a conviction thereunder without discussion. The second decision, *Ex parte* Meckel, 87 Tex. Cr. 120, 220 S. W. 81 (1919), upheld the statute under both state and federal constitutions, terming it a proper exercise of the police power designed to prevent breaches of the peace. The last "or" in the statute was held to mean "and," thus making two necessary elements: the disloyal language must be calculated to bring . . . into disrepute *and also* be of such nature as might provoke a breach of peace if heard by a citizen. This decision did not expressly hold that being heard by a citizen was necessary, but the court did so hold a few days later, reversing one conviction where the complaint did not allege that the hearers were citizens, and reversing another conviction because the indictment failed to allege conjunctively the two elements set up in the *Meckel* decision.

Then, on March 17, 1920, with the war over and reaction rampant against restrictions, the court granted a rehearing in the *Meckel* case and found the statute unconstitutional as invading the exclusively federal jurisdiction to punish disloyal utterances. In deciding that the statute did not seek to prevent breaches of the peace, the court held that the word "if" did not require that a citizen hear the language, but only that the language be of a nature likely to cause a breach "in case that" it were so heard. Later in the same year, Gilbert v. Minnesota,

sedition act first quoted can best be discussed in connection with the anarchy and syndicalism statutes, which it resembles. Indeed, the provisions of the statutes defining these three separate offenses are quite similar and although the source and motive behind them differ, have a like effect. While over half of the states have either a syndicalism or an anarchy statute, virtually none have both,[144] and many states with neither of them reach the same result with a sedition statute. So, while most of the reported cases concern criminal syndicalism statutes, the doctrines they pronounce are equally valid as to anarchy and sedition prosecutions.

In considering some of the decisions under these statutes, let us look first at the criminal syndicalism prosecutions. In *State v. Moilen*,[145] the Minnesota court in 1918 upheld the constitutionality of the criminal syndicalism statute of that state, and sustained a conviction based on evidence that the defendant had publicly displayed posters mentioning "Sabotage," "I. W. W.," "Join the one big union," "Abolition of the Wage System," and carrying likenesses of the red flag and a snarling black cat. The appellate court thought the jury was justified in finding that these posters advocated the criminal type of sabotage, which advocacy was by the statute an offense.

The next year, in *In re McDermott*,[146] the California Supreme Court denied a writ of *habeas corpus* to a person convicted under the California statute of circulating books advocating sabotage. The court considered the statute invulnerable constitutionally. The state constitution[147] required that each statute taking immediate effect should contain a section stating the facts which make its enactment necessary "for the immediate preservation of the public peace, health or safety." The syndicalism statute had a section which read:

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254 U. S. 325 (1920), upheld the power of a *state* to employ criminal sanctions in promoting national patriotism, the Court relying on Halter v. Nebraska, 205 U. S. 34 (1907), which had upheld such state legislation in 1907. The dissent vainly cited the final *Meckel* opinion.

Texas re-enacted the statute in its revised statutes of 1925, changing the word "or" to "and" but leaving the "if" unchanged. It is, therefore, ready for use in the next war, the court having only to follow Gilbert v. Minnesota, and after the next peace it can be held unconstitutional under the *state* constitution.

144. Seventeen states have syndicalism statutes and ten have anarchy statutes but only two have both. Both of the latter states, Colorado and Washington, are credited with all three statutes. The Washington anarchy statute was enacted in 1909, the syndicalism statute in 1919, a period when the desire for new legislation of this nature ran high and could hardly be satisfied by a mere amendment to an existing statute, although the same results were then obtainable under the old laws.

145. 140 Minn. 112, 167 N. W. 345 (1918).

146. 180 Cal. 783, 183 Pac. 437 (1919).

147. CALIF. CONST. art. IV, § 1.

> "Inasmuch as this . . . is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place . . . teaching and practicing criminal syndicalism. . . ."[148]

The court held itself powerless to say this conclusion of the legislature was not justified.

Again, in *People v. Steelik*,[149] the California court affirmed a conviction under the Act, and expressly upheld its various provisions, which defined three distinct offenses:

1. The advocacy of crime, to effect the desired change.
2. Conspiracy to commit crime, to effect change.
3. Commission of crime, to effect change.

Advocacy of crime, although the crime is not committed, was held an offense. The different conspirators were to be punishable whenever the conspiracy was made, without the necessity of an overt act by anyone. The defendant had been an I. W. W. member before the Act was passed, and by remaining a member thereafter and attending meetings he committed the offense of knowingly belonging to a conspiracy, *et cetera*. Evidence as to crimes committed by the I. W. W. before the defendant joined was held properly admitted, and the objection that the statute was constructive treason was waived with the statement that the constitution did not limit legislative power to punish inimical acts which might formerly have been punished as constructive treason. Indeed, reasoned the court, mere knowingly remaining a member of the I. W. W. constituted a violation of the Act.[150]

Three years later, however, the California Court of Appeals reversed a conviction under the statute, pointing out that for an indictment in Los Angeles county to be good, the defendant must be proved either to have been a member of the I. W. W. in that county (and could thereby be convicted for membership), or to have been a member of a conspiracy, one of the members of which must have committed an overt act in that county. The court also held it error to admit the dictionary definition of criminal syndicalism since the dictionary said syndicalism could include revolution, sabotage, or peaceful demonstration, and this might have misled the jury

148. Act of April 30, 1919, § 4.
149. 187 Cal. 361, 203 Pac. 78 (1921).
150. Here was an offense not requiring any overt act except an act performed at a time it was not criminal. Actually, the defendant was an organizer, not merely a member.

into thinking that a peaceable strike came within the statute. Admission of testimony of what other members had told witnesses of the nature of the I. W. W. was also error. Further, the court ruled that the unlawful character of the organization must be proved in each separate prosecution in which a conviction was procured.[151]

The United States Supreme Court considered the California statute in two famous cases. A federal statute[152] provided that anyone committing a wrongful act in Yosemite National Park, which offense was not punishable by the federal penal code, should be punished according to the provisions of the California penal code covering that offense. In *Burns v. United States*,[153] decided in May, 1927, the Supreme Court had to pass on a conviction in the federal district court based on a violation of the California Criminal Syndicalism Act.

At Yosemite National Park, the defendant had helped organize and knowingly become a member of the I. W. W., which organization allegedly advocated sabotage and criminal syndicalism. The evidence showed that the organization advocated scamped work, such as loading ships in a manner causing the cargo to shift, necessitating a return to port and a reloading, all of which would mean additional money for the laborers. In affirming the conviction the majority held harmless a jury instruction which concluded:

> ". . . any deliberate attempt to reduce the profits in the manner I have described would be sabotage."

Since the quoted words were preceded by an illustration of scamped work as loading ships in the manner above described, which not merely required a return to port for reloading but also might endanger the safety of the persons aboard the ships, the court held that when they were construed with the rest of the instructions and the evidence they would not mislead the jury into extending the meaning of sabotage beyond the provisions of the statute. Moreover, the majority opinion upheld the statute as not violating the Fourteenth Amendment. Justice Brandeis, in dissenting, did not discuss the constitutional question but urged that the instructions of the trial court had been prejudicial.

Earlier in the same day that it decided the *Burns* case, the Supreme Court upheld the California statute in a case appealed from the state

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151. People v. Ware, 67 Cal. App. 81, 226 Pac. 956 (1924).
152. Act of June 2, 1920, c. 218, § 4, 41 STAT. 731 (1921).
153. 274 U. S. 328 (1927).

courts. In *Whitney v. California*,[154] the defendant had been first a radical socialist but, after being expelled from her own party, had thereafter helped organize the Communist Labor Party, taking part in its 1919 convention and helping seat the delegates. In affirming the conviction, the Court refused to review the evidence, despite the claim of the defendant that she opposed the resolutions of the convention indorsing sabotage, and had not known when she helped organize the convention that such a program would be adopted. The opinion further upheld the statute as not repugnant to the due process clause, nor uncertain, nor violative of the equal protection clause, nor a restraint of freedom of speech, assembly, or association.

