THE NEW YORK CRIMINAL ANARCHY ACT. — Under the Criminal Anarchy Act,[1] the Court of Appeals of New York has sustained the conviction of a newspaper publisher for printing the manifesto of the Left Wing of the Socialist Party.[2] The Act makes it a felony to advocate "the doctrine that organized government should be overthrown by force or violence, or by assassination . . . or by any unlawful means," or to publish a writing so advocating.[3] The manifesto invited the workers of the world to join in a mass strike, destroy the capitalistic government through economic paralysis, and

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[1] See CONSOL. LAWS, c. 40, §§ 160, 161; 1918 PENAL LAW, §§ 160, 161. This act was passed in 1902, soon after the assassination of President McKinley in Buffalo, but lay dormant for eighteen years, until the present prosecution was begun. See CHAFEE, FREEDOM OF SPEECH, 188. A very similar statute is in force in Washington. See 1909 WASH. LAWS, c. 249, § 312. See State *v.* Fox, 71 Wash. 185, 127 Pac. 1111 (1912); Fox *v.* Washington, 236 U. S. 273 (1915).

[2] People *v.* Gitlow, 234 N. Y. 132, 136 N. E. 317 (1922). For the facts of this case see RECENT CASES, *infra*, p. 219.

[3] The constitutionality of the present act was unanimously upheld. The pertinent provision of the New York Constitution is as follows: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." See N. Y. CONST., Art. I, § 8; 2 MCKINNEY, CONSOL. LAWS N. Y., 185. This provision has been held not to forbid punishment for publication of matter injurious to society according to the standard of the common law. People *v.* Most, 171 N. Y. 423, 64 N. E. 175 (1902). See 16 HARV. L. REV. 55. The constitutionality of the statute has not been unquestioned. See FREUND, POLICE POWER, § 478.

It seems quite settled, however, that this and similar statutes represent legitimate exercise of the police power, under the state constitutions. People *v.* Lloyd, 136 N. E. 505, 512, 513 (Ill. 1922); People *v.* Wieler, 204 Pac. 410 (Cal. 1922); State *v.* Laundy, 204 Pac. 958 (Ore. 1922); State *v.* Hennessy, 195 Pac. 211 (Wash. 1921); State *v.* Sinchuk, 96 Conn. 605, 115 Atl. 33 (1921); State *v.* Tachin, 92 N. J. L. 269, 106 Atl. 145, 93 N. J. L. 485, 108 Atl. 318 (1919); State *v.* Moilen, 167 N. W. 345 (Minn. 1918); State *v.* Fox, 71 Wash. 185, 127 Pac. 1111, (1912). In most of these cases the statutes upheld were Criminal Syndicalism acts, but the constitutional questions presented are about the same. The New Mexico peacetime sedition statute was held unconstitutional as prohibiting agitation for peaceful change in government, and for indefiniteness. State *v.* Diamond, 202 Pac. 988 (N. Mex. 1921). Part of the New Jersey sedition act, making it criminal to become a member of any society organized to encourage opposition to the government of the United States, was held invalid because it did not specify violence as essential to criminality. State *v.* Gabriel, 95 N. J. L. 337, 112 Atl. 611 (1921). See 1918 LAWS N. J., c. 44, § 3. For a list and summary of state statutes affecting freedom of speech and the press, see CHAFEE, FREEDOM OF SPEECH, 399 *et seq.* The constitutionality of these statutes has been attacked on eight grounds: (1) that they do not define the offense with sufficient certainty; (2) that they are class legislation; (3) that they violate the constitutional guarantee of freedom of speech and the press; (4) that they punish for constructive treason, contrary to the Constitution of the United States, Art. 3, § 3; (5) that the long imprisonments authorized are cruel and unusual punishments; (6) that the acts violate the constitutional guarantee of freedom of assembly; (7) that incitement of opposition to the federal government is not punishable by the states; (8) that because of indefiniteness the statutes delegate to the jury the legislative function of determining what words have punishable tendency.

