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NOTE

MONTANA'S CRIMINAL SYNDICALISM STATUTE: AN AFFRONT TO THE FIRST AMENDMENT

Lawrence F. Reger

I. INTRODUCTION

In the winter of 1995, just before trouble with the "Freemen" erupted in Jordan, Montana, a call to arms went out in the western part of the state. Montana militia members recruited all good "patriots" to protect the people of Ravalli County from a "tyrannical" government by arresting various state officials and trying them for treason in "Common Law Courts." However, the State of Montana met this challenge to government authority, armed with a statute adopted in the early part of the twentieth century—one which purported "to deal with those social elements which advocate violence, subversion, and destruction." After the State of Montana charged two self-proclaimed leaders of the Montana Militia with felony criminal syndicalism, the judiciary was forced to decide whether the law was constitutional. Though few debate that Montana's criminal syndicalism statute is unconstitutional, the State contended that it could be construed in a constitutional manner.

Montana's criminal syndicalism statute was adopted in 1973, when the Criminal Law Commission combined several outdated laws into a single statute criminalizing the advocacy,
promotion, and dissemination of materials advocating unlawful action in Montana. Several other states have criminal syndicalism statutes, some of which the United States Supreme Court has declared unconstitutional in light of the First and Fourteenth Amendments.

In 1977, Montana slightly amended its criminal syndicalism statute. This statute now reads as follows:

**MONT. CODE ANN. § 45-8-105. Criminal syndicalism.**

(1) "Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

(2) A person commits the offense of criminal syndicalism if he purposely or knowingly:

(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism;
(b) organizes or becomes a member of any assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or
(c) for or on behalf of another whose purpose is to advocate or promote the doctrine of criminal syndicalism, distributes, sells, publishes, or publicly displays any writing advocating or advertising such doctrine.

(3) A person convicted of the offense of criminal syndicalism shall be imprisoned in the state prison for a term not to exceed 10 years.

(4) Whoever, being the owner or in possession or control of any premises, knowingly permits any assemblage of persons to use such premises for the purpose of advocating or promoting the doctrine of criminal syndicalism shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both.


4. See MONT. CODE ANN. § 45-8-105 (1973) (replacing Revised Codes of Mont. § 94-4401, Sedition; § 94-4402, Punishment for sedition; § 94-4403, Emergency clause; and § 94-4404, Criminal syndicalism (Smith 1947)) provides:

(1) "Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

(2) A person commits the offense of criminal syndicalism if he purposely or knowingly:

(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism;
(b) organizes or becomes a member of any assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or
(c) for or on behalf of another whose purpose is to advocate or promote the doctrine of criminal syndicalism, distributes, sells, publishes, or publicly displays any writing advocating or advertising such doctrine.

6. MONT. CODE ANN. § 45-2-101(63) (1995) provides that "a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or cause that result . . . ."

7. MONT. CODE ANN. § 45-2-101(34) (1995) provides that "a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the
(a) orally or by means of writing, advocates or promotes
the doctrine of criminal syndicalism;

(b) organizes or becomes a member of any assembly,
group, or organization which he knows is advocating or
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months, or both. 8

Section 45-8-105 was derived from a Minnesota criminal
syndicalism statute. 9 The Montana Criminal Law Commission
stated that its intent was to "deal with those social elements
which advocate violence, subversion, and destruction" and to
modernize the statute for application to present social needs. 10
However, neither the Criminal Law Commission nor the legisla-
ture defined the precise social needs they were trying to meet. 11

Part II of this note examines the historical circumstances
that led to the adoption of criminal syndicalism laws and dis-
cusses relevant United States Supreme Court decisions. Part III

9. See MONT. CODE ANN. § 45-8-105 (Criminal Law Commission Comments in
Annotations) (1996); MINN. STAT. ANN. § 609.405 (West 1963) (amended by 1984
Minn. Laws, c. 628, art. 3, § 11; 1986 Minn. Laws, c. 444; repealed by 1987 Minn.
Laws, c. 10, § 1).
10. MONT. CODE ANN. § 45-8-105 (Criminal Law Commission Comments in An-
11. See id.
addresses the growing militia movement and Montana prosecutors’ use of criminal syndicalism laws to convict those who have threatened public officials. Part IV analyzes Montana’s criminal syndicalism statute in light of United States Supreme Court authority and discusses proposed changes to this law. Finally, Part V of this note concludes that the present form of Montana’s criminal syndicalism statute is facially overbroad and thus unconstitutional.

II. THE RED SCARE, CRIMINAL SYNDICALISM, AND THE EARLY “CLEAR AND PRESENT DANGER” STANDARD

There is a long history of governmental and public repression of dissident groups within the United States. The post World War I environment, especially after the Bolshevik Revolution, provided the initial impetus for the adoption of criminal syndicalism statutes. Faced with anti-war movements and the Red Scare, legislators rushed to quash the advocacy efforts of dissident groups. Over the next several decades, the United States Supreme Court examined the constitutionality of these reactionary statutes. In so doing, the Court developed a significant body of First Amendment jurisprudence and articulated the “clear and present danger” standard.