The minority opinion concurred in the judgment, since failure to except in the trial court prevented a review of many vital points, but Justice Brandeis pointed out that the statute aimed at the bare association with people who preach syndicalism, and therefore violated the due process clause. Further, Justice Brandeis said that police measures might be unconstitutional where the remedy, although effective, was unduly harsh or oppressive. He failed to find the existence of present danger as prescribed in the *Schenck* case.

> "The fact that speech is likely to result in some violence or destruction of property is not enough to justify its suppression . . . I am unable to assent to the suggestion . . . that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment."[155]

Still later, in 1931, a California Court of Appeals decision[156] considered the question of the criminality of organization and membership in various organizations. The court held bad a count alleging that the defendants

> ". . . organized and became members of the 'Communist party' and 'Trade Union Unity League,' and 'Agricultural Workers Industrial League,' and 'Red International of Labor Unions' . . . advocating syndicalism."

The court held the count vague as to whether the defendants were being tried for belonging to all or only one of the various associations, and questioned whether a conviction under the count could avoid a later prosecu-

154. 274 U. S. 357 (1927).
155. *Id.* at 379.
156. People v. Horiuchi, 114 Cal. App. 415, 300 Pac. 457 (1931).

tion for the same offense, under the double jeopardy doctrine. The other counts were upheld, however, and as each defendant had been found guilty on each count, the convictions of six of the defendants were affirmed, a reversal being ordered as to one defendant who was not shown to be a member of any of the organizations, but merely a representative of the I. L. D. who had come to promise the others legal support if they were prosecuted. The notation by the jury at the end of its verdict,

> "We recommend you deport the foreigners; give the citizens the effect of the law,"

was held mere surplusage and not evidence of any prejudice on the part of the jury.

The California prosecutions for criminal syndicalism have counterparts in other western states. In Idaho they are principally represented by two decisions. In the first, *State v. Dingman,*[157] the conviction of an I. W. W. organizer who had been fined $1000, plus $964 costs, was reversed on the ground that incompetent evidence was admitted as to the teaching of the I. W. W., the witnesses repeating conversations had in times past with persons claiming to be members of the organization, but not shown to have any connection with the defendant. After noting that the twenty-two other defendants jointly tried with the appellant had all been acquitted at the trial, the court pronounced the statute[158] constitutional despite objections advanced, and intimated that its use of the word "sabotage" might include mere inefficient work or loafing on the job, deliberately done, but stated that even without the use of that word the remaining words of the statute created a clear offense. The acts of the defendant complained of had occurred in November, 1919, nearly four years prior to the date of the opinion. Two judges, agreeing with the majority construction of the statute, dissented from the finding of reversible error.

In 1924, the Idaho court granted an application for *habeas corpus,* where the defendant was an I. W. W. and the evidence relied on to prove that the I. W. W. advocated sabotage consisted of pamphlets advocating three types of strikes, including striking by remaining on the job but doing as little work as possible, all three types being peaceable in form. The majority opinion, not even mentioning the *Dingman* opinion, held

157. 37 Idaho 253, 219 Pac. 760 (1923).
158. C. S. §§ 8580, 8581.

that it was quite doubtful whether the legislature meant to include mere peaceable strikes in its definition of sabotage, and consequently such activity could not be termed criminal.[159] The dissenting opinion vainly cited the *Dingman* case as determining the meaning of "sabotage" and that it included loitering on the job, poor work, retarding production, and other possibly non-violent acts.[160]

In Oklahoma, too, the statute defined criminal syndicalism and sabotage, and provided a maximum penalty of ten years imprisonment for belonging to any organization advocating such doctrine.[161] In two separate decisions, both handed down in 1925, the state court firmly supported the constitutionality of the statute but set aside all the convictions. In *Wear v. State,*[162] the reversal was on the ground that the information was insufficient in alleging that the defendant, "organized, became a member of, . . ." although the allegation followed the exact wording of the statute. The court held that the information must go beyond the statute and state the facts essential to constitute the crime. Another ground relied upon in setting aside the five year sentence was that the information was duplicitous in charging both the offense of belonging and the offense of issuing material advocating syndicalism, for although both were contained in the same section of the statute they constituted separate offenses.

In *Berg v. State,*[163] the evidence showed the defendant had been arrested on December 27, 1922, shortly after arriving in town on a freight train, and while waiting a chance to leave on another. The arresting officers had no warrant but found I. W. W. membership cards on the defendant's person. A strike was in progress in the town where the defendant was arrested. The court upheld the validity of the statute against a half dozen constitutional objections, including the treason and free speech provisions, but reversed the conviction because the information was duplicitous; because of a refusal by the trial court to permit the defendant to ask each juror on *voir dire* examination, "Would knowledge that I belonged to the I. W. W. prejudice you against me?"; and because the words on the

159. *Ex parte* Moore, 38 Idaho 506, 224 Pac. 662 (1924).
160. Justices Budge and McCarthy, dissenting against a majority opinion of three judges, had also dissented in the *Dingman* case. Legal doctrines apart, the majority in both cases effected a reversal of conviction or a release from custody, with the same two dissenting justices favoring conviction in both.
161. OKLA. STAT. (Harlow, 1931) §§ 2571, 2573.
162. 30 Okla. Cr. 118, 235 Pac. 271 (1925).
163. 29 Okla. Cr. 112, 233 Pac. 497 (1925).

I. W. W. membership cards mentioning "wage wars" and "revolutionary watch-word" were deemed susceptible of a purely rhetorical meaning and not intended literally. The court likened them to the song, "Onward Christian Soldiers," which did not mean the churchmen were actually militant.

In *People v. Ruthenberg*,[164] the Michigan court in 1924 upheld a conviction under the criminal syndicalism statute[165] of that state, where the information charged that the defendant had, on August 20, 1922, voluntarily assembled with an assemblage of Communists formed to teach criminal syndicalism. The evidence disclosed that the defendant had attended as delegate a secret Communist convention, replete with fictitious names, surreptitious meetings, and clandestine pamphlets which were gathered after each session and secreted in the ground. Delegates from Russia representing the Comintern were present, as was a Government secret operative. Despite the defendant's claim that he attended only to urge the party to change its character to that of a legal political organization, the jury found him guilty. In affirming the conviction and upholding the constitutionality of the statute, the court ruled that it defined "sabotage" and "violence" with sufficient clarity, and that mere loafing on the job was not covered by its provisions.

One of the most drastic of the decisions under the syndicalism statutes was *State v. Hennessy*,[166] a January, 1921, pronouncement of the Washington Supreme Court, in which a conviction under the Washington statute[167] was affirmed in no uncertain terms. In addition to upholding the statute against all constitutional objections, the opinion contained several other interesting rulings:

(1) The information was not duplicitous, although it charged the defendant with organizing and voluntarily assembling with or being a member of the I. W. W. and with printing, publishing, and distributing pamphlets advocating criminal syndicalism.

The information followed the statute, even to charging disjunctively that the defendant "associated with or [was] a member", but the court held that the entire statute defined only one offense, which could be committed in several ways, so the information could allege all the different

164. 229 Mich. 315, 201 N. W. 358 (1924).
165. Act No. 255, Public Acts, 1919.
166. 114 Wash. 351, 195 Pac. 211 (1921).
167. Wash. Laws 1919, p. 518.

ways. This ruling is directly *contra* to the Oklahoma decision of *Wear v. State,* decided three years later.

(2) Since the defendant voluntarily belonged to the I. W. W. it was unnecessary to prove he intended to advocate sabotage, and a refusal to instruct that he must have had knowledge of the unlawful purpose of the organization was not error. In this connection, the court relied on *Ellis v. United States,*[168] a Supreme Court decision holding that one who violated a statute prohibiting working laborers on public work projects more than eight hours per day could not avoid conviction because of a lack of intention to violate the law. However, the *Ellis* ruling said, "If a man intentionally adopts certain conduct in certain circumstances known to him . . . ," and a failure to know the unlawful purpose of the organization might show the circumstances were *not* known to him. Hence *State v. Hennessy* really went beyond the *Ellis* holding, in addition to involving a felony whereas the *Ellis* case involved only a misdemeanor.

