THE CURIOUS CASE OF BENJAMIN GITLOW

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INTRODUCTION

This is a story about a man with incredible luck. It was made possible by some remarkable lawyers and judges, and it ended unpredictably. It is the story of Benjamin Gitlow (1891–1965), a man who loved a freedom others feared. It is also a short story about a segment of the *history* of the First Amendment, a history that *Gitlow*

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v. New York[1] (1925) helped to shape. Curious then that the same man who first fought for freedom later fought to suppress it—he was intolerant of those with opposing opinions. In time, his turncoat stripes would reveal his true colors, which made his life story all the more curious. Moral: We take our free speech heroes as we find them, warts and all.

I. Bad Associations

For each new arrival to New York's Sing Sing prison in 1920, the questions were the same: parents' names, places of birth, religion, occupation, and level of education—plus a few other facts to fill out the prisoner's profile. The final question asked was more pointed, more psychological: "What made you do this?"

There were, of course, many possible answers. But Lewis E. Lawes (1883–1947), Sing Sing's new warden, wanted just one. The "experienced prisoner," Lawes said, knew what his answer had to be: "'Bad associations.' . . . 'Bad associations.'"[2] (One of Lawes' several books was titled *Twenty Thousand Years in Sing Sing* (1932), which was made into a movie starring Spencer Tracy and Bette Davis.)

Born on December 22, 1891, in Elizabethport, New Jersey, Benjamin Gitlow (the son of Jewish immigrant parents), was not your typical Sing Sing prisoner. Unlike his cellmates, he was not there for murder, rape, robbery, burglary, arson, or even grand larceny. He was there for word crimes. Yet of Sing Sing's newest arrivals on February 11, 1920, Gitlow's "bad associations" were the worst of all.

The first Communist prisoner in the history of Sing Sing,[3] Gitlow was also the first man to be tried and convicted under New York's Criminal Anarchy Act. [4]

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[1] 268 U.S. 652 (1925). *See* Marc Lendler, Gitlow v. New York: Every Idea an Incitement (2012).

[2] Lewis E. Lawes, Twenty Thousand Years in Sing Sing 182 (1932).

[3] Lendler, *supra* note 1, at 71 ("[Gitlow's] total time in prison was close to three years, longer than any of the others convicted with him. He served from February 13, 1920, to April 25, 1922; then, beginning on September 7, he served three more months following an unfavorable court of appeals verdict. He was moved from Sing Sing to Clinton Prison in upstate New York, and then to Auburn Prison, returning every so often to Sing Sing.").

[4] N.Y. Penal Law §§ 160–166 (1902). This act was passed in 1902, soon after the assassination of President McKinley in Buffalo, but lay dormant for eighteen years, until the present prosecution was begun. *See* Zechariah Chafee, Jr., Free Speech in the United States 163–64 (1948).

Passed in 1902 after the assassination of President William McKinley[5] in Buffalo, the Act made it a crime to "print, publish, edit, issue or knowingly circulate" anything that advocated, advised, or taught "the doctrine that organized government should be overthrown by force, violence, and unlawful means."[6] His fellow prisoners had little need for or liking of him. Whatever else, prisoners are patriotic.

At the time of Gitlow's arrest, Americans nationwide became increasingly concerned, and increasingly vocal, about the extent to which the country was at risk. "The more of these dangerous anarchists are arrested," declared a *New York Times* editorial, "the better for the United States." A *Washington Post* banner read: "A Terrorist Plot." The editorial asserted that "every known radical with a tendency toward terrorism should be rounded up and kept under surveillance."[7] In one of the more bizarre incidents, a Communist sympathizer was arrested and jailed. Then a mob took matters into its own hands and beat, castrated, shot, and hanged him three times "on a rope that was too short." The assailants found a friend in the coroner, who reported that the Communist prisoner broke out of jail, shot himself, and then jumped off a bridge with a rope tied around his neck.[8] Such were the times.

In this climate, Gitlow had few known friends and many unknown enemies. Yet by the time his case concluded its long and agonizing path through the legal system, after years lost to the "rattling of locks and the clang of steel on steel,"[9] Benjamin Gitlow emerged as an unlikely American hero. His case would revolutionize modern First Amendment law. In Zechariah Chafee's[10] words, it would place "forever in the hands of the Supreme Court [a] sharp sword with which to

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[5] But for the assassination, Oliver Wendell Holmes (1841–1935) might never have been nominated to the Supreme Court since President McKinley then had no intention of nominating Holmes to fill the vacancy created by Justice Horace Gray's announced resignation. *See* THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICAL AND READER 161–62 (Ronald K.L. Collins ed., 2010).

[6] N.Y. PENAL LAW § 161 (1902).

[7] N.Y. TIMES, Jan. 5, 1920; WASH. POST, Nov. 21, 1919.

[8] MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS 117 (1992) (citing ARTHUR GARFIELD HAYS, TRIAL BY PREJUDICE 260(1933)).

[9] LAWES, *supra* note 2, at 219.

[10] THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 430 (Roger K. Newman ed., 2009). Chafee (1885–1957), a Harvard law professor, became a noted and highly influential free-speech scholar. His first book was titled *Freedom of Speech* (1920) and was thereafter expanded into *Free Speech in the United States* (1941).

defend the ideals of [Thomas] Jefferson and [James] Madison against local intolerance."

II. Limits and Rights

Though unlikely, Gitlow's troubles might have been avoided if James Madison had just gotten his way, 140 years earlier. It was June 1789, the first session of the First Congress, and the first order of business was the question of which rights to add to the Constitution. In some sense, the idea of constitutional *rights* was not central to the Constitution of 1787. What was central was the idea of *limits* on federal power. That is, the national government had only those powers given to it either by the Constitution directly or by particular laws enacted by Congress. Thus, so the logic went, the national government could not abridge freedom of speech or press or assembly or petition or religion because it was not *authorized* by law to do so. Alexander Hamilton put it succinctly in *Federalist* No. 84:

> [A Bill of Rights] would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

Moreover, Hamilton added, such an attempt to spell out the specific rights of the people would be counterproductive. For example, and again in *Federalist* No. 84, he asked: "What is liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?" Hence, Hamilton and others believed it was best to omit a bill of rights and simply limit government power by granting it particular powers and none other.

However adequate this approach (today largely forgotten) would or would not have been in safeguarding freedom of expression and religion, it did not envision any limitation on the power of the *states* to curtail civil liberties and civil rights, including the right to speak and print freely.

In anticipation of a June 1789 meeting to amend the Constitution, Madison compiled a dizzying list of recommendations collected from the thirteen state conventions—more than two hundred different amendments, to be precise, covering eighty different areas. When he presented the final draft to the House, Madison had reduced the original long list of amendments to nine. In the language of three, we can see the precursors to the five freedoms of our First Amendment. They read:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.
>
> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.
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> The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances for redress of their grievances. [11]

When Madison's list was considered, the senators eventually streamlined those three amendments into a more manageable forty-five words—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Originally, this proposed amendment and the other nine were to be situated under Article 1 of the Constitution, the legislative article. What became the First Amendment was at first to be listed among the limitations on legislative power set forth in Article I, section 9. Those limitations related to matters such as the suspension of the writ of habeas corpus and restrictions on bills of attainder. The reason the guarantee that ultimately became the First Amendment was addressed to Congress and did not refer either to the executive[12] or judicial branches,[13] or to the states, is that the founding generation was concerned with the arm of government that was granted the most power under the Constitution of 1787. By far, that branch was Congress. It was that mammoth grant of constitutional power conferred on

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[11] THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 1, 143–68 (Neil H. Cogan ed., 1997).

[12] In a March 13, 1789, letter to Francis Hopkinson, Jefferson complained: "What I disapproved of from the first moment . . . was the want of a bill of rights to guard liberty against the legislative *as well as the executive branches* of the government, that is to say to secure freedom in religion, freedom of the press" and other freedoms. THE COMPLETE BILL OF RIGHTS, *supra* note 11, at 116 (emphasis added).

