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No. 10.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES

---

October Term, 1925.

CHARLOTTE ANITA WHITNEY,
*Plaintiff in Error,*
*vs.*
THE PEOPLE OF THE STATE OF CALIFORNIA,
*Defendant in Erroı.*

**IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA.**

*BRIEF OF DEFENDANT IN ERROR ON REHEARING.*

### Foreword.

In view of the additional briefs filed and additional points made on behalf of plaintiff in error in recent months and subsequent to the filing of our *one* brief in this matter, which was addressed solely

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to the points made in plaintiff's opening brief, we deem it our duty both to the court and to the cause to ask leave to file this supplemental argument. We shall avoid repetition of the argument made in our first brief, which was directed principally to the original and main contention of plaintiff in error, as to the alleged unconstitutionality of the California Criminal Syndicalism Act, deeming that it will be sufficient to merely refer this court to the numerous decisions therein cited with the additional authority (since decided) of

*Gitlow* vs. *New York,* 45 Sup. Ct. 625.

## Jurisdiction.

In fairness and candor we deem it proper to state that we have entertained the view, and so intimated at the oral argument, that plaintiff in error had duly made and saved its objection to the invalidity of the *statute* itself, but *not* the unconstitutionality of its *application.* In other words, inspection of briefs filed on behalf of this plaintiff in the lower courts (reproductions of which have been recently filed herein) and her "assignments of error" will show that the only arguments made which at all impinge upon the Fourteenth Amendment are but three, to wit, (1) that the act is void for indefiniteness and the information in the language thereof insufficient; (2) that the act discriminates against those who desire a change in political and industrial conditions and favors those who oppose such change;

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and (3) that the act is an abridgement of the freedom of speech.

As a confirmation of the accuracy of this statement we refer to plaintiff's "Petition for Rehearing" in this court, and more particularly pages 3 to 6 thereof, wherein counsel summarizes the arguments made on her behalf in the state appellate tribunals, from which it is manifest that the sole point of attack was upon the law itself rather than its application. Plaintiff virtually concedes this, for on page 6 of the petition just referred to it is stated that all of these points were argued in this court "and *additional arguments* were adduced supporting plaintiff's in error contention that the statute *as applied in her case* violated the due process clause of the Fourteenth Amendment." (Our italics.) This is only too true, for many months after the original briefs were filed and after the decision of the *Gitlow* case, plaintiff for the first time raised the objection of the unconstitutionality of the application of the law. The vice of such proceeding as we view it is this. It is not contended that this act has been applied any differently in plaintiff's case than that of other persons prosecuted thereunder as was properly contended in that line of cases headed by *Yick Wo* vs. *Hopkins,* 118 U. S. 356, but the object seems to be to lead us far afield into the domain of voluminous and complex facts, the weight and effect of which were and can only be determined by

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our constitutional triers of fact, to wit, a jury. *The endeavor now appears to be to have this court weigh the evidence rather than adjudicate the validity of the statute.* Thus in the brief filed immediately prior to the oral argument and upon such argument, learned counsel for plaintiff presented this case to this court as to a jury, maintaining that plaintiff in error was innocent of the commission of acts upon which she was found guilty by a jury, further arguing that she was a mere passive spectator and that her criminality had been made to depend on the acts of other persons occurring both prior and subsequent to the date of the crime charged. We respectfully submit that this is ignoring the rule that decisions on question of fact by a jury can not be reviewed on a writ of error.

*Dower* vs. *Richards,* 151 U. S. 658;
*Chicago etc. Railroad Co.* vs. *Chicago,* 166 U. S. 226, 242.

"It is well settled in this court that a review of the judgment of a state court is confined to the assignments of error made and passed upon in the judgment of the state court brought here for review. The assignment of errors in this court can not bring into the record any new matter for our consideration."

*Harding* vs. *Illinois,* 196 U.S. 78;
*Waters-Pierce Oil Co.* vs. *Texas*, 212 U. S. 112.

It is not sufficient that the claim of right under

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the constitution is made in the briefs or oral arguments.

*Sayward* vs. *Denny,* 158 U. S. 180;
*Zadig* vs. *Baldwin,* 166 U.S. 485.

A party who has raised only *one* federal question in the state court can not come into this court and argue *another* which was not raised in any of the courts below, even though "an inspection of the record shows the existence of facts upon which the question might have been raised."

*Dewey* vs. *Des Moines*, 173 U. S. 193.

As we can not anticipate in advance the scope which this hearing may take, we deem it proper to now make reply *seriatim* to "Points I–X" made in the brief filed by plaintiff in error immediately preceding the last hearing of this matter. Before doing so it becomes necessary to briefly sketch the facts of this case.

## The Facts.

On or about August 16, 1918, plaintiff sent a ballot to the Socialist Party in Oakland, California, of which she was then a member, in which she voted for certain radicals (Bedacht, Taylor, Ragsdale and Dolsen) as delegates to the national convention of the Socialist Party at Chicago (pp. 205–206). These delegates were among other radicals at this convention (calling themselves the "Left Wing") who bolted the Socialist Party and organized the

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munist Labor Party of the United States. (P. 100.) On November 8, 1919, the secretary of the "Local Oakland, Communist Labor Party," directed a letter to the "California Communist Labor Party Convention, Loring Hall, Oakland, California," reading as follows:

> "This is to inform you that Local Oakland, Communist Labor Party, with 286 members in good standing, has elected the following 16 comrades to sit in this convention in accordance with the convention call."