In several respects the Oregon case of *State v. Boloff*[169] is outstanding. It involved an illiterate Russian immigrant, for nineteen years a resident of this country, who was proved to be a member of the American Communist party but who had apparently never been active. It was not shown that Boloff had ever attended a meeting where criminal syndicalism had been advocated, yet he was sentenced to ten years imprisonment under the Oregon statute making it a felony to belong to any association advocating political or industrial change by violence. The Statute of Limitations had apparently run since Boloff joined the party, so his conviction was for *belonging* (i. e., continuing to belong), and the lower court instructed that knowledge of the tenets of the party was not an element of the offense. The appellate court did not pass on whether the instruction was proper, refusing to decide that point for lack of a proper exception to it, but intimated that it thought Boloff did know the doctrines of the party. A rehearing was granted but resulted in a vehement affirmance by the majority.[170] Three judges dissented in both instances, and in the latter there was a stirring protest against the prosecution, the sufficiency of the evidence, the severity of the penalty, and the wisdom of suppressive measures in general.[171]

The *Boloff* decision has been severely criticized on several constitutional

168. 206 U. S. 246 (1907).
169. 138 Ore. 568, 4 P. (2d) 326 (1931).
170. 138 Ore. 568, 7 P. (2d) 775 (1932).
171. 7 P. (2d) at 790.

grounds as well as those of policy,[172] but the Oregon courts remained firm in their stand, with the eventual result that the United States Supreme Court had to pass on the question, in *De Jonge v. Oregon.*[173] In that case, the defendant, in 1934, had helped conduct public meetings sponsored by the Communist party, at which he condemned the police measures taken against striking longshoremen, and urged them to join the Communists. The Oregon courts affirmed a conviction of the defendant for conducting an assemblage of a society which advocated criminal syndicalism. It was not proved that the defendant had advocated such activity but only that he conducted the meeting. In reversing the conviction, the Supreme Court held that mere participation in a public meeting called to discuss public issues could not be criminal, regardless of under whose auspices the meeting took place; hence, the interpretation of the statute by the state court constituted a deprivation of the constitutional right of free speech and freedom of assembly protected by the Fourteenth Amendment. The Court pointed out that the state court's interpretation did not even require membership in the party, and covered meetings called for entirely peaceful and lawful purposes.

Prosecutions under the Kansas syndicalism statute had led to a somewhat similar reversal at the hands of the Supreme Court. In 1921, in *State v. Berquist,*[174] the state court had upheld the constitutionality of the provision of the statute[175] making it a felony to belong to a society advocating criminal syndicalism. In *State v. Breen,*[176] decided the next year, the state court again upheld the statute, although reversing the conviction on other grounds. Neither of these decisions were disturbed by the Supreme Court, but in 1924, the state court[177] sustained a conviction under the statute in which the principal trial evidence was the preamble of the I. W. W. and proof that the defendant was a member and had recruited other members. In *Fiske v. Kansas,*[178] the decision of the state court was reversed on the ground that the evidence was insufficient to show that the I. W. W. taught sabotage or other illegal activity. The statements

172. Note (1932) 45 HARV. L. REV. 927.
173. 299 U. S. 353 (1937). A note on the decision of the Oregon court, 51 P. (2d) 674, appears in (1936) 24 GEO. L. J. 744. The notewriter errs, however, in citing Ellis v. United States, 206 U. S. 246 (1907), as holding or expressly supporting the proposition that mere membership in a prohibited organization can be punished criminally.
174. 109 Kan. 368, 199 Pac. 101 (1921).
175. Laws 1920, c. 37, § 1.
176. 110 Kan. 817, 205 Pac. 632 (1922).
177. State v. Fiske, 117 Kan. 69, 230 Pac. 88 (1924).
178. 274 U. S. 380 (1927).

in the preamble of that organization, that the working class and employing class have nothing in common, and that the workers should abolish the wage system and take possession of the machinery of production, were held not necessarily advocating the use of illegal force instead of peaceful methods. As administered in the lower court the statute was termed an arbitrary and unreasonable exercise of the police power and violative of the due process clause.

A 1923 Iowa decision[179] and a 1932 Ohio decision[180] dealt with the syndicalism statutes of those states. All of these decisions are but typical of scores of court pronouncements on the same point. The reports contain many other cases from California,[181] Washington,[182] and Oregon,[183] and a few from Idaho.[184]

Sedition statutes, having been enacted by fewer states, have not resulted in as many interpretative decisions as the syndicalism statutes, but the results are quite similar. The New Jersey sedition statute had three distinct sections, outlawing, respectively:

§ 1. Inciting insurrection or sedition.

§ 2. Advocacy of "subversion or destruction by force," or attempting to promote "hostility or opposition" to the state or Federal Government.

§ 3. Membership in any society formed to promote "hostility or opposition" to the state or Federal Government.[185]

In *State v. Tachin*,[186] the New Jersey Supreme Court in 1919, affirmed convictions of two persons indicted under Section two of the Act, the defendants having made speeches against American participation in the War, and accused the President of sending men to France to be

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179. State v. Tonn, 195 Iowa 94, 191 N. W. 530 (1923).

180. State v. Kassay, 126 Ohio St. 177, 184 N. E. 521 (1932).

181. People v. Taylor, 187 Cal. 378, 203 Pac. 85 (1921); *Ex parte* Wood, 194 Cal. 49, 227 Pac. 908 (1924); People v. McClennegen, 195 Cal. 445, 234 Pac. 91 (1925); (and twenty Cal. App. decisions during 1920-1925).

182. State v. Aspelin, 118 Wash. 331, 203 Pac. 964 (1921); State v. Hemhelter, 115 Wash. 208, 196 Pac. 581 (1921); State v. Hestings, 115 Wash. 19, 196 Pac. 13 (1921); State v. Kowalchuk, 116 Wash. 592, 200 Pac. 333 (1921); State v. McLennen, 116 Wash. 612, 200 Pac. 319 (1921); State v. Payne, 116 Wash. 640, 200 Pac. 314 (1921).

183. State v. Laundy, 103 Ore. 443, 204 Pac. 958 (1922); State v. Pugh, 151 Ore. 561, 51 P. (2d) 827 (1935) (reversing a five year sentence); State v. Denny, 152 Ore. 541, 53 P. (2d) 713 (1936) (affirming a two year sentence given a De Jonge accomplice).

184. *Ex parte* Bates, 38 Idaho 523, 224 Pac. 668 (1924) (memo); *Ex parte* Perring, 38 Idaho 524, 224 Pac. 668 (1924) (memo). (Both hold peaceful striking or loafing on the job not within the statute).

185. P. L. 1918, p. 130.

186. 92 N. J. L. 269, 106 Atl. 145 (1919).

slaughtered, and declared the United States did not need a government and that the people should arm themselves for protection against the Government. In upholding the constitutionality of the statute, the court interpreted "hostility or opposition," as used in Section two, to apply only to activity aiming at "destruction by force" as used in the same section. The Court admitted that peaceful opposition to the Government did not come under the statute, and said:

> "The right of citizens to express their sentiments . . . could not be taken away, and . . . men may criticize the administration, even in time of war, as they have criticized *without objection* during the last two years."[187]

A further appeal resulted in affirmance of the conviction of both defendants,[188] although a strong dissent attacked the statute as violating the rights of free speech and free assembly, being contrary to the treason provision of the constitution, and being as ill-considered, foolish and futile as the Sedition Act of the Federalist period.[189]

In 1920, however, the New Jersey Supreme Court was more critical. In *State v. Gabriel,*[190] the defendant had been convicted on two separate counts, one charging violation of Section two, the other charging violation of Section three. The court unhesitatingly held Section three unconstitutional, since the words "hostility or opposition" included peaceful activity within its ban. The fact that the same words had previously been upheld with reference to Section two, did not perturb the court. Moreover, it admitted the constitutionality of Section two, but reversed the conviction on that count, too, because the trial court erroneously permitted the reading to the jury of Herbert Spencer's views on Communism. The court also pointed out that the defendant's response to questions by the magistrate, that he believed in overthrow of government by revolution where necessary, was not a public speech within the meaning of the statute.

