ARTICLES

BRANDENBURG FOR GROUPS

by
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Contemporary emerging scholarship on the First Amendment right of assembly is based primarily on either normative arguments arising from post-World War II cases or constitutional originalism that looks to the Framers' intent. This scholarship continues to treat the advent of substantive First Amendment rights in the World War I era as isolated to the speech right. That is an incomplete picture because the formative First Amendment cases were assembly cases just as much as they were speech cases. This Article fills that historical gap and, from it, generates a doctrinal argument in favor of the assembly right.

Historically, it shows that the seminal WWI cases were part of a milieu that entailed the socio-political control primarily of groups, not individuals' speech. The mechanism was membership crime—criminal conspiracy in federal and state courts, and criminal syndicalism at the state level. This Article recovers assembly as a core First Amendment right, not secondary to speech. Doctrinally, this Article shows that at the advent of the substantive First Amendment it was assembly, rather than speech, that was often the primary right at issue. Indeed, even Brandenburg v. Ohio *was an assembly case before it was a speech case. This Article therefore presents what it calls the "*Brandenburg *for groups" test, which would protect groups—even some criminal conspiracies—if they pose no imminent likelihood of substantive crime.*

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This test responds to emerging scholarship on the assembly right, most notably the debate between John D. Inazu and Ashutosh Bhagwat on the utility of Brandenburg v. Ohio *to protect that right. It traces a constitutionally and normatively appropriate line between protected and unprotected assembly that is currently lacking but is necessary to protect the democratic function of groups while continuing to ensure public safety.*

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INTRODUCTION

Nelson Mandela's recent passing reminds us that the distinction between terrorist and human rights champion is sometimes made for political, not moral, reasons: as late as 1988, the Reagan Administration called Mandela's African National Congress (ANC) one of the world's "most notorious terrorist groups."[1] This fact justifies broad First Amendment rights.[2] Mandela as an individual speaker in the United States would have

[1] Charles M. Blow, *A Lesson Before Dying*, N.Y. TIMES, Dec. 7, 2013, at A21; *see also* Milt Freudenheim & Katherine Roberts, *Shultz Talks with Tambo of A.N.C.*, N.Y. TIMES, Feb. 1, 1987, at 2E.

[2] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

enjoyed extensive free speech protection.[3] But the ANC as an assembly would not have been so protected,[4] for when we think of the First Amendment, we think of the freedom of speech and, until recently, rarely of assembly.[5] The historical evolution of the amendment, and not a constitutional inevitability, has produced the focus on speech.

1919 was a landmark year for the First Amendment. Three Supreme Court cases were handed down[6] that have become accepted as the advent of the substantive First Amendment[7] for the clear and present danger speech test they generated.[8] Subsequent to these cases, scholars and jurists imbued the test with the robust speech protective power that we recognize today.[9] Through a series of cases,[10] 1919 ultimately gave rise to the *Brandenburg v. Ohio* imminency test,[11] which has informed speech protec-

[3] As of October 4, 2013, a Westlaw search of Journals and Law Reviews that contained the phrase "first amendment" in the article and "speech" in the title produced 3,653 hits. This is compared to 3,015 articles that contain the phrase "first amendment" and have "religio!" in the title, 1,681 that have "press" in the title, 1,096 that have "associat!", and only fifty-six that have "assembl!" in the title.

[4] *See* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 Nw. U. L. Rev. 937, 941, 947–48 (1983).

[5] *See* Paul Horwitz, First Amendment Institutions 238 (2013); John D. Inazu, Liberty's Refuge: The Forgotten Freedom of Assembly (2012); Tabitha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 547 (2009); Susan Frelich Appleton, Commentary, *Liberty's Forgotten Refugees? Engendering Assembly*, 89 Wash. U. L. Rev. 1423, 1423; Ashutosh A. Bhagwat, *Assembly Resurrected*, 91 Tex. L. Rev. 351 (2012) (book review); Ashutosh Bhagwat, *Associations and Forums: Situating* CLS v. Martinez, 38 Hastings Const. L.Q. 543, 550 (2011) [hereinafter Bhagwat, *Associations and Forums*]; Richard A. Epstein, *Forgotten No More. A Review of Liberty's Refuge: The Forgotten Freedom of Assembly by John D. Inazu*, Engage: J. Federalist Soc'y for Prac. Groups, Mar. 2012, at 138, 138; Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 825–27 (2012); Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn. L. Rev. 1256, 1257–59 (2005); Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 Notre Dame L. Rev. 949, 949 (2004).

[6] *Abrams*, 250 U.S. 616; Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919); *see also* Debs v. United States, 249 U.S. 211 (1919).

[7] Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, *in* Eternally Vigilant: Free Speech in the Modern Era 1 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. Pa. L. Rev. 975, 975 (1968); Mathieu J. Shapiro, *When is a Conflict Really a Conflict? Outing and the Law*, 36 B.C. L. Rev. 587, 589 (1995).

[8] *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

[9] Thomas Healy, The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America 244–50 (2013).

[10] Scales v. United States, 367 U.S. 203 (1961); Thomas v. Collins, 323 U.S. 516 (1945); De Jonge v. Oregon, 299 U.S. 353 (1937); Whitney v. California, 274 U.S. 357 (1927).

[11] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *see also* United States v. Williams, 553 U.S. 285, 321 (2008) (Souter, J., dissenting) ("[O]ne of the milestones of American political liberty is *Brandenburg v. Ohio* . . . , which is seen as

tions involving material support for terrorism,[12] the right of Nazis to march through a town of Holocaust survivors,[13] the acceptable nature of political protests,[14] and so much more.[15] While all of these landmark cases through *Brandenburg* are at least partly assembly cases,[16] *Brandenburg* has come to be viewed solely as a speech case.[17] This is a problem because that case has been so influential,[18] has been understood solely as a speech case,[19] and therefore has not cabined laws that limit assembly.

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the culmination of a half century's development that began with Justice Holmes's dissent in *Abrams v. United States* . . . .").

[12] Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010); Boim v. Holy Land Found. for Relief and Dev., 549 F.3d 685, 700 (7th Cir. 2008); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134 (9th Cir. 2000).

[13] Collin v. Smith, 578 F.2d 1197, 1202–03 (7th Cir. 1978).

[14] Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1296 (9th Cir. 2013) (Smith, J., concurring and dissenting); Bell v. Keating, 697 F.3d 445, 457 (7th Cir. 2012); United States v. Fullmer, 584 F.3d 132, 158 (3d Cir. 2009).

[15] *See* United States v. Turner, 720 F.3d 411, 424–25 (2d Cir. 2013) (on true threats); United States v. Alvarez, 617 F.3d 1198, 1215 (9th Cir. 2010) (on speech integral to criminal conduct); Rice v. Paladin Enter., Inc., 128 F.3d 233, 246 (4th Cir. 1997) (on aiding and abetting crime); American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985) (on seditious libel).

[16] *Brandenburg*, 395 U.S. at 444–45 (Defendant charged under Ohio's criminal syndicalism statute for "voluntarily assembl[ing] with" the Ku Klux Klan (alteration in original)); Scales v. United States, 367 U.S. 203, 229–30 (1961) (setting forth the test for First Amendment protection in group membership); Thomas v. Collins, 323 U.S. 516, 535–36 (1945) (speaking to a crowd of potential union members, an organizer's effort to abide by a speech restrictive law "could not be free speech, free press, or free assembly, in any sense of free advocacy of principle or cause"); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("The mere act of assisting in forming a society . . . is given the dynamic quality of crime.").

[17] *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012); Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2733 (2011); McDonald v. City of Chicago, 130 S. Ct. 3020, 3126 (2010); *Holder*, 131 S. Ct. at 2733 (Breyer, J., dissenting); United States v. Stevens, 130 S. Ct. 1577, 1584 (2010); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 896–97 (2010); District of Columbia v. Heller, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting); United States v. Williams, 553 U.S. 285, 321–22 (2008) (Souter, J., dissenting); Morse v. Frederick, 551 U.S. 393, 439 (2007) (Stevens, J., dissenting); Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 498 (1996) (opinion of Stevens, J.); R.A.V. v. City of St. Paul, 505 U.S. 377, 413 (1992) (White, J., concurring); Texas v. Johnson, 491 U.S. 397, 409 (1989); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 (1984); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–28 (1982); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 596 (1980) (Rehnquist, J., dissenting); Bell v. Wolfish, 441 U.S. 520, 570 n.9 (1979) (Marshall, J., dissenting); Ratchford v. Gay Lib, 434 U.S. 1080, 1085 (1978) (Rehnquist, J., dissenting); Bigelow v. Virginia, 421 U.S. 809, 819 (1975). *But see* Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 183–84 (1971) (Black, J., dissenting); White v. Lee, 227 F.3d 1214, 1227 (9th Cir. 2000); United States v. Kaun, 827 F.2d 1144, 1151 (7th Cir. 1987).

[18] Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of* Brandenburg, 4 HARV. L. & POL'Y REV. 361, 366 (2010); Steven G. Gey,

This Article retrieves a new history of the World War I era that justifies contemporary arguments for a more robust assembly right because it suggests that assembly, and not speech, was the closer fit constitutional right during that era. In retrieving an assembly-oriented history, this Article rejects three accepted assumptions: first, that the 1919 cases were a surprising break from their WWI-era context; second, that speech was the constitutionally inevitable First Amendment right at issue; and third, that the tension between First Amendment rights and group conduct was a late-coming aberration to an otherwise unsullied First Amendment.[20] It was, rather, inherent in that amendment, present at the advent. The 1919 cases were typical of the widespread anti-democratic group prosecutions of the WWI era. Assembly,[21] just as much as speech, should have been attended to.

This Article's retrieved history of the WWI era, which it sets as 1918–1927, has two important but unappreciated aspects. First, criminal conspiracy charges played a major role in anti-dissident prosecutions in federal and state courts. Second, states passed and used their criminal syndicalism laws in the same way.

Conspiracy and syndicalism are subsets of what I call "membership crime," which refers to crimes whose proof depends primarily or solely on membership in or association with certain, more-or-less formally defined groups. Pure membership crimes are those that directly criminalize group membership with no other element necessary for proof. Some

The Brandenburg *Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 976 (2010); Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 498 (2012); Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1, 18–19 (2006); Robert S. Tanenbaum, Comment, *Preaching Terror: Free Speech or Wartime Incitement?*, 55 AM. U. L. REV. 785, 816 (2006).

[19] *Whitney*, 247 U.S. at 373 (1927) (Brandeis, J., concurring); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1005 (2011); Robert M. Cover, *The Left, the Right and the First Amendment: 1918–1928*, 40 MD. L. REV. 349, 352 (1981) (treating freedom of expression as a "single, critical problem" in shaping democratic theory).

[20] Some scholars suggest this. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 290 (1970); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 244–45 (Jamie Kalven ed., 1988); David Cole, *The Roberts Court vs. Free Speech*, N.Y. REV. BOOKS, Aug. 19, 2010, at 80, 81.

[21] Many of the cases discussed in this Article may appear to be freedom of association cases rather than assembly cases. The Article refers consistently to the freedom of assembly, however, for two reasons. First, it was only in 1958 that the Supreme Court judicially created the freedom of association, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958), whereas assembly is a textual freedom. Second, there is substantial overlap and interchangeability between the concepts of association and assembly. *See* Ashutosh Bhagwat, Commentary, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1388 (2012); Bhagwat, *supra* note 19, at 982; Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 1071 (1999). It is, therefore, both convenient and constitutionally correct to refer to the freedom of assembly in the World War I era.

syndicalism laws were pure membership crimes. These membership crimes today are unconstitutional because they explicitly impose guilt by association.[22] Hybrid membership crimes prohibit group membership or association but require additional elements. Common law conspiracy, for example, requires a criminal *mens rea*. De facto membership crimes are crimes that prohibit such a broad swath of various acts—often determined by judicial interpretations of criminal statutes—that virtually any interaction with certain groups becomes a crime. The modern material support for terrorism law is a de facto membership crime.

While the law distinguishes between pure, and hybrid or de facto membership crimes—the former are constitutionally vulnerable, the latter are not—this Article rejects that distinction. It does so because pure membership crimes are invalid based on their imposition of guilt by association, but hybrid and de facto membership crimes have often had the purpose and function of imposing the very same guilt. A test is needed that can evaluate the validity of *all* types of membership crime.

Based on the application of membership crime in the WWI era and the *Brandenburg* speech jurisprudence, this Article sets forth what I call the "*Brandenburg* for groups" test for the assembly right. This is a controversial proposal because it would protect some actual conspiracies and unpopular associations, such as those with terrorist organizations. It will, however, respond to anticipated criticism, most notably expressed in an important debate between John D. Inazu and Ashutosh Bhagwat over the utility of *Brandenburg v. Ohio* to protect assembly. It is also an important proposal because the WWI-era cases demonstrate that membership crime models often have been used for socio-political control[23] rather than to ensure public safety. These cases also support the *Brandenburg* for groups test by undermining the accepted[24] but questionable[25] belief that group

[22] United States v. Archuleta, 737 F.3d 1287, 1303 (10th Cir. 2013) (Holloway, J., dissenting) ("Our system of criminal justice deals with guilt, not guilt by association.").

[23] Richard W. Steele, *Fear of the Mob and Faith in Government in Free Speech Discourse, 1919–1941*, 38 AM. J. LEGAL HIST. 55, 59 (1994) (describing the postwar "ideological struggle" for the "'soul' of the nation," which shaped free speech thought).

[24] *See* United States v. Recio, 537 U.S. 270, 274–75 (2003); Iannelli v. United States, 420 U.S. 770, 778 (1975); United States v. Feola, 420 U.S. 671, 693 (1975); Callanan v. United States, 364 U.S. 587, 593–94 (1961); United States v. Rabinowich, 238 U.S. 78, 88 (1915); United States v. E.C. Knight Co., 156 U.S. 1, 35 (1895); Callan v. Wilson, 127 U.S. 540, 556 (1888); United States v. Cassidy, 67 F. 698, 703 (N.D. Cal. 1895); State v. Setter, 18 A. 782, 784 (Conn. 1889); Commonwealth v. Putnam, 29 Pa. 296, 296–97 (1857); State v. Burnham, 15 N.H. 396, 401–02 (1844); Lambert v. People, 9 Cow. 578, 598–99 (N.Y. 1827); Commonwealth v. Judd, 2 Mass. (1 Tyng) 329, 337 (1807); Bhagwat, *supra* note 21, at 1389; Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 443 (1983); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1315 (2003); Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 57 (2006).

[25] Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 YALE L.J. 405, 414 (1959); Steven R. Morrison, *Requiring Proof of Conspiratorial Dangerousness*, 88 TUL. L. REV. 483, 485–86, 505–07 (2014); Herbert Wechsler et al., *The Treatment of Inchoate*

crime is particularly dangerous. Finally, as I have suggested elsewhere,[26] the *Brandenburg* for groups test is a practicable proposal that would not negatively affect public safety.

To provide a historical, constitutional, and normative foundation for the *Brandenburg* for groups test, Parts I–III detail the role of membership crime in the WWI era. The first Section of Part IV lays the First Amendment groundwork. It provides a short introduction to the assembly right, beginning with *United States v. Cruikshank* in 1875, evolving in the mid-twentieth century, being displaced by the right of association, and leading ultimately to contemporary scholarly attempts to reinvigorate the right. This will situate the Article's main thesis in the larger context. The second Section of Part IV describes the abiding but tense relationship between First Amendment rights and membership crime. The third Section sets forth the *Brandenburg* for groups test, its benefits, responses to its anticipated criticisms, and examples of its potential application. The Conclusion briefly discusses membership crime in the post-9/11 era, which shows the persistence of anti-democratic group crime models and the contemporary need for *Brandenburg* for groups.

