## APPENDIX.

**Exhibit A.**

Criminal
No. 907

IN THE

DISTRICT COURT OF APPEAL,

STATE OF CALIFORNIA.

FIRST APPELLATE DISTRICT—DIVISION ONE.

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THE PEOPLE OF THE STATE OF CALIFORNIA,
*Plaintiff and Respondent,*
vs.

CHARLOTTE A. WHITNEY,
*Defendant and Appellant.*

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## APPELLANT'S OPENING BRIEF.

The defendant and appellant in this cause is a refined, cultured, intellectual woman who has spent her life and private fortune in charitable and philanthropic work for the relief and betterment of her fellowmen. This [page 2] characterization is not based upon any matters or things *dehors* the record in this case; it finds abundant support in the transcript, a transcript which does not contain a shred or syllable of evidence showing, or tending to show, that the appellant ever

by thought, word or deed, broke or advocated the breach, of any law of the land. She was convicted in the court below and sentenced to a term of from one to fourteen years in the state penitentiary on an information that charges no crime, on evidence that proves the commission of no crime. She was convicted, not because of anything that she herself ever did, not even because of anything that she herself ever *said;*—but because of the crimes and misdeeds of others,—crimes with which she was not shown to have had the remotest connection, and which it was not contended that she ever advised, counselled or ratified. She was convicted merely because of her membership in a political party which held, or rather was deemed by the police force of the City of Oakland to have held, radical views on social and economic questions.

We believe that the decision of this honorable court in this cause will have vast and far-reaching consequences. *A reversal of this conviction will have incalculable value in maintaining and safe-*[page 3] *guarding the constitutional rights of free thought, free speech and free assemblage;* it will serve as a well-merited rebuke to those who in the name of law and order, are guilty of the most flagrant and reprehensible violations of the law. We present this appeal with the utmost confidence in the justice of our cause and in the learning, wisdom and absolute fairness of the judges of this honorable court.

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(Omitted as immaterial.)

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[Page 7] **I. The Information Does Not State a Public Offense, and the Demurrer Should Have Been Sustained.**

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(Omitted as immaterial.)

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[Page 11] The defendant demurred to each of the several counts of the information for failure to state a public offense, for failure to state any particulars of the offense charged, or to state the acts constituting the offense in ordinary and concise language so as to enable a person of common understanding to know what was intended, and for lack of directness and certainty. This demurrer was overruled by the trial judge. We believe that it should have been sustained as to each of the counts, and cases by the hundred might be cited in support of such contention, but in view of the fact that no verdict was reached on the last four counts, and that the same were ultimately dismissed, we shall confine this portion of the brief to a discussion of the first count—the one on which appellant was convicted. If that count charges no crime, such failure is not cured by the verdict, and the judgment must of necessity be reversed.

Let us say at the outset, that we are not unmindful of the fact that the appellate [page 12] courts of this state since the adoption of Section 4½ of Article 6 of the Constitution, have, with some degree of frequency, refused to reverse convictions because of technical errors and defects

in indictments and informations. But *it has never been contended that that section was designed to do away in toto with the well-established rules of criminal pleading or to abrogate the time-honored and constitutional right of every accused person "to be informed of the nature of the accusation against him." Only by some such construction can the first count of this information be upheld, for it violates every known rule and principle of criminal pleading;* it is insufficient, not only under the plain provisions of the Penal Code, but under the rules laid down by every text writer on criminal law from Hale to Wharton, and by the decisions of every court the basis of whose jurisprudence is the common law of England. As a pleading, it stands beside the fictitious information framed by the brilliant and witty Justice Henshaw to illustrate his argument in *People* vs. *Greisheimer*, 176 Cal., 44—an information charging that A "killed a man." And truth again is stranger than fiction, for the information in the case at bar is even less direct and certain as to the offense attempted to be charged than is Judge [page 13] Henshaw's imaginary pleading. Among the many defects, uncertainties, and insufficiencies in the first count, we may note the following:

In the first place, it is merely alleged that the defendant organized, assisted in organizing, and became a member of *an organization.* The organization is not named, neither is it described in any manner whatever. If the organization referred to had a name or a common designation, it should have been set forth. If it had no name or definite designation, that fact should have been stated, and some descriptive phrases should have

been used. In the trial of the cause the District Attorney offered proof tending to show that the defendant actually joined an organization or political party known as the Communist Labor Party. Certainly it would have been easy for the District Attorney to have pleaded the name of such organization in the information. For all that appears from the information, the unlawful organization or society which the defendant is accused of organizing might be the Democratic Party, the Methodist Church, the Knights of Columbus, or the Ladies' Aid Society. Furthermore, while it is alleged that she became a member of an organization, etc., of persons organizing and assembling, to advocate, teach, aid and abet criminal syndicalism, it is not alleged in the first [page 14] count and cannot be ascertained therefrom how or in what manner or by what means the said organization would or could or did *advocate* or *teach* or *aid* or *abet* criminal syndicalism, neither is it alleged what the criminal syndicalism consisted of, and none of the facts or circumstances constituting the same are set forth. Plainly, these allegations in the information are merely conclusions of the pleader, and are not in any sense of the word a *statement of the acts* constituting the offense attempted to be charged. The information is fully as insufficient as would be an information which merely charged that the defendant on a certain day "committed the crime of burglary," without naming or describing the premises or stating the intent with which the entry was made.

It is a fundamental rule of criminal pleading that where the statute itself so describes the

ticulars constituting the crime that the statutory language is sufficient to apprise the defendant of the nature of the act with which he stands charged, an indictment or information drawn in the language of the statute is sufficient, but the rule is otherwise where the statute uses general language, or employs generic terms which are not in themselves a statement of the acts constituting the offense. In the latter case the particulars of the al- [page 15] leged crime must be set forth. It is an elementary rule that an indictment or information should contain such a specification of acts and descriptive circumstances as will on its face, fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet and avail himself of a conviction or acquittal as a bar to further prosecution arising out of the same facts.

*Wingard* vs. *State,* 13 Geo., 396;
*Harne* vs. *State,* 39 Md., 552;
*Commonwealth* vs. *Terry,* 114 Mass., 263;
*State* vs. *McGinnis,* 126 Mo., 564;
*Moline* vs. *State,* 67 Nebr., 164; 93 Northwestern, 228;
*State* vs. *Pirlot,* 19 R. I., 695; 36 Atlan., 715;
*Bishop* vs. *Commonwealth,* 13 Gratt., 785;
*U. S.* vs. *Cruikshank,* 92 U. S., 542;
*State* vs. *Shirer,* 20 S. C., 392;
*Peters* vs. *U. S.,* 94 Feo., 127.

In the case at bar, the statute makes use of generic terms and words having a general meaning. Criminal syndicalism, as defined in Section 1 of the act, means a number of things. It may mean the teaching or advocating or aiding or abetting crime. It may mean sabotage or malicious physical damage to personal property. It [page 16] may mean unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change. These terms employed by the statute are general in their scope and have varying significance. To charge an offense under this act in the mere language of the statute without setting forth any particulars whatsoever does not apprise the accused of the nature of the accusation against him. Furthermore, the information in question does not even follow the language of the statute, insufficient and faulty as such a course would be. It merely uses the words "criminal syndicalism" without even the statutory description and definition of the same.

