

The People v. Benjamin Gitlow (1920)

Michael Hannon (2010)

Benjamin Gitlow

Benjamin Gitlow was born in Elizabethport, New Jersey in 1891. While he was still young, his family moved to New York. Gitlow's parents were labor supporters and active in the Socialist Party. Early on, Gitlow became interested in radical politics. He joined the Socialist Party when he was eighteen and quickly moved up into leadership positions. When World War I began in Europe in 1914 he announced a strong anti-war position, and when it later seemed more likely that the United States would enter the war, he ran for political office as an anti-war supporter and was elected to the New York Assembly. He also supported the Russian Revolution in 1917.

Gitlow became a member of the more radical Left Wing faction of the Socialist Party which believed that the Russian Revolution was the model for bringing about the changes needed to implement a socialist society. In 1918, that faction was expelled from the Socialist Party. Later Gitlow, John Reed, and James Larkin established the Communist Labor Party. John "Jack" Reed was an American journalist, poet, and communist. Reed's most well-known work was *Ten Days that Shook the World*, a first-hand account of the Bolshevik Revolution. James Larkin was an Irish trade union leader and socialist activist who was born in Liverpool, England to Irish parents. Larkin is most well-known for his participation in the The Dublin Lockout, one of the most important labor struggles in the history of Ireland. It involved approximately 20,000 workers and 300 employers and lasted from August 26, 1913 to January 18, 1914.

In November 1919, Benjamin Gitlow and James Larkin were arrested and charged with violating the New York State Criminal Anarchy Act¹ for publishing the *Left Wing Manifesto* and an article by Nikilai Bukharin entitled "The Communist Program" in the July 5, 1919 issue of the *The Revolutionary Age*. Gitlow was the business manager of the *The Revolutionary Age*. The government alleged these articles called for the overthrow of the United States government by force, violence and illegal means. According to Gitlow, "I was the first Communist in the United States to be prosecuted for the advocacy of Communism."²

¹ N. Y. PENAL LAW §§ 160, 161 (Consol. 1909). This statute was originally enacted in 1902.

² BENJAMIN GITLOW, I CONFESS: THE TRUTH ABOUT AMERICAN COMMUNISM, 150 (1939) [hereinafter I CONFESS].

New York's Criminal Anarchy Act was enacted in 1902 in response to the assassination of President William McKinley by a professed anarchist, Leon Frank Czolgosz. Czolgosz shot McKinley at the Pan-American Exposition in Buffalo on September 6, 1901. McKinley died eight days later on September 14, 1901. Czolgosz was tried and convicted of murder and executed by electric chair at Auburn Prison on October 29, 1901.

The Criminal Anarchy Statute provided:

Sec. 160. Criminal Anarchy Defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

Sec. 161. Advocacy of Criminal Anarchy. Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means

Lusk Committee

In 1919, the New York State Legislature established the Joint Legislative Committee to Investigate Seditious Activities.³ The committee consisted of four senators and five assemblymen and was headed by Senator Clayton R. Lusk, so it became known as the “Lusk Committee.” Lusk was a 1902 graduate of Cornell Law School and had only been in the legislature for two months. Attorney General Charles D. Newton and Archibald E. Stevenson were two of the four lawyers who served as counsel to the Lusk Committee.

The Lusk Committee was granted broad power to investigate individuals and organizations in New York who were suspected of promoting the overthrow of American government in violation of criminal anarchy statutes in the New York Penal Code. Prior to the 1919 Lusk Committee investigations, these statutes, enacted in 1902 after the assassination of President McKinley in September 1901, had only been used once in a minor case.

The committee’s work occurred during the first “Red Scare” at the end of World War I. Agitation and labor unrest by Anarchists, Socialists, Communists and others who

³ This was done by passing a Concurrent Resolution on March 26, 1919.

opposed capitalism and America's entry into World War I combined with the 1917 Bolshevik Revolution in Russia, and bombings by suspected anarchists caused intense concern in the United States. This concern was also influenced by economic problems and the influx of poor immigrants from Eastern Europe, many of whom were viewed as bringing radical ideas with them or as susceptible to their influence.

The committee worked for about a year gathering information and intelligence on suspected radical groups by participating with law enforcement in arresting thousands of potential suspects, raiding offices to obtain documents, infiltrating meetings, and subpoenaing witnesses to appear before the committee. The committee's work involved the use of private detectives and legislative staff members. The committee worked with local police and district attorneys as well as with officials from the federal government's Justice Department and Immigration Bureau. The majority of committee's investigations focused on New York City, but investigations were also launched in Buffalo, Rochester, and Utica.