I. SUBSTANTIVE FIRST AMENDMENT'S ADVENT

The advent of the substantive First Amendment in the WWI era was preceded by a period, starting in the 1850s,[27] that saw an unprecedented increase in the number,[28] size,[29] and national power[30] of labor unions. Some advocated revolution[31] and violence,[32] and so, when strikes broke out,[33] state[34] and federal troops were deployed, resulting in hundreds of deaths.[35] The Haymarket bombing in 1886, and the subsequent conspiracy trial of anarchist August Spies and others, created fear and political

Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, 61 COLUM. L. REV. 957, 960, 1029 (1961) (questioning the assumption that conspiracies are distinctly dangerous); MODEL PENAL CODE § 5.05(2) (1962) (reflecting Wechsler et al.'s approach); ARK. CODE ANN. § 5-3-101 (2013) (same); COLO. REV. STAT. § 18-2-206(3) (2013) (same); N.J. STAT. ANN. § 2C:5-4(b) (2012) (same); 18 PA. CONS. STAT. ANN. § 905(b) (West 2013) (same).

[26] Morrison, *supra* note 25, at 488, 503–05.

[27] Deborah A. Ballam, *Commentary: The Law as a Constitutive Force for Change: The Impact of the Judiciary on Labor Law History*, 32 AM. BUS. L.J. 125, 129 (1994).

[28] *Id.* at 130.

[29] DAVID RAY PAPKE, THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA 9 (1999).

[30] Ballam, *supra* note 27, at 130, 143.

[31] TIMOTHY MESSER-KRUSE, THE TRIAL OF THE HAYMARKET ANARCHISTS: TERRORISM AND JUSTICE IN THE GILDED AGE 11 (2011).

[32] *Id.* at 12–13.

[33] Ballam, *supra* note 27, at 130.

[34] *Id.*

[35] ANTHONY WOODIWISS, RIGHTS V. CONSPIRACY: A SOCIOLOGICAL ESSAY ON THE HISTORY OF LABOUR LAW IN THE UNITED STATES 75 (1990).

paranoia[36] and sparked the country's first red scare.[37] Courts and the media found culprits in aliens and socialist labor unionists.[38] Conspiracy was widely used for socio-political control.[39]

In response to massive immigration,[40] authority institutions engaged in a concerted assimilation effort.[41] Labor unions, however, asserted their own aspirations and rights.[42] This, along with its position of neutrality going into WWI,[43] increased support for the socialist party. The Industrial Workers of the World (IWW) was founded in 1905, which would become the target of the lion's share of criminal conspiracy and syndicalism charges in the WWI era. Three years later, the FBI (then called the Bureau of Investigation, or BI) was created. It was intended to enforce only

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[36] PAPKE, *supra* note 29, at 16.

[37] MESSER-KRUSE, *supra* note 31, at 4.

[38] JAMES GREEN, DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA 8–9, 11 (2006); VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 70–71 (1993).

[39] State v. Glidden, 8 A. 890, 894 (Conn. 1887) (Affirming a conviction for conspiracy to boycott a company, the Connecticut Supreme Court in 1887 wrote, "The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasable appetite for more."); *see also* Callan v. Wilson, 127 U.S. 540, 556 (1888); Arthur v. Oakes, 63 F. 310 (Harlan, Circuit Justice, 7th Cir. 1894); Consol. Steel & Wire Co. v. Murray, 80 F. 811, 812–13 (C.C.N.D. Ohio 1897); *In re* Grand Jury, 62 F. 840, 842 (N.D. Cal. 1894); Brunswick Gaslight Co. v. United Gas, Fuel & Light Co., 27 A. 525, 527–28 (Me. 1893); San Antonio Gas Co. v. State, 54 S.W. 289, 290–92 (Tex. Civ. App. 1899); Moores & Co. v. Bricklayers' Union, 10 Ohio Dec. Reprint 48, 56–57 (1889); Wechsler et al., *supra* note 25, at 957 (noting "the early condemnation of the labor union as a criminal conspiracy and the use of the charge against political offenders"). *But see* United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895); Am. Fire Ins. Co. v. State, 22 So. 99, 100–01, 104 (Miss. 1897); Longshore Printing & Publ'g. Co. v. Howell, 38 P. 547, 548 (Or. 1894).

[40] James R. Barrett, *Americanization from the Bottom Up: Immigration and the Remaking of the Working Class in the United States, 1880–1930*, 79 J. AM. HIST. 996, 997 (1992) (Between 1880 and 1924, twenty-five million immigrants arrived in the United States); CENSUS OFFICE, STATISTICS OF THE POPULATION OF THE UNITED STATES AT THE TENTH CENSUS 34 (June 1, 1880) (The U.S. population in 1880 was 50 million.), *available at* http://www.census.gov/prod/www/decennial.html; *Historical National Population Estimates*, July 1, 1900 to July 1, 1999, U.S. CENSUS BUREAU, http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt (The U.S. population in 1920 was 106 million.).

[41] At his Model T assembly plant in Michigan, Henry Ford arranged a language and civics program for his immigrant workers, culminating in a mawkish pageant designed to depict the Americanization process. Barrett, *supra* note 40, at 996 (Ford's newly-American workers would "descend from a boat scene," and walk a gangway into a large pot depicting the Ford English School. Teachers on either side would stir the pot, and the workers would emerge as part of one American nationality.); Gary Gerstle, *Liberty, Coercion, and the Making of Americans*, 84 J. AM. HIST. 524, 530 (1997).

[42] Barrett, *supra* note 40, at 1010.

[43] James Weinstein, *Anti-War Sentiment and the Socialist Party, 1917–1918*, 74 POL. SCI. Q. 215, 216 (1959).

interstate commerce and anti-trust laws,[44] but would soon come to monitor dissent.[45]

With the country's entry into the war, a regime of censorship, investigation of dissident groups, and the use of conspiracy law immediately followed. Assimilation was replaced by a nativist drive for "100 percent Americanism,"[46] bringing with it forced displays of loyalty, assaults, and even murder of dissidents.[47] The Army broke up IWW strikes,[48] anti-union mob violence emerged,[49] and by October 1918, a new immigration law facilitated the deportation of a handful of Wobblies, which would pick up during the Red Scare a few years later.[50] The BI participated in the 1918 "[S]lacker [R]aids," which indiscriminately rounded up young men in major cities, ostensibly to enforce the war's draft law.[51] In addition to dissent groups, the BI began to monitor politicians, judges, and anyone else perceived to be disloyal.[52] Within one year of its passage, 250 people had been convicted under the Espionage Act.[53] These law enforcement moves would lead to the three cases that would signal the advent of the substantive First Amendment.

Schenck v. United States, *Frohwerk v. United States*, and *Abrams v. United States* are important First Amendment cases, but are also important membership crime cases[54] for two reasons. First, they reflect the WWI

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[44] Athan G. Theoharis, *Dissent and the State: Unleashing the FBI, 1917–1985*, 24 HIST. TEACHER 41, 41 (1990).

[45] *Id.* at 41–42.

[46] STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 246 (2008).

[47] *Id.* at 247.

[48] John Braeman, *World War One and the Crisis of American Liberty*, 16 AM. Q. 104, 106 (1964) (book review).

[49] *Id.* at 111.

[50] *Id.* at 107.

[51] Christopher Capozzola, *The Only Badge Needed Is Your Patriotic Fervor: Vigilance, Coercion, and the Law in World War I America*, 88 J. AM. HIST. 1354, 1380 (2002).

[52] Theoharis, *supra* note 44, at 41–43.

[53] FELDMAN, *supra* note 46, at 248.

[54] Bhagwat, *supra* note 19, at 1006 ("The Espionage Act cases . . . all involved pleas by antiwar groups to join opposition to World War I, and they often involved members of the Socialist Party."). To be sure, membership crime was not new to the WWI era. It has, rather, been endemic to the American system of governance and criminal law. At the virtual framing of the Constitution, membership crime models were employed as anti-democratic systems. The Alien and Sedition Acts, passed in 1798, directed governmental power against alien groups perceived to pose a national threat. An Act Concerning Alien Enemies, ch. 58, 1 Stat. 577, 577 (1798) (codified as amended at 50 U.S.C. § 21 (2012)) (Permitting the government to "apprehend[], restrain[], secure[] and remove[] as alien enemies," "all [male, adult] natives, citizens, denizens, or subjects of the hostile nation or government."). They also made it illegal to form conspiracies to oppose the government. An Act in Addition to the Act, Entitled An Act for the Punishment of Certain Crimes Against the United States, ch. 73, 1 Stat. 596 (1798). These Acts indicate the persistent conflict between First Amendment rights on the one hand and public safety and the Framers' preference

era's anti-leftist group hysteria and the use of conspiracy law against these groups. Second, they reflect the early twentieth century law's increasing social regulatory function,[55] whose mechanism was often membership crime.[56]

A. Schenck v. United States *and* Frohwerk v. United States

Decided on March 3, 1919, the defendants in *Schenck*[57] had been convicted under the Espionage Act of conspiracy to use the mails to distribute socialist political tracts[58] to 15,000 draft-eligible men.[59]

The leaflets had no actual effect on recruitment; the defendants' convictions were affirmed based on their mere hope of hindering the war effort. Their free speech arguments, furthermore, were quickly dismissed.[60] Offering a gloss on the bad tendency test,[61] Justice Holmes wrote that the test of First Amendment protection would be whether the speech at issue comprised a clear and present danger of resulting in a substantive harm. Holmes considered the proximity of the speech to the harm and the degree of harm as important criteria.[62] The same gloss would appear in *Frohwerk*, published one week after *Schenck*.[63]

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for broad police power on the other, which supported broad criminalization of certain groups, rather than the support for rights recognized today. *See* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 632, 637 (1994). The Acts also reflect the unavoidable conflict between First Amendment rights and socio-political control via membership crime. The Acts were passed in the aftermath of the French Revolution when taming the "dangerous classes" became a priority for those who held power. Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 68 (2012); Immanuel Wallerstein, *Citizens All? Citizens Some! The Making of the Citizen*, 45 COMP. STUD. SOC'Y & HIST. 650, 650 (2003).

[55] Tabitha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 45–48 (2011).

[56] Cover, *supra* note 19, at 357–58. The defendants in the three cases were charged with conspiracy to violate either the Espionage Act of 1917, or its amendment, the Sedition Act of 1918. Both of these laws were passed explicitly to censor anti-war First Amendment activity. FELDMAN, *supra* note 46, at 241 (After Congress declared war, Wilson announced that "censorship . . . is absolutely necessary to the public safety.") (ellipsis in original). Just two months after the war declaration, Congress passed the Espionage Act, which prohibited making statements that would interfere with the war effort, and conspiring to do so. Espionage Act, ch. 30, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. §§ 792–799 (2012)). Although the Espionage Act was textually limited to false statements, the prosecutions overwhelmingly involved dissident political opinion.

[57] Schenck v. United States, 249 U.S. 47 (1919).

[58] *Id.* at 48–49.

[59] *Id.* at 49–50.

[60] *Id.* at 51–52.

[61] *Id.* at 52; FELDMAN, *supra* note 46, at 263.

[62] *Schenck*, 249 U.S. at 52.

[63] Frohwerk v. United States, 249 U.S. 204, 208–09 (1919).

This test, which would evolve into the *Brandenburg* imminency test, suggests that conspiracies ought to be treated as acts of assembly, subject to the *Brandenburg* for groups test set forth in Part IV below. This is so for two reasons. First, the *Schenck* defendants were far from dangerous.[64] Their speech comprised the primary evidence against them and was highly unlikely to lead to any substantive harm. The proximity of the speech to the substantive target crime was remote. Second, *Schenck* shows that conspiracy charges can be tools of socio-political control rather than genuine attempts to secure public safety. Determining assemblies' protection by formal legal categories such as conspiracy risks leaving many valuable assemblies unprotected and enables anti-democratic membership crime prosecutions.

B. Abrams v. United States

Friends of Justice Holmes, disappointed at his *Schenck* and *Frohwerk* opinions, lobbied Holmes to recognize the importance of First Amendment rights.[65] The result was *Abrams*,[66] in which Holmes would have reversed the conviction of radicals for conspiracy to violate the Sedition Act.[67]

While Holmes's friends may have moved him, the *Abrams* case itself was sufficiently different from *Schenck* and *Frohwerk* to compel Holmes to a more speech-protective response. In *Abrams*, the defendants were convicted under the Sedition Act, not the Espionage Act, and the conspirators' conduct was harmless, even relative to the conduct of the *Schenck* and *Frohwerk* defendants.[68]

On the first point, the Sedition Act, unlike the Espionage Act, was clearly a membership crime designed for socio-political control. It amended the Espionage Act to prohibit so much more speech[69] that it

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[64] *See* Morrison, *supra* note 25, at 507–08.

[65] HEALY, *supra* note 9, at 21–24; DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 30 (1986); Richard M. Abrams, *Oliver Wendell Holmes and American Liberalism*, 19 REVS. AM. HIST. 86, 89 (1991) (book review); *see also* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 430–31 (1992).

[66] Abrams v. United States, 250 U.S. 616 (1919).

[67] *Id.* at 624, 631.

[68] *Id.* at 629 (Holmes, J., dissenting) (referring to the defendants as "poor and puny anonymities."); Abrams, *supra* note 65, at 89.

[69] Sedition Act of 1918, ch. 75, 40 Stat. 553 [U.S. COMP. STAT. ANN. 1916, § 10212c (West Supp. 1919)] (With the amendment, it had become a crime to say anything with intent to obstruct the sale of war bonds or government securities; say anything to obstruct the making of government loans; incite, attempt to incite, or attempt to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government," the Constitution, the military, the flag, or military uniforms; use any language intended to bring these things "into contempt, scorn, contumely, or disrepute"; utter, print, write, or publish anything intended to incite, provoke, or encourage resistance to the United States; willfully display the flag

became impossible for Holmes to ignore his friends' concerns.[70] The extensive list of prohibited speech created a de facto membership crime because it virtually prohibited any association with a dissident group—if people cannot speak about their shared opinions, they cannot meaningfully assemble.

Holmes now took seriously the clear and present danger test, voting to overturn the defendants' convictions because there was no immediate danger.[71] Holmes's approach was meant to protect public safety while acknowledging that seditious views could, in hindsight, emerge as valuable speech,[72] and that even speech that advocated crime could be valuable, since, as Holmes wrote in 1925, "[e]very idea is an incitement."[73]

The same logic should lead to an imminency test for assemblies that appear to be seditious or intent on crime. Indeed, in the WWI era, it was only the speech of groups that was believed to approach this imminency threshold, and prosecutions targeted only people who acted in concert with others—the mythical soapbox orator was never a target.[74] This is why the 1919 and other WWI-era cases were conspiracy cases. Like the nineteenth-century sentiment that individual speakers were exercising their rights, but that assembled groups were intent on crime,[75] the WWI-era cases were not concerned with lone radicals, speaking to passersby on a street corner. They were concerned with groups that threatened to undermine the social order.[76] To analyze these cases, courts chose the free speech framework over the assembly framework. While this was good for free speech, it made the courts incapable of addressing the assembly issues at play.

