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The Internationalist Beginnings of American Civil Liberties

John Fabian Witt*

Students of American civil liberties inevitably confront what historian Thomas Haskell has called “the curious persistence of rights talk in the age of interpretation.” Haskell’s dilemma is to explain the persistence and growth of the modern civil liberties movement in precisely the post-World War II decades in which skepticism about the truth value of rights claims spread widely among American public intellectuals.¹ In fact, the problem is even more acute than this. A civil liberties tradition as twenty-first-century American lawyers understand it – a body of legal protections for liberties such as speech and assembly – barely existed in the United States before intellectuals and political reformers of a variety of different perspectives began to challenge the characteristic hallmarks of nineteenth-century liberalism. The civil liberties movement in American law – even the use of the phrase “civil liberties” itself – arose in precisely the years in and around World War I in which pragmatic skepticism about the status of rights claims grew strongest. Moreover, early architects of the civil liberties movement were themselves leading skeptics and even founders of modernist legal institutions that sought to consign rights talk to a nineteenth-century past.

One prominent solution to the paradox connects the advent of civil liberties to the rise of the distinctively American philosophical tradition of pragmatism and its jurisprudential analogues. Justice Oliver Wendell Holmes famously observed in 1919 that pragmatic uncertainty as to ultimate truths ought to lead nation-states to be reluctant to prohibit the expression of even apparently abhorrent ideas. “Time,” Holmes wrote in his dissent in *United States v. Abrams*, “has upset many fighting faiths,” and it followed

*Associate Professor of Law, Columbia University. Many thanks to Michael Aronson, Stuart Banner, Christina Burnett, Ariela Dubler, Mary Dudziak, Cindy Estlund, Gillian Metzger, Gerry Neuman, Tony Sebok, Seana Shiffrin, and workshop audiences at Brooklyn Law School, Columbia Law School, and the UCLA School of Law.

¹Thomas L. Haskell, “The Curious Persistence of Rights Talk in the ‘Age of Interpretation,’” in *The Constitution and American Life* 324 (David Thelen ed., 1988).

for Holmes that nation-states should establish protections for speech and expression that we would today call civil liberties.² Yet until Holmes's suggestion in 1919, pragmatism had consistently cut against rights claims. John Dewey scorned those who at the opening of World War I clung to "the individualistic tradition" of "early Victorian platitudes" about "the sanctity of individual rights."³ Critics pointed out that the problem of uncertainty to which Holmes pointed in *Abrams* cut both ways, calling into question not only legislative commitments to the suppression of particular ideas, but also the unyielding commitment to principle that underlay civil liberties claims in crisis times.⁴ And indeed, as American intervention in World War I approached, lawyers like Raymond Fosdick (soon to become the first Undersecretary General of the League of Nations) increasingly saw "natural rights" along with "Jefferson and laissez-faire" as just so many "mental trappings" from "a century ago."⁵ As Ernest Hemingway would write, the war had called into question the power of "abstract words such as glory, honor, courage, or hallow" – and, we might add, liberty and rights.⁶

A second account of the civil liberties paradox sees in World War I what political scientist Samuel Huntington would call a moment of "creedal passion": a confrontation between the nation and its deepest values.⁷ Federal legislation effectively criminalized antiwar speech; the Post Office barred antiwar and radical literature from the mails; mobs brutalized and even lynched anti-war speakers; and federal agents and allied vigilantes led lawless raids on labor unions and radical organizations. Events such as these, the second account contends, touched off a movement on behalf of ideas about rights that Americans had long held but had long

²United States v. *Abrams*, 250 U.S. 616, 630 (1919). For one of the more recent and brilliant versions of this solution, see Louis Menand, *The Metaphysical Club* (2001).

³David M. Kennedy, *Over Here: The First World War and American Society* 50 (1980); David M. Rabban, *Free Speech in its Forgotten Years* 3 (1997).

⁴See Jane Addams, *Peace and Bread in Time of War* 143 (1945); Randolph S. Bourne, *War and the Intellectuals* 11 (Carl Resek ed., 1964)

⁵Raymond B. Fosdick, "Liberty in America," *The Outlook*, Feb. 2, 1916, pp. 282, 286.

⁶Ernest Hemingway, *A Farewell to Arms* (1929); Paul Fussell, *The Great War and Modern Memory* 21 (1975).

⁷Samuel P. Huntington, *American Politics: The Promise of Disharmony* (1981).

taken for granted.⁸ Yet there is remarkably little evidence for a long-standing American civil liberties tradition in nineteenth-century America. As one historian has put it, the nation's civil liberties record instead "seems terribly dismal."⁹ The civil liberties violations of the World War One period were not so different from those of the Civil War. Indeed, as a prominent opponent of antiwar speech noted in 1917, Lincoln's "limitations of free speech" provided a model for the Wilson administration a half century later.¹⁰ Moreover, American law had long been characterized a wide array of practices that by twenty-first-century standards would seem clear violations of important civil liberties. Southern states banned antislavery literature and speech. Congress stifled abolitionist petitions. Congress and the states alike prohibited the dissemination of birth control, sexual literature, and pornography. Laws prohibited entertainment on Sundays. Courts broadly enjoined peaceful labor picketing. And communities participated in repressing the free speech efforts of organizations like the Industrial Workers of the World.¹¹ Indeed, historian Henry Steele Commager plausibly wrote of the period between 1789 and 1937 that there had not been "a single case, in a century and a half, where the Supreme Court has protected freedom of speech, press, assembly, or petition against congressional attack."¹² Nineteenth-century American law, in short, seems to have borne out James Madison's warning that the provisions of the Bill of Rights would be mere "parchment barriers" to acts

⁸See, e.g., Robert E. Cushman, "The Repercussions of Foreign Affairs on the American Tradition of Civil Liberty," 92 *Proceedings of the American Philosophical Society* 257 (1948); Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (1979); Donald Johnson, *The Challenge to American Freedoms: World War I and the Rise of the American Civil Liberties Union* (1963); Kennedy, *Over Here*; Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"* 389-94 (2000); Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 11-47 (2nd ed. 1999). For a recent summary of this view, see Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," 82 *Va. L. Rev.* 1, 34-38 (1996).

⁹Michael Les Benedict, "Victorian Moralism and Civil Liberty in the Nineteenth-Century United States," in *The Constitution, Law, and American Life* 91, 109 (Donald G. Nieman ed., 1992).

¹⁰William English Walling to L. Hollingsworth Wood, Jan. 7, 1918, reel 1, vol. 3, *American Civil Liberties Union Archives: The Roger Baldwin Years, 1917-1950* (Scholarly Resources, Inc., 1996) [hereinafter "*ACLU Archives*"]; see also Mark Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991); Geoffrey R. Stone, "Abraham Lincoln's First Amendment," 78 *NYU L. Rev.* 1 (2003).

¹¹On nineteenth-century civil liberties practices, see Curtis, *The People's Darling Privilege*; Rabban, *Free Speech in its Forgotten Years*; Russel B. Nye, *Fettered Freedom: A Discussion of Civil Liberties and the Slavery Controversy in the United States, 1830-1860* (1949).

¹²Henry Steele Commager, quoted in Murphy, *World War I*, 9.

of government repression.¹³

The development of civil liberties in and around World War I is thus difficult to explain by reference to home-grown traditions. Neither the philosophical tradition of pragmatism, nor some supposed moment of truth for Americans' ostensibly deepest values provide powerful explanations of the modern civil liberties movement.

Instead, what stands out about the beginnings of our modern civil liberties tradition is the way in which a legal and political movement that transcended the national boundaries of the United States found fertile soil in American law. The domestic civil liberties movement has its roots in pre-World War I cosmopolitanism in international law. In the late nineteenth century, internationalists had begun to question not just the abstract metaphysical truth of rights claims but also the usefulness of that other great abstraction of nineteenth-century law: the sovereignty of the nation state. The civil liberties movement in American law thus did indeed emerge out of a pragmatist critique of abstract legal fictions. The relevant abstraction, however, was not so much the formal concept of rights as the formal concept of state sovereignty.

This article describes the connections between the movement contemporaries called "internationalism" and the beginnings of the twentieth-century civil liberties tradition. No one better captures these connections than Crystal Eastman, an indefatigable and charismatic, though now largely forgotten, young New York lawyer. Between 1913 and 1917, she became one of the most important figures in the early-twentieth-century American internationalist movement. And in 1917, she founded with Roger Baldwin the predecessor organization to the American Civil Liberties Union. Yet a domestic civil liberties movement had not been Eastman's aim at all. For Eastman and a like-minded group of transatlantic internationalists, the world war occasioned a struggle for new supranational legal structures to constrain the excesses of nation states that the war had so plainly revealed. When the patriotic obligations of wartime placed new limits on internationalism, however, American internationalists like Eastman turned to civil liberties as a means to constrain the nation state that could ostensibly be located the American national tradition. The irony is that within a very short time, civil liberties claims swallowed up and

¹³Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in *James Madison: Writings* 418, 420 (Jack N. Rakove ed., 1999).

obscured the internationalism out of which they had arisen.

If the story told here is successful, a number of interesting points about the international law and American civil liberties follow. As I suggested at the outset, the internationalist beginnings of American civil liberties solves the paradox of civil liberties in the age of pragmatism. And as I indicate in Part II, it also helps to explain the exceptionally prominent role of women in the American civil liberties movement. Women like Crystal Eastman were especially quick to recognize the dangers posed by nation-states in which they had long had only an attenuated form of membership. Nation states had barred women from voting and even stripped them of their citizenship when, like Eastman in 1916, they married foreign nationals.

Moreover, the internationalist beginnings of American civil liberties help bring the civil liberties experience into line with contemporaneous developments in American law and statecraft. Historians and lawyers have for almost three decades now been chipping away at the myths of American exceptionalism in such areas of the law as tort, crime, labor, and the constitution,¹⁴ and such areas of reform as urban planning, social insurance, and even home economics.¹⁵ In these areas and elsewhere, we are learning, American law and politics developed not in isolation but in robust trans-oceanic conversations.¹⁶ The story of Eastman and of American internationalism shows that even in that ostensibly most distinctively American feature of our legal system – its emphasis on the civil liberties of individuals – American law has inescapably been a product of interactions and ideas on a global scale. The American civil liberties movement in the

¹⁴See, e.g., Mary Dudziak, *Cold War Civil Rights* (1998); William Forbath, *Law and the Shaping of the American Labor Movement* (1991); Michael Wilrich, *City of Courts* 71-72 (2003); John Fabian Witt, *The Accidental Republic* (2004).

¹⁵See, e.g., James Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (1986); Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (1998); Kristin Hoganson, "Cosmopolitan Domesticity: Importing the American Dream, 1865-1920," 107 *Am. Hist. Rev.* 1 (2002); Daniel T. Rodgers, "An Age of Social Politics," in *Rethinking American History in a Global Age* 250 (Thomas Bender ed., 2002); Robert Wiebe, "Framing U.S. History: Democracy, Nationalism, and Socialism," in *Rethinking American History in a Global Age*, 236.

¹⁶Much of the focus of recent work has been on trans-Atlantic conversations, but there was a parallel trans-Pacific conversation. See Mae Ngai, *Impossible Subjects* (2004); Adam McKeown, "Ritualization of Regulation: Enforcement of Chinese Exclusion in United States and China," 108 *Am. Hist. Rev.* 377 (2003); Dirk Hoerder, "From Euro- and Afro-Atlantic to Pacific Migration System: A Comparative Migration Approach to North American History," in *Rethinking American History in a Global Age*, 195.

twentieth century has not merely been a U.S. export to the world, though it has been that.¹⁷ Civil liberties have instead been part of a kind of civil libertarian import / export business, as ideas drawn from transatlantic and European currents in international law have been fed back into circulation as civil liberties claims.

The story of civil liberties and American internationalism holds sobering lessons for those internationalists and civil libertarians in our own time. Much like the World War I moment almost a century ago, ours is an era that once again pits the obligations of loyalty to the nation-state against aspirations to an international rule of law. Crystal Eastman would find that the nation states of the world would vigorously and even violently defend their prerogatives. Much as Woodrow Wilson's League of Nations idea would falter in the face of nationalism, Eastman would learn that the authority of law was deeply and perhaps even inextricably connected to the authority of the very nation states she sought to eclipse. In the United States, the result was a cosmopolitan prewar internationalism that – though it had begun with the aim of transcending the nation state – soon came to rely on a set of civil liberties claims that could be rooted in the constituent documents of American nationalism.

I

Catherine Crystal Eastman hailed from the heart of the nineteenth-century American reform tradition. In the words of her brother, the eclectic aesthete and radical editor Max Eastman, he and Crystal had grown up near the “center of gravity” of the “moral and religious map of the United States.”¹⁸ She was born in 1881 in Glenora, New York, not far from where the Seneca Falls Convention had issued the Declaration of Sentiments in 1848 to mark the beginnings of the nineteenth-century woman's movement. Her mother, Annis Ford Eastman, attended Oberlin College, Ohio's center of abolitionist activism. Her father, Samuel Eastman, served and was wounded in the Civil War. Both became congregational ministers in upstate New York, where they eventually moved to the Park Church in Elmira, one

¹⁷See Louis Henkin, *The Age of Rights* (1990); see also William P. Alford, “Exporting ‘The Pursuit of Happiness,’” 113 *Harv. L. Rev.* 1677, 1699 (2000).

¹⁸Max Eastman, *Enjoyment of Living* 1 (1948).

of the nation's leading churches. In 1870, Mark Twain had married the daughter of a prominent Elmira family at the Park Church. The church's abolitionist pastor, Thomas Beecher, belonged to one of the most prominent families in America. His sister, Harriet Beecher Stowe, the author of *Uncle Tom's Cabin*, was (in words attributed to Abraham Lincoln) the "little woman who wrote the book that started" the Civil War. His brother, Henry Ward Beecher, was (like their father, Lyman Beecher, before them) America's most influential preacher. And in 1889, upon Thomas Beecher's death, Crystal's parents jointly assumed the church pastorate that Beecher had held for thirty-five years.¹⁹

In Elmira, Crystal and her brothers Max and Anstice grew up in a home that embraced the tenets of nineteenth-century reform movements, the woman's movement principal among them. At least in part at Crystal's insistence, the household "was run on feminist principles"; there was, as she later explained, "no such thing in our family as boys' work and girls' work."²⁰ As a 15-year-old, Crystal had read a paper – "Woman" – at a lakeside symposium on the woman's movement organized by her mother. And Crystal scandalized the community by refusing to sacrifice her enthusiasms for the sake of community ideas about how girls ought to behave, "wearing bathing suits without the customary stockings and skirts," in the words of her biographer, and refusing to ride horses sidesaddle.²¹ Taking the woman's movement's goal of "woman's rights" as her standard, Eastman's upbringing was organized around the importance of the rights of individual, unencumbered by the happenstance of such things as gender. As Annis told her children from early on, the ideal of the Eastman household and of nineteenth-century American reform movements from abolition and married women's property laws to temperance was that each human being "be an individual." "Nothing you can gain," Annis warned them, "will make up for the loss of yourself." The "conformity of the crowd" was anathema where it involved the individual's "sacrifice of principle."²²

¹⁹Max Eastman, *Heroes I Have Known* 1-15 (1942); Blanche Wiesen Cook, "Introduction" to *Crystal Eastman on Women & Revolution* 4 (1978); Sylvia A. Law, "Crystal Eastman: NYU Law Graduate," 66 *NYU L. Rev.* 1963 (1991).