A. The Old “Threat”: The Red Scare of the 1920s

Criminal syndicalism statutes are a phenomenon of the early twentieth century. These statutes were adopted, in part, to target an organization called the Industrial Workers of the World (I.W.W.), a radical relative of the Socialist Party. Although both organizations were devoted to overthrowing the capitalist system, the I.W.W. believed that overthrow could only be achieved by direct action. The Socialist Party, on the other hand, believed that political action would eventually result in the emancipation of the working class. The I.W.W.'s “direct action”

13. See id.
14. See id. at 49.
15. See id. at 24-25.
17. See id. at 7.
18. See id.
platform included organizing local unions, strikes, boycotts, and sabotage attempts. Once America entered World War I, I.W.W. members expanded their idea of direct action to include anti-war activities such as slow-downs and resistance to the draft.

The I.W.W.'s anti-war activities sparked a storm of legislative reaction. Between 1917 and 1919, twenty-three states adopted statutes creating the new crime of criminal syndicalism, defined as the "doctrine which advocate[s] crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform."

While criminal syndicalism statutes led to many convictions in the 1920s, some believed there was little justification for the restrictions on personal liberty these laws imposed. For example, the traditional criminal law of the states not only proscribed actual acts of violence against life, property, and government, but also conspiracy to commit those acts. Because of these existing laws, criminal syndicalism statutes, at best, overlapped traditional conspiracy law. Some commentators criticized criminal syndicalism statutes for criminalizing the mere advocacy or suggestion of change to the existing social-economic

19. See id. at 10.
21. See id. at 654-55.
22. See Woodrow C. Whitten, Criminal Syndicalism and the Law in California: 1919-1927, TRANSACTIONS OF THE AMERICAN PHILOSOPHY SOCIETY, March 1969, at 3-4, 65; Dowell, supra note 12, at 147 (noting that, by 1937, the following states and territories had enacted criminal syndicalism laws: Alaska, c. 6 (1919); Ariz., c. 13 (ext. sess. 1918) (repealed in 1926); Cal., c. 188 (1919); Colo., c. 1 (ext. sess. 1919); Haw., Act 186 (1919); Idaho, c. 145 (1917), c. 136 (1919), c. 51 (1925); Ind., c. 125 (1919); Iowa, c. 382 (1919); Kan., c. 37 (ext. sess. 1920); Ky., c. 100 (1920), c. 20 (1922); Mich., Act 255 (1919) (reenacted by Act 328 (1931)); Minn., c. 215 (1917); Mont., c. 7 (ext. sess. 1919); Neb., c. 261 (1919); Nev., c. 22 (1919); Ohio Laws, CVIII, Pt. 1, p. 189 (1919); Okla., c. 70 (1919); Or., c. 12 (1919), c. 34 (1921) (repealed in 1937); S.D., c. 38 (ext. sess. 1918); Utah, c. 127 (1919); Wash., c. 3 (1919) (replaced by c. 174 (1919) (repealed in 1937)); W. Va., c. 24, § 1 (1919); Wyo., c. 76 (1919)).
23. Whitten, supra note 22, (citing Idaho, c. 145 (1917)).
24. See id. at 64 (citing LEE TULIN, DIGEST OF CALIFORNIA CRIMINAL SYNDICALISM CASES 72 (1926) (unpublished report of the Secretary of the California Branch of the General Defense Committee of the I.W.W., San Francisco) (noting that in California, from 1919 to 1926, some 164 people were convicted under that state's criminal syndicalism statute).
25. See Whitten, supra note 22, at 63.
26. See Dowell, supra note 12, at 144.
27. See id.
structure, thus hindering the free flow of ideas that the First Amendment was designed to safeguard.28 A classic example of the abuse of criminal syndicalism and related statutes occurred in Butte, Montana, in 1918.29 Federal troops in Butte, acting under the color of these statutes, arrested groups of I.W.W. members in order to prevent them from organizing labor workers for strikes and related activities.30

B. The Early "Clear and Present Danger" Standard

In 1919, a unanimous Court in Schenck v. United States31 examined the restrictions that criminal syndicalism and similar statutes imposed upon First Amendment freedoms.32 Schenck articulated the "clear and present danger" test for determining whether governmental interference with the First Amendment was constitutional.33 Under this test, government could constitutionally infringe upon First Amendment freedoms if the prohibited speech created a clear and present danger of bringing about "the substantive evils that Congress [had] a right to prevent."34 The Supreme Court followed and clarified this standard in subsequent opinions.35

A later Supreme Court decision, Whitney v. California,36 indicated that the clear and present danger standard was not necessarily a stringent one. In the early 1920s, a social activist named Charlotte Anita Whitney was arrested for attending a meeting of the Communist Party37 and charged under California's criminal syndicalism statute.38 According to investigating officers, Ms. Whitney had no interest in unlawful activity or governmental overthrow.39 In fact, during the course of her

28. See id. at 145.
29. See CALVERT, supra note 16, at 112.
30. See id. at 113-14.
32. See Schenck, 249 U.S. at 52.
33. See id.
34. Id.
35. See, e.g., Gitlow v. New York, 268 U.S. 652, 668 (1925) (stating that "utterances advocating the overthrow of organized government by force, violence and unlawful means are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of . . . police power (citation omitted)).
37. See Blasi, supra note 20, at 657.
38. See id.; see also 1919 Cal. Stat. 199, c. 188.
39. See Blasi, supra note 20, at 657 (citing The Pardon of Anita Whitney, THE
trial, Ms. Whitney testified that while she was a member of the Communist Labor Party, "it was not her intention that [the Party] should be an instrument for terrorism or violence." Despite her testimony, Charlotte Whitney was found guilty of criminal syndicalism and sentenced to up to fourteen years in prison.