Among the organizations raided during the Lusk Committee investigations were the Russian Soviet Bureau, the Rand School of Social Science, the left wing section of the Socialist Party, and the Industrial Workers of the World, which were all located in New York City, along with 73 branches of the Communist Party. Working pursuant to search warrants, thousands of documents were seized including financial records and membership lists.

The Lusk Committee also held public hearings which resulted in over 3,000 pages of testimony. A large part of the testimony came from the State Attorney General, local law enforcement officials, and private detectives. People suspected of being part of the radical groups were subpoenaed to testify

The Lusk Committee investigations officially ended when it submitted its final report and recommendations to the New York legislature on April 24, 1920. Archibald E. Stevenson wrote the Lusk Committee report in collaboration with several others. The four-volume report was titled *Revolutionary Radicalism: Its History, Purpose and Tactics*. Volumes one and two described the origins and growth of radical and left wing organizations in the United States and Europe and how the groups worked to spread their beliefs and engage in seditious activities in the United States.

Volumes three and four discussed and recommended ways to counter radical thought. The Lusk Committee emphasized the use of education to teach American values and recommended several bills to reform education to accomplish these goals. Concerned that several teachers were members of radical organizations, one bill would require a mandatory certificate of loyalty for all teachers at public schools. Teachers who refused to obtain certification were subject to dismissal. The committee was also concerned about private schools such as the Rand School that were not governed by state education laws. A bill was proposed that would require private institutions to file an application with the Regents of the University of the State of New York. If the Regents determined that a school was operating in a way "detrimental to the public interest" they would have the

power to deny or revoke their license. They would also inform the attorney general so they could prosecute schools that operated without the required license. Religious schools were exempt.

The Lusk Committee was also very concerned that poor immigrants were susceptible to radical propaganda so it recommended a bill that created mandatory classes at factories and community centers to teach American values. It also recommended teaching schools include special classes so educators learned how to teach American values. If these educational recommendations failed, the committee proposed that a special bureau be created under the Attorney General to continue the investigation into radical groups and prosecute those who violated the criminal anarchy laws.

These bills were passed by the New York legislature but Governor Alfred E. Smith, a Democrat, vetoed them. In 1921, Republican Nathan Miller was elected Governor. The legislature passed the laws again and Miller signed them into law. Two years later, Smith was re-elected Governor and his administration successfully pushed the legislature to repeal the laws.

Gitlow and Larkin were arrested as part of the Lusk Committee investigations. According to the Lusk Committee report:

On November 8, 1919, search warrants were issued by Chief Magistrate William McAdoo at the request of the Committee, and directed against the seventy-one headquarters of the Communist Party of America in the various boroughs of the city. At 9 o'clock in the evening of that day all of these headquarters were simultaneously entered by representatives of the Committee, by members of the State constabulary, and by upward of 700 members of the New York police force under the leadership of Inspector Faurot, Detective Sergeant Gegan and other members of the bomb squad.

Many tons of seditious and anarchist literature were seized in the execution of these search warrants and a large number of prisoners taken. Those concerning whom there was not absolutely positive proof of membership in the Communist Party of America were released, and those concerning whom indubitable proof was possessed were held for the action of the grand jury, and later indicted. Among those interested on that date were Benjamin Gitlow, a former Socialist Assemblyman of the State of New York, and one of the editors of the "Revolutionary Age," and James J. Larkin, also one of the editors of the "Revolutionary Age."⁴

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⁴ REVOLUTIONARY RADICALISM: ITS HISTORY, PURPOSE AND TACTICS WITH AN EXPOSITION AND DISCUSSION OF THE STEPS BEING TAKEN AND REQUIRED TO CURB IT: BEING THE REPORT OF THE JOINT LEGISLATIVE COMMITTEE INVESTIGATING SEDITIOUS ACTIVITIES, FILED APRIL 24, 1920, IN THE SENATE OF THE STATE OF NEW YORK 22-23 (1920) [hereinafter REVOLUTIONARY RADICALISM].

Magistrate McAdoo

On November 14, 1919 Gitlow and Larkin were brought before Chief City Magistrate William McAdoo in the City Magistrates' Court, City of New York. They were charged with violating sections 160, 161, 162, 163 and 164 of New York's Penal law, which prohibited "criminal anarchy."