Plaintiff's name was No. 12 on this list (p. 152) Witness Ragsdale, a member of Local Oakland, testified that this local had already endorsed the Communist Labor Party and had withdrawn from the Socialist Party (pp. 154–155). It was also established that she held a *membership card* at this time in said Oakland branch of the Communist Labor Party (pp. 190–191).

That plaintiff fully understood the purpose of the meeting is shown by her statement on the witness stand, viz: "It was a convention to formulate the principles and to put in existence the Communist Labor Party, a political party for California, to be a *branch* of the National Communist Labor Party." (P. 309.)

Plaintiff was the very first person to present a report. As chairman of the "Credentials Committee" she presented a report designating those authorized to sit in the convention. (P. 84.) The opening

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anthem of this convention, which was originally sung at the said Chicago meeting, was in part as follows:

"Glor-ious, Glor-ious,
We'll make the Bolshevik victorious;
Praise to the plutes, they're making more of us,
While Gene lies in prison for us all.

Long we've waited in the night,
Working for the dawning light,
*Now it's coming,* all unite,
*Rise, Rise, Rise!*

All who right and justice seek,
*Burst your bonds,* no longer weak,
*Unite and join the Bolshevik,*
*Rise, Rise, Rise!*"

It will be noted that the foregoing anthem is the very antithesis of the national anthem which is usually sung at conventions and assemblages of American citizens. At the very threshhold it shows the temper and the spirit as well as the purpose of this organization. It contains, not merely language of *incitement,* but even of *exhortation,* to rise and join and making common cause with the Bolshevik or Communist Party of Russia, and to follow their tactics in America in effecting the release of Debs.

Plaintiff was also a member of the "Resolutions Committee" (Folio 128), and signed certain "Resolutions Reported Out By This Committee," (Folios 145 and 147). While it is true that certain of these

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resolutions pointed out the advantage of political action, they did not *exclude other means* calculated to promote the ends of the organization. Indeed, one recommended *forcing the release* of class war prisoners (p. 103).

Plaintiff was elected one of two alternate members of the governing body of the organization, to wit, the State Executive Committee (p. 121). Immediately thereafter, the constitution of the state organization was adopted (p. 121).

The first two sections read as follows:

> "Section 1. The name of this organization shall be The Communist Labor Party of California.
>
> "Section 2. It shall be *affiliated with the Communist Labor Party of the U. S.* of America and *subscribe to its Program, Platform, and Constitution.* Through this affiliation it shall be *joined with the Communist International of Moscow.*"

It is unnecessary to quote further from this document, for the language just quoted can mean only one thing and that is that the Communist Labor Party of California affiliated with the Communist Labor Party of the United States and the Communist International of Moscow, whose general history is a matter of common knowledge. The California branch of this party *adopted by reference* the "Program, Platform, and Constitution" of the National Communist Party, and these

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ments thereby became a part of its organic institution, just as much as though they were included *haec verba* in its constitution.

> "The Communist Labor Party of the United States of America declares itself in full harmony with the revolutionary working class parties of all countries and stands by the principles stated by the Third International formed at Moscow.
>
> * * * * *
>
> With them it also fully realizes the *crying need for an immediate change* in the social system; it realizes that the time for parleying and compromise has passed; and that now it is only the question whether all power remains in the hands of the capitalist or is taken by the working class.
>
> The Communist Labor Party proposes the organization of the workers as a class, the *overthrow* of capitalist rule and the conquest of political power by the workers. The workers organized as the ruling class, shall, through their government make and enforce the laws; they shall own and control land, factories, mills, mines, transportation systems and financial institutions. All power to the workers!
>
> * * * * *
>
> The Communist Labor Party of America declares itself in complete accord with the principles of communism as laid down in the Manifesto of the Third International formed at Moscow. (Rec. p. 172.)
>
> * * * * *
>
> The working class must organize and train

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itself for the capture of state power. (Rec. p. 172.)

*     *     *     *     *

The Dictatorship of the Proletariat shall transfer private property in the means of production and distribution to the working class government, to be administered by the workers themselves. It shall nationalize the great trusts and financial institutions. It shall abolish capitalist agricultural production.

The present world situation demands that the revolutionary working class movements of all countries shall closely unite.

The most important means of capturing state power for the workers is the action of the masses, proceeding from the place where the workers are gathered together—in the shops and factories. The use of the *political* machinery of the capitalist state for this purpose is only *secondary.*

*     *     *     *     *

The years of Socialist activity on the politcal field have brought no increase of power to the workers. Even the million votes piled up by the Socialist Party without any proportionate representation. *The Supreme Court, which is the only body in any government in the world with power to review legislation passed by the popular representative assembly, would be able to obstruct the will of the working class, even if Congress registered it, which it does not.* The constitution, framed by the capitalist class for the benefit of the capitalist class, can not be

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amended in the workers' interest, no matter how large a majority may desire it. (p. 173.)

*Not one of the great teachers* of scientific Socialism has ever said that it is possible to achieve the Social *Revolution by the ballot.*

* * * * *

In any mention of *revolutionary* industrial unionism in this country, there must be recognized the immense effect upon the American Labor movement of the propaganda and *example* of the INDUSTRIAL WORKERS OF THE WORLD, whose long and *valiant struggles* and heroic sacrifices in the class-war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and *pledge* them *our wholehearted support* and cooperation in their struggles against the capitalist class." (Rec. p. 176.) (Our italics.)