On appeal, the United States Supreme Court affirmed Ms. Whitney's conviction, finding California's criminal syndicalism statute constitutional. The Court reasoned that advocating violent political change presented such a danger to the State that it could be outlawed. However, Justice Brandeis, concurring, stated that First Amendment freedoms were critical to a free society and that "[t]o justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced." Brandeis' defense of free speech foreshadowed further developments in First Amendment jurisprudence.

The United States Supreme Court continued to provide for the protection of free speech after Whitney. In De Jonge v. Oregon, a unanimous Court found that Oregon's criminal syndicalism statute was unconstitutional. The Court held that the statute's overbroad wording unconstitutionally infringed upon freedoms guaranteed by the First Amendment, encompassing both protected and unprotected methods of speech and assembly.

After De Jonge, other United States Supreme Court decisions continued to increase the level of protection for First Amendment freedoms. The Court began distinguishing be-

NEW REPUBLIC, Aug. 10, 1927, at 310-11 (quoting Oakland Chief of Police Walter Peterson, a strong supporter of syndicalism laws, who stated:

I investigated Anita Whitney's record in 1919. I found that she had always done an enormous amount of good in the community. I wasn't in sympathy with her pacifistic ideas and a lot of her other notions. But I recognized that it wasn't in her nature to commit violence nor to encourage it. She was one of those idealists who want to make the world better for every-one).
between advocacy of abstract doctrine and advocacy directed at producing unlawful action. In two cases, *Noto v. United States* and *Yates v. United States*, the Court found that the First Amendment protected advocating governmental overthrow by force, as long as the advocacy was remote from concrete action. In 1968, the *O'Brien* Court created a four-part test to determine whether governmental infringement upon First Amendment freedoms was constitutionally acceptable in cases involving a mixture of conduct and expression. The trend toward increasing protection for freedom of speech continues in the wake of *De Jonge, Noto, Yates*, and *O'Brien*.

Other important developments in First Amendment jurisprudence concerned the freedom of assembly, especially the role that assembly played in speech. The Supreme Court recognized even the threat of criminal sanctions may deter the exercise of those rights and noting the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Id*. The case also states that "[i]f there is an internal tension between proscription and protection in a statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." *Id.* at 437; *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) (noting the usual presumption favoring statutes was balanced by the Court's overriding concern with protecting First Amendment freedoms); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (noting that statutes infringing upon speech were unconstitutional if overbroad, "sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in [their] application." *Id.*).


52. See *Noto*, 367 U.S. at 297-98; *Yates*, 354 U.S. at 321-22.


54. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) (recognizing that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected"); *Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley California*, 454 U.S. 290, 294 (1981) (emphasizing the importance of freedom of assembly by stating "[w]e begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process"); *Healy v. James*, 408 U.S. 169, 183 (1972) (holding that the Constitution's protection is not limited to direct interference with fundamental rights and courts are not free to disregard the practical realities of that interference). The Court noted that, in order to constitutionally infringe upon the freedom of assembly, "government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Id.* at 186; see *Noto*, 367 U.S. at
that free association made the advocacy of a group’s point of view possible (especially the more controversial the idea) and that government must have a compelling interest before infringing upon freedom of assembly. The Court also concluded that the First Amendment includes the right to express one’s beliefs by disseminating printed materials. In Associated Press v. United States, the Court stated that “[f]reedom to publish means freedom for all and not for some.”

III. MODERN DEVELOPMENTS IN FIRST AMENDMENT JURISPRUDENCE AND THE RISE OF THE MILITIA MOVEMENT

After the “Red Scare” passed, criminal syndicalism statutes were rarely used. However, while these statutes lay dormant, First Amendment jurisprudence continued to evolve, developing more stringent standards than the clear and present danger test.

A. The Modern “Incitement to Imminent and Likely Unlawful Action” Standard

In 1969, the Supreme Court issued a landmark opinion in First Amendment jurisprudence. In Brandenburg v. Ohio, a unanimous Court struck down the Ohio Criminal Syndicalism

298 (stating that, for a group to be punished for inciting unlawful acts, the acts complained of must “fairly be imputed to the [whole group], and not merely to some narrow segment of it.”); NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 460-61 (1958) (noting that effective advocacy of both public and private points of view, particularly controversial ones, is enhanced by group association and that whether a group’s beliefs are political, economic, religious, or cultural in nature is immaterial and that governmental restrictions on the freedom to associate, even if incidental and unintended, are subject to stringent scrutiny).