[13] The final text of the First Amendment notwithstanding, in time the First Amendment was applied as against the *executive* branch. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (the Pentagon Papers Case). In other cases, the First Amendment was likewise held binding on the judicial branch. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

Congress that struck fear into Republican hearts of the likes of Thomas Jefferson, James Madison, and others of similar beliefs. Hence, the constitutional limitation was on that power: "*Congress* shall make no law . . ."

There was also a constitutional logic to that wording. The power to make laws is vested in Congress; the power to enforce laws in the executive; and the power to interpret laws in the judiciary. By that constitutional measure, the executive could never enforce a law abridging any of the five freedoms protected by the First Amendment if Congress was barred from making such a law in the first place. Similarly, the judiciary could never interpret and thereafter apply a law abridging such rights for the same reason. Thus, so the argument runs, a restriction on Congress's lawmaking powers was a limitation on the powers of the other two branches of government as well.

Another argument, among others, was this: The Anti-Federalist objections to the Constitution of 1787 reveal that *if* any branch of government had the constitutional power to abridge citizens' expressive and religious freedoms, then Congress with its vast powers would be that branch, the *sole* branch. Thus, only its powers were limited when it came to our First Amendment freedoms. The Federalists thought Congress had no such power; the Anti-Federalists thought it did; but both would have agreed that neither the executive nor the judicial branches had any such delegated authority in need of restriction by way of constitutional amendment.[14] For the executive or judiciary to take any such actions, then, would be to act in contempt of the Constitution, or so the old-fashioned line of constitutional thinking might have it. (Whatever the soundness of such arguments, the First Amendment has since been held applicable to both the executive and judicial branches.)

While Madison continued to press for a national Bill of Rights that included protections for freedom of speech, press, and assembly, he also pushed for a bill that would restrict *state* encroachments on such freedoms and others. He proposed that no "*state* should infringe on the right of trial by jury in criminal cases, nor the right

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[14] This has jurisprudential implications, as Oregon Supreme Court Justice Hans Linde has observed: "If government acts without a basis in valid law, the court need not find facts or weigh circumstances in the individual case. When a constitutional prohibition is addressed to lawmakers, as the First Amendment is, the role that it assigns to courts is the censorship of laws, not participation in government censorship of private expression." Hans A. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 208 (1981); *Courts and Censorship*, *in* INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM 43 (Robert F. Nagel ed., 1995).

of conscience, nor the freedom of speech or of the press."[15] Madison insisted this amendment was essential because it bound the states to abide by the freedoms that were set forth in the federal Bill of Rights. Without it, he argued, citizens of certain states would be powerless against the "oppressive majority" he had always feared. And that majority will, exercised most dangerously at the state and local levels, presented a greater threat to liberty than any act of the national legislature. Said Madison on June 8, 1789:

> But I confess that I do conceive that in a Government modified like this of the United States, the greater danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty ought to be leveled against that quarter where the greater danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, but in the body of people, operating by the majority against the minority.

For Madison, this proposal to limit the power of the states was seen as "the most valuable amendment in the whole list," he wrote in a letter on August 17, 1789, continuing, "If there is any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments."[16]

The proposal, however, had its opponents—chief among them Thomas Tucker of South Carolina. "It will be much better," Tucker stressed, "to leave the State Governments to themselves, and not interfere with them more than we already do, and that is thought by many to be much too much."[17]

The proposed amendment was subsequently reworded: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State." While the amendment passed the House, it failed in the Senate; the House later agreed with the Senate's action.[18] Meanwhile, the text of what we now know as the First Amendment became the law

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[15] GEORGE ANASTAPLO, REFLECTIONS ON FREEDOM OF SPEECH AND THE FIRST AMENDMENT 221 (2007) (emphasis added).

[16] 2 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 246 (1901).

[17] 1 THE BILL OF RIGHTS AND AMERICAN LEGAL HISTORY 517 n.5 (Paul L. Murphy ed., 1990).

[18] A detailed account of this history and what followed is set out in Charles Warren, *The New 'Liberty' Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

of the land, along with nine other amendments, on December 15, 1791, when Virginia cast the last vote needed to ratify the Bill of Rights.

And so, at the time of Gitlow's arrest in November 1919, the First Amendment right to freedom of speech applied to the federal government, and *not* to the states. As a result, dissidents like Gitlow received far less constitutional protection for freedom of speech than Americans have come to expect today. By 1920, thirty-five of the nation's forty-eight states had passed "anti-revolution" laws, which forbade people from publicly calling for violent revolution in the United States.[19] At the time, all of these state laws were beyond the reach of the First Amendment, which meant that the only express constitutional protection for free speech had to come from the state constitutions.

III. "We Mean to Speak the Voice of Dynamite"

The new syndicalism laws had no shortage of potential targets, either, thanks to a series of events that put the nation on alert and culminated indirectly in Gitlow's arrest. In March 1919, the same month the U.S. Supreme Court handed down its unanimous decision in *Schenck v. United States*[20] and upheld the suppression of dissident speech, Bolshevik agitators announced they would begin exporting the ideals of the Soviet Revolution. One month later, thirty-six bombs, each addressed to a different public figure—including *Schenck*'s author, Justice Oliver Wendell Holmes, Jr.—were discovered in various post offices across the country. (Calamity and mayhem were avoided thanks only to luck and insufficient postage.) And on May 1, riots broke out in various American cities as "radicals" attempted to publicly celebrate International Labor Day. In several locations, according to Margaret Blanchard, "police joined bystanders to put a bloody end to the marches."[21]

Then more bombs went off in early June. One exploded in front of the home of the U.S. attorney general, A. Mitchell Palmer. Palmer and his family escaped serious injury; the attacker was less fortunate. In fact, his head was blown across the street, in the direction of the home of the then assistant secretary of the Navy, Franklin D. Roosevelt, whose home had also been bombed. Among the debris was a leaflet, "PLAIN WORDS," that threatened yet more violence:

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[19] *See* CHAFEE, *supra* note 4, at 145–49.

[20] 249 U.S. 47 (1919).

[21] MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS 112 (1992).

> The powers that be make no secret of their will to stop here in America the worldwide spread of revolution. The powers that be must reckon that they will have to accept the fight they have provoked. . . . We have been dreaming of freedom, we have talked of liberty, we have aspired to a better world, and you jailed us, you clubbed us, you deported us, you murdered us whenever you could. . . . We know that all you do is for your defense as a class. We know also that the proletariat has the same right to protect itself. Since their press has been suffocated, their mouths muzzled, we mean to speak for them the voice of dynamite, through the mouths of guns.[22]

All in all, there were ten bombings on that terror-filled day alone. The homes of judges, mayors, state legislators, and industrial giants were bombed in Boston, Cleveland, New York, Philadelphia, and Pittsburgh. According to Kenneth Ackerman, "all fingers pointed to the same familiar culprit: radical anarchists."[23]

The next day, June 4, Attorney General Palmer announced that "the outrages of last night indicate nothing but the lawless attempt of an anarchistic element in the population to terrorize the country and thus stay the hand of the government. This they have utterly failed to do." Later that month, while addressing Congress, Palmer warned of more difficult days ahead. "It has almost come to be accepted as a fact," he said, "that on a certain day in the future, which we have been advised of, there will be another serious and probably much larger effort of the same character which the wild fellows of this movement describe as a revolution, a proposition to use up and destroy the Government at one fell swoop."[24]

With pressure mounting for Palmer to do *something*, the Department of Justice conducted the infamous "Palmer Raids," first in November 1919, and then again in January 1920. Thousands of Russian immigrants, along with members of the Communist Party and the Communist Labor Party, were hunted down. In fact, with the aid of his young twenty-four-year-old assistant, J. Edgar Hoover, Palmer "directed federal agents and local police to go and round up between 5,000 and 10,000 people in a three-month orgy of government bullying," Kenneth Ackerman has recounted. Ironically, many of those rounded up were detained in the reception room at Ellis Island—an icon of American liberty.

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[22] *Red Bombs Palmer's House; Dies Himself; Family Is Not Injured*, WASH. POST, June 3, 1919, at 1.

[23] KENNETH D. ACKERMAN, YOUNG J. EDGAR: HOOVER, THE RED SCARE, AND THE ASSAULT ON CIVIL LIBERTIES 14 (2007).