Magistrate McAdoo said of the criminal anarchy statute:

This act, in the wisdom of the law-making power, was deemed necessary by conditions which sprung up unlooked for in this country. This big-hearted, strong, young, country, up to the time of this enactment tolerant and charitable to the discontent begotten by old-world millennial feuds and injustices among those who came to our shores, admitted the greatest latitude to angry vaporings and vituperative abuse of all governmental agencies.⁵

McAdoo examined the *Left Wing Manifesto* to determine the "state of mind" of its authors so he could answer the question, "What did these defendants intend by the language used in the manifesto?"⁶

He found the manifesto started out with severe criticism of the moderate Socialist Party and the American Federation of Labor. All attempts to reform government through participation and elections merely thwarted the coming revolution. The manifesto urged action to hasten the worsening of social and economic conditions. The Socialists and labor unions that participated in the government were public enemies. McAdoo found that the manifesto "is a little guarded as to what direct action means" so the document was to be read in connection with statements made by Larkin.⁷

After reading the manifesto, McAdoo described the common enemy as the bourgeoisie or middle class and the "main props of the 'capitalistic' state, the pulpit, the army and the police."⁸

McAdoo found the document clear in its intent but several times he said it was written to avoid legal trouble:

[H]ow are they going to effect the revolution? Does the manifesto tell us? It does, in very plain terms, with, it must be admitted, a tinge of subtle evasiveness, intended for a defense in court. How is this revolution to be accomplished? The manifesto gives the battle cry and slogan in practically two words, *coercion* and *suppression*."⁹

⁵ The People vs. Benjamin Gitlow, N.Y. City Magis. Ct. 1 (1919).

⁶ *Id.* at 2.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.* at 3-4.

Magistrate McAdoo declared:

A few years back if any one had said that in this year of grace 1919 there would be in the City of New York, known to the authorities, between seventy and eighty official headquarters of a criminal organization like this, well equipped with money and the rooms bulging with literature, more dangerous to our civilization than the microbes of disease to the human body, he would have been laughed at. Nearly eighty recruiting barracks for this red army in the City of New York, with thousands of members and apparently unlimited money, from at home or abroad. Is this money part of the vast treasure seized in Russia? If this is not, in the language of the statute, an attempt to overthrow and destroy the organized state, what is? To fail to enforce this law therefore, under the circumstances, would be on the part of public officers, judicial and otherwise, a species of treason against the state itself—at least the betrayal of a sacred public trust.¹⁰

McAdoo pointed out:

[W]e are still at war, no legal peace having as yet been arrived at, and we are to construe this law under these conditions—the aftermath of the bloodiest and greatest war the world has ever seen. The manifesto itself declares that this is the golden opportunity of the red revolutionists. Is this not a call to action for those who are sworn to uphold the laws of their country? Are we, who are the ministers of the law, to ignore this challenge? Are we to lose ourselves in legal subtleties and nice disquisitions and historical references, and bury our heads in clouds of rhetoric about liberty of speech? Liberty of speech! It is the very breath and soul of every American; it is the essence of our republicanism and we guard it with such jealousy that we have hitherto tolerated its abuse into a license which now threatens our institutions. Are there no limits to liberty of speech? Can these men openly state that they intend to destroy the state, murder whole classes of citizens, rob them of their property, and then escape under the plea of liberty of speech?¹¹

To McAdoo, Gitlow and Larkin were clear and present dangers:

These two defendants, Gitlow and Larkin, are beyond doubt two of the prominent leaders in this revolutionary scheme. They are men of intelligence, with considerable experience in public affairs, and all this either from honest fanaticism or muddled thought they have perverted into the most dangerous channels. As they stand to-day, as against the organized government specified in the statute, they are positively dangerous men.¹²

McAdoo declared, “I am of the opinion beyond any doubt, reasonable or otherwise, that these defendants in their writing, concocting, drawing, collaborating, and confederating

¹⁰ *Id.* at 4.

¹¹ *Id.* at 5.

¹² *Id.* at 5-6.

in the production, printing and circulation of the manifesto, are clearly guilty as charged in the complaint.”¹³

McAdoo concluded, “The principles of the law as to collective action in such crimes as this is well established and laid down in our books from the day the first white man put his foot on this continent to the present moment, and it is not necessary to quote them here.”¹⁴

The magistrate held Gitlow and Larkin on \$15,000 bail for the action of the Grand Jury. On November 26, 1919, a grand jury impaneled at an Extraordinary Trial Term indicted Gitlow and three others defendants on three counts:

The first count charges that on the 5th day of July, 1919, defendants feloniously advocated, advised, and taught the duty, necessity, and propriety of overthrowing and overturning organized government by force, violence, and unlawful means by certain writings then and there procured, prepared, composed, circulated, and distributed by the defendants, and caused to be circulated and distributed by them among divers people in the city of New York, which writings are set forth in the indictment and consist of ‘the Left Wing Manifesto.’ The manifesto was published in the issue of July 5, 1919, of the Revolutionary Age, a weekly publication devoted to the international Communist struggle.

