A CENTURY OF FREE SPEECH IN THE STATES:
THE STORY OF *GITLOW v. NEW YORK*

NEW YORK AMERICAN INN OF COURT
HISTORICAL TRIAL TEAM
SEPTEMBER 26, 2024

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TIMED OUTLINE

I.	Introduction	5 minutes
II.	Trial of *People v. Gitlow*	25 minutes
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	B. Prosecution case	
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	D. Jury charge, verdict, and sentencing	
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CAST AND TEAM MEMBERS

P. Dawn Baker-Miller

Clement J. Colucci

Vincent DiDonato

Evan S. Fensterstock

Hon. Helen E. Freedman (Ret.)

Henry A. Freedman

Vilia Hayes

Hon. Debra A. James

Bruce N. Lederman

Ira Brad Matetsky

Maggie Maurone

Hon. Saliann Scarpulla

Edward G. Sponzilli

Chryssa V. Valletta

Hon. Mary Kay Vyskocil

CAST AND TEAM MEMBER BIOGRAPHIES

P. Dawn Baker-Miller is a judicial hearing officer at the New York City Office of Administrative Trials and Hearings. She formerly was Senior Counsel at the New York City Office of the Corporation Counsel, where she served in the General Litigation Division, the Labor and Employment Division, and the Special Litigation Unit. Prior to that, she was an associate in private practice. Her background includes general pretrial litigation experience as well as trial and appellate experience in both federal and state courts. Dawn is a member of the Federal Bar Council and the New York City Bar Association, where she served on the Litigation Committee from 2000 through 2009. She is admitted to practice in the Southern and Eastern Districts, the Second Circuit, and the Supreme Court of the United States. Ms. Miller is a graduate of the University of South Carolina School of Law, where she was Associate Editor-in-Chief of the Law Review.

Clement J. Colucci is an Assistant Attorney General in the New York City Litigation Bureau of the Office of the Attorney General, and has been for 30 years. He defends actions against state agencies and officials in state and federal court, except in the Court of Claims. Before that, and during a brief hiatus in his public service, he was an associate at both large and small firms in New York City. He is a graduate of the Columbia Law School and was an editor of the Law Review.

Vincent DiDonato is an Assistant District Attorney at the Kings County District Attorney's Office. He is a 2023 graduate of William & Mary Law School and a 2018 graduate of New York University. In law school, he interned for Judge Douglas Miller of the US District Court for the Eastern District of Virginia, and served as a Symposium Editor of the William & Mary Business Law Review. He is a former member of the I'Anson-Hoffman Inn of Court in Williamsburg, Virginia and has been a member of the New York Inn of Court since May 2023.

Evan S. Fensterstock is a New York City trial lawyer and founder of the complex commercial and employment litigation law firm, Fensterstock, P.C. Evan focuses his practice on all aspects of complex commercial and employment litigation and arbitration in state, federal, and bankruptcy courts from pre-complaint analysis through trial and post-trial appeals. Evan has represented companies and individuals on both the plaintiff and the defense side in a wide range of industries including insurance, employment, recruiting, financial services, banking, pharmaceutical, advertising, entertainment, media, hospitality, and gaming. Evan provides employment advice to executives and companies, negotiates compensation packages and separation agreements, and consults on covenants not to compete (non-compete agreements) and non-solicitation clauses. Evan also provides outside general counsel services to businesses that do not require full-time in-house representation or who are looking for a second opinion.

Evan recently won a nearly five-million-dollar ($5,000,000.00) judgment for his client after a four-day bench trial in the Commercial Division in the Supreme Court of the State of New York concerning indemnification and breach of contract claims arising out of a sixty-three-million-dollar ($63,000,000.00) purchase and sale of an insurance company and its subsidiaries pursuant to a stock purchase agreement.

Evan is also a mediator. Evan completed advanced commercial mediation training making him eligible under Part 146 of the Rules of the Chief Administrative Judge of New York to serve on court mediation rosters. Evan is currently on the roster of mediators in the prestigious Commercial Division in New York County. Evan enjoys serving on this prestigious court roster and assisting parties in facilitating productive negotiations and resolutions in commercial disputes.