It does not set forth how or in what manner the unnamed organization referred to, proposed to or did teach or aid or abet criminal syndicalism, nor does it appear what form of criminal syndicalism the unnamed organization was formed to promote. Clearly, the information does not, to use the language of Section 950 of the Penal Code,

> "contain a statement of the *acts* constituting the offense in ordinary and concise language and in such manner as to enable a

son of common understanding to know what is intended."

[Page 17] At the risk of being tedious and of seeming to argue the truth of a self-evident and axiomatic proposition, we beg leave to call the attention of the court to a few authorities in support of the foregoing specifications. In *People* vs. *Mahony,* 145 Cal., 104, the court had under consideration an indictment based upon the provisions of Section 72 of the Penal Code for the presentation of a false and fraudulent claim against the county. In that case, Chief Justice Angellotti concisely states the rule of pleading applicable to the case at bar in the following language:

> "It is urged in support of the indictment that it is generally sufficient to describe the offense substantially in the language of the statute. This is undoubtedly the general rule, but, as has been said, such rule simply means, 'that when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient in an indictment to describe those acts in the language employed in the statute, applying them, of course, concretely to the person charged.' (People vs. Ward, 110 Cal., 369, 372.) In such cases, the statutory description gives to the accused sufficient notice of the charge against him. In the vast majority of cases the statute declaring the public offense does so define or describe the acts constituting it, but in many cases it does not, and to these

cases is applicable the qualification to the general rule described by Mr. Justice Harlan in United States vs. Simmons, 96 U. S., 360, [page 18] as a qualification 'fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead judgment as a bar to any subsequent prosecution for the same offense.' Our Penal Code provides that the indictment or information must contain 'a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended' (Sec. 905, Subd. 2); that it must be direct and certain as regards 'the particular circumstances of the offense charged, when they are necessary to constitute a complete offense' (Sec. 952, Subd. 3); and that it is sufficient if, among other things, the act charged as the offense is set forth 'in such a manner as to enable a person of common understanding to know what is intended.' These provisions but recognize the principle universally recognized in civilized countries, that one accused of crime shall be allowed to know the charge against him, so that he may have an opportunity to present his defense thereto, if any he has. (See People vs. Palmer, 53 Cal., 615; People vs. Ward, 110 Cal., 369.)"

This decision is cited and approved in *People* vs. *Butler,* 35 Cal. App., 357, in which the

ciency of another indictment which attempted to charge a violation of Section 72 of the Penal Code is under consideration. If the court will examine those portions of the indictment in the Butler [page 19] case which are quoted in the opinion, it will be seen that the Butler indictment in comparison with the one in the case at bar is almost a model pleading. Notwithstanding this, it was held to be insufficient upon the ground that the offense created by that section could not be charged in the language of the statute, but that the circumstances of the offense must be set out. Another recent case strongly in point is *U. S.* vs. *Bopp,* 230 Fed., 723. In that case the defendants had been indicted for conspiring to begin and set on foot certain military enterprises to be carried on within the territory and jurisdiction of the United States against the territory and Dominion of the King of Great Britain, a foreign prince with whom the United States was at peace. The indictment alleged that the end, aim and purpose of said military enterprise was, among other things, to blow up certain railway tunnels in the Dominion of Canada, and to destroy and sink by force of arms, all ships with their cargoes and crews engaged in transporting munitions of war for Great Britain and her allies. The indictment was held to be insufficient. In the course of the opinion Judge Dooling says:

> "Neither this statute nor any other declares what is meant therein by the words [page 20] 'military enterprise,' nor what would be required to constitute such an enterprise, so that in giving effect to the statute

the court must determine from other sources what Congress meant when it used these words. So far as the conspiracy itself which is charged in this indictment is concerned, it is stated in the language of the statute without amplification; that is to say, there is no statement that defendants conspired to do certain things, which, if accomplished, would in the judgment of the pleader constitute the beginning or setting on foot or the preparing or providing means for a military enterprise, and upon the sufficiency of which things to constitute such offense the judgment of the court might be exercised.

"It is a settled rule of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same terms as in the definition; but it must state the species, it must descend to particulars, or as stated in United States vs. Carll, 105 U. S., 611, 26 L. Ed., 1135:

" 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished.'

"The sole charge against the defendants here is that they conspired 'to begin and set on foot, and prepare and provide the means [page 21] for certain military enterprises.' This is the bald language of the statute; the

mere conclusion of the pleader. But the particular things which they conspired to do are not stated—the things which, if in fact accomplished, would constitute the setting on foot or providing means for a military enterprise. What does the pleader understand the words 'military enterprise' to mean? What in his judgment constitutes a military enterprise? The indictment gives neither the defendants nor the court any information in this regard, and the things that the pleader might regard as sufficient to warrant him in asserting that defendants conspired to set on foot or provide means for a military enterprise might in the judgment of the court fall far short of being the things intended by the statute. The language of the Supreme Court in United States vs. Hess, 124 U. S., 486, 8 Sup. Ct., 573, 31 L. Ed., 516, seems to me peculiarly applicable to the present case:

" 'The statute upon which the indictment is founded only described the general nature of the offense prohibited; and the indictment, in repeating its language, without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury.'

"The defendants are entitled to know the particular things which they are charged with having conspired to do, and the court, when the indictment is challenged, must also have this information, in order to be able definitely to say whether a conspiracy to do such particular things is a conspiracy to set [page 22] on foot or provide means for a

> military enterprise. The indictment here is not aided by the averments therein that the intention of defendants and the purpose of the enterprise was to destroy tunnels, railroads, bridges, trains and ships which were engaged in the transportation of munitions of war. Such destruction is not necessarily aimed at the territory or dominions of the king of Great Britian, but might be directed only against the various companies owning such tunnels, railroads, bridges, trains and ships. And while such destruction might well be the aim of a military enterprise, it is not necessarily so, nor can it be said that everyone who might undertake so to destroy or cripple railroads or ships was engaged in such an enterprise, even though munitions of war were transported, by them. It is not even averred that the purpose of destroying the railroads and ships was to prevent the transportation of munitions of war, and the words 'railroads or ships which were engaged in transporting munitions of war,' without further averment, might well be mere words of description, having no relation to the motives of the defendant, and certainly not being sufficient to stamp every attempt to destroy such roads or ships as a military enterprise."

Perhaps the best statement of the rule applicable to charging statutory offenses in the language of the statute is found in *People* vs. *Perales,* 141 Cal., 581:

[Page 23] "While it is the general rule that it is sufficient to charge an offense in the language of the statute, yet this rule is subject to the qualification, that where a more particular statement of facts is necessary in order to charge the offense definitely and certainly, it must be made. The statute may, and often does, define the offense by the use of precise and technical words which have a well-recognized meaning, or designates and specifies particular acts or means whereby an offense may be committed.

"Under such circumstances, to charge the offense substantially in the language of the statute will be sufficient.

"When, however, the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted."

[Page 24] The language of the late Justice Lorigan, in the case last above quoted is cited with approval in *People* vs. *Silva,* 8 Cal. App., 349 (see also *People* vs. *Martin,* 52 Cal., 201).