The second count charges the defendant with having committed the crime by feloniously printing, publishing, editing, issuing, and knowingly circulating, selling, distributing, and publicly displaying and causing and procuring to be printed, published, edited, issued, and knowingly circulated, sold, distributed, and displayed the said issue of the Revolutionary Age, containing certain writings advocating, advising, and teaching the doctrine that organized government should be overthrown by force, violence, and unlawful means, and charges that the writings are the same as those set forth in the first count.

The third count charges that the defendants were evil-disposed and pernicious persons, and of most wicked and turbulent dispositions, and unlawfully, wickedly, and maliciously intending and contriving to disturb the peace and to excite discontent and disaffection and to excite the good citizens of the state to hatred and contempt of the government and the Constitution of this state, and to solicit, incite, encourage, persuade, and procure divers persons to commit acts of violence upon the persons and property of divers of the good citizens aforesaid, and to raise and make insurrections, riots, routs, unlawful assemblies, and breaches of the peace within the state, and to obstruct the laws and government thereof and to oppose and prevent their due execution, and to procure and obtain arms and ammunition for the more effectual carrying into effect their said most wicked and unlawful intentions and contrivances on or about said 5th of July, 1919, in the county of New York by certain writings by the defendants then and there

¹³ *Id.* at 6.

¹⁴ *Id.*

distributed among and displayed to and caused to be distributed among and displayed to the said divers persons, which writings are the same as those set forth in the first count and which writings did unlawfully, willfully, and wrongfully solicit and encourage and attempt and endeavor to incite, persuade, and procure the said persons to commit such acts of violence upon the persons and property of the goods citizens aforesaid, and to raise and make insurrections, riots, routs, and unlawful assemblies and breaches of the peace within the state, and to obstruct the laws and government thereof, and to oppose and prevent their due execution, and to procure and obtain arms and ammunition wherewith and whereby to execute and consummate their said most wicked and unlawful purposes to the serious damage to the public peace of the state and open outrage of the public decency thereof.¹⁵

The third count was later withdrawn.

Clarence Darrow Hired for Gitlow Defense

Gitlow wrote in his autobiography that the Communist Party executive committee decided to hire Clarence Darrow to defend him. Darrow had become increasingly concerned about civil liberties as the Red Scare took place around the country. Darrow took the case without even meeting Gitlow. Gitlow recalled, “I was too busy to worry about the case. I did not see Darrow until the eve of the trial. He was not enthusiastic about the case. He told Gitlow, “‘Oh, I know you are innocent, but they have the country steamed up. Everybody is against the Reds.’”¹⁶

The People vs. Benjamin Gitlow

Gitlow was tried in a jury trial presided over by Justice Bartow S. Weeks sitting in the Extraordinary Criminal Trial Term of the Supreme Court. The trial began on January 30, 1920. In addition to Darrow, Gitlow was defended by Charles Recht and Walter Nelles, attorneys with the National Civil Liberties Bureau which would soon change its name to the American Civil Liberties Union. Gitlow would be prosecuted by Assistant District Attorney Alexander I. Rorke.

Rorke emphasized how radical and subversive the *Left Wing Manifesto* was and that its purpose was the violent overthrow of government. He urged the jury to see the danger and argued they needed to convict Gitlow to prevent anarchy. He explained that Gitlow was no longer a socialist but had moved to the more radical “left wing”:

The difference between the Socialist Party and the Communist Part, formerly the left wingers, is that the Socialists advocate bringing about socialism by means of the ballot box, by peaceful measures, while the Communists advocate overthrow of constituted authority by force and violence or by any other unlawful means.

¹⁵ *People v. Gitlow*, 187 N.Y.S. 783, 786-87 (N.Y. App. Div. 1921).

¹⁶ *I CONFESS*, *supra* note 2, at 69.

Rorke read part of the article published in the *Left Wing Manifesto* into the record and said it formed the basis for the charges against Gitlow. He noted the manifesto declared that “massed action of the proletariat is the only means of overthrowing the capitalistic State.”

Darrow and the defense did not try to deny that Gitlow was responsible for the publication. Before any evidence was taken, Gitlow admitted full responsibility under sections 160 and 161 of the Penal Law for the publication and circulation of the manifesto as charged in the indictment. The defense did not call any witnesses and Gitlow did not take the stand in his own defense. Instead, the defense refuted the notion that the publication called for violent overthrow of established government. They also argued that the criminal anarchy laws were unconstitutional because they violated the freedom of speech guaranteed to individuals and the press by the First Amendment. Finally, the defense claimed the statutes violated the Fourteenth Amendment’s protection which prohibits the government’s taking of life, liberty or property without due process of law.

