

CRYSTAL EASTMAN AND THE INTERNATIONALIST BEGINNINGS OF AMERICAN CIVIL LIBERTIES

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ABSTRACT

The modern American civil liberties movement famously began with the United States's intervention in World War I. Yet these beginnings have long raised a conundrum for civil liberties historians. Why did the American civil liberties movement arise precisely when so many sophisticated legal and political thinkers began to call into question the truth value of abstract rights claims? The puzzling rise of civil liberties in an age of pragmatic skepticism is all the more startling given that early leaders of the civil liberties movement were themselves leading rights skeptics. This Article offers a new interpretation of the rise of the modern American civil liberties movement. Our ostensibly domestic civil liberties movement—and indeed, the phrase “civil liberties” itself—has its roots in a pre-World War I international law cosmopolitanism. In particular, the social movement that coalesced around the phrase civil liberties developed as a group of self-consciously internationalist organizations. Led by people such as Crystal Eastman, a little-remembered, charismatic, progressive-era reformer and radical, these organizations 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: sovereignty. 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 nation-state sovereignty.

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With American intervention in World War I, obligations of loyalty to the nation-state compelled American internationalists such as Eastman, her colleague Roger Baldwin, and the fledgling American Civil Liberties Union to reframe their critique of sovereignty in terms made available by the constituent documents of American nationalism.

INTRODUCTION

A paradox haunts the history of civil liberties in the United States. The Bill of Rights notwithstanding, it took well over a century for U.S. law to develop protections for dissenting or unpopular speech. Both the phrase “civil liberties” itself and the civil liberties tradition as twenty-first-century American lawyers understand it—a body of legal protections for rights such as speech and assembly—date to World War I. Yet the years leading up to the war witnessed the emergence of powerful challenges to the very ideas of “rights” and “liberty” on which a civil liberties movement might be thought to depend. Indeed, many early architects of the civil liberties movement were themselves leading rights-skeptics and builders of the kinds of modernist legal institutions that sought to consign rights talk to a nineteenth-century past.¹

One prominent response to the paradox seeks to connect the advent of civil liberties to the distinctively American philosophical tradition of pragmatism and its jurisprudential analogues. Justice Oliver Wendell Holmes famously contended 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. “[T]ime,” Holmes wrote in his dissent in *Abrams v. United States*, “has upset many fighting faiths.”² It followed for Holmes that nation-states should establish the kinds of protections for speech and expression that Americans today would describe as central elements of the civil liberties agenda. Yet until Holmes’s suggestion in 1919, pragmatism had more often undermined rights claims. Pragmatist philosopher John Dewey scorned those who clung to “the

1. Thomas L. Haskell, *The Curious Persistence of Rights Talk in the “Age of Interpretation,”* in *THE CONSTITUTION AND AMERICAN LIFE* 324, 328–29 (David Thelen ed., 1988).

2. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For an especially elegant version of this solution, see LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* (2001).

individualistic tradition”³ of “early Victorian platitudes” about “the sanctity of individual rights.”⁴ Critics noted 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 rights claims in times of crisis.⁵ 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.”⁶ As Ernest Hemingway would write, the war had called into question the power of “[a]bstract words such as glory, honor, courage, or hallow”—and, one might add, liberty and rights.⁷

A second response to 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.⁸ Federal legislation effectively criminalized antiwar speech; the Post Office barred antiwar and radical literature from the mails; mobs brutalized and even lynched antiwar 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 taken for granted.⁹ Yet there is

3. DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 50 (1980).

4. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 3 (1997).

5. RANDOLPH S. BOURNE, *The War and the Intellectuals*, in *WAR AND THE INTELLECTUALS: COLLECTED ESSAYS, 1915–1919*, at 3, 11 (Carl Resek ed., 1964).

6. Raymond B. Fosdick, *Liberty in America*, *OUTLOOK*, Feb. 2, 1916, at 282, 285.

7. ERNEST HEMINGWAY, *A FAREWELL TO ARMS* 196 (1929); see also PAUL FUSSELL, *THE GREAT WAR AND MODERN MEMORY* 21 (1975) (describing Hemingway’s disillusionment).

8. SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 85 (1981).

9. *E.g.*, MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 389–94 (2000); DONALD JOHNSON, *THE CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION*, at vii–ix (1963); KENNEDY, *supra* note 3, at 72–92; PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 26–30 (1979); RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 138–44 (1999); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 11–47 (1999); Robert E. Cushman, *The Repercussions of Foreign Affairs on the American Tradition of Civil Liberty*, 92 *PROC. AM. PHIL. SOC’Y* 257, 257 (1948). For a recent summary of this view, see

remarkably little evidence of a long-standing American civil liberties tradition in nineteenth-century American law. As one historian puts it, the nation's civil liberties record instead "seems terribly dismal."¹⁰ The civil liberties violations of the World War I period were not so different from those of the Civil War. As one prominent supporter of the war noted in 1918, Lincoln's "limitations of free speech" provided a model for the Wilson administration a half-century later.¹¹ Indeed, American law had long been characterized by a wide array of practices that by later standards 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 literature and sexually explicit materials. 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 (IWW).¹² 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."¹³ Nineteenth-century American law, in short, seems to have borne out James Madison's warning that the provisions of the Bill of Rights

Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 34–38 (1996).

10. Michael Les Benedict, *Victorian Moralism and Civil Liberty in the Nineteenth-Century United States*, in *THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE* 91, 109 (Donald G. Nieman ed., 1992).

11. Letter from William English Walling to L. Hollingsworth Wood (Jan. 7, 1918), *microformed on American Civil Liberties Union Archives: The Roger Baldwin Years, 1917–1950*, Reel 1, vol. 3 (Scholarly Res., Inc.) [hereinafter *ACLU Archives*]; see generally MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991) (describing Lincoln's wartime speech policies); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERROR* 108–19 (2004) (same).

12. On nineteenth-century restraints on speech and other expressive activity, see generally CURTIS, *supra* note 9; RUSSEL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860* (1949); RABBAN, *supra* note 4; John W. Wertheimer, *Free Speech Fights: The Roots of Modern Free-Expression Litigation in the United States* 51–67 (1992) (unpublished Ph.D. dissertation, Princeton University) (on file with the *Duke Law Journal*).

13. MURPHY, *supra* note 9, at 9 (quoting Henry Steele Commager).

would be mere “parchment barriers” to acts of government repression.¹⁴

In sum, neither of these home-grown traditions—neither the philosophical tradition of pragmatism, nor an ostensible moment of truth for America’s civil libertarian values—provides an especially satisfying explanation of the modern civil liberties movement. Neither account, moreover, offers a solution to the paradox of rights-claims in an age of skepticism.

An important feature of the beginnings of the American civil liberties tradition has gone missing from domesticated historical accounts. The modern civil liberties movement, as well as the phrase “civil liberties” as a language with which to organize that movement, arose out of a pre-World War I transatlantic internationalism that transcended the national boundaries of the United States. 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 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 that 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 early-twentieth-century American internationalism. And in 1917 she and Roger Baldwin founded 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 war occasioned a struggle for new supranational institutions 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, American internationalists like Eastman turned to

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

civil liberties as a way to constrain those excesses that could be rooted in the language and constitutive documents of American nationalism. Within a very short time, however, the civil liberties strategy swallowed up and replaced the internationalist agenda it had been designed to advance.

If the story told here is successful, a number of interesting points about American civil liberties and international law follow. The internationalist beginnings of American civil liberties help to explain the paradox of civil liberties in an age of pragmatism. Rights-skeptics in the early twentieth century were grappling not with one but with two conceptual abstractions: rights and sovereignty. If they seized on the former, they did so because it seemed to them less dangerous than the latter. Critiques of sovereignty also help 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 possessed only attenuated forms of membership. Nation-states had barred women from voting and had even stripped them of their citizenship when, like Eastman in 1916, they married foreign nationals.

Moreover, the internationalist beginnings of American civil liberties suggest that even those features of American law that are typically described as distinctive—such as the United States's emphasis on the civil liberties of individuals—are often the result of interactions and ideas on a global scale. For almost three decades now, historians and lawyers have chipped away at the myths of American exceptionalism in such areas of the law as torts, crime, labor, and the constitution,¹⁵ and such areas of reform as urban planning, social insurance, and even home economics.¹⁶ In these areas

15. *E.g.*, MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 71–72* (2003); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 2–21* (2004); *A CENTURY OF JUVENILE JUSTICE* (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus, & Bernardine Dohrn eds., 2002); William E. Forbath, *Law and the Shaping of Labor Politics in the United States and England*, in *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 201* (Christopher L. Tomlins & Andrew J. King eds., 1992).

16. *E.g.*, JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920*, at 3–11 (1986); DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 2–7* (1998); Kristin Hoganson, *Cosmopolitan Domesticity: Importing the American Dream, 1865–1920*, 107

and elsewhere, it now appears, American law and politics developed not in isolation but in robust transoceanic conversations.¹⁷ By the same token, the American civil liberties movement has not been merely a U.S. product for export to the world, though it has sometimes been that.¹⁸ Civil liberties have instead been part of an import/export business, as ideas drawn from transatlantic and European currents in international law were fed back into circulation as civil liberties claims.

Much as in World War I, twenty-first-century crises once again pit obligations of national loyalty against aspirations to an international rule of law. One lesson of civil liberties and American internationalism may be that such moments of conflict over questions of national loyalty have helped to shape some of the United States's most basic legal commitments. But another lesson appears to be that such moments can be full of irony and unanticipated consequences. National conflict, it seems, sometimes shapes the United States in ways that few participants either foresee or intend.

I. CATHERINE CRYSTAL EASTMAN AND THE CRITIQUE OF RIGHTS

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 grew up near the “center of gravity” of the “moral and religious map of the United States.”¹⁹ 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

AM. HIST. REV. 55, 55–83 (2002); Daniel T. Rodgers, *An Age of Social Politics*, in *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE* 250, 254–60 (Thomas Bender ed., 2002); Robert Wiebe, *Framing U.S. History: Democracy, Nationalism, and Socialism*, in *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE*, *supra*, at 236, 236–49.

17. Much of the focus of recent work is on transatlantic conversations, but there is now some work on parallel transpacific conversations. *E.g.*, MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 2–14 (2004); 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*, *supra* note 16, at 195, 198–200; Adam McKeown, *Ritualization of Regulation: Enforcement of Chinese Exclusion in United States and China*, 108 AM. HIST. REV. 377, 385–91 (2003).

18. LOUIS HENKIN, *THE AGE OF RIGHTS* 148–59 (1990); William P. Alford, *Exporting “The Pursuit of Happiness,”* 113 HARV. L. REV. 1677, 1699 (2000) (reviewing THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)).

19. MAX EASTMAN, *ENJOYMENT OF LIVING* 1 (1948).

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. The Park Church was among 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.²⁰ His brother, Henry Ward Beecher, succeeded their father, Lyman Beecher, as 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.²¹

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 foremost among them. At least in part at Crystal's insistence, the household "was run on feminist principles";²² there was, as she later explained, "no such thing in our family as boys' work and girls' work."²³ As a fifteen-year-old, Crystal read a paper—"Woman"—at a woman's movement symposium organized by her mother. Crystal's unfeminine behavior often scandalized the community. She wore "bathing suits without the customary stockings and skirts," her biographer writes, and she refused to ride horses sidesaddle.²⁴ Taking the woman's movement's goal of "woman's rights" as their standard, Annis and Samuel Eastman organized their children's upbringing around their rights as individuals, 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

20. JOAN D. HEDRICK, *HARRIET BEECHER STOWE: A LIFE*, at vii (1994).

21. MAX EASTMAN, *HEROES I HAVE KNOWN* 1–15 (1942); Blanche Wiesen Cook, *Introduction* to CRYSTAL EASTMAN, *CRYSTAL EASTMAN ON WOMEN & REVOLUTION* 1, 4 (Blanche Wiesen Cook ed., 1978); Sylvia A. Law, *Crystal Eastman: NYU Law Graduate*, 66 N.Y.U. L. REV. 1963 (1991).

22. EASTMAN, *supra* note 21, at 8–9.

23. Crystal Eastman, *Mother-Worship*, in *TOWARD THE GREAT CHANGE: CRYSTAL AND MAX EASTMAN ON FEMINISM, ANTIMILITARISM, AND REVOLUTION* 193, 196 (Blanche Wiesen Cook ed., 1976).

24. Cook, *supra* note 21, at 9.

movements (from abolition to married women's property laws to temperance) was that each human being "be an individual."²⁵ "Nothing you can gain," Annis warned them, "will make up for the loss of yourself."²⁶ "Conformity with the crowd" was anathema when it involved the individual's "sacrifice of principle."²⁷

By the late nineteenth century, however, the American reform tradition into which Crystal Eastman had been born began to lose its way. The abolition of slavery removed the tradition's greatest campaign, and although some abolitionists turned their attention to the "wage slavery" that accompanied free-labor capitalism, considerably less moral fervor coalesced around alternative forms of labor exploitation.²⁸ In the Beecher family alone, Harriet Beecher Stowe turned from writing antislavery novels to running a Florida plantation worked by poorly paid black agricultural workers.²⁹ Closer to Elmira, Henry Ward Beecher had been brought low by the media spectacle of an apparent affair with the wife of a prominent parishioner.³⁰ 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 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 1910.³¹ As Max Eastman 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.'"³²

In the new century in which Crystal Eastman came of age, Americans were beginning to grope toward new ways of articulating the relationships between individuals and their communities—ways

25. Blanche Wiesen Cook, *Introduction* to TOWARD THE GREAT CHANGE: CRYSTAL AND MAX EASTMAN ON FEMINISM, ANTIMILITARISM, AND REVOLUTION, *supra* note 23, at 15, 17.