[24] *Attempt to Terrorize Has Failed, Says Palmer*, WASH. POST, June 4, 1919, at 1.

This was a breathtaking exercise of raw power. As Christopher Finan has noted, "many were held for months in cramped, filthy, makeshift prisons, beaten, brutalized, railroaded, denied lawyers or access to family members, then released with no explanation, never charged with a crime." [25] And then there were hundreds of thousands of government files—450,000 by 1921. Notably, one of those files bore the name of Louis Brandeis, a sitting Supreme Court justice.

"Although the Palmer Raids generated a lot of good publicity for the Department of Justice," Finan observed, "they accomplished little. The government never discovered who was behind the June bombings. The radicals who were arrested in November and January were not charged with any crime." [26] But most Americans didn't mind, so great was the hostility toward the "Reds."

IV. "EVERYBODY IS AGAINST THE REDS"

Against that historical backdrop, Benjamin Gitlow and his ideological comrades preached their Marxist gospel. A week after Palmer's rousing address to the House, Gitlow and others broke ideological ranks with the Socialist Party. It was too timid for their revolutionary tastes. Their new group, tagged the "Left Wing Section," rhetorically boasted of a more aggressive form of revolution, including—if necessary—violence.

The Left Wing Section appointed a National Council and charged it to produce a text capable of galvanizing people the way Marx's and Engels' *Communist Manifesto* had when it was published in 1848. During this time, Ben Gitlow was both a member of the Section and its business manager. It took a summer of feverish work to hammer out the manifesto. It called for "revolutionary Socialism" and "revolutionary mass action." True to its provocative title, the document declared, "it is necessary to destroy the parliamentary state, deprive the bourgeoisie of political power, and function as a revolutionary dictatorship." The proposed means to that revolutionary end: "The revolution starts with strikes of protest, and then into revolutionary mass action for the conquest of the power of the state." [27]

That radical message, Ackerman has observed, was published in "*The Revolutionary Age* as a feature for its July 15, 1919, edition, with a record print of 16,000

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[25] CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 4 (2007).

[26] *Id*. at 3.

[27] *See* LENDLER, *supra* note 1, at 10–16, 23, 24, 39–40, 62, 63–64.

copies." By November 1919, the radical Socialist message was taking hold—there were police strikes in Boston, steelworker strikes in fifty cities, and a United Mine Workers walkout. Yet when it came to the *Left Wing Manifesto,* some considered its message so boring as to be unable to move anyone to do anything. Harvard law professor Zechariah Chafee, the noted First Amendment scholar, was one such person. "Any agitator who read these thirty-four pages to a mob would not stir them to violence, except possibly against himself," he wrote. "This Manifesto would disperse them faster than the Riot Act."[28]

Dull prose or not, Gitlow's fellow Socialists shied away from the Left Wing Section's highly exaggerated rhetoric. More and more came to think that the Section was a menace to public safety. In fact, in a June 24 statement to the press, the National Executive Committee of the Socialist Party spoke of "an opera bouffe reign of terror," and warned that the group was planning "an incredible series of acts hitherto unknown in the Socialist party in this country."[29] That was more than enough for Attorney General Palmer. He set up a "Radical Division" within the Justice Department and appointed the ambitious Hoover as its head. And then, on November 7, 1919—the second anniversary of the Bolshevik revolution—government officials, federal and state, raided dissident meeting places in twelve different cities. New York was among the cities, and Benjamin Gitlow was among those jailed.

It was a bad omen. As Ackerman has noted, "federal prosecutors had [already] won more than five hundred Espionage Act convictions during the [First] World War." If Gitlow had wondered about his legal prospects, his criminal arraignment hearing clarified matters. "I hold that the Communist Party has declared a state of war against the United States," said the magistrate assigned to his bail hearing. "[T]he establishment of the Communist Party in the State of New York," he added, "is the highest crime known to our law. I will not reduce the bail one dollar." When defense counsel pointed out that the United States was not legally at war with Russia, the magistrate shot back: "'Who killed the 111 American soldiers whose bodies are being brought back from Russia?' The defense attorney shrugged his shoulders.

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[28] CHAFEE, *supra* note 4, at 319.

[29] *Socialists Assail 'Left Wing' Party*, N.Y. TIMES, June 24, 1919, at 5.

'I don't know,' he said. 'Well,' said the magistrate, 'it was the Soviet guards of Russia. Now let's get back to the law.'"[30]

Not everyone agreed with the new law and how it was being enforced. Editors of the *San Francisco Examiner* charged government officials with "trying to change our laws so that any American citizen who DISAGREES WITH THEIR IDEAS or advocates a change in government may be sent to jail for twenty years."[31] In New York, Governor Al Smith vetoed legislation that would have mandated loyalty tests for teachers, regulation of all school curricula, and special investigations to detect revolutionary conspirators. Eventually, Smith's willingness to stand up for constitutional principles would link his fate to Gitlow's, though in a curious way. For now, those principles simply cost him the 1920 election.

By contrast, far more Americans supported mass arrests of Communists, Socialists, anarchists, and any other *ists* hell-bent on empowering the proletariat. It was that mindset that led Gitlow to be indicted by state prosecutors on November 26, 1919. He was charged with three counts of violating New York's Criminal Anarchy Act:

1. He "feloniously advocated, advised, and taught . . . the necessity and propriety of overthrowing and overturning organized government by force."
2. He printed *The Revolutionary Age,* which urged the overthrow of the government.
3. He was an "evil-disposed and pernicious person . . . of most wicked and turbulent dispositions" (this count was later withdrawn at the trial).[32]

Ben Gitlow, the pudgy, round-faced radical, was in big trouble, and he needed a big-time lawyer to defend him. He found just such counsel in *three* lawyers. Charles Recht and Walter Nelles, a pair of seasoned lawyers from the National Civil Liberties Bureau, conducted the lion's share of the trial.[33] But for the jury argument

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[30] *Drastic Penalties Planned for Reds*, N.Y. TIMES, Nov. 12, 1919, at 1.

[31] Editorial, *Bad Laws*, S.F. EXAMINER, Nov. 14, 1919, at 1.

[32] LENDLER, *supra* note 1, at 18–25. *See also* Thomas G. Mackey, *"They Are Positively Dangerous Men": The Lost Court Documents of Benjamin Gitlow and James Larkin Before The New York City Magistrates' Court, 1919*, 69 N.Y.U. L. REV. 421 (1994).

[33] The National Civil Liberties Bureau later became the American Civil Liberties Union. And Nelles's pamphlets on wartime prosecutions helped to shape Zechariah Chafee's views on the First Amendment, which played an important role in the history of free speech in America. Nelles would

portion, an even more accomplished criminal defense lawyer was recruited—someone who would argue for the defense in more than two thousand cases during the course of his career: Clarence Darrow (1857–1938). The great defender of the underdog, the staunch opponent of capital punishment, Darrow was the man who famously debated William Jennings Bryan in the 1925 Scopes trial involving the teaching of evolution. He was so dedicated to free-speech issues that he accepted Gitlow as a client even before the two had personally met. That occasion was reserved until the eve of the trial, in January 1920. "Oh, I know you are innocent," Darrow then told Gitlow, "but they have the country steamed up. Everybody is against the Reds."[34]

Gitlow's Booking Photo

The lead prosecutor, Assistant District Attorney Alexander I. Rorke[35] was colorful in the words he chose to portray Ben Gitlow: "He would make America a Red

later be co-counsel for the rights claimant in *Whitney v. California*, 274 U.S. 357 (1927), the free speech case in which Justice Brandeis issued his famous concurrence.

[34] ARTHUR WEINBERG & LILA WEINBERG, CLARENCE DARROW: A SENTIMENTAL REBEL 290 (1980).

[35] Rourke also prosecuted Charles Ruthenberg. *See* LENDLER, *supra* note 1, at 64–67. The Ruthenberg case was the one that set the stage for Brandeis' concurrence in *Whitney v. California*. *See* Ronald Collins & David Skover, *A Curious Concurrence: Justice Brandeis' Vote in* Whitney v. California, 2005 SUP. CT. REV. 333.