Even though he did not take the stand, Gitlow planned to address the jury. His future would depend on his own address to the jury and Clarence Darrow’s closing arguments. Gitlow recalled that when Darrow realized that Gitlow intended to defend the views announced in the *Left Wing Manifesto* and *The Communist Program*, he told Gitlow it would be no use for him to take the stand. Gitlow agreed with Darrow but insisted that he be able to speak to the jury and say what he believed. Darrow told him, “Well, I suppose a revolutionist must have his say in court even if it kills him.”¹⁷

Gitlow’s Address to the Jury

During his address, Gitlow tried to describe socialist philosophy but was continually interrupted by Judge Weeks. Gitlow tried to describe socialist philosophy by telling the jury “[T]he 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 maintain that in the eyes of the present day I am a revolutionist. I desire complete, fundamental--.”¹⁸ Gitlow was cut off by Judge Weeks who said, “Mr. Gitlow, you are not permitted to state what your views are or what you are, or what you think. You must confine yourself to an argument based upon the testimony in the case.”¹⁹ Gitlow tried to explain his philosophy and what the Manifesto meant, but Weeks kept interrupting him. Darrow tried to intervene, telling the judge, “Your Honor, he has a right to explain the meaning of it.” But Weeks was adamant: “No, sir, he has no right to explain the meaning of the manifesto, because he is not subject to cross-examination.” Darrow objected to the court’s ruling. Weeks cut in again when Gitlow was trying to explain conditions in Russia, because there was no evidence in the

¹⁷ *Id.* at 70.

¹⁸ Benjamin Gitlow, *The "Red Ruby" Address to the Jury* by Benjamin Gitlow 4 (1920) [hereinafter *Red Ruby*].

¹⁹ *Id.*

case about that. Darrow told the judge that his client had the right to state historical facts, but the court disagreed that Gitlow was stating facts. They argued back and forth:

Darrow: Your Honor, everybody reads history from his own standpoint more or less.

Court: Everybody reads the newspapers, but newspapers are not history.

Darrow: They are current history.

Court: I cannot agree with you.

Court: I will not discuss it. I will not allow the speaker to continue as to statements of conditions in Russia, or the forms of organizations as to which there is no proof in the case. He may refer to the fact that something is stated in the manifesto.

Darrow: I take an exception.

Darrow's Closing Argument

Before the trial Gitlow discussed with Darrow the argument he would present on Gitlow's behalf: "I knew it was to be one of his flowery appeals to the jury, seeking, through arousing their sympathy and feelings for righteousness, to get them into a mood favorable for an acquittal."²⁰ Gitlow claimed that he insisted that Darrow defend the right to revolution and denounce the red scare that was taking place.

Darrow usually saw his clients as actors in a slow, unsteady march towards freedom. They might not be correct, their means might not be the best, but he never saw his clients as isolated participants in a static situation. Gitlow's views may have been right or wrong, but he had a right to his views and to express them.

Darrow told the jury:

I doubt whether any government, with possibly one or two exceptions, I doubt whether any great revolution, which meant the abolition of the old and building up the new, was ever accomplished without force and violence accompanying it.

Does that say that I should not advocate a change, because somebody is going to get hurt? Why, gentlemen, if that had been the law down through the ages and had been strictly enforced, you would all be living in caves now. All of you. Because the civilization of today is made up of an infinite number of revolutions, one after the other, all through the history of the world.

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 that 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.

²⁰ I CONFESS, *supra* note 2, at 71.

What of our own country? We 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!²¹

Darrow spoke for free thought and expression:

I would place no fetters on thought and actions and dreams and ideals of men, even the most despised of them. They may be criminals in their day and generation, from the Christ and the John Browns, who risked their lives and took their chance for a dream that they could see far away. Whatever I may think of their prudence, whatever I may think of their judgment, I am for the dreamers. I would rather that every practical man shall die if the dreamer be saved.²²

Speaking of the Manifesto, Darrow said:

All of this is nothing except a statement of facts. Nothing in the world but an essay. Nothing excepting the statement of what Communist regard as political doctrine. Not a word of it is inciting anybody to action, not a word of it is inviting anybody to anything, now or at any time.²³

Darrow was a student of history and talked to the jury about mass movements. He declared that no important changes happen without mass movements, such as the French Revolution:

I am glad it happened. As Victor Hugo said, it was the greatest event in the history of the world. And every man has been freer and every society has been better and every institution has been really safer because of that. It was done by a great marching throng . . . until the people got rid of the old and ushered in the new, and though the new was never perfect, still it was time for the old to die.²⁴

Darrow gave as a recent example a railroad strike in the United States that led to the passage of the Adamson bill. In 1915, railway brotherhood unions' demands for an eight hour work day and overtime pay for work beyond eight hours had prompted their leadership to deal more aggressively with railway employers. The employers rejected the demands and by September 1916 the unions were organized for a national strike while the employers made plans to operate without the strikers. President Woodrow Wilson became so alarmed at the prospect of a nation-wide railway strike, which besides the disruption to the nation's commerce and citizens also threatened military preparedness, that he asked Congress for legislation establishing an eight hour day. A bill was drafted by William C. Adamson, chair of the House Interstate Commerce Committee and House Majority Leader Claude Kitchen, and rapidly passed into law. The railroads challenged the constitutionality of the hurriedly enacted law.