In the present case, the defendant has applied to the Supreme Court of the United States for a writ of error, which was granted November 27, 1922

set up a dictatorship of the proletariat.[4] Nowhere was the use of force or violence directly counseled.[5]

The requisites of criminality specified by the legislature are: (1) advocacy; (2) of overthrowing organized government; (3) by force or violence or other unlawful means.[6] The first element was clearly present. The defendant was not convicted for his belief, but for publishing a manifesto which a jury could easily find was more than an academic discussion.[7]

Does the second requisite refer to governments other than our own?[8] Our traditional policy has been to continue America as the haven of political refugees from other lands, and that policy is a guide to statutory interpretation.[9] Must the defendant advise the abolition of all government, or is it enough that he desire the overthrow of the present state or federal government? The name of the

according to unofficial newspaper reports. It is settled that the federal Bill of Rights does not restrict state legislation; United States *v.* Cruikshank, 92 U. S. 542, 552 (1875); Barron *v.* Baltimore, 7 Peters (U. S.), 243 (1833). and that the "privileges and immunities" clause of the Fourteenth Amendment does not do so. Twining *v.* New Jersey, 211 U. S. 78, 98 (1908). See Slaughter House Cases, 16 Wall. (U. S.) 36, 74, 79 (1873). See *contra*, dissents in Patterson *v.* Colorado, 205 U. S. 454, 464 (1907), and Twining *v.* New Jersey, 211 U. S. 78, 114 *et seq.* (1908). It may be argued, however, that the Fourteenth Amendment guarantee of life, liberty and property protects against state denial of the liberty to advocate overthrow of the government by a mass strike. See dissents of Mr. Justice Brandeis in Gilbert *v.* Minnesota, 254 U. S. 325, 343 (1920), and of Mr. Justice Harlan, in Patterson *v.* Colorado, *supra*, at 465. The Fourteenth Amendment recognizes "liberty" as fully as "property," and bars the states from unwarranted interference with either. See Coppage *v.* Kansas, 236 U. S. 1, 17 (1915).

[4] See REVOLUTIONARY AGE, June 5, 1919, 15.

[5] This is perhaps the strongest passage: "Revolutionary Socialism . . . proposes to conquer the power of the state . . . by means of political action . . . in the revolutionary Marxian sense which does not simply mean parliamentarism, but the class action of the proletariat *in any form* having as its objective the conquest of the power of the state." *Ibid.* Similar expressions appear in publications which have been allowed to circulate freely. See AMERICAN LABOR YEARBOOK, 1919–20, 418.

[6] It should be observed that there is no specific requirement that there be any danger that the advocacy will accomplish its purpose. *Cf.* the "clear and present danger" test applied by the United States Supreme Court to the prosecutions under the Espionage Act. See notes 27, 28, 29, *infra*. By the common law, words inciting to crime were not generally punishable as attempts or solicitations unless there was dangerous proximity to success. See Joseph H. Beale, "Criminal Attempts," 16 HARV. L. REV. 491, 501 *et seq;* Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, 963 *et seq.*; and see 33 HARV. L. REV. 442. See also 1 WHARTON, CRIMINAL LAW, Kerr's 11 ed., §§ 213, 218; CHAFEE, FREEDOM OF SPEECH, 169 *et seq.*

[7] The crime was an act, not words. Had the manifesto been spoken instead of written, the difficult question of intent would have arisen. Would the uttering of these words, without intent to advance their cause, be criminal? The word "advocate" seems to require such intent. At common law *mens rea* was an essential attribute of felony. See 1 BISHOP, NEW CRIMINAL LAW, 8 ed., c. 18.

[8] If so, much of the recent Irish propaganda in New York was criminal. The court suggests that the legislature would naturally think of self-preservation rather than the protection of foreign governments. See People *v.* Gitlow, 136 N. E. 317, 319 (1922).

[9] See BLACK, INTERPRETATION OF LAWS, 2 ed., 285; 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 462.

crime suggests the former,[10] and on this ground two judges dissented in the present case.[11] The omission in the act of "the" or "an" before the words "organized government" bears out this interpretation. Granting its correctness, can the case be sustained upon the ground suggested by Chief Judge Hiscock, that dictatorship of the proletariat is not government at all, as that term is used by the legislature? [12] If the power to compel obedience be the criterion of government,[13] proletarian dictatorship as manifested in Russia seems not devoid of the essential attribute.

Force or violence, in so many words, was not advocated.[14] The manifesto urged substitution of proletarian dictatorship for parliamentary government, by means of a mass strike, and mentioned the Winnipeg strike as showing the trend toward revolution.[15] The court, however, suggested four bases for finding such advocacy. (1) Communism is so repugnant to the American mind that it could not be adopted without violence, and hence the defendant advocated violence.[16] But can it be said that to advise something which may

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[10] Anarchy is defined as "Absence of government; the state of society where there is no law or supreme order; absence of regulating power in any sphere." See WEBSTER, NEW INT. DICT. For extended discussion of the doctrines of anarchy, see BERTRAND RUSSELL, PROPOSED ROADS TO FREEDOM, c. 2.

