ESSAY

"THEY ARE POSITIVELY DANGEROUS MEN": THE LOST COURT DOCUMENTS OF BENJAMIN GITLOW AND JAMES LARKIN BEFORE THE NEW YORK CITY MAGISTRATES' COURT, 1919

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Few individual stars shine as brightly in the constellation of American civil liberties cases as *Gitlow v. New York*.[1] While law academics and legal historians know this Supreme Court decision well, none of them (nor Gitlow himself) appears aware of the first written decision in Gitlow's litigation history—an unusual magistrates' court opinion reproduced below.

In an otherwise routine decision upholding the state's authority to decide what sorts of speeches and publications could be held to

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[1] 268 U.S. 652 (1925). An enormous literature exists on the freedom of speech in the United States, and the limits of speech continue to be hotly debated. For a sampling of the monographic literature on free speech and *Gitlow*'s central role in the arguments, see Harold Josephson, Political Justice During the Red Scare: The Trial of Benjamin Gitlow, in American Political Trials 139, 142-54 (Michal R. Belknap ed., 1994); Margaret A. Blanchard, Revolutionary Sparks: Freedom of Expression in Modern America 122-24, 187, 251, 334 (1992); John Braeman, Before the Civil Rights Revolution: The Old Court and Individual Rights 15-17, 31-33, 109, 118-19 (1988); Zechariah Chafee, Jr., Speech in the United States 318-25 (1942); Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism 122-64 (1991); Kent Greenawalt, Speech, Crime, and the Uses of Language 189-90, 202, 221-22 (1989); Franklyn S. Haiman, Speech and Law in a Free Society 9, 270-72, 288-89 (1981); Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America 150-56 (Jamie Kalven ed., 1988); Paul L. Murphy, The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR 248-72 (1972) [hereinafter P. Murphy, The Meaning of Freedom of Speech]; Paul L. Murphy, World War I and the Origin of Civil Liberties in the United States 269 (1979) [hereinafter P. Murphy, World War I]; Donald L. Smith, Zechariah Chafee, Jr.: Defender of Liberty and Law (1986); Rodney A. Smolla, Free Speech in an Open Society 104-06, 162 (1992); Thomas L. Tedford, Freedom of Speech in the United States 57-60 (1993). None of these scholars, however, referred to the magistrates' court opinion reproduced in this Essay.

constitute a "clear and present danger,"[2] the Supreme Court decided in a 7-2 vote that "[f]or present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement 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."[3] Although the Court did not immediately pursue this "incorporation" of first amendment rights as a restriction on state action, *Gitlow* pointed the way toward the establishment of federal minimum standards for protection of fundamental rights and civil liberties. This process of applying the first amendment against the states through the language of the fourteenth amendment provided a mechanism for establishing national standards of state and even private behavior. Incorporation now forms a bridge through the federal system whereby individuals can seek protection of their rights as national citizens against coercive and possibly illegal and unconstitutional state actions, as well as against private discrimination.[4]

Although Justices Oliver Wendell Holmes and Louis D. Brandeis dissented in *Gitlow*, they were not opposed to the "Gitlow assumption" regarding the special place of speech and press in American political democracy and American life.[5] They dissented because they believed that Gitlow's conviction for speaking and publishing should be overturned. In one of his shortest and most articulate dissents, Holmes argued, as he had in his famous dissent in *Abrams v. United States*,[6] for a constitutional law and public policy tolerant of speech and press, even outrageous speech and press.[7] In *Abrams*, Holmes

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[2] Justice Oliver Wendell Holmes enunciated the "clear and present danger" standard for the regulation of speech and press in Schenck v. United States, 249 U.S. 47, 52 (1919).

[3] *Gitlow*, 268 U.S. at 666.

[4] See note 1 supra (listing works which discuss *Gitlow* and incorporation); see also Richard C. Cortner, The Supreme Court and The Second Bill of Rights: The Fourteenth Amendment and The Nationalization of Civil Liberties 59-64 (1981) (discussing nationalization of the first amendment); Alfred H. Kelly et al., The American Constitution: Its Origins and Development 523-50 (7th ed. 1991) (discussing incorporation); Melvin I. Urofsky, A March of Liberty: A Constitutional History of the United States 641-52 (1988) (same).

[5] *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting).