Ruby in the Red Treasure Chest of the Red Terror."[36] Rorke spent two days making the state's case against Ben Gitlow. He called eight witnesses, including a federal undercover agent. Predictably, the picture he painted of Gitlow was of a man irreparably wed to a violent revolution.[37]

By contrast, Darrow offered no opening statement. He barely made an objection when the prosecution offered its case, and throughout the trial he did not call a single witness. (Such inaction, not surprisingly, infuriated his client.) When Darrow did speak, albeit briefly, he spoke in a slow drawl. "My client was the business manager and on the board of this paper and there will be no attempt on his part to deny legal responsibility for it," he said. "He was on the board of managers, he knew of the publication, in a general way and he knew of its publication afterward, and is responsible for its circulation."[38]

Darrow's argument was essentially twofold: first, the *Manifesto* was not a revolutionary call for violence; and second, if the statute were allowed to be applied to such expression, it would be unconstitutional. As to the first argument, he told the jury that the *Manifesto* was the "tamest, the dullest, the most uninteresting document ever submitted." Surely, its publication and distribution could not fall within the purview of New York's Criminal Anarchy Act. As for the second argument, Darrow told the jury that any advocate of freedom of speech and of the press would want "no fetters on the thoughts and actions and dreams and ideals of men, even the most despised of them. Whatever I think of their prudence, whatever I may think of their judgment, I am for the dreamers," he said. "I would rather that every practical man shall die if the dreamer be saved."

Consistent with that, and per Gitlow's request, Darrow lectured the jury on the splendor of revolution:

> Is anybody afraid of revolution? For a man to be afraid of revolution in America would be to be ashamed of your mother. Nothing else. Revolution? There is not a drop of honest blood in a single man [who] does not look back to some revolution for which he would thank his God that those who revolted won. None of you. Take the revolutions out of Great Britain, and what is left. Take them out of France and you would have the absolute despotism with the people as slaves. What of our own country? We

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[36] *The Gitlow Case*, *in* THE CLARENCE DARROW DIGITAL COLLECTION, https://librarycollections.law.umn.edu/darrow/trials_details.php?id=14.

[37] LENDLER, *supra* note 1, at 18–32.

[38] ACKERMAN, *supra* note 23, at 36–45, 53–54.

> are 150 years old or thereabouts, and we now speak about revolution as if we were speaking of cutting a man's throat, a nation born in it, born in it! [39]

Grudgingly, Darrow also allowed Gitlow to address the jury on his own behalf. "I suppose a revolutionist must have his say in court even if it kills him," the compassionate yet cynical lawyer remarked. Faithful to Darrow's prediction, Gitlow, who spoke for nearly an hour—sometimes in rambling fashion—told the jury:

> I am charged in this case with publishing and distributing a paper known as *The Revolutionary Age*, in which paper was printed a document known as the Left Wing Manifesto and Program. It is held that that document advocates the overthrow of government by force, violence, and unlawful means. The document itself, the Left Wing Manifesto, is a broad analysis of conditions, economic conditions, and historical events in the world today. It is a document based upon the principles of socialism from their earliest inception. The only thing that the document does is to broaden those principles in the light of modern events. . . . [40]

And then with his trademark bravado he added:

> The socialists have always maintained that the change from capitalism to socialism would be a fundamental change, that is, we would have a complete reorganization of society, that this change would not be a question of reform; that the capitalist system of society would be completely changed and that that system would give way to a new system of society based on a new code of laws, based on a new code of ethics, and based on a new form of government. For that reason, the socialist philosophy has always been a revolutionary philosophy and people who adhered to the socialist program and philosophy were always considered revolutionists, and I as one who maintains that, in the eyes of the present-day society, I am a revolutionist. [41]

Frequently, Gitlow bickered and exchanged barbs with an impatient judge, by the name of Bartow S. Weeks. But the self-righteous defendant refused to sacrifice his opinion for his liberty. He was not going to evade the issue, he told the jury. "My whole life has been dedicated to the movement in which I am in. No jails will change my opinion in that respect. I ask no clemency."[42]

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[39] WEINBERG, *supra* note 34, at 291.

[40] Benjamin Gitlow, *The "Red Ruby": Address to the Jury*, COMMUNIST LABOR PARTY, 1920, at 4.

[41] *Id.*

[42] ALBERT FRIED, COMMUNISM IN AMERICA: A HISTORY IN DOCUMENTS 51 (1997).

Passionate—yes. Principled—yes. Prudent—no. Despite Darrow's bold, three-hour summation, Gitlow was convicted on February 5, 1920, in the Criminal Branch of the New York Supreme Court. In thanking the jury, which reached its decision in less than three hours, Judge Weeks said: "Your verdict reflects credit on your sincerity and intelligence and is one of distinct benefit to the country and the State. There must be a right in this organized State to protect itself. . . . I hope this verdict will reach out and act as a deterrent to others."[43]

Six days later, Judge Weeks gave Gitlow the maximum—five to ten years.[44] Shortly thereafter, the still-proud revolutionist boarded a train bound for Sing Sing, where he would begin his sentence in a prison cell seven feet deep, three feet wide, and six feet seven inches high. He was now prisoner no. 50516.

V. "MERE ADVOCACY WAS ENOUGH"

If a prison has a soul, Warden Lawes once said, "it is up there in those cells, suffering all the torments of an age-old and unsolved problem of life."[45] Looking back to the day he arrived at Sing Sing, Ben Gitlow remembered only the natural beauty surrounding it. The Hudson River, its frozen mass gently reflecting the rays of the retreating sun. The Palisades rose in the distance to encircle the stark prison at the top of the hill. Acres of snow provide the landscape with its winter blanket. As he remarked, "I felt no fear in approaching the place. I confess, it appealed to me. I began to wonder what was in store for me. Perfectly calm, I took a fatalistic attitude and was prepared for anything that was to follow."[46]

Aesthetics aside, more bad news followed. On April 1, 1921, the Appellate Division of the New York Supreme Court (an intermediate appellate court) unanimously affirmed Gitlow's conviction. "It behooves Americans to be on their guard," wrote the court, "to meet and combat the movement which, if permitted to

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[43] *Gitlow Convicted in Anarchy Trial*, N.Y. TIMES, Feb. 6, 1920, at 17.

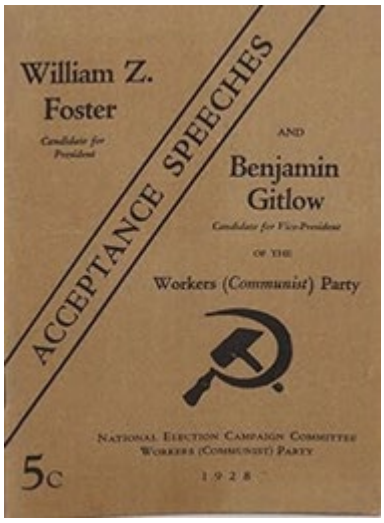
[44] *Gitlow, Anarchist, Gets Limit Sentence*, N.Y. TIMES, Feb. 12, 1920, at 1; LENDLER, *supra* note 1, at 33–48.

[45] LAWES, *supra* note 2, at 229.

[46] BENJAMIN GITLOW, I CONFESS: THE TRUTH ABOUT AMERICAN COMMUNISM (E. P. Dutton & Co. ed.,1939). "[A]s a reward for Gitlow's defense of communism, the Moscow Soviet made him an honorary member during his stay in prison." Mackey, *supra* note 32, at 435.

progress as contemplated, may undermine and endanger our cherished institutions of liberty and equality."[47]

So Gitlow remained in jail, imprisoned but not disillusioned. In fact, the ever-idealistic Socialist behind bars ran (unsuccessfully) for mayor of New York City. Then, a year after his first failed appeal, he received his first good news: after twenty-six consecutive months in a cell, he was to be released pending his next appeal. Gitlow's good fortune was the handiwork of Benjamin N. Cardozo, then a member of New York's high court and later the successor to Justice Oliver Wendell Holmes on the U.S. Supreme Court. Cardozo issued the order because he surmised the criminal anarchy statute might well be inapplicable to the facts of the case.