²⁰Eastman, *Heroes I Have Known*, 8-9.

²¹Cook, "Introduction" to *Women & Revolution*, 9.

²²Crystal Eastman, "Mother-Worship," in *Women & Revolution*, 41-46.

By the late nineteenth century, however, the nineteenth-century American reform tradition into which Crystal was born had begun to lose its way. The abolition of slavery had removed the tradition's greatest campaign, and although a few abolitionists turned to address the "wage slavery" of northern capitalism, relatively little moral fervor coalesced around such alternative forms of labor exploitation.²³ In the Beecher family alone, Harriet Beecher Stowe had moved from writing *Uncle Tom's Cabin* to running a Florida plantation worked by poorly-paid black agricultural workers.²⁴ Closer to Elmira, Henry Ward Beecher had been brought low by the media spectacle of his apparent affair with the wife of a prominent parishioner.²⁵ To be sure, the woman's movement that had begun at Seneca Falls continued. But the New Departure for women's suffrage and political equality that the leaders of the nineteenth-century Woman's Movement had pursued beginning in the 1870s had sputtered; despite a modest string of successes in western states from 1887 to 1896, not a single state had enfranchised women between 1896 and 1910.²⁶ As Max would later remark about Mark Twain, by the turn of the century old Elmira and the nineteenth-century reform tradition seemed more and more like they "belonged to the 'old regime.'"²⁷

In the new century into which Crystal came of age, Americans were beginning to grope toward new ways of articulating the relationships between individuals and their communities – ways that sought to reject the abstract rights claims and individualism of nineteenth-century liberalism in favor of a historicized conception of society and politics as organic, evolving, and deeply interdependent phenomena.²⁸ After her graduation from Vassar, Crystal plunged into the center of this new conversation about

²³See David Brion Davis, *The Problem of Slavery in the Age of Revolution* (1975).

²⁴See Joan D. Hedrick, *Harriet Beecher Stowe: A Life* (1994);

²⁵See Richard Wightman Fox, *Trials of Intimacy: Love and Loss in the Beecher-Tilton Scandal* (1999);

²⁶ Sylvia A. Law, "Crystal Eastman: Organizer for Women's Rights, Peace, and Civil Liberties in the 1910s," 28 *Val. U. L. Rev.* 1305, 1310 (1994);

²⁷Eastman, *Enjoyment of Living*, 330.

²⁸See Morton G. White, *Social Thought in America: The Revolt Against Formalism* (1949); Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* (1977); James Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (1986); Dorothy Ross, *The Origins of American Social Science* (1991);

social politics in European and American thought. With the encouragement of her mother, Crystal entered Columbia University to pursue a graduate degree in political economy beginning in the fall of 1903. And although Eastman would spend only a year at Columbia, while there she took two courses each with the men who had made Columbia a center for the study of new ideas in economics and sociology: John Bates Clark, pioneering economist and co-founder of the iconoclastic American Economic Association, and Franklin Henry Giddings, a leading sociologist.²⁹

Clark, like many other prominent late nineteenth-century American economists, had done graduate work in economics in Germany in the 1870s, where he developed a deep respect for socialist ideas that emphasized cooperation over individualism. The German school of historical economics in which Clark studied argued that classical economists such as Ricardo and Malthus had failed to account for the apparent growth of poverty and inequality in industrializing economies. As history veered toward greater and greater interdependence, the German historicists argued, the state would be required to take on wider and wider responsibilities in economic life. Clark quickly came to agree. By the time he returned to the United States, Clark was convinced of the “beauty” and “altruism” of “the socialistic ideal” as against the selfish advancement of the strong over the weak in individualism. Over time, Clark would pull back from his endorsement of socialist principles; by the time Eastman arrived at Columbia, Clark had become better known for his groundbreaking ideas in the field of marginalist economics. But Clark remained a committed – if moderate – progressive into the twentieth century.³⁰

Giddings’s influence on Eastman appears to have been still more important. Giddings was a leader in the use of statistical techniques in the study of society; as one scholar later put it, Giddings sought to make sense of social phenomena “in terms of chance and probability.”³¹ As the holder of the first chaired professorship in sociology in the United States, Giddings

²⁹Letter from Annis Ford Eastman to Catherine Crystal Eastman, July 16, 1903, box 5, folder 132, CCE Papers, Schlesinger Library, Harvard University; Transcript of Catherine Crystal Eastman, June 8, 1904, on file with Columbia University.

³⁰Ross, *Origins of American Social Science*, 106-22.

³¹F.H. Hankins, “Franklin Henry Giddings, 1855-1931: Some Aspects of His Sociological Theory,” 37 *J. Am. Sociology* 349, 359 (1931).

conceived his subject not as the study of individuals in isolation, but as the study of individuals in the variety of collective groups in which they inevitably found themselves. Sociology was “the phenomena presented by aggregations of living beings,” as Giddings put it in an article he drafted while Eastman was enrolled in his classes, for aggregation was the constant fact of social life.³² Society, in Giddings’s conception, was an “organization for the promotion of . . . efficiency by means of standardization and discipline,” a “norm” that functioned to control “the variations from itself” such that individual behaviors would generally be found “clustering” around it.³³ Within the structures of “social pressure” that constituted modern social life, eighteenth and nineteenth-century individualism and natural rights ideas were simply beside the point. “The aggregation of human beings into communities” necessarily occasioned “restrictions of liberty.”³⁴ Indeed, individualism in the nineteenth-century sense was little more than the “riotous” use of power by those who had it.³⁵ Natural rights ideas, in turn, were mere “legal forms of freedom” that had given rise to “conditions of great and increasing inequality.”³⁶ To be sure, Giddings was no socialist – “Utopian collectivism” was as distasteful to him as individualism run amok.³⁷ But a “third and middle view,” which combined the cautious use of the state with reasonable competitive freedoms, could ensure the proper mix of liberty and equality. Ultimately, the proportions of restraint and liberty that were “conducive to the general welfare” turned on the “normal social constraint” in the community and the “stage of its evolution” in history.³⁸ This was the “supremely important question in all issues of public policy,” and no doubt it would be difficult

³²Franklin H. Giddings, *Studies in the Theory of Human Society* 144-53 (1922).

³³Clarence H. Northcott, “The Sociological Theories of Franklin H. Giddings,” 24 *Am. J. Soc.* 1 (1918).

³⁴Franklin H. Giddings, “The Concepts and Methods of Sociology,” 10 *Am. J. Sociology* 161, 161 (1904).

³⁵F.H. Giddings, “Social Self-Control,” 24 *Pol. Sci. Q.* 569, 574, 579, 581, 588 (1909)

³⁶Franklin H. Giddings, “The Measurement of Social Pressure,” 11 *Pubs. Of the Am. Stat. Ass’n* 56, 56 (1908)

³⁷Franklin H. Giddings, Book Review, 17 *Pol. Sci. Q.* 704, 706 (1902).

³⁸Franklin H. Giddings, “A Theory of Social Causation,” 5 *Pubs. Of the Am. Econ. Ass’n* (3rd Series) 139, 167-68 (1904).

to discern in particular cases.³⁹ What Giddings was certain of, however, was that the instruments of the social policy maker were the insights of sociology and statistics, not old nostrums about rights and individualism.⁴⁰

Eastman may not have imagined that she would put Giddings's ideas to use so quickly. In 1904, she left Columbia after what may either have been a bad final examination experience or an encounter with Giddings's increasingly dim view of the place of women in public life.⁴¹ She decided instead to go into the law. It was a bold decision for a woman in 1904 and 1905. Of all the major American professions, law was probably the most unwelcoming to women. In 1872, when the U.S. Supreme Court upheld Illinois's refusal to admit Myra Bradwell to the state bar, Associate Justice Joseph P. Bradley explained that "nature herself" had made women unfit to enter into the bar; their "paramount destiny and mission" was service as wives and mothers.⁴² Although Bradwell was soon admitted to practice in Illinois by a change in the state's law, no women were admitted to practice law in the Eastman's home state of New York until 1886. By 1910, there were only 133 women among the 17,000 lawyers across the state, and only 558 women among the more than 114,000 lawyers nationwide. Even as late as 1920, women would make up 5 percent of all physicians and 4.7 percent of all scientists, but only 1.4 percent of all lawyers in the country.⁴³

Columbia's law school did not admit women, but the law school at New York University did. By the time Crystal enrolled there in 1905, New York University had become the leading school for training women lawyers in the United States.⁴⁴ Crystal quickly became part of a close-knit circle of early women lawyers with whom she just as quickly developed a deep enthusiasm for the law. "I am even more wild than before to be a lawyer,"

³⁹Franklin H. Giddings, "The Natural Rate of Wages," 2 *Pol. Sci. Q.* 620, 621 (1887).

⁴⁰Franklin H. Giddings & Agnes Mathilde Wergeland, "The Ethics of Socialism," 1 *Int'l J. Ethics* 239 (1891).

⁴¹Letters from Annis Ford Eastman to Catherine Crystal Eastman, box 5, folder 139, Crystal Eastman Papers.

⁴²*Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

⁴³Virginia G. Drachman, *Sisters in Law: Women Lawyers in Modern American History* 2, 252 (1998); Department of Commerce, Bureau of the Census, *Population 1910: Thirteenth Census of the United States . . . Volume IV, Occupational Statistics* 54, 136-37 (1914).

⁴⁴Drachman, *Sisters in Law*, 256; Law, "Crystal Eastman: NYU Law Graduate," 1977.

she confided her brother. By her second year of two at law school she had emerged as one of the school's leading students – the second vice-president of the class, a champion of law school causes, and friend of everyone from faculty members to the school janitor.⁴⁵

For Eastman, as for so many woman lawyers in the twentieth-century, success in law school did not translate into professional success after graduation. She sought out a law office where she could get “started with a good practice.” “My mind is just tingling to get to practicing law,” she wrote to Max.⁴⁶ In particular, she picked out the prosecution of negligence cases and personal injury suits on behalf of plaintiffs as the speciality she would like to pursue. The field of employee injuries was notoriously hostile to plaintiffs. Injured employees faced a number of legal hurdles to winning a case against their employers. Relatively few employees chose to sue, and practicing in the field offered little remuneration and even less prestige. Nonetheless, Eastman came to believe that in such cases “a lawyer has every chance of winning before a jury if he . . . knows the business.”⁴⁷ Yet it turned out that she could not get work in even a relatively low-prestige and poorly-paid area of the law such as personal injury practice. Her connections to a few reform-minded New York lawyers like the prominent socialist Morris Hillquit and leading labor lawyer George W. Alger failed to produce employment prospects. In fact, the refusal of male lawyers to practice with women effectively kept her out of the profession altogether. Crystal Eastman would never actually practice law.⁴⁸

Instead, after taking the bar exam in the summer of 1907, Eastman went to Pittsburgh in the fall of 1907 to begin what was scheduled to be a two-month investigation of industrial accidents and the law for the Pittsburgh Survey, a survey of social conditions in the nation's most important industrial city. Her friend Paul Kellogg, an editor and progressive reformer with whom she had an ongoing flirtation, had hired

⁴⁵Letter from Crystal Eastman to Max Eastman, Nov. 28, 1904, box 6, Crystal Eastman Papers; Letters from Crystal Eastman to Annis Ford Eastman: Dec. 17, 1906, April 18, 1907, and June 8, 1907, box 6, Crystal Eastman Papers.

⁴⁶Crystal Eastman to Annis Ford Eastman, Oct. 10, 1907, box 6, Crystal Eastman Papers; Crystal Eastman to Max Eastman, Oct. 17, 1907, box 6, Crystal Eastman Papers.

⁴⁷Crystal Eastman to Annis Ford Eastman, Oct. 17, 1907, box 6, Crystal Eastman Papers; CE to AFE, Apr. 21, 1908, box 6, Crystal Eastman Papers.

⁴⁸CE to ME, Oct. 4, 1911 and Oct. 17, 1911, box 6, Crystal Eastman Papers.

her on to the project.⁴⁹ And though her interest in practicing law initially made her a reluctant participant, she soon began to turn with more and more energy to the investigation of industrial accidents. Here was work that tapped both her legal training and her training in sociology. “Strange to say,” she noted to her mother, “my spirits thrive on all this atmosphere of death and destruction.” “Statistics,” it turned out, the “records of tragedies” that she collected in the coroners’ office, were not so much depressing as “interesting to me sociologically.” Her two month engagement turned into a full year, and she spent the first half of 1908 bringing Giddings’s statistical empirics to the study of work accidents, tabulating hundreds of injuries and fatalities into carefully presented tables documenting the human wreckage of the steel mills, coal mines, and railroads of western Pennsylvania.⁵⁰

In fact, although Eastman seems to have had only the vaguest sense of this when she began the Pittsburgh study, industrial accidents provided an ideal field for bringing the new currents in sociological thought to bear on the law. When she arrived in Pittsburgh in the fall of 1907, the United States was entering the fourth decade of an industrial accident problem like none that had ever existed anywhere in the world. The relative absence of safety regulations in American industrial work, relatively expensive labor and capital, and a law of employers’ liability that made employee injuries relatively inexpensive for employers had combined to make American work accident rates far greater than those of other industrializing nations. And by the first decade of the twentieth century, leading lawyers, politicians, and muckraking journalists alike had begun to focus public attention on the problem.⁵¹

Critics of the law of employers’ liability, as the field was known, argued that it was based in the nineteenth-century rights-based thinking that sociologists like Giddings were now describing as antiquated at best. Nineteenth-century jurists had sought to develop the law of torts as a kind of applied discipline in liberal political theory that would uphold each individual’s right to act as he pleased so long as he did not do harm to

⁴⁹John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* 126-31 (2004).

⁵⁰Crystal Eastman to Annis Ford Eastman, Sep. 21, 1907, box 6, Crystal Eastman Papers; Crystal Eastman, *Work-Accidents and the Law* (1910); Witt, *The Accidental Republic*, 143-44.

⁵¹Witt, *Accidental Republic*, 22-42.

others. Employees could generally recover compensation from their employers in work accident cases only if they could show that the employer had acted outside the scope of its rightful sphere of action by injuring the employee through some negligent or intentionally harmful act. If the employer had acted within its rights (or if the employee had acted outside his rights by a negligent act of his own), the employee could not recover. The employee's tort case against the employer thus turned on an inquiry into the relative rights and duties of the parties. Yet such inquiries all too often proved intractable. For one thing, it was extraordinarily time-consuming and costly to conduct trials into the nuances of the parties' behavior. Perhaps more troublingly, it seemed increasingly apparent that a significant percentage of work accidents could not be traced to the fault of anyone at all. Even where no one seemed to have acted outside of their rights, injuries occurred. Such injuries were simply the inevitable fallout from dangerous work, and whether or not they could be attributed to some individual or institution's fault, the existence of a grave social problem – the destitution of thousands upon thousands of families each year – seemed abundantly clear.⁵²

Between 1908 and 1910, Eastman did as much as any American lawyer to direct public discourse about work accidents away from tortured inquiries into the rights and duties of employer and employee. Beginning in the 1880s, western European nations – first Germany, then England and then France, had enacted workmen's compensation statutes that sought to eliminate questions of right and duty and to instead provide injured workers with a kind of guaranteed insurance payment.⁵³ Injured employees were not made whole – that is, compensation levels sought merely to provide for their needs, not to restore them to the status quo ante as if in response to a violation of their rights. But for Eastman as for Giddings before her, talk of rights was largely a futile exercise. Employee injuries were not so much a problem of conflicting rights and duties as a problem of “national economy.” “Each year” turned out industrial injuries just “as surely as the mills ran full and the railroads prospered.” Yet the “American System” of distributing accident costs “on the basis of old individualistic legal theory”

⁵²Witt, *Accidental Republic*, 43-70.