[6] 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

[7] See *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting). *Gitlow* and *Abrams* are two in a series of first amendment cases arising out of the Red Scare of the 1920s which are noted for opinions by Justices Holmes and Brandeis advocating a robust reading of first amendment rights. See Frohwerk v. United States, 249 U.S. 204, 205-10 (1919) (Holmes, J.); Debs v. United States, 249 U.S. 211, 212-17 (1919) (Holmes, J.); Schaefer v. United States, 251 U.S. 466, 482-95 (1920) (Brandeis, J., joined by Holmes, J., dissenting); Pierce v. United States, 252 U.S. 239, 253-73 (1920) (Brandeis, J., joined by Holmes, J., dissenting); Gilbert v. Minnesota, 254 U.S. 325, 334-43 (1920) (Brandeis, J., dissenting); Whitney v.

reasoned that, as times had changed, assumptions about appropriate and inappropriate speech had also changed, reflecting the passions and prejudices of the day. Therefore, since "the best test of truth is the power of the thought to get itself accepted in the competition of the market," the decision whether any particular speech or publication is appropriate ought not be left to the legislatures but rather to a "free trade in ideas."[8]

In *Gitlow*, Holmes continued along this line, pointing out that the Court's majority wanted to punish speech and press even though no action could be attributed to Gitlow. Using state power to suppress Gitlow's speech and publication ran counter to Holmes's argument in *Abrams* that ideas which find a popular constituency grow and bloom while ideas which fail to do so wilt and die. Public discourse, which includes open exchanges of even the most extreme ideas, provides a better mechanism for regulating speech and press than does preemptive action by the state. In *Gitlow*, Holmes wrote,

> It is said [by the majority] 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 birth.[9]

Holmes held a Social Darwinist view of ideas: stronger ideas flourish and weaker ones perish, all without need for any interference from the state.

Holmes's and Brandeis's ideas about speech and press would, in a series of cases in the 1960s,[10] become the standards for the Court and the nation. In the late 1910s and 1920s, however, this defense of free speech represented a minority position not only on the Supreme Court but also in the country as a whole. In fact, the majority of Americans and of Supreme Court justices in the first decades of the twentieth century believed that some speech and publications could be so dangerous as to deserve suppression and the jailing and censure

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California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., joined by Holmes, J., concurring), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969).

[8] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). For the best analysis and discussion of the *Abrams* decision, see Richard Polenberg, Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech 197-242 (1987).

[9] *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

[10] See generally Brandenberg v. Ohio, 395 U.S. 444 (1969) (holding that freedoms of speech and press do not permit states to forbid subversive advocacy unless there is imminent incitement to lawlessness); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (forging modern freedom of press); Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991) (discussing *New York Times* case in greater detail).

of offending speakers and authors.[11] Benjamin Gitlow lost all of his appeals, and as impressive and important as *Gitlow* is for its "assumption" and the attached dissents, *Gitlow* reflects a belief that there were limits beyond which the speech of authors and publishers should not be free.[12] It is within that tradition of suppression of ideas and publications "for the public good" that a recently rediscovered *Gitlow* decision fits.

The rediscovered opinion was written by longtime New York City Chief Magistrate William McAdoo. Before becoming chief magistrate, McAdoo served one term as police commissioner from 1904 to 1906. He not only presided over his own police bench, but also acted as the administrative judge for the entire system of police courts in America's most urban and cosmopolitan city.[13]

Located at 300 Mulberry Street, the police courts provided summary and trial justice for the multitude of minor offenses committed in the daily course of urban life. Police courts also oversaw police arrests, hearing charges and deciding whether there was just cause in holding and charging defendants.[14] In effect, as urban reformer and New York politico Raymond Moley described the police magistrates' function, such courts exercised "what amounts to a veto power over the enforcement of the criminal law."[15]

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[11] See P. Murphy, World War I, supra note 1, at 15-31, 71-132, 179-247. Murphy lists 36 instances of popular and governmental repression during World War I. See id. at 128-32; see also P. Murphy, The Meaning of Freedom of Speech, supra note 1, at 4. Murphy asserts that the government's policies in World War I

> rest[ed] upon a series of assumptions about the dangers of freedom of expression, [and] were significant for their lack of peacetime precedent as well as for the fact that they met with general acquiescence. The first broad-scale departure from the supposedly sacrosanct American credo of freedom of speech happened with distressingly little protest and with an appalling unconcern for the implications . . . .

Id.

[12] For the record of Benjamin Gitlow's appeals in the New York and federal appellate courts, see People v. Gitlow, 183 N.Y.S. 846 (N.Y. Sup. Ct. 1920) (denying certificate of reasonable doubt); People v. Gitlow, 187 N.Y.S. 783 (N.Y. App. Div. 1921) (affirming Gitlow's conviction); People v. Gitlow, 136 N.E. 317 (N.Y. 1922) (affirming Gitlow's conviction); People v. Gitlow, 138 N.E. 438 (N.Y. 1922) (granting motion to amend); Gitlow v. New York, 260 U.S. 703 (1922) (granting writ of error); Gitlow v. New York, 268 U.S. 652 (1925) (affirming Gitlow's conviction).