A very brief illustration of the propaganda thus endorsed will be found in the report of Lambert, the secretary of the I. W. W., viz:

"*To the Delegates of the Tenth Convention of the I. W. W.*

FELLOW WORKERS: In submitting the financial report of the Wheatland Hop Pickers' Defense Committee, I believe that it would not be out of place to give some account of the efforts made to effect the release of our imprisoned Fellow Workers. They were tried and sentenced by the Superior Court of Yuba County, State of California, to life imprisonment for

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their activities in forcing better working and living conditions in the Agricultural Industry of California. An appeal was taken to the Third District Appellate Court and the lower court was upheld. The case was then carried to the Supreme Court of the state for a rehearing, but a rehearing of the case was refused. Agitation and action on the job was continually carried on by the members of the I. W. W. *and the State of California has already paid eight million dollars per year (the state's own figure) since 1913 for holding Ford and Suhr in prison.* Early in 1915 the case came up on a petition for pardon before the Governor. The matter, as far as Governor Johnson was concerned, lay dormant for over nine months. He then made the statement that he would not consider the cases of Ford and Suhr further until sabotage and threats of sabotage were stopped. It is not generally known that more than forty members of the I. W. W. languish in prisons of California, serving sentences ranging from one to six years, for their activities, nor that two of our members have been killed in the fight with the employing class of California for the freedom of Ford and Suhr. These things have not dampened our spirits in the least. Nor have they altered our determination to keep *banging away at them* until either Ford and Suhr are free, or that we are all in prison with them. We do not want any money (fol. 310) from the General Organization; we can get along without that, but what we do want is 'Men, and lots of men, who are willing to help us *battle* the employing class of California by

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*any* and all *means* at our command, for the freedom of Richard Ford and Herman Suhr.'

Yours for the O. B. U.,

C. L. Lambert,
Secretary."

(Our italics.) (p. 231).

The record shows that the example of this latter organization, thus endorsed, included the use of incendiary bombs (265), burning of barns and hay stacks (266), poisoning of cattle with cyanide of potassium and injuring fellow workers who would not join them by putting lye in their shoes (271), crop destruction by sowing noxious weeds and destruction of machinery by use of emery dust (228). To meet this situation and as a matter of self-preservation, the State of California enacted its Criminal Syndicalism Law.

That plaintiff's advocacy of the example of the I. W. W. was not merely constructive, and that she was in entire sympathy with the I. W. W. and familiar with its leaders and practices, is indicated by the following facts:

A former member of the I. W. W. testified that he knew her, and had seen her several times in San Francisco at I. W. W. headquarters as early as July, 1918 (p. 274). She was present at I. W. W. headquarters at the time San Francisco police officers raided the place and carried Diamond and one, Stredwick, off to jail (p 281). She also discussed

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with Diamond the circulation of defense letters on behalf of the I. W. W. prisoners in Sacramento (p. 281–2). She admitted that she corresponded with Esmond, an I. W. W. in San Quentin and Fort Leavenworth prisons (p. 315) and also with Stredwick (p. 316), above alluded to.

That she not only assisted in organizing, but actually became a member of Communist Labor Party is shown by the testimony of the secretary of the Oakland Local branch.

But her membership even up to the time of trial is conclusively established by her bold admission on the witness stand, viz:

> **"Q. You are a member of the Communist Labor Party?**
> **A. I am."** (p. 310.)

This alone is sufficient evidence as to the main issue of membership. It was not necessary for the state to prove that plaintiff herself committed any other act. As said by this court in

*Aikens* vs. *Wisconsin,* 195 U. S. 194,

construing a statute prohibiting a combination of two or more persons for the purpose of maliciously injuring another in his reputation, trade or business:

> "The statute is directed against a series of acts, and the acts of several, the acts of combining, with intent to do other acts. *'The very plot is an act in itself.'* * * * No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most

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innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law." (Our italics.)

"The gist of the offense is the criminal confederacy, and it has been stated that if the word 'conspiracy' were substituted for the words 'organization, society, group or assemblage,' the meaning of the law would be in no wise changed. To charge persons with being members of a society of persons organized to advocate, teach or aid and abet criminal syndicalism is in effect to charge them with conspiring to advocate, teach or aid and abet criminal syndicalism. Such conspiracy is complete *without* the commission of any overt act.

* * * * *

"It is not the character of the system to be established, but the means advocated and employed by the conspiracy in effecting its ultimate object, that is material in the prosecution, for, it is said, however beneficient may be the object of an organization, the conspiracy is criminal if it advocates the accomplishment thereof by unlawful acts of force and violence or unlawful methods of terrorism."

23 California Jurisprudence, pp. 1110–1112.

That plaintiff in error did not withdraw from this party after it adopted the platform of the National Communist Party and endorsed the example and

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conduct of the I. W. W., is shown by her above admission and by the testimony of the secretary of the convention, Taylor, to the effect that she was present at the second meeting of the Executive Committee in San Jose about December 9, 1919 (p. 125), and attended another meeting "about a week ago" (p. 128). In other words, plaintiff did not withdraw even after her indictment and arrest, but was still a member at the time of the trial. Police Inspector Kyle saw her on five different occasions at Loring Hall, the C. L. P. headquarters—November 17, 18 and 19, some time in December and January 5th. (Folio 277.) This same witness testified that the police took a "ton" of literature and printed propaganda from these same headquarters (281), numerous excerpts of which are in the record, showing the same to be of the most inflammatory, revolutionary and syndicalistic nature. Among these are the following to which we shall, for sake of brevity, refer the court to the record for an illuminating lesson as to nature and evils of syndicalism:

"Syndicalism" by Ford & Foster, pp. 216–219.
"Sabotage" by Walker C. Smith, pp. 250 to 254.
"Sabotage" by Emile Pouget, pp. 246–249.
"The Revolutionary I. W. W." by Perry, pp. 233–234.
"The I. W. W. Its History, Structure and Methods," by Vincent St. John, p. 234.
"The General Strike," by William D. Haywood, pp. 243–245.