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of a foreign enemy; and urge or advocate any curtailment of production of any product necessary to the war effort.).

[70] Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1352 (1997).

[71] *Abrams*, 250 U.S. at 628.

[72] *Id.* at 630.

[73] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[74] *Debs v. United States* could be viewed as the prosecution of a lone speaker, but the defendant's speech in that case was "delivered, to an assembly of people, a public speech." 249 U.S. 211, 212 (1919).

[75] State v. Glidden, 8 A. 890, 895 (Conn. 1887) ("Any one man, or any one of several men, acting independently, is powerless; but when several combine, and direct their united energies to the accomplishment of a bad purpose, the combination is formidable.").

[76] *See* Richard D. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1842 (2001) ("[W]e express and endorse ideas by and through associating with others; associations, in turn, transmit values and loyalties to us, and mediate between persons and the state.").

C. The 1919 Cases in Context

Other conspiracy cases show that the 1919 cases were part of their time, all of which tended to target group conduct rather than individual speech. Four cases illustrate a much more extensive body of law.

In *Schoborg v. United States*,[77] the defendant was a 66-year old cobbler from Germany who had arrived in the United States as a child.[78] He had been a city policeman, marshal, a member of the board of trustees, and a city council member.[79] His shop was used by the local German community as a place for meeting, gossip, and conversation.[80] Frequent attendees included a 65-year old tobacco dealer and banker, who had been born in the United States, and a 56-year old native-born treasurer of a local brewery.[81] These men often visited the cobbler's shop "'as a loafing place' to sit down and talk and 'meet the same old crowd.'"[82] "Desiring to know what was going on," a group of citizens hired a detective agency to wiretap the cobbler's shop.[83] Based on a handful of recordings,[84] the three loafers were convicted of conspiracy to violate the Espionage Act, which the Sixth Circuit affirmed.[85] Their specific criminal plan—if indeed they had one—was never mentioned.

In *State v. Townley*,[86] the Minnesota Supreme Court affirmed convictions for conspiracy to thwart the war effort[87] because the defendants made anti-war speeches and distributed pamphlets that were intended to dissuade people from buying Liberty Bonds, teach people that it was the poor farmers, rather than the rich, who were being drafted, show that the poor were paying for the war twice, with their lives and their tax dollars,

[77] 264 F. 1 (6th Cir. 1920).

[78] *Id.* at 3.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 6–7 ("It is strenuously insisted that defendants' conduct could not be thought to have any direct tendency to cause the obnoxious 'substantive evils,' because what they said was spoken secretly and among themselves. However true this might be of the ordinary, casual conversation, it cannot reach the long-continued maintenance of an intensive school of disloyalty. Even if the talk had been confined to the three respondents, the cumulative effect upon each of what the others said would be to aggravate, if not cause, an extremity and recklessness in opposition to the war and favor to the enemy which would be an incitement to direct obstruction and injury in the many ways open to the evil disposed in that vicinity. But the talk was not confined to these three. Several others were present more or less, and that the influence of such a center would radiate through an appreciable part of the community is too sure for doubt." (footnote omitted)).

[86] 182 N.W. 773 (Minn. 1921).

[87] *Id.* at 778.

and oppose American autocracy at home before attempting to relieve Europeans of German autocracy.[88]

In *Sykes v. United States*,[89] church members were convicted of conspiracy under the Espionage Act[90] because they encouraged other fellow congregants not to contribute to the Red Cross, buy Liberty Bonds, display the American flag, visit the homes of others who displayed the flag, or register as alien enemies.[91] The defendants also told their congregation that the German army represented the Lord's chosen people and would be victorious.[92]

These cases echoed *Pierce v. United States*,[93] which had been published four days before *Schoborg*. The *Pierce* Court affirmed an Espionage Act conspiracy conviction for publishing an evocative anti-war pamphlet.[94] The trial court had ensured that popular prejudice would control (and the First Amendment be ignored) by leaving to the jury the task of interpreting the pamphlet and its effects.[95] Justice Brandeis dissented, arguing that the trial court should have directed a verdict for the defendants because the pamphlet presented no clear and present danger of any illegal (or normatively bad) result.[96] While the clear and present danger test would come to protect speech, it would never protect against conspiracy charges.

D. *The Role of Conspiracy*

In each of these cases, conspiracy operated to indirectly censor speech, and directly suppress the assembly right. As to speech, conspiracy did not explicitly criminalize unpopular statements. Instead, the statements in *Schoborg*, *Townley*, and *Sykes* comprised the sole substance and evidence of the conspiracies. Conspiracy, therefore, was a system of law that enabled the censorship of speech while giving law's imprimatur to these assembly restrictive prosecutions.[97]

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[88] *Id.* at 775–77.

[89] 264 F. 945 (9th Cir. 1920).

[90] *Id.* at 945.

[91] *Id.* at 946.

[92] *Id.*

[93] 252 U.S. 239 (1920).

[94] *Id.* at 241, 253.

[95] *Id.* at 244, 249–50.

[96] *Id.* at 272 (Brandeis, J., dissenting).

[97] In *United States v. Strong*, a Washington District Court took the rare—but not unheard of—step of dismissing an Espionage Act charge, predicated upon the publication of an editorial in the *Union Record*, charged to be disloyal, scurrilous, and abusive toward the form of the U.S. government. The Court conceded, "[T]he advocacy of anarchy and sedition, or overthrow of government, is no crime, under the general statutes or law as presently enacted, unless the acts amount to treason, rebellion, or seditious conspiracy; nor is advising or advocating unlawful obstruction of industry, or unlawful or violent destruction of private property, a crime under the laws of the United States." 263 F. 789, 791–92 (W.D. Wash. 1920). But advocating

As to assembly, conspiracy worked a direct suppression; people could assemble and share unpopular thoughts, but they could therefore be prosecuted. This assembly right was not recognized in the Lochnerian milieu of individualism. Had it been, case results may have been different. To see why, imagine that the *Schoborg* loafers were indicted today. The government might indict for conspiracy to serve in the armed forces of a foreign state,[98] to bear arms against the United States,[99] or to overthrow the United States government.[100] The defendants' dissenting speech would be relevant evidence of the crime, the admissibility of which would be unlimited by *Brandenburg* or any other constitutional ruling. The *Brandenburg* for groups assembly test, however, would directly address the criminalization of group conduct. It would not ask whether speech is relevant, but whether the application of conspiracy law violated the freedom of assembly. Courts would ask whether the group posed an imminent danger. The *Schoborg* defendants would have been protected because even if they in fact conspired, their plan's fruition was far from imminent. This is an expression of the constitutional overprotection that John D. Inazu advocates.[101] Some guilty (but harmless) parties may go free, but many more deserving people will enjoy the assembly right.[102]

E. The House That Jack Built

The Seventh Circuit recognized another problem with conspiracy law, which it called the "house that Jack built."[103] On review of the conviction of IWW leader "Big" Bill Haywood,[104] the court observed that conspiracy charges can be predicated on facts that are so far removed from any substantive danger as to be normatively troubling, contrary to legislative intent, and evidentiarily unreliable. In *Haywood v. United States*, the court considered a conspiracy to hinder the execution of federal law. The hindrance came from a timbermen's strike in a far-off camp, and

sedition or overthrow of the government could easily be seen as an Espionage Act violation! The court certainly knew this, and so it was not making a statement regarding the statutory law, but rather, possibly, a statement that the First Amendment protected such advocacy *despite* the law. Even this progressive and speech-protective statement, however, highlighted conspiracy's usefulness as a workaround: one could not be charged directly with advocacy, but one *could* be charged with conspiracy, which, to the court, was on par with treason and rebellion.

[98] 8 U.S.C. § 1481(a)(3)(A) (2012).

[99] *Id.* § 1481(a)(7).

[100] 18 U.S.C. § 2384 (2012).

[101] *See* John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1437 (2012).

[102] 9 THE WRITINGS OF BENJAMIN FRANKLIN 293 (Albert Henry Smyth ed., 1907) ("That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved.").

[103] Haywood v. United States, 268 F. 795, 800 (7th Cir. 1920).

[104] *See id.* at 799–801.

could have resulted, ultimately, in a shortage of paper at the Government Printing Office, which that office needed to execute federal law.[105]

Membership crime depends upon the house that Jack built because it often entails no imminent or realized danger. There is instead an undemonstrated presumption that certain groups pose such an imminent and potent threat that membership itself is sanctionable. As the causal distance between a membership crime's *actus reus* (agreement and overt act for conspiracies, association for other membership crimes) and its envisioned harmful effects increases, so too do the normative and evidentiary concerns. Holmes's proximity and degree inquiry responds to these concerns. If the *actus reus* and envisioned substantive harm are so distant from each other, or the potential harm so minor, a constitutional concern emerges.

The speech right, as an evidentiary inquiry in the membership crime context, offers no protection. In *Haywood*, for example, the strikers might truly have conspired—or their rhetoric might have been erroneously interpreted as such—and the impossibility of achieving the intended result would be no defense. The assembly right, however, would address the house that Jack built. If lumberjacks in one camp go on strike, a conspiracy could be proven. But wood can be procured from other camps, and so the strike represents no clear and present danger of hindering federal law. The assembly right would limit the government's ability to sustain a conspiracy charge, allowing strikers to air their grievances when doing so poses no imminent danger.

While the strikers might "get away" with the crime of conspiracy, this is an acceptable constitutional result; *Brandenburg v. Ohio* was itself a problematic case in the same way because it invalidated the application of the syndicalism law in question and has served to invalidate many other criminal laws.[106] Under *Brandenburg*, some criminal laws can no longer withstand a First Amendment challenge. Similarly, the criminalization of certain conspiracies, if they pose no imminent danger, ought also to be constitutionally vulnerable under an assembly theory. If conspiracies are unprotected *simply because* they are conspiracies, then legislatures determine the constitutional line of assembly protection. This implicates con-

[105] *Id.* at 800 ("Any direct interference by force with [the Government Printing Office's] operations might possibly be held to be a forcible prevention of the execution of laws of the United States. . . . But the printing office cannot operate without paper. Suppose the workmen in a paper mill that has a contract to supply paper to the printing office, with knowledge of the contract and with intent to prevent the mill from fulfilling it, go on strike and forcibly prevent the running of the mill. Suppose that workmen in a hemlock forest, whose owner has a contract to supply logs to the paper mill that has a contract to supply paper to the printing office, with knowledge of those contracts and with the intent to prevent their execution, go on strike and forcibly stop the timberman's operations. And so on, along the whole imaginable line of 'the house that Jack built.'").

[106] Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (per curiam).

stitutional judicial review and enables the enaction of anti-democratic membership crimes.

II. THE RED SCARE: 1919–1920

The early conspiracy cases were part of a broad application of membership crime models, which included a wholesale condemnation of leftist, immigrant, and other dissident groups during the Red Scare.

Beginning in November 1919, federal and local authorities raided meeting places, closed down presses, seized records, and jailed or deported immigrant activists.[107] Conventional political figures such as Zechariah Chafee and Felix Frankfurter were investigated as subversives,[108] as were various non-mainstream groups.[109]

On January 2, 1920, the Red Raids reached their peak. On that Friday night, BI agents, in conjunction with local police, fanned out over thirty cities to arrest as many as 10,000 people.[110] Targets were members of the Communist or Communist Labor parties, but others were also arrested because they had assembled with subversive groups.[111]

In *Colyer v. Skeffington*,[112] for example, a group of twenty aliens petitioned for writs of habeas corpus as a result of the January 2 raids. They had been arrested that night in Boston simply for their membership in the Communist or Communist Labor party. Indeed, the authorities were explicitly on the lookout for membership, not crime.[113] U.S. District Court Judge Anderson, highly critical of the abusive raids,[114] questioned

[107] Barrett, *supra* note 40, at 1019.

[108] David Williams, *The Bureau of Investigation and Its Critics, 1919–1921: The Origins of Federal Political Surveillance*, 68 J. AM. HIST. 560, 572 (1981).

[109] This included Jews who advocated for a national homeland in Palestine, Irish–Americans who favored Irish independence, civil libertarians who defended dissidents' rights, and anyone who supported recognizing the Soviet Union. *Id.* at 577.

[110] *Id.* at 561.

[111] *Id.* (People were arrested who were not affiliated with communist groups because they attended functions that the BI regarded as subversive.).

[112] 265 F. 17, 20–21 (D. Mass. 1920).

[113] According to the government agents responsible for the raids, Communist leaders were supposed to have instructed their members to refuse to answer questions and "to destroy all evidence of membership or affiliation with their respective organizations." *Id.* at 31. The agents were therefore ordered to obtain admissions that the targets were group members. *Id.* It was particularly important to obtain "documentary evidence proving membership." *Id.* "[P]articular effort [should be] given to finding the membership book." *Id.* at 32. The intended charges pertained "to [Communist Party] membership merely." *Id.* at 33.

[114] Judge Anderson wrote that government officials involved in these arrests "described these proceedings, properly enough, as a 'raid' and as 'catching the Communists in the net.' The word 'raid' seems appropriate, and will hereafter be used in this report." *Id.* at 37. In Boston alone, the raids involved as many as 500 government agents. *Id.* at 38. A Boston BI superintendent estimated the arrests at 600; Judge Anderson believed the number was as much as double that. *Id.* at 39.

the evidentiary reliability entailed in arresting so many people simply for group conduct.[115] According to Anderson, the government's conduct led to unreliable judicial outcomes and normative failures.[116] Anderson recognized the government's paranoid conspiracy theory for the empty trope that it was.[117] For his stance, the BI began spying on Anderson.[118]

III. THE STATE SYNDICALISM CASES

While the Espionage Act, Sedition Act, and a collection of other war enabling acts were being used to charge dissidents with conspiracy at the federal level, a concomitant system of membership crime was emerging state by state. Criminal syndicalism statutes began to be passed around 1917, and by 1921 the majority of the states had nearly identical laws.[119] The Oregon Supreme Court likened these laws to conspiracy and criticized both.[120]

The California Syndicalism Act, passed in 1919 and applied more than any other state's syndicalism law, was representative. Section one defined "criminal syndicalism" as:

> [A]ny doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlaw-

Anderson referred to the government agents as a mob that acted with a "disregard of law and of properly verified facts." *Id.* at 43. For example, authorities arrested and held overnight thirty-nine people in Lynn, who were meeting to discuss forming a cooperative bakery. *Id.* The court went on to describe specific abusive arrests and detentions, and the *Grand Guignol* parade of handcuffed immigrants through the streets of Boston. *Id.* at 43–44.

[115] *Id.* at 47 ("[M]any of these aliens were arrested in boarding houses or halls in which were found large quantities of literature and pamphlets, the origin and ownership of which were necessarily largely matters of guesswork. In cases of doubt, aliens, already frightened by the terroristic methods of their arrest and detention, were, in the absence of counsel, easily led into some kind of admission as to their ownership or knowledge of communistic or so-called seditious literature.").

[116] *Id.* at 72.

[117] Williams, *supra* note 108, at 565, 567 ("Experience taught [Anderson] that '99 percent of the spy plots were pure fake' . . . . [that g]uilt . . . was personal, and the government could not deport persons because of membership in certain political or labor organizations. . . . Guilt by association, he declared, had no place in American society.").