[13] See generally William McAdoo, Guarding a Great City (1906) (describing McAdoo's impressions of ethnic New York, the New York police department, and duties of the city chief magistrate).

[14] Raymond Moley, Tribunes of the People: The Past and Future of the New York Magistrates' Courts 1-36 (1932) (discussing the workings of the New York magistrates' courts).

[15] Id. at 1. A scandal broke out in New York in the late 1920s involving the framing of women accused of prostitution in the women's court and bribes paid to magistrates' court officers. Id. at 97-100. In August 1930, Governor Franklin D. Roosevelt asked the Appellate Division of the First Judicial Department to conduct an investigation into the magis-

Police courts could also be designated as specialized forums for particular classes of offenses. For example, for many years the New York City Women's Night Court handled all the city's cases involving prostitution and prostitution-related offenses, including those involving disorderly house charges. Such inferior courts, which handled issues ranging from barking dogs to petty theft, were not courts of record.[16] On occasion, however, the judges of the police courts prepared formal, written opinions to accompany their decisions on whether to hold an accused or to certify a case to the grand jury for possible indictment.

One such instance occurred on Friday, November 14, 1919, when Chief Magistrate McAdoo prepared a six-page opinion on the criminal anarchy charges against Benjamin Gitlow and James "Big Jim" Larkin and bound both men over for action by the grand jury. Twelve days later, on Wednesday, November 26, the grand jury of the Extraordinary Trial Term of New York County Supreme Court indicted both men.[17] Their conviction on February 5, 1920 on the criminal anarchy charges[18] set off the series of appeals which ended five years later with the Supreme Court's decision upholding Gitlow's conviction and enunciating the "Gitlow assumption" that ironically set the stage for the later expansion of civil liberties.

What follows, then, is Chief Magistrate McAdoo's intriguing opinion regarding both the charges against Gitlow and Larkin and their policy statement, "The Left Wing Manifesto," printed in their newspaper, *The Revolutionary Age*. McAdoo's opinion is stored among the archived papers of a private New York City anti-vice organization, the Committee of Fourteen, housed in the New York Public Library.[19]

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trates' courts. Id. at 42. The Appellate Division appointed as special referee Judge Samuel Seabury. Id. His thorough investigation of the magistrates' courts forced the disbarment of numerous lawyers, exposed widespread graft among the city's vice squad police officers, prompted the firing of an assistant district attorney for soliciting bribes, and led to the removal of six of the judges of the magistrates' courts through resignation or trials for malfeasance of office. Id. at 44-49; see also William B. Northrop & John B. Northrop, The Insolence of Office: The Story of the Seabury Investigations 3-114 (1932) (discussing magistrates' court scandal). See generally Herbert Mitgang, The Man Who Rode the Tiger: The Life and Times of Judge Samuel Seabury (1963).

16 See R. Moley, supra note 14, at 1-20.

17 See Josephson, supra note 1, at 144 n.18; Police After 500 Red Sympathizers, N.Y. Times, Nov. 27, 1919, at 3.

18 See Josephson, supra note 1, at 146; Gitlow Convicted in Anarchy Trial, N.Y. Times, Feb. 6, 1920, at 17.

19 See New York Public Library, Rare Books and Manuscripts Division, Committee of Fourteen Record Group, Legal Decisions & Minutes of Court Cases, 1910-1925, Box 62.

McAdoo helped to organize the Committee in 1905 to combat the vice problem of so-called "Raines law hotels."[20] New York state had changed its liquor tax law in 1896 to prohibit alcohol sales in saloons and taverns on Sunday.[21] This same revision, however, allowed hotels of ten or more rooms to sell alcohol on Sundays for the convenience of the traveling public. Especially in immigrant neighborhoods, where the Sunday beer garden was an ethnic tradition, local saloons soon divided their upstairs or back rooms into the requisite ten rooms and obtained a hotel license.[22] Since all those extra rooms were not needed by travelers, they quickly became convenient locations for prostitution. To rid New York of these "Raines law hotels" (named for the bill's sponsor, state senator John Raines)[23] and the vice problem they harbored, the City Club sponsored the formation of the Committee of Fourteen in January 1905. Judge McAdoo served as one of the fourteen directors for four years and as an advisor to the Committee until his death in 1930.[24]