26. *Id.*

27. *Id.*

28. DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823*, at 275 (1975).

29. HEDRICK, *supra* note 20, at 330.

30. RICHARD WIGHTMAN FOX, *TRIALS OF INTIMACY: LOVE AND LOSS IN THE BEECHER-TILTON SCANDAL* (1999).

31. 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).

32. EASTMAN, *supra* note 19, at 330.

that purported to reject the abstract rights claims and individualism of nineteenth-century liberalism in favor of historicized conceptions of society and politics as organic, evolutionary, and deeply interdependent.³³ Eastman plunged into the center of the new conversation about social politics in European and American thought. After graduating from Vassar College, and with the strong encouragement of her mother, Eastman entered Columbia University in the fall of 1903 to pursue a graduate degree in political economy. Although Eastman would spend only a year at Columbia, 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 cofounder of the iconoclastic American Economic Association, and Franklin Henry Giddings, one of America's leading sociologists.³⁴

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 among individuals, the German historicists argued, the state was 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"³⁵ 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

33. THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* 24–47 (1977); KLOPPENBERG, *supra* note 16, at 107–14; DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE*, at xiii–xxii (1991); MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 47–58 (1949).

34. Letter from Annis Ford Eastman to Catherine Crystal Eastman (July 16, 1903) (on file with Harvard University, Crystal Eastman Papers, Box 5, Folder 132); Academic Transcript of Catherine Crystal Eastman (June 8, 1904) (on file with Columbia University).

35. ROSS, *supra* note 33, at 107.

marginalist economics. But Clark remained a committed—if moderate—progressive into the twentieth century.³⁶

Giddings's influence on Eastman appears to have been still more important than Clark's. Giddings was a leader in the use of statistical techniques in the social sciences; as one scholar later put it, Giddings sought to make sense of social phenomena "in terms of chance and probability."³⁷ As the holder of the first chaired professorship in sociology in the United States, Giddings conceived his subject not as the study of individuals in isolation but as the study of individuals in the groups in which they inevitably found themselves. Sociology was the study of "the phenomena presented by aggregations of living beings," Giddings wrote in an article that he drafted while Eastman was enrolled in his classes.³⁸ Such aggregations, he argued, had enormous influence on individuals' behavior. 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.³⁹ Given 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."⁴⁰ Indeed, individualism in the nineteenth-century sense was little more than the "riotous use" of power by those who had it.⁴¹ Rights, in turn, were mere "legal forms of freedom" that had given rise to "conditions of great and increasing inequality."⁴² To be sure, Giddings was no socialist. "Utopian collectivism" was as distasteful to

36. *Id.* at 106–22.

37. F.H. Hankins, *Franklin Henry Giddings, 1855–1931: Some Aspects of His Sociological Theory*, 37 J. AM. SOC. 349, 359 (1931).

38. Franklin H. Giddings, *The Concepts and Methods of Sociology*, 10 AM. J. SOC. 161, 161 (1904); *see also* FRANKLIN H. GIDDINGS, *STUDIES IN THE THEORY OF HUMAN SOCIETY* 144–53 (1922).

39. F.H. Giddings, *Social Self-Control*, 24 POL. SCI. Q. 569, 574, 579, 581 (1909); *see also* Clarence H. Northcott, *The Sociological Theories of Franklin H. Giddings*, 24 AM. J. SOC. 1, 12 (1918).

40. Giddings, *The Concepts and Methods of Sociology*, *supra* note 38, at 161.

41. Franklin H. Giddings, Book Review, 17 POL. SCI. Q. 704, 706 (1902) (reviewing EDMOND KELLY, *GOVERNMENT OF HUMAN EVOLUTION* (1901)); *see also* Giddings, *supra* note 39, at 574, 579, 581, 588.

42. Franklin H. Giddings, *The Measurement of Social Pressure*, 11 PUBLICATIONS AM. STAT. ASS'N 56, 56 (1908).

him as individualism run amok.⁴³ But a “third and middle view,”⁴⁴ 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.⁴⁵ This was the “supremely important question in all issues of public policy.”⁴⁶ Giddings had no doubt that the balance would be difficult to strike in particular cases.⁴⁷ He was just as certain, however, that the instruments of the social policymaker were the insights of sociology and statistics, not old nostrums about rights and individualism.⁴⁸

Eastman may not have imagined that she would put Giddings’s ideas to use any time soon. In 1904, she left Columbia after what may have been either a bad final examination experience or an encounter with Giddings’s increasingly dim view of the place of women in public life.⁴⁹ She decided instead to go into law. A career in the law 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 1873, 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 join the bar; their “paramount destiny and mission,” Justice Bradley wrote, was service as wives and mothers.⁵⁰ Although Bradwell was eventually admitted to practice in Illinois after an 1873 change in the state’s law, no woman was admitted to practice law in 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

43. Franklin H. Giddings, *Government or Human Evolution: Individualism and Collectivism* by Edmond Kelly, 17 POL. SCI. Q. 704, 706 (1902).

44. Franklin H. Giddings, *The Natural Rate of Wages*, 2 POL. SCI. Q. 620, 621 (1887).

45. Giddings, *supra* note 39, at 588; *see also* Franklin H. Giddings, *A Theory of Social Causation*, PUBLICATIONS AM. ECON. ASS’N (3d Series, vol. 5), May 1904, at 139, 167–68.

46. Giddings, *supra* note 39, at 588.

47. Giddings, *supra* note 44, at 621.

48. Franklin H. Giddings & Agnes Mathilde Wergeland, *The Ethics of Socialism*, 1 INT’L J. ETHICS 239, 240–41 (1891).

49. *See generally* Letters from Annis Ford Eastman to Catherine Crystal Eastman, May 1904 (on file with Harvard University, Crystal Eastman Papers, Box 5, Folder 139).

50. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

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.⁵¹

Columbia's law school did not admit women, but the law school at New York University did. By the time Crystal enrolled in 1905, New York University had become the leading school for training women lawyers in the United States.⁵² Crystal quickly became part of a close-knit circle of women lawyers, and she just as quickly developed a deep enthusiasm for the law. "I am even more wild than before to be a lawyer," she confided to her brother.⁵³ 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 a friend of everyone from faculty members to the school janitor.⁵⁴

But 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 in which she could get "started with a good practice."⁵⁵ "My mind is just tingling to get to practising law," she wrote to Max.⁵⁶ In particular, she picked out the representation of plaintiffs in negligence cases and personal injury suits as a specialty. To be sure, relatively few accident victims in the first decade of the twentieth century 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

51. 4 BUREAU OF THE CENSUS, DEP'T OF COMMERCE, THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910: POPULATION 1910, OCCUPATIONAL STATISTICS 54, 136–37 (1914); VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 2, 252 (1998). Bradwell never sought admission after 1873, but she was admitted to practice in 1890 when the Illinois Supreme Court (on its own motion) reversed itself and approved her original 1869 application. See Susan Gluck Mezey, *Myra Colby Bradwell*, in *AMERICAN NATIONAL BIOGRAPHY ONLINE* (Feb. 2000).

52. DRACHMAN, *supra* note 51, at 256; Law, *supra* note 21, at 1977.

53. Letter from Crystal Eastman to Max Eastman (Nov. 28, 1904) (on file with Harvard University, Crystal Eastman Papers, Box 6).

54. Letter from Crystal Eastman to Annis Ford Eastman (Dec. 17, 1906) (on file with Harvard University, Crystal Eastman Papers, Box 6); Letter from Crystal Eastman to Annis Ford Eastman (Apr. 18, 1907) (on file with Harvard University, Crystal Eastman Papers, Box 6); Letter from Crystal Eastman to Annis Ford Eastman (June 8, 1907) (on file with Harvard University, Crystal Eastman Papers, Box 6).

55. Letter from Crystal Eastman to Annis Ford Eastman (Oct. 10, 1907) (on file with Harvard University, Crystal Eastman Papers, Box 6).

56. Letter from Crystal Eastman to Max Eastman (Oct. 17, 1907) (on file with Harvard University, Crystal Eastman Papers, Box 6).

lawyer has every chance of winning before a jury if he . . . knows the business.”⁵⁷ Yet she proved unable to get work even in this low-prestige and poorly-paid area of the law. 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.⁵⁸

Instead, after taking the bar examination, 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 her onto the project.⁵⁹ 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.”⁶⁰ “Statistics,” it turned out, the “records of tragedies” that she collected in the coroner’s office, were not so much depressing as “interesting to me sociologically.”⁶¹ Her two-month engagement turned into a full year, and she spent the first half of 1908 bringing Giddings’ 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.⁶²

57. Letter from Crystal Eastman to Annis Ford Eastman (Oct. 16, 1907) (on file with Harvard University, Crystal Eastman Papers, Box 6); *see* Letter from Crystal Eastman to Annis Ford Eastman (Apr. 21, 1908) (on file with Harvard University, Crystal Eastman Papers, Box 6).

58. Letter from Crystal Eastman to Max Eastman (Oct. 17, 1911) (on file with Harvard University, Crystal Eastman Papers, Box 6); Letter from Crystal Eastman to Max Eastman (Oct. 4, 1911) (on file with Harvard University, Crystal Eastman Papers, Box 6).

59. WITT, *supra* note 15, at 126–31.

60. Letter from Crystal Eastman to Annis Ford Eastman (Sept. 21, 1907) (on file with Harvard University, Crystal Eastman Papers, Box 6).

61. *Id.*

62. CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW (1910); WITT, *supra* note 15, at 143–44.

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 had experienced three decades of extraordinarily high industrial accident rates. Relative to other industrializing nations, American workplaces were characterized by lax and poorly enforced safety regulations. The law of employers' liability, moreover, imposed relatively few financial obligations on employers for injuries to their employees. These factors, among others, had combined to make American work accident rates far greater than those in western European nations. By the first decade of the twentieth century, leading lawyers, politicians, and muckraking journalists alike had begun to focus public attention on the problem.⁶³

Critics of the law of employers' liability, as the law of torts in the workplace was known, argued that it was based in the nineteenth-century rights-based thinking that sociologists like Giddings now described as anachronistic. 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 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. Employees' torts cases against employers 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 when 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

63. WITT, *supra* note 15, at 22–42.

destitution of thousands upon thousands of families each year—seemed abundantly clear.⁶⁴

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, toward the aggregate treatment of social needs. 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, instead providing injured workers with a guaranteed insurance payment.⁶⁵ Injured employees were not made whole in workmen’s compensation programs. 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.”⁶⁶ “Each year” turned out industrial injuries, noted one student of work safety conditions, just “as surely as the mills ran full and the railroads prospered.”⁶⁷ Yet what Eastman called the “American System” of distributing accident costs “on the basis of old individualistic legal theory” made a “necessary national loss” into “an absolutely unnecessary amount of national deprivation.”⁶⁸ What was needed was nothing short of a revolution in the way American law dealt with the problem, and the statistical methods that Eastman had learned in graduate school were (she decided) “good stuff” with which to “start a revolution.”⁶⁹ Statistics would establish that “justice between individuals” was a quixotic aim in the work accident field.⁷⁰ All the law could do was to seek “a distribution of the loss which shall be to the best interests of all concerned.”⁷¹ Workmen’s compensation

64. *Id.* at 43–70.

65. RODGERS, *supra* note 16, at 211–66.

66. Crystal Eastman, *The American Way of Distributing Industrial Accident Losses: A Criticism*, PUBLICATIONS AM. ECON. ASS’N (3d Series), Apr. 1909, at 119, 119.

67. Emory S. Bogardus, *The Relation of Fatigue to Industrial Accidents*, 17 AM. J. SOC. 206, 208 (1911).

68. Eastman, *supra* note 66, at 126.

69. CRYSTAL EASTMAN, *The Three Essentials for Accident Prevention*, in CRYSTAL EASTMAN ON WOMEN & REVOLUTION, *supra* note 21, at 280, 281–82.

70. EASTMAN, *supra* note 62, at 218.

71. *Id.*

statutes would vindicate the social interests that Eastman saw as the proper aim of twentieth-century accident law.⁷²

Eastman's involvement in the Pittsburgh Survey 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 her brother Max, was unrolling for her.⁷³ 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, created to investigate the problem of work accidents in the state of New York and to recommend new legislation to address it.⁷⁴ Completion of her work on the Pittsburgh Survey 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.⁷⁵

Even as the workmen's compensation movement got underway, however, the nineteenth-century legal tradition of liberal, rights-based jurisprudence seemed to obstruct efforts to rationalize the law of workplace accidents. Legislation purporting to regulate the employment contract seemed all too often to be struck down by courts as unconstitutional interference with rights of contract and liberty. Eastman, like many others, feared that constitutional provisions "originally intended . . . to safeguard the rights of the people" would now be used to strike down the important reforms

72. *Id.* at 84, 188, 218.