Another case strongly in point, is *People* vs. *Pierro,* 17 Cal. App., 741. The defendant in that case was prosecuted under the provisions of the juvenile court law for having committed acts of a lewd and lascivious character, with an alleged dependent child. Otherwise expressed, the offense of contributing to the dependency of a minor under the age of 18 years, was the crime intended to be charged by the information. It is held in the opinion of the District Court of Appeal that the general allegation in the information that the child therein named was then and there a dependent child, was insufficient to inform the defendant of the particulars of the charge which he was called upon to meet. We quote from the language used by the court:

> "The defendant, by demurrer, objected to the insufficiency of this information on the ground that the particular acts or conduct chargeable against Valita Rhinehart by reason of which the child became a delinquent were not set out in the information, and that therefore defendant was not informed of the particulars of the charge he was called upon to meet. In our opinion, there was merit [page 25] in this objection and the demurrer to the information should have been sustained. The child, if dependent, may have become a vagrant, or a beggar, she may have become incorrigible or destitute; she may

have frequented the company of criminals, or become an inmate of a house of prostitution; or deported herself in many other ways by reason of which the character of a dependent child may have become affixed to her within the meaning of the juvenile court law. Defendant was entitled to have the information show the particulars in this regard, for he was called upon to meet the issue, first, as to whether the child had in fact become a delinquent. If she had not, the charge of contributing to the cause of such delinquency of the child or its continuance, could not be made out against him. Merely charging that the child was a delinquent within the meaning of the juvenile court law, as the district attorney did charge, when the statute enumerates many and different acts by reason of which a child may become a delinquent, cannot be said to satisfy the requirement of section 952, Penal Code, which provides that an indictment or information must be direct and certain, as it regards '3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.' "

We further respectfully call the attention of the court to the following authorities:

*I. Wharton's Crim. Proc.* (Kerr's Ed.) Secs. 269, 270;
[Page 26] *Sykes* vs. *State,* 66 Ala., 70;
*Grattan* vs. *State,* 71 Ala., 344;
*Bates* vs. *State,* 31 Ind., 72;

*State* vs. *Windell,* 60 Ind., 300;
*State* vs. *Flint,* 33 La. Ann., 1288;
*State* vs. *Simmons,* 73 N. C., 269;
*State* vs. *Meschac,* 30 Tex., 518;
*State* vs. *Higgins,* 53 Vt., 191;
*Commonwealth* vs. *Chase,* 125 Mass., 202;
*U. S.* vs. *Ballard,* 118 Fed., 757;
*Haynes* vs. *U. S.,* 101 Fed., 718;
*State* vs. *Halsted,* 39 N. J. L., 402;
*State* vs. *Kentner,* 178 Mo., 487;
*Collier* vs. *Commonwealth,* 110 Ky., 516; 62 S. W., 4.

*In concluding this portion of our argument, we most respectfully urge to the court that the overruling of the demurrer in this case by the trial court was not a mere technical error. It deprived the defendant of a substantial right,—the right to be sufficiently informed of the nature of the accusation against her, to enable her to prepare her defense. The defendant and her counsel went into the trial of this case without the slightest knowledge as to what alleged acts of the defendant the District Attorney would rely upon for her conviction. Not only were these uncertainties and insufficiencies of the information raised* [page 27] *by demurrer, but defendant's counsel in an effort to ascertain what his client was charged with and what he must be prepared to meet and disprove, moved the court for an order to compel the District Attorney to furnish him with a bill of particulars—a procedure sanctioned by the practice of the federal courts. This motion as appears from the clerk's transcript, was denied by the trial judge.*

*Both before and during the trial, defendant's counsel sought, without success, for information as to what their client was actually charged with.* Under the information as drawn, the District Attorney might have proved that the defendant had organized or become a member of any society or assemblage that the mind could conceive, and then proceeded to introduce evidence as to the character, belief and doctrines of such organization. If the information in this case is held to be sufficient, we say, with the utmost sincerity, that criminal pleading might as well be abolished.

Tested by every known rule covering the sufficiency of indictments and informations as laid down by the learned text writers and by the decisions of the highest courts of this and every other state, and by the federal courts as well, the information in the case at bar is clearly insuffici- [page 28] ent to sustain a conviction. It would have been insufficient even in the absence of a demurrer. The reports are full of cases where indictments and informations which describe the offense attempted to be charged with a far greater degree of certainty, have been held bad. We know of no rule of law and are aware of no decision upholding such a pleading as the information in question. For this reason alone, the judgment should be reversed.

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**II. The Evidence was Insufficient to Justify the Verdict.**

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(Omitted as immaterial.)

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[Page 39] *However radical or contrary to prevailing opinion the views of an individual or society may be, mere opinion cannot be punished as a crime.* Conspiracy to violate the law may be criminal, but to seek to change the law by peace-[page 40] able means,—by the ballot or by political action,—cannot be punishable. And yet this, according to the admission of the District Attorney himself, is what the defendant was in favor of doing, and we challenge the Attorney General to point out to the court any evidence in the record which by any reasonable inference tends to show that the organization which she joined advocated the commission of any crime or the violation of any law.

*The right of every citizen under the Constitution and fundamental laws of this land to freedom of conscience and freedom of speech, and to advocate changes both political and economic, is well expressed in the language used by Justice Kerrigan of this court, while sitting on the supreme bench, in the case of In re Hartman* (*Crim.* 2300, *decided March* 13, 1920):

> "Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peaceable changes in our Constitution, laws or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis."

The charge in the count in the indictment on which the defendant was convicted is that she did unlawfully, wilfully, wrongfully, deliberately and [page 41] feloniously organize, and assist in organizing, and was, is and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism. The proofs do not show that she ever organized or became a member of any such organization. There is nothing either in the platform of the Communist Labor Party adopted at the Oakland meeting hereinabove referred to, or in the platform or program of the Communist Labor Party of the United States (People's Exhibit 5—Rep. Trans., pages 411-439) which either expressly or by implication advocates the violation of any law or the use of force or violence in bringing about political or industrial changes. There is no evidence of any combination or conspiracy, by the Communist Labor Party or among any of the members thereof, to commit any crime, to inaugurate terrorism, or to use unlawful measures in bringing about their desired ends. For this total failure of proof the judgment of conviction should be reversed.

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## III. Prejudicial Error in the Admission of Evidence.

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(Omitted as immaterial.)

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[Page 61] **The Conviction a Miscarriage of Justice.**

We have presented briefly, but we believe with sufficient detail, the issues involved upon this appeal. The defendant was tried and convicted, not for any act of her own, but because other persons, with whom she was not shown to have had the [page 62] slightest dealings, started fires and carried poison in other parts of the State, because irresponsible fanatics sang doggerel verses set to Methodist tunes, and because a French Nihilist wrote a book dealing with matters and things so preposterous that its author should have been brought before a lunacy commission. We do not wish to be guilty of levity, in arguing a cause which involves the liberty of an innocent woman, but where it appears from the record as it does in this case that the police of one of the larger cities of this State raided the house of a law-abiding citizen, suspected of holding radical views, and, among other things, confiscated a copy of the English Bible,—then it seems to us that language fails to properly characterize the absurdity of this prosecution from its very inception. Where a District Attorney is allowed to convict a defendant residing in this State of the offense denounced by this statute by reading from the writings of foreign fanatics, we say in all seriousness, that he might as well have been permitted to have read to the jury from the Book of Judges or the Book of Kings, and to have taxed the defendant with responsibility for the assasination of Uriah or the judicial murder of Naboth. The evidence in this case, insofar as it relates to the defendant herself, fails utterly to prove that

she ever in word, thought or deed violated or [page 63] intended to violate any law upon the statute books or do the slightest injury to the persons or property of others. The information upon which she was convicted does not charge any crime known to the law. When this court has examined, as it must examine, the entire case including the evidence, we believe that it will say that in this judgment of conviction there has been a miscarriage of justice.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco, July 21, 1920.