In time the Committee became a seemingly permanent fixture on the New York City social hygiene/private law enforcement scene. In 1907, it hired Frederick H. Whitin as its executive secretary, who became the driving force in the Committee's work.[25] He also became good friends with McAdoo. The Committee's copy of McAdoo's *Git-*

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[20] See generally Committee of Fourteen, Annual Report: The Committee of Fourteen for the Suppression of the "Raines Law Hotels" (1909). This first report of the Committee lists McAdoo as one of the fourteen founders. McAdoo is also mentioned as one of the founders in the twenty-fifth anniversary annual report. See Committee of Fourteen, Annual Report for 1929, at 4 (1930).

[21] See James B. Lyon, Laws of the State of New York, Passed at the One Hundred and Nineteenth Session of the Legislature, Begun January First, 1896, and Ended April Thirteenth, 1896, in the City of Albany 48-81 (1896).

[22] The Committee of Fourteen, The Social Evil, with Special Reference to Conditions Existing in the City of New York 159-68 (1902).

[23] See Who Was Who in America: Volume One (1897-1942), at 1006 (1943) [hereinafter Who Was Who in America].

[24] McAdoo served as a Director from 1905 to 1909. See New York Public Library, Rare Books and Manuscripts Division, Committee of Fourteen Record Group, Minutes & Reports, 1909-1910, Box 86. For biographical information on McAdoo, see Who Was Who in America, supra note 23, at 795. See also McAdoo's obituary, Magistrate M'Adoo Dies Suddenly at 76, N.Y. Times, June 8, 1930, at 1. New York University awarded McAdoo an honorary LL.D. degree in 1915.

[25] See generally New York Public Library, Rare Books and Manuscripts Division, Committee of Fourteen Record Group. On Frederick H. Whitin, see Memorandum of the Executive Secretary of the Committee of Fourteen, Motion Adopted by the Directors of the Committee of Fourteen (December 31, 1906) (adopting motion to hire Whitin), in New York Public Library, Rare Books and Manuscripts Division, Committee of Fourteen Record Group, Executive Secretary's Files, Box 84. For evidence of the influence of the Committee and Whitin, see the annual reports of the Committee of Fourteen, in New York Public Library, Rare Books and Manuscripts Division, Committee of Fourteen Record Group, Minutes & Reports, 1907-1930, Box 86.

low opinion is stamped with McAdoo's signature. Perhaps McAdoo distributed his printed opinion within the legal and social service professions and his friend Whitin received the copy now in the Committee's records and reproduced below.

New York City police arrested Benjamin Gitlow, an ex-assemblyman from the Bronx, and James "Big Jim" Larkin, the Irish labor organizer, on November 11, 1919, in raids directed by the New York State Lusk Commission.[26] Established by the New York Assembly in March 1919 and chaired by Assemblyman Clayton Lusk of Cortland, New York, the Lusk Commission set upon the task of investigating and counteracting "seditious" activities.[27] This vague legislative mandate led the Commission to sponsor and direct a series of police raids beginning in June 1919. Before each of these raids, the police applied to Chief Magistrate McAdoo for a general search warrant to search for and confiscate "[a]ll publications, documents, books, circulars, letters, typed or printed matter" as well as all business records.[28] The ex-police commissioner provided warrants and the police raided the headquarters of the "Russian Socialist Federal Soviet Republic," also known as the Russian Soviet Bureau and Soviet Mission, as well as the Rand School of Social Science.[29]

On November 8, New York City police raided seventy-three "Red-Centers"[30] in New York as part of a citywide dragnet. Three days later, in a mopping-up operation, the police arrested Gitlow and Larkin. McAdoo held a hearing in his City Magistrates' Court on November 13 and 14 on whether to hold the men for further action.[31] He bound them over to the grand jury late on November 14; to explain his decision McAdoo produced the opinion below.

What strikes modern readers about McAdoo's opinion is both his smugness about his ability to know what was appropriate and inappropriate speech and his willingness to use state power to censor and to

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26 See Larkin and Gitlow Held in $15,000, N.Y. Times, Nov. 11, 1919, at 1.

27 For a detailed history of the Lusk Commission and its activities in New York, see Lawrence H. Chamberlain, Loyalty and Legislative Action: A Survey of Activity by the New York State Legislature, 1919-1949, at 1-52 (1951) [hereinafter L. Chamberlain, Loyalty and Legislative Action]; see also Lawrence H. Chamberlain, New York: A Generation of Legislative Alarm, in The States and Subversion 231-81 (Walter Gellhorn ed., 1952) [hereinafter Chamberlain, A Generation of Legislative Alarm].

