DEFENDING LABOR IN *COMMONWEALTH V. PULLIS*: CONTEMPORARY IMPLICATIONS FOR RETHINKING COMMUNITY

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I. Introduction

The first example in the history of the judicial suppression of trade unions in the United States was *Commonwealth v. Pullis*.[1] For the purpose of this essay, *Pullis* is useful because the rationale (or narrative) articulated by the prosecution and the court for the legal marginalization of organized labor continues to have cultural influence, even as the specific holding of the case is no longer valid law.[2] As noted by Dianne Avery, *Pullis* and its progeny had great influence on subsequent jurisprudence concerning combinations of workers (in the form of strikes, pickets, and boycotts) which restrained capitalist production.[3] The discourse in *Pullis* promoted the narrative "that workers were transitory, irresponsible, and dangerous," and were, thus, properly the subject of judicial control.[4] This view remains salient. *Pullis*, therefore, is paradigmatic as it encapsulates recurring themes animating the larger labor movement and its relationship to government and industry.

The goal of this essay is to revisit *Pullis* and to defend the interests of the defeated workers. By defending the workers' movements of the past, we learn better what it means to defend our current common interests as working people in the age of globalization. The pages that follow provide an overview of the context for the conspiracy charge in the *Pullis* case. The essay then explores the government's repression of non-violent labor tactics and engages claims made by the government that non-violent union action should be repressed as coercion. Fundamental to the issues raised by *Pullis* is the problem of legitimacy and its relationship to "working class republicanism" evoked by the labor movement.

II. Context for the Conspiracy Charge

The first expression of the Industrial Revolution in the United States occurred in the shoe industry.[5] In 1794, Philadelphia shoemakers (known as the Journeymen Cordwainers) responded to the labor hardships of industrialization by forming an organization, the Federal Society of Journeymen Cordwainers (FSJC). Through direct action (as described below), the FSJC successfully redefined the Philadelphia shoe industry as a closed union shop, in which only members of their organization could be employed.

Through 1804, the Journeymen Cordwainers received moderate wage increases.[6] These increases were not detrimental to the shoe industry, as the FSJC was sensitive to the larger economics of the business. As one example of this, the FSJC voluntarily accepted a reduction in wages to help the Master Cordwainers cultivate an export market for shoes to the American South.[7] Yet, as this very export trade matured, pressure mounted for the Masters to reduce the piece-rate wages of their workers. To be successful in this task, the Masters had to destroy the power of the FSJC. The Masters, thus, founded their own management organization and filed a criminal complaint with the State of Pennsylvania to have the tactics of the FSJC declared unlawful. In a particularly egregious example of justice for sale, the employers, not the government, paid the prosecution's expense.[8] The criminal complaint against the leaders of the FSJC was grounded in the English Common Law of Conspiracy, which precluded workers from organizing for the goal of increasing wages or reducing working hours.[9] Eight leaders of the FSJC (including George Pullis) were indicted and found guilty at trial "of a combination to raise their wages."[10]

The prosecution in *Pullis* was part of a larger political battle being waged in the United States between the forces of *aristocracy* (federalism) and those of *republicanism* (Jeffersonian democracy).[11] Within this ideological battle (which continued with different labels through the early-20th century), the working classes argued that Jeffersonian democracy envisioned a society in which the pursuit of happiness and dignity was the right of each citizen. Under this view,

equality was grounded in the opportunity for individuals to participate in public and economic life. With the growth of industry, organized labor was necessary to mobilize citizens to retain their presence in the public sphere. Nothing less than the freedom of the individual was at stake.[12] In short, Jeffersonian democracy placed great value on individuals and defined freedom as autonomy and self-reliance:

> The hallmarks of labor and Populist rhetoric were demands for equal rights, anti-monopoly, land reform, and an end to the exploitation of producers by non-producers. These movements inherited an older republican tradition hostile to large accumulations of property, but viewing small property as the foundation of economic and civic autonomy.[13]

This republican view was a radical break from English society and necessitated a rejection of the English legal system.

The Federalists, to the contrary, maintained that the national interest could best be advanced through an aristocracy, such as that found in England. According to the Federalists, men of wealth and accomplishment were the best stewards of the common good. Threatening this common good were the base passions and unrealistic whims of the common person. Because the English Common Law reflected this aristocratic interest, the Federalists were interested in importing much of that tradition into the emerging legal systems of the United States. The debate in *Pullis* concerns the wisdom of applying the English Common Law of Criminal Conspiracy to domestic labor cases.