J. E. PEMBERTON,
NATHAN C. COGHLAN,
Attorneys for Appellant.

WILLIAM F. HERRON,
of Counsel.

**Exhibit B.**

IN THE

DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE FIRST APPELLATE DISTRICT, Division One.

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Criminal No. 907.

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THE PEOPLE OF THE STATE OF CALIFORNIA,
*Plaintiff and Respondent,*

vs.

CHARLOTTE A. WHITNEY,
*Defendant and Appellant.*

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## APPELLANT'S CLOSING BRIEF.

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### Preliminary Statement.

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(Omitted as immaterial.)

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[Page 2] An analysis of the 998 pages of testimony taken at her trial does not disclose one word even purporting to show—

That she ever committed an act of violence;
That she ever aided or abetted violence;
That she ever advised violence;
That she ever uttered a violent sentiment;
That she ever knew of any act of violence offered by any organization or individual belonging to any organization;
Or even that the organization in which she admits membership ever committed any act of violence.

On the contrary, the record indicates that Charlotte Anita Whitney was opposed to all violence and held convictions against it as strongly as those held by people of the Quaker faith, whose religious scruples are respected and not made the basis for sneers and prosecution.

It is not alleged nor suggested that Charlotte Anita Whitney was ever a member of the Industrial Workers of the World or of the Bolshevists of Russia. There is not one scrap of evidence even remotely suggesting that she ever endorsed any act of violence either by these organizations or by individuals belonging to these organizations. Yet appellant believes that no intelligent human being can review the record of her trial and not be forced to believe that a conviction was secured [page 3] by inflaming the minds of the jurors with the idea that she was in some degree responsible for and sympathetic with the atrocious crimes committed either by these organizations or members thereof.

It is respectfully urged that never in the history of California was there a plainer miscarriage of justice.

Never in the history of California was a defendant before a court of justice so ruthlessly deprived of vital rights guaranteed under the Constitution.

Never was there a more apparent indecent haste to appease public wrath by the offering up of a vicarious sacrifice.

The time has now arrived in the free United States of America when, even if inadvertently, you should join a political party which expresses sympathy with a political change any place on earth, you are a criminal syndicalist and liable to serve a sentence of fourteen years in the penitentiary. It seems incredible that this should be true, but the facts in the Whitney case prove conclusively that this is the exact fact.

An analysis of the prosecution's case and of respondent's brief demonstrates conclusively that when it was found impossible to prove that in any degree Charlotte Anita Whitney had ever advocated violence or taught violence, when it was found that her entire life was a denial of violence and that her personality was the antithesis of violence, when it was found impossible to prove that the Communist Labor Party, of which she was a member, had been involved in any violence, resort was had to the introduction of testimony as to acts committed by criminals belonging to the Industrial Workers of the World and acts committed by the Bolshevist regime in Russia.

Not only was Charlotte Anita Whitney not a member of the I. W. W. organization or of the Bolshevist party of Russia, but there is not one [page 4] shred of testimony even remotely suggesting that she ever sympathized in any degree with any of the excesses committed by any

viduals belonging to any of these organizations or by these organizations as such.

In attempting to justify the deluging of the jury in the trial of Charlotte Anita Whitney with testimony as to crimes committed and advocated by the Bolshevists of Russia, thousands of miles distant, and of crimes committed by members of the I. W. W. organization two and three years prior to the trial of Charlotte Anita Whitney, counsel for respondent argues that the court instructed the jury that defendant was not to be charged with responsibility for acts done outside of her presence.

The transcript of testimony shows that conservatively speaking, sixty per cent. of the testimony taken had reference to the Bolshevists of Russia or the acts of I. W. Ws.

To assert that this testimony did not arouse in the jury an unjust prejudice against the defendant after the jury had witnessed the admission of this testimony as pertinent, competent and relevant, and after the jury had listened to this testimony hour after hour and day after day, is to deny the obvious.

If it were simply desired to show the character of the Bolshevist regime in Russia and of the I. W. W. organization, and if it were not the determination of the prosecution to inflame the mind of the jury unjustly against Charlotte Anita Whitney, what further testimony was necessary, admitting for the sake of argument that it was relevant and competent, than the manifestoes of the Bolshevist party and the printed propaganda of the I. W. Ws.

The record shows conclusively that the prosecution was in possession of thousands of circulars by the introduction of any one of which it [page 5] could have proved the character of Bolshevism or I. W. W.ism. Yet for days we find witnesses paraded before the jury, testifying to crimes committed in remote places without the knowledge of Charlotte Anita Whitney, and without any suggestion that she had any knowledge of the crimes or what the party of which she was a member had any knowledge of the crimes testified to.

It is apparent from respondent's brief that the weakness of the proof against this defendant was such as to require conclusions not warranted by the premises on which they are based.

On page 3 of respondent's brief we find the following:

> "But on the contrary, counsel for appellant concede her intellectual powers and admit that she is learned in political and economic questions. In view of this the defendant *must* have been very familiar with the history, principles, tactics and acts of other revolutionary organizations and movements which were endorsed by the very organization, the California Communist Labor Party, of which she became a member."

A calm and judicial review of this startling sentence should serve to enlighten the court regarding the manner in which conclusions were jumped at in the prosecution of this defendant.

From the fact that Charlotte Anita Whitney was learned in political and economic questions,

the conclusion is drawn that she must have been very familiar with the history, principles, tactics, etc., of revolutionary organizations and movements.

We are enlightened regarding the necessity for this violent logic when we recall the fact that in 998 pages of testimony there is not one single word to prove or to suggest that Charlotte Anita Whitney either directly or indirectly ever had any knowledge of any revolutionary movement, and particularly is the record bare of an iota of evidence to prove that Charlotte Anita Whitney [page 6] had any knowledge whatever of any crime committed either by the Bolshevist Party of Russia or the I. W. Ws.

The necessity for the violent logic in respondent's brief, however, is further made plain when we realize that the burden was upon the prosecution to establish that Charlotte Anita Whitney *knowingly* was a party to the organization of a group committed to criminal syndicalism.

It seems apparent that having been unable to produce at the extraordinary trial accorded to Charlotte Anita Whitney any evidence to show any knowledge on her part of any revolutionary movement, the fatal missing link in the state's proof is supplied by the extraordinary logic of counsel on page 3, of respondent's brief.

**Fair and Impartial Trial.**

* * * * * * *

(Omitted as immaterial.)

* * * * * * *

[Page 16] It also tends to an understanding of respondent's brief to bear in mind the following, from page 7:

> "In other words, all the good of the French revolution proceeded not from violence and mob action, but through the orderly processes of law and legislation."

By inference we may deduce that the violence of the American revolutionary army in attacking the British was a most reprehensible mistake, and that the thirteen colonies should have proceeded through the orderly processes of law and legislation to redress their wrongs.

Sepiently, counsel for the respondent proceeds:

> "The foregoing suggests the reason for the enactment of the criminal syndicalism act as well as its spirit and purpose."