In *State v. Diamond,*[191] the New Mexico court held a similar statute void for uncertainty and for violating the constitutional guaranty of free speech. The statute made it a felony to advocate the destruction of the federal, state, or municipal government or ". . . incite revolution

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187. *Id.* at 269, 106 Atl. at 148 (italics supplied).
188. 93 N. J. L. 485, 108 Atl. 318 (1919).
189. *Ibid.* Minturn and Kalisch, JJ., dissented.
190. 95 N. J. L. 337, 112 Atl. 611 (1921). See also the dozen Montana court decisions on the sedition act of that state, including State v. Kahn, 56 Mont. 108, 182 Pac. 107 (1919) (conviction affirmed, D having said "This is rich man's war. Hooverism is a joke. Lusitania was carrying munitions").
191. 27 N. M. 477, 202 Pac. 988 (1921).

against or opposition to such organized government."[192] In reversing the judgment sentencing the defendant to the penitentiary, the court held that the statute covered advocacy of peaceful opposition or revolution, and destruction of the Government by peaceful means. Conceivably destruction could be accomplished peacefully, but there seems no doubt that in time of war legislators and citizens alike were thinking only of the bloody variety of revolution, an example of which they understood to exist in Russia. In comparison with the 1920 Iowa decision of *State v. Gibson*,[193] in which unfavorable comments toward the Y. M. C. A. and Red Cross (and God) comprised a large part of the evidence upon which the conviction was based and the conviction sustained, the *Diamond* case seems surprisingly liberal.

On the other hand, the use of the word "sedition" in an indictment caused a reversal in a 1928 Kentucky[194] case. The indictment charged sedition, which was defined by Section two of the statute, but the offense the indictment described, Section seven, concerned intimidation by threats or violence of any state officer discharging his duty. The defendants had threatened an officer who had warrants for their arrest, and the evidence proving that offense was apparently sufficient, but the use of the word "sedition" was held fatal. The defendants had been sentenced to three and ten year terms, which might have had a bearing on the decision.

In Pennsylvania there were several convictions under the sedition statute. In addition to some cases in the immediate post-World War years,[195] other cases show convictions at a later date. In *Commonwealth v. Widovich*,[196] the conviction of four Communists was affirmed, the legal issue being whether belonging to an organization which advocated a proletarian dictatorship to be forcibly established constituted the offense. The opinion defended the statute against all claims of violation of either the state or Federal Constitution. The court pointed out that the statute did not cover advising persons to commit such crimes as trespass or bootlegging (this was near the close of the prohibition era) but only the advocacy of crimes which sought to change the form of government.

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192. Laws 1919, c. 140.
193. 189 Iowa 1212, 174 N. W. 34 (1920).
194. Gregory v. Commonwealth, 226 Ky. 617, 11 S. W. (2d) 432 (1928).
195. Commonwealth v. Belevsky, 79 Pa. Super. 12 (1922); Commonwealth v. Blankenstein, 81 Pa. Super. 340 (1923).
196. 93 Pa. Super. 323, *aff'd*, 295 Pa. 311, 145 Atl. 295 (1929), *cert. denied*, 280 U. S. 518 (1929).

In *Commonwealth v. Lazar*,[197] the Pennsylvania court reiterated its previous position. Lazar, a naturalized citizen, was a member of the Communist party. In 1928 he spoke from a soapbox in behalf of the candidacy of William Z. Foster, the party presidential nominee, and stated that the United States had murdered Sacco and Vanzetti, that the Government was a strike breaking government, that young workers should be taught to shoot down the persons who order them to war, and that for Communists to get the power it would be necessary to resort to revolution and force. The court denied the argument that Lazar referred to a revolution of the majority made necessary by the anticipated wrongful refusal of the minority to relinquish control even in the face of a constitutional majority of Communists. The court also upheld the constitutionality of the statute,[198] and ruled that the section under which Lazar was convicted, that of advocating the propriety of engaging in violence to accomplish a change in government, did not require any particular intent, so Lazar could not escape punishment by claiming that he intended to refer only to the future and not to the present. For this construction it was necessary to distinguish an earlier Pennsylvania sedition case[199] which had required the element of intent, but the court urged that the earlier case had not involved the section under which Lazar was convicted.

Of the cases reported under the anarchy statutes, *Gitlow v. New York*[200] is the best known. The defendant was charged under the statute making it a felony to advocate that organized government should be overthrown by force or by assassination or other unlawful means. He had printed and circulated pamphlets entitled "The Left Wing Manifesto" and "Revolutionary Age" in which the necessity of a proleterian revolution was stressed. No evidence was offered of any resulting criminal activity, yet his conviction was upheld, not only by the state courts[201] but also by the United States Supreme Court. In the latter Court, it was held by the majority that the *Schenck* test of present danger applied only

197. 103 Pa. Super. 417, 157 Atl. 701 (1931).
198. Act of June 26, 1919, P. L. 639, as amended by Act of May 10, 1921, P. L. 435, P. S. (1936) tit. 18, § 121.
199. Commonwealth v. Belevsky, 79 Pa. Super. 12, 15 (1922).
200. 268 U. S. 652 (1925). See also People v. Ferguson, 234 N. Y. 159, 136 N. E. 327 (1922), reversing the conviction upheld in 199 App. Div. 642, 192 N. Y. Supp. 24 (1922), which had affirmed the conviction of Ferguson and Ruthenberg, who had been jointly indicted with Gitlow.
201. 195 App. Div. 773, 187 N. Y. Supp. 783 (1921), *aff'd*, 234 N. Y. 132, 136 N. E. 317, and 234 N. Y. 539, 138 N. E. 438 (1922).

to situations where the legislature had condemned acts involving the danger of substantive evil, without any reference to the language used, and did not apply to situations where the statute itself had determined the substantive evil arising from a certain class of utterances. Hence, in the latter situation and in the case at bar, the likelihood of the evil resulting was not necessary to a conviction, nor was it a defense that the force advocated was not to be immediately sufficient, so long as it included acts of violence. Justices Holmes and Brandeis dissented on the ground that the present danger test should apply, and that no present danger existed. Holmes concluded:

> "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[202]

In several states[203] the statutes expressly mention insurrection, but the decisions under the Georgia act have attracted particular attention. In *Carr v. State,*[204] the Georgia Supreme Court, with one judge dissenting,[205] in 1932 sustained a judgment overruling demurrers filed by two persons indicted for "circulating various Communist pamphlets with intent to incite insurrection and overthrow by violence the lawful Georgia state government." The court upheld the constitutionality of the statute and quoted excerpts from the pamphlets to show that actual forcible revolution was urged. The defendants urged that their statements "against Bosses' wars" and "smash the National Guard, C. M. T. C. and R. O. T. C." were no more criminal than the common campaign phase "smash the political machine," but the court easily distinguished the latter as alone not advocating the overthrow of an organized government. In 1933, in passing upon a writ of error brought by the same defendants after their conviction, the court reiterated its former rulings in affirming the conviction.[206] The majority opinion declared that a statute is not unconstitutional because vague or indefinite, but that such defects can be urged only as ground for a demurrer on the theory that the allegations of the indictment failed to state an offense. The Georgia code provided that indictments were sufficient which followed the terms of the

202. 268 U. S. 652, 673 (1925).
203. Including Georgia, Florida, and New Jersey.
204. 176 Ga. 55, 166 S. E. 827 (1932).
205. Separately reported, Carr v. State, 176 Ga. 55, 167 S. E. 103 (1933). The dissent is based on the insufficiency of the indictment, not on the unconstitutionality of the statute.
206. Carr v. State, 176 Ga. 747, 169 S. E. 201 (1933).

statute in alleging the defense, or where so plain that the jury could easily understand the offense charged, and the court held the jury could easily understand the offense charged in the *Carr* indictments.