28 L. Chamberlain, Loyalty and Legislative Action, supra note 27, at 21 n.17 (reprinting full text of general search warrant issued by McAdoo against Rand School of Social Science).

29 Chamberlain, A Generation of Legislative Alarm, supra note 27, at 234. The Rand School of Social Science was a pro-socialist organization separate from the unofficial Soviet mission.

30 L. Chamberlain, Loyalty and Legislative Action, supra note 27, at 22.

31 Anarchist Cases Postponed a Day, N.Y. Times, Nov. 14, 1919, at 10.

silence those at the political margins. In order to appreciate the significance of McAdoo's opinion, it is worth remembering that his condemnation of Gitlow and Larkin, which seems extreme to modern readers, found the support of the public and the judiciary. McAdoo probably spoke for the majority of New Yorkers in asserting that the appropriate response to politically extreme speech was censorship.[32] Moreover, in upholding the convictions of Gitlow and Larkin, the appellate courts approved the censorship of politically extreme speech.

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PEOPLE v. BENJAMIN GITLOW
PEOPLE v. JAMES LARKIN
City Magistrates' Court
City of New York

McAdoo, *C.C.M.*—These defendants are charged with violating sections 160, 161, 162, 163, and 164 of the Penal Law of this State, which deals with the crime denominated therein criminal anarchy. This it proceeds to describe in distinct and unequivocal terms. We are therefore not called upon to discuss the meaning of the word "anarchy" in its common use, or dictionary definition. The statute makes certain actions felonious, and the name which it gives to such acts is not of importance in determining this case. 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 amongst those who came to our shores, admitted the greatest latitude to angry vaporings and vituperative abuse of all governmental agencies.

The American mind up to that time could not conceive that even a very small portion of aliens hopelessly incorrigible to American civic influences, amongst immigrants to this country like myself—immigrant and son of immigrant—would fail to repay with loyalty and love, devotion to the institutions of a democratic state which admitted us to every privilege and opportunity.

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[32] See Robert J. Goldstein, Political Repression in Modern America: From 1870 to the Present 137-91 (1978); P. Murphy, World War I, supra note 1, 15-31, 71-132. See generally Julian F. Jaffe, The Anti-Radical Crusade in New York, 1914-1924: A Case Study of the Red Scare (1972); H.C. Peterson & Gilbert Fite, Opponents of War, 1917-1918 (1957); William Preston, Jr., Aliens and Dissenters: Federal Suppression of Radicals, 1903-1933, at 118-207 (1963).

This case turns upon whether or not the published manifesto of the Communist Party, taken in connection with the trend of thought shown by the articles in both numbers of the paper called The Revolutionary Age, and more particularly the illuminative statements of one of its authors, the defendant Larkin, is in violation of the statute under consideration.

The connection of these defendants with the writing, publishing, circulating and selling of the manifesto is convincing beyond doubt, and need not be further discussed. This is especially so in the case of Gitlow, who arranged and paid for the printing and attended to the circulation and sale of the paper containing the document in question.

We are therefore called upon to examine the manifesto itself. This paper is to be taken in its entirety. According to the statement of the defendant Larkin, it had several authors but one mind, and we are dealing here, as Mr. Justice Hughes of the Supreme Court said in the decision some years ago, with a state of mind. What did these defendants intend by the language used in the manifesto?

The manifesto starts out with a bitter arraignment and condemnation of what it calls the moderate Socialist Party (for its strategic policy) and the American Federation of Labor and organized skilled artisans generally. It accuses the Socialist Party of having betrayed socialism, especially in aiding and abetting the military operations of different foreign countries during the recent war. The existing political state and all the social and economic conditions which exist under it are condemned without measure. It is declared to be beyond redemption and must be utterly and thoroughly destroyed, root and branch. To this end, all reformatory measures intended to beget social and economic conditions are denounced and the Communist Party is pledged to refrain from aiding parliamentary action. Voting by ballot and participating in government is to thwart the coming of the revolution. Everything is to be done to make social and economic conditions worse and not better, so as to produce universal unrest and discontent, later on to be goaded into desperation. The Socialist Party and the labor unions, in so far as they take part in parliamentary or governmental action of any kind, are utterly condemned and held up as public enemies. If one man is desperately discontented he must be a disease carrier to others, until the whole body is infected. The terms most frequently in use in the paper are "the political mass state," meaning a class state; "control of the industrial process," meaning the power to stop production; "when the workers stop the state dies;" "mass action, industrial in origin, becomes political in action," that is, mass action in universal strike throttles and starves the political state.