[Page 17] We can only conclude that the American revolutionists were wrong and that the whole spirit of freedom of political thought and liberty for which that contest was waged was a mistake.

If it were not for the fact that through the autocratic abuse of administrative power in the United States during the last four years, the rights of American citizens to freedom of thought and freedom of action have been reduced to a shred of those which they formerly enjoyed, it would be hard to understand how such assertions could be seriously made in a document presented to a court of justice in the United States of America.

Under the circumstances, however, respondent's brief is enlightening in showing how far we have drifted from the fundamental concepts of the rights of American citizens.

There is no question that the criminal syndicalism law, insofar as it is aimed at the cowardly and brutal crimes committed in secret in connection with industrial warfare, has acomplished good, but insofar as it has been utilized as an engine of tyranny to deprive American citizens of freedom of political thought and speech, it is a replica of the alien and sedition laws enacted in America, in the latter part of the eighteenth century, which were so hateful in the eyes of the American people that they wrecked the political party responsible for their enactment.

In respect to the instant case, we wish earnestly to direct the attention of the court to the vital distinction between the case of Charlotte Anita Whitney and the cases of People vs. Malley, 33 Cal. App. Dec., 346, and People vs. Taylor, 34 Cal. App. Dec., 414.

[Page 18] In each of these cases it was shown that the defendant was not only a member of the Communist Labor Party but had been or still was a member of the I. W. Ws.; that in each case the defendant was active in the distribution of literature and the spreading of the propaganda of this organization.

In the case of Charlotte Anita Whitney, there is no allegation that either now or at any time in the past she was ever a member of the I. W. Ws. or of the Bolshevist Party of Russia, or that she at any time ever distributed any literature of these organizations or that at any time she ever

expressed any sympathy with acts of violence committed by these organizations.

In the case of Charlotte Anita Whitney the sum total of her offense consists in the fact that she was present at the organization meeting of and joined a political party known as the Communist Labor Party, and that she participated in some of the deliberations of some of the committees of that party during a party convention.

It is admitted that she acted as a member of the credentials committee and that she also acted as a member of a committee which adopted a resolution advocating amnesty for political and class war prisoners.

In other words, in so far as this record shows, Charlotte Anita Whitney is sentenced to serve fourteen years in San Quentin prison because in broad daylight she walked into a public convention hall in the City of Oakland, there joined a political party, acted as a member of the credentials committee, and was a member of a committee which adopted a resolution advocating amnesty for political and class war prisoners.

[Page 19] *Constitutionality of Criminal Syndicalism Act.*

Conscious of the fact that in passing on an application for a writ of prohibition the Supreme Court of the State of California has rendered an opinion stating—"*We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the federal and state constitution*"; and also conscious of the fact that this honorable court has by

plication upheld the constitutionality of the act by reference to the case of People vs. Moilen, 167 N. W. (Minn.), 345, 348, appellant respectfully urges that a thorough review of all of the aspects of this question will sustain the contention of unconstitutionality as to a portion of the California Act, and will demonstrate conclusively the vital distinction between the criminal syndicalism act of the State of Minnesota and the criminal syndicalism law enacted by the State of California.

*Appellant respectfully urges that the criminal syndicalism law of the State of California, as it stands, is violative of the 14th Amendment of the Constitution of the United States.*

The case of the State vs. Moilen cannot be taken as conclusive in relation to the California statute because of a vital difference in the language employed in the two statutes.

The Minnesota statute prohibits the advocacy of crime, etc., *"as a means of accomplishing industrial or political ends."*

The criminal syndicalism act of California punishes violence or unlawful methods of terrorism, etc., *"as a means of accomplishing a change in industrial ownership or control or effecting any political change."*

In other words, the Minnesota statute provides a penalty for the commission of any act of violence or the teaching or aiding or abetting of any act [page 20] of violence designed to effect any political end. It would apply with equal vigor to the person who would employ methods of terrorism or of violence, for instance, to prevent a chance on the prohibition law, and to the person who

would use such methods to bring about a change in the prohibition law.

The Minnesota statute would punish the corrupt holder of a political office who would seek by methods of terrorism and violence to prevent his being ousted lawfully from office, and at the same time would punish the aspirant for political office who would resort to means of terrorism or violence to bring about the desired political end.

In other words, the Minnesota statute does not discriminate between classes of persons, but is general in its application and is in accord with the Constitution.

The Minnesota statute with equal force applies to those engaged in industrial controversies. It would punish the person who would seek by violence and terrorism to prevent a change in industrial control, as well as the persons who by those methods sought to accomplish a change.

The criminal syndicalism law of California expressly refers only to those who seek by violence or methods of terrorism to accomplish a change in industrial ownership or control, or to effect a political change.

Under the California law the corrupt holder of political office might with impunity organize a group to maintain itself in office by violence or terrorism and escape any penalty under the criminal syndicalism law, while the person desiring to oust such corrupt regime would be guilty of criminal syndicalism and liable to punishment.

[Page 21] The proponents of prohibition might organize to control by methods of terrorism elections to the legislature and not be guilty of criminal syndicalism, while the opponents of

tion at the same election using the same methods would be.

The opponents of city and county consolidation in the City of Oakland and County of Alameda, could without regard to the criminal syndicalism law organize by violence to defeat the measure on this subject shortly to be submitted to the voters of that locality. The proponents of city and county consolidation however would be liable to fourteen years' imprisonment for the same offense.

The present owners of industries in California might practice violence to prevent the application of new laws providing for control of industries by the Railroad Commission of the State of California and not be guilty of criminal syndicalism.

Illustrations might be multiplied indefinitely to accentunate the discriminatory character of the law.

*No doctrine has been more explicitly or frequently promulgated by the courts of the United States than the doctrine which holds that classifications in legislation to avoid violating the equality clause of the Constitution must be reasonable and not arbitrary.*

It seems impossible to conceive a more arbitrary classification than that which permits one person or group to prevent a change while making it criminal for the opposing person or group to accomplish the change.

12 C. J., 1133:

> "Statutes passed in the interest of the public health, safety or morals, are void as class

legislation wherever they are made to apply arbitrarily only to certain persons or classes of persons, or to make an unreasonable discrimination between persons or classes." Citing cases.

[Page 22] 12 C. J., 1141:

"But on the other hand a penal statute which makes arbitrary distinctions between different persons or classes of persons, either by making certain acts criminal offenses when committed by some persons but not when committed by others * * * has been declared unconstitutional as class legislation." Citing cases.

12 C. J., 1175:

"A statute or ordinance is void as a denial of the equal protection of the laws which makes a particular act a crime when committed by a person of one race but not when committed by a person of another race."

12 C. J., 1186:

"A legislation is void as contravening the equal protection guaranty which makes an act a crime when committed by one person but not so when committed by another in a like situation" (citing cases), "or which makes the question as to whether a certain act is criminal or not depend on an arbitrary or unreasonable distinction between persons or classes of persons committing it" (citing

cases), "within these rules statutes or ordinances have been sustained which have made it a criminal offense * * * to incite to the unlawful destruction of property." Citing cases.

12 C. J., 1187:

"A statute is void as a denial of the equal protection of the laws which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in a like situation." Citing cases.

Re Ah Fong, Fed. Cases 102 (3 Sawy., 144):

"The equal protection of the laws under the 14th Amendment, implies not only equal accessibility to the courts for the prevention or the redress of wrongs and the enforcement of rights, but equal exemption with others of the same class of all charges and burdens of every kind."