Prior to founding Fensterstock, P.C. in 2018, Evan was a Partner at Fensterstock & Partners LLP from 2015-2017. From 2009-2015, he was an Associate at Kasowitz, Benson, Torres & Friedman LLP. Following in the footsteps of his father, Blair C. Fensterstock, and grandfather, Hon. Nathaniel Fensterstock, Evan is highly dedicated to pro bono work. In 2013, he received the Legal Aid Society Pro Bono Publico Award for his service to Hurricane Sandy victims. He spearheaded the Holocaust Survivor Representation Pro-Bono Project while at Kasowitz, which helps Holocaust survivors recoup pensions and payments from the German government for work performed in ghettos during World War II. Evan served as Executive Literary Editor of the *New England Law Review* at New England Law|Boston, where he graduated from law school *cum laude* and received the Cali Excellence for the Future Award in Civil Procedure. While in attendance, Evan interned for the Honorable Raya S. Dreben in the Massachusetts Appeals Court, the Honorable Charles T. Spurlock in Suffolk Superior Court, and the Legal Division of the Massachusetts Department of Correction in Boston, Massachusetts. In 2007, he was elected Vice Magister of the Bradlee Inn Chapter of the International Legal Honor Society Phi Delta Phi, and in 2008 he received the Phi Delta Phi Balfour Scholarship for outstanding service to Bradlee Inn. Evan holds a Bachelor of Arts degree from Bowdoin College where he double majored in Government and Spanish, played varsity golf and squash, and served as Class President. From 2015-2022, Evan has been named a New York Metro Area *Super Lawyers* Rising Star in Business Litigation.

Honorable Helen E. Freedman (Ret.) is currently a neutral with JAMS. She was an Associate Justice of the Appellate Division of the New York State Supreme Court, First Department, from 2008 to 2014 and served as a Justice of the Supreme Court from 1984 to 2008. She served on the Appellate Term of the Supreme Court from 1995-99 and in the Commercial Division of the New York County Supreme Court, for eight years.

Justice Freedman was the Presiding Judge of the Litigation Coordinating Panel for multi-district litigation in New York State from 2002 until 2014. She has been a member of the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of the State of New York since 1994 and is a member of the Advisory Council of the New York State and Federal Judicial Council. She is also a Trustee of the Historical Society of New York Courts. She is the author of New York Objections, a book on trial practice and the making of objections, and of a chapter in the treatise Commercial Litigation in New York State Courts. She is a graduate of Smith College and of the New York University School of Law.

Henry A. Freedman retired in 2014 after serving as Executive Director of the National Center for Law and Economic Justice since 1971. Before becoming Executive Director, he had been in private practice in New York City and taught at Catholic University Law School in Washington, DC. He has also taught at Columbia and New York University Law Schools, and

Columbia and Fordham Schools of Social Work. He has chaired the Committee on Legal Assistance of the Association of the Bar of the City of New York, and was the only "welfare recipient advocate" on HEW Secretary Califano's 32-member group formed to study welfare reform alternatives in 1977. He successfully argued *Califano v. Westcott* before the United States Supreme Court in 1979. Mr. Freedman has received the National Legal Aid and Defender Association's Reginald Heber Smith Award for Dedicated Service (1981), the New York State Bar Association's Public Interest Law Award (1998), the William Nelson Cromwell Medal of the New York County Lawyers' Association (2001), and an honorary Doctor of Laws degree from Amherst College in 2008. He is a graduate of Amherst College and Yale Law School.