III. Analysis of *Pullis* and the Construction of Community

The government opened the case against the Journeymen Cordwainers by arguing that citizens do not have the liberty to judge their own economic value or to intervene with the valuation placed on them by society. Claims to the contrary violate "just government, equal laws, and that due subordination to which every member of the community is bound to submit."[14] The government's argument reflects the change caused by industrialization which was then transforming the United States and under which the autonomy and

dignity of small-town agrarian individualism gave way to a more regulated existence necessitating heightened means of social control and new forms of authority. Such regulation was regarded by the Federalists to be the responsibility of the elite. Therefore, the defendants acted unlawfully by combining to "regulate the price of the labour of others as well as their own."[15] In combining for the common good of the working classes, the FSJC hampered the stewardship of the elite. In contemporary language, the defendants could be considered partisan actors who argued that challenging elite privilege is fundamental to the development of democratic society and a necessary part of social progress.

The government's argument suffered from one major issue; namely, the actions of the Journeymen Cordwainers were completely legal if done outside the legal fiction of a conspiracy context. As noted by the defense attorney, "A purpose innocent or lawful in one man, cannot be otherwise in a society or body of men. Supposing, therefore, that the facts charged . . . are true; that the men refused to work but at a certain price, it is no crime, and they cannot be punished for it."[16] In other words, the Journeymen Cordwainers were acting within the liberty generally afforded to people living in the society of the period. Therefore, if the government were to succeed in punishing the Journeymen Cordwainers, a new principle had to be established, a new discipline had to be constructed.

The vehicle for establishing this principle would be the law of criminal conspiracy. Conspiracy laws are broadly written to punish agreements between two or more people to complete some act that the legislature seeks to discourage—completed acts that are themselves illegal.[17] For example, robbing a bank is a criminal act. The act, however, does not have to be completed for the action to become a crime, as illustrated by the crime of "attempt." With the crime of conspiracy, however, a crime is committed when a person works in tandem with others to *intend* to rob a bank, even if no attempt is actually made. All that is required for the crime of conspiracy is an agreement to commit an illegal act and for one party to that agreement to engage an action furthering the agreement. This action can be innocuous, such as renting a car, purchasing rope, or checking

into a motel. Note also that conspiracy is different from the law of attempt. The law cannot punish someone both for attempting to rob a bank and for actually robbing a bank, as the completed act subsumes the intent. However, the law *can* punish someone for robbing a bank and for the conspiracy (i.e., the agreement) to rob the bank.

Arguably, society has an interest in preventing bank robberies and may legally intervene to break up a gang of robbers who, although preparing for their act, have not in any other way acted illegally. The subject of the conspiracy in *Pullis*, however, was not analogous to a bank robbery, as working class unity cannot easily be considered illegal or immoral. Such immorality must first be *assigned* to working class unity, which is the function of the law in this case. As an individual, each Cordwainer was free to reject the conditions of his work and to withhold his labor. Collectively, the Journeymen Cordwainers sought to exercise the same rights they had as individuals (as a society, they refused to associate with people who did not respect the efforts of the FSJC). In a Jeffersonian world, such action would be appropriate, as democracy is grounded in that view in the strength of individual citizens who come together as a community and work for the common good. Community life is strong only when individuals of that community are strong. From individual freedom and autonomy does the larger culture assume an ethos of freedom and autonomy. The American Revolution was fought, at least in theory, to actualize this vision of community, and much of the labor movement has been a struggle to remind the nation of this vision.