This, says the manifesto, is revolutionary socialism in action, as defined by Karl Marx.

Having the law in view, the document is a little guarded as to what direct action means but must be read in connection with the statements of Larkin. The organized government mentioned in the statute is yet too strong for those who wish to destroy it to speak plainly. The manifesto not only does not condemn the anarchists, as the term is generally used, but is most friendly and conciliatory. Fearing that it might give offense to those who openly call themselves anarchists it says, "The attitude toward the state divides the Anarchist (and Anarcho-Syndicalist), the moderate Socialist and revolutionary Socialist. Eager to abolish the state (which is the ultimate purpose of revolutionary Socialism), the Anarchist (and Anarcho-Syndicalist) fails to realize that the state is necessary in the transition period from Capitalism to Socialism." In other words, after the revolutionary Socialists have killed the state and suppressed or exterminated the bourgeoisie, they ask time to recover their breath and fill up the interregnum with a shadow of government. He would certainly be an unreasonable anarchist who would not agree with this.

The common enemy, against which all organized revolutionary effort is to be directed, is the bourgeoisie or middle class of people—from the owner of the department store to the keeper of the small shop, from the great steel works to the little smithy on the village street, from the president of a college to the bookkeeper in the office, and always to include what they denominate as the main props of the "capitalistic" state, the pulpit, the army and the police. These forces are to be utterly beaten down and destroyed. The state is to be owned and controlled by the proletariat. This proletariat is to consist in bulk on hitherto unorganized manual laborers, but does not include farmers, who in the nature of things as owners of property would be denominated as bourgeoisie and looked upon as enemies.

Having overthrown organized government, the state is therefore to be in the possession of a class. It is noticeable that throughout this paper it is always the proletariat that is to rule and not the majority of the whole people; it is class rights that must be dominant. Under cries of "liberty," the voice of the majority is to be stifled by force. Counsel for defendants says the Soviet Government in Russia is opposed to anarchists. If you dissent in any degree from those then in control, as now happens in that country, you are denominated an anarchist and at once shot. All dissidents are anarchists. For instance, "'Do you agree with the Soviet?' 'I do not.' 'To the slaughter house with him, he is an anarchist'." The bitter intolerance which this paper exhibits towards any possible difference of opinion might well be called to the attention

of dilettante parlor Socialists and pseudo-Anarchists who are looking for nervous excitement and notoriety, and to easy-going gentlemen in and out of juries or civic forums who are condemning the zeal of the officers of the law in the pursuit of this and kindred organizations, and here let us remind them that in this projected revolution, as in those hitherto enacted, the Jacobins are to swallow or to destroy the Girondists.

Certainly those of us who are bound by the decisions of the Supreme Court of the United States, as evidenced in the case of Jacob Abrams, et al., vs. United States, convicted of distributing in this city inflammatory placards and circulars, will not have any doubt as to what is the law of the land in dealing with such people.

According to the manifesto, the revolutionary Socialists, calling themselves the Communist Party, confronted with this common enemy which is to be destroyed, organized government as it exists today, the "capitalistic" state as they call it, and the hated bourgeoisie, how 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.* The mass action strike is to paralyze all the industries of the country, depriving millions of people of the necessaries of life, paralyzing the armed forces of the United States, making the soldier and the policeman impotent and silencing of such voices in the pulpit as are not in accord. This is the first stage, coercion by absolutely and unqualifiedly illegal means, unlawful practices and a criminal conspiracy deliberately invented to carry out the purposes intended. These strikes are called mass action and have nothing whatever to do with the efforts for increase of wages or lessening of hours or the betterment of the workers. It is a militant uprising of the red revolutionists. At this point the state is given the option that it must either suicide or be killed. Wherein does this differ from professed anarchy?

If the great middle classes of the country, which include organized labor as at present, do not surrender at once all their property and possessions and commit their lives to the tender mercies of the raging proletariat, what is to be done with them? The manifesto makes it perfectly plain. If they resist they are to be suppressed. What does suppression mean? It means that if they continue to resist they must be exterminated; while the money from the banks and other repositories flows into the coffers of the leaders of the revolutionary communists, the blood of the doomed class will flow in the gutters. If this is not violence, if this if not anarchy, if this is not directly, openly

and brazenly a defiance of the Penal Law of this State, what is? Well-meaning gentlemen tell us that we should not interfere with the incendiary when he is preparing the torch, we should only apprehend him when he is setting fire to the building. This statute is a preventative measure. It is intended to head off these mad and cruel men at the beginning of their careers. It is intended to put out a fire with a bucket of water which might later on not yield to the contents of the reservoir.