In *Dalton v. State,*[207] another 1933 decision, the Georgia court again overruled a demurrer to the sufficiency of an indictment under the statute. The indictment charged the defendants with circulating insurrectionary papers ". . . for the purpose of inciting insurrection . . . and to abolish . . . by violence . . . the lawful authority of the State of Georgia . . .," setting out the names of the pamphlets and their authors. The court held the *Carr* case controlling on questions of constitutionality, but independently of that case it again found the allegations of the indictment sufficient, and held that the certainty required in indictments for libel was not required in such cases, so an inclusion of the pamphlets *verbatim* was not required.

In 1934, the Georgia Supreme Court handed down the decision of *Herndon v. State,*[208] destined to become a *cause celebre* among insurrection prosecutions. Herndon had been convicted of attempting to incite an insurrection. The evidence showed he was a Communist organizer, a Negro, and had on his person and in his room various Communist pamphlets similar to those figuring in the *Carr* case. One pamphlet advocated self-determination for the Black Belt, that the land be confiscated and turned over to the Negroes and that they be given the right of self-government, with an independent government; and that it was necessary that the Negro masses form a fighting alliance with the revolutionary white proletariat in the Revolutionary struggle against the ruling classes. In affirming the conviction the court upheld the constitutionality of the statute and refused numerous grounds of alleged error in the trial. One witness had called the defendant "darky" and the trial court had instructed him thereafter to use the word "defendant"; the defendant was denied the right to ask each juror separately whether he had any prejudice against the defendant because of his race, but the court had permitted this same question to be asked the jurors in panels of twelve. Other allegations of prejudicial statements by witnesses or by the court were refused, and a few alleged errors were held not reviewable for lack of proper exceptions. The court concluded that the jury was amply authorized to find that vio-

207. 176 Ga. 645, 169 S. E. 198. Russell, C. J., dissented, as he had done in the previous decisions.

208. 178 Ga. 832, 174 S. E. 597 (1934) (Russell, C. J., not sitting).

lence was intended, and that the existence of actual present danger of imminent overthrow was unnecessary as such plots could be suppressed in their incipiency.

On rehearing[209] the court affirmed its first decision. The defendant pointed out that the trial court had instructed that the statute covered only such advocacy as was to be acted upon immediately and that the evidence to warrant a conviction must show that immediate serious violence was to be expected or advocated; that the original decision of the court said that it was immaterial whether the authority of the state was in danger of being subverted or that an insurrection actually occurred or was impending; that it was unnecessary that the defendant advocated insurrection immediately or at any given time, but it was sufficient that he intended it to happen at any time, as a result of his influence. The defendant urged that the latter interpretation made the statute clearly unconstitutional under the *Schenck* doctrine. The court denied this and asserted that the phrase "at any time" was necessarily interpreted to mean "a reasonable time, within such time as one's persuasion . . . might reasonably be expected to be directly operative in causing an insurrection." The court refused to permit the constitutionality of the statute to be questioned, since such objection had not been made properly in the trial court and the Georgia authorities were settled that raising the question in the trial court[210] and getting a ruling thereon were prerequisites to raising it before the appellate court.

Law review comments[211] criticized the decision as failing to apply the "clear and present danger" test, and distinguished the Georgia statute from the New York statute which the *Gitlow* decision construed not to require a present danger. The decision remained for a time unmolested. In *Herndon v. Georgia,*[212] the United States Supreme Court refused to take jurisdiction because the defendant had failed to raise the constitutional issue properly in the trial court, justifying the state supreme court in refusing to consider the question on appeal. In refusing to discuss

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209. Herndon v. State, 179 Ga. 597, 176 S. E. 620 (1934) (Russell, C. J., not sitting).

210. An allegation of the particular clause of the constitution infringed and the way in which the statute infringed it, was also held necessary before raising the issue in the trial court would be sufficient to authorize appellate review of the statute's constitutionality.

211. Notes (1934) 34 COL. L. REV. 1357, (1936) 84 U. OF PA. L. REV. 256, (1935) 35 COL. L. REV. 1145.

212. 295 U. S. 441 (1935) (Sutherland, J., wrote the majority opinion; Cardozo, Brandeis, and Stone, JJ., dissented).

the merits of the case the Court stated that its rule necessitated a proper raising of the issue in the trial court before the action of the state appellate court in refusing to review it would be ground for appeal, except where the construction by the state appellate court was unanticipated, and *Carr v. State*[213] had shown how the state court would interpret the statute in the *Herndon* case. Subsequently, the constitutionality of the statute being raised in a *habeas corpus* hearing, the trial court refused to remand the defendant to the custody of the sheriff, who thereupon appealed to the Georgia Supreme Court, the court upholding the statute as not being too vague and indefinite to provide a sufficiently ascertainable standard of guilt.[214]

Again there was an appeal to the Supreme Court, which this time held that the statute, as construed by the Georgia Supreme Court, violated the due process clause of the Fourteenth Amendment in that no reasonably ascertainable standard of guilt was prescribed, no specific or definite act was forbidden, and vague and indeterminate boundaries were set to freedom of speech and assembly.[215] The majority view of the evidence was that Herndon was a confessed Communist organizer having in his possession various kinds of pamphlets, most of which were innocent and the others of which had a radical but not unlawful platform for the advancement of Negro rights, also containing some vague statements about revolution and struggle; that no evidence existed that Herndon distributed these pamphlets or advocated any forcible subversion in his speeches. Herndon was indicted under a section of the penal code which made no reference to force or violence, although such reference existed in the preceding section, also a part of the insurrection statute.[216] The opinion, after citing the Georgia court's interpretation of that section as requiring for conviction only that the defendant intended that insurrection should happen at any time (the Georgia court added "within a reasonable time" but this is not mentioned) in which his influence continued to operate as a cause, stated:

> "To be guilty under the law, as construed, a defendant need not advocate resort to force. He need not teach any particular

213. 176 Ga. 747, 169 S. E. 201 (1933).
214. Lowry v. Herndon, 182 Ga. 582, 186 S. E. 429 (1936).
215. Herndon v. Lowry, 301 U. S. 242 (1937).
216. GEORGIA PENAL CODE, § 55, defines insurrection as "combined resistance . . . when intended to be manifested by acts of violence;" § 56 does not contain the words "force or violence," but the Georgia court had held intended resort to force was an essential of the offense under § 56, the section under which Herndon was prosecuted.

> doctrine . . . indeed, he need not be active [in forming any group] if he agitate for a change in . . . government, however peaceful his own intent. If, by the exercise of prophesy he can forecast that as a result of a chain of causation . . . a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain. . . . Every person . . . who agitates for a change . . . in government, must take the risk that [if a jury think] he ought to have foreseen that his utterance might contribute in any measure to some future forcible resistance to the existing government, he may be convicted of . . . inciting insurrection."[217]

The four dissenting justices[218] upheld that statute as reasonably definite and not encroaching on freedom of speech or assembly. The dissent italicized some of the more violent passages from the pamphlets, passages the majority opinion failed to stress. Also quoted were excerpts from one book the majority had decided was irrelevant, which book openly advocated "revolutionary measures . . . agrarian revolution . . . uprising." The dissent conceded there was no direct testimony that Herndon distributed this literature, but thought the evidence reasonably justified such an inference.

Even the Federal Government has made a few excursions into insurrection and sedition legislation. Generally prosecutions have been confined to war-time disturbances. Thus, in *Bryant v. United States*,[219] the circuit court of appeals affirmed the conviction of three persons (fifty-five had been indicted but only three convicted) for conspiring to overthrow and destroy by force the Government of the United States, and to levy war against it.[220] The defendants were officials of a secret labor order, and the evidence showed they had tried to promote resistance to conscription, even forcible resistance if necessary. A few members, but not the defendants, actually took a position in a canyon, armed to resist the conscription order. The evidence all concerned acts committed by the defendants prior to the passage of the Selective Service Act but the court said that since the conspiracy was not shown to have ceased when the Act was passed, it was presumed to have continued thereafter, even though it became illegal only upon the passage of the Act!