73. Letter from Crystal Eastman to Max Eastman (Mar. 24, 1909) (on file with Harvard University, Crystal Eastman Papers, Box 6).

74. Letter from Annis Ford Eastman to Crystal Eastman (May 3, 1909) (on file with Harvard University, Crystal Eastman Paper, Box 5, Folder 159); Letter from Crystal Eastman to Annis Ford Eastman (Mar. 28, 1908) (on file with Harvard University, Crystal Eastman Papers, Box 6); Letter from Crystal Eastman to Max Eastman (June 15, 1909) (on file with Harvard University, Crystal Eastman Papers, Box 6).

75. Letter from Crystal Eastman to J. Mayhew Wainwright (Nov. 13, 1909) (on file with the New York Historical Society, J. Mayhew Wainwright Papers, Box 6, Folder July–Dec. 1909); *The Reminiscences of John Spargo 174* (1957) (on file with Columbia University, Oral History Research Office); Memorandum on Division of Work on Report (n.d.) (on file with the New York Historical Society, J. Mayhew Wainwright Papers, Box 6, Folder 1909–1912).

contained in the workmen's compensation statutes.⁷⁶ Sure enough, in March 1911, New York State's highest court struck down the new workmen's compensation law on which Eastman had worked as a violation of employers' property rights.⁷⁷ The rights tradition of American law had once again obstructed the sociological rationalization of the law.⁷⁸

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. The decision came at a difficult time for her. Her mother, Annis, had died of a stroke the previous October. In January, Eastman had come down with one of the illnesses that would plague her for the rest of her life, causing her to return home to Elmira and to break off her work with the Wainwright Commission. To be sure, she had married a young man named Wallace Benedict, who shared some of her interests in the insurance industry. But both she and Max, who married at almost exactly the same time, seem to have rushed into their marriages in an attempt to compensate for their mother's death. Already in early 1911 Crystal was beginning to dread the impending move from the eclectic excitement of New York to "Bennie's" hometown of Milwaukee.⁷⁹

One 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 only blocks from Eastman's Greenwich Village apartment. Many of the dead were young women who had been working behind locked doors and ill-secured fire escapes at the Triangle Shirt-Waist Company.⁸⁰ The fire, she wrote Max, "sank into my soul," giving rise to a "constant stirring sense of

76. CRYSTAL EASTMAN, *Work-Accidents and Employers' Liability*, in CRYSTAL EASTMAN ON WOMEN & REVOLUTION, *supra* note 21, at 269, 278–79.

77. *Ives v. South Buffalo Ry.*, 94 N.E. 431, 439–48 (N.Y. 1911).

78. WITT, *supra* note 15, at 152–86.

79. *Id.* at 180–84; Letter from Wainwright Commission Staff to J. Mayhew Wainwright (Jan. 30, 1911) (on file with the New York Historical Society, J. Mayhew Wainwright Papers, Box 6, Folder 1911).

80. LEON STEIN, *THE TRIANGLE FIRE* 117, 213 (William Greider ed., 2001) (1962); DAVID VON DREHLE, *TRIANGLE: THE FIRE THAT CHANGED AMERICA* 3 (2003).

tragedy and horror.”⁸¹ Combined with the court decision of the previous day, the Triangle Fire seemed to pose 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 rational, sociologically informed legal institutions now gave way to fiery radicalism. “Benevolent talk about workingmen’s insurance and compensation” might “appease our sense of right,” Eastman announced, but after events like the Triangle Fire “what we want is to start a revolution.”⁸²

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.⁸³ What she could not have guessed then was that the new internationalist venture on which she had 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, Crystal Eastman would return to nineteenth-century rights claims as the quintessential strategy for resistance to the modern state that she had helped design.

II. INTERNATIONALISM AND THE CRITIQUE OF SOVEREIGNTY

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 Herald*, broken only by the “dirge-like roll of the

81. Letter from Crystal Eastman to Max Eastman (Apr. 3, 1911) (on file with Harvard University, Crystal Eastman Papers, Box 6); Letter from Crystal Eastman to Max Eastman (Feb. 6, 1911) (on file with Harvard University, Crystal Eastman Papers, Box 6).

82. EASTMAN, *supra* note 76, at 281.

83. CRYSTAL EASTMAN, *Suffragists Ten Years After*, in CRYSTAL EASTMAN ON WOMEN & REVOLUTION, *supra* note 21, at 132, 132–35; Letter from Crystal Eastman to Max Eastman (circa 1913) (on file with Harvard University, Crystal Eastman Papers, Box 6); Letter from Crystal Eastman to Max Eastman (Mar. 29, 1913) (on file with Harvard University, Crystal Eastman Papers, Box 6).

muffled drums” that accompanied the marchers.⁸⁴ The great mass of the marchers were “robed in black,” wrote the *New York Times*.⁸⁵ In contrast, the banner carriers, carrying a banner of a dove with an olive branch, were dressed in white with black armbands. “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.”⁸⁶

The Woman’s Peace Parade, which Crystal Eastman helped organize, marked the beginnings of World War I. The parade also touched off a movement against American intervention in the Great War. Over the course of the next two years, the peace movement produced a host of 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 and January, 1915–16. 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.⁸⁷

The Woman’s Peace Parade Committee and the organizations that followed in its wake formed the American wing of what international lawyer Nathaniel Berman calls “international legal

84. LILLIAN D. WALD, *WINDOWS ON HENRY STREET* 286 (1934).

85. *Protesting Women March in Mourning*, N.Y. TIMES, Aug. 30, 1914, at 11.

86. *Id.*; see C. ROLAND MARCHAND, *THE AMERICAN PEACE MOVEMENT AND SOCIAL REFORM, 1898–1918*, at 182–84 (1972).

87. On American antiwar organizations during World War I, see CHARLES CHATFIELD, *FOR PEACE AND JUSTICE: PACIFISM IN AMERICA, 1914–1941* (1971); CHARLES DEBENEDETTI, *ORIGINS OF THE MODERN AMERICAN PEACE MOVEMENT, 1915–1929* (1978); MARCHAND, *supra* note 86, at 148, 206–07, 256, 358 (same). Alan Dawley’s *Changing the World: American Progressives in War and Revolution*, published in 2003, is uneven and unfortunately marred by a number of errors, but is nonetheless valuable.

modernism.”⁸⁸ 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 transnational legal structures. 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 to 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”⁸⁹ by means of a century of technological advances, from the steamship and the railroad, to the telegraph, the telephone, and the wireless radio, had brought the nations, races, and civilizations of the world into closer contact than ever before.⁹⁰ 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.⁹¹

All told, the century following the end of the Napoleonic Wars witnessed the promulgation of an extraordinary outpouring of international treaties: some sixteen thousand by one count.⁹² Many of these were traditional bilateral treaty agreements between states. An increasing number of them were multilateral, lawmaking treaties on

88. Nathaniel Berman, “*But the Alternative Is Despair*”: *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1798 (1993).

89. Franklin H. Giddings, *The Heart of Mr. Spencer’s Ethics*, 14 INT’L J. ETHICS 496, 499 (1904).

90. Franklin H. Giddings, *Imperialism?*, 13 POL. SCI. Q. 585, 596 (1898).

91. SONDRÁ R. HERMAN, *ELEVEN AGAINST WAR: STUDIES IN AMERICAN INTERNATIONALIST THOUGHT, 1898–1921*, at 10–21 (1969); WARREN F. KUEHL, *SEEKING WORLD ORDER: THE UNITED STATES AND INTERNATIONAL ORGANIZATION TO 1920*, at 87 (1969); GERALD J. MANGONE, *A SHORT HISTORY OF INTERNATIONAL ORGANIZATION* 93–97 (1954); DAVID S. PATTERSON, *TOWARD A WARLESS WORLD: THE TRAVAIL OF THE AMERICAN PEACE MOVEMENT, 1887–1914*, at 11–12 (1976).

92. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 196 (revised ed., 1954).

issues ranging from tariffs, copyrights, and patents, to the treatment of war wounded. The crowning 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. Although the agreements that emerged from the Conferences were hedged with reservations, the First Conference produced a Permanent Court of Arbitration for the peaceful resolution of international disputes.⁹³ 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.⁹⁴ Much remained to be done, but many participants believed that much had been accomplished; in the words of the closing address of the Second Conference, the Conference had made the “greatest” progress “that mankind has ever made” toward “the maintenance of peaceful relations between nations.”⁹⁵

The Hague Conferences quickly captured the hearts and minds of international lawyers. Even before the Hague Conferences, 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*.”⁹⁶ By the end of 1868, a cadre of international lawyers from England, Italy, and the Netherlands began 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

93. CALVIN DEARMOND DAVIS, *THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE* 146–61 (1962).

94. CALVIN DEARMOND DAVIS, *THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE* 289–302 (1975).

95. MANGONE, *supra* note 91, at 127; *see also* DAVIS, *supra* note 93; DAVIS, *supra* note 94.

96. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW* 4, 13 (2001).

developing an organized constituency with a professional self-consciousness.⁹⁷

American internationalists followed fast on the heels of the European international lawyers. Beginning in 1895, peace advocates, leading businessmen, and international lawyers gathered for annual conferences 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.⁹⁸ 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 ardent support for the arbitration of international disputes.⁹⁹ In 1905, a group of international lawyers at the Lake Mohonk Conference established the American Society for International Law.¹⁰⁰ The American Association for International Conciliation was founded in 1906 to "awaken interest" in "international law, international conduct, and international organization."¹⁰¹ The New York Peace Society, established that same year, brought together men of affairs in New York City, as did similar associations in places like Boston, Buffalo, Chicago, and Maryland.¹⁰² 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

97. *Id.* at 12–19.

98. KUEHL, *supra* note 91, at 41–43.

99. AM. CONF. ON INT'L ARB., THE AMERICAN CONFERENCE ON INTERNATIONAL ARBITRATION HELD IN WASHINGTON, D.C., APRIL 22 AND 23, 1896 (1896); AM. CONF. ON INT'L ARB., THE SECOND AMERICAN CONFERENCE ON INTERNATIONAL ARBITRATION HELD IN WASHINGTON, D.C., JANUARY 12, 1904 (1904).

100. MARCHAND, *supra* note 86, at 39.

101. AM. ASS'N FOR INT'L CONCILIATION, *Publisher's Introduction to OFFICIAL DOCUMENTS LOOKING TOWARD PEACE* (1917).

102. BUFFALO PEACE & ARB. SOC'Y, FIRST REPORT OF THE EXECUTIVE COMMITTEE AND TREASURER (1911); CHICAGO PEACE SOC'Y, REPORT OF THE CHICAGO PEACE SOCIETY, 1912 (1913); JAY WILLIAM HUDSON, MASS. PEACE SOC'Y, WHAT IS THE NEW INTERNATIONALISM? (1915); NEW YORK PEACE SOCIETY, OFFICERS, CONSTITUTION (1908); James Brown Scott, *Judicial Proceedings as a Substitute for War or International Self-Redress*, MD. Q., Feb. 1910, at 1.

organization” in American schools.¹⁰³ 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.¹⁰⁴

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.”¹⁰⁵ Indeed, American international lawyers adopted an often utopian exuberance about the prospects for international order. The formation of international law institutions and peace organizations led many American international lawyers—along with many of their peers across the Atlantic—to hope 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.¹⁰⁶ A century of relative peace seemed to have brought forth a new system of relations among states, symbolized by the Hague Conferences. In the Permanent Court of Arbitration, internationalists saw the progressive substitution of “the empire of law” for the anarchy of state rivalries.¹⁰⁷ 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.”¹⁰⁸ 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.¹⁰⁹ President McKinley announced at his

103. AMERICAN SCHOOL CITIZENSHIP LEAGUE: AN ELEVEN YEAR SURVEY OF THE ACTIVITIES OF THE SCHOOL PEACE LEAGUE FROM 1908 TO 1919, at 11 (1919).

104. LARRY L. FABIAN, ANDREW CARNEGIE’S PEACE ENDOWMENT: THE TYCOON, THE PRESIDENT, AND THEIR BARGAIN OF 1910, at 1 (1985).

105. MARCHAND, *supra* note 86, at 23.

106. DAVIS, *supra* note 94, at 19.

107. Convention for the Pacific Settlement of International Disputes (Hague I) (July 29, 1899), 32 Stat. 1779, 187 Consol. TS 410, *as amended*, Oct. 18, 1907, 36 Stat. 2199, 205 Consol. TS 233.

108. NICHOLAS MURRAY BUTLER, THE INTERNATIONAL MIND: AN ARGUMENT FOR THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES (1912).