⁵³See Rodgers, *Atlantic Crossings*.

made a “necessary national loss” into “an absolutely unnecessary amount of national deprivation.”⁵⁴ What was needed was nothing short of a revolution in the way American law dealt with the problem, and the statistical methods Eastman had learned in graduate school were (she decided) “good stuff” with which to “start a revolution.” Statistics would establish that “justice between individuals” was a quixotic aim in the work accident field. All the law could do was to seek “a distribution of the loss which shall be to the best interests of all concerned.” Workmen’s compensation statutes would vindicate the social interests that Eastman saw as the proper aim of twentieth-century accident law.⁵⁵

Eastman’s newfound prominence brought her to the attention of the growing number of lawmakers interested in substituting workmen’s compensation’s insurance system for tort law’s rights and duties. “The book of fame,” as she put it to Max, was unrolling for her.⁵⁶ By late 1908 she was actively sought after for speaking engagements and articles on a topic that was quickly moving to the forefront of the political agenda. And in June 1909, at the suggestion of one of her professors at Vassar, Governor Charles Evans Hughes named her secretary to the Wainwright Commission, appointed to investigate the problem of work accidents in the State of New York and to recommend new legislation to address it.⁵⁷ Completion of her work on the Pittsburgh Study prevented Eastman from participating as fully in the work of the Commission as she might have liked. But her imprint on the Commission’s influential report – significant portions of which were allocated to her for drafting – was abundantly evident.⁵⁸

Indeed, as the workmen’s compensation movement got underway,

⁵⁴Crystal Eastman, “The American Way of Distributing Industrial Accident Losses: A Criticism,” 10 *Pubs. Of the Am. Econ. Ass’n* (3rd Series) 119, 119-26 (1909).

⁵⁵Crystal Eastman, “The Three Essentials for Accident Prevention,” in *Women & Revolution*, 280, 281-82; Eastman, *Work-Accidents and the Law*, 84, 188, 218.

⁵⁶Crystal Eastman to Max Eastman, Mar. 24, 1909, box 6, Crystal Eastman Papers.

⁵⁷Crystal Eastman to Annis Ford Eastman, Mar. 28, 1908, box 6, Crystal Eastman Papers; CE to ME, June 15, 1909, box 6, Crystal Eastman Papers; AFE to CE, May 3, 1909, folder 159, box 5, Crystal Eastman Papers.

⁵⁸The Reminiscences of John Spargo 174 (Oral History Research Office, Columbia University, 1957); “Division of Work on Report” (undated memorandum), folder for 1909-1912, Box 6, J. Mayhew Wainwright Papers, New-York Historical Society; Crystal Eastman to J. Mayhew Wainwright, Nov. 13, 1909, folder for July-December 1909, Wainwright Papers.

the nineteenth-century legal tradition of liberal, rights-based jurisprudence came to seem a chief obstruction to efforts to rationalize the law of workplace accidents. Legislation purporting to regulate the employment contract had all too often been struck down by courts as unconstitutional interference with rights of contract and liberty. As Eastman observed soon after the commission's proposed statute had gone into effect in the fall of 1910, provisions in the nation's state and federal constitutions that had been "originally intended . . . to safeguard the rights of the people" now served instead "to deny the rights of the people."⁵⁹ In March 1911, nine months after the New York workmen's compensation law went into effect, the state's highest court struck the statute down as a violation of employers' constitutional rights. The rights tradition of American law had once again obstructed the sociological rationalization of the law.⁶⁰

For many, the decision of the New York court set off a search for ways to accommodate workmen's compensation statutes to the constitutional rights of employers. For Eastman, however, the court's decision marked the end of her involvement in sociological law reform. It had come at a difficult time for her. Her mother, Annis, died of a stroke in October. In January, Eastman came down with one of the illnesses that would plague her for the rest of her life, causing her to return home to Elmira and break off her work with the Wainwright Commission. To be sure, she had fallen in love with a young man named Wallace Benedict, who shared her interest in the insurance industry. But already in early 1911 she was beginning to dread the impending move from the eclectic excitement of New York to "Bennie's" home town of Milwaukee.⁶¹

Then in March, a day after the New York court struck down the workmen's compensation law on which she had labored, the infamous Triangle Shirt-Waist Fire killed 146 people, many of them young women working behind the locked doors and ill-secured fire escapes of the Triangle Waist Company.⁶² The fire, she wrote Max, "sank into my soul," giving

⁵⁹Crystal Eastman, "Work-Accidents and Employers' Liability," in *Women & Revolution*, 269, 278-79.

⁶⁰*Ives v. South Buffalo Railway*, 74 N.E. (N.Y. 1911); Witt, *The Accidental Republic*, ch. 6.

⁶¹Witt, *Accidental Republic*, 180-84; Commission Staff to J. Mayhew Wainwright, Jan. 30, 1911, folder for 1911, box 6, Wainwright Papers.

⁶²See Leon Stein, *The Triangle Fire* (William Greider ed., 2001) (1962); David von Drehle, *Triangle: The Fire that Changed America* (2003).

rise to a “constant stirring sense of tragedy and horror.” Combined with the court decision of the previous day, the Triangle Fire seemed to raise starkly the ways in which the social reform of American law had run headlong into the institutions of the nineteenth-century state. Eastman’s sociological skepticism about rights and her progressive reform optimism about the capacity of rationalized, sociologically-informed legal institutions now gave way to a newly fiery radicalism. “Benevolent talk about workingmen’s insurance and compensation” might “appease our sense of right,” but after events like the Triangle Fire, Eastman announced, “what we want is to start a revolution.”⁶³

Within two years, Eastman left Milwaukee and indeed the United States altogether for a European tour with Bennie in tow. In Europe, she would come into contact with the beginnings of an internationalist movement for woman’s suffrage, a movement that sought to transcend the boundaries of the nation-states that had so long excluded women from full citizenship.⁶⁴ What she could not have guessed then was that the new internationalist venture on which she embarked would soon bring her back around to the relationship between individual rights and the new institutions of the modern state. This time, however, she would be a crucial figure in the conversion of the internationalist impulse into the modern American civil liberties tradition. Through the looking glass of internationalism, she would reach back into the available stock of nineteenth-century legal-liberal forms to elaborate the quintessential strategy for resistance to the modern state she had helped design.

II

On August 29, 1914, 1500 women paraded silently down Fifth Avenue in New York City from Fifty-Eighth Street to Seventeenth Street. An “intense hush prevailed” along the parade route, reported the *New York*

⁶³Crystal Eastman to Max Eastman, Feb. 6, 1911, box 6, Crystal Eastman Papers; Crystal Eastman to Max Eastman, Apr. 3, 1911, box 6, Crystal Eastman Papers; Eastman, “Work-Accidents and Employers’ Liability,” 281.

⁶⁴Crystal Eastman to Max Eastman, n.d. (1913?), and Crystal Eastman to Max Eastman, March 29, 1913, box 6, Crystal Eastman Papers; Crystal Eastman, “Suffragists Ten Years After,” in *Women & Revolution*, 132.

Herald, broken only by the “dirge-like roll of the muffled drums” that accompanied the marchers. The great mass of the marchers were “robed in black,” wrote the *New York Times*. In contrast, the banner carriers, carrying a banner of a dove with an olive branch, were dressed in white with black arm bands. “There were women of all nations,” from India and China to Russia and Germany, “but they all wore the mourning symbol to show that” notwithstanding the war that had broken out in Europe, “they marched not as nations, but as sorrowing women together.”⁶⁵

The Woman’s Peace Parade, as the march became known, marked the beginnings of World War I and of a movement against American intervention in the Great War. Over the course of the next two years, the parade – of which Crystal Eastman had been an organizer – gave rise to a host of like-minded organizations opposed to the war and to the United States’s possible intervention in it. With Eastman’s help, Chicago social worker and public intellectual Jane Addams and American woman’s suffrage leader Carrie Chapman Catt formed the Woman’s Peace Party in January 1915. Eastman herself – along with her old friend Paul Kellogg and the prominent settlement house leader Lillian Wald – organized the American Union Against Militarism in December 1915 and January 1916. Similar associations (with almost all of which Eastman had significant contact) included the Union for Democratic Control, the People’s Council, the American Conference for Democracy and Terms of Peace, the American League to Limit Armaments, the American Neutral Conference Committee, the Emergency Peace Federation, and the Fellowship of Reconciliation, all of which sprung up in the period between 1914 and 1917 in hopes of discouraging American entry into the war.⁶⁶

Perhaps only nationalist prejudices can explain the failure of American historians to identify more strongly the beginnings of the civil liberties movement with the moment of international engagement out of which it arose. The Woman’s Peace Parade Committee and the

⁶⁵Lillian D. Wald, *Windows on Henry Street* 286 (1937); C. Roland Marchand, *The American Peace Movement and Social Reform* 182-84 (1972); “Protesting Women March in Mourning,” *New York Times*, Aug. 30, 1914, p. 11.

⁶⁶Marchand, *American Peace Movement*; Charles Chatfield, *For Peace and Justice: Pacifism in America, 1914-1941* (1971); Charles DeBenedetti, *Origins of the Modern American Peace Movement, 1915-1929* (1978). Alan Dawley’s *Changing the World: American Progressives in War and Revolution* (Princeton, 2003) is unfortunately marred by a number of errors and should only be used with great caution.

organizations that followed in its wake formed the American wing of what international lawyer Nathaniel Berman has called “international legal modernism.”⁶⁷ Indeed, when Crystal Eastman and colleagues like Addams and Wald took up the fight against militarism and war in 1914, their efforts were the culmination of more than four decades of ideas in the United States and in Europe about the development of new international legal structures. And as the symbolism of the 1914 parade indicated, among the most important of these ideas was the notion that sovereign nation states ought to be subordinated at least in part to those international institutions.

Discussions among “internationalists,” as they typically called themselves, often began with an observation that (in a variety of related forms) has continued to be made ever since, right up into discussions of twenty-first-century globalization. Technology, they announced, had made the world a smaller place. As Eastman’s teacher Giddings was fond of observing, the extension of “communication throughout the world” by means of a century of technological advances, from the steam ship and the railroad, to the telegraph, the telephone, and the wireless radio had brought the nations, races, and civilizations of the world into much closer contact than ever before.⁶⁸ International treaties and fledgling international organizations followed. European nations signed a multilateral convention on telegraph communications in 1865; the Universal Postal Union followed nine years later; and in 1890, European diplomats crafted a uniform law for the international transport of goods by rail.⁶⁹

All told, the century following the end of the Napoleonic Wars witnessed the promulgation of an extraordinary outpouring of international treaties: some 16,000, by one count.⁷⁰ Many of these were traditional bilateral treaty agreements between states. An increasing number of them were multilateral, law-making treaties on issues ranging from tariffs, copyrights, and patents, to the treatment of war wounded. The crowning

⁶⁷Nathaniel Berman, “‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law,” 106 *Harv. L. Rev.* 1792, 1798 (1993).

⁶⁸Franklin H. Giddings, “The Heart of Mr. Spencer’s Ethics,” 14 *Int’l J. Ethics* 496, 499 (1904); Franklin H. Giddings, “Imperialism?,” 13 *Pol. Sci. Q.* 585, 596 (1898).

⁶⁹Gerald J. Mangone, *A Short History of International Organization* 67-97 (1954); David S. Patterson, *Toward a Warless World* 11-12 (1976); Sondra R. Herman, *Eleven Against War: Studies in American Internationalist Thought, 1898-1921*, pp. 10-21 (1969); Warren F. Kuehl, *Seeking World Order: The United States and International Organization to 1920*, p. 87 (1969).

⁷⁰Arthur Nussbaum, *A Concise History of the Law of Nations* 191 (1947).

achievements of the multilateral agreements of the late nineteenth century international lawyers were the Hague Conferences of 1899 and 1907. Initiated by Czar Nicholas II, who secretly feared that he would be unable to keep up in the European arms race, the Conferences sought (among other things) to create international agreements for the peaceful resolution of disputes among nation states. And although the agreements on this point that emerged from the Conferences were hedged with reservations, the First Conference produced a Permanent Court of Arbitration for the pacific resolution of international disputes. The Second Conference, in turn, strengthened the Court of Arbitration and authorized the creation of an International Prize Court to decide disputes over vessels and cargo seized on the high seas.⁷¹ Much remained to be done, but participants believed that much progress had been made; indeed, as the closing address of the Second Conference stated, the Conference had made the “greatest” progress “that mankind has ever made” toward “the maintenance of peaceful relations between nations.”⁷²

The Hague Conferences quickly captured the hearts and minds of the international lawyers. Already for several decades, the gradual development of international institutions had encouraged “a new professional self-awareness and enthusiasm” among international lawyers in Europe and in the United States, committed to the spreading of what a small but enthusiastic young group of European lawyers in 1867 called “*l’esprit d’ internationalité*.”⁷³ By the end of the next year, a cadre of international lawyers from England, Italy, and the Netherlands had begun publishing a professional journal, the *Revue de droit international et de législation comparée*. A professional association, the Institut de Droit International, was founded in Belgium in 1873; in the same year, another group of European international lawyers formed the Association for the Reform and Codification of the Law of Nations. Internationalism, in short, was developing an organized constituency with a professional self-

⁷¹Calvin DeArmond Davis, *The United States and the First Hague Peace Conference* (1962); Calvin DeArmond Davis, *The United States and the Second Hague Peace Conference* (1975).

⁷²Calvin DeArmond Davis, *The United States and the First Hague Peace Conference* (1962); Calvin DeArmond Davis, *The United States and the Second Hague Peace Conference* (1975); Mangone, *History of International Organization*, 127.

⁷³Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* 4, 12-19 (2001).

consciousness.⁷⁴

American internationalists followed fast on the heels of the European international lawyers. Peace advocates, leading businessmen, and international lawyers gathered beginning in 1895 for an annual Conference on International Arbitration at Lake Mohonk in the foothills of New York's Catskill Mountains to discuss alternatives to armed conflict in the resolution of disputes among nations.⁷⁵ The next year, eminent figures in business, education, the ministry, law, medicine, and the armed forces held an American Conference on International Arbitration in Washington; they reconvened at a Second American Conference in 1904, at which labor unions, chambers of commerce, and the mayors and governors of dozens of cities and states expressed their ardent support for the arbitration of international disputes.⁷⁶ In 1905, a group of international lawyers at the Lake Mohonk Conference established the American Society for International Law.⁷⁷ The American Association for International Conciliation (1906) was founded to "awaken interest" in "international law, international conduct, and international organization." The New York Peace Society (1906) brought together men of affairs in New York City, as did similar associations in places like Boston, Buffalo, Chicago, and Maryland. A National Peace Congress met in New York in 1907, spinning off new peace and arbitration advocacy groups of its own, including the American School Peace League, dedicated to teaching "broad ideas of international justice, universal brotherhood, and world organization" in American schools. In July 1910, wealthy publisher Edward Ginn founded the World Peace Foundation with a grant of \$1 million, and in December of the same year, Andrew Carnegie endowed the Carnegie Endowment for International Peace with a massive \$10 million gift.⁷⁸

⁷⁴Id.