55. See Patterson, 357 U.S. at 460-61.
56. See Button, 371 U.S. at 438.
57. See, e.g., Garrison v. Louisiana, 379 U.S. 64, 67, 70 (1964) (limiting state power to impose criminal sanctions for criticism of the official conduct of public officials and noting that the criminal law is usually reserved for behavior that exceptionally disturbs the community); New York Times v. Sullivan, 376 U.S. 254, 266-67 (1964) (noting that, even though someone is not a member of the press per se, that person still has the right to have his ideas printed and disseminated to the public, otherwise “[t]he effect would be to shackle the First Amendment in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources”’ (citation omitted)).
58. 326 U.S. 1, 20 (1945).
59. Interview with William F. Crowley, Professor of Law, University of Montana School of Law, Missoula, Mont. (Sept. 23, 1996) (noting that, until 1995, no one had ever been convicted of criminal syndicalism in Montana).
Act as unconstitutionally overbroad. Ohio's Criminal Syndicalism Act prohibited "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well as "assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." The Brandenburg Court found this statute unconstitutional, noting that:

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed towards inciting or producing imminent lawless action and is likely to incite or produce such action.

The Court further stated that a statute which failed to draw a distinction between advocacy and "preparing a group for violent action and steeling it to such action" was unconstitutional in light of the First and Fourteenth Amendments. Finally, the Brandenburg Court replaced the clear and present danger standard with the "direct incitement" test, thereby overruling the Whitney decision.

B. The New "Threat": The Rise of Militias

Today, a growing number of Americans feel their constitutional liberties are threatened by a vast federal government. Some of these individuals seek to challenge what they see as an abuse of governmental power by forming militia groups. The militia movement's philosophy of challenging the government has been linked to several violent incidents, including the Oklahoma City bombing, which brought national attention to the movement. Despite militia members' denials of involvement in such acts against the government, state and federal legislatures have passed laws attempting to neutralize these groups.

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63. Brandenburg, 395 U.S. at 447.
64. Id. at 448-49 (quoting Noto, 367 U.S. at 297-98 (1961)).
65. See id. at 449.
67. See id.
68. See id. at 581-82.
69. See id. at 582-83.
CRIMINAL SYNDICALISM

Some of these laws may infringe upon freedom of speech and other constitutional rights. Additionally, these laws may fuel militia fears, as one of the militia's goals is to resist government encroachment upon their constitutional rights. Commentary on legislative efforts to control these groups exemplifies this effect. For example, militia activist J.J. Johnson stated that "the only thing standing between some of the current legislation being contemplated and armed conflict is time." Despite the push for legislation regulating militia activities, some prosecutors are using criminal syndicalism statutes in an attempt to punish those who would merely advocate using unlawful activity to overthrow government.

1. Militia Activity and Recent Applications of the Criminal Syndicalism Statute in Montana

Montana Militia members have recently been convicted of criminal syndicalism under section 45-8-105, sparking concern over the statute's constitutionality. In two separate actions, the State of Montana charged Francis Joe Holland, the self-proclaimed leader of the North American Volunteer Militia, and Calvin Greenup, the Montana Coordinator of the North American Volunteer Militia, with criminal syndicalism under section 45-8-105 of the Montana Code.

Both prosecutions arose from the same series of events. In 1994, a letter printed on North American Militia stationary and allegedly signed by Holland was mailed to various state and local officials in Montana. This message stated that the purpose of the Militia was to "defend our inhabitants against an out of control government and their hordes of officers that have been

70. See Joelle E. Polesky, Comment, The Rise of Private Militia: A First and Second Amendment Analysis of the Right to Organize and the Right to Train, 144 U. Pa. L. REV. 1593 (1996) (discussing the impact of recent anti-militia legislation upon the Second Amendment and arguing that while the right to organize a militia enjoys constitutional protection, the right to paramilitary training does not).


sent forth to harass our people." Furthermore, this letter contained a number of threatening statements, such as the following passage:

We would prefer that you take a good hard look at what you and your agencies are doing and amend your ways immediately. We are prepared, however, to defend, with our life, our Rights to Life, Liberty, and the Pursuit of Happiness. We number in the thousands in your area and everywhere else. How many of your agents will be sent home in body bags before you hear the pleas of the people?

Assistant Attorney General John Connor, Jr., sent Holland a letter on January 17, 1995, advising Holland that the threatening tone of his letter may constitute a violation of several Montana criminal statutes. Despite this warning, a press release bearing Holland's name as National Director of the North American Militia was mailed in early February 1995, referring to a corrupt judicial system and encouraging readers to contact Calvin Greenup for further details.

Approximately one month later, Holland issued another press release in Montana, claiming that he was prepared to "call out approximately one million militia members to protect the patriots and good people of Ravalli County." This release urged readers to contact Calvin Greenup and "let him know that you intend to stay on top of this situation." In April, 1995, another press release bearing Holland's name as "National Director" was distributed throughout Montana, urging interested Militia members to call and pledge their help "against the tyrants that seek their, and your, destruction ..." These press releases all contained the name of Calvin Greenup as Montana State Coordinator of the North American Volunteer Militia.

In response, several undercover Montana Criminal Investigation Bureau agents contacted Greenup and obtained information about possible planned actions. During the course of a

74. Id.
75. Id.
76. See id. at 3.
77. See id.
79. Id. at 4.
80. Id.
81. See id.
82. See id. at 4-5.
telephone conversation, an individual claiming to be Greenup told the agents that they should come to Ravalli County and be prepared to arrest public officials, including judges, attorneys, and the sheriff, for violating the Constitution. These individuals would, after arrest, be immediately tried in a “Common Law Court” and, if found guilty, hanged for treason. The agents were also instructed to bring firearms, both for long-range and close-quarters work.