109. Hamilton Holt, *A League of Peace*, in THE EAGLE AND THE DOVE: THE AMERICAN PEACE MOVEMENT AND UNITED STATES FOREIGN POLICY, 1900–1922, at 17, 18 (John Whiteclay Chambers II ed., 2d ed. 1991).

inauguration in 1897 that the “importance and moral influence” of arbitration among states could “hardly be overestimated in the cause of advancing civilization.”¹¹⁰ Indeed, other commentators suggested that arbitrations of nation-state disputes would complete the process of “substituting law for war,”¹¹¹ vindicate the possibility of a “spiritual evolution for mankind,”¹¹² and give life to an “all-embracing” idea of “brotherly love” and a “bond of union transcending national, racial or color lines.”¹¹³ 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.¹¹⁴ “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.”¹¹⁵ 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.¹¹⁶ The “glorious example of reason and peace,” President William McKinley explained, would at last triumph over “passion and war.”¹¹⁷ 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 unequaled “power and influence” in this “new era of the law

110. William McKinley, First Inaugural Address (March 4, 1897), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON, 1789, TO GEORGE BUSH, 1989, at 193, 200 (1989).

111. James L. Tryon, *A Permanent Court of International Justice*, 22 *YALE L.J.* 203, 203 (1913).

112. M.A. STOBART, *WOMEN AND WAR* 18 (World Peace Foundation Pamphlet Series, vol. 3, no. 2, 1913).

113. LOUIS P. LOCHNER, *INTERNATIONALISM AMONG UNIVERSITIES* 12 (World Peace Foundation Pamphlet Series, vol. 3, no. 7, 1913).

114. William Howard Taft, *World Peace and the General Arbitration Treaties*, in *THE EAGLE AND THE DOVE: THE AMERICAN PEACE MOVEMENT AND UNITED STATES FOREIGN POLICY, 1900–1922*, *supra* note 109, at 21, 22.

115. HUDSON, *supra* note 102, at 3.

116. CARNEGIE ENDOWMENT FOR INT’L PEACE, *CARNEGIE ENDOWMENT YEAR BOOK FOR 1911*, at 3 (1912). The analogy of the abolition of war to the abolition of slavery was made commonly. *See, e.g.*, WALTER L. FISHER, *PREPARATIONS FOR PEACE*, S. DOC. NO. 64-323 (1916); JOHN HAY & ELIHU ROOT, *INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE CONFERENCES, 1899 AND 1907*, at 9 (World Peace Foundation Pamphlet Series, vol. 3, no. 4, 1913).

117. McKinley, *supra* note 110, at 200.

of nations” to bring about “peace and justice” and “human brotherhood the world over.”¹¹⁸

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 in the McKinley administration and then secretary of state under President Theodore Roosevelt, Root 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 cosponsored a Central American Peace Conference that established the Central American Court of Justice. And in 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 the American Society of International Law and the Carnegie Endowment, Root was awarded the Nobel Peace Prize for 1912.¹¹⁹

Root viewed nation-state sovereignty as the foundational building block of international law. The law of nations, in Root’s 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.”¹²⁰ 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.”¹²¹ The world was therefore ready neither for a “parliament of man with authority to control the conduct of nations,” nor for “an

118. Elihu Root, *The Function of Private Codification (April 27, 1911)*, reprinted in ADDRESSES ON INTERNATIONAL SUBJECTS BY ELIHU ROOT 57, 69 (Robert Bacon & James Brown Scott eds., 1916); ELIHU ROOT, PANAMA CANAL TOLLS 27 (World Peace Foundation Pamphlet Series, vol. 3, no. 3, 1913); Elihu Root, *The Hague Peace Conferences (April 15, 1907)*, reprinted in ADDRESSES ON INTERNATIONAL SUBJECTS, *supra*, at 129, 144, 134.

119. HERMAN, *supra* note 91, at 22–54; 2 PHILIP C. JESSUP, ELIHU ROOT 3–136 (Klodd, Mead and Co., Inc. 1964) (1938).

120. Elihu Root, Nobel Peace Prize Address (scheduled for Sept. 8, 1914, not delivered due to war), reprinted in ADDRESSES ON INTERNATIONAL SUBJECTS BY ELIHU ROOT, *supra* note 118, at 153, 157.

121. Elihu Root, *The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts (April 23, 1909)*, reprinted in ADDRESSES ON INTERNATIONAL SUBJECTS BY ELIHU ROOT, *supra* note 118, at 33, 34.

international police force with power to enforce national conformity to rules of right conduct.”¹²² Instead, people and organizations seeking to work for world peace, Root contended, were best advised to “stand behind the men who are in the responsible positions of government.”¹²³

If truth be told, even Root’s nineteenth-century orthodoxy made room for international constraints on the sovereignty of nation-states. In 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.”¹²⁴ Like a Lockean social contract writ global, the implied 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.

A second strand of American internationalism, however, focused much more explicitly on creating international constraints on the nation-state. “[T]o 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.¹²⁵ Radical internationalists like John Dewey and Jane Addams thus sought to move beyond the building blocks of nation-states to new international structures.

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

122. *Id.*

123. Elihu Root, *The Causes of War* (Feb. 26, 1909), *reprinted in MISCELLANEOUS ADDRESSES BY ELIHU ROOT* 275, 277 (Robert Bacon & James Brown Scott eds., 1917).

124. Root, *supra* note 121, at 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 QUINNIPIAC L. REV. 99, 113 (1997).

125. John Dewey, *Introduction to JANE ADDAMS, PEACE AND BREAD IN TIME OF WAR*, at xv (1945).

phrases” were “abstractions” with dangerous power.¹²⁶ 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.¹²⁷ It was those suspicions and rivalries that made the legal fiction of nation-states—“artificial unit[s] of loyalty,” as Max Eastman put it—so dangerous.¹²⁸ 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.”¹²⁹ What the radical internationalists like Addams offered instead, Max Eastman contended in 1916, was a world in which humanity would break the cycle of competitive rivalries to join together in “international union.”¹³⁰ War, he urged, might thus be eliminated “exactly as the wars of family and clan and city” had been “eliminated by national union.”¹³¹

As World War I 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 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.”¹³² Others came to internationalism from the perspective of

126. Jane Addams, *The Revolt Against War*, in *WOMEN AT THE HAGUE: THE INTERNATIONAL PEACE CONGRESS OF 1915*, at 69, 72 (Mary Jo Deegan ed., 2003).

127. ADDAMS, *supra* note 125, at 52; *see* Addams, *supra* note 126, at 72.

128. Max 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*, *supra* note 23, at 239, 246–47; *see* S.L. FRIEDENBERG, *AN APPEAL FOR INTERNATIONAL UNION* 3 (1915).

129. Norman Thomas?, *Untitled Partial Typescript* (circa Oct. 1916) (on file with the New York Public Library, Norman Thomas Papers); *see* Letter from Norman Thomas to Dr. Laidlaw 2 (Mar. 15, 1917) (on file with the New York Public Library, Norman Thomas Papers).

130. Eastman, *supra* note 128, at 246–47.

131. *Id.*

132. Letter from Norman Thomas to Members of the Fellowship of Reconciliation 3 (Apr. 23, 1917) (on file with the New York Public Library, Norman Thomas Papers).

socialist and communist critiques of the state.¹³³ Still others were latter-day James Madisons, seeing in the relationships among states in the American federal system a principle that might be extended to nation-states in a transnational system.¹³⁴ Some radical internationalists, like one American conscientious objector in August 1917, claimed simply that “internationalism” was their “only principle.”¹³⁵ What this eclectic array of radical internationalisms agreed upon, however, was that nationalism all too often and all too easily gave way to militarism, 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.”¹³⁶ 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.”¹³⁷ Their internationalist aim was thus to create transnational institutions that would contain the threat of militarism by eclipsing the ostensibly unquestioned authority of nation-states in the orthodox nineteenth-century view of international law.

Between August 1914 and March 1917, Eastman became perhaps the leading organizer of the radical internationalist movement in the United States. 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 worldwide “clearing-house” for internationalist

133. *3,000 Would Rather Die Than Fight*, NEW YORK JOURNAL, Sept. 4, 1917, *microformed on* ACLU Archives, *supra* note 11, Reel 6, vol. 46; *The Psychological Examination of Conscientious Objectors* (circa Dec. 1918) (on file with the New York Public Library, Norman Thomas Papers).

134. WALTER L. FISHER, PREPARATIONS FOR PEACE, S. DOC. NO. 64-323 (1916).

135. *Refuses to Serve in Draft Army*, BOSTON ADVERTISER, Aug. 31, 1917, *microformed on* ACLU Archives, *supra* note 11, Reel 1, vol. 4.

136. Speech by Amos Pinchot, American Union Against Militarism (n.d.), *microformed on* Swarthmore College Peace Collection, American Union Against Militarism Papers, Reel 1 (Scholarly Resources, Inc.) [hereinafter AUAM Papers].

137. *Id.*

ideas during the war.¹³⁸ 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.¹³⁹ 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.”¹⁴⁰

The American Union developed into America’s most important radical internationalist organization, with Eastman (in Lillian Wald’s words) as its “wonderful secretary.”¹⁴¹ Eastman worked to ensure that all of the “energy and genius” of the American Union would “be directed toward putting this idea of a world federation into workable form, acceptable to all nations.”¹⁴² 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.”¹⁴³ Indeed, the organization’s international program was lifted almost directly from the eclectic (and often not altogether consistent) array of ideas that American and European internationalists had bandied about for decades: self-determination; equal treatment for all nations; a “Society of Nations” developed through the Hague Conference; 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”¹⁴⁴ and called for a “democratic federation of American

138. Alice Thacher Post, A Statement on Preparedness, Address Before the Preliminary Meeting of the Woman’s Peace Party at the Hotel McAlpin, New York (Nov. 19, 1915), *microformed on* Columbia University, Lillian D. Wald Papers, Reel 101, Folder 1.1 [hereinafter Wald Papers].

139. *Id.*

140. Civil Liberties Bureau, Am. Union Against Militarism, Proposed Announcement for the Press (circa fall 1917), *microformed on* AUAM Papers, *supra* note 136, Reel 1.

141. Letter from Lillian D. Wald to Amos Pinchot (March 13, 1917), *microformed on* Wald Papers, *supra* note 138, Reel 7, Folder 8.1; *see* MARCHAND, *supra* note 86, at 240–43 (describing Eastman’s role during the American Union’s beginning).

142. CRYSTAL EASTMAN, *A Platform of Real Preparedness*, in CRYSTAL EASTMAN ON WOMEN & REVOLUTION, *supra* note 21, at 241, 246.

143. Am. Union Against Militarism, Statement to the Press (n.d.), *microformed on* AUAM Papers, *supra* note 136, Reel 1.

144. Am. Union Against Militarism, Statement Concerning the Anti-Militarism Committee (n.d.), *microformed on* AUAM Papers, *supra* note 136, Reel 1.

republics as a step toward international government.”¹⁴⁵ They testified, as Eastman did before Congress in January 1916, against the creeping militarism that had created a dangerous arms race. And they urged President Wilson to take up the so-called Hensley Resolution in the Naval Appropriation Act of 1916, which authorized him to convene a Conference of Nations for disarmament. Eastman and her colleagues advocated policies that they believed would move the world toward what Eastman described to Congress as “unnationalism”: a “federation of nations” dedicated to “democracy, to peace, and to their mutual good will and friendship.”¹⁴⁶

Of course, the radical internationalists’ ideas were often utopian and impractical. But they were no more so than many of the ideas that had been spinning out of internationalist conversations on both sides of the Atlantic for decades. Radical internationalism was a continuation of international lawyers’ *esprit d’internationalité*. Indeed, the radicals of 1914 to 1917 drew their inspiration from virtually the same set of developments that had sent 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 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. Such institutions, Eastman and her colleagues contended, were harbingers of a coming internationalism. The world, it seemed, was growing smaller. According to orthodox and radical internationalists alike, it was “already in large measure internationalized.”¹⁴⁷ 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.¹⁴⁸

145. Am. Union Against Militarism, Development (typescript circa Sept./Oct. 1917), *microformed on AUAM Papers, supra* note 136, Reel 1; Letter from Charles T. Hallinan to Lillian D. Wald (Jan. 11, 1915 [1916?]), *microformed on Wald Papers, supra* note 138, Reel 102, Folder 2.2; Letter from David Starr Jordan to Lillian D. Wald (Mar. 6, 1917), *microformed on Wald Papers, supra* note 138, Reel 3, Folder 4.5 (enclosure).

146. *Hearing on H.R. 6921 and H.J. Res. 32 Before the House Comm. on Foreign Affairs*, 64th Cong. 9–10 (1916) (statement of Commission for Enduring Peace).

147. H.A. Overstreet, *The Next Step in International Control*, FOUR LIGHTS, Apr. 7, 1917.

148. *Id.*

Yet the same questions of nation-state sovereignty and of the citizen's obligations to work through official state channels that divided orthodox internationalists from radicals reappeared within organizations like the Woman's Peace Party and the American Union. In the latter organization, for example, leading members such as 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,"¹⁴⁹ and discrete advocacy with President Wilson and his Secretary of War Newton Baker were their preferred methods of action. The American Union therefore pursued a campaign of private advocacy and personal meetings with Wilson, Baker, and others in the Wilson administration into early 1917.¹⁵⁰

Eastman, by contrast, represented the radical wing of even the nation-state skeptics in the internationalist movement. Friendly critics such as Wald suggested that Eastman was overly enamored of an "impulsive radicalism."¹⁵¹ (Members of the Peace Party quietly warned that she was too radical to "greatly help the movement."¹⁵²) Eastman's more confrontational tactics included propaganda campaigns, national speaking tours, and mass meetings. In the spring of 1916, she organized a public exhibit that included Jingo the Dinosaur ("All Armor Plate—No Brains," announced the collar on the papier-mâché caricature of militarist nationalism), whose aggressive personality and tiny brain had led to its own extinction. A speaking tour through the Midwest followed, reaching an estimated forty thousand listeners. By May, Eastman had collected the names of five thousand supporters and distributed over six hundred thousand "pieces of propaganda."¹⁵³ Internationalism, she insisted, was a

149. Am. Union Against Militarism, *supra* note 144.

150. KENNEDY, *supra* note 3, at 34–36; Letter from Lillian D. Wald to Newton Baker (June 20, 1917), *microformed on* Wald Papers, *supra* note 138, Reel 1, Folder 1.2.; Letter from Lillian D. Wald to Emily Balch (May 23, 1917), *microformed on* Wald Papers, *supra* note 138, Reel 1, Folder 1.3.