In securing a conviction under the English Common Law of Conspiracy, the prosecution faced three related hurdles. First, the Common Law crime was clearly perceived by many in society at the time to be a "discriminatory dragnet designed to catch only certain sorts of economic actors at the instance of others who were being economically hurt."[18] As later labor history would illustrate, the conspiracy law would seldom, if ever, be applied to management organizations that "conspired" to depress wages, nor was it applied that way previously in Britain. Thus, the indictment "seemed arbitrary, unfair and class-oriented when all [the Journeymen Cordwainers] had done was to attempt to exert the same kind of collective pressure

against employers that employers' organization, with their massive control of capital . . . exerted against workers."[19]

Second, the English Common Law rule had not been endorsed by the Pennsylvania legislature in positive law. In other words, the state legislature—aware of the English Common Law rule—did not codify the rule with a state penal statute. In the absence of a penal statute, the application of the English rule to Pennsylvania was considered controversial.[20]

Third, and perhaps most salient at the time, Pennsylvania had only recently gained its independence from what the former colonies considered British tyranny. Thus, the government faced the political awkwardness of introducing English precedent (overtly biased on behalf of the aristocracy) to the new U.S. working classes of Pennsylvania who had recently fought a war against aristocracy. This weakness is clearly illustrated by the defense attorney who addressed the jury as follows: "If you are desirous of introducing a similar spirit of inequality into our government and laws . . . if you think that the labourer and the journeyman enjoy too great a portion of liberty, and ought to be restricted in their rights . . . such disposition and opinions will lead you to convict the defendants."[21]

Pullis, as we will see, turns on the manner in which society defines the concept of violence or coercion and acceptable social action. If the union of workers is defined as violent, coercive, and/or unfair, then policy makers are privileging the values of the economic elite over a more socially inclusive set of values that understand that much union mobilization (particularly in the classical period) is the result of social and economic factors that are themselves violent against labor. As argued below, the tactics of Journeymen Cordwainers, although coercive in a rudimentary sense, were not violent and were far less coercive and more justifiable than the larger economic and political violence directed against them and subsequent labor organization.

IV. Non-Violent Labor Tactics

Central to the history of conflict between labor and government is the issue of violence. As discussed in this context, violence can be understood in two paradigmatic forms: the violence of worker militancy and the violence of the government and industry in suppressing workers (as well as the violence of the system more generally in degrading and harming workers). Although workers have acted violently at times, the overwhelming responsibility for the loss of life in labor disputes lies with government and industry. Throughout much of this country's history, the government used the excuse of worker militancy to justify the violent suppression of organized labor. The government has been so zealous in suppressing organized labor that even when organized labor acts non-violently (as is often the case), violence is often attributed to it, as well as blame for any violence that may result from governmental provocations.

In this early labor dispute between the Journeymen Cordwainers and their Masters, little violence was experienced, although the prosecution vigorously claimed that the FSJC was *de facto* a coercive organization. Although an objective reading of the trial record does suggest that some limited scuffling may have taken place between the striking Journeymen Cordwainers and scab employees (and that a shop window may have been broken by a thrown potato), such violence was atypical of the strike and atypical of future labor disputes, which, in some cases, bordered on open warfare with tragic fatalities for workers and their families (for example, the Ludlow Massacre of 1914). Further, particular examples of violence from among ranks of labor cannot be used to discredit the just struggle of a class of people who regard violence as the *result* of struggle and not as the *reason* for struggle. This is particularly important when, in contrast, the government typically views violence as a means to an ends.

What makes the *Pullis* case so paradigmatic is the way that the government and the court defined the strategies of the Journeymen Cordwainers as violent, when all they did was to withdraw their labor and shun both employers and employees who violated the labor standards they articulated. These methods—generically known as—

"scab law"—were described by a witness for the Commonwealth: "When a journeyman came from New York or Baltimore, a notice was sent to him, at the house he lived at, that he must come forward and join the society; if he did not his employer was called upon to turn him off; and none of the members would board at the same house with him."[22] Then, if a FSJC member failed to follow the rules of the society, or if that member worked for less than the wages established by the FSJC, the FSJC would tell that person's employer to discharge him. If the employer refused, the other FSJC members would leave that employer. As noted by the witness, "Suppose you was scabb'd, and working in Mr. Ryan's shop, all the members would leave him, if they were fifteen or twenty, unless he turned off the scab."[23] One Master testified that, due to this tactic, he lost more than half of his employees for more than 2 years.[24] As a result, no employer would dare to hire the scab, and he would be "driven out of all manner of work, that is of any profit."[25] With such tactics, the Journeymen Cordwainers successfully closed the shoemaking industry to FSJC members only.

