

Guilt By Association

Whitney v. California

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When American citizens have believed their basic national values to be threatened, fear has often become hysteria. An example of American hysteria at its greatest extreme is the first Red Scare which occurred in the years following the first World War. During this time, legislatures passed laws prohibiting communist activity of any kind. Nationwide, police departments enforced these laws with a heavy hand and patriotic citizens wholeheartedly supported the widespread arrests. Blinded by fear, Americans attempted to wipe communism out of the country in one giant sweep. Unfortunately, many individuals who had turned to socialist movements for philanthropic reasons — those who saw peacefully achieved communism as a cure to America's ills — found themselves swept up among the violent radicals and revolutionaries. Despite their lack of participation in political uprisings or sabotage activities, these people found that mere association with radical groups was grounds for arrest. One such person whom the state of California not only arrested but found guilty of a felony for her political associations was the archetypical social worker, Charlotte Anita Whitney. Had Whitney pursued her philanthropic concerns through political means during any other period of history, it is not likely that she would have been designated as a criminal. However, in the patriotic fervor which dominated American politics in 1919, anything was possible. Whitney's case shows both the dangerous heights to which public paranoia can mount and the extent to which public opinion can change over a short period of time.

Widespread hysteria known as the "Red Scare" characterized the years following the first World War. To explain this intensified fear of a communist revolt,

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most historians have pointed to reverberating wartime hatreds and tensions, coupled with fears engendered by the Russian Revolution and the apparent spread of communism in Europe, all complicated by domestic tensions resulting from such problems as severe inflation.¹ Terrified by an ever-present threat of political upheaval, Americans lumped together as "Reds" all factions of the Socialist Party, the new Communist parties, the industrial Workers of the World (I.W.W.), anarchists, liberals, and trade unionists.² Increased activity by the I.W.W. and the Communist Party of America contributed to this anxiety and many Americans believed these political groups threatened their capitalistic economy, and, indeed, their accepted values. Americans turned to the government for protection but the federal antiradical campaign was inhibited by constitutional limitations, such as guarantees of freedom of speech and assembly.³ Congress was reluctant to pass the repressive laws the public called for. Increasingly, responsibility for prosecution of radicals fell to the states.⁴ Between 1917 and 1919 legislatures passed Criminal Syndicalism Acts in Nebraska, Idaho, Michigan, Minnesota, North Dakota, Montana, South Dakota, and California.⁵

In California the antiradical sentiment was strong in 1919. In January of that year the courts convicted 46 "Wobblies," members of the militant I.W.W. who denounced the capitalist system and attempted to organize all workers into one industrial organization, for wartime violations of the espionage act, a Federal measure enacted during the war which virtually outlawed all criticism of the government. In February police broke up a wave of I.W.W. activity in Southern California with numerous arrests of the strikers and a mob deportation of 38 strike leaders.⁶ By April, Senator William Kehoe of Eureka had introduced the Criminal Syndicalism Act. Governor William D. Stephens, who had in the previous year while campaigning for reelection had stressed the need for curtailing the I.W.W., had framed the act; the California legislature was highly sympathetic.⁷ Newspapers actively supported this bill, fervently urging its passage in editorials by presenting it as an emergency measure, with the immediate preservation of public safety dependent on its passage. So great was the pressure to pass the bill that only eight votes were cast against it in the assembly and none at all in the senate.⁸

1. Robert J. Goldstein, *Political Repression in Modern America* (Cambridge, MS: Schenkman Pub. Co., 1972) p. 139.

2. Benjamin Gitlow, *I Confess: the Truth About American Communism* (New York: E.P. Dutton & Co., 1940) p. 144.

3. Harold Josephson, "Political Justice During the Red Scare," in Michal R. Belknap, ed., *American Political Trials*, (Westport, CT: Greenwood Press, 1981), p. 155.

4. *Ibid.*, p. 156.

5. Paul F. Brissenden, Ph.D., "The I.W.W., Study in American Syndicalism," *Columbia Studies in the Social Sciences*, vol. 193 (New York: Longmans, Green & Co., 1920), pp. 346-348.

6. Goldstein, *Political Repression*, p. 146.

7. Paul L. Murphy, *The Meaning of the Freedom of Speech* (Westport, CT: Greenwood Publishing Co., 1972) p. 50.

8. Al Richmond, *Native Daughter*, (California: Anita Whitney Anniversary Committee, 1942), p. 32.

On April 30th the law went into effect. This California statute defined the term Criminal Syndicalism as any doctrine or precept advocating, teaching, aiding or abetting the commission of criminal sabotage or unlawful acts of force or violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or affecting any political change. The law provided that any person who organized or assisted in organizing any organization formed to advocate, teach, or aid and abet criminal syndicalism was guilty of a felony.⁹

Politicians and police were determined to prevent the communist movement from gaining any momentum in their state and believed this law would hamper the Red cause in California. Thus, following the passage of this act, there was a rash of arrests of suspected communists. In the five years following its enactment 504 persons were arrested and held for bail of \$15,000 each and 264 actually tried.¹⁰ On November 28, 1919, only seven months after the law had gone into effect, Oakland's Police Inspector, Fenton Thompson, arrested Anita Whitney for violation of the California Criminal Syndicalism Act on five counts.