²¹ Red Ruby, *supra* note 18, at 9.

²² *Id.* at 10.

²³ *Id.* at 10-11.

²⁴ *Id.* at 11.

Darrow told the jury:

You have it in America. You remember the Adamson Bill, that, under the urgent messages of the President of the United States, was passed by Congress—for what? To avert a general strike. Perhaps the railroad men should not have struck. I have no opinion. I don't know. If I owned the stocks and bonds, I might look at it one way. If I handled a switch in a cold night, with my life constantly in danger from moving trains, if I handled a switch in the frost and the snow and the cold, I might look at it another way. . . . An yet, because through mass action, every railroad man in the United States proposed to strike, it influenced Congress, it influenced the Senate and it influenced the President, until the law was passed.²⁵

Towards the end of his argument Darrow quoted Abraham Lincoln's first inaugural address "“This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right to amend it, or their revolutionary right to dismember or overthrow it.””

Darrow told the jury “This was Lincoln. If Lincoln would have been here today, Mr. Palmer, the Attorney-General of the United States, would send his night-riders to invade his office and the privacy of his home and send him to jail.”

The case went to the jury on February 5, 1920. The jury deliberated for about forty-five minutes before returning a guilty verdict.

Judge Weeks Thanks the Jury

Judge Weeks took the unusual step of congratulating and thanking the jury. Part of his thanks included:

Now, gentlemen of the jury, the Court must express its thanks to you for your services here. I can only say that I believe that your verdict is a proper and a just verdict, one that reflects credit upon your own sincerity and intelligence, and one which will be of distinct benefit to the country and the State. There must be a right in an organized society to protect itself.²⁶

He concluded his words to the jury by saying:

Gentlemen, your duty has been faithfully performed. I trust that the lesson that has been taught from your verdict is one that will reach out and influence and correct and save these misguided idealists who have allowed themselves to be carried beyond their depth into the stormy waters of a would-be-revolution.²⁷

²⁵ *Id.*

²⁶ *Id.* at 13.

²⁷ *Id.*

Private Property

During his comments after the verdict, Judge Weeks seemed especially disturbed by Gitlow's communist beliefs in the abolition of private property:

If there is to be no right of property recognized, except the might of 'power to take, and power to keep', it is difficult to see that anything is left but savagery. The savage tribes possessed such property as they were able by power to take from their enemies, and retained such property as they were able to retain by force of arms. And it is difficult for the Court to see how absolute destruction of private property can exist in an atmosphere of civilization.²⁸

Judge Weeks described Gitlow as “[a] young man, 29 years of age, of intelligence, a striking example of the educational system of this country, able-bodied, of full intellect, confesses he owns no property. Employed at \$41 a week the last time he was employed and never accumulated any property!”²⁹

Arturo M. Giovannitti

Arturo M. Giovannitti, an immigrant from Italy and union leader, anarchist, socialist and poet observed the Gitlow trial. The Lusk Committee referred to Giovannitti as “an extreme radical with marked anarchistic tendencies”³⁰ Giovannitti wrote of Darrow's closing argument:

For two hours Clarence Darrow battled and stormed and raged against the ramparts of the prosecution, striking down brick after brick and raising strident red sparks. It is not possible to describe the eloquence of this man, save by a translation of his very name. It should be spelled with an apostrophe D, like French or Italian. It! The Sheen of the Dart! A javelin of light. [H]is voice now rose in huge tidal waves of passion, now fell suddenly down to a whisper! Now it stopped for long unbearable pauses, hemmed in by the tyranny of silent words. A voice that could at once order a battle charge and croon a lullaby, hurl a heaven-wrecking challenge and murmur a quivering benediction.³¹

Giovannitti continued his sensational description:

Poor, pathetic twelve men good and true, “posted as sentinels between civilization and anarchy!” They had no chance. How could they acquit Communism when Communism was represented by such a man as Gitlow and defended by this unleashed old Lucifer, dark, uncouth, still sooty with the dust of the abyss, but still fulgorant with the untarnished glow of the archangel! What could the twelve

²⁸ *Id.*

²⁹ *Id.*

³⁰ REVOLUTIONARY RADICALISM, *supra* note 4, at 953.