Benjamin Gitlow was again free to revel with his revolutionary friends. Or so he thought, until he was rearrested a short time later for a separate warrant relating to criminal anarchy. The next morning, he found himself back in a line-up of prisoners, awaiting arraignment. Meanwhile, Gitlow's lead appellate attorney, Walter Nelles, prepared his next state court appeal, this time to the seven judges of the Court of Appeals of New York, the state's highest tribunal. It would be Gitlow's last chance, short of the highly unlikely intervention of the U.S. Supreme Court, to have his First Amendment rights vindicated. But without some new legal angle, Nelles's prospects for victory were bleak. Absent a different interpretation of the state statute or some new constitutional defense, Gitlow would remain a resident of Sing Sing.

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[47] People v. Gitlow, 187 N.Y.S. 787 (App. Div. 1921).

Predictably, the Court of Appeals was disinclined to render novel rulings on behalf of Communist agitators. On July 12, 1922, the judges voted five to two against Gitlow. Writing for the majority, Judge Frederick E. Crane declared: "The First Amendment to the United States Constitution and section 8 of article I of the New York State Constitution[48] . . . do not protect the violation of this liberty or permit attempts to destroy that freedom which the Constitutions have established."[49] While the majority admitted "there is no advocacy in specific terms of the use of assassination or force of violence," it ruled, nonetheless, that "there was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described." Mere advocacy—or even something approximating it—was enough. Moreover, it didn't much matter if any threat it posed was not imminent.

Judge Cuthbert W. Pound, joined by Judge Cardozo, saw it differently in his dissent. For him, New York's criminal statute was not violated because Gitlow had not actually advocated violent anarchy. As Pound put it: "Although the defendant may be the worst of men; although Left Wing socialism is a menace to organized government; the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."

Pound and Cardozo aside, Ben Gitlow had now lost before three different courts and thirteen different judges. His options were running out. With the sweltering summer months ahead—when his limestone-walled cell grew so wet that, as Gitlow would later write, "the moisture drips from the walls"[50]—it seemed he had no choice but to serve out his sentence.

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[48] Section 8 of Article I of the New York State Constitution reads as follows: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST. art. I, § 8.

[49] People v. Gitlow, 234 N.Y. 132 (1922).

[50] GITLOW, *supra* note 46.

VI. A QUESTION OF "FUNDAMENTAL RIGHTS AND LIBERTIES"

Success in the U.S. Supreme Court is always a long shot. What were the chances of prevailing? After all, in the twenty freedom-of-expression cases the Court had ruled on by that time, it had decided *against* the free-speech claim nineteen times. Even the Court's two liberals, justices Oliver Wendell Holmes and Louis Brandeis, had only sided with free-speech claims in a few cases.

As the case came to the High Court, Gitlow's legal team added yet another notable legal mind to the roster of his defense counsel. The man was Walter Helprin Pollak, a bright, Harvard-educated lawyer, then thirty-five years old. In later years he would become one of the most celebrated civil liberties appellate lawyers in the land. For now, he had to deal with a formidable challenge to his somewhat novel argument that the First Amendment protected Benjamin Gitlow from prosecution under the New York Criminal Anarchy Act. In other words, he had to argue that the First Amendment, its text notwithstanding, applied to the states.

History seemed against him. After all, no court up to that time had ever invalidated the Alien and Sedition Acts of 1798, in which seditious libel was deemed to be a crime.[51] Borrowing a page from the English common law of seditious libel, this

[51] Such laws were not called into constitutional question by a majority of the Court until the ruling in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). For a contemporary discussion of the

early federal statute made it a crime to, among other things, disparage the government or government officials or to hold either up to ridicule in ways that might erode their authority. Indicative of its partisan slant, the original sedition act was written to expire when President John Adams ended his term in 1801.

While such eighteenth-century laws did have a few notable protections not available under the old common law—truth was a defense and trial by jury was permitted—the Acts were seen by Jeffersonian Republicans and others as a blatant violation of the First Amendment. A mere seven years after the First Amendment became law, President Adams and his Federalist friends invoked the sedition provision to arrest the likes of Matthew Lyon (an outspoken Vermont congressman), James Thompson Callender (an Anti-Federalist satirical writer, reporter, and author of a book harsh on Adams), Benjamin Bache (the spirited publisher of the infamous Anti-Federalist *Aurora*),[52] and twenty-two others, most of them newspaper editors. All but one of the eleven people tried were convicted. But when Thomas Jefferson, a Republican, took office in 1800, he denounced the sedition law as unconstitutional and violative of the First Amendment. Accordingly, he pardoned all those convicted under the law.

Admittedly, the historical ending of the alien and sedition laws did offer some comfort to Gitlow's lawyers, even if it did not amount to binding judicial precedent. But even if his counsel could get past the precedent of the early sedition act prosecutions, there was another legal hurdle in their way. Whatever viability the First Amendment had—so one major historical school of thought maintained—was confined to prior restraints, which meant that the government could punish a person *after* the expression occurred. And that was what the state of New York had done with Gitlow.

Even if Pollak could overcome legal historical hurdles, how could he get the Court to set aside New York's Criminal Anarchy Act? Whatever constitutional relief Gitlow may have been entitled to, so the argument then went, was limited to the protections afforded by the New York Constitution. Gitlow had already lost that

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historical backdrop of all of this, see GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME—FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004). *See also* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

[52] *See* Martin Gruberg, *Benjamin Franklin Bache*, FREE SPEECH CENTER (2025), https://perma.cc/Q5YL-5XNZ.

argument on appeal, twice, and there was nothing the Supreme Court would do to change that interpretation of state law.

As for applying the First Amendment to the states, as early as 1833 the Court, in an opinion by Chief Justice Marshall, had held that the Bill of Rights restricts the power of the national government alone. Here is how John Marshall put it in *Barron v. Mayor & City Council of Baltimore*:

> In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.[53]

Such a view of things held firmly until at least 1868, when the Fourteenth Amendment[54] was ratified. That historic amendment, a child of the Civil War, promised what Madison had sought unsuccessfully to guarantee—namely, a fundamental alteration of the balance of power between the national government and the states. For one thing, it suggested that the rights secured by the Bill of Rights might be interpreted as limits on *state* power, insofar as to abridge them would be to deny people "due process of law." So great was its potential that by 1897 the Court interpreted the Fourteenth Amendment's due process guarantee as restricting the power of the states to take property for public use without just compensation. Thus, some believed that if the promise of the Fifth Amendment could be applied to the states, [55] then that of the First Amendment could likewise apply.

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[53] 32 U.S. 243, 250 (1833).

[54] In relevant part, the text of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws." Even though the Fourteenth Amendment was passed in 1868 to protect the rights of recently freed slaves, Howard Zinn has observed that of the 307 Fourteenth Amendment cases brought before the Court between 1890 and 1910, just nineteen dealt with the rights of minorities; the other 288 dealt with the rights of *corporations*. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT (2003).

[55] Quincy Railways v. Chicago, 166 U.S. 226 (1897).

The Court's 1897 ruling, however pregnant with potential, did not formally apply to the states all of the guarantees of the Bill of Rights. Still, it offered Pollak and Nelles the main legal argument that had been missing in the earlier appeals cases—a hook on which to hang the petitioner's claim that freedom of speech was a "fundamental right" safeguarded under the due process clause of the Fourteenth Amendment.[56] If the argument could be presented convincingly enough, the Court might agree that the First Amendment's free-speech guarantee was "incorporated" into the Fourteenth Amendment. In other words, the due process protections of the Fourteenth Amendment included the protections of freedom of speech and association.[57] By that logic, the Court would have to concede that the First Amendment was incorporated into the Fourteenth Amendment. If so, the justices would have no choice but to apply the First Amendment to the states, and Madison's 150-year-old dream of advancing civil liberties by checking state power would then be realized.