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"Sabotage," by Elizabeth Gurley Flynn, pp. 272–274.

We submit that the record abundantly establishes the two principal issues of fact, to wit, (1) membership and (2) the criminal character of the organization. In other words, the foregoing statement which is the mere sketching of the record, shows that plaintiff was one of the most active organizers and members of the Communist Labor Party of California, which was affiliated with the Communist Labor Party of the United States, and was at the same time a member of Local Oakland, the Communist Labor Party from which she was a delegate to the convention which formed the state party; that her activities in connection therewith covered a period of at least a year prior to the organization of the state branch and continued, according to her own admission, right up to and including the time of the trial; in short she was not an innocent bystander or passive spectator, but was one of the *leaders* in this movement in the State of California and contributed much strength and impetus to the movement by reason of her influence and prestige.

## The Information—Its Sufficiency—No Denial of Due Process.

In plaintiff's Point I, in the brief filed immediately before the first hearing in this court,

*Hodgson* vs. *Vermont,* 168 U. S. 262,

is cited as authority for the proposition that the

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generality of the information denies due process. It is held in that case that the information which an accused must receive "is that which will acquaint him of the *essential* particulars of the offense * * *." In the instant case the vice of the crime was not the name given to the organization, but rather its character, purposes and the things for which it stood. The information did describe the organization by giving its essential characteristics, to wit, "an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism," the latter term having been specifically defined by the statute.

In the *Hodgson* case the accusation did *not* state the *name* of the person to whom the liquor was alleged to have been sold, nor the *place* where it was so sold. This court said:

> "The prescribed form covers the offense in the exact and easily understood language of the *statute which creates* it. This is sufficient * * * It is not an *ancient* crime which has been, from time *immemorial, clothed in special terms* which, by long use, have become the most apt and definite ones to describe the exact crime. The statute sometimes prescribes the punishment of a common law crime without defining it, or creates an offense and prescribes no form for an information. In such cases it is well held that the common law requirements in charging it must be met * * * But it is sufficient to charge a statutory offense in the terms of the statute. * * *"

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The California Criminal Syndicalism Act is a statutory offense, unknown to the common law, of recent enactment and designed to meet new conditions. Mention is made in the case just cited that more particular information was subsequently furnished to the accused upon a bill of particulars.

In any consideration of what constitutes due process with respect to the administration of justice in criminal cases in California regard must be had to an important part of its organic law providing that

> "No judgment shall be set aside * * * for error as to any matter of pleading, or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California constitution, Sec. 4½, Art. VI.

It is thereby made the duty of the appellate tribunals in California to abstain from reversing cases for procedural errors that do not result in actual injury or prejudice to the accused. The record here shows that the District Court of Appeal of California following the mandate of its constitution, after an examination of the case, determined that the defendant in the trial court did not suffer any prejudice from the circumstance that the name of the organization was not specified (p. 4, fol. 6). The said court found that the accused had been fully advised upon a long *voir dire*

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ination of the jurors, which part of the record has not been brought up to this court, and in the opening statement of the district attorney, of the organization she was charged with having assisted in organizing and becoming a member thereof (p. 4, fol. 6).

But in addition to this and long before the trial she had been apprised not only of the nature of the accusation but as well much of the evidence supporting it. The proceeding against her was not by indictment but by "information." In California an information can only be filed by the district attorney after a "preliminary examination" or trial before a magistrate and his determination that there is sufficient cause to believe the defendant guilty of a public offense. (Secs. 858 to 883, both inclusive, California Penal Code.)

Upon such preliminary examination the defendant therein has the opportunity of hearing all the evidence produced, cross-examining witnesses and introducing a defense if desired. The accused by reason of this procedure is necessarily advised of much, if not all, of the state's case in advance of the filing of the information and trial in the superior court. Not only must it be presumed that the accused in the instant case was advised of the nature of the charge against her, but it actually appears from the record before this court that she knew what constituted the real substance of the state's case. The principal portion of the record

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ing plaintiff in error with the Communist Labor Party is found in the testimony of her fellow member, Reed (pp. 151–194), who did not appear as a witness at the trial in the superior court but whose *deposition,* given at the preliminary examination, was read, as provided by law in case of missing witnesses (p. 150, fol. 208). There was no objection to this witness' testimony being received by deposition. As the record shows the information was filed December 30, 1919, and as this deposition given at the preliminary examination must have preceded said information, it thus appears that at least a month transpired between the giving of said deposition and the trial which commenced January 28, 1920, thereby allowing the accused ample time to prepare her defense. The record is devoid of any showing that she at any time was surprised with respect to the nature of the state's case, nor did she at any time request a continuance upon the ground of such surprise. Indeed, plaintiff at no time denied her membership in the Oakland branch of the California Communist Labor Party, which was affiliated with and subscribed to the program and platform of the Communist Labor Party of the United States. That is to say, the Oakland branch was part and parcel of the national organization and devoted to the same principles and purposes.

There is no merit to the suggestion that former jeopardy could not be established under such

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ment. The same point was urged in the first case under this statute, to wit:

> *People* vs. *Malley,* 49 Cal. App. 597 at 608 (194 Pac. 48),

where the court said:

> "If he should be again prosecuted for the offense, he may plead his conviction in the manner provided for in the code, and establish the identity of the cases by evidence, the burden being upon him."