A. The Question of Coercion

As discussed above, the activities of the Journeymen Cordwainers were based on tactics that cannot be considered violent—people were not attacked, property was not destroyed, and there were no battles with the police or military. The Journeymen Cordwainers simply cooperated with each other to coordinate a favorable change in their working environment. These tactics were certainly uncivil, but civility is not necessarily a virtue when the continuation of social inequality is at stake. An absence of civility and an element of coercion, although discernable in the actions of the Journeymen Cordwainers, does not equate with immorality.

In other words, because conditions of individual freedom depend on others working collectively to maximize social conditions conducive to economic democracy, union tactics such as the closed shop are often necessary, even though some workers may feel that the closed shop is an affront to their autonomy. Simply, the closed

shop is a useful method for attaining and preserving union strength. In the U.S. economic system, workers are often pitted against other workers so that some individuals can gain personally at the expense of their colleagues. Consequently, workers are not always conscious of their interests and often align themselves with anti-labor politics. Given this situation, the closed shop may be a politically necessary (although regrettable) tool so that the collective power of labor can be used to advance its interests (which the workers in—*Pullis* and throughout the larger labor movement assume as being widely inclusive of most people and preferable from a social justice point of view). All employees of an enterprise share in the benefits achieved through collective bargaining; therefore, all employees should contribute toward common strategies and goals.[26]

For the prosecution, however, the fact that coercion was not overtly violent was irrelevant because, in fact, when a new Cordwainer Journeyman worker arrived in town, he was "required" to join the FSJC. Although the new worker was free to refuse, to do so would preclude him from working or having a place to live. Once in the FSJC, the new member would be obliged to follow the rules established by the society, or else be expelled. Not only would such a member be required to pay dues, but he would have to strike when ordered by the FSJC, even if he preferred to work. Thus, the prosecution defined coercion in language that anticipates later so-called "right to work" legislation:

> If I go into a country I am bound to submit to its laws, but surely I may judge, whether or not I will go there. The society has no right to force you into its body, and then say you shall obey its rules under severe penalties. [Yet the] man who seeks an asylum in this country, from the arbitrary laws of other nations, is coerced into this society [the FSJC] . . . he must leave his seat and join the turn-out.[27]

As noted by the government, this was the case of a man named Harrison, a state witness at trial:

> [Harrison] was a stranger, he was a married man, with a large family; he represented his distressed condition; they [the FSCJ] entangle him, but shew no mercy. The dogs of vigilance

> find, by their scent, the emigrant in his cellar or garret: they drag him forth, they tell him he must join them; he replies, I am well satisfied as I am . . . No . . . they chase him from shop to shop; they allow him no resting place, till he consents to be one of their body; he is expelled [from] society, driven from his lodging, proscribed from working; he is left no alternative, but to perish in the streets, or seek some other asylum in a more hospitable shore.[28]

A second worker testified that the "name of a scab is very dangerous; men of this description have been hurt when out at nights. I myself have been threatened for working at wages with which I was satisfied. I was afraid of going near any of the body: I have seen them twisting and making wry faces at me, and heard two men call out scab, as I passed by."[29]

In responding to the claims of the prosecution, the defense attorney noted that no disturbance was created in violation of any applicable criminal law and that the only offensive behavior of the defendants was "their refusing to work for any master who employed such journeymen as infringed the rules of the society to which they belonged."[30] Such refusal may have been "unreasonable," "ridiculous," "capricious," "whimsical," or "illiberal," but that was not enough to support a criminal prosecution.[31] As argued by the defense attorney, individuals in the United States have both moral and political authority to work with others to achieve common lawful goals. Thus, every "man may chuse his company, or refuse to associate with any one whose company may be disagreeable to him, without being obliged to give a reason for it: and without violating the laws of the land."[32]

Outside of slavery (still legal in Southern jurisdictions at the time), forms of indentured servitude, court-ordered child support payments, and vagrancy laws, refusing to work was not a criminal act and should not be so considered. Although contemporary society tends to reject scab politics as unfair to individual workers who do not agree with union goals, it would do well to consider how the existence of a permanent pool of unemployed labor, created by industrial and governmental policy, makes scab labor attractive to

many workers who would otherwise support collective action. The unfairness is the systemic cultivation of unemployment by industry to suppress labor costs and not the tactics of labor in responding to the exploitation of the unemployed and the use of their human needs as a weapon against the efforts of the collective to better the condition of all workers. Scab politics is often a necessary response to a larger economic system that embraces coercion (e.g., crude physical necessity) as its fundamental economic engine.