Peacetime, too, may see such prosecutions. In *Albizu v. United*

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217. 301 U. S. 242, 262 (1937).
218. McReynolds, Sutherland, Butler, and Van Devanter, JJ., speaking through the latter.
219. 257 Fed. 378 (C. C. A. 5th, 1919); see also Enfield v. United States, 261 Fed. 141 (C. C. A. 8th, 1919).
220. Act of March 4, 1909, c. 321 (U. S. PENAL CODE § 6).

States,[221] the circuit court of appeals in 1937 affirmed the conviction of eight Puerto Ricans on charges of conspiracy. The defendants, members of the Nationalist party of Puerto Rico, had by speeches and in newspapers and pamphlets urged their countrymen to arm themselves to bring about "by force and violence" independence from the United States. These exhortations allegedly resulted in the killing both of policemen and Nationalists. None of the eighty-six assignments of error were sustained as prejudicial and the opinion quoted liberally from many of the speeches and writings, including the speech by one defendant that they should have received President Roosevelt with bullets and not with flowers. On June 1, 1937, only five weeks after its *Herndon v. Lowry* decision, the United States Supreme Court denied *certiorari.*[222] The Civil Liberties Union was there as *amicus curiae.*

Examined collectively, the many decisions interpreting the syndicalism, anarchy, sedition, and insurrection statutes show a wide divergence, from construing "opposition" to mean only forcible opposition,[223] the statutes therefore being constitutional, to holding that "destruction" and "revolution" include peaceful revolution and non-violent destruction, the statute containing those words thereby being unconstitutional.[224] Again, words contained in one section of a statute were denounced although a previous decision of the same court had upheld the same words in an adjoining section of the same statute.[225]

The important rulings on the admissibility of evidence and proof of illegal advocacy have been placed alongside the various pronouncements as to constitutionality, but they are of little value in harmonizing the decisions. Indeed, they are equally conflicting, one decision holding that the fact that the Communist party advocates sabotage is common knowledge, while another decision requires proof of such advocacy in each individual prosecution. A legislative attempt to simplify the situation by naming specific groups commonly known to offend was held unconstitutional as discriminatory. No adequate explanation of these cases can be given unless it includes the time and place of each decision, for these considerations assume unusual importance.

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221. 88 F. (2d) 138 (C. C. A. 1st, 1937).
222. Campos v. United States, 301 U. S. 707 (1937) (memo) (Campos was surname of Pedro Albizu, hence the different title in lower court opinion).
223. *Contra*: Stromberg v. California, 283 U. S. 359 (1930).
224. State v. Diamond, 27 N. M. 477, 202 Pac. 988 (1921).
225. State v. Gabriel, 95 N. J. L. 337, 112 Atl. 611 (1921).

Although insurrection statutes had existed in some states since the Civil War period, they had become dead letters. The assassination of President McKinley, although it caused considerable excitement, resulted principally in legislative acts creating anarchy statutes. The possibility of determined prosecution was small until the period of the World War, when opposition to the Government was intolerable in the face of the accepted need for united action, patriotic ferver then making possible convictions under all kinds of statutes. With the close of the War period, the reaction against war-time restriction would ordinarily have eased the situation, but the post-war slump with its continued and growing activity of radical groups in the west caused even more statutes and prosecutions.

Prosecutions were the more determined as the agitation of I. W. W. groups became more and more prevalent. Along the west coast the prosecutions reached their peak. The reported cases show more than twenty-five separate decisions from California alone, nearly all sustaining convictions under the syndicalism statute of that state.

The arrival of better times and the prosperity of the middle and late 'twenties eased the economic plight of the submerged groups, leaving little encouragement to the agitator. As the activity of the radical orders subsided so did the public anxiety. Prosecutions were dropped or resulted in acquittals or probation, and appeals to the higher courts brought reversals to persons convicted in the preceding years. The decisions of this period show several courts upholding the statutes in unqualified terms, but releasing the defendants on various technicalities; the Oklahoma court relied on insufficiency of evidence,[226] the Idaho court achieving the same result by reversing its interpretation of the statute so as *not* to include within its purview the activity shown by the evidence.[227] Elsewhere the later decisions construed the statute to cover even a wider range of activity so that it became unconstitutional. The statutes became virtual dead letters. Of three reported cases arising in one period, reversals were had in two.[228] An ordinarily reliable source[229] reports that from June, 1926, no new prosecutions were brought under these statutes anywhere in the United States, and appeals from convictions of previous

226. Wear v. State, 30 Okla. Cr. 118, 235 Pac. 271 (1925); Berg v. State, 29 Okla. Cr. 112, 233 Pac. 497 (1925).
227. *Ex parte* Moore, 38 Idaho 507, 224 Pac. 662 (1924).
228. Legis. (1935) 35 COL. L. REV. 917, 921.
229. *How Goes the Bill of Rights?* (pamphlet, Am. Civ. Lib. Union, June, 1936).

years were meeting reversals. An American Civil Liberties Union pamphlet of 1928[230] denounced Pennsylvania as the only state in the union in which a sedition or syndicalism statute was still actively used. Lazar's conviction in Pennsylvania, while speaking in behalf of the Communist opponent of Herbert Hoover in the 1928 campaign, seemed quite unnecessary.

With the onset of the depression after 1929, the activity of radical organizers again bore fruit. Continued increase of unemployment and gloom made new converts easy to gain, and public concern mounted as rapidly as the membership. The result was a revival of prosecutions, principally along the west coast where the organizations were most strongly entrenched and where industrial unrest was very acute, but where the I.W.W., had been the principal target before, the Communists now bore the brunt of the prosecution.

Another example could be ventured: the Kansas prosecutions. A 1922 decision showed a possibility of relaxation by the Kansas court of its 1921 stand, but when 1924 saw its affirmance of a conviction based principally on the defendant's I. W. W. membership, the United States Supreme Court in 1927 held the statute unconstitutional as administered in that case. 1927 was the period when such prosecutions and the apparent need for them were at a very low ebb. The *Herndon* case is another but similar story, with the Supreme Court forced to distinguish its holding from its own *Gitlow* decision of twelve years earlier. With the return of relative optimism under Roosevelt, the prosecutions again tapered off.

An attempted examination of the cases as to legal doctrine soon loses the searcher in a maze of discussions of nice problems of precedents, of proper objections, and of improperly admitted evidence, but an analysis of some of these collateral matters shows that some evidence admissible during the very early 'twenties became inadmissible in prosecutions a few years later. Even the two decisions of the United States Supreme Court in the *Herndon* case add a little light. Although the decisions were based on entirely different grounds the opinions of seven[231] of the nine justices reached the same result in both cases. The shifting of two justices,[232] whether due to a change in their own attitudes or their belief

230. *The Shame of Pennsylvania* (1928).
231. Sutherland, McReynolds, Butler, and Van Devanter, JJ., joined in the majority opinion in the first decision and dissented from the second decision. Cardozo, Brandeis and Stone, JJ., dissented in the first instance.
232. Hughes, C. J., and Roberts, J.

as to the legal rules involved, reversed the position of the court and set aside the Georgia conviction. The statements of facts contained in the opinions are unreliable[233] but an independent source[234] reveals that some of the differences noted by the courts between the quality of the acts of one defendant as contrasted to the evidence in a previous case, were very slender reeds upon which to base a difference of result.

The latter half of 1937 added two more reported cases to the list construing the syndicalism and sedition statutes. In *Butash v. State*,[235] the Indiana court reversed a conviction under that state's sedition act,[236] for advocating and inciting the overthrow of the Government by force. The defendant, a magazine solicitor, in a private conversation had told a storekeeper that he favored the overthrow of the Constitution and the United States Government by force, even though blood be shed. The storekeeper called a meeting in a nearby hall, and the defendant that night addressed an audience of forty persons, speaking on the same topic. In answer to questions the defendant said a new party was needed by which the middle and lower classes could take over the Government, the purposes of the party including the forcible overthrow of the Government by armed force, if necessary. The court defined "advocate" as "to plead in favor of; to defend by argument before a tribunal or the public"[237] and held that the defendant had merely stated his opinions without urging their adoption, and therefore had committed no offense, the statute being directed against advocacy. The court concluded:

> ". . . we are almost persuaded to say that the whole incident was so trivial as to be beneath the notice of the law."