Citing:

> *People* vs. *Faust,* 113 Cal. 172, 45 Pac. 261;
> *People* vs. *Burke,* 18 Cal. App. 72, 122 Pac. 435.

In other words, in California, a person is not confined to the judgment roll in establishing a plea of former jeopardy, but may prove it by evidence *aliunde.*

"Due process of law," as here used, refers to the law of the land in each state, deriving its authority from the inherent and reserved powers of the state, exerted within the limits of the fundamental principles of liberty and justice underlying our civil and political institutions. What is due process of law in the respective states is regulated and determined by the law of each state, and this amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided

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the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided.

*Hallinger* vs. *Davis,* 146 U. S. 320;
*U. S.* vs. *Cruikshank,* 92 U. S. 542;
*Hurtado* vs. *California,* 110 U. S. 535.

Law, in its regular course of administration through the courts of justice, is due process, and when secured by the law of the state, the constitutional requisite is satisfied.

*Caldwell* vs. *Texas,* 137 U. S. 697;
*Duncan* vs. *Missouri,* 152 U. S. 382;
*Munn* vs. *Illinois,* 94 U. S. 123.

A decision upon a matter of practice under the state procedure does not draw in question any right under this provision.

*Thorington* vs. *Montgomery,* 147 U. S. 492;
*Ballard* vs. *Hunter,* 204 U. S. 258;
*Cross* vs. *North Carolina,* 132 U. S. 140.

**Evidence of Activities of Others Was Received for Sole Purpose of Determining Character of Organization and so Limited by Instruction of Court.**

Plaintiff's Point II, to the effect that the verdict was based on acts occurring prior to the enactment of the law, is based upon a misconception of the facts. The record shows that plaintiff in error was one of the most active persons present at the convention held in Loring Hall, Oakland, California,

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November 9, 1919, which resulted in the formation of the "Communist Labor Party of California," and which adopted as its platform the platform of the Communist Labor Party of the United States, which platform endorsed the propaganda and example of the I. W. W., further declaring:

> "We greet the revolutionary proletariat of America, and *pledge* them our wholehearted *support* * * *." (P. 176.)

As a keynote to the Oakland convention, "one of the speakers praised the I. W. W. * * *." (P. 98.)

Evidence of and concerning the propaganda and example of the I. W. W. and its activities was introduced for the purpose of showing the character and the purposes of the Communist Labor Party of California, this being one of the essential facts in issue. Such evidence was competent under

*Debs* vs. *U. S.,* 214 U. S. 211;
*Schenck* vs. *U. S.,* 249 U. S. 47;
*Baer* vs. *U. S.,* 249 U. S. 47;
*Hitchman Co.* vs. *Mitchel,* 245 U. S. 229.

Thus, in the *Debs* case the the criminal records of certain radicals whom he extolled were received in evidence, this court saying:

> " * * * It was proper to show what those grounds were in order to show what he was talking about, to explain the true import of his expression of sympathy and to throw light on the intent of the address * * *."

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The defense in the instant case was not so much of the plaintiff as of her *party.* It was important to determine what this party advocated. This evidence was not introduced to prove her guilty of prior acts committed by other syndicalists. Nor was it so considered by the jury.

The court gave a *limiting* instruction, viz:

> "Evidence has been admitted in this case of statements, acts and declarations of persons other than the defendant, and not made and done in the presence of the defendant, and of printed matter purporting to be printed matter of the I. W. W. and of the Communist Labor Party, or circulated or publicly displayed by the I. W. W. and by the Communist Labor Party, and taken from places and at times at which the defendant was not present, and which was not directly connected with the defendant, and which the evidence does not show was circulated, printed, or publicly displayed with her acquiescense or consent. Evidence has also been admitted of other objects which are not directly connected with the defendant.
>
> The court instructs you that *such evidence was admitted for but one purpose,* and is to be considered by you for that one purpose only, and that is *to determine the character of the organization* of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing, namely, whether or not it was an organization, society, group or assemblage of persons organized or assembled to advocate, teach, or aid and abet criminal syndicalism,

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as defined in the statute from which I have read to you." (P. 46.)

## Plaintiff Not Penalized for Subsequent Acts of Others, but for Her Continued Connection With Proscribed Organization.

Plaintiff's Point III, to the effect that she was punished for the subsequent acts of other members of her party is refuted by the facts. The record shows that she was one of the most active founders and organizers of the Communist Labor Party, serving on the credentials and resolutions committee at the convention wherein it was organized. It is true that certain resolutions proposed by her recommended the advantages of political action but they did not exclude other and more direct means. When the convention adopted the platform of the Communist Labor Party of the United States, which decried the ballot as a means of accomplishing its aims and extolled and recommended the tactics used by the I. W. W., she could have *withdrawn* from the convention. But this she did not do. On the contrary, she continued for months thereafter to serve as an alternate member of the state executive committee and even at the time of the trial admitted that she was still a member of this organization.

## Knowledge and Intent.

Plaintiff's Point IV takes exception to the comment of the California court that it was not concerned with any question as to whether or not

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tiff realized that she was giving herself over to forms and expressions of disloyalty and lending her influence to an organization whose purposes savored of treason, saying "it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. (C. C. P., Sec. 1962.)"

This is fully explained in a later decision of our California Supreme Court involving this act, in

> *People* vs. *McClennegen,* 69 Cal. Dec. 195, at 210 and 211; 234 Pac. 91.