⁷⁵Kuehl, *Seeking World Order*, 41-43.

⁷⁶*The American Conference on International Arbitration Held in Washington, D.C., April 22 and 23, 1896* (New York, Baker & Taylor Co. 1896); *The Second American Conference on International Arbitration Held in Washington, D.C., January 12, 1904* (1904).

⁷⁷Marchand, *American Peace Movement*, 39, 3, 10, 100-14.

⁷⁸American Association for International Conciliation, *Official Documents Looking Toward Peace* (1917); *The Peace Society of the City of New York* (1908); Jay William Hudson, *What is the New Internationalism?* (Massachusetts Peace Society, 1915); Buffalo Peace and Arbitration Society, *First Report of the Executive Committee and Treasurer* (1911); *Report of the Chicago Peace Society, 1912* (1913); James Brown Scott, "Judicial Proceedings as a Substitute for War or International Self-Redress,"

From the proliferation of American international law and peace organizations came what one historian has called a “veritable flood of plans for world courts, world federation, and world government.”⁷⁹ Indeed, American international lawyers adopted a utopian exuberance. The formation of international law societies and other developments in the field of international law led many American international lawyers – along with any number of their peers across the Atlantic – to believe that they were watching the dawning of a “new internationalism” in which war between nation states would be rendered obsolete as a mechanism for the resolution of international disputes.⁸⁰ A century of relative peace had brought forth a new system of relations among states, symbolized by the Hague Conferences. In the Permanent Court of Arbitration as a machinery for the “friendly settlement of international disputes,” internationalists saw the progressive substitution of “the empire of law” for the “anarchy” of state rivalries.⁸¹ And with the example of the Hague Conferences before them, American internationalists found themselves involved in an increasingly heady new conversation about what Nicholas Murray Butler — following the European lawyers’ *esprit d’internationalité* — began to call “the international mind.”⁸² As early as 1889 and 1890, Secretary of State James Blaine had described an agreement to arbitrate disputes among western hemisphere nation states as the new “Magna Charta” of international peace.⁸³ President McKinley announced at his inauguration in 1897 that the “importance and moral influence” of arbitration among states could “hardly be overestimated in the cause of advancing mankind.”⁸⁴ Indeed, other commentators suggested that arbitrations of nation-state disputes

in *Maryland Quarterly*, Feb. 1910; Larry L. Fabian, *Andrew Carnegie’s Peace Endowment: The Tycoon, the President, and their Bargain of 1910* (1985).

⁷⁹Marchand, *American Peace Movement*, 23.

⁸⁰Davis, *United States and the Second Hague*, 19.

⁸¹ John Hay & Elihu Root, Instructions to the American Delegates to the Hague Conferences, 1899 and 1907, p. 9 (World Peace Foundation Pamphlet Series, vol. 3, no. 4, 1913).

⁸²Nicholas Murray Butler, *The International Mind: An Argument For the Judicial Settlement of International Disputes* (1912); Nicholas Murray Butler, *L’Esprit International: Considérations sur le Règlement Juridique des Différends Internationaux* (1914).

⁸³Hamilton Holt, “A League of Peace,” in John Whiteclay Chambers, *The Eagle and the Dove* 17, 18 (2nd ed. 1991).

⁸⁴M.A. Stobart, *Women and War* 18 (World Peace Foundation Pamphlet Series, vol. 3, no. 2, 1913).

would complete “the process of substituting law for war,” vindicate the possibility of a “spiritual evolution for mankind,” and give life to an “all-embracing” idea of “brotherly love” and a “bond of union transcending national, racial or color lines.”⁸⁵ International arbitrations would give rise to “nothing less than a court of the nations” to decide disputes among peoples “according to eternal principles of law and equity,” argued President William Howard Taft.⁸⁶ “Never before,” announced an advocate of the “new internationalism,” had “there been such a universal revulsion against force as a means of settling international quarrels.”⁸⁷ War, Andrew Carnegie declared upon the formation of his Endowment for International Peace, had been “discarded as disgraceful to civilized men,” much as dueling and slavery had been discarded in the century before.⁸⁸ The “glorious example of reason and peace,” McKinley explained, would at last triumph over “passion and war.” And as leading American international lawyers like Elihu Root observed again and again, the United States – as the world’s greatest and freest republic – seemed to have an unequalled “power and influence” in this “new era of the law of nations” to bring about “peace and justice” and “civilization and brotherhood for all mankind.”⁸⁹

Yet there were actually at least two distinct internationalisms at work in early twentieth-century American thinking. Many elite international lawyers – and preeminently Elihu Root – took up the orthodox version of American internationalism. As Secretary of War under McKinley and then Secretary of State under Theodore Roosevelt, Root had helped to craft the United States’s renewed engagement with the world after a century of relative isolation. He shaped U.S. authority and defended U.S. interests in Cuba, the Philippines, and Puerto Rico after the Spanish-American War. In 1907, he co-sponsored a Central American Peace Conference that established the Central American Court of Justice. And in

⁸⁵Louis P. Lochner, *Internationalism among Universities* 12 (World Peace Foundation Pamphlet Series, vol. 3, no. 7 1913).

⁸⁶William Howard Taft, “World Peace and the General Arbitration Treaties,” in Chambers, *Eagle and the Dove*, 21, 22.

⁸⁷Hudson, *What is the New Internationalism*, 3.

⁸⁸*Carnegie Endowment Year Book for 1911*, p. 3 (1912). The analogy of the abolition of war to the abolition of slavery was a commonly made one. See, e.g., Walter L. Fisher, “Preparations for Peace,” Sen. Doc. No. 323, 64th Cong., 1st sess., February 4, 1916; Hay & Root, *Instructions to the American Delegates*, 9.

⁸⁹Hay & Root, “Instructions to the Delegates.”

that same year he orchestrated American involvement in the Second Hague Conference. Indeed, for his efforts as secretary of state and as a U.S. Senator thereafter, and for his work as the president of both of the American Society of International Law and the Carnegie Endowment, Root was awarded the Nobel Peace Prize for 1912.⁹⁰

Root's conception of internationalism viewed the sovereignty of nation states as the foundational building blocks of international law. The law of nations, on the orthodox view, was organized around the practices and agreements of sovereign states. "The independence of nations," Root wrote in his Nobel Prize Address of 1912, "lies at the basis of the present social organization of the civilized world."⁹¹ As "between two mutually exclusive sovereignties," he had explained three years earlier in a presidential address to the American Society for International Law, "each is supreme and subject to no compulsion on its own side of the line." The world was therefore "not ready" for a "parliament of man with authority to control the conduct of nations," nor for "an international police force with power to enforce national conformity to rules of right conduct."⁹² Instead, those seeking to work for peace, Root explained, were best advised to "stand behind the men who are in the responsible positions of government."⁹³

If truth be told, even Root's nineteenth-century orthodoxy made room for international constraints on the sovereignty of nation-states. On Root's account, international law assumed the consent of all states to a minimal baseline standard of conduct. Nations "in the exercise of their individual sovereignty" were required to conform to "a standard of international conduct" deduced from the "universal postulate" that "every sovereign nation is willing at all times and under all circumstances to do what is just."⁹⁴ Like a Lockean social contract writ global, the implied

⁹⁰Philip C. Jessup, *Elihu Root* (2 vols., 1964); Herman, *Eleven Against War*, 22-54.

⁹¹Elihu Root, "Nobel Peace Prize Address," in *Addresses on International Subjects by Elihu Root* 153, 157 (Robert Bacon & James Brown Scott eds., 1916).

⁹²Elihu Root, "The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts," in *Addresses on International Subjects*, 33, 34.

⁹³Elihu Root, "The Causes of War," in *Miscellaneous Addresses by Elihu Root* 275, 277 (Robert Bacon & James Brown Scott eds., 1917).

⁹⁴Root, "International Tribunals of Arbitration," 35-36. On the private law analogy, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 68-73 (1989); David Kennedy, "International Law and the Nineteenth Century: A History of an Illusion," 17

consent of nation states to this baseline standard created theoretical constraints on the sovereignty of states even under Root's orthodox approach to the law of nations.

The second strand of American internationalism, however, focused much more explicitly on creating international constraints on the nation state. "To trust traditional political 'organization' to create peaceful relations between nations," argued advocates of this second strand of internationalism, inevitably involved "reliance upon" precisely the "exaggerated nationalistic and power politics" that had caused crises between rival powers in the first place.⁹⁵ Radical internationalists like John Dewey and Jane Addams thus sought to move beyond the building-blocks of nation states to new international structures. And as Dewey's inclusion in the ranks of the radical internationalists suggests, this second approach to internationalism brought to bear the skeptical force of pragmatic thinking on the concept of the nation state. Jane Addams warned that "nationalistic words" and "patriotic phrases" were "abstractions" with dangerous power. Disputes among nations, she argued, were like international conventions for railroads, telegraphs, and commercial paper; they required solutions that "transcended national boundaries" and they could not be solved "while men's minds were still held apart" by the "national suspicions and rivalries" that nation-states so often generated.⁹⁶ It was those suspicions and rivalries that made the legal fiction of nation states – "artificial units of loyalty," as Max Eastman put it – so dangerous.⁹⁷ Indeed, nation-state rivalries, argued Addams's colleague Norman Thomas, ensured that no nation could prepare to defend itself without "awaken[ing] suspicion" among its neighbors, who would be forced to "keep up a race in armaments" that would lead to regular "nationalistic struggles."⁹⁸ What the radical internationalists like Addams offered instead, as Max Eastman put it in 1916, was a world in which

Quinnipiac L. Rev. 99, 113 (1997).

⁹⁵John Dewey, "Democratic versus Coercive International Organization," in Addams, *Peace and Bread*, xv.

⁹⁶Jane Addams, "The Revolt Against War," in *Women at the Hague: The International Peace Congress of 1915*, pp. 69, 72 (Mary Jo Deegan ed., 2003); Addams, *Peace and Bread*, 51-52.

⁹⁷Max Eastman, "What Is Patriotism and What Shall We Do With It?," in *Toward the Great Change: Crystal and Max Eastman on Feminism, Antimilitarism, and Revolution* 239, 246-47 (1976); see also S.L. Friedenberg, *An Appeal for International Union* 3 (1915).

⁹⁸Untitled Partial Typescript, n.d. [October 1916?], Norman Thomas Papers, New York Public Library; Norman Thomas to Dr. Laidlaw, Mar. 15, 1917, p. 2, Norman Thomas Papers.

humanity would break the cycle of competitive rivalries to “join together in international union.” War, he urged, might thus be eliminated “exactly as wars of family and clan and city” had been “eliminated by national union.”⁹⁹

As World War One approached, Crystal Eastman joined the increasingly vocal cadre of radical internationalists who argued that nationalism (though only recently a positive force for the self-determination of peoples) had become a Trojan horse for militaristic arms races among European powers. There were, to be sure, a variety of different approaches to internationalism even within the radical wing of American internationalism. Norman Thomas held a Christian-pacifist “internationalism based on the universal brotherhood of the children of God.”¹⁰⁰ Others came to internationalism from the perspective of a socialist critique of the state.¹⁰¹ Still others were latter day James Madisons, seeing in the relationships among states in the American federal system a principle that might be extended among nation states.¹⁰² Some, like one American conscientious objector in August 1917, claimed simply that “internationalism” was their “only principle.”¹⁰³ What this eclectic array of radical internationalisms agreed upon, however, was that nationalism all too often and all too easily gave way to militarism, which was an especially virulent form of nationalism. Militarism was “the aggressive spirit and unfriendly point of view toward other nations,” which created “parochial hostility,” “national aggression,” and a “national psychology of fear,” all of which led “inevitably . . . to conflict.” In its place, Eastman and the radical internationalists advanced a conception of cosmopolitan democracy as the “mutual recognition of the rights of other men, irrespective of creed, color or national boundaries.” Their internationalist aim was thus to create transnational institutions that would contain the threat of militarism by

⁹⁹Eastman, “What is Patriotism,” 246-47.

¹⁰⁰Norman Thomas to Members of the Fellowship of Reconciliation, April 23, 1917, p. 3, Norman Thomas Papers.

¹⁰¹See “The Psychological Examination of Conscientious Objectors” [Dec. 1918?], reel 82, Norman Thomas Papers; “3,000 Would Rather Die than Fight,” *New York Journal*, Sep. 4, 1917, reel 6, vol. 46, *ACLU Archives*;

¹⁰²Walter L. Fisher, “Preparations for Peace,” Sen. Doc. No. 323, 64th Cong., 1st sess., February 4, 1916.

¹⁰³“Refuses to Serve in Draft Army,” *Boston Advertiser*, *ACLU Archives*, reel 1, vol. 4.

eclipsing the ostensibly unquestioned authority of nation states in the orthodox nineteenth-century view of international law.¹⁰⁴

During the two and a half years between August 1914 and March 1917, Eastman became perhaps the leading organizer of the radical internationalist movement. By early 1916, she was serving as the Executive Secretary of the American Union Against Militarism and as the chair of the active New York City branch of the Woman's Peace Party. Both organizations adopted the positions of the radical internationalists, opposing the militarism of nation-state rivalries and supporting a world federation to transcend them. The Peace Party sought to serve as a world-wide "clearing-house" for internationalist ideas during the war. It urged the democratization of foreign policy; the abrogation of secret treaties; and the nationalization of arms manufacture to remove commercial incentives to the whipping-up of nationalist fervor.¹⁰⁵ The American Union, in turn, pursued a nearly identical program to "work against militarism" and to build "toward world federation, which alone would make disarmament possible, and which alone could really root out militarism."¹⁰⁶

The American Union developed into America's most important radical internationalist organization, with Eastman (in Lillian Wald's words) as its "wonderful secretary."¹⁰⁷ Eastman worked to ensure that all of the "energy and genius" of the Union would "be directed toward putting this idea of a world federation into workable form, acceptable to all nations." As she conceived it, the American Union's aim was to "keep the ideal of internationalism alive and growing in the minds and hearts of the American people."¹⁰⁸ Indeed, the organization's international program was lifted almost directly from the eclectic array of ideas that had been bandied about by American and European internationalists for decades: self-determination; equal treatment for all nations; a "Society of Nations"

¹⁰⁴Speech by Amos Pinchot (n.d.), *American Union Against Militarism*, reel 1 (Scholarly Resources, Inc.: published in cooperation with the Swarthmore Peace Collection, 2001) ("*AUAM Papers*").

¹⁰⁵"A Statement on Preparedness," reel 101, folder 1.1, Lillian D. Wald Papers, Columbia University.

¹⁰⁶"Proposed Announcement for the Press" [fall 1917?], reel 1, *AUAM Papers*.