Peter Guirguis is a partner at Mintz & Gold LLP, where he advises clients in a wide range of disputes and investigations involving commercial contracts, complex financial instruments, mergers and acquisitions, financial reporting, corporate control and governance, data use and privacy, executive compensation and employment, bankruptcy, real estate construction and financing. He also advises individuals and entities in a wide variety of investigatory, regulatory and enforcement matters. He represents diverse clients, from individuals to major financial institutions, insurers, manufacturers and retailers, and numerous software and technology companies. Before joining Mintz & Gold, Peter practiced at large firms including Norton Rose Fulbright, Akin Gump Strauss Hauer & Feld, and Dechert. He also clerked for the Honorable Judge Kevin T. Duffy in the United States District Court for the Southern District of New York. He has been a member of the Inn since its founding year, and a member of the historical team since the musical team finally accepted that he cannot sing.

Vilia Hayes is Senior Pro Bono Counsel at Hughes Hubbard & Reed LLP, litigating pro bono cases in the areas of prisoner's rights, voting rights, immigration, family law, and housing among others. She is Co-Chair of the Firm's Pro Bono Committee and supervises numerous pro bono matters in federal and state court. Ms. Hayes has over 35 years of experience as a litigation associate and partner concentrating on employment, product liability, insurance, bankruptcy, and commercial litigation, as well as counseling/and negotiations on employment law and insurance law.

Hon. Debra A. James is a Supreme Court Justice, New York County, elected to that office in 2013. She began her judicial career as a New York City Civil Court judge in 1995. Judge James started her legal career as an Assistant Corporation Counsel, New York City Law Department, where she represented municipal corporations in New York state and federal trial and appellate courts. Immediately prior to ascending to the bench, Judge James served as the first general counsel of the Roosevelt Island Operating Corporation. Judge James is a member of the New York City Bar Association, and member emeritus of its Executive Committee. She is also president emeritus of the Association of Justices of the Supreme Court of the State of New York, Inc. A member of the National Association of Women Judges, Judge James is former chair of its Women in Prison Committee, New York chapter, and a recipient of NAWJ's Mattie Belle Davis Award. Judge James earned her B.A. degree (cum laude) in American Government and Politics at Cornell University and received her J.D. degree from Cornell Law School. She received certification in September 2023, to serve as a "retired" justice until December 31, 2025.

Bruce N. Lederman has more than 43 years of complex commercial, real estate, and intellectual property litigation experience. He presently practices as a solo practitioner, and is also Counsel to London House Chambers, a Guyana-based law firm. An AV preeminent rated attorney by both the Judiciary and his peers, Bruce was a founding partner of Fischbein Badillo Wagner Harding. For more than 15 years, Bruce headed that firm's litigation department. He has tried numerous civil matters in both bench and jury trials, and has handled appeals in the State and Federal Courts. He has appeared as trial counsel to other attorneys, and has often worked with local counsel throughout the United States. He is currently a member of the JHO Selection Advisory Panel for the First Judicial Department, the Panel of Referees for the First Judicial Department Attorney Grievance Committee, and the New York County Commercial Division ADR Panel. Bruce earned his BA from Colgate University in 1975 and his JD from the Benjamin N. Cardozo School of Law in 1979.

Ira Brad Matetsky is a partner at Dorf Nelson & Zauderer LLP in Manhattan, where he concentrates his practice in litigation and arbitration matters, including corporate, commercial, securities, and trust-and-estates litigation and appeals. He is a 1984 graduate of Princeton University and a 1987 graduate of the Fordham University School of Law, where he received awards in Contracts and Constitutional Law and served on the *Fordham Law Review*. Prior to joining Dorf Nelson & Zauderer, Mr. Matetsky was a litigator for 12 years at Skadden, Arps, Slate, Meagher & Flom LLP; worked for five years as in-house counsel at Goya Foods, Inc.; and spent the next 19 years as a litigation partner at Ganfer Shore Leeds & Zauderer LLP.

Mr. Matetsky has authored several published articles on U.S. Supreme Court history, including "Clerking for 'God's Grandfather': Chauncey Belknap's Year with Oliver Wendell Holmes," in the 2018 *Journal of Supreme Court History*; "The Longest-Serving Justice Retires: How Stephen Preempted the Field" in *The Green Bag*; and "Chief Justice Hughes and Martin Manton's Appeal" in *The Green Bag Almanac and Reader*. He has published articles on New York law and procedure in legal periodicals including the *New York State Bar Journal*, the *New York Real Property Journal*, and the *New York Law Journal*.