> "Unquestionably the legislature had the power to provide that any person who joins an organization organized for unlawful purposes, whether such person is or is not aware of the unlawful purpose, is guilty of an offense."
>
> "Subdivision 5, of the same section, defines knowingly, as follows:
>
> 'The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission;' * * * "
>
> "The commission of various acts are made punishable under our criminal procedure, even though the doer be ignorant of the fact that the doing of the act constitutes an offense. A mistake of fact, or a want of intent, is not in every case a sufficient defense for the violation of a criminal statute. Statutes enacted for the protection of public morals, public health and the public peace and safety are apt illustrations of

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the rule just announced. (*People* vs. *Ratz,* 115 Cal. 132; *People* vs. *Griffin,* 117 Cal. 583; *People* vs. *Sheffield,* 9 Cal. App. 130; *State* vs. *Hennessy,* 195 Pac. 211, and cases cited.) The latter case quotes the following extract from 8 R. C. L., page 62, as a correct statement of law:

'* * * The doing of the inhibited act constitutes the crime, and the *moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt.* The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute.' (See, also, 7 Cal. Jur. 852; *In re Ahart,* 172 Cal. 762; *People* vs. *O'Brien,* 96 Cal. 171; 16 C. J. 76.)

There is much force in the observation made by Mr. Presiding Justice Finch in the case of *People* vs. *Flanagan, supra,* to the effect that the average man does not ordinarily become affiliated with political or industrial organizations which may affect national welfare without informing himself as to the cardinal principles of such organization. Political and economic experiences justify the observation. The general principles and primary purposes of all organizations whether political, industrial, benevolent, fraternal or social are quite generally known to the public. We agree with what was said in the *Flanagan* case that: 'The intent of the defendants must be determined from their voluntary

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connection with the conspiracy, viewed in the light of the circumstances which they knew or ought to have known. * * * '

* * * * *

A consideration of the entire subject leads us to the conclusion that proof of the act of joining an organization shown to be such as the statute denounces is a sufficient showing of knowledge of the purposes of the organization. *An accused may meet this showing by proof that he was ignorant of its criminal purposes or that he was induced by false or fraudulent representations to become a member of said organization and was ignorant of its purposes.* Of course, if he remained a member and became active in teaching and advocating its doctrines, as was done in the instant case, such conduct would itself be evidence of knowledge of its evil purposes."

### Character of Communist Labor Party Is Matter of Common Knowledge, But Plaintiff Was Exceptionally Versed in Its Tenets.

Plaintiff's Point V that defendant could not know at the time of joining the organization whether the action of other persons would give it an illegal character is merely a moot and abstract question. The record shows that a year prior to the organization of the Communist Labor Party in California plaintiff was in sympathy with the radical Socialists and was active in the election of radical delegates, who later organized the Communist Labor Party of the United States. Then after the

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form of this party had been promulgated and given wide publicity plaintiff took a leading part in establishing a local and state branch at Oakland. In other words, the principles and program of the party were established prior to the actual formation of the local organizations in California. She was not therefore merely engaged in founding an organization whose purposes and principles were to be formulated in the future, but rather in joining and affiliating with and promoting the expansion of an organization whose program was already well known.

## Freedom of Speech Not Abridged by Legislation Prohibiting Teachings, Publications and Propaganda Tending to Imperil or Subvert the Government.

Plaintiff's Points VI, VII, VIII and IX may be summarized under the general objection that the statute and its application in this case infringes upon the right of free assemblage and free speech. This was treated in our brief heretofore filed herein, wherein we cited authorities to the proposition that the right of free speech and assembly does not include unlicensed speech or the right of assembly for every purpose, and that there is no constitutional provision guaranteeing any set of men the right to assemble and advocate the overthrow of the government by force or violence. In addition to the authorities there cited we desire to cite the *Gitlow* case, *supra,* and more particularly the

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ity opinion of this court which is the most recent expression as well as a complete summary of the law on this subject. The opinion of the court, delivered by Mr. Justice Sanford, reads in part as follows:

> "And, for yet more imperative reasons, a state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional state. Freedom of speech and press, said Story, (*supra*) does not protect disturbances to the public peace or the *attempt* to *subvert* the government. It does not protect publications or *teachings which tend to subvert or imperil the government* or to impede or hinder it in the performance of its governmental duties. *State* vs. *Holm, supra,* p. 275. It does not protect publications *prompting the overthrow of government by force;* the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state. *People* vs. *Most, supra,* pp. 431, 432. And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. *People* vs. *Lloyd*, 304 Ill. 23, 34. See also, *State* vs. *Tachin,* 92 N. J. L. 269, 274; and *People* vs. *Steelik,* 187 Cal. 361, 375. In short this freedom does not deprive a state of the primary and essential right of self preservation; which, so

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long as human governments endure, they can not be denied." (Our italics.)

It is noteworthy that this court cited among other cases as authority for its conclusions the case of *People* vs. *Steelik,* the leading case by our California Supreme Court upon the questions here involved.