Charlotte Anita Whitney was born in 1867 to George and Mary Whitney, a well-respected upper-middle class couple. Her American heritage was rich. Her father was a descendant of *Mayflower* settlers and had been a State Senator. Her maternal uncle, Stephen J. Field, was a Supreme Court justice appointed under Lincoln who holds the record for the longest term, sitting on the bench for the 34 years from 1863 to 1897. By her own accounts, Anita Whitney led a sheltered childhood and did not get her first glimpse of poverty until age nine, but from that first moment in New York City she was motivated by a strong desire to help the under-privileged people in America. After graduating from Wellesley College, she became involved in social work. She began working in settlement houses in the slums of New York but soon returned to her own community in Oakland, California. In Oakland she supported various causes including equal suffrage, prohibition, civil rights, and free speech. In 1914 she left social work and joined the Socialist Party. She did not join a radical group in order to instigate political upheaval; rather, she embraced socialism as the solution to poverty. As she herself wrote:

I passed over the line, the invisible line, which divides mankind into two different groups, the group which stands for human exploitation and the group which stands for the fullness of life here and now, for human welfare.¹¹

In 1919 a split in the Socialist Party developed over a dispute between the Left Wing and Right Wing factions. From this division emerged the Communist

9. California 1919, c. 188.

10. Zachariah Chaffee, *Free Speech in the United States* (Cambridge, MS: Harvard University Press, 1954), p. 327.

11. Richmond, *Native Daughter*, p. 63.

Labor Party, which was composed of both committed supporters of the Bolshevik Revolution and former party members who joined in protest against the Socialist leadership's undemocratic methods and mass expulsions.¹² When the Oakland Local, the group with which Whitney was affiliated, voted to go over to the Communist Labor Party, she went to the organizational convention at Loring Hall in Oakland on November 9, 1919. Subsequently, she was marked a dangerous radical. When the Oakland Center of the California Civic League invited her to speak before the Friday, November 28th meeting, her appearance became a public issue. The women of the Civic League refused to rescind their invitation to Whitney despite appeals by Police Commissioner J.F. Morse. As a result, following her address on the subject of "The Negro Problem in the United States" the Oakland police placed Whitney under arrest for violating the California Criminal Syndicalism Act.

The arrest of Whitney was a questionable move on the part of the Oakland Police Department. In an effort to prevent the establishment of a strong communist movement in Oakland, the police combed through a list of the 145 attendants of the Loring Hall convention and hand picked six "radicals" to be arrested. By arresting Whitney the police apparently believed they were setting an example. Anita Whitney was a prominent suffragette and former social worker who, coming from one of California's oldest families, had modest wealth, social position and political connections. Yet even she could not challenge the social and political order with impunity. Although the evidence against her was scanty at best, the police stood behind their claim that she was a dangerous radical. Police inspector Thompson based this claim on evidence gained by a police raid on the headquarters of the Communist Labor Party of Oakland.¹³ He cited her membership in the I.W.W. Defense Committee of Oakland which had been soliciting funds to defend radicals on trial. Being unable to point to any tangible proof of her revolutionary activities, he claimed her utterances and writings as a member of this committee were questionable. In his appeal to the women at the Civic League meeting he said, "I have direct proof that Miss Whitney has carried food and radical literature to prisoners on Alcatraz Island. Can any of you say she isn't an I.W.W.?"¹⁴ To anyone who knew Miss Whitney and her devotion to charitable causes, this implication that she herself was a Wobbly was, of course, ridiculous. However, in the public's eyes she was a threat to society and the charges against her must stand. Unfortunately, by the time her case went to trial, the hysteria had swelled to even greater dimensions.

In October and November of 1919 the police had conducted raids similar to the one in Oakland on the Communist Labor Party headquarters in Cleveland,

12. Theodore Draper, *The Roots Of American Communism* (New York: Viking Press), p. 180.

13. *San Francisco Chronicle*, November 29, 1919, p. 1, col. 4.

14. Anita Whitney had been the first president of the California Civic League (*San Francisco Chronicle*, November 29, 1919, p. 3, col. 3).

Chicago, and New York City. But these were only dress rehearsals for the show yet to come. Suddenly during the night of January 2, 1920, the Department of Justice extended its power beyond constitutional limitations and struck nationally in 70 cities, dragging workers from their homes, handling them roughly and throwing them into crowded cells. These raids were carried out by Attorney General A. Mitchell Palmer and his hatchet man J. Edgar Hoover, then head of the Justice Department's special anti radical division. Allegedly, the country was on the brink of a revolution and this was the only way to save it, regardless of law and constitutional rights. The extent of Americans' paranoia can be gauged from Palmer's testimony that, according to his own figures, in less than two years 4,138 alleged aliens or dissenters had been arrested.¹⁵ Twenty-five days after this nationwide attack on the radical elements of American society, Charlotte Anita Whitney's case went to trial.