In sum, the coercion issue was, for the most part, a red herring. On the face of the trial record, it is not possible to conclude that the actions of the Journeymen Cordwainers were truly abusive in a way that would be repugnant to a dynamic democratic society. On the contrary, the Journeymen Cordwainers went out of their way for five years to coordinate their need for labor with the needs of industry (strengthening industry to the point of undermining their own interests). What changed was not the tactics of the workers but their power. As the Philadelphia shoe industry broadened into an export industry, the Philadelphia workers were hindered by their competition with other producers, such as workers in England. This competition forced down the selling price of shoes. In this new market, the Master Cordwainers could no longer afford to pay the same wages as when the market was local and the Journeymen Cordwainers had less competition. The FSJC, therefore, had to be eliminated, which was why this case was brought. If any compulsion can be said to exist in this case, it was the compulsion of industry to lower wages.

B. The Problem of Legitimacy

When the charge of compulsion is rejected, the salient issue in the case becomes heightened. This issue, fundamental to the larger conflict between the Federalists and the Jeffersonian Republicans, centers on the issue of legitimacy. Specifically, who are "the people"? Who has the right to speak for the people and to enact laws to govern their development? When do citizens have the right to reject one notion of community and to offer another? These questions are central to"*Pullis*, as well as to most subsequent labor solidarity cases.

Pullis provided society with an opportunity to develop in terms of democratic inclusion, what William E. Forbath identifies as "working class republicanism."[33] Working class republicanism, an expression of Jeffersonian democracy, involved labor's "conviction that the integrity of the Constitution depended on the 'ability of the people to rule.'"[34] Such belief "was rooted in a republican tradition that dated back to the Revolution."[35] Working class republicanism emphasized equality and dignity for all citizens.[36] Specifically, this view maintained that "being forced to sell his labor contradicted the worker's status as a citizen."[37]

Such working class republicanism—as well as future expressions of anarchism, communism, socialism, progressivism, or unionism—are frequently labeled threats to liberty by the defenders of the status quo. With this definitional tactic, the status quo reifies itself as the standard of social truth. The government in *Pullis* exemplifies this phenomenon:

> Shall these, or any other body of men, associate for the purpose of making new laws, laws not made under the constitutional authority, and compel their fellow citizens to obey them, under the penalty of their existence? The prosecution contravenes no man's right, it is to prevent an infringement of right; it is in favor of the equal liberty of all men, this is the policy of our laws; but if private associations and clubs can make constitutions and laws for us . . . if they can associate and make bye-laws paramount, or inconsistent with state laws; What, I ask, becomes of the liberty of the people. [These men] ought to submit to the laws of the country, and not attempt to alter them according to their own whim or caprice.[38]

The concerns of the government were not entirely foundationless given that three major rebellions occurred in the United States during the years of 1776-1800, challenging the conception of "the people" offered by the new federal government.[39] Furthermore, established states such as Massachusetts were splitting apart, creating new political bodies, such as Maine. Other states, such as the State of Franklin, failed to stabilize.[40] In light of these events, and others, such as the French Revolution, which frightened U.S. elites (e.g., the

passage of the Alien and Sedition Acts were the result of this fear), there was much concern, during these early years of the republic, over what the political boundaries of "the people" meant.[41] As argued by the government:

> We charge a combination, by means of rewards and punishments, threats, insults, starvings and beatings, to compel the employers to accede to terms, they the journeymen present and dictate. If the journeymen cordwainers may do this, so may the employers; the journeymen carpenters, the bricklayers, butchers, farmers, and the whole community will be formed into hostile confederacies, the prelude and certain forerunner of bloodshed and civil war.[42]

To talk about civil war, as the prosecutor did, is to forefront the issue of legitimacy. As with legal norms, civil war is neither good nor bad, *per se*, and should not be feared simply because it involves conflict. Although such war is a radical expression of a failed community, there are many reasons why a community may fail and significant reasons why conflict is necessary to heal the community. Most of these reasons center on the fact that, for a significant portion of a population, normative state legitimacy has been rendered obsolete. Communities have no *a priori* presence—they exist only through communication and to the extent that common, moral bonds and identifications between members remain strong. In other words, community "possesses no fixed, stable referent but is instead an 'essentially contested concept' whose meaning is continuously negotiated in and by cultural performances, as well as other symbolic forms."[43]