[118] Theoharis, *supra* note 44, at 42.

[119] People v. Lloyd, 136 N.E. 505, 537 (Ill. 1922) (Carter, J., dissenting).

[120] State v. Boloff, 7 P.2d 775, 788 (Or. 1932) (Describing both as "the quicksands of the law . . . subject to the shifting public sentiment which always affects matters pertaining to government.").

ful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.[121]

Section Two provided that "Any person who . . . [o]rganizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism [is guilty of a felony.]"[122]

Syndicalism statutes therefore criminalized mere membership in any group that advocated—but did not necessarily commit or plan to commit—unlawful acts as a means of accomplishing industrial or political change. These membership crime statutes went further than conspiracy because their proof was membership only and required no agreement or overt act.[123]

The first syndicalism case seems to have been *State v. Moilen*.[124] Although it was primarily a speech case,[125] it highlighted recurring membership crime tropes. These included a presumption of certain groups' danger, popular prejudice[126] that drove both burden shifting[127] and damning definitions of vague words,[128] and the ease with which evidence was

[121] People v. McClennegen, 234 P. 91, 93 (Cal. 1925) (quoting California Criminal Syndicalism Act, CAL PENAL CODE §11400–11402, *repealed by* 1991 Stat. 436 (1991)).

[122] *Id.* (quoting California Criminal Syndicalism Act).

[123] *See* Windsor v. United States, 286 F. 51, 54–55 (6th Cir. 1923).

[124] 167 N.W. 345, 345–46 (Minn. 1918).

[125] The defendant had posted around town, at night, four types of 1x2-inch "posters," proclaiming, "Beware Sabotage," "Join the One Big Union," "Industrial Unionism, Abolition of the Wage System, Join the IWW," and "Sabotage means to push back, pull out or break off the fangs of Capitalism." *Id.* at 348.

[126] In *United States v. Steene*, a defendant was convicted under the Espionage Act for distributing evocative antiwar leaflets. 263 F. 130, 131 (N.D.N.Y. 1920). One leaflet depicted a man and the descriptive words: "Hung by the wrists from ceiling for 8 Hours a Day. McNeil's Island, Washington." *Id.* at 132 (internal quotation marks omitted); *see* STEPHEN M. KOHN, AMERICAN POLITICAL PRISONERS: PROSECUTIONS UNDER THE ESPIONAGE AND SEDITION ACTS 106 (1994) (Emil Herman, the secretary of Washington's Socialist party, had been imprisoned at McNeil's Island.). Another depicted a man who had apparently been beaten with a club, under which appeared, "Political Prisoners Beaten with a Baseball Ba[t] at Leavenworth Penitentiary." Another depicted a man with a pistol and army hat, kicking a hapless victim, described as "Punishment of a Conscientious Objector in Disciplinary Barracks." *Steene*, 263 F. at 132 (internal quotation marks omitted). The leaflets, concluded the court, were "well calculated to have the effect of arousing the contempt, scorn, contumely, and disrepute which Congress has sought to prevent." *Id.* at 133. In *In re O'Connell*, the California Supreme Court disbarred an attorney because he had been convicted of conspiracy to violate the Selective Service and Espionage Acts by persuading others to avoid the draft. 194 P. 1010, 1010–11 (Cal. 1920). The court had no doubt that these were crimes of moral turpitude. *Id.* at 1011.

[127] *Moilen*, 167 N.W. at 349 ("If [the] defendant intended some innocent phase of the doctrine of sabotage he should have made it appear on the face of the posters.").

[128] *Id.* at 348 (Sabotage was the court's major concern, which it referred to as "terrorism.").

deemed sufficient to convict[129] and thus nearly impossible to remedy on appeal.[130]

Most of the syndicalism defendants were IWW members and were charged not for any violent actions they took, but for being members of a group presumed to be criminal, single-minded, and cohesive.[131] This meant that only a defendant's membership in the IWW needed to be proven at trial. Oftentimes, no *mens rea* was required. Courts took judicial notice of the IWW's criminal nature, relieving the prosecution from having to prove an element of the crime.[132] They also seated jurors who were prejudiced against the IWW.[133]

A. *Mere Speech and Criminal Acts*

An ironic result was that speech was believed to pose a greater danger than some criminal acts. In *People v. Lloyd*, the Illinois Supreme Court affirmed the conviction of eighteen members of the Communist Labor Party for conspiracy to violate the state's syndicalism law.[134] The court applied the bad tendency test to the speech, but suggested that it would apply the more exacting clear and present danger test to acts:

> [I]f the acts are too trivial for the law's notice, and create no apparent danger and no perturbation in the peaceful order of things,

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[129] *Id.* (Because one of the posters depicted a "snarling black cat," the court found sufficient evidence to convict.).

[130] Howenstine v. United States, 263 F. 1, 2, 5 (9th Cir. 1920) (The defendant was convicted of conspiring to violate the Espionage Act by giving to another man, who was subject to the draft, a pair of eyeglasses that would impair the man's vision, permitting him to avoid induction. On review, the Ninth Circuit observed that this gift "unquestionably would tend to cause disloyalty on [the draftee's part] and refusal of military service.").

[131] In *People v. Lesse*, the California Appeals Court affirmed the conviction of a man for being an IWW member. 199 P. 46 (Cal. Dist. Ct. App. 1921). The court approved the introduction in evidence of a book entitled *The New Unionism*, which was produced by the IWW. *Id.* This book was said to "relate[] to and expound[] the doctrines of [the] syndicalistic organization," the IWW. *Id.* at 47. The appeals court did not suggest that the defendant had anything to do with *The New Unionism*. The court also described no part of the book, which might have been necessary to demonstrate that the IWW was a criminal organization. Instead, the court observed, "[T]he purposes of the IWW are a part of the current history of the day—a part of the history of the times. We are informed by the magazines, encyclopedias, and dictionaries of the day that the organization advocates criminal syndicalism, revolutionary violence, and sabotage." *Id.*

[132] *See, e.g.*, *id.* at 47.

[133] *Id.* at 47–48 ("Several jurors stated on their voir dire that they entertained unfavorable opinions of the IWW . . . . All jurors who read must know in a general way all about the IWW. Those who cannot read are not competent jurors anyway."); People v. Thompson, 229 P. 896, 897 (Cal. Dist. Ct. App. 1924) (citing this prejudice, the defendant argued that criminalizing membership in the IWW was "an attempt to create the crime of constructive conspiracy in violation of the constitutional right of personal liberty").

[134] 136 N.E. 505, 510, 537 (Ill. 1922).

> then no crime is committed; but if the means advocated are apparently adapted to the end, then the public peace, so far as advocacy is concerned, is as much disturbed as if they should be so actually.[135]

This ironic result, however, did not reach completed "acts" of conspiracy. The *Lloyd* court rejected the defendants' free speech claims because the crime of conspiracy is complete when the agreement is made, whether it is successful or not.[136] Dissident groups would be liable if they took action and liable for conspiracy if they merely assembled.

B. Career Government Witnesses

Most courts during the WWI era eschewed *Lloyd*'s absolute presumption and required some evidence that the IWW was in fact a criminal organization. Evidentiary rulings were not, however, entirely reliable or fair. Prosecutors were fond of using unsavory and discreditable former group members as witnesses to testify to the group's criminal intent.[137] These witnesses were sometimes responsible for the very crimes they alleged defendants committed.[138] They also fed the presumption of the IWW's danger, despite also testifying that the IWW never took any illegal action.[139] They spun evocative, but far-fetched, yarns of group sabotage.[140]

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[135] *Id.* at 512.

[136] *Id.* at 515.

[137] In the California syndicalism cases, a man named Elbert Coutts often testified for the prosecution. He was an admitted former member of the IWW, during which time he made his living "primarily by stealing." AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 62 (1995). Later, he made his living by testifying against Wobblies. Coutts's "chief source of income was the $250 per case, above expenses, he got from the government for his testimony in more than 40 trials of IWW members." *Id.* at 63.

[138] Coutts and other former IWW members testified consistently at multiple trials that the IWW had been responsible for a series of mysterious haystack burnings. In fact, in *People v. Wright*, Coutts himself admitted to making chemical explosives and that he himself had set fires to haystacks. 226 P. 952, 953 (Cal. Dist. Ct. App. 1924). There was never, in any of these cases, evidence that anyone other than Coutts set fire to any haystack, though defendants were accused of it.

[139] People v. Roe, 209 P. 381, 386 (Cal. Dist. Ct. App. 1922) (A former Wobbly, John Dymond, testified that the "wholesale destruction of property was caused by the direct acts of members of the IWW," and that "while no specific action was ever taken by the organization," one of the IWW's rules was that its members "should act on their own initiative whenever they thought it necessary to accomplish" the goals of the organization.).

[140] Joe Arada was a popular government witness. In numerous cases, *Wright*, 226 P. at 953–54, People v. La Rue, 216 P. 627, 630 (Cal. Dist. Ct. App. 1923), and *Roe*, 209 P. at 383–84, Arada testified that he had been employed on a potato farm. On one particular day, other workers showed up, worked, and slept in the laborers' bunkhouse with Arada and others. *Wright*, 226 P. at 953–54. They left early the next day, before the others awoke, without taking their breakfast or asking for their day's pay. Later, in the fields, Arada's feet started to burn. *Id.* at 954. This was a result, he claimed, of the potassium hydroxide that had been placed in his shoes by Wobbly saboteurs. *Id.* IWW papers, he would testify, were found in the bunkhouse the morning the mysterious laborers left, which had not been there before. *Id.*

These witnesses' testimony connected no specific defendant to the IWW, and it provided no extrinsic evidence that the IWW in fact ordered its members to engage in illegal action. These professional witnesses were credible only if the jury presumed that the IWW was a criminal group. This presumption was, indeed, widely held.[141]

C. *Defining Groups, Ensnaring Individuals*

Membership crime was useful against the IWW because, like the presumption of the IWW's criminality, conspiracy and syndicalism laws were vague,[142] applicable to any unpopular group. Once applied, courts' and jurors' presumption of the group's criminality virtually ensured a guilty verdict. The *mens rea* required of the defendant varied from case to case, but was always set at a low bar.[143] This meant that the primary goal of a prosecution was to prove the criminal nature of a group, not the actual crimes of either the group or an individual defendant.[144]

This approach implies a perennial problem with proving conspiracy: the evidence is of individuals' intent and conduct, but the thing to be proven is the contours of the group's criminality. In politically charged cases, the group is usually said to be geographically large and amorphously organized around an idea rather than a specific, isolated criminal act. The probativeness of the conduct of individual *A*, who may have been a member of the group, to prove the criminal intent of individual *B*, who may also have been a member of the group, is tenuous if the individuals' only connection to each other is an amorphous, poorly defined group that is presumed to be criminal. In such cases, guilt by association is a reality, but remains unmitigated by any constitutional protection.

[141] In *People v. Bailey*, the California district court admitted the testimony of Coutts and another unreliable former Wobbly, W.E. Townsend, because the IWW was supposedly a criminal conspiracy. 225 P. 752, 754, 756 (Cal. Dist. Ct. App 1924). The literature introduced to prove the group's criminality was of "ancient vintage," published prior to the passage of California's Syndicalism act. *Id.*

[142] Krulewitch v. United States, 336 U.S. 440, 446–47 (1949) (Jackson, J., concurring) ("The modern crime of conspiracy is so vague that it almost defies definition."); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922) ("A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought.").

[143] People v. McClennegen, 234 P. 91, 101 (Cal. 1925) (Syndicalism, including membership, was a strict liability crime.); State v. Steelik, 203 P. 78, 84 (Cal. 1921) (requiring that a defendant knowingly belong to a conspiratorial organization); State v. Boloff, 7 P.2d 775, 777–78 (Or. 1932) (Syndicalism, including membership, was a strict liability crime.); State v. Hennessy, 195 P. 211, 217 (Wash. 1921) (same).

[144] In *Burns v. United States*, for example, the U.S. Supreme Court affirmed the conviction of a defendant for violating a state syndicalism statute on federal land. 274 U.S. 328 (1927) The evidence was primarily intended to establish the nature of the IWW, not the defendant's conduct. Justice Brandeis, dissenting, noted that the evidence regarding the group related mainly to acts of individuals. *Id.* at 340 (Brandeis, J., dissenting).

Group membership leads to criminal liability, often in the most absurd[145] and impossible[146] circumstances. Guilt by association also produces normative failures, as individual defendants are held responsible for everything their group and their group's members ever advocated.[147] The assembly right has not evolved to provide substantive protection against such guilt; the *Brandenburg* for groups test provides that protection.

IV. ASSEMBLY AND *BRANDENBURG* FOR GROUPS

Prior to the WWI era, the First Amendment's force was mostly inspirational, not substantive, and gave rise to a grassroots movement toward individual rights.[148] In 1875, the Supreme Court in *United States v. Cruikshank* held that assembly for lawful purposes was a natural right,[149] but was limited to discussing national matters.[150] The Court reversed the conspiracy convictions of whites who had attacked African-American voters, stating that the First Amendment limited only federal governmental—not private, and not state—action.[151] The Court further clarified the

[145] *People v. Wright* was such a case. 226 P. 952. It is commonly believed that criminal conspiracies operate in secret. Grunewald v. United States, 353 U.S. 391, 402 (1957). In *Wright*, however, agents raided a house, on the front of which hung a three-foot by eight-inch sign reading "I.W.W. Office." *Wright*, 226 P. at 953. An IWW member who had not been in the house when the raid commenced approached an officer, delivering to him his IWW membership card. *Id.* The usual government witnesses, Coutts, Townsend, and Arada, testified for the prosecution. *Id.* It was at this trial that Coutts admitted to being an arsonist. *Id.*

[146] In *People v. Johansen*, the defendants had been convicted of syndicalism for being members of the IWW in Sacramento County, where they were arrested. 226 P. 634, 634 (Cal. Dist. Ct. App. 1924). They resided in Alameda and Los Angeles Counties, but had been subpoenaed to testify at another IWW trial, which was taking place in Sacramento County. They obeyed the subpoenas, appeared and testified, and after they were done, they were arrested and indicted. *Id.* Although they had been tried and acquitted on a prior occasion for IWW. membership, the court affirmed their second conviction on the basis of their continued IWW membership. *Id.* at 635–36. Addressing itself to the apparent catch-22 of either being charged with IWW membership or with contempt for disobeying a subpoena, the court noted that the defendants "had ample opportunity to sever their connection with the unlawful organization of which they were members before coming into that county." *Id.* at 636.

[147] Judge Belt, dissenting in *Boloff*, described the extent to which prosecution for membership could go. By showing that the defendant was a Communist Party member, the state would hold him responsible for "all of the strange doctrines and teachings that any member of such organization ever advocated . . . . Applying the same logic, if some Democrat should go so far as to assert in a public speech that all Republicans should be shot at sunrise, then every member of the Democratic Party would be guilty of crime. The doctrine of criminal conspiracy, when thus extended, leads to absurdity." *Boloff*, 7 P.2d at 791 (Belt, J., dissenting).

[148] *See* David M. Rabban, Free Speech in Its Forgotten Years 12–13 (1997); David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 Stan. L. Rev. 47, 53 (1992).

[149] 92 U.S. 542, 551 (1875).

[150] *Id.* at 552.