Whitney was charged with five violations, all closely following the wording of the California Criminal Syndicalism Act. The first charge against her was the organization of a group assembled to advocate, teach, aid and abet criminal syndicalism. The second charge involved the publication and circulation of works advocating criminal syndicalism while the third, fourth, and fifth charges involved spoken advocacy of criminal syndicalism and the justification of violence and unlawful terrorism in order to accomplish a change in industrial leadership and effecting a political change.¹⁶

As the prosecution opened the case against Whitney, it was immediately clear that it depended upon associating her with the radical element of the California branch of the Socialist Party. The lack of concrete evidence proving Whitney guilty of dangerous political activities required the prosecution to attempt to prove her guilty by association. Since Whitney considered herself a charter member of the Communist Labor Party, the goal of the prosecution was to associate the state party with the national party, and through the national party with the Third International in Moscow and the I.W.W., an organization endorsed by the national party — thereby to establish the criminal nature of the organization, and by association the guilt of the defendant.¹⁷ Thus, throughout the trial, the prosecution was able to bring in evidence which they could in no way link to Whitney. Over the objections of the defense, they subjected the jury to testimony from people she did not know concerning events she did not attend and organizations to which she did not belong. Admittance of this evidence was disastrous to Whitney's case, for in the excitement of the times there was a tendency to convict without need

15. William Z. Foster, *History of the Communist Party of America* (New York: International Publishers Co., Inc., 1952), p. 175.

16. Richmond, *Native Daughter*, pp. 88-89.

17. *Whitney v. California*, *Reporter's Transcript* as submitted to the Supreme Court under Writ of Error (Microfilm), Delaware: Michael Glazier, Inc. This was the only documentation of the trial available to me. This abridged version did not contain closing arguments; therefore, I will be quoting these from a secondary source.

and an inclination to identify the mere fact of arrest with "indisputable evidence."¹⁸ Therefore, despite the lack of any solid evidence against Whitney, the prosecution was able to prejudice the jury against her.

When the prosecution brought their first witness to the stand, Mr. Ed Condon, a reporter from the Oakland *Enquirer*, his testimony initially seemed detrimental to their case. However, by the end of his testimony it was obvious that Miss Whitney was no longer on trial — the Communist Labor Party was. Condon was intended to be a key witness to the prosecution. After all, he attended the convention in Oakland and could attest to Whitney's activities there. He was especially important because he could relate what was referred to as the "red flag incident", the supposed shrouding of an American flag by a red flag.¹⁹ Upon cross-examination, however, Condon conceded that neither involvement at the convention nor the red flag incident were convincing evidence of criminal activity by Whitney.

First of all, Condon testified that Miss Whitney's involvement was minimal. When asked if there was anything said or done by Miss Whitney which excited his special interest as having been a violation of the law, Condon answered no.²⁰ Having established that she had not taken a radical position at the convention, Thomas O'Connor, Miss Whitney's attorney, questioned the nature of her involvement:

Mr. O'Connor:

Question: Did you hear Miss Whitney that afternoon make any speech?

Answer: No, sir, I did not.

Question: Did you hear her say a single word other than that the Resolutions Committee would be ready to report in five minutes, after she had read the report of the Credentials Committee?

Answer: I did not, no sir.

Question: And that is all that you can tell the jury to the activities of Miss Whitney that day?

Answer: That is.²¹

When O'Connor pressed the witness about the red flag incident, Condon surprisingly admitted that the red shroud, which had been an old piano cover, had been planted there by a police agent under the direction of Police Inspector Thompson

18. Woodrow C. Whitten, "The Trial of Charlotte Anita Whitney," *Pacific Historical Review*, November 14, 1925, p. 188.

19. *Ibid.*, p. 287.

20. Goldstein, *Political Repression*, p. 134.

21. Red Flag laws were passed in 28 states making it unlawful to display red flags (Transcript, p. 113).

and had gone unnoticed by the rest of the convention. When asked why he had not admitted this fact earlier, Condon said it had not seemed important to him. He had not considered that this omission could contribute to sending a woman to prison for as many as fourteen years. Apparently, from Condon's point of view, it was an organization, the Communist Labor Party, that was on trial rather than a person.

Mr. O'Connor:

Question: You haven't any illusions about how the average man, and the average community, and the average juror feel about the red flag, have you?

Answer: No sir, I have not.

Question: And yet, having no illusions about that, you were quite willing to let these gentlemen and ladies believe that the American flag at that meeting was obscured and covered by a red flag . . .

Answer: I would not have permitted it to go to the jury as I do not consider it an essential piece of evidence: myself, sending her to the the penitentiary — that is not — the fact that the red flag was draped there by anybody doesn't indicate that she is guilty of criminal syndicalism.²²

the red flag incident was then to be dropped as admissible evidence. However, the fact that it was still mentioned frequently in the course of the District Attorney's prosecution implied that Whitney's guilt was not personal. Her guilt was the guilt of the organization, the Communist Labor Party.