Several days later, the agents met with Greenup in person. During the course of this encounter, Greenup told the agents that the militia must first impose common law in Hamilton, immediately hang all people guilty of treason, and then continue to enforce their law throughout the state. The agents observed many weapons, gas masks and crates of ammunition during their meeting with Greenup and were also instructed to kill any law enforcement officers that they saw. Apparently, these agents were the only people who responded to the “national” press releases.

Greenup and Holland were charged with criminal syndicalism pursuant to section 45-8-105 of the Montana Code. In response, both asserted that Montana’s criminal syndicalism statute is facially overbroad and, therefore, unconstitutional. The State asserted that section 45-8-105 can be interpreted in a constitutional manner and, thus, is not facially unconstitutional for overbreadth. The State argued that courts must presume that statutes are constitutional and construe those laws narrowly to avoid such conflicts if possible.

84. See id.
85. See id.
86. See id. at 6.
87. See id. at 7.
89. See John Connor, Jr., Assistant Attorney General, Address at James R. Browning Symposium, University of Montana School of Law (Oct. 4-5, 1996).
93. See id. at 6 (citing State v. Lilburn, 265 Mont. 266, 875 P.2d 1036, 1041
thermore, the State claimed that any unenforceable portion of Montana's criminal syndicalism statute is "arguably severable from the remainder." The State also asserted that any constitutional problems with the statute could be cured by proper jury instructions.

The State also emphasized that Montana's criminal syndicalism statute has the legitimate purpose of prohibiting advocacy which leads to crime. The State claimed that this statute does not punish speech or advocacy, but rather the illegal conduct that results from that speech. However, the State conceded that a statute which has constitutional problems can be invalidated if (1) the statute is overbroad and (2) that overbreadth is real and substantial, as reviewed in regard to its purpose.

The Honorable Douglas G. Harkin, District Judge for the Montana Fourth Judicial District, denied Holland's and Greenup's motions to dismiss based on the statute's overbreadth. Judge Harkin noted that "Montana's criminal syndicalism statute was enacted long before the Court decided Brandenburg and, consequently, the Montana legislature did not have the benefit of [that test] for constitutionality." The court failed to recognize, however, that section 45-8-105 was enacted four years after Brandenburg. Furthermore, Judge Harkin agreed with the State that any constitutional difficulty with Montana's criminal syndicalism statute could be cured by requir-

94. Id. (citing New York v. United States, 505 U.S. 144 (1992); Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993); State v. Lance, 222 Mont. 92, 721 P.2d 1258 (1986); Gullickson v. Mitchell, 113 Mont. 359, 126 P.2d 1106 (1942)).
95. See id. at 8 (citing R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Wurtz v. Risley, 719 F.2d 1438, 1442-43 (9th Cir. 1983)).
96. See id.

https://scholarship.law.umt.edu/mlr/vol58/iss1/11
ing jury instructions on constitutionally protected speech.102

IV. ANALYSIS: MONTANA'S CRIMINAL SYNDICALISM STATUTE

Because Montana's criminal syndicalism statute affects First Amendment rights of speech, the press, and assembly, section 45-8-105 should be considered in light of established First Amendment jurisprudence. Since the First Amendment confers fundamental rights, courts allow facial challenges to statutes that impact expression.103 In fact, even persons charged with constitutionally prohibited conduct may challenge statutes that, on their face, substantially infringe upon protected speech.104 Essentially, a facial challenge will invalidate a statute if the statutory language is unconstitutionally overbroad, and no narrowing construction is apparent.105 If a facial challenge to a statute is successful, that statute may not be enforced under any circumstances until it has been appropriately narrowed.106

A. Overbreadth Under Brandenburg

Under Brandenburg, a State may not proscribe advocacy of unlawful action unless such advocacy is directed to inciting or producing imminent lawless action and is likely to do so.107 Montana's criminal syndicalism statute fails to meet the requirements of Brandenburg. First, section 45-8-105's language is almost as overbroad as Ohio's unconstitutional criminal syndicalism statute. Second, the statute does not have a purpose that extends beyond the traditional criminal law in a constitutionally acceptable manner. Finally, Montana's criminal syndicalism statute does not meet Brandenburg's mental culpability requirements.

Ohio's Criminal Syndicalism Act was remarkably similar to

section 45-8-105 of the Montana Code. Both statutes pro-
scribe the advocacy of crime, violence, or unlawful methods of
terrorism as a means of accomplishing industrial or political
reform. Both statutes prohibit "assembling with any society
or group formed to advocate the doctrines of criminal
syndicalism." While the Montana statute is not so broad as
to expressly prohibit teaching criminal syndicalism, as Ohio's
statute did, section 45-8-105 nonetheless fails to differentiate be-
tween advocacy and incitement to imminent lawless action.
Montana's criminal syndicalism statute prohibits advocating or
promoting malicious damage to property as a means of accom-
plishing political ends. Therefore, standing on a street corner
and announcing that everyone in Missoula should deface the
city's parking meters because the rates are too high would sub-
ject the speaker to potential criminal charges. This failure to
distinguish advocacy from incitement is sufficient to make
Montana's criminal syndicalism law overbroad, and hence, un-
constitutional under Brandenburg.