He was co-editor of *The Green Bag Almanac and Reader* (an annual collection of the year's best legal writing) for 2012, 2015, 2016, and is editor-in-chief of *The Journal of In-Chambers Practice* (formerly the annual supplements to *In Chambers Opinions by the Justices of the Supreme Court of the United States*). He is a past recipient of the President's Pro Bono Service Award from the New York State Bar Association, and served for six years on the Board of Education of the Baldwin Union Free School District on Long Island. In non-legal pursuits, Mr. Matetsky is the Werowance (President) of The Wolfe Pack, the international literary society for the Nero Wolfe books by Rex Stout, is an invested member of the Baker Street Irregulars, and was the longest-serving member of the English Wikipedia Arbitration Committee. Mr. Matetsky has been a member of the Historical Trial Team each year since 2009 and has co-chaired the Team since 2016.

Maggie Maurone is a career law clerk to the Hon. Stewart D. Aaron in the United States District Court for the Southern District of New York. Prior to clerking, Maggie was a litigation associate at Arnold & Porter LLP. She is a Distinguished Graduate of the United States Air

Force Academy and received her J.D. from Columbia Law School. Before law school, Maggie served as an officer in the United States Air Force.

Hon. Saliann Scarpulla, Associate Justice, Supreme Court, Appellate Division, First Department is a graduate of Boston University and Brooklyn Law School, cum laude. After law school, Justice Scarpulla clerked for the Hon. Alvin F. Klein in Supreme Court, New York County and then joined Proskauer Rose Goetz & Mendelsohn as a litigation associate. Justice Scarpulla later moved to the Federal Deposit Insurance Corporation as Senior Counsel in New York. From the FDIC Justice Scarpulla became Senior Vice President and Bank Counsel to Hudson United Bank.

Justice Scarpulla was elected to the New York City Civil Court in 2001, appointed to the New York State Supreme Court in 2009, and elected to the Supreme Court in 2012. From February 2014 to July 2020, Justice Scarpulla sat in the New York County Commercial Division, and she was responsible for all international commercial arbitration matters. In 2020 Justice Scarpulla was appointed to the Appellate Division, First Department.

Justice Scarpulla is a contributing author to the Commercial Litigation in New York State Courts treatise and has authored several articles on technology and commercial litigation. Justice Scarpulla is a frequent lecturer for, among others, the New York City Bar, the New York County Lawyers Association, the New York State Bar Association, the American Bar Association, the Practicing Law Institute, the New York State Judicial Institute, and the New York Women's Bar Association.

Justice Scarpulla is active in several bar associations, is a member of New York's Commercial Division Advisory Council, and is the Co-Chair of the Council's Subcommittee on Use of Technology in Commercial Division Cases. Justice Scarpulla also sits on the Chief Judge's Alternative Dispute Resolution Advisory Committee, and recently retired from the New York State Continuing Legal Education Board. Justice Scarpulla is a past Co-President and board member of Judges and Lawyers Breast Cancer Alert (JALBCA).

Justice Scarpulla has received numerous awards in recognition of her service to the community and legal profession, including: Columbian Lawyers Rapallo Award; New York Women's Bar Association Recognition Award; New York County Lawyers Association Conspicuous Service Award; New York American Inn of Court Award for Best CLE Program; National Organization of Italian American Women Wise Woman Award; New York County Lawyers Association Justice Louis J. Capozzoli Gavel Award; and New York City Bar Thurgood Marshall Award.