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.

No one claims that the modern state is free from evils nor denies that progressive reformation is absolutely essential to the maintenance of justice and democracy, but all these are obtainable under the constitutional forms of our government.

The basis of our government is a written constitution, in which it differs from nearly every other country in the world. Great Britain, to whose socialistic party the defendant Larkin refers, is living under a government where Parliament makes the constitution every day that it is in session. Parliamentary dominancy in its elasticity is instantly responsive to public opinion expressed at the polls.

Our government can only be constitutionally and legally changed by the terms of the constitution itself. The constitution absolutely forbids in every letter of it such things as coercion and suppression. Amendments to it must be made with great deliberation and much time. It provides for its own safety against hasty action. The people and the states must both act before any change can be made. A red, revolutionary, proletarian class government could not be established here unless the constitution is destroyed. Primarily, all changes both as to the laws and the persons who administer under them are effected by ballot voting at elections. The war has proven it to be a government of stability and centralization when necessary to meet emergen-

cies. It is well, too, to remember in this connection that we 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? We are told the human mind must be free. Is the human mind entitled in civilized society to germinate poisonous and criminal thoughts and then scatter them abroad to beget anarchy, robbery and chaos? Are we to say to this formidably organized army, with its recruiting barracks in our midst, forward with your battle cry of coercion, suppression, murder and robbery, called euphemistically expropriation. If the law failed to meet such a situation as this, loyal, honest and law-abiding citizens might well despair.

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, gross egotism, venomous class hatred, criminal ambition, conceited ignorance on great subjects, or muddled thought they have perverted into the most dangerous channels. As they stand today, as against the organized government specified in this statute, they are positively dangerous men.

I notice in the statement of Larkin, made to the District Attorney, a latent spirit of the conservative spirituality of the people whence he sprung, when he dissented as against the "God-killers." Possibly he had in mind the spirit of the Paris Commune, when it controlled that city in the early seventies. One of the chiefs of the Communist Party, after which this is modeled, giving a pass to a clergyman to visit some of the condemned bourgeoisie in prison wrote, "Admit the bearer, who says he is the servant of a person called God."

I am of the opinion beyond any doubt, reasonable or otherwise, that these defendants in their writing, concocting, drawing, collaborating and confederating in the production, printing and circulation of

the manifesto, are clearly guilty as charged in the complaint. I may also add that in my opinion every member of this criminal organization, who knowingly subscribes to the manifesto and the rules under which he becomes a member of the party, is equally guilty of violating the statute, and that the act of one in this widespread conspiracy, in this respect is the act of all, however physically separated, and that no overt act beyond that is necessary to make the case complete against them.

"I declare myself for the coercion, suppression and extermination of a whole class of my fellow-citizens and the expropriation of all of their property"; I join an organization and comply with its rules and sign its manifestoes and probably pay in my dues, and accept its card of membership. What greater overt act, short of actual, physical violence, can I commit than that? I need not in this connection refer to the cases in our courts of Johann Most and the one in which an opinion was delivered but a few days ago by the Supreme Court of the United States and referred to above. 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.

Defendants are held for the action of the Grand Jury.

Dated, November 14, 1919.

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Supporters of Gitlow and Larkin posted bail for them on November 20, 1919. Indicted on November 27, they stood for their arraignment, pleaded "not guilty" to the charge of criminal anarchy, and made bail pending trial on December 2. Although their trial was originally scheduled to begin on January 15, it was postponed until January 30[33] and noted criminal attorney Clarence Darrow joined their defense team on January 22.[34] Given the atmosphere of fear and hysteria of those months over the supposed threat from internal subversion—a social mood no doubt encouraged by the Lusk Commission raids of 1919 and the anti-red raids of January 1, 1920 conducted by U.S. Attorney General A. Mitchel Palmer—it is not surprising that on February 5 the jury took less than three hours to reach a "guilty" verdict on the criminal anarchy charges.[35] Gitlow received the maximum

[33] See Prosecutor Calls Gitlow Communist, N.Y. Times, Jan. 31, 1920, at 2.

[34] See Strike Hint Given in Gitlow Trial, N.Y. Times, Jan. 22, 1920, at 2.