Ho Ah Kow vs. Noonan, Fed. Cases 6546 (5 Sawy., 552):

"The equality of protection assured by the 14th Amendment implies that no charges or burdens shall be laid upon one person which are not equally borne by others, and that in the administration of federal justice one person shall suffer for his offenses no

greater or different punishment than another."

In re Tiburcio Parrot (C. C.), 1 Federal, 481, 1 Ky. L. R., 136:

"Discriminating legislation by a state against any class of persons or against persons of any particular race or nation in what- [page 23] ever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws and is prohibited by the 14th Amendment to the Constitution of the United States."

State vs. Williams, 32 S. C., 123, 10 S. E., 876:

"General statutes 2084 which makes the violation of a contract between land owner and a laborer indictable and fixes the limit of punishment in the case of the landowner but imposes no limitation in the case of the laborer, is unconstitutional as making a discrimination in the punishment which may be imposed."

Peonage Cases, 123 Fed., 671:

"Act of Alabama, Mar. 1, 1901, makes it a penal offense for any person who has contracted in writing to labor for another for any given time * * * and who shall afterwards without the consent of the other party and without sufficient excuse, to be adjudged

by the court to 'leave such other party * * * and take employment of a similar nature from other persons without giving him notice of the prior contract.' ''

''Another statute subjects the new employer to penalties if he employs such person with knowledge of the prior contract. Held, such statute is unconstitutional as class legislation, subjecting laborers to penalties for breach of contract which are not imposed on any other class of citizens. Statute also denies to class of citizens affected the equal protection of the laws.''

Re Langford, 57 Fed., 570:

''The act involved required knowledge on the part of the person charged that intoxicating liquor was intended for sale; subdivision 2 made it a criminal offense for any servant of a special class of common carriers to remove from a car any intoxicating liquor whatever, without any qualification as to knowledge that it was intoxicating liquor and without attaching any liability to the person receiving the liquor from the carrier. Held, subdivision 2 discriminated in singling out one class from the whole community for punishment. The South Carolina constitution provided that 'No person shall be liable to any other punishment for any offense, or be subjected in law to any other restraints or disqualifications in regard to any person rights, than such as are laid on others under like circumstances.' ''

Horwich vs. Walker Gordon Laboratory Co., 68 N. E., 938:

"Act prohibiting sale and use of cans, boxes, bottles, etc., bearing the registered mark of the owner without his consent is in contravention of the Constitution, Art. IV, [page 24] par. 22, prohibiting special legislation, as it gives the owners of the property of the class named rights not enjoyed by owners of other classes of personal property."

"The act also provided that the possession of such articles by junk dealers was prima facie evidence of unlawful possession. Held, unconstitional, as it authorized conviction of such dealers on evidence that would not warrant the conviction of other persons."

The analogy here, is that the joining of a society advocating crime to bring about a political change is a violation of the criminal syndicalism law, while the joining of a similar society for the purpose of preventing a political change is not a violation of the law.

Re Opinions of Justices, 207 Mass., 601, 94 N. E., 558, 34 L. R. A. N. S., 604.

"Rendering proprietor of a Chinese restaurant criminally liable for permitting women under the age of twenty-one years to enter it or be served with food and drink there, deprives him of his liberty and property without due process of law and deprives him of the equal protection of the laws.

lice power does not extend to exclusion of young women from restaurants kept by Chinese, since such a regulation has no direct relation to the evil to be remedied."

The above is from the syllabus. The following is the last paragraph of the opinion:

"The fact that a man is white, or black, or yellow, is not a just and constitutional ground for making certain conduct a crime in him when it is treated as presumably an innocent act in a person of a different color."

American Sugar Refining Co. vs. McFarland, 229 Fed., 284:

"Act of Louisiana, par. 10, of 1915, regulating the business of refining sugar, provides that any person engaged in the business of refining sugar within the state, who shall systematically pay in Louisiana a less price for sugar than he pays in any other state, shall be prima facie presumed to be a party to a monopoly or combination in restraint of trade or commerce and upon conviction thereof subject to a fine of $500 a day for the period during which he is adjudged to have done so, and that the business of refining sugar within the meaning of that act is thereby defined to be that of any concern that buys or refines raw or other sugar exclusively, or that re- [page 25] fines raw or other sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar

duced by it from the cane grown and purchased by it. Held, that the discrimination between the sugar refiners to which it applies and buyers of sugar not engaged in refining or refiners of sugar not engaged in refining in Louisiana, or not buying or refining more sugar than that produced from cane grown and purchased by them, or not buying sugar in any other state, is such a denial of the equal protection of the laws to the refiner to which it applies as to render the statute invalid and unenforceable, as it makes the fact of ones ownership of property in Louisiana the test of criminality, *and makes an arbitrary selection of the parties who shall be subjected to its penal provisions,* without regard to any difference between their delinquency and that of others."

The following is taken from the opinion:

"Unless the legislature may arbitrarily select one corporation or one class of corporations, *one individual or one class of individuals,* and visit a penalty upon them which is not imposed upon others *guilty of a like delinquency,* this statute cannot be sustained. * * * Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this." Citing Gulf of Colorado and Santa Fe R. R. vs. Ellis, 165 U. S., 150, 159, 17 Supreme Ct., 255, 258, 41 L. E., 666.

Re Mallon, 16 Ida., 737, 22 L. R. A. N. S., 1123:

"Sec. 6452 Revised Codes, in fixing the punishment of a person who escapes from a state's prison at the same term for which he is serving at the time of the escape denies equal protection of the law to persons under like circumstances, and, in providing that the escape of a state prisoner is made a crime and exempting federal prisoners and others who may be confined in the penitentiary for temporary purposes, is special and discriminatory legislation and violates the 14th Amendment to the Constitution of the United States and the Constitution of Idaho."

Miller vs. Sincere, et al, 112 N. E., 664:

"While the legislature has a wide discretion in determining what shall be considered a crime and the classification of crimes, discriminations of criminal statutes applying to certain persons or classes must be based on valid, and not upon mere arbitrary classification in favor of certain individuals or corporations."

Commonwealth vs. International Harvester Co. of America, 115 S. W., 755:

"A statute which, when construed according to the canons of statutory construction, *confers a right on one class of citizens to do* [page 26] *an act made a criminal offense,* when done by one other class, conflicts with the 14th Amendment of the Federal Constitution."

State vs. Latham, 98 Atl. (Me.), 578:

"If legislative regulations differ as to localities, classes and conditions, the classifications must be reasonable, and based upon a real and not arbitrary difference in conditions.

"Revised Statute Chapt. 136, par. 12, requiring milk dealers to pay for purchases semi-monthly, and providing for punishment by fine on default in payment, is unconstitutional as violating Constitutional Amendment No. 14, as to class legislation and is not justifiable under the police power as being for the protection of public health."

The above is from the syllabus.
The following is from the opinion:

"Diversity in legislation to meet diversities in conditions is permissible. But if legislative regulations for different localities, classes and conditions differ, in order to be valid, these differentiations or classifications must be reasonable and based upon real differences in the situation, conditions or tendencies of things. Arbitrary classification of such matters is forbidden by the Constitution. If there be no real difference between the localities or business or occupation or property, the state cannot make one in order to favor some person over others." Citing a large number of cases.