Edward G. Sponzilli, a member of Norris McLaughlin, P.A., is a New Jersey Supreme Court Certified Civil Trial Attorney with 44 years' experience in complex corporate and commercial litigation and education matters, as well as employment litigation relating to restrictive covenant, wrongful termination, CEPA, employment discrimination and sexual harassment. Ed is a Fellow of the American Bar Association and is a 2008 recipient of the Professionalism Award. In 1999 he was awarded the New Jersey Supreme Court's Fund for Client Protection's "Client Protection" Award for his outstanding service on behalf of the public

and the Bar of New Jersey in his role as Chancery Court-appointed Receiver in the case of Montano v. Cohen & Cohen. Ed is a past president of the C. Willard Heckel Inn of Court and the Rutgers—Newark Law School Alumni Association. He is Trustee of the Trial Attorneys of New Jersey. He has been on the faculty of the National Institute for Trial Advocacy for over seventeen years and, for the past nine years, has been one of only two non-government faculty members in the New Jersey Attorney General's Trial Advocacy Institute. Ed is currently also a master of the Lifland (federal practice) American Inn of Court. He has served as a federal arbitrator and state court certified mediator. Ed was a Judicial Law Clerk for The Honorable James A. Coolahan, U.S. District Court for the District of New Jersey (D.N.J.) from 1975-77. During his two-year clerkship, Judge Coolahan held a temporary assignment to the Court of Appeals for the Third Circuit. Ed was a 1971 Phi Beta Kappa, magna cum laude graduate of Rutgers College. He received a masters in American History in 1972 from Columbia and his law degree from Rutgers, Newark in 1975. Ed has been selected for inclusion in *The Best Lawyers In America* and *New Jersey Super Lawyers*, as well as Marquis' *Who's Who In American Law* and *Who's Who in America*. He is a member of the New Jersey Supreme Court Committee, Bench, Bar and Media, as well as chair of the New Jersey State Bar Association's Higher Education Section.

Chryssa V. Valletta is Acting Head of Legal at Trusted Health, a healthcare staffing and technology company. She is a graduate of the University of Scranton and Columbia Law School, where she served as the director of the Jerome Michael Jury Trials moot court program. Prior to joining Trusted Health, she was a partner in the New York office of a multinational law firm.

Hon. Mary Kay Vyskocil was sworn in as a United States District Judge for the Southern District of New York on January 6, 2020. She previously served for almost four years as a United States Bankruptcy Judge for the Southern District of New York. Prior to her appointment to the bench, Judge Vyskocil practiced general commercial litigation for almost thirty-three years at Simpson Thacher & Bartlett, from which she retired as a Senior Litigation Partner in March 2016 to join the bankruptcy bench.

At the time of her judicial appointment, Judge Vyskocil had a diverse practice handling complex commercial cases, including major insurance and reinsurance disputes, contract and tort issues, bankruptcy-related issues, securities and antitrust law, both as a trial attorney and an appellate advocate. During her career, she tried dozens of cases, argued scores of appeals and handled numerous arbitrations in state and federal courts throughout the United States and in the United Kingdom.

Judge Vyskocil was ranked as one of the "Top Ten Women Litigators in the United States" by Benchmark Litigation and, in 2016, received a "Top Women in Law Award" from the NYLJ. She was consistently recognized as a litigation leader by numerous publications, including first-tier rankings in Chambers, Legal 500, Who's Who Legal and America's Leading Business Lawyers. She was selected by Law360 as a top 15 female litigator and recognized at the Law360 2012 MVP Awards. Judge Vyskocil is the co-author of the leading treatise, *Modern Reinsurance Law & Practice, 3d ed.* (Thompson Reuters 2015).

Judge Vyskocil has a long history of public service, including service on the SDNY Merits Selection Panel for Magistrate Judges, the Second Circuit Task Force on Racial, Ethnic and Gender Fairness, the NYS Commercial Division Advisory Council, as a hearing referee for the Disciplinary Committee (First Dept.), and as a trustee of the Historical Society of the New York Courts. She is active in professional associations, including the Federal Bar Council (former president). Judge Vyskocil previously served as president of the Alumni Association of St. John's Law School and until her appointment to the bench, served on the boards of the NY Community Trust, St Joseph's Seminary, Dominican College and Sanctuary for Families. She serves on the board of the Judges & Lawyers Breast Cancer Alert ("JALBCA").