But could such a defense carry the day? Granted, Holmes and Brandeis were then pushing the boundaries of First Amendment protections generally, though not against the states specifically. On that score, in 1907 in the case of *Patterson v. Colorado,*[58] the great Holmes (Brandeis was not on the Court then) left the question open of whether the First Amendment applied to the states. "We leave undecided the question whether there is to be found in the 14th Amendment a prohibition similar to that in the 1st," declared Holmes. Justice John Marshall Harlan, however, disagreed. He believed that the Fourteenth Amendment's privileges and immunities clause protected freedom of expression:

> I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the 14th Amendment forbidding a state to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action,

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[56] But according to Charles Warren, in at least "twenty cases between 1877 and 1907 the Court was required to rule upon" the wisdom of John Marshall's 1833 ruling in *Barron v. Baltimore.* In all, he stressed, the Court followed the *Barron* precedent. Warren, *supra* note 18, at 436.

[57] As early as 1916, another progressive, Theodore Schroeder, advanced that same view. *See* THEODORE SCHROEDER, FREE SPEECH FOR RADICALS (1916). Schroeder was a key figure in the early progressive movement to safeguard free speech, especially related to obscenity.

[58] Patterson v. Colorado, 205 U.S. 454 (1907).

> whether by the nation or by the states, which does not embrace the right to enjoy free speech and the right to have a free press. [59]

Again, in 1920, a majority of the Supreme Court (with Brandeis in dissent) declined to apply the liberty protected by the Fourteenth Amendment in such a way as to include freedom of speech. And as late as 1922, the Court, again with Holmes's approval, had ruled in *Prudential Insurance Co. v. Cheek* that the Fourteenth Amendment imposed no restrictions on the states when it came to matters of free speech. Yet even if Holmes were to change his mind and Brandeis were to join him, they were only two in number. Five votes were needed for a win. Besides, how kindly would Justice Holmes's perspective be on the likes of Benjamin Gitlow if his ilk were indeed the ones who had earlier attempted to murder Holmes with a mail bomb? For a variety of reasons, winning in the Supreme Court was unlikely.

Even if the First Amendment were to be held applicable to the states, and even if it were to apply to the states in the same way it applied to the federal government, there was still a problem. Since 1919, the Court had heard four such criminal advocacy cases and had denied the First Amendment claims in all of them.[60] Even the Court's "clear and present danger test,"[61] first announced by Justice Holmes, had not convinced a majority of the Court to vindicate a First Amendment claim of right. So even if Gitlow's lawyers could convince the Court to apply the First Amendment to the state of New York, the chances were still slim that they could convince the justices to agree with them on the substantive merits of their claim.

When *Gitlow v. New York* came before the nine justices of the Supreme Court on April 12, 1923, Pollak and Nelles knew they could not count on the support of at least one of them—Justice Mahlon Pitney. A lackluster justice (John Marshall Harlan's successor), Pitney had authored two opinions that were nonetheless of special interest to Pollak and Nelles. One was *Prudential Ins. Co. v. Cheek,*[62] wherein Pitney announced that "the Constitution of the United States imposes on the states

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[59] *Id.* at 465 (Harlan, J. dissenting).

[60] *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting, joined by Brandeis, J.).

[61] As Holmes declared in *Schenck:* "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52.

[62] 259 U.S. 530 (1922).

no obligation to confer upon those within their jurisdiction . . . the right of free speech."[63] Phrased differently: the protections of the First Amendment did not apply to the states. The same year, Pitney again wrote for the Court, this time in *Pierce v. United States,*[64] to uphold the convictions of three Socialists for distributing an antiwar pamphlet. (Brandeis and Holmes, of course, dissented.) Again, when it came to the states, the First Amendment had no real role to play. Not yet anyway.

Then, unexpectedly, Justice Pitney suffered a stroke and retired from the Court—after *Gitlow* was argued but before it was decided. It was a good omen for Pollak and Gitlow; one of their leading constitutional foes on the Court was now gone. As a result, the case was reargued later that year, on November 23rd, this time before the Court's newest member, Justice Edward T. Sanford.

When it came time for Pollak to deliver his opening remarks, he said: "If the Court please, this case is one of such complexity and importance that I feel I cannot do justice to my argument in the allotted hour.[65] I therefore respectfully request an additional 15 minutes of time."[66] At that point, Chief Justice William Howard Taft—the former president of the United States—leaned his big bulk toward the senior Justice on his right, Justice Holmes, and asked his opinion. Holmes replied by way of a whisper that could be heard in open court: "I'll see him in Hell first." At that point, Taft turned to Pollak and said: "Mr. Pollak, it is the view of the Court that you should confine yourself to the allotted hour."[67]

For the next two hours, the lawyers and the Court went back and forth over the merits of New York's Criminal Anarchy Act, the application of the First Amendment to the states, and the proper construction of a free speech test in light of the Court's more recent rulings. Nineteen long months later, on June 8, 1925, the Court issued its ruling in *Gitlow v. New York.* The vote was seven to two, with Holmes and Brandeis in dissent. Justice Sanford wrote for the majority.

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[63] *Id.* at 534.

[64] 255 U.S. 398 (1921).

[65] At the time of the *Gitlow* case, the Supreme Court welcomed one-hour arguments from counsel on both sides of the case. In modern times, that time has typically been reduced to thirty minutes for each side.

[66] Louis H. Pollak, *Advocating Civil Liberties: A Young Lawyer Before the Old Court*, 17 HARV. C.R.-C.L. L. REV. 1 (1982).

[67] Pollak's son, the late federal judge Louis Pollak, recounted this story to me in June 2003. *See also id.*

A big man who smoked small cigars, Justice Sanford was highly educated, with a law degree and an M.A. from Harvard. He paid strict attention to legal detail, was conscientious in reading legal briefs, and was as open-minded and as attentive to civil liberties as any man born in Knoxville, Tennessee, just three months after the Confederate surrender at Appomattox. The following statement from his majority opinion would be his greatest First Amendment legacy:[68]

> For present purposes, we may and do *assume* that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co. v. Cheek* . . . that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question. [69]

It was just an assumption, not a legal holding. But it was an assumption that would ultimately change the course of constitutional history. For the first time, a majority of the Court was willing to *assume* that the First Amendment was incorporated into the protections of the Fourteenth Amendment, which were binding on the states. It was *dicta*—nonbinding legal language—that would help to change the law of the land.

For Charles Warren, a respected constitutional law scholar writing at the time, what the *Gitlow* Court had done with its *dicta* amounted to a major and unwarranted shift in the American constitutional scheme of things. He tagged it a "new conception of 'liberty.'" And he was highly critical of that "new conception": "this most recent development . . . may well awaken serious thoughts as to whether there is not danger that the 'liberty' of the States is being unduly sacrificed to this new conception of 'liberty' of the individual." [70]

Warren feared that the *Gitlow* dicta would ignite a wildfire in constitutional law. "If the doctrine of the case is to be carried to its logical and inevitable conclusion," he wrote in 1925, every one of the rights contained in the Bill of Rights ought

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[68] A few years later, Justice Sanford wrote the majority opinion in *Whitney v. California*, 274 U.S. 357 (1927), in which Justice Brandeis authored his famous concurrence.

[69] 268 U.S. at 667 (emphasis added).

[70] Warren, *supra* note 18.

to be and must be included within the definition of 'liberty,' and must be guaranteed by the Fourteenth Amendment against deprivation by a State 'without due process of law.'"[71]

Shortly after the arguments in the case but before the matter was decided, Justice Holmes wrote to his friend Harold Laski: "I am curious to see what the enthusiasts of liberty of contract will say with regard to liberty of speech under a state law, punishing advocating the overthrow of the government – by violence. The case was argued this week."[72]

VII. Substantive Evils

Such fears notwithstanding, the actual ruling in the case sealed Benjamin Gitlow's fate. The vote was 7–2 against him. "By enacting the present statute," wrote Justice Sanford,

> [T]he State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute.[73]

Sanford's majority opinion stressed that the New York statute could be "constitutionally applied to the specific utterance of the defendant if its natural *tendency* and probable effect was to bring about the substantial evil which the legislative body might prevent."[74] The state, he added, "cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale." But, importantly, he also noted that the law "does not restrain the advocacy of changes in the form of government by constitutional and lawful means." But if that were the actual measure, Professor Geoffrey Stone has observed, the "Court clearly implied

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[71] *Id.*

[72] Letter from Oliver Wendell Holmes, Jr. to Harold Laski, *in* 1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold Laski: 1916–1935, at 495 (Mark De Wolfe Howe ed., 1953).