In the Greenup and Holland cases, the State successfully
argued that Montana's criminal syndicalism statute could be
applied constitutionally. The State argued that statutory in-
terpretation rules required courts to presume statutes are consti-
tutional and to construe them narrowly to accomplish this pur-
pose. However, this argument is flawed.

The State concedes that a statute which has constitutional

108. See OHIO REV. CODE ANN. § 2923.13 (repealed 1972) provided:
Sec. 13421-23. Criminal syndicalism defined. That criminal syndicalism is
the doctrine which advocates crime, sabotage, which is defined as the mali-
cious injury or destruction of the property of another, violence, or unlawful
methods of terrorism as a means of accomplishing industrial or political
reform. The advocacy of such doctrine, whether by word of mouth or writ-
ing, is a felony, punishable as is in this act.

109. See OHIO REV. CODE ANN. § 2923.12 (repealed 1972); see MONT. CODE ANN.

110. OHIO REV. CODE ANN. § 2923.13 (repealed 1972); see MONT. CODE ANN. §


112. See John Smith, Attorney for Calvin K. Greenup, Address at James R.
Browning Symposium, University of Montana School of Law (Oct. 4-5, 1996).

113. See Memorandum and Order at 17, State v. Holland, No. CR-95-53 (21st
Judicial Dist. Ct. Mont. filed Nov. 8, 1995) (denying Holland's Mot. to Dismiss); Com-
ments of John Connor, Jr., Assistant Attorney General, at Symposium, The Militia:
Constitutional and Criminal Law Perspectives, University of Montana School of Law
(Oct. 4-5, 1996).

114. See Response to Mot. to Dismiss at 6, State v. Holland, No. CR-95-53 (21st
applications can be invalidated if the law is overbroad and that overbreadth is real and substantial, in regard to the statute's purpose. 115 According to the State, Montana's criminal syndicalism statute has the "legitimate purpose of prohibiting advocacy which leads to crime" and "punishing the unlawful acts resulting from that speech." 116 However, those unlawful acts could be punished with a variety of conventional means, such as theft, 117 robbery, 118 arson, 119 and deliberate homicide 120 statutes. Furthermore, even if Montana's criminal syndicalism statute has the legitimate purpose of prohibiting advocacy which leads to crime, a variety of statutes are already on the books which can constitutionally accomplish this function, such as intimidation, 121 conspiracy, 122 and attempt 123 statutes. For example, Greenup's plan to impose "common law justice" in Ravalli County, when viewed in light of the facts that he was stockpiling munitions and summoning people to aid him could be viewed as an attempt to commit intimidation. 124 However, Assistant Attorney General John Connor stated that, due to proof problems, the only viable means of charging Greenup and Holland was under Montana's criminal syndicalism statute. 125

117. See MONT. CODE ANN. § 45-6-301 (1995).
124. See MONT. CODE ANN. § 45-5-203 (1995), which provides in relevant part:
   (1) A person commits the offense of intimidation when, with the purpose to cause another to perform, or omit the performance of any act, he communicates to another, under circumstances which reasonably tend to produce a fear that it will be carried out, a threat to perform without lawful authority any of the following acts:
      (a) inflict physical harm on the person threatened or any other person;
      (b) subject any person to physical confinement or restraint; or
      (c) commit any felony.
   MONT. CODE ANN. § 45-4-103 (1995) provides in relevant part:
   (1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.
125. See John Connor, Jr., Address at James R. Browning Symposium, Universi-
Another significant constitutional difficulty with section 45-8-105 is the statute’s failure to meet the mental culpability requirements of *Brandenburg*. Specifically, Montana’s criminal syndicalism statute proscribes a broader spectrum of conduct than permitted by *Brandenburg*. Montana’s criminal syndicalism statute prohibits purposeful and knowing conduct. In Montana, “a person acts purposefully with respect to . . . conduct described by a statute . . . if it is the person’s conscious object to engage in that conduct.” *Brandenburg* requires that incitement be directed to producing imminent and likely lawless action, so the mental state of “purposely” in Montana meets this standard. However, in Montana, “a person acts knowingly with respect to conduct . . . described by a statute defining an offense when the person is aware of his conduct.” Furthermore, “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence.” This level of mental culpability is significantly lower than the deliberateness required under *Brandenburg*.

For example, under Montana’s criminal syndicalism statute, one could not advocate an inflammatory position in front of a crowd where there may be a high probability that someone would react with lawless conduct. This would be true whether the speaker intended to incite lawless action or whether the crowd itself was hostile and where the speaker was advocating an extremely unpopular position. For example, consider a militant anti-abortion activist engaged in fiery rhetoric in front of a crowd that contained pro-choice activists who would likely react with violence. Montana’s criminal syndicalism statute could be applied in this situation because it prohibits persons from knowingly promoting violence as a political solution. Because the speaker in this example “agitated” the crowd into violence, regardless of the fact that it would most likely be violence against him or her, that individual could face criminal liability under section 45-8-105. Allowing the risk of an unlawful result to satis-

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129. See *Brandenburg*, 395 U.S. at 447.
132. See *Brandenburg*, 395 U.S. at 447.

https://scholarship.law.umt.edu/mlr/vol58/iss1/11
fy the mental state element of criminal syndicalism effectively chills free speech because it forces speakers to tiptoe around volatile issues to avoid the unlawful actions of others. This fails to meet the direct incitement required for governmental restrictions on speech in *Brandenburg*.