In *People v. Chambers*,[238] the California court once more discussed the criminal syndicalism statute, boldly upholding the trial court's action in admitting various pamphlets and testimony over the objection of the defendants, and upholding the exclusion of testimony offered by the defendants, and holding that the pamphlets and red flags found in the defendant's possession were clearly insurrectionary in nature, but reversing the conviction of joining and belonging to an association advocating crim-

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233. Notice, for example, the gross dissimilarity between the evidence as portrayed by the majority and minority opinions in the Herndon case; also that the majority dismissed as immaterial a book which the minority considered quite important.
234. See the American Civil Liberties Union pamphlets hereon.
235. 212 Ind. 492, 9 N. E. (2d) 88 (1937).
236. IND. STAT. ANN. (Burns, 1933) § 10-1302.
237. A dictionary definition.
238. 22 Cal. App. (2d) 687, 72 P. (2d) 746 (1937).

inal syndicalism, because the same defendants had been acquitted under an indictment charging the publishing of criminal syndicalism propaganda. The court reaffirmed the constitutionality of the statute, harmonizing that holding with the *Herndon* and *De Jonge* decisions. The charges against two of the accused group had been dismissed before trial; seven others had been acquitted under both indictments, and the remainder had been acquitted under one and convicted under the other, which conviction being set aside by the court meant the total failure of the entire prosecution. The result of this case, in the face of the fact that the accused were members of a large group with a headquarters filled with Communist pamphlets, who had denounced the American Government and Flag, praised the red flag, and said that the Government should be *overthrown by violence,* creates a noticeable contrast to earlier California decisions, despite the explanation afforded by the court's interpretation of the prior acquittal.

Furthermore, prosecutions for these offenses did not await the enactment of statutes. In *Respublica v. Dennie,*[239] the prosecution was for criminal libel. The defendant had issued a pamphlet denouncing democracy, and the jury was charged that if the words were "honestly meant to inform the public mind, and warn against supposed dangers in society," the defendant should be acquitted. Assuming that the verdict was based on the evidence, it might, nevertheless, be mentioned that the trial occurred in Pennsylvania in 1805, only four years after the hated Sedition Act had expired by its own terms. A still better example is reported in *People v. Most,*[240] in which the defendant had published in his newspaper in New York City, on September 7, 1901, an article describing the government as one of and by murderers, and urging its overthrow by murder, poison, and dynamite. According to the defendant, the article was merely reprinted from an original publication fifty years earlier, and was written against monarchies, although in words applicable to all governments. On the date of the publication by the defendant, President McKinley was assassinated. The defendant tried to withdraw the copies for fear of their misinterpretation. He was convicted under the general statute which declares:

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239. 4 Yeates 267 (Pa. 1805), 2 Am. Dec. 402. (The indictment was for criminal libel, for seditiously attempting to bring into hatred and disrepute the independence and the Constitution of the United States. Verdict, not guilty). It is beyond the scope of this article to discuss prosecutions based, at least ostensibly, on criminal offenses entirely unconnected with political opinion or activity: The Haymarket convictions, the Sacco-Vanzetti case, etc.

240. 171 N. Y. 423, 64 N. E. 175 (1902), *aff'g,* 36 Misc. 139, 73 N. Y. Supp. 220 (N. Y. City Cts. 1901).

> "A person who wilfully and wrongfully commits any act . . . which seriously disturbs or endangers the public peace for which no other punishment is expressly prescribed by this code, is guilty of a misdemeanor."

The court ruled a breach of peace could be committed by written words. Also, that the defendant was not charged with an actual breach, but with an act which seriously endangered the peace, the public peace being endangered when a breach is *likely* to occur in the ordinary course of events. No constitutional right was considered infringed by the conviction. The lower court opinion reads:

> "The murderer of our late President . . . declares that he was instigated . . . by the teachings of Emma Goldman. The advocacy of crime is itself criminal. . . . It is not necessary to trace any connection between the defendant's article and any overt criminal act; his advocacy of murder is itself criminal. The offense here, in the eye of the law, is precisely the same as if [the assassination] had never occurred. . . . It would be well if the laws of this country were such that it could be said truthfully, that no anarchrist can breathe the free air of America."[241]

Here the court denounced a foul murder, denounced the defendant as a potential instigator of more murders, then assured him that the murder had no effect in determining either his guilt or punishment. Despite this protestation as to the attitude of the law toward the defendant, the opinion itself shows that the coincidence of assassination marked the defendant for prosecution, although his articles otherwise would probably have gone unnoticed.

Similarly, the Federal Government has from time to time inflicted penalties on Communists, without recourse to any penal statute. A strong weapon has been the deportation power. *Turner v. Williams*[242] upheld as constitutional a Congressional Act[243] providing for the exclusion of aliens who advocated the forcible overthrow of the Government. Again, in *United States v. Olsen*,[244] the Government procured the cancellation of a certificate of naturalization that had already been issued to the defendant, because he was a member of the I. W. W. Two witnesses had signed Olsen's petition, but at the hearing they qualified their statement as to his good character by saying he had participated in I. W. W. strikes during the war. The Government contested the naturalization

241. 36 Misc. at 145, 73 N. Y. Supp. at 224.
242. 194 U. S. 279 (1904) (anarchist).
243. Act of March 3, 1903, c. 1012, § 2, 32 STAT. 1213.
244. 272 Fed. 706 (W. D. Wash. 1921).

on that ground, but the trial court found the qualification not based on fact so had granted the certificate. In holding the certificate had been illegally procured the opinion pointed out that the Naturalization Act required affidavits that the applicant was of good moral character and qualified in every way to be a citizen, and expressly disqualified those who belonged to an organization which, like the I. W. W., opposed the Government. The qualified recommendations were, therefore, insufficient, and the naturalization was set aside.

It is well settled that deportation proceedings are civil, not criminal, in character, but they provide an even more effective means of getting rid of politically troublesome non-citizens. The statute construed in *Turner v. Williams,* was enacted in 1903 and was aimed at anarchists, the country having been aroused by the assassination of President McKinley late in 1901. But the troublesome doctrines advocated during the World War, and the Communist Revolution in Russia, resulted in broader enactments which are still in force. The present federal statute[245] excludes from admission to the United States, and provides for the deportation of, any alien who at any time after entering this country, is found to have been at the time of entry or to have become thereafter a believer in, advocate or teacher of, or member or affiliate of any group or organization advocating[246] or teaching, any of the following doctrines:

(a) Anarchy.
(b) Opposition to all organized government.
(c) Overthrowal by force or violence of the Government of the United States or of all forms of law.
(d) Assassination of government officials.
(e) Sabotage.
(f) Unlawful damage, injury or destruction of property.

It will be noted that the foregoing civil statute extends to all the activities prohibited by state penal statutes on anarchy and syndicalism. Moreover, deportations on any of the above grounds can be brought at

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245. Acts, Oct. 16, 1918, c. 186, §§ 1-3, 40 STAT. 1012; June 5, 1920, c. 251, 41 STAT. 1008, 8 U. S. C. § 137. While not in the same words, the statute as to admissibility to citizenship (Act of June 29, 1906, c. 3592, § 7, 34 STAT. 598, 8 U. S. C. A. § 364) and the statute prescribing the form of the petition for naturalization (Act of June 29, 1906, c. 3592, § 4, 34 STAT. 596, 8 U. S. C. A. § 378) are similar in effect. The difference is explained by the difference in the dates of passage. See Act of May 10, 1920, c. 174, §§ 1-3, 41 STAT. 593, 594, 8 U. S. C. § 157 (deportation of alien violators of war time statutes against injury to war material, threatening the president, or trading with the enemy).