¹⁰⁷Marchand, *American Peace Movement*; Lillian D. Wald to Amos Pinchot, March 13, 1917, Wald Papers;

¹⁰⁸Crystal Eastman, "A Platform of Real Preparedness," in *Women and Revolution*, 241, 246; "Statement to the Press" (n.d.), *AUAM Papers*, reel 1.

developed through the Hague Conference, along with a “permanent Court of International Justice” to strengthen the existing Hague Court of Arbitration; reductions in armaments; the voiding of secret treaties; and the removal of restraints on international trade. Members of the American Union protested the war’s diversion of public attention away from “World Peace based on International Agreement” and called for a “democratic federation of American republics as a step toward international government.”¹⁰⁹ They testified, as Eastman did before Congress in January 1916, against the creeping militarism that had created a dangerous arms race.¹¹⁰ And they urged the President to take up the so-called Hensley Resolution in the Naval Appropriation Act of 1916, authorizing the President to convene a Conference of Nations for disarmament. Eastman and her colleagues advocated such policies as they believed would be steps toward what she called in her congressional testimony “unnationalism”: a “federation of nations” dedicated to “democracy, to peace, and to their mutual good will and friendship.”¹¹¹

Of course, the radical internationalists’ ideas were often utopian and impractical. But it is important to remember they were no more so than many of the ideas that had been spinning out of internationalist conversations on both sides of the Atlantic. Radical internationalism was continuous with the international lawyers’ *esprit d’internationalité*. Indeed, the radicals of 1914 to 1917 drew their inspiration from virtually the same set of developments that had been sending international lawyers into flights of fantastic rhetoric for the previous half-century. Like international lawyers since the 1870s, Crystal Eastman’s Woman’s Peace Party of New York City, for example, pointed to the development of the Universal Postal Union and the International Telegraphic Union and to the proliferation of international commercial associations such as the International Congress of Chambers of Commerce. The world, it seemed, was growing smaller; according to orthodox and radical internationalist alike, it was “already in

¹⁰⁹“Resolution Introduced by Miss Wald,” Oct. 24, 1916, reel 102, folder 2.3, Wald Papers; Charles T. Hallinan to Lillian D. Wald, Jan. 11, 1915 [1916?], reel 102, folder 2.2, Wald Papers; David Starr Jordan to Lillian D. Wald, March 6, 1917 (enclosure), Wald Papers.

¹¹⁰Commission for Enduring Peace, *Hearings Before the Committee on Foreign Affairs, House of Representatives, 64th Cong., 1st Sess., on H.R. 6921 and H.J. Res. 32, January 11, 1916*, pp. 9-10 (1916).

¹¹¹“Proposed Announcement for Press” (n.d.) [fall 1917?], p. 3, Wald Papers.

large measure internationalized.” And like Andrew Carnegie just a few years before, Eastman and her colleagues cited the international condemnation of slavery in the nineteenth century as demonstration of the moral progress that international action could achieve in the newly close quarters of the twentieth.¹¹²

In fact, the same questions of nation state sovereignty and of the citizen’s obligations to work through the official channels of the state that divided the orthodox internationalists from the radicals reappeared within ostensibly radical organizations like the Woman’s Peace Party and the American Union. In the latter organization, for example, leading members like Lillian Wald and Paul Kellogg believed strongly in working through the instrumentalities of the national government to advance their internationalist aims. Congressional hearings, “personal work with congressmen,” and discrete advocacy with the President Wilson and his Secretary of War Newton Baker were their preferred methods of action. The American Union therefore kept up into early 1917 a campaign of private advocacy and personal meetings with Wilson, Baker, and others in the Wilson Administration.¹¹³

Eastman, by contrast, took up the radical wing of even the nation-state skeptics in the internationalist movement. She was, Wald suggested, enamored of an “impulsive radicalism.”¹¹⁴ (Members of the WPP quietly warned that she was too radical to “greatly help the movement.”¹¹⁵) Eastman’s more confrontational tactics included propaganda campaigns, national speaking tours, and mass meetings. By the spring of 1916, she was organizing a public exhibit that included Jingo the Dinosaur (“All Armor Plate – No Brains,” read the collar on the paper-mâché caricature of militarist nationalism), whose aggressive personality and tiny brain had led to its own extinction. A speaking tour through the mid-west followed, reaching an estimated 40,000 listeners. By May, Eastman had collected the names of 5,000 supporters and distributed over 600,000 “pieces of propaganda.” Internationalism, she insisted, was a movement to be pursued

¹¹²H.A. Overstreet, “The Next Step in International Control,” *Four Lights*, April 7, 1917, New York Public Library.

¹¹³Lillian D. Wald to Newton Baker, June 20, 1917, Wald Papers; Lillian D. Wald to Emily Balch, May 23, 1917, Wald Papers; Kennedy, *Over Here*, 34-36.

¹¹⁴Lillian D. Wald to Crystal Eastman, Aug 26, 1917, reel 1, *AUAM Papers*.

¹¹⁵Marchand, *American Peace Movement*, 219, 243.

by “the people acting directly – not through their governments or diplomats or armies.”¹¹⁶

Internationally-minded women like Eastman had good reason to adopt a stance of skepticism toward the official channels of the nation state. As woman’s movements across Europe and in the United States had observed throughout the nineteenth century, states had long excluded them from full membership. Annis Ford Eastman, for one, had noted long before that women (and especially married women) had at best a complicated relationship to the conventional categories of nation-state citizenship. States typically disabled women from service as soldier, property owner, voter, officer of the court, or public official.¹¹⁷ Indeed, in 1916, Eastman encountered first-hand the liminal status of women in the modern nation state when she divorced Bennie and married Walter Fuller, a citizen of Great Britain whom she had met through their joint involvement in the early stages of the American Union. By virtue of a law enacted by Congress in 1907¹¹⁸ and upheld by the Supreme Court in the year before Eastman’s marriage,¹¹⁹ American women automatically took the nationality of their husbands. As a result, Eastman herself – though still living in the United States – was stripped of her U.S. citizenship when she married Walter. It should hardly be surprising, then, that many women adopted confrontational tactics – publicity, mass meetings, and direct action by the people – that skirted the official channels of the state. The state, after all, had long made it exceedingly difficult for women to act through those official channels. And just as many American women by the 1910s – Eastman included – were being drawn to the radical suffragist tactics of the British suffragettes, so too were they drawn to such tactics in the

¹¹⁶Chatfield, *For Peace and Justice*, 23; Anti-Preparedness Committee Typescript (n.d.), reel 1, *AUAM Papers*; Crystal Eastman to Lillian D. Wald, May 29, 1916, reel 102, folder 2.3, Wald Papers; Crystal Eastman to Lillian D. Wald, May 27, 1916, reel 102, folder 2.3, Wald Papers; Thomas J. Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* 63 (1992).

¹¹⁷Annis Ford Eastman, “Women’s Relation to Good Citizenship,” folder 86, box 4, Crystal Eastman Papers.

¹¹⁸An Act in Reference to the Expatriation of Citizens and their Protection Abroad, 34 Stat. 1228, § 3 (1907).

¹¹⁹MacKenzie v. Hare, 239 U.S. 299 (1915).

internationalist campaign against militarist nationalism.¹²⁰

For Eastman and many other women in internationalist circles, women's persistent second-class citizenship highlighted the dangers of the nation state and its nationalist symbols. In the journal *Four Lights*, the magazine of the Woman's Peace Party of New York City, Eastman and her colleagues attacked the nation state as a kind of artificial superstition. "Long ago," wrote one *Four Lights* author, "we drew 'imaginary' lines over our globe . . . we put deep-printed lines over latitudes and longitudes, believing that lines can separate the nations of the earth." Over time, those imaginary lines had hardened into divisions among peoples, "conceiving those across our crooked lines as hostages, enemies, or at best, remote and unlike peoples." The "foolish little boundaries" of imaginary maps, however, were now under attack from a band of "Internationalists" who were "as disturbing to your nationalistic Flatlander as the witches to Salem." On the internationalist view, *Four Lights* explained, the "boundary lines of nations are as imaginary as the equatorial line"; the people on the other side were "neighbors and friends instead of strangers and enemies."¹²¹ Indeed, the internationalist agenda, as Eastman and the *Four Lights* editors of the Women's Peace Party of New York City conceived it, was no less than "to destroy geography" by "welding the nations of the world into the United States of the World."¹²²

¹²⁰Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 45-112 (1998); Nancy F. Cott, "Justice for All? Marriage and the Deprivation of Citizenship in the United States," in *Justice and Injustice in Law and Legal Theory* 77, 87-89 (Austin Sarat & Thomas R. Kearns eds., 1996); Virginia Sapiro, "Women, Citizenship, and Nationality: Immigration and Naturalization Policies in the United States," 13 *Politics & Society* 1, 10-11 (1984); Marchand, *American Peace Movement*, 194-208. In 1922, the Cable Act authorized women who lost their citizenship under the 1907 legislation to seek re-naturalization, but there is no evidence that Eastman took advantage of the opportunity. The 1922 statute (which was prompted by women voters newly enfranchised by the Nineteenth Amendment in 1920) did not automatically restore what the 1907 statute had taken away. See 67 Stat. 411, § 4 (1922). On the relationships between gender and internationalism in the late nineteenth and early twentieth centuries, see Gail Bederman, *Manliness and Civilization* (1995); Kristin L. Hoganson, *Fighting For American Manhood: How Gender Politics Provoked the Spanish-American and Philippine-American Wars* (1998); Harriet Hyman Alonso, *Peace as a Women's Issue: A History of the U.S. Movement for International Peace and Women's Rights* (1993); Kristen Hoganson, "As Badly Off as Filipinos?: U.S. Women's Suffragists and the Imperial Issue at the Turn of the Twentieth Century," 13 *J. Women's Hist.* 9 (2001); Judith Papichristou, "American Women and Foreign Policy: 1898-1905," 14 *Diplomatic History* 493 (1990).

¹²¹Edna Kenton, "Bounded on the North, South, East, and West," *Four Lights*, Jan. 27, 1917.

¹²²"To George Washington and Patrick Henry: Greetings!," *Four Lights*, March 10, 1917. Eastman and the Woman's Peace Party of New York were not complete utopians. "There will still be numerous independent sovereign nations" after the war was finished, they conceded, but at the very least the war's end could bring into being some kind of international structures to mediate the militarist

What women-led antiwar organizations had done was to sharpen two decades' worth of growing skepticism about a nineteenth-century abstraction. But it was not skepticism about the abstraction of rights. It was instead skepticism about that other great nineteenth-century legal abstraction: the sovereignty of nation states, which in internationalist circles had come already to seem little more than an abstract "relic from an earlier era," as international lawyer Louis Henkin would later describe it, made up of "fictions upon fictions."¹²³ Here was one of the most dangerous of "a priori truths," in Addams's words, a fiction that inspired "violent loyalty" and caused "men in a nation, an army, a crowd" to do things "horrible as well as heroic that they could never do alone."¹²⁴ The nation had become a kind of "metaphysical entity," complained Norman Thomas, "apart from the individuals who compose it."¹²⁵ Rights might have been a nineteenth-century idea newly vulnerable in an era of war and pragmatism, but so too was the state. As Germany resumed unrestricted submarine warfare in January 1917, conditions in the United States were right for a collision between the obligations of loyalty exacted by the nation state, on one hand, and internationalist ideals of an evolving cosmopolitan citizenship, on the other. That collision would initiate the twentieth-century civil liberties movement.

III.

It was one thing to question the form of the nation state in 1916, to describe it as a dangerous legal fiction, and to call for its eclipse by new systems of international governance. But once the United States entered the war in April 1917, questions about citizens' obligations to the state were no longer merely theoretical. Among U.S. internationalists, intervention in the

rivalries that had brought the war on. A.D., "Friendly Relations Commissions," *Four Lights*, Apr. 7, 1917.

¹²³Louis Henkin, *International Law: Politics and Values* 8-10 (1995).

¹²⁴Addams, "Revolt Against War," 73-74.

¹²⁵Norman Thomas to Alfred T. Carton, Sep. 7, 1917, Norman Thomas Papers. For the point that claims of national attachment and obligation should be treated as skeptically as claims of natural individual right, see Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," 25 *U. Mich. J. L. Reform* 751, 781 (1992).

war thus precipitated a scramble for a position between loyalty and internationalism. “After war was declared, we of course ceased all opposition to it,” explained one member of the American Union.¹²⁶ At the Woman’s Peace Party, the reaction was the same: “All the activities of the Woman’s Peace Party have been, of course, modified by entrance into the World War.”¹²⁷ And as far as Crystal’s long-time friend Paul Kellogg was concerned, he was “not blocking the prosecution of war, now that the decision has been made against me.”¹²⁸ The loyalty obligations of the nation state, in short, seemed to many to trump the internationalist agenda. In the words of Elihu Root, “the question of war and peace” had “now been decided by the President and congress.” “The question thus no longer remains open,” Root concluded, and it had become the duty of American citizens “to stop discussion upon the question decided” lest criticism weaken the power of the nation to “succeed in the war upon which” it had entered.¹²⁹ As William R. Vance, dean of the University of Minnesota Law School, summed up in 1917, “wartime was no time to quibble about constitutional rights and guarantees.”¹³⁰ Indeed, the mere “suggestion” of opposition to conscription – a position that had formed one of the American Union’s deepest commitments – now seemed to many no different than “treason,” and its advocates “traitors” to “be dealt with accordingly.”¹³¹

Whether the American Union would be able to identify an intermediate position between loyalty and internationalism seemed to turn in large part on the Wilson administration’s wartime stance toward the radical internationalists. As a rhetorical matter, at least, Wilson often allied himself with radical internationalists such as Addams and Eastman. As far back as the 1880s, Wilson had tentatively endorsed the idea that the world was witnessing a gradual evolution toward “confederation” among states on

¹²⁶“Development” (typescript, n.d.), reel 1, *AUAM Papers*.

¹²⁷Addams, *Peace and Bread*, 107.

¹²⁸Crystal Eastman, Typescript, June 14, 1917, reel 1, *AUAM Papers*.

¹²⁹*Address by Elihu Root, Chicago, September 14, 1917*, pp. 3-5 (National Security League, Patriotism Through Education Series No. 17, 1917); Elihu Root, “Foreign Affairs, 1913-1916,” in *Addresses on International Subjects*, 427-28.

¹³⁰H.C. Peterson & Gilbert C. Fite, *Opponents of War, 1917-1918*, p. 79 (1957).