[151] *Id.* at 552, 554–57.

limits of the assembly right in the 1886 case *Presser v. Illinois* to the textualist right of petitioning the government for redress of grievances.[152] States were free to exercise their police power to "disperse assemblages organized for sedition and treason . . . ."[153] In the 1904 case *United States ex rel. Turner v. Williams*, the Court held that the assembly right did not protect immigrants who were involved in the anarchist movement,[154] and were thus deportable under the 1903 Immigration Act.[155]

In the run-up to and through the WWI era, courts virtually ignored the assembly right.[156] In 1925 the Supreme Court incorporated the First Amendment speech and press rights into the Fourteenth Amendment, applying them to the states.[157] Incorporation did not protect the defendant in *Whitney v. California*,[158] whose conviction for being a member of the Socialist Party[159] was affirmed by the Supreme Court in 1927.[160]

In 1937, however, the Court reversed a syndicalism conviction in *De Jonge v. Oregon* as violative of the assembly right,[161] which was then incorporated.[162] In the 1945 case *Thomas v. Collins*, the Court appeared to widen the assembly right, holding that it could only be limited where its exercise presented a clear and present danger.[163] The right was, furthermore, "not confined to any field of human interest,"[164] and could even include business or economic activity.[165] The Court therefore protected an attempt at union organization.[166] Finally, in *Scales v. United States*, in 1961, the Court fashioned a test for the assembly right when it came to membership in groups that advocated illegal conduct. Membership was protected, said the Court, unless the member is active in his membership, knows of the group's illegal purposes, and has the intent to further those purposes.[167]

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[152] 116 U.S. 252, 267 (1886).

[153] *Id.* at 268.

[154] 194 U.S. 279, 292, 294 (1904).

[155] *Id.* at 284, 289.

[156] People v. Lloyd, 136 N.E. 505, 515 (Ill. 1922) (affirming conviction for conspiring to violate state syndicalism law); City of Buffalo v. Till, 182 N.Y.S. 418, 423 (N.Y. App. Div. 1920) (upholding city ordinance as against a claim it violated the assembly right). *But see* State v. Tachin, 108 A. 318, 319 (N.J. 1919) (Minturn, J., dissenting) (declaring violative of a state assembly right a law that prohibited membership in any organization that "promot[ed] or encourage[ed] hostility or opposition to the government of the United States, or of the state of New Jersey").

[157] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[158] 274 U.S. 357, 371 (1927).

[159] *Id.* at 363.

[160] *Id.* at 372.

[161] 299 U.S. 353, 366 (1937).

[162] *Id.* at 364.

[163] 323 U.S. 516, 530 (1945).

[164] *Id.* at 531.

[165] *Id.*

[166] *Id.* at 533–34.

[167] 367 U.S. 203, 207–08 (1961).

Concomitant with this evolving assembly jurisprudence, the Court in 1958 held that the First Amendment provided an implicit freedom of association.[168] Inazu has argued that since then, the Court has come to favor the association right over the assembly right.[169] This is a problem, he argues, because the right of association depends upon groups having a sufficient expressive function.[170] Some groups, such as the Jaycees[171] and Rotary International,[172] have not been protected because the Court found them to be insufficiently expressive. Robert K. Vischer has raised a similar concern about private companies that have a religious mission beyond profit maximization, and whether they have a First Amendment right to opt out of the contraception mandate of the Affordable Care Act.[173] Nicholas S. Brod would have applied the assembly right to the Westboro Baptist Church protesters in *Snyder v. Phelps*—the opinion of which did not mention assembly once.[174] And Richard D. Kahlenberg and Moshe Z. Marvit have invoked the virtues of the assembly right in addressing contemporary regulation of the labor movement.[175]

These issues highlight Vischer's observation that "we are not quite sure what to do with liberty claims by groups."[176] The *Brandenburg* for groups test is an answer to that question, at least as it pertains to group criminalization. This Article's retrieved WWI history supports that proposed test by filling in the historical gap at the advent of substantive First Amendment rights, which has left assembly issues at that time unappreciated and, since then, underdeveloped.

A. Conspiracy and the First Amendment

Schenck, *Frohwerk*, and *Abrams* were parts of their time, which was characterized by a system of socio-political control (often at the state, rather than federal, level[177]) that conflicted with nascent First Amendment rights, persistent questions about how the criminal law should treat group conduct, and anti-left and anti-labor wartime hysteria accompany-

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[168] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958).

[169] INAZU, *supra* note 5, at 2.

[170] *Id.* at 2–3.

[171] *See* Roberts v. United States Jaycees, 468 U.S. 609, 626–27 (1984).

[172] *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548–49 (1987).

[173] Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?* 21 J. CONTEMP. LEGAL ISSUES 369, 369–70 (2013).

[174] Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 160 & n.33 (2013).

[175] Richard D. Kahlenberg & Moshe Z. Marvit, *"Architects of Democracy": Labor Organizing as a Civil Right*, 9 STAN. J. C.R. & C.L. 213, 227–30 (2013).

[176] Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1403 (2012).

[177] Alexis J. Anderson, *The Formative Period of First Amendment Theory, 1870–1915*, 24 AM. J. LEGAL HIST. 56, 64–66 (1980).

ing the country's entry into WWI.[178] Just as it was used in these cases, conspiracy law has been used widely against groups to effect socio-political control. As an inchoate crime that often depends upon protected speech as both its evidence[179] and substance,[180] conspiracy law is suited to this function.[181] This is so for one substantive and one evidentiary reason. Substantively, conspiracy law is expansive: bombing the dais where the president might be speaking is clearly prohibitable. *Agreeing* to bomb the dais should probably also be subject to criminal sanction. But conspiracy law may be used to prosecute those whose agreement is entirely vacuous, who *advocate* bombing the dais (but never would), *agree* to *advocate* bombing the dais,[182] and advocate regime change *by any means necessary*. To be sure, the last three examples are not de jure conspiracies. Evidentiarily, however, such advocatory speech can be used to prove a conspiracy charge, and it is nearly impossible for a jury to render reliably an accurate verdict. This is especially so in times of crisis. Such charges, therefore, can be leveled against law-abiding groups who engage in unpopular expression.

These substantive and evidentiary questions tie First Amendment rights to conspiracy (and, more broadly, membership crime), and because conspiracy law asks what *mens rea* a group has (in reality,[183] if not formally[184]), often it is the assembly right, not the speech right, that can have the most meaningful impact. To see why, consider the *Brandenburg* test for incitement speech,[185] which protects speech unless it is intended to and is likely to lead to imminent lawless action. The same words—for example, the admonishment to boycotters against frequenting discriminatory businesses in *NAACP v. Claiborne Hardware*, "[W]e're gonna break

[178] *See* Cover, *supra* note 19, at 353–54.

[179] *See* Yates v. United States, 354 U.S. 298, 334 (1957) (overt act need not be criminal in character); United States v. Donner, 497 F.2d 184, 192 (7th Cir. 1974); United States v. Mubayyid, 476 F. Supp. 2d 46, 55 (D. Mass. 2007) ("[E]ven constitutionally protected speech may constitute an overt act in a conspiracy charge."); United States v. Al-Arian, 308 F. Supp. 2d 1322, 1342 (M.D. Fla. 2004).

[180] United States v. Rahman, 189 F.3d 88, 116–17 (2d Cir. 1999) (Political speech or religious preaching can comprise the *actus reus* of crime.).

[181] *See generally* Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865 (2013).

[182] *See Yates*, 354 U.S. at 300, 334; Dennis v. United States, 341 U.S. 494, 504–05, 516–17 (1951) (opinion of Vinson, C.J.).

[183] Goldstein, *supra* note 25, at 409 (Prosecutors use conspiracy to "reach persons who might escape conviction if they were proceeded against separately."); Sayre, *supra* note 142, at 406 (concerning prosecution of labor unions, conspiracy "enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable"); Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 872 (1970) (explaining that cases involving the use of conspiracy law to prevent individuals from joining controversial groups had attained notoriety).

[184] Kotteakos v. United States, 328 U.S. 750, 772 (1946) ("Guilt with us remains individual and personal, even as respects conspiracies.").

[185] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

your damn neck"[186]—can be interpreted as an unprotected true threat[187] and political rhetoric that lies at the core of the First Amendment.[188] The speech right gives individuals the breathing space they need to speak rhetorically and emotionally,[189] but there is no such breathing space for groups. With conspiracies, the crime is committed with the agreement and a very minor overt act,[190] no matter how evanescent the danger or *mens rea*. Had it wanted to, the government could have charged the *Claiborne Hardware* boycotters with conspiracy to batter. There would have been no First Amendment defense available, because speech—while it may be protected from direct criminal sanction under *Brandenburg*—is relevant to proving a conspiracy. No First Amendment right protects unpopular groups from an overzealous prosecutor and prejudiced jury.[191]

B. Interest Brinkmanship

Until the 1919 cases, courts' deference to the exercise of the police power left no room for substantive First Amendment rights.[192] States freely criminalized not only the speech and conduct of labor unions, but also the labor unions *themselves* as criminal conspiracies. This generated an evolving grassroots awakening to the potential of individual rights to trump the police power,[193] which was manifest in the WWI-era concern for speech rights. This introduced a new tension, between specific *speech* rights and the police power. Over time, courts began to prefer these speech rights, leading to the unprecedented system of free speech that we enjoy today.

This did not mean that government was no longer concerned with dissident speech; it simply meant that government was increasingly prevented from prosecuting dissidents *for their speech*. Furthermore, the new tension between speech rights and the police power left assembly out of the equation. The result was what I call "interest brinkmanship"—the use

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[186] 458 U.S. 886, 902 (1982).

[187] *See id.* at 894–95.

[188] *Id.* at 926–27.

[189] *See* United States v. Alvarez, 132 S. Ct. 2537, 2553, 2563 (2012).

[190] Whitfield v. United States, 543 U.S. 209, 211 (2005) (no overt act required to prove money laundering conspiracy); United States v. Shabani, 513 U.S. 10, 11 (1994) (no overt act required in a Title 21 drug conspiracy); United States v. Pumphrey, 831 F.2d 307, 308 (D.C. Cir. 1987) (same); United States v. Abdi, 498 F. Supp. 2d 1048, 1064 (S.D. Ohio 2007) (no overt act required in material support for terrorism conspiracy); Note, *supra* note 183, at 878 (The overt act "is seldom more than a formality.").

[191] To be sure, civil conspiracy was alleged in *Claiborne Hardware*, but was a losing argument because the civil rights movement had become popular. *See* KALVEN, *supra* note 20, at 259 ("The Communists cannot win, the NAACP cannot lose.").

[192] *See* RABBAN, *supra* note 148, at 1, 300–02; Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 830–32 (2008).

[193] RABBAN, *supra* note 148, at 53, 83, 88–89.

of membership crime to elide speech protections and continue to prosecute dissidents.[194]

Interest brinkmanship exists because speech rights and the use of hybrid or de facto membership crime have a directly proportional relationship. As the right to speak expands, the amount of protected speech increases. But the amount of dissident speech does not decrease—it just emerges from underground. Often couched in violent rhetoric, dissident speech remains a governmental target. With expanding speech rights, prosecuting the speech qua speech becomes more difficult. Prosecuting dissidents for their speech by the proxy of hybrid membership crime like conspiracy or de facto membership crime like syndicalism or material support, however, remains a viable alternative.

The preference for speech over assembly has had four important consequences. First, it has generated the highly speech-protective *Brandenburg* imminence test.[195] Second, it has permitted the use of membership crime to elide speech rights. Now, if the government wants to prosecute a dissident for her speech, the government can allege a membership crime, whose evidence is that very speech.[196] Third, membership crime has insulated statutes from challenge under the assembly right. Consider the modern material support for terrorism statutes.[197] It is illegal to provide oneself as personnel to a foreign terrorist organization (FTO).[198] Certainly a prosecution could stand if the defendant took up arms with Al Qaeda. But if, for example, the defendant were an attorney and provided legal representation to Al Qaeda, the United States has taken the position that it could indict him for providing material support[199]—despite the fact that the attorney apparently would be exercising the textualist right of peaceably assembling with Al Qaeda to petition the government for redress of grievances.[200] Fourth, conspiracy law remains immune from constitutional challenge. If two Americans, residing far from the Middle East and any known Al Qaeda member, agree to help Al Qaeda "in whatever way possible," they could be prosecuted for conspiracy to provide material support. Although the protection for speech that advocates crime depends upon an imminence inquiry, the likelihood that the men would ever actually provide material support is entirely irrelevant because their agreement itself is the crime.[201] *Brandenburg* for groups

[194] *See* Cover, *supra* note 19, at 383.

[195] *Id.* at 385–86.

[196] *See generally* Morrison, *supra* note 181.

[197] 18 U.S.C. §§ 2339A, 2339B (2012).

[198] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2713 (2010).

[199] *Id.* at 2716–17.

[200] U.S. CONST., amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[201] *See* Morrison, *supra* note 181, at 888–89.

can head off interest brinkmanship by giving substance to the assembly right.

C. Brandenburg *for Groups*

1. The Test and Its Benefits

The *Brandenburg* speech test protects speech that advocates crime "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[202] This gives speakers a lot of breathing space because it requires that the speaker intend to incite imminent lawless action *and* that the context be one in which imminent lawless action is *likely*. With membership crime, the assembly right has no such breathing space: syndicalism laws in the WWI era were broken when someone became an IWW member; the material support law is broken when someone helps a terrorist organization achieve its goals, even peacefully; and conspiracy is committed as soon as people agree to commit a crime and take one small step toward its fulfillment. The *Brandenburg* for groups test would provide groups with the "overprotection" that the *Brandenburg* speech test provides.[203]

The *Brandenburg* for groups test would protect any assembly—even those that are currently subject to criminal sanction, such as conspiracies and unlawful assemblies—unless the assembly is likely to produce imminent lawless conduct beyond the assembly itself. To render assemblies unprotected, there would be no need to prove that the group members intended to produce such imminent lawless action. This is an appropriate departure from the *Brandenburg* speech test. For individual speakers, requiring *mens rea* is an appropriate and traditional limit on the power of the state to obtain a conviction. Individuals who compose a group, however, may have varying *mens rea*—at a political rally, for example, some may intend to riot and damage property, others may intend to make a political statement, and others may simply have a passing interest in attending the event. Attempting to discern a group's homogenous *mens rea* will usually be fruitless and, when lawless action is imminent, dangerous.

The test would, however, effectively protect all groups qua groups so that those that are merely unpopular or pose some distant danger would be protected by the assembly right. As a result, a combination that we consider today to be an indictable criminal conspiracy would, under a *Brandenburg* for groups test, be protected assembly if it were unlikely to lead to the substantive target crime. Group formations, like conspiracies, would be treated not as conduct (thus unprotected as set against speech acts), but as assemblies, whose protection would depend upon the likelihood of their producing some imminent illegal conduct. This makes doctrinal sense, since *Brandenburg v. Ohio* was in fact not a speech case, but a membership crime case; the defendant had been charged with criminal

[202] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
[203] *See* Inazu, *supra* note 101, at 1437.

syndicalism for "voluntarily assembl[ing]" with the Ku Klux Klan.[204] Indeed, footnote four of *Brandenburg* may mandate the test because it appeared to subject anti-assembly laws to the same imminency test that the Court established for anti-speech laws.[205]

It also makes theoretical sense. Although speech is protected, in proving a membership crime the speech right carries no constitutional weight; the inquiry is, rather, whether speech is evidentiarily relevant. Asserting an assembly right, however, would engage a constitutional challenge to the charge and contextualize the group to determine how likely it is to produce imminent lawless action. Given the different standards of review (often strict[206] or intermediate scrutiny[207] for laws impinging upon First Amendment interests, and only abuse of discretion for relevance determinations[208]), over time courts in membership crime cases will be likely to tend more favorably toward assertions of the assembly right than the speech right.