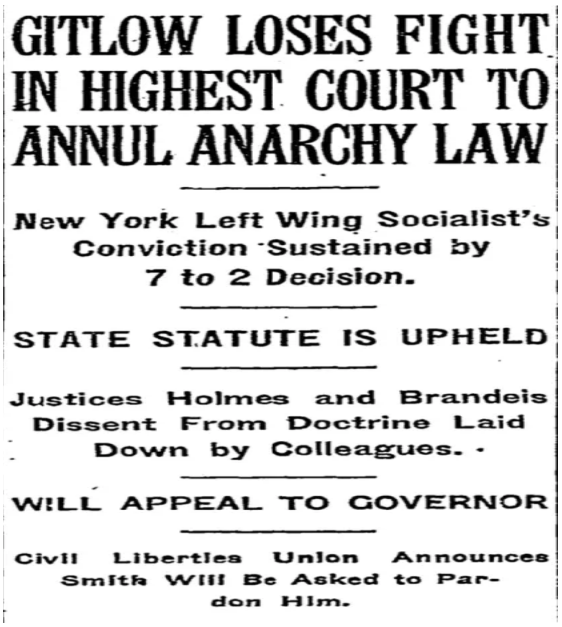
[73] 268 U.S. at 670.

[74] This "bad tendency" test applied a less protective gloss to the "clear and present danger" line of First Amendment cases. In time, the Court moved beyond such a restricted interpretation and wooden application of the First Amendment.

that utterances that stopped short of criminal conduct would pose a *different* constitutional question." Even so, Sanford was not troubled; he had another argument. Further on in his opinion, and with a touch of literary flair, Justice Sanford wrote words that would come back to haunt him:

> A single revolutionary spark may kindle a fire that, smoldering [*sic*] for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.[75]

As he concluded, Sanford announced the bottom line: "We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality."[76] In other words, even if the First Amendment applied to the states, New York's Criminal Anarchy Act had not abridged the First Amendment.



GITLOW LOSES FIGHT IN HIGHEST COURT TO ANNUL ANARCHY LAW

New York Left Wing Socialist's Conviction Sustained by 7 to 2 Decision.

STATE STATUTE IS UPHELD

Justices Holmes and Brandeis Dissent From Doctrine Laid Down by Colleagues.

WILL APPEAL TO GOVERNOR

Civil Liberties Union Announces Smith Will Be Asked to Pardon Him.

[75] 268 U.S. at 669.

[76] *Id.* at 670.

So, Benjamin Gitlow's fate would stand—a fact that troubled the Court's two most respected members. Justice Holmes, issuing what the *New York Times* characterized as "the sharpest kind of divergence" on the case, began his dissent, joined by Justice Brandeis, by observing:

> [T]his judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.[77]

In true Holmesian vernacular, he then turned Sanford's incitement language back on itself:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.[78]

Holmes's *Gitlow* dissent suggested that he had become more liberal in his view of the First Amendment. He no longer applied it in quite the restricted way he had earlier in *Schenck, Frohwerk,* and *Debs.* Off the record, Holmes was less than flattering about men and women like Gitlow, who believed in a proletarian panacea to the ills of capitalism. About a month after the decision came down, Holmes said as much in a letter to his friend Lewis Einstein: "I regarded my view as simply upholding the right of a donkey to drool."[79]

But in his published dissent, Holmes concluded with a flourish on behalf of "donkeys" like Gitlow: "Eloquence may set fire to reason," he wrote. "But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration." He then added a dose of social Darwinism—a survival-of-the-fittest approach to politics and free speech. "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant

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[77] *Id.* at 672 (Brandeis, J., dissenting).

[78] *Id.* at 673 (Brandeis, J., dissenting).

[79] LIVA BAKER, THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 589 (1991).

forces of the community," he stressed, "the only meaning of free speech is that they should be given their chance and have their way."[80]

Holmes and Brandeis aside, the *Gitlow* opinion met with predictable acceptance. "The decision stands as a safeguard for sound government," editorialized the *Washington (D.C.) Evening Star.*[81] Similarly, a *New York Times* editorial declared: "There is no denial of free speech. But the free speakers must be ready to face their responsibility to the law for what they say."[82]

Writing in the *New Republic,* Holmes's friend Professor Zechariah Chafee took a longer view of things: "The victories of liberty of speech must be won in the mind before they are won in the courts. In that battlefield of reason we possess new and powerful weapons, the dissenting opinions of Justices Holmes and Brandeis. Out of this long series of legal defeats [starting with the 1919 cases]," added Chaffee, "has come a group of arguments for toleration that may fitly stand beside the *Areopagitica* and Mill's *Liberty.* The majority opinions determined the cases, but the dissenting opinions will determine the minds of the future."[83]

Pollak and Nelles's work, too, would help shape the minds of the future. The good news was that the Court had assumed that the free-speech provision of the First Amendment applied to the states. Though not a formal victory, it was a symbolic one. *Gitlow v. New York* was a constitutional milestone; it would forever be hailed as the first case in which the Court applied the First Amendment to the states.

But the formal victory came later, thanks largely to Chief Justice Charles Evan Hughes. First, in *Stromberg v. California* (1931)[84] he wrote for the Court when it struck down a state "red-flag" law on First Amendment grounds. Relying on *Gitlow,* Hughes declared: "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." Not long afterward, in *Near v. Minnesota* (1931),[85] the First Amendment's press clause was applied to the states: "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause

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[80] 268 U.S. at 673 (Holmes, J., dissenting).

[81] THE EVENING STAR, June 9, 1925.

[82] N.Y. TIMES, June 9, 1925.

[83] Zechariah Chafee, *The Gitlow Case*, NEW REPUBLIC, July 1, 1925, at 141.

[84] 283 U.S. 359 (1931).

[85] 283 U.S. 697 (1931).

of the Fourteenth Amendment from invasion by state action." And then in *DeJonge v. Oregon* (1937),[86] Hughes again wrote for the Court when it applied the First Amendment's assembly guarantee to the states: "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. . . . The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[87]

By 1937 Pollak's former law office boss, Benjamin Cardozo, was also flying the incorporation banner. Writing for the Court in *Palko v. Connecticut,* Justice Cardozo ruled that *some* of the protections found in the Bill of Rights were so fundamental that the states must honor them. A decade later, in *Adamson v. California,*[88] Justice Hugo Black further extended the Pollak and Nelles incorporation principle by arguing that the states must honor *all* of the rights specified in the Bill of Rights.

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced.[89]

While Black's historical conclusions were contested, and while the full Court never went quite that far, in time all of the provisions of the First Amendment were held applicable to the states, as were most of the provisions of the Bill of Rights. Charles Warren's 1925 prediction came to pass—though it was not an outcome he welcomed.

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[86] 299 U.S. 353 (1937).

[87] *Id.* at 364. The First Amendment's right to *petition* was later inferred as applying to the states in *Edwards v. South Carolina*, 372 U.S. 229 (1963), and the right of *association* was deemed to be binding on the states in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[88] 332 U.S. 46 (1947).

[89] *Id.* at 71 (Black, J., dissenting).

On the merits, Holmes's *Gitlow* dissent pointed to the future. Though his general view of the First Amendment would be vindicated in later opinions, that time was still decades away.

Walter Pollak and Walter Nelles had set the wheels of American constitutional law in motion.[90] Pollak's greatest professional satisfaction, in fact, came from having had, as he later expressed it, "some part in a number of legal battles on behalf of persons persecuted for their opinions." Even so, his client had lost. And grand as the symbolic victory was, the real and immediate consequence of the Court's handiwork was to require Gitlow to serve out the remainder of his five- to ten-year jail term.

Benjamin Gitlow's options had run out. If the Highest Court in the land would not spare him, who in the world would?