151. Letter from Lillian D. Wald to Crystal Eastman (Aug. 26, 1917), *microformed on* AUAM Papers, *supra* note 136, Reel 1.

152. MARCHAND, *supra* note 86, at 219, 243.

153. CHATFIELD, *supra* note 87, at 23; Am. Union Against Militarism, Anti-Preparedness Committee Typescript (n.d.), *microformed on* AUAM Papers, *supra* note 136, Reel 1.

movement to be pursued by “the people acting directly—not through their governments or diplomats or armies.”¹⁵⁴

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 years before that women (and especially married women) had at best a complicated relationship to the conventional categories of nation-state citizenship. Nation-states, she observed, had regularly disabled women from service as soldier, property owner, voter, officer of the court, or public official.¹⁵⁵ Indeed, in 1916, Crystal Eastman encountered firsthand the liminal status of women in the modern nation-state when she divorced Bennie and married Walter Fuller, a British citizen 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 1907¹⁵⁶ and upheld by the Supreme Court in the year before Eastman’s marriage,¹⁵⁷ 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 Fuller. 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 made it exceedingly difficult for women to act through those official channels. And just as many American women in the 1910s—Eastman included—were being drawn to the radical tactics of the British suffragettes, so too were they drawn to such tactics in the internationalist campaign against militarist nationalism.¹⁵⁸

154. Letter from Crystal Eastman to Lillian D. Wald (May 29, 1916), *microformed on* Wald Papers, *supra* note 138, Reel 102, Folder 2.3; see CHATFIELD, *supra* note 87, at 23; THOMAS J. KNOCK, *TO END ALL WARS: WOODROW WILSON AND THE QUEST FOR A NEW WORLD ORDER* 63 (1992); Am. Union Against Militarism, *supra* note 153; Letter from Crystal Eastman to Lillian D. Wald (May 27, 1916), *microformed on* Wald Papers, *supra* note 138, Reel 102, Folder 2.3.

155. Annis Ford Eastman, *Women’s Relation to Good Citizenship* (n.d.) (unpublished manuscript, on file with Harvard University, Crystal Eastman Papers, Box 4, Folder 86).

156. An Act in Reference to the Expatriation of Citizens and Their Protection Abroad, ch. 2534, § 3, 34 Stat. 1228, 1228–29 (1907) (repealed 1940).

157. *MacKenzie v. Hare*, 239 U.S. 299, 301 (1915).

158. CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* 45–112 (1998); MARCHAND, *supra* note 86, at 194–208; Nancy F.

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 *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."¹⁵⁹ 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."¹⁶⁰ 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."¹⁶¹ On the internationalist view, *Four Lights* contended, 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."¹⁶² Indeed, the internationalist agenda, as Eastman and the *Four Lights* editors of the Women's Peace Party of New York City

Cott, *Justice for All? Marriage and 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 POL. & SOC'Y 1, 10–11 (1984). In 1922, the Cable Act authorized certain women who lost their citizenship under the 1907 legislation to seek renaturalization, but there is no evidence that Eastman took advantage of the opportunity. The Cable Act (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. Act Relative to the Naturalization and Citizenship of Married Women, ch. 411, § 4, 42 Stat. 1021 (1922). On the relationships between gender and internationalism in the late-nineteenth and early-twentieth centuries, see HARRIET HYMAN ALONSO, PEACE AS A WOMEN'S ISSUE: A HISTORY OF THE U.S. MOVEMENT FOR INTERNATIONAL PEACE AND WOMEN'S RIGHTS (1993); GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917 (1995); KRISTIN L. HOGANSON, FIGHTING FOR AMERICAN MANHOOD: HOW GENDER POLITICS PROVOKED THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS (1998); Kristin Hoganson, "As Badly Off as Filipinos": U.S. Women's Suffragists and the Imperial Issue at the Turn of the Twentieth Century, J. WOMEN'S HIST., Summer 2001, at 9; and Judith Papachristou, *American Women and Foreign Policy: 1898–1905*, 14 DIPLOMATIC HIST. 493 (1990).

159. Edna Kenton, *Bounded on the North, South, East, and West*, FOUR LIGHTS, Jan. 27, 1917.

160. *Id.*

161. *Id.*

162. *Id.*

conceived it, was no less than “to destroy geography” by “welding the nations of the world into the United States of the World.”¹⁶³

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 already come 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.”¹⁶⁴ 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.”¹⁶⁵ The nation had become a kind of “metaphysical entity,” complained Norman Thomas, “apart from the individuals who compose it.”¹⁶⁶ Rights might have been a nineteenth-century idea newly vulnerable in an era of war and pragmatism, but so too was the sovereignty of states. 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 cosmopolitan citizenship, on the other. That collision would initiate the twentieth-century civil liberties movement.

III. INTERNATIONALISM AND THE BEGINNINGS OF AMERICAN “CIVIL LIBERTIES”

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

163. *To George Washington and Patrick Henry: Greetings!*, FOUR LIGHTS, Mar. 10, 1917. Eastman and the Woman’s Peace Party were not completely utopian on this point. “[T]here 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 international structures to mediate the militarist rivalries that had brought on the war. A. D., *Friendly Relations Commissions*, FOUR LIGHTS, Apr. 7, 1917.

164. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8–10 (1995); *see also* STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

165. Addams, *supra* note 126, at 73–74.

166. Letter from Norman Thomas to Alfred T. Carton (Sept. 7, 1917) (on file with the New York Public Library, Norman Thomas Papers). For the point that claims of national attachment and obligation should be treated as skeptically as claims of natural individual rights, see Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751, 781 (1992).

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 war thus touched off a scramble for a secure position between loyalty and internationalism. "After war was declared, we of course ceased all opposition to it," explained one member of the American Union.¹⁶⁷ 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 the entrance . . . into the World War."¹⁶⁸ And as far as Crystal Eastman's long-time friend Paul Kellogg was concerned, he favored "not blocking the prosecution of war, now that the decision has been made."¹⁶⁹ For many, the loyalty obligations of the nation-state thus seemed to trump the internationalist agenda. In the words of Elihu Root, "the question of peace or war" had "now been decided by the President and congress."¹⁷⁰ "The question 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.¹⁷¹ As William R. Vance, dean of the University of Minnesota Law School, summed up in 1917, "[W]artime was no time to quibble about constitutional rights and guarantees."¹⁷² 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 Americans no different than "treason," and its advocates "traitors" to "be dealt with accordingly."¹⁷³

167. Am. Union Against Militarism, *supra* note 145.

168. ADDAMS, *supra* note 125, at 107.

169. Crystal Eastman, Typescript (June 14, 1917), *microformed on* AUAM papers, *supra* note 136, Reel 1.

170. Elihu Root, Address in Chicago 3 (Sept. 14, 1917) (Nat'l Security League, Patriotism Through Education Series No. 17, 1917).

171. *Id.* at 3, 5; see Elihu Root, Foreign Affairs, 1913–1916 (Feb. 15, 1916), *reprinted in* ADDRESSES ON INTERNATIONAL SUBJECTS BY ELIHU ROOT, *supra* note 118, at 427, 427–28.

172. H.C. PETERSON & GILBERT C. FITE, OPPONENTS OF WAR, 1917–1918, at 79 (1957).

173. *They Who Play with Fire*, GRAND RAPIDS PRESS, May 31, 1917, *microformed on* ACLU Archives, *supra* note 11, Reel 4, vol. 29; see also *Christian Pacifists Are Given Cold Shoulder*, LONG BEACH TELEGRAM, Sept. 7, 1917, *microformed on* ACLU Archives, *supra* note 11, Reel 4, vol. 29; *Speaking of Conscientious Objectors*, ARMY & NAVY NEWS, Sept. 6, 1917, *microformed on* ACLU Archives, *supra* note 11, Reel 6, vol. 47. On the culture of obligation in World War I America, see Christopher Joseph Capozzola, Uncle Sam Wants You: Political Obligations in World War I America 284–351 (2002) (unpublished Ph.D. dissertation, Columbia University) (on file with the *Duke Law Journal*).

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 the model of the United States. He taught international law at Princeton in 1892. In 1908 he joined the American Peace Society.¹⁷⁴ 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.¹⁷⁵ In 1916, Wilson privately assured a delegation from the American Union that he was working toward a "joint effort" on a global 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."¹⁷⁶ In his famous "Fourteen Points" speech to the Senate in January 1917, he called again for an international "concert of power which will make it virtually impossible that any such catastrophe should ever overwhelm us again."¹⁷⁷

In these respects, at least, 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, Wilson seemed to believe, would merely 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."¹⁷⁸ Moreover, many of his public addresses seemed (like Eastman's antimilitarist

174. HARLEY NOTTER, *THE ORIGINS OF THE FOREIGN POLICY OF WOODROW WILSON* 264 (1937).

175. JOHN MILTON COOPER, JR., *THE WARRIOR AND THE PRIEST: WOODROW WILSON AND THEODORE ROOSEVELT* 273, 275 (1983); see RUHL J. BARTLETT, *THE LEAGUE TO ENFORCE PEACE* 34 (1944).

176. 37 *THE PAPERS OF WOODROW WILSON* 115 (Arthur S. Link ed., 1981); see 36 *id.* at 645 (1981).

177. 40 *id.* at 534 (1982).

178. 36 *id.* at 645 (1981).

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”;¹⁷⁹ 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.”¹⁸⁰ Wilson, in short, seemed to have embraced the hopeful idealism of the prewar internationalist spirit. 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 postwar international order. Even as late as the beginning of 1918, for example, Crystal Eastman and her brother Max supported the president, endorsing “his demand for an international union, based upon free seas, free commerce and general disarmament.”¹⁸¹

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,” and the “rights of mankind.”¹⁸² But those rights were to be advanced on the international stage by vindicating the rights not of individuals but of sovereign 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.”¹⁸³ 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*.”¹⁸⁴ 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.”¹⁸⁵ 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

179. KNOCK, *supra* note 154, at 162; see Laurence W. Martin, *Woodrow Wilson’s Appeals to the People of Europe*, 74 POL. SCI. Q. 498, 499 (1959).

180. 41 THE PAPERS OF WOODROW WILSON, *supra* note 176, at 55; see KNOCK, *supra* note 154, at 114–15.

181. CRYSTAL EASTMAN, *Editorial*, in CRYSTAL EASTMAN ON WOMEN & REVOLUTION, *supra* note 21, at 291; see KNOCK, *supra* note 154, at 11–12.

182. 41 THE PAPERS OF WOODROW WILSON, *supra* note 176, at 520–26 (1983).

183. 41 *id.* at 525 (emphasis added).

184. 41 *id.* at 521 (emphases added).

185. 41 *id.* at 527 (emphasis added).

March 1917, would require “illiberalism at home to reinforce the men at the front.”¹⁸⁶ “The Constitution,” Wilson continued, “would not survive” a war, and “free speech and the right of assembly would go,” too.¹⁸⁷ 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 postwar internationalism. Such conversations, he warned, were “very unwise” while the war was still pending.¹⁸⁸

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. In February 1917, Congress had debated legislation to punish those who intentionally caused disaffection in the armed forces or who intentionally interfered in military operations.¹⁸⁹ 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 the registration of all men between the ages of twenty-one and thirty.¹⁹⁰ 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.¹⁹¹ Materials violating the Espionage Act or otherwise “urging treason” were “declared to be nonmailable matter” not to be delivered by the postmaster general.¹⁹² The Trading with the Enemy Act limited commerce and communication with enemies of the United States.¹⁹³ Amendments to the Espionage Act in May 1918 prohibited disloyal or abusive language about “the form of government of the United States,” or about its flag, uniforms, or military or naval forces.¹⁹⁴ From

186. Arthur S. Link, *That Cobb Interview*, 72 J. AM. HIST. 7, 11–12 (1985).

187. *Id.*

188. COOPER, *supra* note 175, at 330.

189. *To Punish Espionage and Interference with Neutrality: Hearings on S. 8148 Before the House Comm. on the Judiciary*, 64th Congress (1917); Am. Union Against Militarism, *Bulletins* (Feb. 1917), *microformed on Wald Papers*, *supra* note 138, Reel 101, Folder 1.1.

190. An Act to Authorize the President to Increase Temporarily the Military Establishment, 40 Stat. 76 (1917).

191. Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793–799 (2000)).

192. *Id.* tit. XII, § 2, 40 Stat. at 230.