[11] Judges Pound and Cardozo. See People *v.* Gitlow, 136 N. E. 317, 326 (1922). "Although the defendant may have been the worst of men, although Left Wing socialism is a menace to organized government, the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected. Defendant has been convicted for advocating the establishment of the dictatorship of the proletariat, and not for advocating criminal anarchy." *Ibid.* at 327.

[12] See *ibid.* at 325. Certain passages of the manifesto indicate that even the dictatorship of the proletariat is to be but temporary, and is to be followed by complete absence of restraint. "Together with the government of the proletarian dictatorship there is developed a new government which is no longer government in the old sense. . . . Out of workers' control of industry introduced by the proletariat dictatorship, there develops the complete structure of Communist Socialism — industrial self-government of the communistically organized producers. When this structure is completed . . . the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order." REVOLUTIONARY AGE, *supra.*

[13] Government is defined as "The authoritative direction and restraint exercised over the actions of men in communities, societies or states." See CENT. DICT.

[14] See note 5, *supra.* But see Skeffington *v.* Katzeff, 277 Fed. 129, 133 (1st Circ., 1922).

[15] "Strikes are developing . . . the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg." See People *v.* Gitlow, 136 N. E. 317, 321 (1922).

[16] The courts have read violence into all sorts of radical propaganda. Thus "Worker of the World! Awake! Rise! Put down your enemy and mine. . . . Capitalism" has been held "clearly an appeal . . . to put down by force the Government of the United States." See Abrams *v.* United States, 250 U. S. 616, 620 (1919). "I wish Wilson was in hell, and if I had the power I would put him there," was held a threat to kill the President. United States *v.* Clark, 250 Fed. 449 (5th Circ. 1918). See 32 HARV. L. REV. 724. The Circuit Court of Appeals has characterized the Communist Party a violent organization, because of the language of its manifesto. See Skeffington *v.* Katzeff, *supra.* See also People *v.* Lloyd, 136 N. E. 505, 530, 536 (Ill. 1922). See John H. Wigmore, "Abrams *v.* U. S.; Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time," 14 ILL. L. REV. 539, 557 *et seq.* And see Burleson *v.* United States, 274 Fed. 749, 752 (App. D. C., 1921).

produce violent opposition is *pro tanto* to advise violence? [17] Orderly adoption of measures which a few years before seemed utterly repugnant to the popular mind is not unknown.[18] (2) Judicial notice that a mass strike is bound to be accompanied by violence. But the theory of the strike is non-violent,[19] and no such strike has been conducted in this country, and none is imminent. Is not *a priori* cognizance that practice will not accord with theory a far extension of judicial notice? [20] (3) Judicial notice that the Winnipeg strike brought violence. The inevitable nature of such violence, however, is hardly a matter of common knowledge. (4) The intemperate language of the manifesto, exemplified by such words as "revolt," "revolutionary," "militant," "mass struggle" and the like.[21] These startling words are undeniably florid, but they are all susceptible of peaceable connotation, and the defendant should be given the benefit of the doubt.

Did the manifesto advocate that its ends be accomplished by unlawful means? The court took judicial notice that such a radical change in government could not lawfully be attained, and that a mass strike is bound to be unlawful.[22] By the principle *ejusdem*

[17] The doctrine is an extension of the theory that an act which provokes a breach of the peace is criminal. See Gilbert *v.* Minnesota, 254 U. S. 325, 331 (1920); People *v.* Most, 128 N. Y. 108, 115, 27 N. E. 970, 972 (1891). It may have the effect, however, of making a man a criminal simply because his neighbors have no self-control and cannot refrain from violence. See CHAFEE, FREEDOM OF SPEECH, 172, 183 *et seq.* Accordingly it has been held lawful for an unpopular organization to hold a public meeting, knowing that it will probably be violently molested. Beatty *v.* Gillbanks, 9 Q. B. D. 308 (1882). *Cf.* Star Opera Co. *v.* Hylan, 109 N. Y. Misc. 132 (1919). See DICEY, LAW OF THE CONSTITUTION, 8 ed., c. 7.

[18] The prohibition legislation, for instance. Placards urging the people to start a run on the banks overturned the government of England in 1832, and precipitated a revolution which the vote of the electorate had failed to accomplish. See CHAFEE, *op. cit.*, 260. The very recent victory of the Italian Fascisti indicates that change may be radical and yet be peaceable. See State *v.* Diamond, 202 Pac. 988, 991 (N. Mex., 1921), pointing out that revolution is not necessarily violent. But see People *v.* Lloyd, 136 N. E. 505, 530, 536 (Ill., 1922).