Gitlow was convicted of printing and circulating the "Left Wing Manifesto, and also a Communist program and a program of the Left Wing." The subject-matter of the Manifesto which is subjoined as a footnote to the Gitlow case is substantially identical with that of the Program, Platform and Constitution hereinabove referred to as having been adopted by the Communist Labor Party, of which plaintiff admitted she was a member. But her organization went much further, for it declared itself "in *complete accord* with the principles of Communism, as laid down in the Manifesto of the Third International formed at Moscow," declaring that the working class "must organize" and "train itself for the *capture* of state power;" that a "Dictatorship of the Proletariat" should be created; that "the revolutionary working class movement of all countries shall closely unite"; that the "most important means of capturing state power * * * is the action of the masses"; and that the "use of political machinery * * * for this purpose is *only secondary.*" (pp. 172–173.) It further and in effect denounced this court as a tool of the capitalist

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class and as having arbitrarily predetermined to obstruct and defeat the accomplishment of any radical legislation which might be adopted by congress. The Communist Labor Party also went further than the Manifesto condemned in the *Gitlow* case in recognizing and extolling "the propaganda and example of the Industrial Workers of the World * * *." Instead of disavowing the activities of this organization which are a matter of common knowledge, it classed the same as "valiant struggles and heroic sacrifices in the *class war.*" Not content with this, it proceeded to *"pledge them our whole-hearted support* and cooperation * * *"

Further and in addition to the above this organization maintained on display at its headquarters at Loring Hall, Oakland, and sold and distributed a large quantity of syndicalistic literature (p. 76, fol. 115; p. 78), including the Manifesto, radical newspapers and about a ton of syndicalistic literature hereinabove referred to in our statement of facts.

## Statute Does Not Deny Equal Protection of the Laws.

In Point X plaintiff contends that the statute denies equal protection because it applies only to those who commit the acts in question for the purpose of effecting a *change* and does not include those who do the same things to *maintain* present conditions.

The equal protection of the laws is secured where the laws operate on all alike and do not subject the

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individual to an arbitrary exercise of the powers of government.

*Duncan* vs. *Missouri,* 152 U. S. 382;
*Atchison, etc. R. Co.* vs. *Mathews,* 174 U. S. 104.

As said in *State* vs. *Hennessy,* 195 Pac. 211, considering a similar act:

> "The act is general in its terms and provides that 'whoever' shall do the things there prohibited shall be guilty of a felony. Under this language anyone, no matter what his business association or professional calling might be, who did the things prohibited by the act, would be subject to its provisions."

Says the Oregon Supreme Court in

*State* vs. *Laundry,* 204 Pac. 958:

> "The syndicalism statute is not class legislation. It affects all alike. It does not discriminate against some or favor others."

## Conclusion.

It is true that the record does not show that this defendant threw bombs, fired hay stacks, or preached on street corners inciting men to assassinate the President, governors and other officials of the nation and this commonwealth, but this was not necessary. The charge was that she assisted in *organizing and became a member of* a society or group of persons organized to advocate, teach and aid criminal syndicalism, which is defined as that doctrine advocating the commission of crime and unlawful acts of

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force and unlawful methods of terrorism as a means of accomplishing a change in the present industrial and political structure. It might be more tersely expressed as *revolution by direct action.* History affords several notable examples. One is the recent revolution in Russia. Another, as to which the lapse of a century renders a perspective unbefogged by current political discussion, is the French Revolution. As one concludes his reading of Guizot's account of that memorable human cataclysm and takes up the record in this case, he can not avoid the conclusion that the story here presented might be well *transposed* and substituted for the account of the first period of that revolution. We see the revolution in the process of formation, the intellectuals of that period were "the brains," and the vicious, malignant and Nihilistic element, "the hands."

In the second period the revolution reaches its crest under Robespierre, the supreme dictator. This period is called the "Reign of Terror." Here we see one of the intellectuals leading the mob. Counsel for appellant argue that the record does not show that *defendant* committed any act of violence or sabotage. History does not record that Robespierre personally shot, stabbed or killed any person. He was a philosopher; he professed to ardently love and to be an exponent of "virtue." The good of the masses and the establishment of the Republic, he asserted, were his sole ambition. Yet he was one

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of the greatest butchers in history and in contemporary parlance the guillotine was called "Robespierre's razor." The violence and bloodshed of the French Revolution accomplished nothing. In a few years it was succeeded by the Empire and a rule more autocratic than that of Louis XVI. The freedom of French citizenry was really established just before the "Reign of Terror" during the ascendancy of Lafayette and Mirabeau, by *due process of law,* through legislation enacted by the first representative parliament in France, known as the Constituent Assembly, 1789–1791. As Guizot declares:

> "It gave France equality before the law, national representation, and that government of the country by the country which has become the watchword of every free people."

In other words, all the good of the French Revolution proceeeded not from violence and mob action, but through the orderly processes of law and legislation.

The foregoing suggests the reason for the enactment of the Criminal Syndicalism Act as well as its spirit and purpose. It was designed not to punish the leaders of a revolution *after* the evil had been done, but rather to provide a means of forestalling it in its inception.

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Respectfully submitted.

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## APPENDIX.

[NOTE.—*The following is taken from the latest and most comprehensive textbook discussion and review of the California Criminal Syndicalism Act found in volume 23, California Jurisprudence, pages 1103 to 1133; which is an encyclopedic summary of the law and practice of the State of California, edited by William M. McKinney, editor, Federal Statutes Annotated, Ruling Case Law, etc. The article, excerpts from which are hereinbelow quoted, has been written since the argument of this case last October and it is herewith submitted for such light and assistance as it may afford the court. The authorities cited as footnotes in the original are inserted in parentheses in their proper places in the text quoted below.*]

"Sec. 1. Definitions—Scope of Article. The term 'criminal syndicalism' is defined by statute as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change. (Stats. 1919, p. 281.) It has been said that criminal syndicalism means, among other things, direct action and sabotage. (*People* vs. *Lesse,* 199 Pac. 46.) But as indicated by the statutory definition it is *not necessary to constitute this offense that there be acts of violence committed;* mere teaching is sufficient, the acts of violence being merely evidentiary as tending to show the character of the organization in question and

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that it does teach and advocate such methods. (*People* vs. *Wright,* 226 Pac. 952.)"