³¹ Red Ruby, *supra* note 18, at 15.

meek apostles of a resurrected messiah of fear and stupidity, a law exhumed in another dark hour of dread and brutish passion—what could they do before an idea that asked for no clemency and defended itself in such a way? Such an idea was surely too redoubtable to let it run at large. Its defence [sic] was more blood-chilling than its indictment. Such logic, tolerance, learning, such glowing love for humanity were indeed too much for any sentinels of civilization. They looked scared. They looked at the judge, the court attendants, the lawyers — they looked around instinctively for protection. They must have felt relieved at once. Thank God, there were still policemen, still manacles, jails, turnkeys, straight-jackets, cat o’hine [sic] tails in the world. They must have felt glad that it was still daylight when Gitlow and Darrow finished and that they wouldn’t have to go home in the dark.³²

Gitlow Sentenced

Sentencing was set for six days later. Judge Weeks gave Gitlow five to ten years at hard labor in Sing Sing prison, which was the maximum sentence allowed. Former New York Governor Charles Seymour Whitman argued on behalf of Gitlow for a certificate of reasonable doubt that would also let Gitlow out on bail pending an appeal. Whitman based the plea on the admission of improper evidence and damaging statements by Assistant District Attorney Rorke. But Judge McAvoy denied the plea, and Gitlow was sent straight to Sing Sing prison.

The *New York Times* reported that Gitlow was “assigned to work on the prison coal pile. So far as ‘hard labor’ is concerned, the court’s mandate will be carried out. Instead of trying to tear down constitutional government he will help to tear down a massive pile of frozen coal in the prison yard.”³³ For his defense of communism Gitlow was given honorary membership in the Moscow Soviet. Larkin was later tried, convicted and sent to Sing Sing prison.

Gitlow remained in prison until April of 1922, when he was released on bail pending a decision on his appeal to the Court of Appeals of New York. The appeal claimed that the conviction violated the due process clause of the Fourteenth Amendment.

Just a day after Gitlow was convicted, the Committee on the Judiciary in the House of Representatives held hearings on Sedition. Gitlow’s case was referred to several times and Magistrate McAdoo’s decision was reprinted in the hearing transcripts.³⁴ Charles D. Newton, Attorney General of the State of New York, attended the hearings and said of the Gitlow case:

Yesterday, we obtained the conviction of Benjamin Gitlow, who was a former member of the Assembly of New York; he was elected on the socialist ticket and

³² *Id.*

³³ *Gitlow Sent to Sing Sing Coal Pile*, NEW YORK TIMES, Feb. 15, 1920, at 9.

³⁴ *Sedition: Hearings on S. 3317, H.R. 10650 and H.R. 12041 Before the H. Comm., on the Judiciary*, 66th Cong. (1920).

had become a communist; and he published the manifesto of the Communist Party. He was well defended, I have no doubt, no less a personage defending him than Clarence Darrow. The jury, I understand, was out a little more than an hour, and brought in a verdict of guilty yesterday.³⁵

Gitlow's Legal Saga

Gitlow's trial and conviction would eventually lead to a landmark legal precedent. But Clarence Darrow did not work on any of Gitlow's appeals. With other attorneys, Gitlow appealed his conviction up through the New York court system and all the way to the United States Supreme Court. His appeals consist of: *People v. Gitlow*, 183 N.Y.S. 846 (N.Y. Sup. Ct. 1920) (certificate of reasonable doubt denied); *People v. Gitlow*, 187 N.Y.S. 783 (N.Y. App. Div. 1921) (conviction affirmed); *People v. Gitlow*, 136 N.E. 317 (N.Y. 1922) (conviction affirmed); *People v. Gitlow*, 138 N.E. 438 (N.Y. 1922) (motion to amend granted); *Gitlow v. New York*, 260 U.S. 703 (1922) (writ of error granted); and *Gitlow v. New York*, 268 U.S. 652 (1925) (conviction affirmed).

Gitlow's appeal was taken to the United States Supreme Court by Walter H. Pollak and Walter Nelles. In its decision, handed down on June 8, 1925, the United States Supreme Court addressed the only question it could consider under the writ of error: "whether the statute, as construed and applied in this case, by the State courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment."³⁶

The Court found:

The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: '1. The act of pleading for, supporting, or recommending; active espousal.' It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose.³⁷

The Court disagreed with Gitlow's defense counsel that the manifesto was simply a statement of abstract doctrine, because "[i]t advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political

³⁵ *Id.* at 140.