This point was further illustrated when the prosecutor, Mr. Calkins, questioned Condon about John Reed, a radical journalist known for his firsthand reports of the Mexican and Bolshevik Revolutions, and was a Communist Labor Party official.²³ When Calkins tried to introduce as evidence a conversation in which Whitney did not participate or even witness, the defense strongly objected. O'Connor insisted that the testimony was hearsay and could not concern Miss Whitney. Calkins replied, "our point is it had to do with the Communist Labor Party." O'Connor continued to object saying, "There is a woman named Anita Whitney on trial here and not the Communist Labor Party. . . . We are not defending the Communist Labor Party, we are defending Miss Whitney."²⁴ Judge Quinn overruled the defense's objections on the grounds that the prosecution could theoretically make a link between Whitney and a conversation between Condon and Reed. The prosecution, however, never bothered to establish any connection.

22. *Ibid.*, p. ???.

23. *Ibid.*, p. 115.

24. Melvyn Dobofsky, *We Shall Be All* (Chicago: Quadrangle Books, 1969), p. 243.

By merely introducing Reed they had already succeeded in shifting the focus of the trial from Whitney to the Communist Labor Party.

While questioning Reed himself, the prosecution was again able to get testimony of questionable relevance admitted as evidence. Reed had also attended the Oakland convention and was able to identify Communist propaganda literature that had been made available to the public there. Again the defense objected but was overruled when the prosecution claimed they were bringing this literature in merely for identification. The defense then had to sit quietly by while the prosecution used this liberty awarded them by Judge Quinn to their best advantage. For example, almost thirty pages of the trial transcript are taken up by the reading of the constitution of the Communist Labor Party. By reading this statement declaring the purposes and beliefs of the Communist Labor Party, beliefs that obviously would not be shared by the jurors, the prosecution was able to prejudice the jury against Whitney. This was especially detrimental to her case considering that while Whitney considered herself a member of the Communist Labor Party, she had not signed an official membership card and was not, therefore, considered a full fledged member by the Party. More importantly, her local had not ratified the actions of the state convention and thus they were not binding on her, a fact admitted by Reed.²⁵ To stress further the dangerous radicalism of the Communist Labor Party the prosecution read several passages from literature that had been available at the convention and confiscated in the raid on Loring Hall. For example, Calkins read from various parts of *Syndicalism* by Earl C. Ford and William Z. Foster. In one passage that he quoted a syndicalist was described as "less than civilized, lawless, reckless sabotage, murderous, unscrupulous, in utter revolt against capitalism, noncooperative, anti-state, radical to law and order, anti-patriot."²⁶ By associating Whitney with Communists and Communists with syndicalists, the prosecution created an image of the defendant that would be seen as dangerous to American society by any jury.

The most blatant attempt by the prosecution to prove Whitney's guilt by association was the introduction of I.W.W. materials. Once again the focus of the trial shifted away from Whitney's case. Whitney was a sympathetic supporter of the I.W.W.'s goals of improved working conditions but not an active member in that organization or a supporter of its occasionally extreme tactics. Yet I.W.W. testimony was to comprise the bulk of the trial transcript. This evidence was especially damaging for several reasons. From 1913 up to the time of the trial, the Industrial Workers of the World had been making headlines all over the country. Striving for improved working conditions through restructuring American capitalist society, the I.W.W. had been involved in violent demonstrations that often included widespread destruction of property. Most Americans viewed this group as revolutionary and quite dangerous. The Palmer raids of January 2, 1920 resulted in heightened hysteria

25. Transcript, p. 106.

26. *Ibid.*, p. 190.

making this evidence even more damaging to Whitney's case.

The defense was well aware of the disastrous repercussions that would result should this evidence be admitted. Recent I.W.W. trials which had found the defendants guilty were still fresh in the mind of the public. These trials had all assumed a familiar pattern. Wobblies who testified as witnesses in one case were often arrested upon leaving the courtroom on the ground that they admitted to being members of the radical organization; previously convicted Wobblies were brought in to testify against their fellow members.²⁷ Thus the prosecution was able to use one conviction to bring others. The defense in Whitney's case put up a strong argument stating that there was no connection between the I.W.W. movement and Whitney, and that this evidence was "absolutely immaterial, irrelevant and incompetent." Her attorney argued that the defendant had no more knowledge of the organization's activities outside what she or anyone would have read in the newspapers.²⁸ Despite his efforts, the prosecution's line of questioning continued. The evidence was admitted after it was shown that the Communist Labor Party had made a brief endorsement of the I.W.W. The prosecution cited a "Special Report on Labor Organization in the Communist Labor Party of the United States of America" which stated:

In any mention of revolutionary industrial unionism in this country there must be recognition of the immense effect upon the American labor movement of the Industrial Workers of the World. . . . We greet the revolutionary industrial proletariat of America and pledge them whole-hearted support and cooperation in their struggle against the capitalist cause.²⁹

This statement was interpreted to mean that the Communist Labor Party approved of the I.W.W. and all its acts, even to the point of abetting them. Stretching this tenuous reasoning a bit further, the prosecution maintained that it was free to introduce evidence as to the alleged criminal acts perpetrated by the I.W.W., and that Anita Whitney was criminally responsible because of her connection with the Communist Labor Party.³⁰

The focus of the proceedings had now shifted not only from Whitney to the Communist Labor Party, but from the Communist Labor Party to the I.W.W. Frustrated, the defense continued to object. Mr. Pemberton, who had taken over Miss Whitney's case after O'Connor had suddenly died from an illness,³¹ appealed to the court saying, "once more we don't know what this lady is being tried for.