"This statute does not apply to all classes of debtors, but to one class. It does not apply to all debts incurred by purchase of products, but to one class of debts. * * * *It subjects a class of debtors to liability of crim-*

*inal prosecution to which other classes of debtors are not subject.''*

Re Van Horn, 70 Atl., 986, from the opinion:

'' 'Equal protection of the laws' must certainly mean equal security or burden, under the laws, to everyone similarly situated. A statute to escape condemnation as infringing the rights guaranteed by this amendment (14, United States Constitution) must bear alike upon all individuals and classes and districts that are similarly situated, in a similar manner, and with uniformity. Otherwise, there would be unjust discrimination which this constitutional mandate prohibits. The purposes of the constitutional amendment must have been to prevent that which was arbitrary and capricious and to require uniformity and equality under like conditions. The so-called police power of the legislature which enables it to make regulations and restrictions to protect the health, morals, [page 27] safety or welfare of the general public; and its determination will rarely, if ever, be interfered with by the courts. But this does not justify a legislative enactment which discriminates when there is no basis for discrimination. *Wherever an enactment has attempted to make that a crime in one place which by all the laws of reason must be a crime elsewhere within the same jurisdiction*, such attempted distinction is found by the courts to be illusory and the act is held unconstitutional.''

State vs. Divine, 98 N. E., 778.
Birmingham Water Works Co. vs. State, 48 So., 658:

"*The sum of these provisions is that no burden can be imposed on one class of persons, natural or artificial, which is not in like conditions imposed on all other classes.*" Citing cases.

Sterret Packing Co. vs. Portland, 74 Ore., 260, 154 Pac., 410:

"An ordinance providing for the inspection of meats and slaughter houses located without the city as a condition precedent to the sale of products within the city, but exempting slaughter houses and placing plants subject to federal inspection laws, is invalid in so far as it prescribes higher inspection regulations than those fixed by federal rules."

State vs. LeBaron (Wyo.), 162 Pac., 265:

"Act limiting hours of labor for females is unconstitutional so far as applying to restaurants as class legislation under the constitution of the United States, amendment No. 14, because applying to all hotels and restaurants except 'those operated by railroad companies,' the distinction being arbitrary and unreasonable."

American Digest, decennial edition, Vol. 4, Constitutional Law, page 1752.

State vs. Santee, 82 N. W., 445, 111 Iowa, 1, 53 L. R. A., 763, 82 Am. St. Rep., 489.

"Where there are two concerns engaged in precisely the same business and both conducting it in precisely the same manner, *a statute which would undertake to impose a liability on the one and not on the other* could not be sustained in the face of either our state or federal Constitution." Sams vs. St. Louis & M. R. R. Co., 174 Mo., 53, 73 S. W., 686, 61 L. R. A., 475.

"*It is not competent for the legislature to give one class of citizens legal exemption from liability for wrongs not granted to others;* and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong." Park vs. Detroit Free Press Co., 40 N. W., 731, 72 Mich., 560, 1 L. R. A., 599, 16 Am. St. Rep., 544.

[Page 28] "A valid classification for legislative purposes must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any just basis. It must be grounded upon a reason of a public nature, and the act must affect all who are within the reason for its enactment." Judgment (C. C.), 128 F., 474, reversed. Kane vs. Erie R. Co., 133 F., 681, 67 C. C. A., 653, 68 L. R. A., 788.

## Statute Vague.

*Again the statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition.*

Respondent argues that because the Communist Labor Party of Oakland endorsed the platform of the National Communist Labor Party, and the National Communist Labor Party endorsed Bolshevism, it was therefore permissible to introduce in evidence manifestoes of the Bolshevist Party of Russia to show the character of the Communist Labor Party of Oakland (page 49).

This being true, then it would be the duty of the District Attorney of Alameda County immediately to cause the arrest and prosecution as a criminal syndicalist of every person who joined the Friends of Irish Freedom. It would be proper to introduce in evidence the resolutions of this organization endorsing the struggle of the Irish people for liberty. It would then be proper to introduce in evidence the manifestoes of De Valera and the Irish Republican Government, forbidding Irishmen to pay taxes to England, and to combat English military forces with violence. Thus the Friends of Irish Freedom in Oakland would be proved to have endorsed violence in the accomplishing of political change and would be criminal syndicalists.

But appellant will freely predict to this honorable Court that it will never be called upon to sustain or reverse the conviction of a Friend of Irish [page 29] Freedom as a criminal syndicalist. The reasons for our confident prediction need not be

expatiated upon. Everyone knows that if this absurd provision of the criminal syndicalism law were enforced or attempted to be enforced against those sympathizing with the struggles of Ireland against butchery and tyranny, the entire law would be blotted out of the statutes at a special session of the legislature if the lawmaking body did not happen to be convened in regular session.

## Conclusion.

The political features of the criminal syndicalism law of the State of California today, it is respectfully urged, *are not only unconstitutional but repugnant to every American ideal of freedom of thought and freedom of speech.*

It is respectfully submitted that the judgment of the trial Court should be reversed.

Respectfully submitted,

NATHAN C. COGHLAN,
J. E. PEMBERTON,
JOHN FRANCIS NEYLAN,
Attorneys for Defendant and Appellant.

Dated, April 8th, 1921.

**Exhibit C.**

IN THE

DISTRICT COURT OF APPEAL OF THE

STATE OF CALIFORNIA,

IN AND FOR THE FIRST APPELLATE DISTRICT,

Division One.

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Crim. No.

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THE PEOPLE OF THE STATE OF CALIFORNIA,
*Plaintiff and Respondent,*

vs.

CHARLOTTE A. WHITNEY,
*Defendant and Appellant.*

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## SUPPLEMENTAL BRIEF FOR APPELLANT.

Since the writing of the opening brief for the appellant in this cause, a decision has been handed down by this Court which in certain particulars discusses and passes upon one of the contentions which we raised in our opening brief, and renders it desirable, therefore, that we file a supplemental

brief, to present our views of the decision referred to and its applicability to the case at bar. The decision to which we have reference is

People vs. Malley, 33 Cal. App. Dec., 346, decided on Oct. 18th of this year. We assume that the Malley case will be cited by the Attorney-General as upholding the sufficiency of an indictment based upon the same statute as that in the case at bar, and accordingly we deem it of importance to discuss at some length the scope and effect of that important and far-reaching decision. We take this procedure for the additional reason that we believe, with the highest respect to this Court, that the opinion in the Malley case is justly subject to criticism upon grounds which may not be urged by counsel in that cause upon a petition for a rehearing or upon a petition for a hearing in the Supreme Court. It is our purpose in this [page 2] memorandum to show, *First,* that this Court erred in holding that the indictment in People vs. Malley was sufficient and, *Second,* that in any event the Malley case is not authority in the case at bar for the reason that the information in this cause is deficient in important particulars in which the Malley indictment was not. We also propose herein to raise a federal, constitutional question.