The health of any community can be compromised by social injustice (social instability arises when a community treats a segment of its population unfairly). Such communities can be transformed so that social morality can be reestablished and no one is allowed to slip through the social cracks. As Sonja K. Foss, Cindy L. Griffin, and Karen A. Foss argue, "The talents of everyone, whatever they are, deserve to be acknowledged and affirmed, even when they do not stand out in dramatic ways."[44] This belief is grounded in the notion of "immanent value."[45] Because people are inherently valuable,

individuals should not be "measured up against an established hierarchy."[46] Furthermore, the established hierarchy can be engaged so that the immanent value of everyone has a chance to flourish. Social entities (including individuals) that stifle human potential must be engaged so as to negate their deleterious influences. In other words, if, by combining to reduce their suffering, the working classes cause widespread social unrest and dramatic transformation in public life, that most likely means that the current status quo is itself untenable and in need of adjustment to better serve human needs.

Specifically, in a society such as the United States where people's subjectivities are often determined by the amount of money they possess, the concept of immanent value implies that social change may, under some circumstances, be necessary. Politically, however, this argument raises difficult issues. For instance, what status do "the people" have as historical agents for political change? What are the limits of the people's right to gather to better perfect their communities and under what conditions is it permissible to constrain others in the process? More practically, where is the line between civic activism and sedition? For the prosecution in *Pullis*, these questions were easy to answer: If "the people" can create their own regulations and constitution in the context of a republic, then such people create, in effect, a sovereignty within a sovereign (an "*imperium in imperio*"), and the national fabric is correspondently eroded.[47] In this way, the government attorney crystallized what would become a major justification for the suppression of organized labor:

> It now rests with the jury, under the direction of the court to say, whether we shall in future be governed by secret clubs, instead of the constitution and laws of the state; a verdict of not guilty, will sanction combinations of the most dangerous kind; a contrary verdict will give the victory to the known and established laws of the commonwealth.[48]

Such reasoning raises a further issue which will become much more evident in future labor conflicts: To what extent does an effective political government exist when confronted by a massive capital monopoly? For instance, many government agencies at both the state

and federal levels collapsed with corruption under the influence of powerful railroads in the 19th century. One notable case, the Crédit Mobilier of America scandal of 1872-1873, involved the Union Pacific Railroad, Congress, and the administration of President Ulysses S. Grant.[49] In the post-Enron world, this is not an inconsequential question. Given pervasive government corruption due to industry influence, neutral observers cannot deny what labor has long claimed: The counter-balance of organized labor is a necessary corrective to the corrupting influences of amassed capital. Oliver Wendell Holmes—while a judge on the Massachusetts Supreme Court—eloquently addressed this issue in a noted dissent:

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[50]

Unfortunately, more than four decades would pass before the sentiment in Holmes' dissent would become public policy, as found in Roosevelt's New Deal policies for the reconfiguration of U.S. society. As New Deal era influence on the U.S. economy has been rendered nearly obsolete in current times, Holmes' dissent takes on a renewed cultural significance.

VI. Conclusion

Contemporary courts face many obstacles when importing foreign legal precedent willy-nilly, as did the *Pullis* court. Furthermore, prosecutors who assume that a crime has been committed on the grounds that the state's ideological conventions have been violated, are now often constrained by public sentiment. For example, through the 1960s, many White prosecutors enforced segregation on the grounds that the White community had the power to protect itself from the "threats" that African Americans allegedly

posed. A majority of the contemporary public would no longer recognize the validity of such arguments. However, when a community's identity is in flux, as it was during the first several decades of the United States, convictions such as those found in *Pullis* occur. As the United States and the world enter another such period, *Pullis* remains illustrative. When such convictions serve the interests of a powerful elite, the "bad" law enacted often begets more bad laws, as legal precedent builds on itself. Furthermore, bad laws tend to multiply because a bad law, by implication, often denies normative community to a significant population, and such people often resist their social marginalization. A community's power to reinforce the alienation of a marginalized group often requires a comprehensive jurisprudence.

Obedience to a law, no matter how bad the law, is commanded by the government in *Pullis*. The recurring trope justifying this position is that the United States is a nation ruled by law, not by individuals. Decontextualized, however, obedience to the "rule of law" becomes a shibboleth that the forces of the status quo often evoke for repressing progressive social change. In Western culture, this argument was eloquently first advanced in Plato's apology for Socrates, in which Socrates staked his life on his fidelity to the Athenian law that condemned him to death.