Judge Vyskocil was honored with the Judge Cecelia H. Goetz Women in Achievement Award from the Women's Division of the New York Institute of Credit in February 2022. In January 2020, the Alumni Association of St. John's Law School conferred on Judge Vyskocil the Dean John Murphy Award, presented in recognition of distinguished service to the public, the profession, and the Rule of Law. She previously was awarded the Sprizzo Award for commitment to the Rule of Law by St. John's Law School in 2017, the Pietas Medal by St. John's University in 2008, the St. Edmund's Medal of Honor by St. Edmund's Retreat in 2005, and the President's Medal from Dominican College in 2002.

vocation statement on such person or firm with whom such principal shall have transacted any business through such agent or manager within six months previous to such filing. But failure to make service of such statement shall not invalidate such revocation except as to persons not so served, said statement to be acknowledged before an officer authorized to take acknowledgments of deeds and to be published in at least three consecutive issues of the newspaper published in the county and nearest to the place where the business of said agent or manager is carried on; but if no newspaper is published in said county, then said statement shall be published in the newspaper published nearest to the place where such business shall be carried on.

Source.—Penal Code, § 561-a, subd. 2, as added by L. 1903, ch. 196, amended by L. 1909, ch. 88, § 1.

ARTICLE XIV.

ANARCHY.

§ 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.

Source.—Penal Code, § 468-a, as added by L. 1902, ch. 371.

"You (are) an anarchist" is a charge of criminal anarchy. Von Gerichten v. Seitz (1904), 94 App. Div. 130, 87 N. Y. Supp. 968.

§ 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; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized

nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine,

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

Source.—Penal Code, § 468-b, as added by L. 1902, ch. 371.

The advocacy of criminal anarchy, that is, advising or advocating the overturning by violence of organized government, is condemned by law, and can be made the basis of a criminal prosecution. Von Gerichten v. Seitz (1904), 94 App. Div. 130, 87 N. Y. Supp. 968.

§ 162. **Assemblages of anarchists.**—Whenever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal anarchy, as defined in section one hundred and sixty, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of * more than five thousand dollars, or both.

Source.—Penal Code, § 468-d, as added by L. 1902, ch. 371.

§ 163 **Permitting premises to be used for assemblages of anarchists.**—The owner, agent, superintendent, janitor, caretaker or occupant of any place, building or room, who wilfully and knowingly permits therein any assemblage of persons prohibited by section one hundred and sixty-two, or who, after notification that the premises are so used permits such use to be continued, is guilty of a misdemeanor, and punishable by imprisonment for not more than two years, or by a fine of not more than two thousand dollars, or both.

Source.—Penal Code, § 468-c, as added by L. 1902, ch. 371.

Consolidators' note.—The reference to Penal Code, § 468, contained in this section, is an obvious error, as said § 468 relates to discharging firearms. Section 468-d, consolidated in Penal Law, § 162, which relates to the assemblages of anarchists, is evidently intended. The reference to Penal Law has been changed to § 162.

§ 164. **Liability of editors and others.**—Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him so soon as known.

* So in original.

Combined with "The New York Communist"

The Revolutionary Age

Devoted to the International Communist Struggle

Vol. 2, No. 1. Saturday, July 5, 1919 Price 5c.

In This Issue:
Left Wing Convention,
Manifesto and Program

"Nothing Doing!"

The Left Wing Manifesto

Issued on Authority of the Conference by the National Council of the Left Wing

THE world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. Out of its vitals is developing a new social order, the system of Communist Socialism; and the struggle between this new social order and the old is now the fundamental problem of international politics.

The predatory "war for democracy" dominated the world. But now it is the revolutionary proletariat in action that dominates, conquering power in some nations, mobilizing to conquer power in others, and calling upon the proletariat of all nations to prepare for the final struggle against Capitalism.