27. *Ibid.*, p. 216-219.

28. Chaffee, *Free Speech*, p. 327.

29. Transcript, p. 220.

30. *Ibid.*, p. ???.

31. Whitten, "The Trial," p. 292.

Is she being tried for being a member of the I.W.W.?"³² Claiming the evidence was immaterial because it predated the passage of the Criminal Syndicalism Act, the defense placed all responsibility for its admittance on the court. Judge Quinn refused to rule on this objection.

The prosecution introduced as principal witnesses John Dymond and Alber Coutts. Former Wobblies who had turned state informers, these professional witnesses,³³ who had never even met Whitney prior to the trial, treated the jury to hours of testimony about atrocities committed by the I.W.W. Sixty percent of the trial transcript was taken up by their testimony which also included the reading of I.W.W. songs and other literature.³⁴ Through these two witnesses the prosecution was able to imply an association between Miss Whitney and known revolutionaries such as "Dublin Bob" Minnellan with whom she was not even acquainted. When questioned about their tactics, the prosecution explained, "We expect to show that she was acquainted with others who were associated with Minnellan in doing certain work."³⁵ Despite the prosecution's failure to prove any intent upon the part of Miss Whitney, to prove that she herself actively subscribed to sabotage, this lengthy presentation of I.W.W. material secured the desired association in the minds of the jurors. Thus the trial continued, following the typical pattern of the previous I.W.W. trails. Catherine Hoftelind described these trials in an article for *The Nation*, a noted liberal magazine, "like a row of houses on a company street exactly alike but for the inmates, the trials against the syndicalists proceed, not against individuals but against their organization. In every case the same two witnesses, in every case the same story of how these two witnesses burned wheat fields four summer ago . . ." ³⁶

Anita Whitney took the stand in her own defense on February 19, 1920. It is interesting to note that while the testimony of the Wobblies comprised 600 pages of the reporter's transcript, Miss Whitney's direct testimony occupied only three. Her defense relied on the basic premise that she had done no wrong. Since the

32. When Mr. O'Connor died, the court insisted that Miss Whitney replace him with Pemberton. Unhappy about this, Whitney appealed to the court saying, "I do not consider that Mr. Pemberton is my counsel in my trial case and anyone who has sat through this last week in this court knows that Mr. O'Connor has charge of my case. I am an American citizen; I am not here to ask for sympathy. I am here to ask for justice, and you must remember that I am on Trial for an offense which carries a penalty of fourteen years of imprisonment . . ." (Transcript, p. 199). But Judge Quinn would not listen, demonstrating that he considered this case to be merely another I.W.W. trial to be rushed through the system. Judge Quinn maintained this attitude throughout the trial.

33. Transcript, p. 282.

34. Coutts testified that he had received \$250 from Shanon, U.S. Marshal for the Southern District of California on behalf of the American Protective League for testifying against the I.W.W. in Sacramento. Dymond testified that he received \$625 from George Hudson, special agent of the Department of Justice.

35. Some of the literature admitted as evidence included: *Proceedings* of the 10th I.W.W. Convention, 1912; Walker C. Smith, *Sabotage*; Emile Pouget, *Sabotage*; Grover M. Penn, *The Revolutionary I.W.W. — Its History, Structure, and Methods*; William D. Haywood, *The General Strike; I.W.W. Songs*.

36. *Transcript*, pp. 261-262.

offense, there must be a joint operation of act and intent,³⁷ the defense attempted to prove that Whitney had never intended to violate any law. While testifying, Whitney maintained that her involvement in the socialist movement was for purely charitable reasons; after all, the movement had first attracted her because she believed it held the solution to poverty. She stood behind the claim she had made at the time of her arrest — that she had judged the Communist Labor Party to be a worthy organization. By becoming a member, she was obeying her conscience and helping in her own way to make the world a little better.³⁸ Questioned about the purpose of the Oakland convention, she answered that the meeting was to “formulate the principles and put into existence the Communist Labor Party, a political party for California.”³⁹ She insisted that she had not intended for the meeting to be an instrument of terrorism or violence, nor was it the intention of the convention to violate any known law since “it was an open convention and would not, of course, have been an open convention if we were deliberately planning to break the laws of the state in which we live.”⁴⁰

Fully confident in her own innocence, Miss Whitney remained steadfast in her beliefs and noble in spirit. The prosecution used this to their advantage. During the cross-examination they questioned her about the party itself and other members of the party who faced similar charges. As they had hoped, this line of questioning led her to lend her support to the causes of well known radical leaders, such as Eugene Debs, labor leader and five time Socialist candidate for president of the United States, who had been convicted and were serving prison sentences. Again the prosecution was able to paint a picture for the jury of Communists and Socialists as criminals who threatened society and to include Anita Whitney amongst them.