¹³¹“Christian Pacifists are Given Cold Shoulder,” reel 4, *ACLU Archives*; “They Who Play With Fire,” *Grand Rapids Press*, May 31, 1917, reel 4, *ACLU Archives*; “Speaking of Conscientious Objectors,” *Army & Navy News*, Sep. 6, 1917, reel 6, vol. 47, *ACLU Archives*.

the model of the United States. He taught International Law at Princeton in 1892. In 1908 he joined the American Peace Society.¹³² And once war broke out in 1914, he appealed to Americans to remain “neutral in fact as well as in name,” while privately endorsing the idea of “an association of nations” and opening a dialogue with peace organizations such as the Carnegie Endowment and the League to Enforce Peace.¹³³ In 1916, Wilson privately assured a delegation from the American Union that he was working toward a “joint effort” on a world-scale to “keep the peace”; two months later, he came out publicly in favor of the principle of a “League of Peace” by which the “nations of the world” would “band themselves together to see that . . . right prevails.” And in his famous “Fourteen Points” speech to the Senate in January 1917, he called again for an international “concert of power which would make it virtually impossible that any such catastrophe should ever overwhelm us again.” Indeed, Wilson’s vision for a postwar order often looked remarkably like that of internationalists in the American Union. To allow nationalistic ambitions to shape the peace would be merely to ensure the resurgence of the national rivalries that had caused it in the first place. Instead, Wilson urged a peace based on the “equality of rights” among nations; “free access” for all nations to the seas and to international commerce; and the “limitation of armies” and of “military preparation.”¹³⁴ Moreover, many of his public addresses seemed, like Eastman’s antimilitarist tactics, to skirt the official channels of nation-state diplomacy. Wilson spoke eloquently of reaching “the peoples of Europe over the heads of their Rulers”; as he told one correspondent, his “Peace Without Victory” speech was addressed not to the Senate, nor even to “foreign governments,” but to “the *people* of the countries now at war.”¹³⁵ Wilson, in short, seemed to have embraced the hopeful idealism of the pre-war internationalist spirit. And not surprisingly, leaders of the American Union and the Woman’s Peace Party thus saw in Wilson’s bold internationalist rhetoric of 1916 and 1917 their own aspirations for post-war international order. Even as late as the beginning

¹³²Harley Notter, *The Origins of the Foreign Policy of Woodrow Wilson* 43 (1937).

¹³³John Milton Cooper, Jr., *The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt* 273 (1983); Ruth J. Bartklett, *The League to Enforce Peace* (1944).

¹³⁴36 *The Papers of Woodrow Wilson* 645 (Arthur S. Link et al. eds. 1966-1994).

¹³⁵37 *Papers of Woodrow Wilson*, 115; 40 *Papers of Woodrow Wilson*, 534-38.

of 1918, for example, Crystal and Max supported the President, endorsing “his demand for an international union, based upon free seas, free commerce and general disarmament.”¹³⁶

In practice, however, Wilson proved to be an ardent believer in Root’s orthodox approach to the relationship between states and individuals in the law of nations. Wilson claimed that the United States had entered the war to pursue the “vindication of right, of human right,” the “rights of mankind.” But those rights were to be advanced on the international stage by vindicating the rights not of individuals but of nation states. “We shall be satisfied,” Wilson told the assembled joint session of Congress, when human rights “have been made as secure as the faith and the freedom of nations can make them.” In the final analysis, Wilson’s internationalism aimed to ensure the “rights and liberties” of “nations great and small,” and in particular “the most sacred rights of our nation.”¹³⁷ His “concert of free peoples” was just that – an association of *peoples* organized in nation states for the purpose of bringing “peace and safety to all nations.” And when the war came to the United States, Wilson became a powerful (if occasionally reluctant) believer in the overriding power of citizens’ obligations of loyalty to the state. War, he warned Frank Cobb of the *New York World* in March 1917, would require “illiberalism at home to reinforce the men at the front.” “The Constitution,” Wilson continued, “would not survive it,” and “free speech and the right of assembly would go,” too.¹³⁸ And by May 1917, merely a month after American entry into the war, Wilson had already begun to shut down the conversations that he had helped to start about the shape of post-war internationalism. They were, he answered, “very unwise” while the war was still pending.¹³⁹

With the Wilson administration’s approval and encouragement, state and federal governments alike enacted new legislation to enforce the loyalty to the nation required of citizens. Congress in February 1917 had debated legislation to punish those who intentionally caused disaffection in

¹³⁶Crystal Eastman & Max Eastman, “Editorial,” in *Women & Revolution*, 290, 291; Knock, *To End All Wars*, 11-12.

¹³⁷41 *Papers of Woodrow Wilson*, 520-26;

¹³⁸Arthur S. Link, “That Cobb Interview,” 72 *J. Am. Hist.* 7, 11-12 (1985).

¹³⁹Cooper, *The Warrior and the Priest*, 330.

the armed forces, or who intentionally interfered in military operations.¹⁴⁰ With the declaration of war on April 6, such legislation became a virtual certainty. Congress authorized selective conscription, which Wilson put into effect by requiring registration of all men ages twenty-one to thirty on June 5.¹⁴¹ The Espionage Act, enacted June 15, authorized criminal prosecution of spies and of anyone who obstructed recruitment or enlistment, or who caused or attempted to cause insubordination or disloyalty in military or naval forces.¹⁴² By the same Act, materials violating the Act or otherwise “urging treason” were “declared to be nonmailable matter” not to be delivered by the Postmaster General.¹⁴³ The Trading with the Enemy Act limited commerce and communication with enemies of the United States.¹⁴⁴ Amendments to the Espionage Act in May 1918 prohibited disloyal or abusive language about “the form of government in the United States,” or its flag, uniforms, or military or naval forces.¹⁴⁵ From Montana and Texas to Minnesota and Nebraska, similar developments produced dozens of new laws at the state and municipal level banning expressions of opposition to the war.¹⁴⁶

Postmaster General Albert S. Burleson and Attorney General Thomas Gregory enforced the new legislation with an enthusiastic abandon that the New York *World* called “an intellectual reign of terror in the United States.” “May God have mercy” on dissenters from the nation’s war plans, thundered Gregory, “for they need expect none from an outraged people and an avenging government.”¹⁴⁷ Between 1917 and the end of 1921, the federal government would commence more than 2,000 prosecutions under the Espionage Act. Dozens of foreign language newspapers were shut down under authority extended to Burleson pursuant to the Trading with the

¹⁴⁰*To Punish Espionage and Interference with Neutrality: Hearings Before the Committee on the Judiciary, House of Representatives, 64th Congress 6* (1917).

¹⁴¹Bulletins of the American Union Against Militarism, February 1917, reel 101, folder 1.1, Wald Papers.

¹⁴²40 Stat. 76, §5 (1917).

¹⁴³*Id.*

¹⁴⁴40 Stat. 411 (1917).

¹⁴⁵40 Stat. 553 (1918).

¹⁴⁶Peterson & Fite, *Opponents of War*, 18, 213-14; Eldridge Foster Dowell, *A History of Criminal Syndicalism Legislation in the United States* (1939)

¹⁴⁷Peterson & Fite, *Opponents of War*, 142, 95.

Enemy Act. Newspapers such as the conservative socialist Milwaukee *Leader* were denied mailing privileges, as were 74 other newspapers by the fall of 1918. Even the eminently respectable *Nation* was barred from the mails on Burleson's order until Wilson stepped in and reversed it.¹⁴⁸ The August 1917 issue of Max Eastman's avant-garde radical journal *The Masses* was declared unmailable by Burleson and Gregory for its anti-war cartoons and its opposition to the draft. After an order by U.S. District Judge Learned Hand ordering Burleson to mail the issue was stayed and overturned by the Court of Appeals, Burleson revoked *The Masses* second-class mailing privileges altogether for having missed an issue and thus failing to remain a "periodical" within the meaning of the second-class mail law.¹⁴⁹

Private and quasi-private patriotism were often as powerful a force as the authority of the state. Ad hoc vigilante gangs and patriots – organizations like the American Defense Society, the American Protective League, the National Liberty League, the Liberty League, the Knights of Liberty, the American Rights League, and the Boy Spies of America – smashed anti-war demonstrations, interrupted pacifist speaking halls, and lynched men suspected of pro-German leanings.¹⁵⁰ The more respectable National Security League held events urging national loyalty and condemning those whom Theodore Roosevelt (who would become increasingly outspoken in his nationalism during the war) called "weaklings, illusionists, materialists, lukewarm Americans and faddists of all the types that vitiate sound nationalism."¹⁵¹ Security League speakers were supplemented by the thousands of speakers ("Four Minute Men," as they were known) who operated out of the federal government's Committee on Public Information. Headed by former journalist George Creel, the CPI spearheaded a massive propaganda campaign in the form of an extraordinary 75 million pamphlets and as many as 6000 press releases, virtually all broadcasting the importance of national loyalty in time of

¹⁴⁸Harry N. Scheiber, *The Wilson Administration and Civil Liberties, 1917-1921*, pp. 30, 63 (1960).

¹⁴⁹Max Eastman, *Love and Revolution* 61 (1964); *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

¹⁵⁰Peterson & Fite, *Opponents of War*, 18; Geo. H. Greenfield, "Democracy's Battle" (n.d.), p. 6, reel 4, *ACLU Archives*; "Press Statement" [July 1917], reel 4, *ACLU Archives*.

¹⁵¹Cooper, *Warrior and the Priest*, 331.

war.¹⁵² As one Security League speaker summed up the message of the patriotic campaign of 1917, the nationalist view was that “citizenship means everything or nothing.” Citizens “should refrain from fractious criticism,” speakers cautioned, and openly display their support for the war effort lest they be mistaken for the kinds of “unconditional traitors” who hid treasonous attitudes beneath an outward display of silence.¹⁵³ And in the new post-war atmosphere, those whom Roosevelt and his nationalist allies scorned as “professional internationalists” were most at risk.¹⁵⁴ Treasury Secretary William McAdoo declared in October 1917 that advocacy of internationalism during wartime was “in effect traitorous.”¹⁵⁵ Others expressed the same sentiment in less civilized fashion, scrawling slogans like “Treason’s Twilight Zone” on the doors to the American Union’s offices.¹⁵⁶

For Crystal Eastman and her American Union colleagues, the wartime atmosphere of mandatory loyalty to the nation state made it extraordinarily important to determine “the logical, courageous, and at the same time law abiding” role for internationalists. “Extreme patriots would have us go out of business,” she observed, while “extremists of another sort” would surely put them all “in the federal penitentiary.” Moreover, many items on the American Union’s pre-war agenda were now “impracticable,” opposition to entry into the war not the least among them.¹⁵⁷ Yet as the spring of 1917 wore on, a new role seemed increasingly available. Woodrow Wilson, as historian John Blum has noted, “turned his back on civil liberties . . . because he loved his vision of the eventual peace more.”¹⁵⁸ But what if the radical internationalists had been right about the importance of skirting the official channels of the nation state? If radically

¹⁵²Kennedy, *Over Here*.

¹⁵³Henry Litchfield West, *Universal Military Training as a Permanent Principle of National Defense* 3 (1918); S. Stanwood Menken, *A Concept of National Service* 3 (National Security League, Patriotism Through Education Series No. 27, 1918);

¹⁵⁴Alfred M. Brooks, *Converted and Secret Americans* (National Security League, Patriotism Through Education Series No. 30, 1918).

¹⁵⁵Knox, *To End All Wars*, 169.

¹⁵⁶Chatfield, *For Peace and Justice*, 4.

¹⁵⁷“Development” (typescript, n.d.), reel 1, *AUAM Papers*; “Memorandum of Organization” [April 1917?], p. 2, reel 67, Norman Thomas Papers.

¹⁵⁸John Morton Blum, *Woodrow Wilson and the Politics of Morality* 144 (1957).

democratic interventions in foreign policy were really necessary to avoid the drift toward militarist nationalism, nongovernmental organizations like the American Union would have to be able to articulate views other than those approved by the state. The very conversation about post-war internationalism that Wilson had started would have to be continued, whether Wilson approved of it or not. Yet if radical antimilitarists were to carry on their advocacy of a new internationalism in the place of the nation state, they should have to establish some kind of protection from the very authority they sought to displace.

In the spring of 1917, civil liberties emerged as the solution to the dilemma of the internationalists in wartime. As American Union member John Haynes Holmes would later remember, American entry into the war meant that disarmament and attendant internationalist goals were, “for the time being at least,” a “lost cause. But lo, as though to engage our liberal efforts afresh, there came suddenly to the fore in our nation’s life the new issue of civil liberties.”¹⁵⁹ Already in April, 1917, the American Union called for an “immediate anti-conscription campaign” and “cooperation in the defense of free speech and free assembly during the war.”¹⁶⁰ Americans might no longer be able safely to argue against the war effort, but they could surely work “to prevent and oppose all those extreme manifestations of militarism” that seemed certain to follow in war’s wake: “the brutal treatment of the conscientious objector,” “the denial of free speech,” and “the suppressing of minority press.”¹⁶¹ The resolution of the internationalist’s crisis, in short, was to fight “the general abrogation of civil liberty” that the war among nation states had brought in its wake. Indeed, such work, American Union leaders argued, was “the logical consequence of what we have been doing for two years.”¹⁶² As Eastman urged, the defense of conscientious objectors and the protection of civil liberties had a “natural and logical place in the progress of our activities.” The American Union, in her view, was the “logical group to defend the other American

¹⁵⁹John Haynes Holmes, *I Speak for Myself: The Autobiography of John Haynes Holmes* 189 (1959).

¹⁶⁰Memoranda of Organization [April 1917?], p. 2, reel 67, Norman Thomas Papers.

¹⁶¹“Development” (typescript, n.d.), reel 1, *AUAM Papers*.

¹⁶²Minutes of the Meeting of June 4, 1917, reel 1, *AUAM Papers*.

liberties, free speech, free press and free assembly.”¹⁶³

As the organization put it in a press release in the fall of 1917, a “Union Against Militarism becomes, during war time, inevitably a Union for Defense of Civil Liberty.”¹⁶⁴ In late June, the Conscientious Objectors’ Bureau of the American Union, which had been tentatively formed two months before, was remade into the “Civil Liberties Bureau.”¹⁶⁵ Even the name of the new American Union’s new bureau was drawn from the transatlantic internationalist conversation. Though the term “civil liberty” had long been a part of English and American law and political theory, its disaggregation into the plural “civil liberties” had been popularized just a year earlier by the British National Council for Civil Liberties. Walter Fuller, Eastman’s new husband, was closely connected to the British organization’s founders; he would later become its corresponding secretary. And in late June, the American Union adopted the National Council’s phrase, “Civil Liberties,” as its own. Roger Baldwin, a recent addition to the American Union staff who headed-up the new Civil Liberties Bureau, would later recall that the Bureau’s name represented “the first time that the phrase ‘civil liberties’ had been so used in the United States.” Within weeks, “civil liberties” had become the “chief war work” of the leading radical-internationalist organization.¹⁶⁶

For Eastman, the new emphasis on civil liberties was a continuation of the Union’s internationalist agenda. Since its founding, the Union had warned of the threats that militarism posed to domestic civil liberties. Now that war had materialized, however, the defense of civil liberties was a necessary precondition to the advancement of internationalist hopes. Norman Thomas argued that “the country which [suppresses civil liberties] will never commend democracy to the world.”¹⁶⁷ Drawing on ideas that had been advanced more than a century before by Immanuel Kant, Eastman further contended that all nations needed to “be democratized before a

¹⁶³Minutes of the June 15, 1917 Meeting, reel 1, *AUAM Papers*.

¹⁶⁴Proposed Announcement for the Press (n.d.) [fall 1917?], reel 1, *AUAM Papers*.

¹⁶⁵Minutes of the Meeting of June 4, 1917, reel 1, *AUAM Papers*; Crystal Eastman to Lillian D. Wald, June 18, 1917, reel 102, folder 2.4, Wald Papers; Minutes of the Executive Committee, June 25, 1917, reel 1, *AUAM Papers*.

¹⁶⁶Marvin Swartz, *The Union of Democratic Control in British Politics During the First World War* 51 (1971); Murphy, *World War I and the Origin of Civil Liberties*, 9.