Brandenburg for groups would also rationalize the border between protected and unprotected First Amendment conduct. This border is irrational for two reasons. First, pure membership crimes are generally unconstitutional but hybrid and de facto membership crimes are not. Second, unpopular speech that reflects genuine, but non-imminent, criminal intent is protected but unpopular assembly that reflects the same intent is not protected. *Brandenburg* for groups would rationalize the inconsistent treatment of different types of membership crime and of speech versus assembly. *All* types of membership crime would be subject to the same test, and both *speech* and *assembly* would be protected or not based on largely the same test (the *mens rea* requirement difference notwithstanding).

Brandenburg for groups is also historically justified. The freedom of assembly was implied in the WWI cases because they involved speech in the context of groups much more than individuals.[209] Courts, furthermore, had long been aware of the assembly right. It was important to the

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[204] *Brandenburg*, 395 U.S. at 444–45; Bhagwat, *supra* note 19, at 1006 ("*Brandenburg* itself involved a KKK rally, quintessentially a public assembly . . . .").

[205] *Brandenburg*, 395 U.S. at 449 n.4 ("Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in *De Jonge v. Oregon*, 'The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.'" (internal citation omitted)).

[206] Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 882 (2010); Time Warner Cable Inc. v. FCC, 729 F.3d 137, 159 (2d Cir. 2013).

[207] Peterson v. City of Florence, 727 F.3d 839, 842 (8th Cir. 2013).

[208] United States v. Ali, 735 F.3d 176, 192 (4th Cir. 2013); United States v. Wyly, 548 F. App'x 363, 366 (9th Cir. 2013).

[209] Bhagwat, *supra* note 19, at 1006 ("Even in the case of individual prosecutions [in the important incitement cases] (such as *Whitney* and *Brandenburg*), membership in and assembly with disfavored organizations such as the Communist Labor Party or the KKK lay at the core of the cases.").

framers of the Constitution,[210] was a familiar topic of judicial opinions at the federal[211] and state[212] levels, and was invoked by Laski[213] and Chafee.[214] Assembly was also recognized as vital to the First Amendment's role in promoting truth[215] and democracy.[216]

Appreciating assembly's proper place in the WWI era cases might have an impact beyond membership crime. Present as it was at the advent of the substantive First Amendment, the assembly right could shape a First Amendment that is framed more in terms of the institutional than the individual.[217] This is important because it responds to arguments that the First Amendment, focused as it is on individualistic speech, is fundamentally Lochnerian.[218] It adheres to the fiction of radical individual freedom and rejects the power of institutions.[219] Speech is the rich man's right, whereas assembly is necessary for the poor to be heard.[220]

Finally, an appreciation of assembly in the WWI era would retrieve an important aspect of First Amendment history. Some scholars commonly place the beginning of the threat to unpopular groups in the pe-

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[210] Emerson, *supra* note 20, at 293.

[211] Twining v. New Jersey, 211 U.S. 78, 96–97 (1908); Logan v. United States, 144 U.S. 263, 286–87 (1892); Presser v. Illinois, 116 U.S. 252, 267 (1886); United States v. Cruikshank, 92 U.S. 542, 551 (1875); United States v. Curtis, 12 F. 824, 834 (C.C.S.D.N.Y. 1882); United States v. Hall, 26 F. Cas. 79, 80–81 (C.C.S.D. Ala. 1871) (No. 15,282).

[212] Neelley v. Farr, 158 P. 458, 467 (Colo. 1916); State v. Tachin, 108 A. 318, 319 (N.J. 1919) (Minturn, J., dissenting); Heald v. Cleveland, 27 Ohio Dec. 435, 448 (Ct. Com. Pl. 1916).

[213] Healy, *supra* note 9, at 36.

[214] Zechariah Chafee Jr., Free Speech in the United States 409–11 (1941).

[215] Frederick Schauer, Free Speech: A Philosophical Enquiry 24 (1982).

[216] *Id.* at 35.

[217] *See* Horwitz, *supra* note 5, at 27 ("[C]urrent approaches [to the First Amendment] . . . routinely emphasize the individual and deemphasize the institutional."); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 Vill. L. Rev. 273, 273–74 (2008). While beyond the scope of this paper, a robust assembly right might have affected campaign finance cases, *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 884 (2010) (involving differences between "wealthy individuals" and corporations), the right of benevolent groups to control their membership rolls, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and university religious groups. Bhagwat, *Associations and Forums*, *supra* note 5, at 553 (arguing that the Christian Legal Society's claim in *CLS v. Martinez* would have been stronger as an associational case rather than the speech case it was.).

[218] Vischer, *supra* note 176, at 1403; G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 Mich. L. Rev. 299, 309, 314 (1996).

[219] *See* White, *supra* note 218, at 304.

[220] Emerson, *supra* note 20, at 286–87; Schauer, *supra* note 215, at 44; Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom" 1909–1931*, 40 Wm. & Mary L. Rev. 557, 607 (1999).

riod of the Second World War,[221] and others view post-9/11 law enforcement as fundamentally different from earlier periods.[222] This Article's retrieved history rejects the notion that the WWII and post-9/11 eras were characterized by aberrational cases that sully a normatively pure First Amendment. Rather, the First Amendment's conflict with membership crimes was there at the amendment's advent and must be central to an understanding of the First Amendment.

2. Criticisms

A number of anticipated criticisms should be addressed. The debate between Inazu and Ashutosh Bhagwat over the translatability of *Brandenburg* to the assembly context includes a number of these criticisms.

In a nod to strict textualism, Inazu has argued that assemblies ought to be protected at least as long as they are "peaceable."[223] Like Bhagwat, Inazu admits to being unable to determine where the peaceability line ought to be drawn,[224] but, like Bhagwat, thinks that the Supreme Court's 2010 decision in *Holder v. Humanitarian Law Project* (*HLP*) was wrongly decided.[225]

Inazu implied another line, responding to a concern of Bhagwat's and arguing that criminal conspiracies would not be protected assemblies because their crime is complete upon the execution of an agreement and some overt act.[226]

Bhagwat rejects Inazu's approach to assembly that depends upon the group having an expressive function.[227] Rather, for Bhagwat assembly should be protected not because it is expressive, but because it "independently advances the goals of the First Amendment."[228] Bhagwat would protect groups when they "provide vehicles for citizens to jointly express themselves," "provide a crucial space within which citizens can develop their values and hone the skills needed for self-governance," or function to "exert pressure on officials, and meaningfully participate in the pro-

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[221] Emerson, *supra* note 20, at 290; Kalven, *supra* note 20, at 244; Cole, *supra* note 20, at 81.

[222] S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 Ariz. St. L.J. 1431, 1469 (2012); Lisa Ugelow & Lance J. Hoffman, *Fighting on a New Battlefield with Old Laws: How to Monitor Terrorism in the Virtual World*, 14 U. Pa. J. Const. L. 1035, 1037 (2012); Tiffani B. Figueroa, Note, *"All Muslims Are Like That": How Islamophobia is Diminishing Americans' Right to Receive Information*, 41 Hofstra L. Rev. 467, 486 (2012); Colby P. Horowitz, Note, *Creating a More Meaningful Detention Statute: Lessons Learned From* Hedges v. Obama, 81 Fordham L. Rev. 2853, 2856 (2013); *Meet the Press: Dick Cheney* (NBC television broadcast Sept. 14, 2003) (transcript), *available at* http://www.msnbc.msn.com/id/3080244/ns/meet_the_press/t/transcript-sept/ ("9/11 changed everything.").

[223] Inazu, *supra* note 101, at 1438.

[224] *Id.*

[225] *Id.*

[226] *Id.* at 1440.

[227] Bhagwat, *supra* note 21, at 1383–84.

[228] *Id.*

cess of self-governance, in ways that individuals acting alone have no realistic hope of accomplishing."[229]

Bhagwat's concern with this "capacious understanding" of the assembly right is that it provides little guidance as to what groups should be able to claim the right and what groups should not.[230] He does, however, focus on the point at which "a private group becomes sufficiently threatening to the social order that it falls outside the right of assembly/association."[231] Indeed, for Bhagwat this question has underlaid almost all of the First Amendment disputes in the twentieth century and through to *HLP*.[232]

Bhagwat claims that *Brandenburg* cannot be easily translated to address assembly.[233] This is so, he argues, because nonviolent conspiracies appear to be peaceable assemblies and therefore should be protected, but it makes little sense to protect purely criminal groups.[234] Bhagwat is wary of conspiracies because groups, he claims, are inherently more dangerous than individuals.[235]

This position, however, is problematic because it treats the assembly right as inferior to the speech right; groups may be outlawed based almost solely on their *mens rea*, but prosecuting individuals for their speech requires an imminent dangerous potential. Were Bhagwat's approach to protecting groups with a criminal purpose applied to individuals, then a person's mere intent to commit a crime would be sufficient for criminal liability to attach.[236]

A poignant illustration is Al Qaeda and its preparations for the 9/11 attacks. Why should a cell of Al Qaeda members dedicated to the mission and operating in the United States enjoy First Amendment protection for their assembly? These cells impart no democratic benefit and will produce, if anything, only harms that legislatures unquestionably have a right to prohibit.[237]

The first response is political. Bhagwat tempers his categorical statement regarding conspiracy and group danger with an appreciation of the socio-political role that some group-based criminal charges have played. He seems sympathetic to the losing petitioners in *HLP*, offering that the Court reached the "peculiar result that association with and membership in a terrorist organization is protected, so long as the association does not

[229] *Id.* at 1387.
[230] *Id.* at 1388.
[231] *Id.*
[232] *Id.*
[233] *Id.* at 1389.
[234] *Id.*
[235] *Id.* at 1394.
[236] *See* Fryer v. Nix, 775 F.2d 979, 993 (8th Cir. 1985).
[237] I am indebted to Professor G. Edward White for this important challenge to the *Brandenburg* for groups test.

in any way assist the organization."[238] What then, asks Bhagwat, does "association" mean?[239] Put another way, to be meaningful, assemblies must be protected in *doing* certain things beyond mere assembly and speech; *HLP* and related cases suggest that they are not. Rather, some assemblies are treated as regulable conduct themselves, excluded from any First Amendment protection.

Evidentiarily, Bhagwat observes, "there is no clear line between groups advocating violence and groups condemning particular social practices . . . ."[240] Because the line cannot be easily drawn, and because dissident groups are often democratically valuable challengers of the status quo, Bhagwat would tend to protect these groups.[241] And yet, the line remains elusive; although Bhagwat attempts to draw a clear distinction between the Southern Christian Leadership Conference and Al Qaeda,[242] the two groups are clearly different only because they represent the extremes of group behavior. The more difficult cases reside in the middle. Bhagwat mentions the terrorist organizations Hamas, the Kurdish PKK, and the Liberation Tigers of Tamil Eelam.[243] The ANC and the early American labor movement could be added to this list.

Legislatively, both Inazu and Bhagwat might criticize the *Brandenburg* for groups test because it would protect even some criminal conspiracies and other "unlawful assemblies." Inazu would criticize it because he appears to define "peaceable" as "non-criminal" rather than "non-violent," and so a conspiracy—complete upon an agreement and overt act—is not peaceable and therefore not protected. Bhagwat would criticize it because he believes that conspiracies present distinct dangers. Put another way, the government already has the burden to show that an assembly is "unlawful" and does not rest on First Amendment protected activity. Why must there be an additional constitutional inquiry?

Inazu's definition of "peaceable" depends upon two presumptions: first, that membership crime never functions to exert anti-democratic socio-political control, and second, that legal systems always accurately discern which groups pose a normatively condemnable danger and which play important democratic roles. These systems must know, for example, that the Southern Christian Leadership Council should be protected but Al Qaeda should not be, and they must never act against the former. Neither of these presumptions always obtains. Line drawing and socio-political control have historically led to anti-democratic results when they involved labor unions, socialists, communists, the ANC, and even, with

[238] Bhagwat, *supra* note 21, at 1391.
[239] *Id.*
[240] *Id.* at 1396.
[241] Bhagwat, *supra* note 19, at 1007.
[242] *Id.* at 1009.
[243] *Id.*

HLP, terrorist groups. This is why Inazu would overprotect groups, just as the law overprotects speech.[244]

Inazu and Bhagwat appreciate this reality, which is why they have trouble drawing the line between protected and unprotected groups. Inazu's line drawing at conspiracy responds to Bhagwat's concern, but I do not think that it is an adequate line for three reasons. First, it is far from clear that criminal conspiracies *always* tend toward external harms, as Bhagwat believes and as I have refuted elsewhere.[245] Second, Inazu's criticism of *HLP* suggests the inadequacy of drawing the line with conspiracy law. The assembly in that case was, according to Inazu, peaceable, and yet it was an assembly with terrorists who used violence to achieve their goals. The line must, therefore, be drawn not by formal legal categories, but, as Bhagwat suggests, by applying a threat analysis. Third, the history of membership crime that this Article retrieves shows that formal legal categories do not always define normatively condemnable threats. If they did, then labor agitators, pamphlet-wielding socialists, and Marxist reading groups would be unprotected.

This is not to say that conspiracy, unlawful assembly, and other membership crime laws are *always facially* invalid; some assemblies pose real threats. These laws *as applied*, however, should be scrutinized pursuant to the *Brandenburg* for groups test. Under this test, groups would become subject to these criminal laws when they pose an imminent threat. This is also not to say that courts must interpret imminence in any particular way. They have not done so with speech,[246] but to the extent they ever would, they would be free to impose, as necessary, a modified imminency definition for the assembly right. When it comes to dangerous combinations, *Brandenburg* for groups should not be understood to prevent law enforcement from ensuring public safety. It should, rather, operate to overprotect the many groups that remain a safe distance from the actual commission of a substantive crime.[247]

The final response is democratic. Inazu and Bhagwat might be concerned that the *Brandenburg* for groups test would protect criminal groups that contribute nothing to democracy, but that do not pose an

[244] Inazu, *supra* note 101, at 1437.

[245] Morrison, *supra* note 25, at 504–05.

[246] *See* Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 81 (2012) ("[I]f a person advocates an action at a definite future time, it is not clear how imminent that future time must be for *Brandenburg* to allow regulation.").

[247] It should be noted that a number of scholars and jurists have criticized the imminence test for speech. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 121 (2006); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1180–81; O. Lee Reed, *The State Is Strong but I Am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals with Violence*, 38 AM. BUS. L.J. 177, 179–82 (2000). *But see* Daniel T. Kobil, *Advocacy on Line:* Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 251 (2000).

imminent and likely threat. They might say that this would be a textually and normatively problematic result, and would threaten public safety. I am not so sure. As for public safety, there is little or no empirical evidence that groups are more likely to tend toward crime or harm rather than law-abidingness and peace.[248] Textually, it seems just as likely that "peaceable" meant or could mean "non-violent" or "non-imminently criminal" rather than "non-criminal." In addition, normatively, groups are criminal only because the law says they are criminal. Labor unions, Communist parties, and the ANC were all "criminal" groups at one point. Drawing the assembly right line along formal legal categories merely constitutionalizes legislative decrees. Or, as Bhagwat might put it, finding "unlawful assemblies" to be unprotected is an invitation to circular reasoning.[249] The better approach is to acknowledge the validity of Bhagwat's "capacious" definition of protected assemblies, and the fact that many criminal groups have historically met that definition.