[19] By "mass strike" the manifesto seems to mean the general strike, which is a familiar aim of radical agitation. See CHAFEE, *op. cit.*, 140, 257–261. See also BERTRAND RUSSELL, PROPOSED ROADS TO FREEDOM, 67. See "Program of the Communist Party," AMERICAN LABOR YEAR BOOK, 1919–20, 418.

[20] The basis of judicial notice is common knowledge or indisputable truth. Does this basis exist in the case of complex social aims and processes? As to the general principle of judicial notice, see 4 WIGMORE, EVIDENCE, § 2565 *et seq.*

[21] "They are crimes against rhetoric, against oratory, against taste, and perhaps against logic, but . . . the Constitution of the United States neither in itself nor by any subsequent amendments has provided for the government of the people of this country in these regards. It is a novelty in this country to try anybody for making a speech." — Evarts' argument in defense of President Johnson. See 1 ARGUMENTS AND SPEECHES OF W. M. EVARTS, 456.

Exaggerated language is the stock in trade of socialistic agitation, and has been since the Communist Manifesto of 1848. The exhortations seem better calculated to amuse than to alarm. See CHAFEE, *op. cit.*, 139. Something usually has to be allowed for "a little feeling in men's minds" when wild talk is being weighed. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 613, 614. See also Zechariah Chafee, Jr., "A Contemporary State Trial," 33 HARV. L. REV. 747, 757, 758.

[22] See People *v.* Gitlow, 136 N. E. 317, 321, 324 (1922).

generis, unlawful means should be construed to refer to means similar to force or violence.[23] Otherwise the question of constitutionality becomes acute, for to make criminal the advocacy of a conspiracy[24] to cripple business by striking is very different from punishing advocacy of assassination.[25] A statute should be construed so far as possible to avoid such doubtful questions of constitutionality.[26]

The validity of the conviction may be questioned because of the failure of the court to insist upon a showing of "clear and present danger" that the publication of the manifesto would bring about the substantive evils that the legislature may prevent.[27] It is assumed that the bad tendency of the words brings them within the scope of the police power. The soundness of this assumption has been authoritatively questioned,[28] although many courts affirm it.[29]

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[23] When there are general words following more particular and specific words, the former must be construed as confined to things of the same kind. See 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., §§ 414 *et seq.*, 422 *et seq.*

[24] By the New York law it is unlawful to conspire to commit an act injurious to trade and commerce. See CONSOL. LAWS, c. 40, § 580. The offense is but a misdemeanor, while advocacy of the overthrow of government by "unlawful means" is a felony.

[25] See FREUND, POLICE POWER, § 475 *et seq.* The difference lies in the fact that assassination may be accomplished in a moment, without warning, by a single person, while a strike requires numbers, time and publicity. The state may suppress incitement to assassination because the danger can be coped with in no less drastic way. See People *v.* Most, 171 N. Y. 423, 430; 64 N. E. 175, 178 (1902). See CHAFEE, *op. cit.*, 165, 173, 205. As to the common law of solicitations to crime, see 1 WHARTON, CRIMINAL LAW, Kerr's 11 ed., § 218.

[26] See Fox *v.* Washington, 236 U. S. 273, 277 (1915); United States *v.* Delaware & Hudson Co., 213 U. S. 366, 407 (1909). See BLACK, INTERPRETATION OF LAWS, 2 ed., 110; 1 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 83.

[27] This is the requirement of the United States Supreme Court in cases under the Espionage Act. See Schenck *v.* United States, 249 U. S. 47, 52 (1919). *Cf.* Frohwerk *v.* United States, 249 U. S. 204 (1919); Debs *v.* United States, 249 U. S. 211 (1919). The "clear and present danger" test has not been expressly disowned by the Court, but in later cases there has been a tendency to get away from it. See Abrams *v.* United States, 250 U. S. 616, (1919); Schaefer *v.* United States, 251 U. S. 466 (1920). In a more recent case the opinion of the court seems to proceed entirely upon the idea that words may be punished if they have a tendency to bring about bad ends. See Pierce *v.* United States, 252 U. S. 239, 249 (1920). As to the position of the Supreme Court on this subject, see Herbert F. Goodrich, "Does the Constitution Protect Free Speech?" 19 MICH. L. REV. 487, 491 *et seq.* See also Zechariah Chafee, Jr., *supra*, 32 HARV. L. REV. 932, 966 *et seq*; *supra*, 33 HARV. L. REV. 747, 764 *et seq.*

[28] See Schenck *v.* United States, *supra;* Masses Publishing Co. *v.* Patten, 244 Fed. 535, 540 (S. D. N. Y., 1917), reversed 246 Fed. 24 (2d Circ., 1917). See also the dissents of Mr. Justice Holmes and Mr. Justice Brandeis, in Abrams *v.* United States, *supra*, Schaefer *v.* United States, *supra*, Pierce *v.* United States, *supra*, and Gilbert *v.* Minnesota, 254 U. S. 325, 334 *et seq.* See State *v.* Diamond, 202 Pac. 988, 991 (N. Mex., 1921). See 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, 300; FREUND, POLICE POWER, §§ 476–478. It has been pointed out that the tendency test of illegality is impracticable, because social and economic tendency is unsuited for decision by judges and jurors. See CHAFEE, *op. cit.*, 68, 69, 104, 132–136, 158. See also Herbert F. Goodrich *supra*, 19 MICH. L. REV. 487, 496.