193. 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. 1–44 (2000)).

194. Act of May 16, 1918, ch. 75, 40 Stat. 553 (codified as amended at 18 U.S.C. §§ 793–799 (2000)).

Montana and Texas to Minnesota and Nebraska, similar developments produced dozens of new laws at the state and municipal levels banning expressions of opposition to the war.¹⁹⁵

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.”¹⁹⁶ “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.”¹⁹⁷ Between 1917 and the end of 1921, the federal government would commence more than two thousand prosecutions under the Espionage Act. Burleson shut down dozens of foreign language newspapers pursuant to authority granted him under the Trading with the Enemy Act. Newspapers such as the conservative socialist Milwaukee *Leader* were denied mailing privileges, as were seventy-four other newspapers by the fall of 1918. Even the eminently respectable *Nation* was barred from the mails on Burleson’s order until Wilson intervened.¹⁹⁸ The August 1917 issue of Max Eastman’s avant-garde journal the *Masses* was declared nonmailable by Burleson and Gregory for its antiwar cartoons and its opposition to the draft. After an order by U.S. District Judge Learned Hand requiring 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 having failed to remain a “periodical” within the meaning of the second-class mail law.¹⁹⁹

Private and quasi-private patriotism was often as powerful a force as the authority of the state. Ad hoc vigilante gangs and ultranationalist patriots—organizations like the American Defense

195. ELDRIDGE FOSTER DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES 147 (1939); PETERSON & FITE, *supra* note 172, at 18, 213–14. See generally William Henry Thomas, Jr., *The United States Department of Justice and Dissent During the First World War* (2002) (unpublished Ph.D. dissertation, University of Iowa) (describing the Justice Department’s covert campaign to suppress opposition to the war effort) (on file with the *Duke Law Journal*).

196. MURPHY, *supra* note 9, at 98.

197. PETERSON & FITE, *supra* note 172, at 115; MURPHY, *supra* note 9, at 95.

198. HARRY N. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917–1921*, at 30, 63 (1960).

199. *Masses Publ’g Co. v. Patten*, 244 F. 535, 537 (S.D.N.Y. 1917); MAX EASTMAN, *LOVE AND REVOLUTION: MY JOURNEY THROUGH AN EPOCH* 61 (1964).

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 antiwar demonstrations, interrupted pacifist speaking halls, and lynched men suspected of pro-German leanings.²⁰⁰ The more respectable National Security League held events urging national loyalty and condemning those whom former President Theodore Roosevelt called “weaklings, illusionists, materialists, lukewarm Americans and faddists of all the types that vitiate sound nationalism.”²⁰¹ National Security League addresses 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 (CPI). Headed by former journalist George Creel, the CPI spearheaded a massive propaganda campaign in the form of an extraordinary seventy-five million pamphlets and as many as six thousand press releases, virtually all broadcasting the importance of national loyalty in time of war.²⁰² 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.”²⁰³ Loyal citizens “should refrain from fractious criticism,” speakers cautioned, and should openly display their support for the war effort lest they be mistaken for “unconditional traitors” who hid treasonous attitudes beneath an outward display of silence.²⁰⁴ In the new wartime atmosphere, those whom Roosevelt and his nationalist allies scorned as “professional internationalists” were most at risk.²⁰⁵ Treasury Secretary William McAdoo declared in October 1917 that advocacy of internationalism during wartime was, “in effect, traitorous.”²⁰⁶ Others expressed the

200. PETERSON & FITE, *supra* note 172, at 18; Geo. H. Greenfield, Democracy’s Battle 6 (n.d.), *microformed on* ACLU Archives, *supra* note 11, Reel 4; National Civil Liberties Bureau, Press Statement (July 1917), *microformed on* ACLU Archives, *supra* note 11, Reel 4. On the work of private associations enforcing political obligations during the war, see Capozzola, *supra* note 173, at 26–81.

201. COOPER, *supra* note 175, at 331.

202. KENNEDY, *supra* note 3, at 61–66.

203. Henry Litchfield West & Charles T. Hallinan, Debate on University Military Training as a Permanent Principle of National Defense 3 (1918) (on file with the *Duke Law Journal*); see ALFRED M. BROOKS, CONVERTED AND SECRET AMERICANS 5 (Nat’l Security League, Patriotism Through Education Series No. 30, 1918).

204. S. STANWOOD MENKEN, A CONCEPT OF NATIONAL SERVICE 2 (Nat’l Security League, Patriotism Through Education Series No. 27, 1918).

205. KNOCK, *supra* note 154, at 169.

206. PETERSON & FITE, *supra* note 172, at 148–49.

same sentiment in less civilized fashion, scrawling slogans like “Treason’s Twilight Zone” on the doors to the American Union’s offices.²⁰⁷

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.²⁰⁸ “Extreme patriots would force us to go out of business,” she observed, yet “extremists of another sort” would surely put them all “in the federal penitentiary.”²⁰⁹ Many items on the American Union’s prewar agenda were now “impracticable,” opposition to the war not the least among them.²¹⁰ As the spring of 1917 wore on, however, a new role seemed increasingly available. President Wilson had “turned his back on civil liberties,” as historian John Blum has argued, “because he loved his vision of eventual peace more.”²¹¹ But if Eastman’s wing of American internationalism was right about 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 postwar 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 to replace the nation-state, they would 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. Civil liberties provided the position between jingoist patriotism and treasonous internationalism for which the American Union had been searching. 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,” he continued, “as though to engage our liberal efforts afresh, there came suddenly to the fore in our nation’s life the

207. CHATFIELD, *supra* note 87, at 4.

208. Am. Union Against Militarism, *supra* note 145.

209. *Id.*

210. Am. Union Against Militarism, Memorandum of Organization 2 (circa Apr. 1917) (on file with the New York Public Library, Norman Thomas Papers).

211. JOHN MORTON BLUM, WOODROW WILSON AND THE POLITICS OF MORALITY 144 (1956).

new issue of civil liberties.”²¹² 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.”²¹³ Americans might no longer safely 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.”²¹⁴ The resolution of the internationalists’ crisis, in short, was to fight “the general abrogation of civil liberty” that the war among nation-states had brought in its wake.²¹⁵ Indeed, such work, American Union leaders argued, was “the logical consequence of what we have been doing for two years.”²¹⁶ 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.”²¹⁷ The American Union, in her view, was the “logical group to defend the other American liberties, free speech, free press and free assembly.”²¹⁸

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 the Defense of Civil Liberty.”²¹⁹ In late June 1917, the Conscientious Objectors’ Bureau of the American Union, which had tentatively been formed two months earlier, was remade into the “Civil Liberties Bureau.”²²⁰ Within weeks, “civil liberties” had become the “chief war work” of the nation’s leading radical-internationalist organization.²²¹

212. JOHN HAYNES HOLMES, *I SPEAK FOR MYSELF: THE AUTOBIOGRAPHY OF JOHN HAYNES HOLMES* 189 (1959).

213. Am. Union Against Militarism, *supra* note 210, at 2.

214. Am. Union Against Militarism, *supra* note 145.

215. *Id.*

216. Am. Union Against Militarism, Minutes of the Meeting (June 4, 1917), *microformed on AUAM Papers*, *supra* note 136, Reel 1.

217. Am. Union Against Militarism, Minutes of the Meeting (June 15, 1917), *microformed on AUAM Papers*, *supra* note 136, Reel 1.

218. *Id.*

219. Am. Union Against Militarism, *supra* note 140.

220. Letter from Crystal Eastman to Lillian D. Wald (June 18, 1917), *microformed on Wald Papers*, *supra* note 138, Reel 102, Folder 2.4; Am. Union Against Militarism, *supra* note 216; Am. Union Against Militarism, Minutes of the Executive Committee Meeting (June 25, 1917), *microformed on AUAM Papers*, *supra* note 136, Reel 1.

221. Proposed Announcement for the Press, AUAM Papers, *supra* note 136, reel 1.

The name of the new Civil Liberties Bureau emerged out of the same transatlantic internationalism from which the American Union had arisen. Though the term “civil liberty” had long been central to Anglo-American law and political theory, eighteenth- and nineteenth-century lawyers and political writers only sparingly and erratically employed its disaggregated form, the plural “civil liberties.” The phrase had been popularized just a year earlier by the British National Council for Civil Liberties.²²² Walter Fuller, Eastman’s new husband, was closely connected to the British organization (he would later become its corresponding secretary). With the establishment of the Civil Liberties Bureau, the American Union adopted the National Council’s coinage as its own. Roger Baldwin, the 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.”²²³

The phrase seemed well-tailored for inveterate rights-skeptics such as Eastman. The term “civil liberties” promised to break down the abstraction of “civil liberty” into its specific and concrete component parts – “free speech, free press and free assembly,” as Eastman put it. Indeed, the phrase accomplished for the American Union what influential legal theorists of the same generation sought to do for legal thought. Early legal realists such as Yale Law School’s Wesley Hohfeld argued that nineteenth-century juristic abstractions such as “liberty” had contributed to dangerously sloppy modes of legal reasoning. Legal slogans such as “right,” “property,” and “liberty,” Hohfeld insisted, contained a multitude of discrete legal relations. Those relations, in turn, were best understood in disaggregated terms, not in the language of conceptual deduction and abstract principle.²²⁴ By the same token, disaggregated “civil liberties” claims seemed well-designed to mediate the tensions that rights-claims posed for those in radical internationalist circles who had been critical of rights-based thinking only a few short years before. Civil

222. MURPHY, *supra* note 9, at 9; *see also* MARVIN SWARTZ, *THE UNION OF DEMOCRATIC CONTROL IN BRITISH POLITICS DURING THE FIRST WORLD WAR* 51 (1971).

223. MURPHY, *supra* note 9, at 9.

224. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *WIS. L. REV.* 975, 1057–58.

liberties would be “civil liberty” for a Hohfeldian age of pragmatic skepticism about legal abstractions.

Most importantly, for Eastman the civil liberties initiative represented not a new set of rights-based ends, but rather a continuation by other means of the American Union’s pre-war internationalist agenda. Now that war had materialized, the defense of civil liberties seemed a necessary precondition to the advancement of internationalism. Norman Thomas argued that “the country which [suppresses civil liberties] will never commend democracy to the world.”²²⁵ Eastman further contended that all nations needed to “be democratized before a federated world can be achieved.”²²⁶ 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.”²²⁷

Early efforts in the Civil Liberties Bureau thus adopted civil liberties as a strategic tool for the advancement of internationalism.²²⁸ The Bureau’s earliest efforts were often not authentic expressions of a commitment to the virtues of the Bill of Rights, but means to internationalist ends. Roger Baldwin of the American Union put it most cynically when he instructed a colleague “to get a good lot of flags” and “talk a good deal about the Constitution.”²²⁹ Baldwin’s

225. Letter from Norman Thomas to Roger Nash Baldwin (Sept. 7, 1917), *microformed on AUAM Papers*, *supra* note 136, Reel 4.

226. Cook, *supra* note 21, at 20. On the political theory of democracy and international peace, see Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs* (pts. 1 & 2), 12 *PHIL. & PUB. AFF.* 205, 323 (1983).

227. Woman’s Peace Party of New York City, *Our War Record: A Plea for Tolerance* 128, 128, in *THE EAGLE AND THE DOVE: THE AMERICAN PEACE MOVEMENT AND UNITED STATES FOREIGN POLICY, 1900–1922*, *supra* note 109, at 128; see Am. Union Against Militarism, Seven Congressmen on Preparedness, *microformed on AUAM Papers*, *supra* note 136, Reel 1; Am. Union Against Militarism, *A Challenge Accepted* (n.d.), *microformed on AUAM Papers*, *supra* note 136, Reel 1; National Civil Liberties Bureau, Handbill: Who Has Been Imprisoned Under the Espionage Act?, *microformed on Wald Papers*, *supra* note 138, Reel 15, Folder 14.

228. Bureau insiders, for example, sought to get the government to distinguish between IWW members and other labor radicals, on one hand, and the “fine type” of conscientious objector who could be found in the nation’s universities, on the other, at least in part because the Bureau had invested its hopes for American internationalism in the latter group. See Oswald G. Villard, Typescript (n.d.), *microformed on Wald Papers*, *supra* note 138, Reel 102, Folder 2.4.

229. 1 J. LEGIS. COMM. IN THE S. OF THE ST. OF N.Y., *REVOLUTIONARY RADICALISM: ITS HISTORY, PURPOSE, AND TACTICS* 1088 (1920).

instrumentalism was perhaps more cynical than most. But his 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. In 1917 the organization's members found themselves compelled by the circumstances of the war to make those claims in new "civil liberties" terms, but the aims remained the same.

During the summer and fall of 1917, Eastman worked alongside Roger Baldwin in the American Union's civil liberties activities. As Baldwin would later recall, Eastman had been his "first associate in World War I days."²³⁰ Together, they defended conscientious objectors and antiwar agitators. Eastman even developed an ambitious plan of test cases to try the "actual testing of the right of free speech" in those places in which it had been limited.²³¹ And yet Baldwin emerged as the leader of the Civil Liberties Bureau. It was a development that had significant implications for the internationalist agenda and the fledgling civil liberties movement.