"Sec. 2. Legislation Proscribing and Constitutionality Thereof.—"

"The act was passed at a time when the practice of sabotage and other unlawful methods of terrorism was deemed a growing menace to law and order in the state. So insistent was the danger that the legislature departed from its usual course and provided that the act should have immediate effect."

"The legislature has power to pass all needful penal laws, so long as they bear with equal weight upon all in like situation or of the same class. (*People* vs. *McClennegen,* 234 Pac. 91.) While some of the acts prohibited might have been punishable as constructive treason at common law, the legislature is not precluded from providing for their punishment by the constitutional definitions of treason, as such definitions merely limit the number of offenses punishable as treason at common law. (*People* vs. *Steelik,* 203 Pac. 78.) The statute does not violate the right of free speech as guaranteed by the federal and state constitutions since that right does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property. (*People* vs. *Steelik,* 203 Pac. 78.) Nor does the absence of any definition of 'crime,' 'unlawful method of terrorism,' 'change in industrial ownership or control,' and the like, render the statute void for indefiniteness since their meanings may be obtained from the decisions and the code provisions. (*People* vs. *Steelik,* 203 Pac. 78.) The act is not unconstitutional because it penalizes certain

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acts done to accomplish an industrial or political change and does not penalize the same acts if done for the purpose of maintaining and perpetuating the same industrial or political condition. (*People* vs. *Wieler,* 204 Pac. 410.)"

"Sec. 7. Organizing or Joining Association.—Any person who 'organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism,' is guilty of a felony. (Stats. 1919, p. 281.) The gist of the offense is the criminal confederacy, and it has been stated that if the word 'conspiracy' were substituted for the words 'organization, society, group or assemblage,' the meaning of the law would be in no wise changed. (*People* vs. *Steelik,* 203 Pac. 78.) To charge persons with being members of a society of persons organized to advocate, teach or aid and abet criminal syndicalism is in effect to charge them with conspiring to advocate, teach or aid and abet criminal syndicalism. (*People* vs. *McClennegen,* 234 Pac. 91.) Such conspiracy is complete *without* the commission of any overt act."

"It is not the character of the system to be established, but the means advocated and employed by the conspiracy in effecting its ultimate object, that is material in the prosecution, for, it is said, however beneficent may be the object of an organization, the conspiracy is criminal if it advocates the accomplishment thereof by unlawful acts of force and violence or unlawful methods of terrorism. (*People* vs. *Flanagan,* 223 Pac. 1014.)"

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"III. Indictment and Information."

"Sec. 11. Organizing or Joining Forbidden Association.—The offense of organizing or belonging to an organization or society organized or assembled to advocate, teach or aid and abet criminal syndicalism may be charged in the language of the statute, since the acts therein denounced are sufficiently described by the language itself to make it perfectly clear what it intended. (*People* vs. *Casdorf,* 212 Pac. 237.) It is not necessary, however, that the language of the statute be literally followed. It is sufficient, for example, to allege that the defendant 'did become and remain' a member of a syndicalistic organization, since by so doing he 'is' a member within the intent and meaning of the Syndicalism Act. (*People* vs. *Thornton,* 219 Pac. 1020.) In charging one with organizing a prohibited society, it is not necessary to name those induced to join, as this element is not mentioned in the statute. (*People* vs. *Wieler,* 204 Pac. 410.) And it has been held that the name of the organization need not be stated (*People* vs. *Wieler,* 204 Pac. 410); in any event a failure to do so is not fatal where the offense is charged in general terms and the accused is advised at the beginning of the trial as to the particular organization intended. (*People* vs. *Taylor,* 203 Pac. 85.)"

"Sec. 5. Advocating Industrial or Political Revolution.—The mere advocacy of a change in industrial ownership or political change to be accomplished by lawful means is not a crime. (*People* vs. *Eaton,* 213 Pac. 275.) The inhabitants of the United States have both individually and collectively the right to

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advocate peaceable changes in our constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. (*In re Hartman,* 188 Pac. 548.) But it is a felony for any person to advocate the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, or for anyone to justify the commission of such unlawful acts with intent to approve, advocate or further the doctrine of criminal syndicalism."

"V. Evidence."

"Sec. 21. Organizing or Joining Association.— It has been held that in a prosecution for organizing or joining a prohibited association, the criminal organization constitutes the *corpus delicti,* and proof of membership therein serves only to connect the accused with the crime. (*People* vs. *La Rue,* 216 Pac. 627.) Accordingly, where the *corpus delicti* is established by the testimony of witnesses other than the accused, an admission of the accused, that he was a member of the organization in question, is sufficient proof of membership. (*People* vs. *La Rue,* 216 Pac. 627.)"

"Sec. 22. Criminal Character of Organization.— In a prosecution for membership in an organization which advocates, teaches or aids and abets criminal syndicalism, the criminal character of the organization is a question always to be determined (*People* vs. *Erickson,* 226 Pac. 637), and must be proved.

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(*People* vs. *Steelik,* 203 Pac. 78.) The evidence is sufficient in this respect where a quantity of the literature of the organization was found at the place where the accused was arrested, and such literature advocated criminal syndicalism. (*People* vs. *Powell,* 236 Pac. 311.)

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