¹⁶⁷Norman Thomas to Roger Nash Baldwin, reel 4, *ACLU Archives*.

federated world can be achieved.”¹⁶⁸ At the very least, it seemed clear, as a small but growing number of people ranging from the members of the Woman’s Peace Party of New York City to Senator Joseph I. France of Maryland noted, that “full free and continuous discussion” of matters of great public import – the nation’s war aims, peace terms, and treaty negotiations – required “freedom of the press” and “freedom of speech.”¹⁶⁹

Early efforts in the Civil Liberties Bureau aimed to advance the Union’s pre-existing internationalist agenda. The Bureau concentrated not on the defense of socialists, members of the Industrial Workers of the World, or other political radicals, but on the defense of conscientious objectors and the protection of the remaining strands of anti-militarist activism. Bureau insiders even sought to get the government to distinguish such radicals as the I.W.W. members from the “fine type” of conscientious objector who could be found in the nation’s universities and in whom the Bureau had invested its hopes for American internationalism.¹⁷⁰ Indeed, the Bureau and its allies in the internationalist camp often understood their use of civil liberties claims not as authentic expressions of a commitment to the virtues of the Bill of Rights, but rather as a means for the strategic advancement of the internationalist aspirations. Roger Baldwin of the American Union put it most cynically, perhaps, when he instructed a colleague “to get a good lot of flags” and “talk a good deal about the Constitution.”¹⁷¹ Nonetheless, Baldwin’s strategic appropriation of constitutional rights as symbols of American nationalism captured the spirit of the organization’s turn to civil liberties in 1917. The American Union had advocated international institutions for years precisely because those institutions seemed better able than nation states to secure human freedom and democracy. But in 1917 the organization’s members began to make claims in terms of the Bill of Rights rather than in terms of new international institutions.

¹⁶⁸Cook, “Introduction” to *Women & Revolution*, 20; Michael W. Doyle, “Kant, Liberal Legacies, and Foreign Affairs” (Parts I & 2), 12 *Philosophy & Public Affairs* 205, 323 (1983).

¹⁶⁹“Seven Congressmen on Preparedness,” reel 1, *AUAM Papers*; A Challenge Accepted (n.d.), reel 1, *AUAM Papers*; Chambers, *Eagle and the Dove*, 128; Handbill: “Who Has Been Imprisoned Under the Espionage Act?,” ACLU Subject Files, Wald Papers.

¹⁷⁰Oswald G. Villard, Typescript (n.d.), reel 102, folder 2.4, Wald Papers;

¹⁷¹1 *Revolutionary Radicalism: Its History, Purpose, and Tactics, . . . The Report of the Joint Legislative Committee . . . In the Senate of the State of New York, Part I . . .*, p. 1088 (1920).

Over the summer and fall of 1917, Eastman worked closely in the Union's civil liberties work alongside Roger Baldwin. As Baldwin would later recall, Eastman had been his "first associate in World War I days."¹⁷² They defended conscientious objectors and assisted in the legal defense of antiwar agitators. Eastman even developed an ambitious plan of test cases to try the "actual testing of the right to free speech" in those places in which it had been limited.¹⁷³ And yet Baldwin emerged as the leader of the Bureau. It was a development that had significant implications for the future of the relationship between the internationalist agenda and the fledgling civil liberties movement.

IV.

Eastman missed the beginnings of the American Union's war time move to civil liberties. On March 19, 1917, she gave birth to her first child, Jeffrey Fuller. The birth appears to have had lasting effects on Eastman's health. She had always been susceptible to sickness. When Eastman was 3, she and her older brother Morgan came down with scarlet fever. Morgan died, and though Crystal survived, she regularly suffered debilitating illnesses thereafter.¹⁷⁴ In 1911, she had broken off her engagement with the state employers' liability commission because of illness. In April 1916, she had become ill again during the Union's truth About Preparedness Tour, and was ordered "kept strictly in bed" for several weeks.¹⁷⁵ With Jeffrey's birth, Eastman developed a "chronic disease of her kidneys," as Max later described it, that would plague her until her death.¹⁷⁶ By March 1921, she would be forced to resign from the Executive Committee of the Bureau's successor, the American Civil Liberties Union. "I have always been too tired," explained the otherwise energetic Eastman.¹⁷⁷

¹⁷²The Reminiscences of Roger Baldwin 158 (Oral History Research Office, Columbia University, 1961).

¹⁷³Secretary's Recommendations (n.d.) [fall 1917?], reel 1, *AUAM Papers*.

¹⁷⁴Eastman, *Enjoyment of Living*, 45-49.

¹⁷⁵Crystal Eastman to Lillian D. Wald, April 11, 1916, reel 102, folder 2.3, Wald Papers.

¹⁷⁶Max Eastman to Lillian D. Wald (n.d.), Wald Papers.

¹⁷⁷Crystal Eastman to Roger Nash Baldwin, March 23, 1921, reel 24, vol. 68, *ACLU Archives*.

Her complicated pregnancy forced Eastman to take off more than two months beginning in mid-March 1917. They were a critical two months, spanning the beginning of American involvement in the war, and Eastman knew it. “I am crazy to get back on the job,” she wrote shortly after Jeffrey’s birth. There would be, she feared, “nothing left for me to do” by the time she got back.¹⁷⁸ Most troublingly, Eastman feared that in her absence the Union would adopt a new agenda taking the Union away from its radical-internationalist agenda. Baldwin, in particular, had suggested a new direction for the group that Eastman found wanting “in a great many respects.” She had hoped to meet with Baldwin before giving birth to Jeffrey and going to Atlantic City to convalesce, but Walter and her physician insisted that she not.¹⁷⁹

During Eastman’s absence, which continued into early June, 1917, Baldwin had indeed begun to establish himself as the new force in the Union. His extraordinary energies matched Eastman’s. And like Eastman, he had begun his career in sociologically-informed reform work. After graduation from Harvard College, he had gone to St. Louis to found the sociology department of Washington University and to run a neighborhood settlement house. While in St. Louis, Baldwin also became actively involved in the reform of the city’s criminal courts. What workmen’s compensation had been to Eastman, the new juvenile courts and probation systems were to Baldwin: new socialized systems for modernizing the nineteenth-century treatment of social problems. Like workmen’s compensation, juvenile courts aimed to replace cumbersome inquiries into individual rights and moral culpability with regimes of social-scientific expertise designed to provide for needs and manage populations. Expert “professional standards,” in Baldwin’s words, would replace traditional adjudication, which Baldwin had come to think of as simply “judicial interference.” While Eastman was counting injured workers in Pittsburgh, Baldwin helped to found the National Probation Officers’ Association. A few years later, he co-authored what would quickly become a leading text in the field of juvenile justice. Like Eastman, then, Baldwin came to the Union and to the Civil Liberties Bureau as someone who had helped to

¹⁷⁸Marchand, *American Peace Movement*, 255 n.80.

¹⁷⁹Crystal Eastman to Lillian D. Wald [April 1917?], reel 102, folder 2.4, Wald Papers; Crystal Eastman to Lillian D. Wald [April 1917?], reel 102, folder 2.3, Wald Papers.

construct the new institutions of the modern administrative state.¹⁸⁰

Nonetheless, despite their similar backgrounds in progressive era sociological reform, Baldwin and Eastman quickly developed an “uneasy” relationship to one another. For one thing, Baldwin was both more inclined and better positioned than Eastman to engage in the kind of quiet advocacy with government officials that colleagues like Lillian Wald favored. His Harvard education and elite background provided him close connections to insiders at the Department of Justice and the Department of War. Moreover, Baldwin came to the work of the Union with an essentially domestic outlook. Where Eastman had toured Europe, met with international woman’s suffrage leaders, and encountered European radicals in the cosmopolitan setting of New York City, Baldwin had gone to the relatively insular St. Louis. His frame of reference in the area of civil liberties was therefore not, as Eastman’s had been, the internationalist outlook of the woman’s suffrage movement. It was instead the domestic outlook of a reformer involved in causes such as Margaret Sanger’s efforts to educate Americans about birth control and the NAACP’s efforts to fight municipal housing segregation.¹⁸¹ To be sure, in his first months with the Union, Baldwin supported its core internationalist agenda. And much later in life, Baldwin would become deeply involved in the United Nations’s work for international human rights. “Nations,” he would go on to suggest in the 1970s, were “downright silly” – imaginary divisions, as Eastman had suggested sixty years before, of people into “geographical units” bounded by arbitrary lines and protected by armies.¹⁸² But in 1917, as Eastman had already begun to realize, significant differences of principle over internationalism increased within the Union upon Baldwin’s arrival.

¹⁸⁰Reminiscences of Roger Baldwin, 24-28; Bernard Flexner & Roger N. Baldwin, *Juvenile Courts and Probation* (1914); David S. Tanenhaus, *Juvenile Justice in the Making* (2004); Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (2003).

¹⁸¹Reminiscences of Roger Baldwin, 55; Robert C. Cottrell, *Roger Nash Baldwin and the American Civil Liberties Bureau 1-60* (2000).

¹⁸²Peggy Lamson, *Roger Baldwin: Founder of American Civil Liberties Union* 278 (1976). Even in the 1920s, Baldwin would become involved in international causes such as opposition to imperialism in India and elsewhere. Baldwin usually approached these international causes outside of his official capacity as the leader of U.S. civil liberties organizations like the ACLU. Moreover, by the early 1920s (and for much of the rest of his life) his international interests were thoroughly caught up in the early Cold War contests between the Soviet Union and the U.S., contests in which Baldwin sympathized with the Soviets until his switch to vigorous anti-communism at the end of the 1930s. See Cottrell, *Roger Nash Baldwin*, 169-98, 262-63.

For a few months, tensions between Baldwin's and Eastman's theories of civil liberties took a back seat to a larger conflict that drove such figures as Lillian Wald and Paul Kellogg out of the Union altogether. Wald and Kellogg had never been convinced that the civil liberties strategy offered a viable solution to the dilemmas facing the Union once war began. After the declaration of war, Wald and Kellogg – like Root and Wilson – believed strongly that the obligations of national citizenship required support for the prosecution of the war. The civil liberties campaign engineered by Baldwin and Eastman, in their view, veered too close to making the Union “a party of opposition to the government.” Over the course of the summer, they struggled to bring the Union around to Wald's less confrontational approach. But by September, Wald, Kellogg, and a number of others felt that they could not “remain if the active work for Civil Liberties is continued.” Eastman and others in the American Union sought to insist that the Union was not “embarking on a program of political obstruction” but merely working “against hysterical legislation, and for peace.” But the subtleties of the distinction were lost on the disgruntled Wald-Kellogg wing of the Union. By October, Wald and Kellogg had resigned.¹⁸³

Divergences between Baldwin and Eastman quickly resurfaced once the split within the Union was complete. But by the fall of 1917, the prevailing atmosphere of mandatory patriotism made it virtually impossible for the Civil Liberties Bureau to advance Eastman's brand of internationalism. After complaints from high-ranking members of the military, Secretary of War Baker cut off the Bureau's relations with the War Department in May 1918. Three months later, the Department of Justice raided the Bureau's offices and seized its papers.¹⁸⁴ Courts began convening grand juries to investigate “foreigners” on soap boxes.¹⁸⁵ Max Eastman was put on trial not once but twice during 1918 for his work on *The Masses* (the juries hung both times).¹⁸⁶ And Baldwin himself was arrested for refusal to register for the draft, convicted, and sentenced to one

¹⁸³See Kennedy, *Over Here*.

¹⁸⁴Reminiscences of Roger Baldwin, 60-61.

¹⁸⁵“Urges Indictments for Seditious Talk,” *New York Times*, Sep. 5, 1917, reel 7, vol. 63, *ACLU Archives*.

¹⁸⁶Eastman, *Love and Revolution*, 92-99, 118-124.

year in prison.¹⁸⁷ Around the country, attitudes toward internationalists deteriorated still further. Herbert Bigelow, who had spoken on behalf of the Union's Truth About Preparedness Campaign in the spring of 1916 was kidnaped and brutalized in November 1917.¹⁸⁸ The *Grand Rapids Press* labeled the Union and allied groups "seditious" and the *New York Tribune* classed them as dangerous "enemies within."¹⁸⁹ By August 1918, Theodore Roosevelt was singling out "internationalists" as playing into the hands of "German autocracy."¹⁹⁰ "Internationalism," Elihu Root would soon announce, had become a threat to "the authority and responsibility of nations," of which the United States was one.¹⁹¹

In the face of nationalist coercion, Baldwin led the Civil Liberties Bureau – now formally divorced from the Union and renamed the National Civil Liberties Bureau – in what Norman Thomas called "a new direction for civil liberties."¹⁹² The moral imperatives of nationalism had indelibly tarred internationalism with the brush of treason. "Internationalists and radical peace organizations," explained Roger Baldwin to one supporter in September 1917, had come under tremendous pressure to purge "German names" from their lists of officials.¹⁹³ Things became all the more dire after the November 1917 Bolshevik revolution in Russia. "Worldwide Anarchist Plot" screamed headlines linking the "Bolsheviki" to the I.W.W. and to "revolutionaries" around the world.¹⁹⁴ As the prosecutor at the 1918 Espionage Act trial of Eugene Debs put it in his closing argument to the jury, "pitch all the nations into one pot with the Socialists on top and you've

¹⁸⁷Cottrell, *Roger Nash Baldwin*, 83-90.

¹⁸⁸E.F. Alexander to Roger N. Baldwin, Nov. 1, 1917, reel 4, *ACLU Archives*; Press Release, Nov. 7, 1917, reel 4, *ACLU Archives*.

¹⁸⁹"They Who Play with Fire," *Grand Rapids Press*, [May 1917], reel 4, *ACLU Archives*; "Statement to the New York Tribune by the Civil Liberties Bureau of the American Union Against Militarism" [Sep. 27, 1917?], folder 2.4, reel 102, Wald Papers.

¹⁹⁰Theodore Roosevelt, "Speech at Springfield, Illinois, August 26, 1918," in Chambers, *Eagle and the Dove*, 127; Knock, *To End All Wars*, 169.

¹⁹¹Elihu Root, "The Conditions and Possibilities Remaining for International Law after the War," in *Men and Policies: Addresses by Elihu Root* 427, 432 (Robert Bacon & James Brown Scott eds., 1925).

¹⁹²Norman Thomas et al. to Lillian D. Wald, Jan. 19, 1920, Wald Papers.

¹⁹³Roger N. Baldwin to Lawrence G. Brooks, Sep. 24, 1917, reel 4, *ACLU Archives*.