The day following Miss Whitney's testimony, the trial drew to a close. In the closing arguments for the defense, Coghlan, who had assisted Pemberton throughout the trial, reiterated that the information presented had failed to specify the acts of which Miss Whitney was guilty. He cited the total lack of proof of that clause in the information that charged that Whitney had by her personal conduct, advocated the commission of crime to achieve a political or industrial revolution and that the weakness in the prosecution's case on this point provided justification for suspicion as to the proof offered for the other charges.⁴¹

Prosecuting Attorneys Calkins and Harris, in their closing statements sought to link the Communist Labor Party of America with the I.W.W. “The Communist Labor Party of America is but a political adjunct of the I.W.W.,” said Calkins. “It is bound with chains of brass to the I.W.W. and forms for them a political as well an industrial control of this country.” Harris, in an impassioned appeal

37. Catherin Hofteling, “Sunkist Prisoners,” *Nation*, September 21, 1921, p. 316.

38. Transcript, p. 262.

39. Richmond, *Native Daughter*, p. 89.

40. Transcript, p. 309.

41. *Ibid.*

called upon the jurors, "to uphold the sacred tenets of Americanism and place with their verdict the seal of disapproval on the activities of the Communist Labor Party and its blood brother the I.W.W." "It is not only Anita Whitney on trial," said Harris, "but the dark doctrines of envy, murder, and terror also facing your verdict, ladies and gentlemen."⁴²

But for all their radical witnesses, all their volumes of evidence, all their eloquent speeches preaching patriotism, the prosecution only confused the jury. During the deliberations the jurors had difficulty agreeing on what counts Whitney was guilty. Five hours after entering the jury room, the jurors reentered the court room for additional instructions. Judge Quinn instructed them that they were to agree on five separate verdicts for the five separate counts and the jury resumed their deliberation. Finally, after another hour, juror Thompson informed the court that "With the present standing of the jury, I don't think there is any possible show of agreement on some of the counts."⁴³ The only concrete evidence that the prosecution had presented was the fact that Anita Whitney had attended the first meeting of California's Communist Labor Party. In the face of the other evidence, it appeared as though that meeting must have contained some criminal element. Therefore, out of their patriotic desire to protect Oakland, California, the United States of America, on February 24, 1920 the jury found Miss Whitney guilty of the first charge against her — the charge of organizing a group assembled to advocate criminal syndicalism — merely upon association with the Communist Labor Party. Unable to come to any agreement on the other four charges, they issued a verdict of not guilty on counts two, three, four, and five.

Anita Whitney's case was immediately appealed. The California Court of Appeals sustained her conviction, certifying that it had considered and passed upon the contention that the section of the Criminal Syndicalism Act on which the conviction was based was repugnant to the Fourteenth Amendment of the federal constitution.⁴⁴ On October 20, 1925, *Whitney V. California* came up before the U.S. Supreme Court. Her attorneys based her appeal to the Court on the fact that 988 pages of testimony failed to show that she ever committed an act of violence, uttered a violent statement, or that she had ever known of any act of violence offered by any organization.⁴⁵ Counsel sought to show in the petition for appeal that the California law violated Constitutional guarantees of freedoms, especially the right to due process under the Fourteenth Amendment. It was argued that neither Whitney nor her attorneys had been informed of the exact nature of the accusations made against her and that she had not been protected against double jeopardy; they argued in addition that the California statute was too vague.⁴⁶ Yet upon reviewing the case, the court found the Criminal Syndicalism Act of

42. *Oakland Tribune*, February 20, 1921, p. 1, col. 1.

43. *Ibid.*, p. 8, col. 1-3.

44. Transcript, p. 52.

45. "Guilt By Association," *Nation*, November 4, 1925, p. 505.

46. Appeal to the Supreme Court, p. 5.

California constitutional. Since Whitney's case was not a question of constitutionality, the Court deemed "no jurisdiction" and her case was dismissed.

The American public was outraged. The hysteria which had been prevalent five years before had since died. By late 1920, fears had already begun to subside. Americans relaxed when Bolshevism failed to flood European nations as they feared it would in the years following the first World War. After the Palmer raids had scared off most of the radicals, the socialists who remained dedicated to the cause lost their enthusiasm as the fight began to appear hopeless. In July of 1923, Attorney General U.S. Webb issued an injunction against the I.W.W. and various specified committees, officers, and members. This action was immediately followed by a restraining order which prevented the Wobblies from continuing their current activities and the I.W.W. was essentially paralyzed.⁴⁷ The underground conditions in which American communists were forced to work in the 1920's sorely hampered their contacts with the masses.