If a formal categorical approach is taken, furthermore, then we should be comfortable with the *Brandenburg* Court *not* protecting the KKK's assembly, since it was, legally, an unlawful assembly. But courts do not adopt a formal categorical approach for First Amendment inquiries, because that would leave the legislative branch with complete discretion to decide which speech and assembly is valuable and which is not. It would also erode the separation of powers, since it would give to legislatures the authority to declare what the Constitution means.[250] The anti-democratic fruits of this proposition have been on display from the WWI era through *HLP*.[251]

Brandenburg for groups assumes a different definition of "peaceable" than Inazu's, and bases it on the persistence of membership crime as a tool of socio-political control. Formal legal categories, in turn, should not draw the line between protected and unprotected assemblies. Law enforcement should, of course, be able to address group danger and so the *Brandenburg* imminency test, which has been successful in protecting individuals' speech rights while not undermining public safety, should be adapted to assembly. In fact, *Brandenburg* for groups does not contain a *mens rea* requirement, and so responds to public safety concerns *better* than the *Brandenburg* imminency test. In the end, as Bhagwat noted,

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[248] Goldstein, *supra* note 25, at 414; Kaminski, *supra* note 246, at 73–74; Morrison, *supra* note 25, at 484–86.

[249] Bhagwat, *supra* note 21, at 1389.

[250] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[251] Bhagwat, *supra* note 21, at 1400 ("There is little doubt that terrorism is to our era what communism was to earlier eras, and extreme care needs to be taken to ensure that reasonable caution does not degenerate into panic and witch-hunting. To date, judicial decisions dealing with enemy combatants and the detainees at Guantanamo suggest that at least the Supreme Court has avoided this pathology, unlike in earlier periods of panic, but *Holder v. Humanitarian Law Project* gives me pause.") (footnotes omitted).

"context matters tremendously."[252] Context is the only way to truly judge a group's danger and determine whether it should be protected or not. *Brandenburg* for groups attends to that context, and provides an effective case-by-case approach to protecting assemblies.[253]

3. Examples

To illustrate the contours of the *Brandenburg* for groups test, and further address Bhagwat's and Inazu's criticisms, consider the following examples.

a. Holder v. Humanitarian Law Project

Although they would not protect terrorist groups as assemblies, both Bhagwat and Inazu believe that *HLP* was wrongly decided. In that case, the Supreme Court held that providing training to an FTO to pursue the group's legitimate aims through nonviolent and socially accepted channels was nonetheless subject to criminal prosecution under the material support laws.[254]

Judicial interpretations of the modern material support for terrorism law have created a de facto membership crime. Congress has defined material support to include, in part, services, training, expert advice or assistance, and personnel.[255] The Court in *HLP*, however, held that principles of resource fungibility[256] and political legitimacy[257] severely limit the type of association one can have with a terrorist group.[258] Other courts have interpreted the law to prohibit a wide range of conduct, including funding the legal social efforts of terrorist groups,[259] providing medical care,[260] speaking in favor of a terrorist group while associating with it,[261] speaking

[252] *Id.* at 1399.

[253] *Id.* ("There can be no off-the-shelf answer to the question of when a private group crosses the line into being a sufficient threat to the social order to forsake constitutional protection.").

[254] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010).

[255] 18 U.S.C. § 2339A(b)(1) (2012).

[256] *Holder*, 131 S. Ct. at 2725.

[257] *Id.*

[258] *Id.* ("Material support meant to 'promot[e] peaceable, lawful conduct,' can further terrorism by foreign groups in multiple ways." (internal citation omitted)).

[259] *See* United States v. El-Mezain, 664 F.3d 467, 483–84 (5th Cir. 2011); Boim v. Quranic Literary Inst. and Holy Land Found. for Relief and Dev., 291 F.3d 1000, 1024 (7th Cir. 2002); *see also Holder*, 131 S. Ct. at 2725 ("'Material support' is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. . . . Money is fungible, and '[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.'") (alteration in original) (citation omitted).

[260] United States v. Farhane, 634 F.3d 127, 165 (2d Cir. 2011).

[261] United States v. Taleb-Jedi, 566 F. Supp. 2d 157, 175–76 (E.D.N.Y. 2008).

in favor of a group while *not* associating with it,[262] and independently translating pro-jihad religious materials.[263]

It appears, after *HLP*, that *any* assistive association (which, Ashutosh Bhagwat suggests, is the only type of meaningful association[264]) with a terrorist organization is illegal. This result is constitutionally problematic because the *HLP* Court itself claimed to leave pure association with such organizations protected. It also impinges upon democratic norms since, as this Article has shown, groups determined by courts or legislatures to be criminal have often played important socio-political roles. Finally, this result is poor public policy because, as in *HLP*, it criminalizes certain attempts to discourage terrorist groups from committing acts of violence.

While opposition to *HLP* stems from traditional association law,[265] it also has something new to say about *Brandenburg* for groups. It rejects Inazu's formal legal category approach to the assembly protection, and prefers instead a case-by-case analysis. Assemblies exist to *do* things,[266] so what those things are should matter to the constitutional analysis. If the assembly exists to engage in crime, perhaps it should not be protected; but if it exists to "materially support" criminal organizations by making them less criminal, then it should be protected.

b. G20 Protestors and The WWI Cases

It is not, however, always easy to tell whether an assembly is intent on crime or on protected socio-political agitation. Consider the 2011 plea deal reached between prosecutors and G20 protestors for conspiracy to damage property and obstruct police during the international economics summit.[267] The agreed statement of facts noted that none of the conspirators participated in riots and none of their statements could be proven to have contributed to illegal actions. In a statement, the indicted protestors

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[262] United States v. Mehanna, 735 F.3d 32, 41, 46 (1st Cir. 2013); Government's Opposition to Defendant's Motion to Dismiss Portions of Counts One through Three of the Second Superseding Indictment at 20, United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. July 29, 2011), ECF No. 200 [hereinafter Government's Opposition to Motion to Dismiss] ("Whether the FTO ever knew that the defendants agreed to support them . . . is irrelevant in a conspiracy analysis; what matters is the intent and understanding of the conspirators.").

[263] *Mehanna*, 735 F.3d at 41, 46; Government's Opposition to Motion to Dismiss, *supra* note 262, at 20.

[264] *See* Bhagwat, *supra* note 21, at 1391–92.

[265] *Holder*, 131 S. Ct. at 2733 (it remains legal to associate with criminal groups for non-criminal purposes).

[266] Garnett, *supra* note 76, at 1852 ("We associate not just to make a statement, but to get something done.").

[267] Jennifer Yang & Peter Edwards, *G20 Charges Dropped Against 11 as 6 Plead Guilty*, TORONTO STAR, Nov. 22, 2011, http://www.thestar.com/news/gta/2011/11/22/g20_charges_dropped_against_11_as_6_plead_guilty.html.

addressed the persistent unreliability involved in conspiracy charges,[268] which reflects the unreliability inherent in the WWI cases, detailed above.

Bhagwat and Inazu are theoretically correct that purely criminal groups should not be protected, but the reality is that discerning groups' criminality in the moment is a fraught endeavor. This is why Inazu advocates for groups' "overprotection," and Bhagwat supports a "capacious understanding" that would protect groups until they become "sufficiently threatening."

c. The KKK and United States v. Stone

It is for these capacious conceptions of First Amendment rights that courts have protected KKK assemblies[269] if they pose no imminent danger of unlawful conduct. Most people believe that the KKK offers no democratic benefit and that its ultimate goals necessarily entail criminal conduct, and yet we find value in permitting it to exist, if only to expose its pernicious ideas to sunlight.[270] The KKK's protection, therefore, suggests a need to reconcile Inazu's requirements that to be protected, groups must be "peaceable," but that criminal conspiracies should never be protected. Put another way, most KKK assemblies are peaceable because their members are not then engaged in crime; but, given KKK rhetoric,[271] a conspiracy to commit crime at some future point could certainly be made out, with any KKK member deemed a conspirator.

Similarly, in *United States v. Stone* in 2011, members of the Hutaree, a group of separatist militia members, were charged with seditious conspiracy.[272] Although the leader of the Hutaree made speeches in which he referred to law enforcement as the "enemy," and the need for "war" and for killing police officers, the judge granted most of the defendants' motions for judgments of acquittal, and did so based on a nuanced treatment of

[268] *Id.* ("This alleged conspiracy is absurd . . . . We were never all part of any one group, we didn't all organize together, and our political backgrounds are all different. Some of us met for the first time in jail. What we do have in common is that we, like many others, are passionate about creating communities of resistance." (internal quotation marks omitted)).

[269] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Collin v. Smith, 578 F.2d 1197, 1202–03 (7th Cir. 1978).

[270] *See generally* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 74 (1991) ("To the extent First Amendment rights are rooted in the 'marketplace of ideas,' disclosure of information cannot but contribute to the functioning of that marketplace. In a well-functioning market, more information moves the market closer to truth.").

[271] *About Us*, LOYAL WHITE KNIGHTS OF THE KU KLUX KLAN (2013–14), http://www.kkkknights.com/about-us.html ("We are always looking for good WHITE PEOPLE to join the Fight.").

[272] Second Superseding Indictment at 2, 5, United States v. Stone, No. 10-cr-20123-VAR-PJK (E.D. Mich. Feb. 10, 2011), EFC No. 293.

conspiracy law doctrine and its tense relationship with the First Amendment.[273]

These examples highlight a need to reconcile two of Bhagwat's approaches to assembly rights. Positively, he would protect assemblies where they advance some First Amendment goal (certainly a capacious conception). Negatively, he would not protect groups where they become sufficiently threatening. There is, however, a lot of space left between these two conceptions; what to do with a criminal enterprise that is not sufficiently threatening? It should, pursuant to *Brandenburg* for groups, be protected the same way that the KKK was protected in *Brandenburg v. Ohio*—by drawing the line at imminence.

d. *The Occupy Movement*

Assembly and membership crime share a primary question, which is how to define the relevant group.[274] Consider the recent Occupy movement. Assume that a group of protestors agree to occupy a public town square in violation of a city ordinance that has appropriate time, place, and manner restrictions. They move silently to the square and set up camp. They have no signs; their presence is their protest. Two weeks into their occupation, they erect signs to publicize their protest. Some occupiers are charged with conspiracy to trespass, and with trespass itself.

[273] Order Granting Defendants' Motions for Judgment of Acquittal on Counts 1–7, at 4–6, 15, *Stone*, No. 10-cr-20123-VAR-PJK (Mar. 27, 2012), ECF No. 767 (Making a "'specially meticulous inquiry' into the government's evidence so there is not 'an unfair imputation of the intent or acts of some participants to all others.' It is black-letter law that '[a] defendant cannot be convicted of conspiracy merely on the grounds of guilt by association, and mere association with the members of the conspiracy without the intention and agreement to accomplish an illegal objective is not sufficient to make an individual a conspirator. . . .' [M]uch of the Government's evidence against Defendants at trial was in the form of speeches, primarily by Stone, Sr., who frequently made statements describing law enforcement as the enemy, discussing the killing of police officers, and the need to go to war. . . . [T]he Government's proofs consist overwhelmingly of speech and association . . . . [Stone's] diatribes evince nothing more than his own hatred for—perhaps even desire to fight or kill—law enforcement; this is not the same as seditious conspiracy." The defendants' talk of assaulting police officers is a "plan" that was "utterly short on specifics.") (first alteration in original) (internal citations omitted).

[274] *See* United States v. Guevara, 706 F.3d 38, 44 n.7 (1st Cir. 2013) ("The jurors asked: 'Can you give us clarification on what is a conspiracy, how to define it? Specifically if people show up together, does that constitute conspiracy?'"); HORWITZ, *supra* note 5, at 226 ("A major problem—perhaps the central problem—with freedom of association is the question of definition. How do we determine whether a particular association is entitled to freedom of association?"); Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 J. CRIM. L. & CRIMINOLOGY 147, 204 (2007) ("Another doctrinal puzzle involves drawing the boundary lines around a conspiracy. Criminal plans rarely involve a single criminal act; they are composed of multiple subparts, each of which may be prosecuted as another criminal offense. This raises the question of how to define the contours of the conspiracy.").

Although the protestors have a weak speech right defense,[275] that right has never protected defendants against conspiracy charges, even in obviously political cases. *Brandenburg* is no help because the conspiracy was beyond intended and imminent; it was completed with the first words of agreement and steps to the square. The protestors' eventual signage was irrelevant; whether they had spoken or not, their assembly was a crime.

A *Brandenburg* for groups assembly test would have traction because it looks to the group's conduct, the danger the group posed, and the importance of the group and its occupation of the square to First Amendment principles. The assembly right would frame the case in the most relevant way—as a case about group assembly, and only speech secondarily.[276]

The *Brandenburg* for groups test would address all of the problems raised in these examples. Constitutionally, it would (over)protect assistive association that poses no imminent danger. Democratically, it would protect valuable but unpopular group formations. As a matter of public policy, it would encourage groups to adopt lawful methods to achieve their goals. Despite these protections, if a group were nevertheless committed to crime, *Brandenburg* for groups's protection would fall away and the government could take steps to preserve public safety.

CONCLUSION: THE PERSISTENCE OF MEMBERSHIP CRIME

By the mid-1920s, state syndicalism and Espionage Act conspiracy prosecutions had begun to wane. The public recognized the excesses of indiscriminate arrests, the need to restore political freedoms restricted during World War I, and the emptiness of the perceived red menace[277] and the IWW's presumed danger.[278]

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[275] *See* Hobbs v. County of Westchester, 397 F.3d 133, 149 (2d Cir. 2005); *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 791 (1994) (Scalia, J., concurring and dissenting) ("'[I]ntermediate scrutiny' . . . [is] applicable to so-called 'time, place, and manner regulations' of speech . . . .").

[276] It should be acknowledged that *Brandenburg* for groups would provide a constitutional limit to the application of conspiracy charges. It would not necessarily alter current law on time, place, and manner regulations. Such regulations are subject to intermediate scrutiny when they limit the speech right; they may be subject to the same level of scrutiny when they limit the assembly right. *See Madsen*, 512 U.S. at 791 (Scalia, J., concurring and dissenting). Indeed, this may be the appropriate result, since the *Brandenburg* Court held that assembly and speech rights should be treated as equally important. Brandenburg v. Ohio, 395 U.S. 444, 449 n.4 (1969) (per curiam).

[277] Braeman, *supra* note 48, at 107; Williams, *supra* note 108, at 563.