¹⁹⁴"See Worldwide Anarchist Plot," *New York Times*, Dec. 26, 1917.

got internationalism.”¹⁹⁵ By 1919, the federal government initiated deportations of suspected radicals back to Russia. The infamous Palmer Raids quickly followed in November of that year, as did the similar Lusk Committee Raids in New York State after them.¹⁹⁶ By December 1919, Wilson, who had been a willing but unenthusiastic supporter of Burleson’s and Gregory’s enforcement actions during the war, was calling for a peacetime extension of the Espionage Act.¹⁹⁷ Even Lillian Wald, who had so carefully extricated herself in the summer of 1917 from the possible appearance of opposition to the war effort, would find herself still trying to defend her patriotism some two years later.¹⁹⁸

Between Baldwin’s domestic frame of reference and the extraordinary pressures being exerted against internationalism, it is hardly a wonder that the National Civil Liberties Bureau began to pull back from its internationalist beginnings. The great virtue of the civil liberties campaign as a war time program was its ostensibly patriotic connections to the nation’s deepest constitutive traditions. And with Baldwin’s leadership, the National Civil Liberties Bureau seized on those traditions to advance a conception of civil liberties increasingly stripped of internationalist trappings. Gone were the appeals to do away with the abstraction of the nation-state as a political form. Gone were the calls for civil liberties as both the necessary precondition for and the purpose of new structures of international governance. In their place, Baldwin substituted civil liberties claims couched in the history of American nationalism. Affiliates were urged to celebrate the 130th anniversary of the signing of the U.S. Constitution in September 1917.¹⁹⁹ The Bureau’s challenges to the federal conscription regime, Baldwin assured, aimed not to obstruct the draft but merely to ensure that the first draft since the Civil War “should not take place without the highest authority in the country deciding upon it squarely.” And propaganda against the draft would cease, Baldwin

¹⁹⁵Peterson & Fite, *Opponents of War*, 253, 290.

¹⁹⁶Richard Polenberg, *Fighting Faiths: The Abrams Case, The Supreme Court, and Free Speech* 155-58, 195-96 (1987).

¹⁹⁷Scheiber, *Wilson Administration*, 57; Kennedy, *Over Here*, 87.

¹⁹⁸“Miss Wald’s War Attitude,” *New York Post*, Jan. 25, 1919, reel 6, vol. 46, *ACLU Archives*.

¹⁹⁹Crystal Eastman & Roger Baldwin to American Union Locals, Aug. 31, 1917, reel 102, folder 2.4, Wald Papers.

explained, to be replaced by work narrowly confined to “the lines of legal defense.”²⁰⁰ “Let us be patriots in the true sense,” exclaimed a Bureau-affiliated lawyer from Chicago, perfectly capturing the newly-bounded legal horizons of the Bureau.²⁰¹ In the Bureau’s devotion to national ideals, a press release from the fall of 1917 declared, “we believe ourselves to be patriots, no less sincere and earnest than those who lead our armies to France.”²⁰² The “cause of civil liberties,” Bureau leaders insisted, was “loyal” to the “American ideal” of freedom.²⁰³ Even Crystal Eastman took advantage of the prerogatives of patriotism: “there is no more patriotic duty than to keep democracy alive at home,” she announced. Democracy, in turn, meant the protection of “ancient American liberties.”²⁰⁴ By the time the Bureau held a conference in January 1918, the forceful internationalist voices of just a year before had become muted. Rather than talk about the relationship between civil liberties and international legal institutions, Baldwin and his colleagues focused on the protection of civil liberties in war time as a “test of the highest type of loyalty” – loyalty not to global citizenship or to the idea of world federation, but to self-consciously national ideals.²⁰⁵

* * *

Three further conferences in the next year – one still widely remembered, the others now more or less obscure – made clear the extent to which the internationalist energies had waned. 1919 had brought renewed hope to internationalists in the United States and across Europe. The Paris Peace Conference began in January, with Wilson promoting the

²⁰⁰Roger N. Baldwin to Lawrence G. Brooks, Sep. 24, 1917, reel 4, *ACLU Archives*.

²⁰¹John L. Metzen to Civil Liberties Bureau, Aug. 9, 1917, reel 4, *ACLU Archives*.

²⁰²Proposed Announcement for the Press (n.d.) [fall 1917?], *AUAM Papers*.

²⁰³Norman Thomas to Lillian D. Wald, Aug. 27, 1917, Norman Thomas Papers.

²⁰⁴Crystal Eastman to Editor of the *New York Tribune*, Aug. 28, 1917, Wald Papers;

²⁰⁵“Dear Friends,” Jan. 5, 1918, reel 1, vol. 3, *ACLU Archives*; see also Walker, *In Defense of American Liberties*, 53.

internationalist idea of a League of Nations.²⁰⁶ At the same time, Jane Addams and the women's branch of the internationalist movement assembled at Zurich in a renewed showing of the radical internationalism that had characterized the Woman's Peace Parade at the early stages of the war. Eastman did not attend; leaders of the Zurich conference feared that the scandal of her divorce from Bennie and quick remarriage to Walter would undermine the respect accorded to the conference.²⁰⁷ And though many internationalists bitterly opposed the indemnities imposed on Germany by the Treaty of Versailles that emerged in June, the Treaty nonetheless provided for what many internationalists had been talking about for decades: a League of Nations "to promote international cooperation and to achieve international peace and security."²⁰⁸

At the war's end, the National Civil Liberties Bureau seemed to be presiding over a similar rebirth of its own internationalism. In June, as the Paris Conference wound down, the Bureau proposed an "international conference for the restoration of civil liberties." The conference, to be held in New York in October, would reach out across international boundaries to begin the process of reconstituting pre-war internationalist alliances.²⁰⁹ The Bureau arranged to co-sponsor the conference with its British counterpart, the National Council for Civil Liberties. Indeed, Eastman and her husband Walter Fuller, who had moved to London together several months before, took the lead in organizing the British side of the event.²¹⁰ Moreover, early signs suggested that the conference would resonate powerfully with the internationalist tradition. Arthur Ponsonby of the English antiwar organization known as the Union for Democratic Control suggested that the conference might help create the "lasting foundation of an enlightened and democratic internationalism."²¹¹ B.N. Langdon-Davies

²⁰⁶George W. Egerton, *Great Britain and the Creation of the League of Nations* (1978); Knock, *To End All Wars*, 194-245; Margaret MacMillan, *Peacemakers: The Paris Conference of 1919 and Its Attempt to End War* (2001).

²⁰⁷Addams, *Peace and Bread*, 152-77; Benedetti, *American Peace Movement*, 91-92; Herman, *Eleven Against War*, 147.

²⁰⁸Mangone, *International Organization*, 157.

²⁰⁹Albert De Silver to B.N. Langdon-Davies, June 6, 1919, reel 9, vol. 73, *ACLU Archives*.

²¹⁰B.N. Langdon-Davies to Albert De Silver, June 30, 1919, reel 9, vol. 73, *ACLU Archives*.

²¹¹Letter of Arthur Ponsonby (n.d.), Walter Fuller to Albert De Silver, Aug. 5, 1919, reel 9, vol. 73, *ACLU Archives*.

of the National Council for Civil Liberties similarly assured his American counterparts that although the conference would focus on Anglo-American liberties, it would not cut against “the wider internationalism we all seek.”²¹² Early programs thus suggested that the conference would focus heavily on such issues as the “International Aspects of Civil Liberty,” and topics like “Why Freedom Matters – International Cooperation.”²¹³

In some respects, the conference was a smashing success. Though Franklin Giddings, who had become increasingly associated with support for the war, refused to come, leading figures in American law – Zachariah Chafee, Jr., Felix Frankfurter, and Roscoe Pound of the Harvard Law School, all of whom were taking up important places in the early history of civil liberties in American law – came down from Cambridge for the event. Their prominence and their close connections to men on the Supreme Court and in the White House meant that support for the protection of civil liberties had moved from the eclectic margins of radical internationalism into the corridors of power.²¹⁴

Yet from the internationalist perspective, the conference failed. Wilson had struggled mightily since his return from Paris to persuade the Senate to ratify his internationalist treaty.²¹⁵ At the Anglo-American Liberties Conference, too, internationalism foundered on the shoals of nationalist passions and difficult details. The conference was full of the high rhetoric of pre-war internationalism. Speakers denounced “old assumptions of sovereignty and national honor” as ideas that “belong to the Middle Ages.” “Liberty is not national,” they declared, and called for an internationalist system that would move beyond the “territorial basis” of the nation state and beyond the “nationalistic segregation of peoples.” But in the new era of the League and the Paris Conference, the platitudes of pre-war internationalism were no longer sufficient. Concrete proposals for international structures were the order of the day. Yet the extraordinary complexity of the international question and the impracticality of

²¹²B.N. Langon-Davies to Mr. Furnas, Aug. 27, 1919, reel 9, vol. 73, *ACLU Archives*.

²¹³Albert De Silver to Lillian D. Wald, Oct. 2, 1919, Wald Papers.

²¹⁴Franklin H. Giddings to Albert De Silver, Oct. 7, 1919; Albert De Silver to Roscoe Pound, Oct. 7, 1919; Albert De Silver to Felix Frankfurter, Oct. 7, 1919; Zachariah Chafee, Jr. to Albert De Silver, Oct. 8, 1917, reel 9, vol. 73, *ACLU Archives*.

²¹⁵See Cooper, *Warrior and the Priest*, 340-45; Kennedy, *Over Here*, 359-62; Knock, *To End All Wars*, 246-76.

internationalist ideas quickly became apparent. Those who favored gradual evolution toward internationalism, for example, clashed with those who urged immediate internationalist commitments. Socialists clashed with liberals. Proto-nationalists from colonized regions like India and Ireland insisted on the priority of national independence to international structures, even as internationalists sought to create trans-national institutions of authority. Finding “a formula between nationalism and internationalism,” as Norman Thomas put it, proved impossible. By the final day of the conference, those in attendance were riven with dissension. The conference, Thomas warned, was “in danger of being lost in an unnecessary bog”; debates over internationalism threatened to “wreck” the conference, cautioned another participant. And so they did. Just four weeks after Wilson’s devastating stroke ensured the demise of the League of Nations in the U.S. Senate, the last gasp of wartime radical internationalism collapsed in a mess of differences and recriminations.²¹⁶

What the assembled participants in the Anglo-American Tradition of Liberty Conference could agree on was the value of civil liberties. Within a few months of the close of the conference, Baldwin reorganized the National Civil Liberties Bureau as the American Civil Liberties Union. The ACLU would continue to follow international events, including the demise of the British National Council for Civil Liberties in 1920. But almost from the moment of its founding, Baldwin and the ACLU sought to obscure the organization’s internationalist beginnings. The Bureau, Baldwin contended in 1920, had not been an “antiwar organization,” but rather an organization that “insisted on American constitutional rights.” And already, the center of attention for civil libertarians had shifted away from the question of war resistance and opposition to militarism, to the problem of the “radicals, especially the I.W.W. . . . and the Socialists.” “Radicalism, not the attitude toward the war,” now seemed to be the motivating factor in most instances of attacks on civil liberties. The ACLU thus organized itself to defend “peaceful picketing” and “trade unionism” and to fight discrimination against radical and labor meetings. Just as the ACLU would later purge communists from its ranks, the early ACLU had

²¹⁶Verbatim Report of Conference on “The Anglo-American Tradition of Liberty,” pp. 522-23, 554, 563, 564, 575, 582-84, reel 9, vol. 73, *ACLU Archives*.

washed itself clean of its internationalist origins.²¹⁷

VI

What is striking about the development of a new language of civil liberties in American law between 1917 and 1920 is that it took part in both the modernist and the traditional idioms the war had occasioned. Historians have long debated the cultural consequences of the great war. Some hold that the attempt to make sense of the brutal violence of modern states touched off a deep shift toward the ironic and the modernist. Others argue that the war occasioned a powerful return to traditionalist rhetorics as a mechanism for coping with the apparent senselessness of the war. Jay Winter, for example, has observed that the war revived “a number of traditional languages” expressed in “unusual and modern forms.”²¹⁸

In precisely this way, lawyers like Eastman had responded to the war and the rise of new totalizing state institutions by reinvigorating the familiar language of rights and liberties that they had only recently rejected as a Victorian anachronism. For Eastman and her colleagues, however, the turn to rights advanced a strikingly modernist project in international law. The abstraction of rights seemed to offer a way to contain the dangerous abstraction of state sovereignty. Eastman’s internationalist appropriations of a traditional language of rights and liberties, in other words, were themselves deeply ironized – they sought to pick and choose among the totems of a national tradition so as strategically to advance a modern internationalist agenda, hitting on the abstraction of rights as more useful (and less dangerous) than the abstraction of sovereignty. The new civil liberties movement of the twentieth-century was thus the product of a kind of double disillusionment with the fixtures of nineteenth-century legal thought – rights *and* states. And yet in the searing heat of war time patriotic

²¹⁷Verbatim Report, 434; Norman Thomas et al. To Lillian D. Wald, Jan. 19, 1920, Wald Papers; Roger N. Baldwin, *The Fight for Civil Liberty During the War*, reel 14, vol. 108, *ACLU Archives*; Walker, *In Defense of American Liberties*, 130-33.

²¹⁸Compare Fussell, *Great War*, with Jay Winter, *Sites of Memory, Sites of Mourning: The Great War in European Cultural History* (1995). The Winter quotation is at p. 18.

fervor, internationalist modernism quickly gave way to a more straightforwardly traditional arguments rooted ever more deeply in the trappings of American national identity. The strategy of invoking a traditionalist language of rights came to overwhelm the internationalist agenda that language had been marshaled to advance. And indeed, within a few short years, Baldwin's recrafting of the civil liberties movement in the ACLU would obscure almost completely the movement's international law beginnings.

Eastman herself refused to compromise with the imperatives of the nation state. As John Haynes Holmes later remembered, Eastman "could not, or more likely would not, surrender the idealism" that had brought her to the internationalist cause.²¹⁹ She therefore never embraced the Bill of Rights and civil liberties as wholeheartedly as Baldwin had, strategically or otherwise. The First Amendment, she wrote from London, had "never" been "any good in a crisis"; it had "never been proof against a strain." And as labor unions, socialists, and the ACLU turned to civil liberties to advance their causes, she caustically noted that those safeguards "had never been "of much practical value in protecting the poorest workers." Especially after U.S. intervention in Russia in 1918, Eastman's own views had radicalized dramatically in the direction of support for a Bolshevik strain of communism that thought it unlikely that "capitalist states" would "maintain democratic institutions against their own interest."²²⁰ Even in the area of woman's rights, where she had worked for legal change since childhood, she lost hope in the reform possibilities of the law. Feminism could "most assuredly" not effect real equality between the sexes by laws; these were problems "of education, of early training." "We must," she concluded, "bring up feminist sons."²²¹

Eastman, it seems, had encountered the limits of lawyering. In Eastman's day, as still in our own, the sovereignty of states was the most powerful source of the authority of law and of lawyers. The authority of the profession she had chosen thus derived from the very sovereign authority of states that Eastman sought to critique. Lawyering seemed to have come

²¹⁹Holmes, *I Speak for Myself*, 189.

²²⁰Crystal Eastman, "The Socialist Party Convention," in *Toward the Great Change*, 436, 437, 439.

²²¹Crystal Eastman, "Now We Can Begin," *The Liberator*, Dec. 1920, reprinted in *Toward The Great Change*, 78.

with powerfully counter-revolutionary institutional limits. Legal institutions were not immune to change. Rights claims based in the nation's constitutive legal documents, after all, had made available the civil liberties movement. Over the succeeding decades, international lawyers would make halting, painstaking progress in the establishment of international human rights norms that constrained the sovereignty of nation-states.²²² But legal institutions were also powerfully resistant to the kinds of radical transformations that Eastman and the radical internationalists had sought to bring about. In particular, the authority of the state had resisted incursions on its jurisdiction. If for the last century American lawyer-skeptics have turned to the abstraction of civil liberties, they have done so at least in part because they have had all too little success in eroding the abstraction of sovereignty.

²²²See Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* 159, 166-232 (2nd ed. 2003).