However, although the community welfare should be guarded, law *per se* is not necessarily the community's best guardian. At its best, the law can serve this function; however, the law often allows individuals to combine to pursue legal goals that are quite injurious to the general welfare of the community. Thus, such arguments based on fidelity to the rule of law should be approached with a suspicious eye. Law and order is often a violence committed against the interest of some people in the name of others. In other words, order, by itself, is not a bad thing, as all societies need a degree of structure to be able to function effectively. But in times of crisis, "order" often becomes operationalzied as a substitute for a wider, more socially inclusive political view (i.e., "order" for the Nazis meant the exclusion of the Jews). Order is also established according to somebody. Society

itself has no "order." Order is the structure that a political vision imposes on a community.

Viewing law and order in this way does not make law and order "bad"; rather, it recognizes that law and order is always suspect, which is why legal norms must be constantly questioned. As Michel Foucault notes, it "would be hypocritical or naïve to believe that the law was made for all in the name of all . . . it would be more prudent to recognize that it was made for the few and that it was brought to bear upon others . . . . Law and justice do not hesitate to proclaim their necessary class dissymmetry."[51] Historical and legal criticism is particularly necessary when law and order is used as a weapon to prevent progressive social change done for the betterment of society. When law and order is used in a self-serving fashion, society opens itself to the charge that "law is congealed injustice, that the existing order hides an everyday violence against body and spirit, that our political structure is fossilized, and that the noise of change—however scary—may be necessary."[52] At such times, however, "a cry rises for 'law and order.' Such a moment becomes a crucial test of whether the society will sink back to a spurious safety or leap forward to its own freshening."[53] The *Pullis* case was one such moment.

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[1] Mayor's Court of Philadelphia (1806), *reprinted in* John R. Commons, Ulrich B. Phillips, Eugene A. Gilmore, Helen L. Sumner, and John B. Andrews, *A Documentary History of American Industrial Society*, (Cleveland: The A.H. Clark Company, 1910-11), 59-248. The British precedent is Rex v. Journeymen Tailors of Cambridge, 8 Modern 10 (K.B., 1721).

[2] Pullis was rejected in Commonwealth v. Hunt, 4 Metc, 111 (1842). See Walter Nelles, *Commonwealth v. Hunt*, 32 Colum. L. Rev. (1932), 1166-69 and

Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw: The Evolution of American Law, 1830-1860*, (New York: Harper & Row, 1957), 183-206. Yet as Barry F. Helfand notes, Hunt was soon distinguished by other courts; thus prosecutions for conspiracy continued for many decades. When combined with later labor injunctions (i.e., In re Debs, 158 U.S. 564 (1895)), these two legal doctrines were effective in suppressing labor organizations. The pro-labor characterization of *Hunt* was questioned by Wythe Holt, *Labour Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 Osgoode Hall L.J. (1984), 643-653.

[3] *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 Buff. L. Rev. (1988), 5.

[4] *Id.*

[5] Walter Nelles, *The First American Labor Case.* 41 Yale L.J. (1931), 166. Parallels can be drawn between that time and the present, in which globalization is upsetting the conditions of community life as fundamentally as did the Industrial Revolution.

[6] The work day for the Cordwainers was sunrise to sunset for less than $10 a week. Nelles, *The First American Labor Case,* 167.

[7] *Id.*

[8] Holt, *Labour Conspiracy Cases in the United States*, 593.

[9] See R.S. Wright, *The Law of Criminal Conspiracies and Agreements*, (Philadelphia: The Blackstone Publishing Company, 1887).

[10] Commonwealth v. Pullis, 236.

[11] Nelles, "The First American Labor Case," 168 and 170-173.

[12] *Id.* at 169.

[13] Eric Foner, *Why is There No Socialism in the United States?* 17 Hist. Workshop J. (1984), 63.

[14] Commonwealth v. Pullis, 132.

[15] *Id.*

[16] *Id.* at 145.

[17] See Richard J. Bonnie, Anne M. Coughlin, John C. Jeffries, Jr., and Peter W. Low,
Criminal Law (Westbury, NY: Foundation Press, 1997), 595-632.