Growing public indifference reflected the realization that there had never been any real cause for alarm.⁴⁸ Bored with threats of bombs that did not go off and revolutions that never occurred, Americans began shifting their concerns elsewhere. As the temper of the aftermath of war gave way to peace, Americans chose to fight their battles not on foreign fronts or against rebellious political groups, but in sports arenas or against the evils of alcohol. Once domestic tensions had relaxed, the public no longer designated Anita Whitney a "Red" for her interest in the Communist movement. Instead, articles in newspapers and magazines across the country professed her innocence. An article in *The Nation* clearly reflected this change in view:

Associations with a group from which proscribed notions emanate does not necessarily involve participation in them. Such organizations may not, and usually do not, exist solely for the propagation of proscribed notions. Association with them may result from a general sympathy as to ultimate aspirations not within the statutory ban. The deprivation of personal liberty involved in a prohibition of association is greater even than that of free speech.⁴⁹

Another indication of how the political mood had moved away from strong antiradicalism was that newspapers which had formerly supported the passage of the Criminal Syndicalism Act now called for its repeal.⁵⁰ In California the prosecutions under the Syndicalism law were more intense than in any other state and involved greater injustice. Seven bills to amend or repeal the act were introduced into California legislature, session from 1921 through 1933, with the

47. Los Angeles *Times*, November 29, 1925.

48. Between 1924 and 1930 there was not a single prosecution under the California Criminal Syndicalism Act (Chaffee, *Free Speech*, pp. 327 and 333).

49. Robert K. Murray, *Red Scare: A Study in National Hysteria 1919-1920* (Minnesota: University of Minnesota Press, 1955).

50. "Guilt By Association," p. 505.

exception of the 1931 session. The California Federation of Labor and the American Civil Liberties Union led the repeal movement. Liberals, church organizations, clergymen, lawyers, and individuals associated with newspapers, utilities and railroads supported the repeal efforts.⁵¹ The California Criminal Syndicalism Act remained on the books, but this shift in public opinion would have made it difficult in 1925 to find a jury that would have convicted Whitney on the same grounds that she was convicted in 1919.

Yet, while public sentiment had changed, Miss Whitney was still guilty in the eyes of the law. Her petition for a rehearing was granted and on May 16, 1927 the Supreme Court handed down its decision; it upheld the lower court's ruling. In the unanimous opinion read by Mr. Justice Sanford, the Court declared it could not reconsider the original jury's verdict that Whitney's connection with the Communist Labor Party constituted a violation of the law. It found no objection to the law's validity on the score of "vagueness and uncertainty of definition."⁵² It did not find that the law violated the equal protection clause of the Fourteenth Amendment.

Justice Brandeis, who had dissented in the *Gitlow v. New York* decision, now concurred with the Court's ruling. Like Whitney, Benjamin Gitlow had been arrested during the height of the Red Scare for his association with a radical political group. On November 8, 1919, Gitlow was arrested and charged with violating the Criminal Anarchy Act of New York by his association with the *Revolutionary Act* and by publishing its "Left Wing Manifesto." The prosecution in his trial, also like Whitney's, placed much more emphasis on the radical subversive nature of the Left Wing than on Gitlow's specific violations of the Criminal Anarchy Act.⁵³ He too was convicted and his conviction upheld by the Supreme Court. In his dissent, Justice Brandeis argued that Gitlow's right to freedom of speech had been violated because the circumstances surrounding his case had not presented a clear and present danger:

It is said that this manifesto was more than a theory, that it was an incitement. Every belief is an incitement. It offers itself for belief outweighs it . . . If publication of this document had been laid as an attempt to induce an uprising against the government at once and not at some indefinite time in the future, it would have presented a different question.⁵⁴

Since the Manifesto had not been used to incite a revolution against the government and could not be proven to be suited to that purpose, Gitlow had not violated the Anarchy Law by expressing his political beliefs. In Whitney's case, however, Brandeis found there was a clear and present danger which justified her 1920

51. Eldridge Foster Dowell, *A History of Criminal Syndicalism Legislation in the United States* (Baltimore: Johns Hopkins University Press, 1939), pp. 122-123.

52. The Fresno *Republican* called for the repeal of the Act because it punished people for their political theories rather than their actions.

53. "California's Anti-Red Law Upheld," *Literary Digest*, May 28, 1927, p. 9.

54. Quoted in Josephson, "Political Justice," p. 159.

conviction. In his opinion, Brandeis did not address the issue of whether or not Anita Whitney herself was guilty of advocating syndicalism. Rather, he supported the concept asserted by the prosecution in this case that the organization was guilty through its association with the I.W.W. and, therefore, its members were also guilty through association:

I am unable to assent to the suggestion in the opinion of the Court 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. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of the members of the I.W.W. to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member.⁵⁵

Justice Brandeis's opinion in the Gitlow ruling shows that political tensions had relaxed considerably. Although the Court did not overturn the lower court's ruling, dissension among the justices demonstrated that it was no longer accepted practice to convict persons according to their political beliefs and associations. His opinion in Whitney's case however, revealed that there were still underlying tensions; the government still felt the need to protect itself from radical political forces.