³⁶ *Gitlow v. People of State of New York*, 268 U.S. 652 (1925).

³⁷ *Id.* at 664-65.

mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government.”³⁸

Incorporation Doctrine

The United States Supreme Court affirmed Gitlow's conviction, but the case is significant because of these few sentences: “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.”³⁹

This ruling by the Court is considered the first decision applying the incorporation doctrine to the First Amendment. Under the incorporation doctrine federal courts have ruled that some protections under the Bill of Rights also apply to the states. According to one source, “The great significance of Gitlow lies in its announcement that the states, too, are bound by the First Amendment speech and press clauses. Since Gitlow, the majority of the Court’s speech and press cases have concerned challenges not to federal but to state enactments.”⁴⁰

The dissent of Justices Holmes, who was joined by Justice Brandeis, would become important in freedom of speech doctrine in the future:

Mr. Justice BRANDEIS and I are of opinion that this 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. If I am right then I think that the criterion sanctioned by the full Court in *Schenck v. United States*, 249 U. S. 47, 52, 39 S. Ct. 247, 249 (63 L. Ed. 470), applies:

‘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 [the State] has a right to prevent.’

It is true that in my opinion this criterion was departed from in *Abrams v. United States*, 250 U. S. 616, 40 S. Ct. 17, 63 L. Ed. 1173, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and *Schaefer v. United States*, 251 U. S. 466, 40 S. Ct. 259, 64 L. Ed. 360,

³⁸ *Id.* at 665.

³⁹ *Id.* at 666.

⁴⁰ FREEDOM OF EXPRESSION IN THE SUPREME COURT: THE DEFINING CASES 13 (Terry Eastland ed., 2000); See also Richard F. Duncan, *Justice Thomas and Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously*, 20 REGENT U. L. REV. 37, 42-43 (2007) (identifying *Gitlow v. New York* as “the first Supreme Court decision to incorporate the First Amendment”).

have settled the law. If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. 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. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.⁴¹

The Court's decision came just a month before Clarence Darrow's most famous trial – the 1925 Scopes anti-evolution trial in Tennessee. Darrow and the Scopes defense team would cite the Gitlow case in their appellate brief to the Supreme Court of Tennessee.

Aftermath

Gitlow was released from prison in 1922 while his case was on appeal. In 1924 Gitlow ran for Vice President of the United States on the Communist Party ticket. The same year, he married Badana Zeitlin. Gitlow was ordered back to Sing Sing prison in November of 1925 to complete his sentence. On December 11, 1925, New York Governor Alfred E. Smith pardoned Gitlow.

Gitlow visited Soviet Russia for the first time in 1927 and returned in 1928 and 1929. He again ran for Vice President of the United States in 1928. Soviet leader Joseph Stalin expelled him from the Party in 1929 after Gitlow openly defied him. This led Gitlow, Jay Lovestone, Bertram Wolfe, and others to organize the Communist Party, USA. But in 1933 Gitlow was expelled by the Community Party, USA. Gitlow later founded and led several small political organizations: the Workers Communist League, the Labor Party Association, and the Organization Committee for a Revolutionary Workers Party. Gitlow rejoined the Socialist Party in 1934 but soon resigned.

Gitlow Leaves Communism

⁴¹ *Id.* at 672-73.

Slowly Gitlow began to have doubts about communism. He wrote in his autobiography:

My break with Stalin in 1929 forced me to reexamine in a critical way the activities and tenets of the Communist movement. My break with Communism, however, did not come suddenly, as I have indicated. It was not easy for me to sever the associations that I had built up in the movement, associations that had become, so to speak, part of my life. I knew that I was drifting away from the movement, but I was not yet ready to take the step that would cut me definitely loose from it. Some important event had to take place which would shake my faith in Communism. It came when Hitler obtained power in Germany. In smashing democracy, Hitler smashed my Communist belief that democracy was an illusion. I realized that, when the German people lost their democratic rights, they lost their freedom and their most valuable possessions. One had to be blind not to see that the labor movement of Germany was infinitely better off when it had the right to organize, to hold meetings, to strike and to publish newspapers. When these rights were lost its existence came to an end.⁴²

Gitlow eventually denounced Communism. He first publicly rejected the Communist Party in 1939 when he testified before the U.S. House Committee on Un-American Activities. A year later he published *I Confess: The Truth About American Communism*. As an anti-Communist Gitlow became a popular writer and lecturer during the 1940s and 1950s. In 1948, he published *The Whole of Their Lives: Communism in America: A Personal History and Intimate Portrayal of Its Leaders*.

Benjamin Gitlow died on July 19, 1965 at age seventy-three in Crompond, New York.

⁴² I CONFESS, *supra* note 2, at 588.