[278] *See* Fiske v. Kansas, 247 U.S. 380, 386–87 (1927) (The Court reversed a syndicalism conviction, finding no evidence that the IWW advocated change by other than legal means); Colyer v. Skeffington, 265 F. 17, 61, 63 (D. Mass. 1920); People v. Thornton, 219 P. 1020, 1022–23 (Cal. Dist. Ct. App. 1923); Joseph R. Conlin, *The IWW and the Question of Violence*, 51 WIS. MAG. HIST. 316, 323 (1968) (A Colorado police chief, the Federal Council of Churches, and the federal Immigration Bureau all noted the IWW's nonviolence.). It was, in fact, authority institutions, not dissident groups, that were primarily responsible for the violence. *Id.* at 324 (The IWW's

The last Espionage Act case in the WWI era was *Dickson v. Young*,[279] a civil suit arising out of a Palmer Raid arrest[280] based on the defendant's inadequate contributions to the Red Cross.[281] *Dickson* signaled the end of the WWI cases, but not the underlying system of membership crime. It has persisted through the WWII era[282] and into the post-9/11 twenty-first century. The assembly right showed promise in the *De Jonge*[283]–*Collins*[284]–*Scales*[285] line of cases, but was displaced by the Court's recognition of the association right in *NAACP v. Alabama ex rel. Patterson*.[286] Since then, assembly has been a discounted First Amendment right, but remains an important one. In addition to *HLP* and related cases, the right is implicated in three other post-9/11 expressions of membership crime.

First, conspiracy charges continue to be normatively questionable, involving prosecutorial overreach[287] and misconduct,[288] evidentiarily question-

reputation for violence was created by *agents provocateurs*, sometimes enlisted by employers to discredit workers' unions.); Michael Stohl, *War and Domestic Political Violence: The Case of the United States 1890–1970*, 19 J. CONFLICT RESOL. 379, 396 (1975).

[279] Dickson v. Young, 221 N.W. 820 (Iowa 1928); Dickson v. Young, 210 N.W. 452 (Iowa 1926); Dickson v. Young, 200 N.W. 210 (Iowa 1924).

[280] *Dickson*, 200 N.W. at 211.

[281] *Dickson*, 221 N.W. at 821.

[282] The most prominent examples include *Yates v. United States*, 354 U.S. 298 (1957) and *Dennis v. United States*, 341 U.S. 494 (1951).

[283] De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.").

[284] Thomas v. Collins, 323 U.S. 516, 535 (1945) (discussing the conceptual difficulty with criminalizing assembly).

[285] Scales v. United States, 367 U.S. 203, 229 (1961) (providing an assembly-protective interpretation of the Smith Act's membership clause).

[286] 357 U.S. 449 (1958); INAZU, *supra* note 5, at 3.

[287] A number of cases demonstrate potential overreach:

- United States v. Goba, 240 F. Supp. 2d 242, 244–45 (W.D.N.Y. 2003) ("Lackawanna Six" charged with providing material support to Al Qaeda by receiving firearms and propaganda training prior to 9/11); Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at A1; Dina Temple-Raston, *Member of 'Lackawanna Six' Released from Prison*, NPR (May 6, 2008), http://www.npr.org/templates/story/story.php?storyId=90235086 (The threat the Lackawanna Six posed was always unclear, and the prosecutor had insufficient evidence to call them a terrorist cell.); Phil Hirschkorn, *Al Qaeda Trainee Gets 10-Year Sentence*, CNN (Dec. 3, 2003), http://www.cnn.com/2003/LAW/12/03/buffalo.six/.
- Criminal Indictment (Third Superseding) at 1–3, 5, United States v. Sadequee, No. 1:06-cr-147-WSD-GGB (N.D. Ga. Dec. 9, 2008), ECF No. 347 (charged with conspiracy to provide and providing material

able government stings[289] that may create criminals out of law-abiding people,[290] the use of career government witnesses,[291] and an admitted[292] discriminatory focus on Muslims.[293]

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support by forming relationships with supporters of jihad, exercised, filmed Washington DC landmarks, sent footage to Al Qaeda media propagandist in England); Judgment in a Criminal Case, *Sadequee*, No. 1:06-cr-147-WSD-GGB (Dec. 14, 2009), ECF No. 622. (guilty verdict); *American is Convicted of Aiding Terrorists*, N.Y. Times, Aug. 13, 2009, at A20 (Government said Sadequee never posed an imminent threat).

- United States v. Lindauer, 448 F. Supp. 2d 558, 559 (S.D.N.Y. 2006) (charged with conspiring to act illegally as an agent of the Iraqi Intelligence Service); Dora W. Klein, *Unreasonable: Involuntary Medications, Incompetent Criminal Defendants, and the Fourth Amendment*, 46 San Diego L. Rev. 161, 201 (2009) (uncontested that Lindauer experienced paranoid and grandiose delusions that made her obviously incompetent to stand trial); Sell v. United States*: Forcibly Medicating the Mentally Ill to Stand Trial*, 121 Harv. L. Rev. 1121, 1124 (2008) ("As early as age seven, Lindauer claimed to have the gift of prophecy.").
- Indictment at 1, 3, United States v. Shah, No. 1:05-cr-00673 (LAP) (S.D.N.Y. Dec. 6, 2006), ECF No. 89; Plea Agreement at 1–2, *Shah*, 1:05-cr-00673 (LAP) (Apr. 2, 2007) (plea of guilty for conspiracy to provide material support to Al Qaeda). Shah's arrest was the result of an FBI sting, which revealed Shah to be "a boastful, albeit somewhat bumbling, man, an almost inconceivable mix of bassist, ninja and would-be terrorist." Alan Fueur, *Tapes Capture Bold Claims of Bronx Man in Terror Plot*, N.Y. Times, May 8, 2007, at B1. Shah allegedly agreed to provide Al Qaeda members with martial arts training, but the plot was almost entirely talk; no weapons were bought and no martial arts training took place. *Id.* at B6. Shah seemed more of an "angry braggart" who described himself as "doggone deadly." *Id.* He expressed interest in opening a martial arts studio where he could teach people how to use swords, "knives and stars and stuff like that." *Id.*

[288] Rabea Chaudhry, Comment, *Effective Advocacy in a Time of Terror: Redefining the Legal Representation of a Suspected Terrorist Facing Secret Evidence*, 8 UCLA J. Islamic & Near E.L. 101, 124–25 (2009) (describing the government's use of unreliable informants and deportation of defense witnesses prior to trial in *United States v. Koubriti*); Barry Tarlow, *Terrorism Prosecution Implodes, The Detroit 'Sleeper Cell' Case*, Champion, Jan./Feb., 2005, at 61, 61 (accessible through LexisAdvance) (same, and suppression of witnesses' and experts' exculpatory statements, with judge ordering DOJ to audit the prosecution, resulting in government moving to set aside the convictions).

[289] Yassin Muhiddin Aref was convicted of money laundering and material support conspiracy charges. United States v. Aref, 285 F. App'x 784, 789–90, 794 (2d Cir. 2008). The charges stemmed from a sting involving a supposed surface-to-air missile that was to be used to attack New York City. Superceding Indictment at 2, 4, United States v. Aref, No. 1:04-cr-402 (TJM) (N.D.N.Y. Sept. 29, 2005), ECF No. 134. A government informant had ensnared another man into the scheme, and that man brought Aref in to witness an exchange of money. Criminal Complaint, *Aref*, No. 04-m-330 (DRH) (Aug. 5, 2005). A number of observers questioned Aref's *mens rea* and the probity of the evidence. Stephen Downs, *From Sting to Frame-Up: The Case of Yassin Aref*, Washington Rep. on Middle E. Aff., Sept./Oct. 2007, at 19, 20; Fred LeBrun, *History Will Remember Albany Terrorism Sting as a Witch Hunt*, Times Union (Albany, N.Y.), Feb. 12, 2007, *available at* http://www.nepajac.org/FredLeBrun.htm; Carl

Second, Muslim charities have been subjected to a "complete taint" theory,[294] which imposes liability for any involvement at all with a terrorist group. The Seventh Circuit rejected this theory in *Boim v. Quranic Literary Institute and Holy Land Foundation for Relief and Development*, holding that to be liable, a donor had to have the intent to further the donee's violent crimes.[295] This meant that a donor could give money to Hamas if it was intended to fund a hospital or school.

Strock, *Verdict is in, but Who is Really Guilty?*, DAILY GAZETTE (Schenectady, N.Y.), Oct. 12, 2006, *available at* http://www.nepajac.org/Strock.htm.

[290] James Cromitie was charged with conspiracy to use a weapon of mass destruction, conspiracy to acquire and use anti-aircraft missiles, and conspiracy to kill U.S. officers. United State v. Cromitie, 727 F.3d 194, 199 (2d Cir. 2013). Cromitie was wary of participating in the FBI's scheme and dodged the informant for months. T. Ward Frampton, *Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine*, 103 J. CRIM. L. & CRIMINOLOGY 111, 142–43 (2013). It was only after he lost his job that Cromitie took the government's bait: nearly $250,000, a BMW, and a two-week vacation in Puerto Rico. *Id.* at 142. At sentencing, the judge made it clear that Cromitie was no threat, and would not have committed any crime but for the government's sting. *Id.* at 143 ("Only the government could have made a terrorist out of Mr. Cromitie, a man whose buffoonery was positively Shakespearean in its scope . . . . I believe beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it and brought it to fruition." (alteration in original)). Even the FBI acknowledged this. Kendall Coffey, *The Lone Wolf—Solo Terrorism and the Challenge of Preventative Prosecution*, 7 FIU L. REV. 1, 17 (2011).

[291] In *United States v. Hashmi*, the government used an informant who had been charged in the United Kingdom and Canada in connection to a plot to bomb soft targets in the U.K. He had been arrested by the United States and pleaded guilty to providing material support to Al Qaeda. He became an informant for a number of years, for which he received a sentence of time served, and testified in numerous trials as a "valuable source of intelligence" about Al Qaeda, Lashkar-e-Taiba, and Al-Muhajiroun. David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 80, 92 (2011). The informant lived with the defendant for only two weeks, but his testimony was the primary evidence at trial. Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 440 (2012).

[292] ACLU, BLOCKING FAITH, FREEZING CHARITIES: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 60 (June 2009) (A former Treasury Department official stated, "We are not going into Irish bars looking for people who support the IRA right now. There is a reason that we are focusing on the Muslim community. There is a greater proportion of Muslims engaged in ethnic terror than other groups. Everybody knows [targeting Muslim charities is] not baseless." A second official observed, "I think the attack on the Muslim charities was just easy, it was an easy, soft target." (alteration in original) (footnote and internal quotation marks omitted)).

[293] Compare these Islamist terrorism cases with *United States v. Stone*, *supra* Part IV.C.3.c.

[294] Malick W. Ghachem, *Of "Scalpels" and "Sledgehammers": Religious Liberty and the Policing of Muslim Charities in Britain and America Since 9/11*, 9 UCLA J. ISLAMIC & NEAR E. L. 25, 32 (2010).

[295] 291 F.3d 1000, 1024 (7th Cir. 2002).

HLP's fungibility and legitimacy arguments undermined *Boim* in favor of the complete taint theory. Now, Muslim charities and donors that intend only to support Hamas's hospital or school construction projects will be frozen as well as civilly and criminally liable.[296] This is controversial; a 2009 ACLU report claimed that the move amounted to an a priori condemnation of virtually all Muslim charities,[297] and the 9/11 Commission recognized the overreach.[298]

Third, the government uses immigration violations as proxy terrorism investigations where evidence of actual terroristic intent is lacking. The 2013 case *Turkmen v. Ashcroft* evokes *Colyer v. Skeffington*. In *Turkmen*, Arab and Muslim detainees filed a *Bivens* action for being detained after 9/11 on pretextual immigration charges.[299] They were held from three to eight months after receiving final orders for deportation or grants of voluntary departure.[300] This was done so that the government could "round[] up" Arabs and Muslims to be questioned in connection with the 9/11 investigation.[301] The detainees were treated as "of interest"[302] despite a lack of evidence of connections to terrorism, and the harsh conditions of their confinement were meant to get them to talk.[303] The court found that these measures were unnecessary because detainees were always fully compliant with orders.[304]

[296] United States v. El-Mezain, 664 F.3d 467, 483–84 (5th Cir. 2011) ("Although these [zakat committee] entities performed some legitimate charitable functions, they were actually Hamas social institutions. By supporting such entities, the defendants facilitated Hamas's activity by furthering its popularity among Palestinians and by providing a funding resource. This, in turn, allowed Hamas to concentrate its efforts on violent activity."). Now, associating with terrorist groups even for humanitarian purposes is illegal. *Id.* at 489 ("The defendants' theory at trial largely was that they did not support Hamas or terrorism, but rather shared a sympathy for the plight of the Palestinian people through support of the zakat committees and the charitable work the committees performed. Their view was that the Government never designated as a terrorist organization any of the zakat committees or anyone connected to the committees.").

[297] ACLU, *supra* note 292, at 60.

[298] John Roth et al., Nat'l Comm'n on Terrorist Attacks upon the United States, Monograph on Terrorist Financing: Staff Report to the Commission 9 (2004), *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf ("In many cases, we can plainly see that certain nongovernmental organizations (NGOs) or individuals who raise money for Islamic causes . . . are 'linked' to terrorists through common acquaintances, group affiliations, historical relationships, phone communications, or other such contacts. Although sufficient to whet the appetite for action, these suspicious links do not demonstrate that the NGO or individual actually funds terrorists and thus provide frail support for disruptive action, either in the United States or abroad.").

[299] Turkmen v. Ashcroft, 915 F. Supp. 2d 314, 325 (E.D.N.Y. 2013).

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.* at 325–26.

[304] *Id.* at 327.

Emerging scholarship on the assembly right recognizes both its democratic importance[305] and weak jurisprudential place.[306] This Article addresses both strands in three ways. Historically, it has retrieved a new history of the substantive First Amendment's advent, with membership crime playing a central formative role.

Doctrinally, it has argued that because of this new history, assembly should have been given equal, if not primary, treatment to the speech right. This is an alternative view of the First Amendment because it is based on a history heretofore unnoticed. It is a view that recognizes the importance of the group, rather than the individual, for political reform and the protection of dissent. It does not reject speech as a vital right or the individual as an important frame. In fact, both individual speech and group assembly rights must work together to further truth and democracy.[307] But it does claim for assembly just as central a role in First Amendment jurisprudence as speech has.

Finally, as a matter of advocacy, this Article presents the *Brandenburg* for groups test, which would protect assemblies in substantially the same way that the *Brandenburg* imminency test now protects individual speakers. While controversial, the *Brandenburg* for groups test is an important and practicable test because it traces a rational, constitutionally defensible line between protected and unprotected assemblies, and responds to critics, most notably Inazu and Bhagwat.

Membership crime was the crucible in which the substantive First Amendment emerged. It was fortuitous, therefore, that the individual's speech right, and not the group's assembly right, was the product. This Article has revisited the advent of the substantive First Amendment and has shown that the formative prosecutions of the time were concerned more with groups than with individuals. To preserve the First Amendment's democratic principles, it is important to turn our attention to membership crime, the threats it poses to the First Amendment, and the ways that an invigorated assembly right can respond.[308]

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[305] HORWITZ, *supra* note 5, at 8–9; INAZU, *supra* note 5, at 1–2, 10; SCHAUER, *supra* note 215, at 41, 60.

[306] HORWITZ, *supra* note 5, at 14, 238; Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 646–47 (2002).

[307] Garnett, *supra* note 76, at 1852 ("Sometimes . . . we affiliate with others in order to amplify, coordinate, and therefore make more effective the expression of our views."); SCHAUER, *supra* note 215, at 47 (Individual rights "are but a mediate step towards maximizing the goals of society at large.").

[308] Garnett, *supra* note 76, at 1849 ("We should . . . attend not only to the ways that government, by regulating associations' activities, burdens the expression of individuals.").