IV. CIVIL LIBERTIES AND THE ECLIPSE OF INTERNATIONALISM

Eastman had missed the beginnings of the American Union's wartime 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 three, she and her older brother Morgan contracted scarlet fever. Morgan died, and though Crystal survived, she regularly suffered debilitating illnesses thereafter.²³² In 1911, she was forced to break off her engagement with the New York state employers' liability commission because of illness.²³³ In April 1916, she became ill during the American Union's Truth About Preparedness Tour, and was ordered "kept strictly in bed" for several

230. The Reminiscences of Roger Nash Baldwin 158 (1961) (on file with Columbia University, Oral History Research Office).

231. Am. Union Against Militarism, Secretary's Recommendations (circa fall 1917), microformed on AUAM Papers, *supra* note 136, Reel 1.

232. EASTMAN, *supra* note 19, at 45-49.

233. See *supra* note 79 and accompanying text.

weeks.²³⁴ With Jeffrey's birth, Eastman developed a "chronic disease of her kidneys," as Max later described it, that would plague her until her death.²³⁵ By March 1921, she would be forced to resign from the executive committee of the Civil Liberties Bureau's successor, the American Civil Liberties Union. "I have always been too tired," explained the otherwise energetic Eastman.²³⁶ She would die just seven years later, in 1928.

Eastman's complicated pregnancy forced her 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.²³⁷ There would be, she feared, "nothing left for me to do" by the time she got back.²³⁸ Most troublingly, Eastman feared that in her absence the American Union would turn 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."²³⁹ 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.²⁴⁰

During Eastman's absence, which continued into early June 1917, Baldwin had indeed begun to establish himself as the new force in the American Union. His extraordinary energies matched Eastman's. Like Eastman, he had begun his career as a sociologically informed architect of the modern administrative state. 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.

234. Letter from Crystal Eastman to Lillian D. Wald (Apr. 11, 1916), *microformed on Wald Papers*, *supra* note 138, Reel 102, Folder 2.3.

235. Letter from Max Eastman to Lillian D. Wald (n.d.), *microformed on Wald Papers*, *supra* note 138, Reel 3, Folder 4.2.

236. Letter from Crystal Eastman to Roger Nash Baldwin (Mar. 23, 1921), *microformed on ACLU Archives*, *supra* note 11, Reel 24, vol. 68.

237. MARCHAND, *supra* note 86, at 255 n.80.

238. *Id.*

239. Letter from Crystal Eastman to Lillian D. Wald (n.d.), *microformed on Wald Papers*, *supra* note 138, Reel 102, Folder 2.3; *see also* Letter from Crystal Eastman to Lillian D. Wald (circa Apr. 1917), *microformed on Wald Papers*, *supra* note 138, Reel 102, Folder 2.4.

240. Letter from Crystal Eastman to Lillian D. Wald (n.d.), *microformed on Wald Papers*, *supra* note 138, Reel 102, Folder 2.4; Letter from Crystal Eastman to Lillian D. Wald (Apr. 11 [1917?]) *microformed on Wald Papers*, *supra* note 138, Reel 102, Folder 2.3.

What workmen's compensation had been to Eastman, the new juvenile courts and probation systems were to Baldwin: socialized systems for modernizing nineteenth-century law. Like workmen's compensation programs, juvenile courts aimed to replace cumbersome inquiries into individual rights and moral culpability with regimes of social-scientific expertise designed to treat social problems and manage populations.²⁴¹ Expert "professional standards," in Baldwin's words, would replace traditional adjudication, which Baldwin had come to think of as simply "judicial interference."²⁴² While Eastman was counting injured workers in Pittsburgh, Baldwin helped to found the National Probation Officers' Association. A few years later, he coauthored what would quickly become a leading text in the field of juvenile justice.²⁴³

Despite their similar backgrounds in progressive-era sociological reform, Baldwin and Eastman quickly developed an "uneasy" relationship to one another.²⁴⁴ For one thing, Baldwin's Harvard education and inside connections in the Wilson administration made him both more inclined and better positioned than Eastman to engage in the kind of discreet advocacy with government officials that colleagues like Lillian Wald favored. Moreover, Baldwin came to the work of the American Union with an essentially domestic outlook. While Eastman 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. Instead, Baldwin had developed the outlook of a domestic reformer, involved in such fights as the National Association for the Advancement of Colored People's efforts to fight municipal housing segregation.²⁴⁵ To be sure, in his first months with the American Union, Baldwin supported its core internationalist agenda. And much later in life, Baldwin would become deeply involved in the United Nations's work

241. See DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* (2004); WILLRICH, *supra* note 15.

242. The Reminiscences of Roger Nash Baldwin, *supra* note 230, at 27.

243. BERNARD FLEXNER & ROGER N. BALDWIN, *JUVENILE COURTS AND PROBATION* (1914).

244. The Reminiscences of Roger Nash Baldwin, *supra* note 230, at 55.

245. ROBERT C. COTTRELL, *ROGER NASH BALDWIN AND THE AMERICAN CIVIL LIBERTIES UNION 1-60* (2000).

for international human rights. “Nations,” he would suggest in the 1970s, were “downright silly.” As Eastman had suggested sixty years earlier, Baldwin would contend that national boundaries were imaginary divisions of people into “geographical units” bounded by arbitrary lines and protected by armies.²⁴⁶ But in 1917, as Eastman had already begun to realize, Baldwin’s arrival served to exacerbate increasingly acute differences within the American Union over the question of internationalism.

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 American Union altogether. Wald and Kellogg had never been convinced that the civil liberties strategy offered a viable solution to the American Union’s wartime dilemmas. After the declaration of war, Wald and Kellogg—like Root and Wilson—believed strongly that the obligations of national citizenship required support for the war effort. The civil liberties campaign engineered by Baldwin and Eastman, in their view, veered too close to making the American Union “a party of opposition to the government.”²⁴⁷ Over the course of the summer, Wald and Kellogg struggled to bring the American Union around to Wald’s less confrontational approach. By September, however, Wald, Kellogg, and a number of others felt that they could not “remain if the active work for Civil Liberties is continued.”²⁴⁸ Eastman and others in the American Union insisted that the organization was not “embarking on a program of political obstruction”²⁴⁹ and merely working “against hysterical legislation, and

246. PEGGY 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 United States, contests in which Baldwin sympathized with the Soviets until his switch to vigorous anticommunism by the end of the 1930s. See COTTRELL, *supra* note 245, at 169–98, 262–63.

247. Letter from Crystal Eastman to Emily Balch (June 14, 1917), in *TOWARD THE GREAT CHANGE: CRYSTAL AND MAX EASTMAN ON FEMINISM, ANTIMILITARISM, AND REVOLUTION*, *supra* note 23, at 271, 271.

248. Letter from Crystal Eastman to Lillian D. Wald (Sept. 25, 1917), *microformed on* Wald Papers, *supra* note 138, Reel 102, Folder 2.4.

249. Letter from Norman Thomas to Lillian D. Wald (Aug. 27, 1917) (on file with the New York Public Library, Norman Thomas Papers).

for peace.”²⁵⁰ But the subtleties of the distinction were lost on the disgruntled Wald-Kellogg wing of the American Union. By October 1917, Wald and Kellogg had resigned.²⁵¹

Divergences between Baldwin and Eastman quickly resurfaced once the split within the American Union was complete. 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 Newton Baker cut off contact between the War Department and the Bureau in May 1918. Three months later, the Department of Justice raided the Bureau’s offices and seized its papers.²⁵² Courts began convening grand juries to investigate “foreigners” on soap boxes.²⁵³ Max Eastman was put on trial not once but twice during 1918 for his work on the *Masses* (the juries deadlocked both times).²⁵⁴ Baldwin himself was arrested for refusing to register for the draft, convicted, and sentenced to one year in prison.²⁵⁵

Around the country, attitudes toward internationalists deteriorated still further. Herbert Bigelow, who had spoken on behalf of the American Union’s Truth About Preparedness Campaign in the spring of 1916, was kidnapped and brutalized in November 1917.²⁵⁶ The *Grand Rapids Press* labeled the American Union and allied groups “seditious,”²⁵⁷ and the *New York Tribune* classed them as dangerous “enemies within.”²⁵⁸ By August 1918, Theodore Roosevelt was singling out “internationalists” as playing into the hands of

250. Letter to Mr. Evans (Mar. 20, 1917) (on file with the New York Public Library, Norman Thomas Papers).

251. KENNEDY, *supra* note 3, at 35–36; Letter from Catherine Crystal Eastman to Lillian D. Wald (Sept. 25, 1917), *microformed on* Wald Papers, *supra* note 138, Reel 102, Folder 2.4; *see also* Letter from Lillian D. Wald to Roger N. Baldwin (Oct. 12, 1917) *microformed on* Wald Papers, *supra* note 138, Reel 1, Folder 1.8.

252. The Reminiscences of Roger Nash Baldwin, *supra* note 230, at 60–61.

253. *Urges Indictments for Seditious Talk*, N.Y. TIMES, Sept. 5, 1917, at 4.

254. EASTMAN, *supra* note 199, at 92–99, 118–24.

255. COTTRELL, *supra* note 245, at 83–90.

256. Telegram from E.F. Alexander to Roger N. Baldwin (Nov. 1, 1917), *microformed on* ACLU Archives, *supra* note 11, Reel 4; Press Release, National Civil Liberties Bureau (Nov. 7, 1917), *microformed on* ACLU Archives, *supra* note 11, Reel 4.

257. *They Who Play with Fire*, GRAND RAPIDS PRESS, May 1917, *microformed on* ACLU Archives, *supra* note 11, Reel 4.

258. Statement to the New York Tribune by the Civil Liberties Bureau of the American Union Against Militarism (Sept. 27, 1917), *microformed on* Wald Papers, *supra* note 138, Reel 102, Folder 2.4.

“German autocracy.”²⁵⁹ “Internationalism,” Elihu Root would soon announce, had become a threat to “the authority and responsibility of nations,” including the United States.²⁶⁰

In the face of nationalist coercion, Baldwin led the Civil Liberties Bureau—now formally divorced from the American Union and renamed the National Civil Liberties Bureau—in what Norman Thomas called a “new direction” for civil liberties.²⁶¹ The moral imperatives of nationalism had recast internationalism as treason. “[I]nternationalists 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.²⁶² Things became all the more dire after the November 1917 Bolshevik revolution in Russia. “Worldwide Anarchist Plot” screamed headlines linking the “Bolsheviki” to the IWW and to “revolutionists” around the world.²⁶³ As the prosecutor at the 1918 Espionage Act trial of Eugene Debs said in his closing argument to the jury, “Pitch all the nations into one pot with the Socialists on top and you’ve got internationalism.”²⁶⁴ By 1919, the federal government initiated deportations of suspected radicals back to Russia. The infamous Palmer Raids on suspected radicals quickly followed beginning in November of that year, as did the similar Lusk Committee Raids in New York State after them.²⁶⁵ By December 1919, President Wilson, who had been a willing but unenthusiastic supporter of Bursleson’s and Gregory’s enforcement actions during the war, was calling for a peacetime extension of the Espionage Act.²⁶⁶ Even Lillian Wald, who had so carefully extricated herself in the summer of 1917 from the possible appearance of opposition to the

259. Theodore Roosevelt, Speech at Springfield, Illinois (Aug. 26, 1918), in *THE EAGLE AND THE DOVE: THE AMERICAN PEACE MOVEMENT AND UNITED STATES FOREIGN POLICY, 1900–1922*, *supra* note 109, at 127, 127; see *KNOCK*, *supra* note 154, at 169.

260. Elihu Root, *The Conditions and Possibilities Remaining for International Law After the War* (April 27, 1921), *reprinted in MEN AND POLICIES: ADDRESSES BY ELIHU ROOT* 427, 432 (Robert Bacon & James Brown Scott eds., 1925).

261. Letter from Norman Thomas et al. to Lillian D. Wald (Jan. 19, 1920), *microformed on Wald Papers*, *supra* note 138, Reel 10, Folder 12.4.

262. Letter from Roger N. Baldwin to Lawrence G. Brooks (Sept. 24, 1917), *microformed on ACLU Archives*, *supra* note 11, Reel 4.

263. See *Worldwide Anarchist Plot*, *N.Y. TIMES*, Dec. 26, 1917, at 1.

264. *PETERSON & FITE*, *supra* note 172, at 253.

265. RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 155–71, 195–96 (1987).

266. *KENNEDY*, *supra* note 3, at 87; *SCHEIBER*, *supra* note 198, at 57.

war effort, would find herself in 1919 still trying to defend her patriotism.²⁶⁷

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 wartime program was its ostensibly patriotic connections to the nation's constitutive legal 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 language and traditions of American nationalism. Affiliates were urged to celebrate the 130th anniversary of the signing of the U.S. Constitution in September 1917.²⁶⁸ 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 "not take place without the highest authority in the country passing upon it squarely."²⁶⁹ Propaganda against the draft, Baldwin explained, would cease and be replaced by work narrowly confined to "the lines of legal defense."²⁷⁰ "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.²⁷¹ In the Bureau's devotion to national ideals, a press release from the fall of 1917 declared, "[W]e believe ourselves to be patriots, no less sincere and earnest than those who lead our armies to

267. *Miss Wald's War Attitude*, N.Y. POST, Jan. 25, 1919, *microformed on* ACLU Archives, *supra* note 11, Reel 6.