[35] See Gitlow Convicted in Anarchy Trial, N.Y. Times, Feb. 6, 1920, at 17.

sentence of five to ten years on February 12,[36] and he reported to Sing Sing prison on February 14, 1920.[37] At Sing Sing, prison authorities assigned him to work in the prison's coal yard. In a story on Gitlow's internment, the *New York Times* self-righteously noted that "[i]nstead of trying to tear down constitutional government" Gitlow would be spending his time helping "to tear down a massive pile of frozen coal in the prison yard."[38] On the other hand, as a reward for Gitlow's defense of communism, the Moscow Soviet made him an honorary member during his stay in prison.[39]

In starting this process, Chief Magistrate McAdoo did more than hold Gitlow and Larkin for the grand jury. In his opinion, McAdoo justified their arrest by the police and acted as a jury in finding them guilty, all *before* any action by the grand jury—surely strange procedural process. Yet McAdoo's opinion fit well within the American legal tradition of determining which published materials were or were not seditious. Going as far back as 1734 in the Peter Zenger trial for seditious libel, judges could take into account the substance of offending speech.[40] Since truth could be a defense in prosecutions for seditious libel, judges attempted to determine whether or not the published materials were, in fact and law, truthful. McAdoo reviewed the wording and meaning of the "Manifesto" and from that review found little truth to protect Gitlow and Larkin from the charge of criminal anarchy.

McAdoo's opinion mirrors well the culture of repression of those scary days (for some) of 1919 and 1920. His opinion captures the

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[36] See Gitlow, Anarchist, Gets Limit Sentence, N.Y. Times, Feb. 12, 1920, at 15.

[37] See Gitlow Sent to Sing Sing Coal Pile, N.Y. Times, Feb. 15, 1920, at 9.

[38] Id.

[39] See Robert K. Murray, Red Scare: A Study in National Hysteria, 1919-1920, at 235 (1955). Although Murray mentioned the Supreme Court decision in *Gitlow*, he did not trace it in the New York courts, nor did he mention McAdoo's decision.

Gitlow mentions his honorary membership in the Moscow Soviet in his autobiography. See Benjamin Gitlow, I Confess: The Truth About American Communism 560 (1940) (with an introduction by Max Eastman). Gitlow's book recounted his development as one of the leading American communist leaders from the 1910s until 1929, when Stalin expelled him from the Party. Although he reviewed his trial and imprisonment, Gitlow did not detail his appearance before Chief Magistrate McAdoo.

In the late 1920s, Gitlow became disillusioned with the drift of communism under the leadership of Joseph Stalin and turned against the Communist Party. He became a noted anti-communist speaker until his death in 1965. See Benjamin Gitlow Is Dead at 73; Leader in Communist Party, N.Y. Times, July 20, 1965, at 33. Gitlow's other major publication was The Whole of Their Lives: Communism in America—A Personal History and Intimate Portrayal of Its Leaders (1948).

[40] For the best work on Zenger, see James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal (Stanley N. Katz ed., 1963).

sense of public fear and outrage at extreme and strongly argued politics far better than the judicial probings and musing about freedom of speech in the Supreme Court's decision in *Gitlow*. Upon these "mad and cruel men," these "positively dangerous men," McAdoo could not heap enough scorn. McAdoo sounded less like a judge and more like an angry reader venting his feelings in a letter to the editor when he described Gitlow's and Larkin's "dangerous" action of publishing a newspaper and saying what they believed: "honest fanaticism, gross egotism, venomous class hatred, criminal ambition, conceited ignorance on great subjects, or muddled thought they have perverted into the most dangerous channels." With these descriptions, McAdoo accused the defendants of virtually everything evil, all because of the extreme political beliefs which they spoke and published.

We should take Chief Magistrate McAdoo's motives seriously. His genuine outrage revealed his and his culture's genuine uneasiness with the world emerging after the Great War. No doubt the majority of New Yorkers who applauded his actions in this case in November 1919 supported the Palmer raids of early 1920 and voted for Warren G. Harding in November 1920. But McAdoo, like many of his time, fell into the common trap of confronting extremism with extremism. Five and a half years later, Justice Holmes articulated the reason for McAdoo's fear of these defendants' speech and publications: "Eloquence," wrote Holmes, "may set fire to reason."[41] McAdoo, seeing himself as civilization's firefighter as much as a New York City police court judge, stood ready to enforce the New York criminal anarchy statute which was intended, as the judge intoned, "to put out a fire with a bucket of water which might later on not yield to the contents of the reservoir." From McAdoo's and the majority's perspective in the late 1910s and 1920s, better to drown dissent now rather than face the flames of the future when "the Jacobins are to swallow or to destroy the Girondists." Furthermore, every level of court in the land, from the police magistrates' court of New York City to the United States Supreme Court, agreed.

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[41] *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).