**B. Severance is an Inadequate Remedy**

Courts consider free speech to be of the utmost importance. Free expression is critical to a democratic society because it is indispensable to free thought and to the "discovery and spread of political truth." The First Amendment's guarantee of free expression "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." This ensures the value of the marketplace of ideas because it provides for rigorous debate between conflicting views. Indeed, free speech is the heart of a democratic society. Therefore, the usual presumption favoring statutes is balanced by the overriding concern for protecting First Amendment freedoms.

In the Greenup and Holland cases, the State maintained that any invalid portion of Montana's criminal syndicalism statute is "arguably severable from the remainder." This assertion fails to recognize that the entire statute depends on the definition of "criminal syndicalism" contained within subsection one. Because this subsection fails to differentiate between mere advocacy and incitement to imminent and likely lawless action, it is not only an unconstitutional intrusion on First Amendment freedoms by itself, but it also taints the rest of the statute.

Even assuming that the entire definitions section, 45-8-105(1), could be severed and replaced with the *Brandenburg* standard, other portions of Montana's criminal syndicalism statute are also unconstitutional. Specifically, section 45-8-105 infringes upon the freedom of the press and the freedom of associa-

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134. *Id.*
tion.

Montana's criminal syndicalism statute prohibits the distribution, sale, publishing, or public display of any writing advocating or advertising the doctrine of criminal syndicalism, whether "for or on behalf of another whose purpose is to advocate or promote the doctrine of criminal syndicalism."\(^{142}\) However, even persons who are not members of the press have the right to disseminate their views in written materials.\(^{143}\) Otherwise, the First Amendment would be "shackled in its attempt to secure 'the widest dissemination of information from diverse and antagonistic sources.'"\(^{144}\) Montana's criminal syndicalism statute intrudes upon the freedom of the press by forbidding the mere advertising of "criminal syndicalism" meetings, as well as the dissemination of any written materials which merely advocate the doctrine. However, this is not the end of section 45-8-105's constitutional difficulties.

The freedom to associate is indispensable to a free "marketplace of ideas" because it gives individuals a realistic opportunity to make their views known through group action when, "individually, their voices would be faint or lost."\(^{145}\) The Constitution gives individuals the right to associate for political, economic, religious, or cultural purposes.\(^{146}\) Thus, governmental restrictions on the freedom to associate, even those that are incidental or unintended, are subject to strict scrutiny.\(^{147}\)

Montana's criminal syndicalism statute contains several provisions which violate an individual's freedom of assembly. Section 45-8-105(2)(b) criminalizes organizing or becoming a member "of any assembly, group, or organization which one knows is advocating or promoting the doctrine of criminal syndicalism."\(^{148}\) This provision fails the strict scrutiny test because even if necessary to further a compelling governmental interest, it still fails to differentiate between members pursuing legitimate and illegal goals. Furthermore, Montana's criminal syndicalism statute prohibits one who is either "the owner or in possession or control of any premises, [from] knowingly permitt[ing] any assemblage of persons to use such premises for

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144. Id. (citing Associated Press, 326 U.S. at 20).
146. See Alabama ex rel Patterson, 357 U.S. at 460.
147. See id. at 460-61.
the purposes of advocating or promoting the doctrine of criminal syndicalism.\textsuperscript{149} This provision conflicts with the freedom of association in the same manner as subsection (2)(b) because it fails to differentiate between owners who allow their property to be used for legitimate purposes, like advocacy of unlawful action, from those who allow their property to be used for illegal purposes, like incitement to unlawful action. Finally, Montana's criminal syndicalism statute violates the freedom of association because it forbids "distribut[ing], sell[ing], publish[ing], or publicly display[ing] any writing advocating or advertising" criminal syndicalism, regardless of the extent of one's association with a group adhering to that doctrine.\textsuperscript{150}

Montana's criminal syndicalism statute is in direct conflict with existing law because it would punish all members of an organization regardless of whether they engaged in unlawful activity.\textsuperscript{151} In 1961, the United States Supreme Court established that, in order to punish a group for unlawful acts, the offending behavior must be fairly attributable to the entire group, rather than some portion of it.\textsuperscript{152} In order to prosecute an individual who assembles with others, the government must show that (1) the individual knowingly affiliated with a group possessing illegal aims and (2) the individual intended to further those illegal aims.\textsuperscript{153} In 1982, the Supreme Court held that "[t]he right to associate does not lose all constitutional protection merely because some members of [a] group may have participated in conduct or advocated doctrine that is itself not protected."\textsuperscript{154}

Under Montana's present criminal syndicalism statute, all who organize, become members of, or attend meetings of groups that advocate unlawful action for purposes of industrial or political change could be charged with criminal syndicalism under section 45-8-105. In the militia context, this means that members assembling only for political action would be punished along with those more radical members who support acts of terrorism. Consider a group of militia members, some who wish to summarily execute various state officials, others who wish to save their farms from foreclosure by joining together for political

\textsuperscript{149} MONT. CODE ANN. § 45-8-105(4) (1995).
\textsuperscript{150} MONT. CODE ANN. § 45-8-105(2)(c) (1995).
\textsuperscript{151} See MONT. CODE ANN. § 45-8-105(2)(b) (1995).
\textsuperscript{152} See Noto, 367 U.S. at 298.
\textsuperscript{153} See Healy, 408 U.S. at 183.
\textsuperscript{154} Claiborne Hardware Co., 458 U.S. at 908.
action. All could be punished under Montana's criminal syndicalism law, whether they joined the militia movement to indulge in violence or to achieve a higher political purpose. Section 45-8-105's failure to address the criminal intentions of those it would punish represents a patent violation of the First Amendment's freedom of association.