268. Letter from Crystal Eastman & Roger Baldwin to American Union Locals, Affiliated Organizations, Correspondents and Members (Aug. 31, 1917), *microformed on* Wald Papers, *supra* note 138, Reel 102, Folder 2.4.

269. Letter from Roger N. Baldwin to Lawrence G. Brooks (Sept. 24, 1917), *microformed on* ACLU Archives, *supra* note 11, Reel 4.

270. Letter from Roger N. Baldwin to Adolph Germer (Dec. 10, 1917), *microformed on* ACLU Archives, *supra* note 11, Reel 1, vol. 3.

271. Letter from John L. Metzen to Civil Liberties Bureau (Aug. 9, 1917), *microformed on* ACLU Archives, *supra* note 11, Reel 4, vol. 32.

France.”²⁷² The “cause of civil liberties,” Bureau leaders insisted, was “loyal” to the “American ideal” of freedom.²⁷³ Even Crystal Eastman took advantage of the opportunities afforded by patriotism: “[T]here is no more patriotic duty than to keep democracy alive at home,” she announced.²⁷⁴ Democracy, she concluded, meant the protection of “ancient American liberties.”²⁷⁵ 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 wartime 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.²⁷⁶

* * *

Three further conferences in the next year—one still widely remembered, the others now more or less obscure—made clear the extent to which internationalist energies had waned. 1919 brought renewed hope to internationalists in the United States and across Europe. The Paris Peace Conference began in January, with Wilson promoting the internationalist idea of a League of Nations.²⁷⁷ 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.²⁷⁸ And though

272. Am. Union Against Militarism, *supra* note 140.

273. Letter from Norman Thomas to Lillian D. Wald, *supra* note 249.

274. Letter from Crystal Eastman to Editor of the New York Tribune (Aug. 28, 1917), *microformed on* Wald Papers, *supra* note 138, Reel 1, Folder 1.6.

275. *Id.*

276. Letter from National Civil Liberties Bureau to Friends (Jan. 5, 1918), *microformed on* ACLU Archives, *supra* note 11, Reel 1, vol. 3; *see also* WALKER, *supra* note 9, at 53 (describing ways in which Baldwin and other early ACLU advocates worked to “capture the symbols of Americanism for the cause of civil liberties”).

277. GEORGE W. EGERTON, *GREAT BRITAIN AND THE CREATION OF THE LEAGUE OF NATIONS: STRATEGY, POLITICS, AND INTERNATIONAL ORGANIZATION, 1914–1919*, at 138–40 (1978); KNOCK, *supra* note 154, at 194–245; MARGARET MACMILLAN, *PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR 94–98* (2001).

278. ADDAMS, *supra* note 125, at 152–77; DEBENEDETTI, *supra* note 87, at 91–92; HERMAN, *supra* note 91, at 147.

many internationalists bitterly opposed the indemnities imposed on Germany by the Treaty of Versailles that emerged in June, the Treaty nonetheless established what many internationalists had advocated for decades: a League of Nations “to promote international cooperation and to achieve international peace and security.”²⁷⁹

At the war’s end, the National Civil Liberties Bureau seemed poised to preside 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.”²⁸⁰ The conference, to take place in New York in October, would reach out across national boundaries to begin the process of reconstituting prewar internationalist alliances. The Bureau arranged to cosponsor the conference with its British counterpart and namesake, the National Council for Civil Liberties. Indeed, Eastman and her husband Walter Fuller, with whom she had moved to London several months before, took the lead in organizing the British side of the event.²⁸¹ Moreover, early signs suggested that the conference would resonate powerfully with the internationalist tradition. Arthur Ponsonby of the British antiwar organization Union for Democratic Control suggested that the conference might help create the “foundation of an enlightened and democratic internationalism.”²⁸² B. N. Langdon-Davies 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.”²⁸³ 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 Co-operation.”²⁸⁴

279. LEAGUE OF NATIONS COVENANT pmbl.

280. Letter from Albert De Silver to B. N. Langdon-Davies (June 6, 1919), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73.

281. *Id.*; Letter from B. N. Langdon-Davies to Albert De Silver (June 30, 1919), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73.

282. Letter from Arthur Ponsonby (n.d.), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73; Letter from Walter Fuller to Albert De Silver (Aug. 5, 1919), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73.

283. Letter from B. N. Langdon-Davies to Mr. Furnas (Aug. 27, 1919), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73.

284. Letter from Albert De Silver to Lillian D. Wald (Oct. 2, 1919), *microformed on* Wald Papers, *supra* note 138 (enclosing the tentative program for the Conference).

In some respects, the conference was a smashing success. Though Eastman's old teacher Franklin Giddings refused to come (Giddings had supported U.S. intervention in the war), leading figures in American law such as Zachariah Chafee Jr., Felix Frankfurter, and Roscoe Pound of the Harvard Law School, all of whom were assuming 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.²⁸⁵

From the internationalist perspective, however, the conference failed. Wilson had struggled mightily since his return from Paris to persuade the Senate to ratify his internationalist treaty.²⁸⁶ At the Anglo-American Tradition of Liberty Conference, too, internationalism foundered on the shoals of nationalist passions and difficult details. The conference was full of the high rhetoric of prewar internationalism. Speakers denounced "old assumptions of sovereignty and national honor" as ideas that "belong to the Middle Ages."²⁸⁷ "Liberty is not national,"²⁸⁸ delegates declared, and they called for an internationalist system that would move beyond the "territorial basis"²⁸⁹ of the nation-state and beyond the "nationalistic segregation of peoples."²⁹⁰ But in the new era of the League and the Paris Conference, the platitudes of prewar 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 internationalist ideas

285. Letter from Zachariah Chafee Jr. to Albert De Silver (Oct. 8, 1919), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73; Letter from Albert De Silver to Felix Frankfurter (Oct. 7, 1919), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73; Letter from Albert De Silver to Roscoe Pound (Oct. 7, 1919), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73; Letter from Franklin H. Giddings to Albert De Silver (Oct. 7, 1919), *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73.

286. COOPER, *supra* note 175, at 340–45; KENNEDY, *supra* note 3, at 359–62; KNOCK, *supra* note 154, at 246–76.

287. CONFERENCE ON THE ANGLO-AMERICAN TRADITION OF LIBERTY, VERBATIM REPORT (New York, N.Y., Oct. 1919), at 522, *microformed on* ACLU Archives, *supra* note 11, Reel 9, vol. 73.

288. *Id.* at 554.

289. *Id.* at 523.

290. *Id.* at 554.

quickly became apparent.²⁹¹ Delegates who favored gradual evolution toward internationalism clashed with those who urged immediate internationalist initiatives. Socialists clashed with liberals. Protonationalists from colonized regions like India and Ireland insisted on the priority of national independence over international structures, even as internationalists sought to subordinate nationalism to transnational institutions.²⁹² Finding “a formula between nationalism and internationalism,” as Norman Thomas put it, proved impossible.²⁹³ 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.”²⁹⁴ Debates over internationalism threatened to “wreck” the conference, cautioned another participant.²⁹⁵ And so they did. Just four weeks after Wilson’s famous 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.²⁹⁶

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.²⁹⁷ The ACLU would continue to monitor 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, the ACLU’s organizers contended in 1920, had not been an “antiwar organization,”²⁹⁸ but rather an organization that “insisted on American constitutional rights.”²⁹⁹ Already in 1920, 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

291. *See id.* at 575.

292. *Id.* at 554, 563.

293. *Id.* at 564.

294. *Id.* at 563.

295. *Id.* at 575.

296. *See id.* at 583–84.

297. Letter from Norman Thomas et al. to Lillian D. Wald, *supra* note 261; CONFERENCE ON THE ANGLO-AMERICAN TRADITION OF LIBERTY, *supra* note 287.

298. Roger N. Baldwin, *The Fight for Civil Liberty During the War 1 (1920)* (unpublished manuscript), *microformed on* ACLU Archives, *supra* note 11, Reel 14, vol. 108.

299. Letter from Norman Thomas et al. to Lillian D. Wald, *supra* note 261.

“radicals, especially the I.W.W. . . . and the Socialists.”³⁰⁰ “Radicalism, not the attitude to the war,” now seemed the motivating factor in most instances of attacks on civil liberties.³⁰¹ The ACLU thus organized itself to defend “peaceful picketing” and “trade unionism” and to fight discrimination against radicals and labor unions.³⁰² Just as the ACLU would later purge communists from its ranks, the early ACLU had washed itself clean of its internationalist origins.³⁰³

CONCLUSION

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 that the war 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 nation-states touched off a deep shift toward the ironic and the modernist.³⁰⁴ Others argue that the war occasioned a powerful return to traditionalist rhetorics as a mechanism for coping with the apparent senselessness of the war. In Jay Winter’s influential formulation, for example, the war revived “a number of traditional languages” expressed in “unusual and modern forms.”³⁰⁵

Like Winter’s distinctly modern traditionalists, lawyers such as Eastman responded to the war and to the rise of newly powerful state institutions by reinvigorating the familiar languages of rights and liberties that they had only recently rejected as Victorian anachronisms. For Eastman and her colleagues, 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

300. *Id.*

301. *Id.*

302. *Id.* (enclosing a proposed reorganization scheme for the ACLU’s civil liberties work); see also Am. Civil Liberties Union, Questionnaire on Condition of Civil Liberty (Feb. 1921), microformed on ACLU Archives, *supra* note 11, Reel 24, vol. 169.

303. See WALKER, *supra* note 9, at 130–33 (describing the 1940 purging of prominent radicals from the ACLU).

304. See FUSSELL, *supra* note 7, at 21.

305. JAY WINTER, SITES OF MEMORY, SITES OF MOURNING: THE GREAT WAR IN EUROPEAN CULTURAL HISTORY 9, 18 (1995).

and choose among the totems of a national tradition so as strategically to advance a modern internationalist agenda, identifying 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 wartime patriotism, internationalist modernism quickly gave way to more straightforwardly traditional arguments rooted ever more deeply in the trappings of American national identity. The traditional language of rights overwhelmed the internationalist agenda that the rhetoric of rights had been marshaled to advance. Indeed, within a few short years, Baldwin's recrafting of the civil liberties movement 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.³⁰⁶ She therefore never embraced the Bill of Rights and civil liberties as wholeheartedly as Baldwin did, 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."³⁰⁷ As labor unions, socialists, and the ACLU turned to civil liberties to advance their causes, she contended that those safeguards had never been "of much practical value in protecting the poorest workers."³⁰⁸ Especially after U.S. intervention in Russia in 1918, Eastman's own views radicalized dramatically. By 1920, she adopted a form of Bolshevik communism. A "capitalist state," she wrote, would never "maintain democratic institutions against its own interest."³⁰⁹ Even in the woman's movement in which she had worked for legal change since childhood, Eastman lost hope in the reform possibilities of the law. Feminism could "most assuredly" not accomplish real sex equality through legal change, she argued; sex discrimination was instead a problem "of

306. HOLMES, *supra* note 212, at 189.

307. Crystal Eastman, *The Socialist Party Convention*, in TOWARD THE GREAT CHANGE: CRYSTAL AND MAX EASTMAN ON FEMINISM, ANTIMILITARISM, AND REVOLUTION, *supra* note 23, at 436, 439.

308. *Id.* at 437.

309. *Id.*

education, of early training.”³¹⁰ “We must,” she concluded, “bring up feminist sons.”³¹¹

Eastman, it seems, had encountered limits to lawyering. In Eastman’s day, as still in our own, the authority of law and of lawyers derived principally from the very sovereign states that Eastman sought to critique. Lawyering therefore seemed to come with powerful institutional limits. To be sure, nation-state institutions were not immune to legal change. The United States’s constitutive legal documents, for example, provided resources on which Eastman and her colleagues drew to launch the modern civil liberties movement. Over the succeeding decades, moreover, international lawyers—walking in the footsteps of internationalists before them—would make painstaking progress in establishing human rights norms to constrain sovereignty’s prerogatives.³¹² But institutions also proved powerfully resistant to the transformations that Eastman and the radical internationalists had sought to bring about. If for almost a century lawyer-skeptics have turned to the abstraction of civil liberties, perhaps they have done so because of the persistent power of the abstraction of sovereignty.

310. Crystal Eastman, *Now We Can Begin*, in *TOWARD THE GREAT CHANGE: CRYSTAL AND MAX EASTMAN ON FEMINISM, ANTIMILITARISM, AND REVOLUTION*, *supra* note 23, at 75, 78.

311. *Id.*

312. On the history of the twentieth-century human rights movement, see ROSEMARY FOOT, *RIGHTS BEYOND BORDERS: THE GLOBAL COMMUNITY AND THE STRUGGLE OVER HUMAN RIGHTS IN CHINA* 29–59 (2000); MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 159, 166–232 (2d ed. 2003); A. W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* (2001); Kenneth Cmiel, *The Emergence of Human Rights in the United States*, 86 *J. AM. HIST.* 1231, 1231–50 (1999); Kenneth Cmiel, *The Recent History of Human Rights*, 109 *AM. HIST. REV.* 117, 117–35 (2004).