VIII. "TO ORGANIZE, TO SPEAK, TO STRIKE AND TO PICKET"

"Within a week after the decision," wrote Harold Josephson, "the American Civil Liberties Union petitioned Governor Al Smith for a pardon, arguing that Gitlow already had served thirty-four months and that his only offense was the expression of his political views."[91] The International Labor Defense organization and several locals of the International Ladies Garment Workers Union echoed that call. But what were the chances?

Six months after the Supreme Court decision, on his first wedding anniversary, Ben Gitlow was resigned to accept his status as a ward of Sing Sing. It was Friday, December 11, 1925, when the dark-curly-haired prisoner ventured to the visiting room to see his wife, Badonna Zeitlin. Together, they struggled with the real likelihood of him remaining in prison for years. About that time, a guard approached Badonna. She had a phone call. "Wouldn't it be funny if the call is on the matter of your pardon?" she quipped. Governor Al Smith, who had returned to the governor's mansion after his 1920 defeat, had recently pardoned one of Gitlow's fellow

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[90] Walter Pollak would later argue (with Walter Nelles) *Whitney v. California*, 274 U.S. 357 (1927), a famous First Amendment case known for Brandeis's concurrence. Pollak also argued *Powell v. Alabama*, 287 U.S. 45 (1932), one of the famous Scottsboro cases in which nine black youths were arrested and convicted for allegedly raping a white woman. *See* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 10, at 430.

[91] MICHAL R. BELKNAP, AMERICAN POLITICAL TRIALS 153 (1994).

dissidents; might he now be willing to do the same for Gitlow? But that was too good to be true—it was fanciful revolutionary thinking.

When Badonna returned from the warden's office, she could barely contain her enthusiasm. "Don't be surprised if you will lose one of your steady guests soon," she said rather snidely to the guard. "I just got word that the Governor pardoned my husband."[92]

The next day, after accepting a cheap suit of clothes from the state and a gift of $10, Benjamin Gitlow left Sing Sing for good. As he watched Gitlow pull his brown cap down over his eyes and boarded a train for Grand Central Station, Lewis Lawes may well have wondered if this unusual prisoner had finally learned his lesson. Was he a man for whom "bad associations" would no longer be a problem?

An hour later, a group of twenty-five energized radical friends met Gitlow at Grand Central Station. Befitting the occasion, the general secretary of the Workers Party made a promise to a gathering of the press: Despite his personal hardships, Benjamin Gitlow "would continue to carry forward the fight for which he was imprisoned . . . [for] the struggles with the employing class and for the defense of every right of the workers to organize, to speak, to strike and to picket."[93]

IX. The Plot Twists

It's hard to comprehend what followed next. After all, who would believe that a man who sacrificed so much for the principles of freedom would later deny the same freedoms to others? Yet that's exactly what happened: Ben Gitlow—the man who twice ran (unsuccessfully) as a Socialist for vice president of the United States, promising he would turn the White House into apartments for poor farmers—turned on his comrades and became a government informant.

In 1929, thanks to Joseph Stalin (whom he had once met), Gitlow was expelled from the Communist Party. Infuriated and feeling betrayed, Gitlow and others organized, unsuccessfully, the Communist Party, U.S.A. Meanwhile, the thirty-nine-year-old radical became a man without an ideological anchor. He drifted. By the late 1930s and into the 1950s, he opposed those he had once embraced by testifying

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[92] GITLOW, *supra* note 46, at 522–24. The governor pardoned Benjamin Gitlow on December 11, 1925, arguing that he had already been punished enough for a "political crime." Moreover, the governor halted further prosecutions under the Criminal Anarchy Act.

[93] *Gitlow, Set Free, Rejoins Radicals*, N.Y. TIMES, Dec. 13, 1925, at 18.

(sometimes as a paid government informant) before the House Un-American Activities Committee (HUAC), the Subversive Activities Control Board,[94] and similar government commissions. Among others, he testified against Harry Bridges (a noted longshoreman leader)[95] and Stephen S. Wise (a revered American rabbi).[96]

"Mr. Gitlow was a favorite witness of the House Un-American Activities Committee,[97] but years later his testimony became suspect in many quarters in 1953 when he said that the Communists were highly successful" at infiltrating the Methodist Church. That same *Washington Post* story added: "He and other defectors related that 600 clergymen in the country were secret Reds." A few years earlier, as recounted by Ackerman, Gitlow wrote a letter to FBI director J. Edgar Hoover "praising him for his anticommunist work and offering to meet with him in Washington to help him ferret out subversives."[98]

X. "THEATER OF FREEDOM"

Ever the showman, there is this Gitlow twist as reported by Marc Lendler:

> One of the ventures Gitlow undertook in the 1950s was a "Theater for Freedom," intended to counter what he saw as Communist domination of the cultural field. He got John Wayne to agree to be the nominal chairman and issued announcements of its first show, "Raise the Red Curtain." But the theater had no funding and no real support from its supposed endorsers, and it never put on a production.[99]

But that was only part of the theatrical character that Gitlow had become. On May 1, 1950, in Mosinee, Wisconsin, he helped stage a mock Communist takeover of the government. The event was hosted by a local American Legion outpost. Gitlow's role: General Secretary of the "United Soviet States of America." Just to add color, a Soviet flag fluttered in front of the Legion outpost.[100]

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[94] LENDLER, *supra* note 1, at 147–48; *Clash over Reds Marks Dies Inquiry*, N.Y. TIMES, Oct. 18, 1939.

[95] *See* Bridges v. California, 314 U.S. 252 (1941).

[96] *See* MELVIN UROFSKY, A VOICE THAT SPOKE FOR JUSTICE: THE LIFE AND TIMES OF STEPHEN S. WISE (1982).

[97] *Investigation of Communist Activities in the New York City Area: Hearing Before the Committee on Un-American Activities*, 83rd Cong., 1st Sess. (1953).

[98] ACKERMAN, *supra* note 23, at 16.

[99] LENDLER, *supra* note 1, at 149.

[100] *See Mosinee in Hands of 'Reds' After a Make-Believe Coup*, MILWAUKEE J., May 1, 1950; *Mayor, Pastor Die at Mosinee*, MILWAUKEE J., May 8, 1950.

As for Gitlow's critics—aging Socialists and young progressives—they denounced him as a vengeful man bent on destroying the world he was forced to leave behind. Gitlow, no doubt still wounded by Stalin's rebuke of him, said he turned against Communism because of its "enslavement of the human mind." If true, Ben Gitlow came to that truth in the rough-and-tumble of ideas he first defended and then divorced. That process—of talking, debating, publishing, protesting, and thereafter reconsidering it all—represents one of the cornerstones of the First Amendment. If Gitlow had reflected long enough on that fact before he died in Crompond, New York, on July 19, 1965, perhaps he would have realized that freedom changes minds; suppression changes nothing.

As fate had it, the day after Gitlow died the "New York criminal anarchy law that was at the center of the legal argument [in his case] was substantially revised on July 20, 1965."[101]

XI. A "GENEROUS ENTHUSIASM FOR JUSTICE"

As for Walter Pollak,[102] the lead lawyer in Gitlow's Supreme Court case, he died years earlier, in 1940, at the age of fifty-three. Unlike the man he defended, Pollak's legacy was honorable. His son, Judge Louis H. Pollak, said this of his father: He lived a "life in the law with enterprise, courage, and utility, a life which affirms that law can be a worthy calling." And then there is Zechariah Chafee's assessment. As he put it in a tribute published in the *Nation* on October 12, 1940: "It is hard to realize that a person so much alive as Walter Pollak can be dead. . . . He radiated generous enthusiasm for justice; delight in mental activity, and unexpected flashes of wit. We have lost him when we need him most."

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[101] LENDLER, *supra* note 1, at 150–51.

[102] Walter Nelles, one of the founders of the ACLU and a professor at Yale Law School, died in 1937. His last book, A LIBERAL IN WARTIME (1940), was published posthumously. *See Prof. Walter Nelles of Yale Law School; An Expert on Labor Injunction and Former Lawyer Here Is Dead at Age of 53*, N. Y. TIMES, Apr. 1, 1937, at 23.