246. Writing, publishing, or displaying matter favoring any of the forbidden doctrines is specifically included as a ground of exclusion and deportation.

any time, rather than being limited to the five year limitation statute applying to deportation generally.[247]

In the first deportation proceedings against Communists, proof was required in each case that the Communist Party of the U. S. A. did in fact advocate the overthrow of the United States Government by force and violence, before an alien would be deported because of party membership.[248] The majority of subsequent decisions tended to consider the fact of such advocacy as being established as a matter of law, so proof of membership was of itself virtually sufficient for deportation;[249] however, some evidence of advocacy was also present. A few decisions required greater proof.[250] In *United States ex rel. Yokinen v. Commissioner of Immigration,*[251] the circuit court of appeals held that even past Communist membership justified deportation. In that case the alien had joined the party after entering this country, and had remained a member until expelled by the party because of his attitude toward negroes. Two days after his expulsion, he was arrested for deportation. He resisted, arguing that the statute only extended to membership at the time of entry or at the time of arrest. In rejecting that contention, the court said:

> "If Congress intended membership at the time of arrest to be the criterion it would have said so."[252]

The Supreme Court denied *certiorari,* giving rise to the assumption that it approved the *Yokinen* doctrine.

The following year the same problem arose in the attempted deportation of Joseph Strecker, an alien who entered this country in 1912, and joined the Communist party in 1932, paying dues through February, 1933. Strecker made no further payments, so by party rules automatically ceased to be a member three months later. The following No-

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247. The limitation statute itself says "any alien who at any time after entry shall be found advocating [syndicalism, anarchy, etc.] . . . shall be deported." Act of Feb. 5, 1917, c. 29, § 19, 39 STAT. 889, 8 U. S. C. A. § 155. Guiney v. Bonham, 261 Fed. 582 (C. C. A. 9th, 1919).

248. United States *ex rel.* Abern v. Wallis, 268 Fed. 413 (S. D. N. Y. 1920); Skeffington v. Katzeff, 277 Fed. 129 (C. C. A. 1st, 1922), *rev'g,* Colyer v. Skeffington, 265 Fed. 17 (D. Mass. 1920).

249 Ungar v. Seaman, 4 F. (2d) 80 (C. C. A. 8th, 1924) (held, precedents had established fact that (in 1919 or 1920) Communist Party was advocating forcible overthrow); Kjar v. Doak, 61 F. (2d) 566, 569 (C. C. A. 7th, 1932) (after citing earlier cases, held that in absence of evidence to contrary it will be presumed that party continues same advocacy).

250. *Ex parte* Fierstein, 41 F. (2d) 53 (C. C. A. 9th, 1930) (court refused to take judicial notice of character of Communist Party, and reversed deportation order because of insufficient evidence). See Legis. (1936) 84 U. OF PA. L. REV. 1020.

251. 57 F. (2d) 707 (C. C. A. 2d, 1932), *cert. denied,* 287 U. S. 607 (1932).

252. *Ibid.*

vember a warrant was issued for his deportation and, after hearings by the administrative tribunals of the Department of Labor, he was ordered deported. The district court denied his petition for *habeas corpus,* but the circuit court of appeals[253] reversed the order and remanded the cause, holding that whether the Communist Party advocated the forcible overthrow of the Government was a question of fact to be determined in each case, as the doctrine of the party changed from time to time. Hence, precedents of years before were not proof of present advocacy. The Supreme Court this time granted *certiorari,* and in *Kessler v. Strecker,*[254] ordered Strecker's release from custody on the ground that past membership in the Communist Party, existing neither at the time of entry nor at the time deportation proceedings were begun, was not a ground for deportation under the statute. In rejecting the *Yokinen* doctrine as to the meaning of the words "at any time after entry . . . is found . . . to have become," the Court said:

> "If Congress meant that past membership . . . was to be a cause of present deportation the purpose could have been clearly stated."[255]

In a strong dissent, Justices McReynolds and Butler vainly cited the *Yokinen* decision and the fact that the Court had then denied *certiorari* although the petition had alleged that

> ". . . proper construction of the statute requires that it be confined in its operation to aliens who are members . . . at the issuance of the warrant of arrest."[256]

The Court left undecided the question of whether the Communist Party does seek forcible overthrow of the Government, expressly stating that it was unnecessary to pass upon that question.[257]

The Government has another potent weapon in its supervision of the

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253. Strecker v. Kessler, 95 F. (2d) 976 (C. C. A. 5th, 1938), *rehearing denied,* 96 F. (2d) 1020 (1938) (Sibley, J., dissenting in the second hearing, favored judicial notice that the Communist Party advocates forcible overthrow, and asserted that the majority attempted to take judicial notice of a change in Party advocacy).

254. 307 U. S. 22 (1939) (circuit court's remanding to district court was error since Department of Labor had jurisdiction, but the reversal of deportation order is sustained).

255. *Id.* at 29. All questions of desirability aside, the Yokinen doctrine probably better interprets the literal meaning of the statute and the legislative intent behind its passage, than does the majority. If Congress meant that a former Communist who had been a member at the date of his entry could be deported after his severance of membership, then it probably also meant that such affiliation subsequent to entry would likewise justify deportation although severed before deportation proceedings began.

256. *Id.* at 38.

257. Without futile speculation on how the Court might have held, it can be noted that the lessening of opposition to Communism in many quarters, under

mails. This was used even in 1928, the postmaster of New York City excluding from the mails envelopes bearing a stamp reading:

"Protest against Marine rule in Nicaragua."

In *Gomez v. Kiely*,[258] the court refused to enjoin the postmaster's acts. Without deciding whether the stamp was obscene literature the court ruled that the plaintiff came into equity without clean hands so was not entitled to relief, since the stamps carried "the false impression that the United States is ruling Nicaragua by force, whereas the truth appears from the affidavit of the Secretary of State."

Many other regulations could be mentioned, including laws requiring loyalty oaths from teachers and government employees, and compulsory patriotic exercises for school children. Such laws require only a formal promise of that which is ordinarily a legal obligation not only on the part of the promisor but on the part of all citizens, and a breach of which may be met with penal sanctions regardless of the oath. The purely formal part could also be strictly enforced without exception and still not affect actual conduct or check subversive activity even by those promising loyalty. Such measures are treated adequately elsewhere,[259] but passing reference might be made to an almost forgotten federal statute of 1861, requiring every employee in the various federal departments to take an oath of allegiance to the government, any violation of which oath was punishable as wilful perjury.[260] This statute was upheld in a grand jury charge[261] which held that no definition of what constituted a violation had been given, that being left to judicial interpretation. The court observed:

> "Official oaths have heretofore generally been left without penal sanctions, their observance being secured only by the conscience of the officer; but we are admonished by recent atrocious examples, that the moral sense is no adequate security . . . and it is wise therefore to affix . . . the penalty of perjury. Such enactments ought to have existed from the beginning. If they had, and had been faithfully executed . . . the catastrophe in which we are now involved probably would have been prevented."

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the so-called United Front campaign against fascism, may be overcome by recent European developments, Russian aggression, and disclosures of the Dies Committee. If so, sanctions against Communists may again increase.

258. 27 F. (2d) 889 (S. D. N. Y. 1928).

259. *How Goes the Bill of Rights?* (pamphlet, Am. Civ. Lib. Union, June, 1936); *The Gag on Teaching* (April, 1936).

260. Act of Aug. 6, 1861, c. 64, 12 STAT. 326.

261. 30 Fed. Cas. No. 18,277 (C. C. D. Mass. 1861).

It is interesting to speculate whether Judge Sprague's confidence in the efficacy of the official oath is justified. Would such an oath, taken by all federal officers in and from the South, have prevented the War? Only if the custom of taking them had led them to believe the Federal Government paramount. Maybe the introduction of this enactment before 1861 would have itself helped widen the breach and hasten hostilities. Or, still, perhaps such an oath, strictly administered from the very founding of the republic, would have had no effect at all on the courses taken by Southern office holders when the question of secession finally became the paramount issue, especially since they had previously taken oaths not greatly dissimilar in form.