[18] Holt, *Labour Conspiracy Cases in the United States*, 601.

[19] *Id.* at 594.

[20] *Id.* at 602-605.

[21] Commonwealth v. Pullis, 162. See Holt, *Labour Conspiracy Cases in the United States*, 613-615.

[22] Commonwealth v. Pullis, 95.

[23] *Id.* at 90.

[24] *Id.* at 100.

[25] *Id.* at 92.

[26] Note that the Supreme Court, in a string of "right not to associate" cases, has repeatedly rejected this argument. See Abood v. Detroit Board of Education, 431 U.S. 209 (1977). "Right to work" laws exist in many states where legislatures—by fiat and with court approval—have outlawed union organization on the grounds that workers have a "right" to not associate with a union.

[27] *Id.* at 139.

[28] *Id.*

[29] *Id.* at 93.

[30] Commonwealth v. Pullis, 150.

[31] *Id.* at 151.

[32] *Id.*

[33] William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Guilded Age*, 4 Wisconsin Law Review (1985), 816.

[34] *Id.*

[35] *Id.*

[36] Note, as with the democracy of Ancient Greece, citizenship in the early United States was rigidly constrained. See Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes*, (Oxford, UK: Blackwell, 1991).

[37] Forbath, "The Ambiguities of Free Labor," 768.

[38] Commonwealth v. Pullis, 135.

[39] These were Shay's Rebellion (1786), The Whisky Rebellion (1794), and Fries Rebellion (1788). See United States v. Mitchell, 26 F.Cas.1277 (1795); Alan Taylor, *Liberty Men and Great Proprietors: The Revolutionary Settlement on the Maine Frontier, 1760-1820*, (Chapel Hill: University of North Carolina Press, 1990), 89-121; Thomas P. Slaughter, *The Whisky Rebellion: Frontier Epilogue to the American Revolution*, (New York: Oxford University Press, 1988), 11-27; and http://www.jamesmannartfarm. com/friesreb1.html.

[40] In the early 1780s, the short-lived State of Franklin was created in the area of what is now Tennessee. Leaders of the former colonies in that region, alienated by federal economic policy and by the ineffectiveness of the new national leadership in controlling the Native American population, petitioned to join the Spanish empire. By 1789, however, the territory came under U.S. control. See *A Dictionary of American History*, (Blackwell Reference, 1995).

[41] For a theoretical discussion of "the people" as a rhetorical topos, see Michael C. McGee, *In Search of "The People": A Rhetorical Alternative*. 61 Quarterly Journal of Speech 61 (1975), 235-49.

[42] Commonwealth v. Pullis, 235.

[43] Kirk W. Fuoss, *"Community" Contested, Imagined, and Performed: Cultural Performance, Contestation, and Community in an Organized-Labor Social Drama*. 15 Text and Performance Quarterly (1995), 93.

[44] *Transforming Rhetoric Through Feminist Reconstruction: A Response to the Gender Diversity Perspective.* 20 Woman's Studies in Communication (1997), 124.
[45] See Karen A. Foss, Sonja K. Foss, and Cindy L. Griffin, *Feminist Rhetorical Theories*, (Thousand Oaks, CA: Sage, 1999), 168-169.
[46] Foss, Griffin, and Foss, "Transforming Rhetoric," 124.
[47] Commonwealth v. Pullis, 235.
[48] *Id.*
[49] See David Bain, *Empire Express: Building the First Transcontinental Railroad*, (New York: Viking Press, 1999), 675-710. By 1900, the accumulated assets of the various railroads constituted 10% of all U.S. wealth. Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale Law Journal (1988), 1018.
[50] Vegelahn v. Guntner 167 Mass. 92, 44 N.E. 1077 (1886), *reprinted in* Archibald Cox, Derek Curtis Box, Robert A. Gorman, and Matthew W. Finkin, *Labor Law: Cases and Materials* 11th ed. (New York: The Foundation Press, 1991), 23. For a discussion of this dissent, see Avery, *Images of Violence in Labor Jurisprudence*, 39-41.
[51] *Discipline & Punish*, (New York: Vintage, 1979), 276.
[52] Howard Zinn, *Disobedience and Democracy: Nine Fallacies on Law and Order*, (New York: Vintage Books, 1968), 4.
[53] *Id.*