## I.

**Criticism of the opinion of this Court in People vs. Malley.**

We believe, and most respectfully urge, that the question of the sufficiency of the indictment in People vs. Malley was erroneously decided by this Court. We further submit that the decision therein is not only contrary to the overwhelming weight of authority, but that it overturns the most fundamental and universally established rules of criminal pleading relating to statutory offenses. The charging portion of the indictment in the Malley case avers that the defendant did "wilfully, unlawfully and feloniously circulate and publicly display, certain books, papers, pamphlets, documents and other printed and written matter, then and there in the possession, custody and under the control of him, the said James P. Malley, containing and carrying written advocacy, teaching and advising the commission of crime, sabotage, and other wilful and malicious damage and injury to property, and unlawful acts of force and violence, and unlawful method of terrorism as a means of accomplishing a change in industrial ownership and control, and effecting political changes."

The Court, after calling attention to the fact that the indictment substantially follows the [page 3] language of the statute, goes on to say:

> "To hold that the indictment does not state a public offense, would be to say that the statute defines none, for as we shall presently

> show the former follows and employs almost the precise language of certain sections of the act. The language of the statute and of the indictment being the same, the latter must be understood in the same sense as the former. (People vs. White, 34 Cal., 183, 186.)''

This seems to us an extremely novel statement of the law, to say the least, and the fallacy of the statement is easily susceptible of demonstration. There are many penal statutes which define and punish offenses and which do not contain and cannot in their very nature contain a statement of the acts constituting such offenses, for the reason that the offense may be committed by a great variety of acts. In such cases it would certainly be inaccurate to say that the statute defines no offense, and yet no lawyer would pretend for a moment that an indictment which merely followed the language of the statute would be sufficient. Let us take two or three illustrations.

There is a penal statute in this state which makes it a crime to obtain the money or property of another by false or fraudulent pretenses. Who would say that such a statute defines no offense? Yet who, on the other hand, would contend for one moment that the crime therein denounced could be charged in the language of the statute? To hold that it did would be to set at nought the decisions of every court of last resort from Maine to California.

There is a statute making it a crime to receive stolen property, knowing the same to have been stolen. Of course the statute defines an offense,

and yet who would seriously urge that a mere charge in the language of the statute which did [page 4] not set forth the fact that the property had been stolen, or by whom, or describe the property with reasonable certainty, would be sufficient?

It is a crime under the law of this state to falsely testify to any material matter in any proceeding or action in which an oath may be administered. Of course the statute defines, and defines sufficiently the crime of perjury. Yet who would contend for a moment that an indictment for perjury which merely followed the language of the statute, was sufficient?

The penal code of this state (sec. 470) also provides that "every person who with intent to defraud * * * falsely makes, forges or counterfeits any charter, letter-patent, deed, lease, indenture, writing-obligatory, etc.," naming a great number of written instruments, is guilty of forgery. Clearly the statute defines the offense, yet what lawyer of the slightest experience or knowledge of criminal pleading would seriously contend that an indictment which merely charged what "A forged, altered and counterfeited a certain deed" would be sufficient? Yet there is no reason why any of these confessedly insufficient indictments cannot be upheld, if an offense under the criminal syndicalism statute may be charged in the naked statutory language. With equal appropriateness might an appellate tribunal quote (as does this Court in the Malley case) the language of People vs. King, 27 Cal., 507: "If the defendant is guilty he stands in need of no information to be derived from the perusal of the indictment as to the means

used by him in committing the act, or the manner in which it was done, for as to both his own knowledge is quite as reliable as statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

[Page 5] Such reasoning, we say with all respect, is reminiscent of that used in one of Bernard Shaw's wittiest plays by a western sheriff conducting the informal trial of a suspected horse-thief, who overrules the defendant's notion for a change of venue on the grounds of local prejudice with the statement that if the defendant did not wish to be tried by a local jury he should steal his horses in another county. It is a sufficient answer to say that such is not the law as it has come down to us from time immemorial, and as it has been declared by every court of last resort in every state of our country and in every land in which the substantive and adjective law are based upon the common law of England. Furthermore the Supreme Court of this state did not in the King case use the language above quoted as a statement of a general rule of law. The language was employed with reference to the sufficiency of an indictment for murder, an indictment which was far more specific than the practice in this state requires, though not as specific as such an indictment at common law. It certainly was not employed in a general sense, for if such be the law, what need is there of any indictment at all? If the defendant is guilty, he knows what he did without being told; if innocent, he knows that he did nothing wrong, and an indictment cannot aid him in the preparation

of his defense. To judges and lawyers such arguments need no refutation. *The framers of the constitution, following the tradition as old as the Magna Charta, have provided that in all criminal prosecutions the accused is entitled to be informed of the nature and cause of the accusation against him. And the courts of this, and every English-speaking land have established from time immemorial the rule that where a statute uses generic terms and words which do not in and of themselves define the acts constituting the offense, it is not sufficient for an indictment to* [page 6] *pursue the language of the statute, but it must descend to particulars.* To this effect, in our opening brief, we cited many authorities from this and other jurisdictions. We can do no better than to quote the language of Justice Field, the great Californian, in U. S. vs. Hess, 124 U. S., 486, 31 L. Ed., 516:

> "Undoubtedly the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

To the same effect we see also:

U. S. vs. Crookshank, 92 U. S., 542.
U. S. vs. Summons, 96 U. S., 360.
U. S. vs. Carll, 105 U. S., 611.
U. S. vs. Bopp, 230 Fed., 723.

The California cases which pronounce this rule are cited, exhaustively we believe, in our opening brief.

We contend, therefore, that an indictment under this statute, containing as it does, generic terms and lacking specific definition of the acts constituting the various offenses denounced, cannot be couched in the bare statutory language. What is an unlawful act of force or violence such as the statute prohibits? Such an act might be one of a thousand different things. What is an "unlawful method of terrorism?" How can a Court or how can anyone say, unless informed by the indictment? The pleader's idea of an unlawful act of terrorism might not be the same as that of the Court, and if the pleader is not required to particularize, then the defendant is bound by the [page 7] pleader's conception, and not by the Court's. How can a person of common or uncommon, understanding know what is intended by an indictment which merely uses the general terms employed by this statute. The Court concedes in the Malley case that "a defendant is entitled under any statute, to a clear statement of the offense with which he is charged." How can it be said that such a statement is contained in an indictment which alleges in the bald statutory phrases that the defendant circulated books and pamphlets advocating unlawful acts of force and violence and unlawful methods of terrorism?

## II.

**The Malley case is not authority in the case at bar.**

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(Omitted as immaterial.)

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## III.

**The Criminal Syndicalist Law violates the Constitution of the United States.**

We desire at this time to raise herein a federal question. We contend that the statute under which appellant was convicted is unconstitutional; that it violates the 14th amendment to the Constitution of the United States in that it abridges privileges and immunities of citizens of the United States. We contend that it is not within the police power of the state to forbid and to punish as a crime membership in any political organization,—and it was for such membership alone that appellant was convicted. It may be conceded that overt acts or declarations designed to overturn the structure of our government by violence or by criminal or unlawful means may be punished as a crime. But mere membership in an organization, without the doing or commission of any overt act is not a crime; it is a constitutional right and privilege; and the legislature cannot otherwise provide. We further contend that the political party of which appellant became

[page 10] a member was not an organization formed for the purpose of bringing about industrial or political changes by unlawful means; that it was an organization which the appellant had a right to join, and that she committed no crime by so doing. By attempting to punish her for the exercise of her legal and constitutional right, the state is abridging the privileges and immunities of a citizen of the United States.

For these reasons, in addition to those advanced in our opening brief we ask that the judgment be reversed.

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