Whitney's supporters were naturally appalled by this decision. They sent letters and petitions to Governor C.C. Young seeking a pardon for Anita Whitney, who refused to ask for one herself in the belief that it would be an admission of guilt. Austin Lewis, counsel, and Ernest Cleive, members of the executive committee of the Civil Liberties Union, issued the following statement to the San Francisco *Chronicle*:

That a person of the integrity and distinction of Miss Whitney whose life has been spent in blameless effort for humanity, should have to go to San Quintin Penitentiary is a disgrace to the state of California and a reproach to the United States. Now is the time for the governor to act. The people of this state must at once call for an immediate pardon for Miss Whitney.⁵⁶

Several legal authorities also wrote the Governor urging the issuance of a pardon. For example, Professor Orin Kip McMurray, head of the School of law of the University of California wrote that the testimony in Whitney's case was by no means strong enough to prosecute her as a dangerous person, and that the union between act and intent though technically established, was too faint to warrant a conviction.⁵⁷ Indeed, the Superior Judge James G. Quinn, who presided at the

55. 268 U.S. 652, 673.

56. 274 U.S. 357, 379.

57. San Francisco *Chronicle*, May 17, 1927, p. 2, col. 1.

trial, said in a letter to the Governor, "reviewing the entire matter, I believe that justice and the welfare of the state would be subserved in this case if she were granted a pardon."⁵⁸

Beginning as early as 1923, the executive pardon for convicted Communists and Socialists was used by state governors across the country. Realizing that the communist movement did not, in fact, pose any real threat to the government or American society and that convicting its leaders only created martyrs, Governor Al Smith of New York set a precedent by granting an unconditional pardon to Jason Larkin, an Irish political leader convicted for violation of the Anarchy Act, in 1923 and later pardoning Benjamin Gitlow in 1925. In his statement to the *New York Times* the Governor made it clear that he utterly disagreed with the doctrines and principles enunciated by Larkin and others of the same school of political thought but expressed the belief that the "safety of the state is affirmatively impaired by imposition of such a sentence for such a case. Political progress results from the clash of conflicting opinions . . . and it is a distinct disservice of the state to impose, for the utterance of a misguided opinion, such extreme punishment."⁵⁹ Instead of viewing the radicals as dangerous and threatening, the public now viewed them as "misguided."

After several weeks of studying the records of Anita Whitney's case, Governor Young issued her a pardon on June 21, 1927. In his statement to the press, he gave among his reasons that the abnormal conditions surrounding the trial went a long way towards explaining the verdict of the jury. "I do not believe that under ordinary circumstance this case would have ever been brought to trial." The governor, too, now believed that it was the extreme paranoia of the Red Scare that made it possible for a mild-mannered, well-intentioned, and responsible citizen like Miss Whitney to be arrested and convicted of Criminal Syndicalism on the grounds that she associated with supposed radicals and revolutionaries. The Governor also added that many of the arrests in 1919 of members of political groups resulted from a misinterpretation of the Criminal Syndicalism Act. Public pressure to suppress a communist revolt along with the vague provisions of the act made it possible to apply the law to any group suspected of advocating violence. The primary intention of the law was to curb the activities of organizations actually known as advocates of terrorism or sabotage, not to allow for the arbitrary arrests of members of newly formed political parties such as the Communist Labor Party.⁶⁰

Because of the national attention Anita Whitney's case received, it could not be considered a typical syndicalism trial of 1920. Most persons arrested for violation of the Criminal Syndicalism Act were rushed through the court system and soon disappeared, lost among the inmates of the state penitentiaries. When the

58. *San Francisco Chronicle*, June 27, 1927, p. 4, col. 4.

59. *Washington Post*, June 21, 1927, p. 3, col. 6.

60. *Ibid.*, p. ???

public cried out for the removal of revolutionaries and radicals, politicians and police quickly responded to this demand. No accurate records were kept of how many people were convicted under state syndicalism acts but the numbers were no doubt staggering.

Anita Whitney's case was just one of many which demonstrated how dangerous the repercussions can be when public fears get out of hand. The hysteria, fortunately, was short-lived, which was proof in itself that it had no real basis. Documentation published less than five years after the Justice and Police departments conducted massive raids and made hundreds of arrests showed that the communist movement had never grown to the proportions necessary to constitute any genuine threat. To most Americans, however, the threat was real. The public demanded protection. That the government was so quick to respond to this demand demonstrated that the paranoia had reached even the highest levels of American society. Indeed, antiradical laws often long survived the popular pressure which forced their creation.

Anita Whitney was innocent. She had never advocated criminal syndicalism as defined by California law. While she had been associated with the Communist Labor Party, her intentions were to bring about a peaceful change; her motives were philanthropic. Public hysteria convicted her. Fortunately, as Americans moved into the more free spirited era of the twenties, the paranoia subsided, but not until after countless numbers of individuals were arrested and, like Anita Whitney, found guilty by association.