Montana's criminal syndicalism statute infringes on a variety of First Amendment freedoms. Not only does the statute fail to differentiate advocacy from incitement, but it also would prohibit a broad spectrum of associational behaviors by failing to differentiate between those group members engaging in legal activities and those engaging in illegal behaviors. Section 45-8-105 also constrains the freedom of the press because it places a blanket prohibition on disseminating materials advocating or even advertising the doctrine of criminal syndicalism without regard to the criminal intent of the individual, much less the substantive contents of the materials themselves. These constitutional problems are so pervasive in Montana's criminal syndicalism statute that severance is an inadequate remedy.

C. Jury Instruction is an Inadequate Remedy

In the Holland and Greenup cases, the trial court stated that proper jury instructions can cure constitutional problems with Montana's criminal syndicalism statute. However, jury instructions cannot prevent law enforcement from using this statute against those who merely advocate unlawful overthrow of the government. This potential use by law enforcement chills free speech because the threat of being arrested deters people from expressing their view.

The United States Supreme Court recognizes the profound danger of tolerating, in the area of First Amendment rights, a penal statute susceptible to abuse. Even the threat of criminal sanctions may deter the exercise of constitutional freedoms as much as actual sanctions. The Brandenburg standard does not tolerate convicting persons merely advocating lawless

156. See Button, 371 U.S. at 433.
157. See id.
158. See id.
action, but those persons could still be arrested under Montana's present criminal syndicalism statute.\textsuperscript{159} Furthermore, courts are prohibited from allowing statutes to stand that "affect First Amendment rights and leave an extreme amount of discretion to law enforcement and other members of the executive branch."\textsuperscript{160}

In the Holland and Greenup cases, the State persuaded the District Court that the \textit{Brandenburg} test could be used to interpret and apply Montana's criminal syndicalism statute in a constitutional manner.\textsuperscript{161} The State argued that a state court's interpretation of a statute was controlling and could "narrow a statute's application to within constitutional parameters."\textsuperscript{162} However, while this may prevent convictions, it fails to address law enforcement's potential use of section 45-8-105 to arrest or harass mere government dissidents. Jury instructions fail to adequately address the problem of a statute that allows law enforcement a general discretion in the area of First Amendment rights.

The constitutional concerns brought out during the Holland and Greenup cases prompted a revision of Montana's criminal syndicalism statute. While the process of revision and drafting continues, it is evident that the new version of section 45-8-105 will firmly adhere to the \textit{Brandenburg} standard and prohibit only direct incitement to imminent and likely lawless action.\textsuperscript{163} The revision will not contain any prohibitions on associational behaviors and will also be renamed, as the very phrase "criminal syndicalism" bears the taint of unconstitutionality. These revi-

\begin{footnotesize}
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\item See \textit{Healy}, 408 U.S. at 183.
\item See John Connor, Jr., Assistant Attorney General, Address at James R. Browning Symposium, University of Montana School of Law (Oct. 4-5, 1996).
\item Telephone interview with John Connor, Jr., Assistant Attorney General, State of Montana (Dec. 23, 1996). As of February 28, 1997, the proposed legislation provides in relevant part:
\begin{enumerate}
\item A person commits the offense of criminal incitement if the person purposely or knowingly advocates the commission of a criminal offense and the advocacy:
\begin{enumerate}
\item is directed to inciting or producing imminent unlawful action; and
\item is likely to incite or produce unlawful action.
\end{enumerate}
\item For purposes of this section, "imminent" means highly predictable.
\item A person convicted of the offense of criminal incitement shall be imprisoned in the state prison for a term not to exceed 10 years.
\end{enumerate}
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\end{footnotesize}
sions should clear up the present constitutional difficulties with Montana's current criminal syndicalism statute.

V. CONCLUSION

Montana's present criminal syndicalism statute is clearly unconstitutional on its face. The statute's failure to differentiate between mere advocacy and incitement to immediate and likely lawless action criminalizes a broad spectrum of activities, both constitutionally protected and unprotected. Montana's criminal syndicalism statute, like many of its counterparts, represents an impermissible intrusion upon First Amendment principles of freedom of speech and association, both considered by many jurists to be the bedrock of American society.

Montana's criminal syndicalism statute must be tailored to conform to Brandenburg. If one accepts the State's position, then Greenup and Holland's actions are just the sort that criminal syndicalism statutes can effectively prohibit. However, because section 45-8-105 is far too broad in wording and potential application, it should be held unconstitutional by the Montana Supreme Court. While this failure will reaffirm the notion that statutes concerning First Amendment freedoms need to be carefully constructed, the proposed revision of section 45-8-105 will probably dispel the constitutional difficulties inherent in the present version of Montana's criminal syndicalism law.
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