[29] See People *v.* Lloyd, 136 N. E. 505, 512 (Ill., 1922); State *v.* Aspelin, 203 Pac. 964 (Wash., 1922); State *v.* Tachin, 92 N. J. L. 269, 276, 106 Atl. 145, 149, aff'd 93 N. J. L. 485, 108 Atl. 318 (1919); Masses Publishing Co.

At the trial, the court admitted evidence as to the conduct of the Winnipeg strike, introduced to show the nature of the mass strike.[30] If advocacy of anarchy is to be a crime, it seems eminently fair to take testimony as to what the defendant actually did advocate, rather than to rely upon the preconceived notions of judge and jury.[31] But owing to the complexity of social and political phenomena, the admission of such evidence may greatly complicate the conduct of the trial.[32]

JUDICIAL DISCRETION IN THE FILING OF INFORMATIONS. — In his summary of the Cleveland Survey,[1] Dean Pound has demonstrated how it is sought to avoid the mechanical operation of legal rules in our administration of criminal justice by a series of devices introducing the element of discretion. A judge's assertion of discretionary power in a situation which the Dean's enumeration does not include, raises an interesting problem.[2] An application was made for leave to file informations under the Migratory Bird Treaty Act. The application disclosed a *prima facie* violation of the regulations. Leave to file the informations was denied, the court saying that, "Each and all of them (informations) are too trivial to warrant setting in motion the elaborate and ponderous machinery of this Federal Court to try them." [3]

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v. Patten, 246 Fed. 24, 38 (2d Circ., 1917). *Cf.* United States *v.* "Spirit of '76," 252 Fed. 946 (S. D., Cal., 1917); State *v.* Fox, 71 Wash. 185, 127 Pac. 1111 (1912). And see Pierce *v.* United States, 252 U. S. 239, 249 (1920). See also 33 HARV. L. REV. 442. Elaborate discussion of this difficult question is found in CHAFEE, *op. cit.*, 24–31, 37–39, 49–52, 154–159, 173–180, 213–219. See also Herbert F. Goodrich, *supra*, 19 MICH. L. REV. 487, 491 *et seq.*; Zechariah Chafee, Jr., "Freedom of Speech in War time," 32 HARV. L. REV. 932, 948 *et seq.*; James Parker Hall, "Free Speech in War Time," 21 COL. L. REV. 526, 531 *et seq.*; John H. Wigmore, "Abrams *v.* U. S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time," 14 ILL. L. REV. 539, 545 *et seq.*; and see 33 HARV. L. REV. 442.

[30] The trial court confined the witness to testimony that the employees of various public services went on strike, and excluded evidence as to the effect of the strike upon Winnipeg and its people. See People *v.* Gitlow, 136 N. E. 317, 321 (1922).

[31] Similar evidence has been held admissible by the Illinois court. People *v.* Lloyd, 136 N. E. 505, 531 (Ill., 1922). As to the wisdom of admitting evidence concerning the social or economic conditions advocated or complained of by those on trial for using words of danger or bad tendency, see CHAFEE, *op. cit.*, 132–137. See also Robert Ferrari, "The Trial of Political Prisoners Here and Abroad," 66 DIAL, 647.

[32] Fairness demands, of course, that defendants, as well as the state, be allowed to introduce evidence concerning the rather speculative nature of the state of affairs advocated.

[1] See ROSCOE POUND, CRIMINAL JUSTICE IN THE AMERICAN CITY, 10, 11. These devices include the dispensing power exercised at different stages and in varying degrees by police, prosecuting-attorneys, grand-juries and petit juries. There must be added judicial discretion as to sentence or suspension or mitigation of sentence, administrative parole or probation, and executive pardon.

[2] *In re* Informations under Migratory Bird Treaty Act, 281 Fed. 546, 548 (D. Mont., 1922). For the facts of this case see RECENT CASES, *infra*, p. 219.

[3] *In re* Informations under Migratory Bird Treaty Act, *supra*, at 549.