But Socialism itself is in crisis. Events are revolutionizing Capitalism *and Socialism*—an indication that this is the historic epoch of the proletarian revolution. Imperialism is the final stage of Capitalism; and Imperialism means sterner reaction and new wars of conquest—unless the revolutionary proletariat acts for Socialism. Capitalism cannot reform itself; it cannot be reformed. Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. There can be only the Socialism which unites the proletariat of the whole world in the general struggle against the desperately destructive Imperialisms — the Imperialisms which array themselves as a single force against the onsweeping proletarian revolution.

THE WAR AND IMPERIALISM.

The prevailing conditions, in the world of Capitalism and of Socialism, are a direct product of the war; and the war was itself a direct product of Imperialism.

Industrial development under the profit system of Capitalism is based upon the accumulation of capital, which depends upon the expropriation of values produced by the workers. This accumulation of capital promotes, and is itself promoted by, the concentration of industry. The competitive struggle compels each capitalist to secure the most efficient means of production, or a group of capitalists to combine their capital in order to produce more efficiently. This process of concentration of industry and the accumulation of capital, while a product of competition, ultimately denies and ends competition. The concentration of industry and of capital develops monopoly.

Monopoly expresses itself through dictatorial control exercised by finance-capital over industry; and finance-capital unifies Capitalism for world-exploitation. Under Imperialism, the banks, whose control is centralized in a clique of financial magnates, dominate the whole of industry directly, purely upon the basis of investment exploitation, and not for purposes of social production. The concentration of industry implies that, to a large extent, industry within the nation has reached its maturity, is unable to absorb all the surplus-capital that comes from the profits of industry. Capitalism, accordingly, must find means outside the nation for the absorption of this surplus. The older export trade was dominated by the export of consumable goods. American exports, particularly, except for the war period, have been largely of cotton, foodstuffs, and raw materials. Under the conditions of Imperialism it is *capital* which is exported, as by the use of concessions in backward territory to build railroads, or to start native factories, as in India, or to develop oil fields, as in Mexico. This means an export of locomotives, heavy machinery, in short, predominantly a trade in iron goods. This export of capital, together with the struggle to monopolize the world's sources of raw materials and to control undeveloped territory, produces Imperialism.

A fully developed capitalist nation is compelled to accept Imperialism. Each nation seeks markets for the absorption of its surplus capital. Undeveloped territory, possessing sources of raw material, the industrial development of which will require the investment of capital and the purchase of machinery, becomes the objective of capitalistic competition between the imperialistic nations.

Capitalism, in the epoch of Imperialism, comes to rely for its "prosperity" and supremacy upon the exploitation and enslavement of colonial peoples, either in colonies, "spheres of influence," "protectorates," or "mandatories," —savagely oppressing hundreds of millions of subject peoples in order to assure high profit and interest rates for a few million people in the favored nations.

This struggle for undeveloped territory, raw materials, and investment markets, is carried on "peacefully" between groups of international finance-capital by means of "agreements," and between the nations by means of diplomacy; but a crisis comes, the competition becomes irreconcilable, antagonisms cannot be solved peacefully, and the nations resort to war.

The antagonisms between the European nations were antagonisms as to who should control undeveloped territory, sources of raw materials, and the investment markets of the world. The inevitable consequence was war. The issue being world power, other nations, including the United States, were dragged in. The United States, while having no direct territorial interests in the war, was vitally concerned since the issue was world power; and its Capitalism, having attained a position of financial world power, had a direct imperialistic interest at stake.

The imperialistic character of the war is climaxed by an imperialistic peace—a peace that strikes directly at the peace and liberty of the world, which organizes the great imperialistic powers into a sort of "trust of nations," among whom the world is divided financially and territorially. The League of Nations is simply the screen for this division of the world, an instrument for joint domination of the world by a particular group of Imperialism.

While this division of the world solves, for the moment, the problems of power that produced the war, the solution is temporary, since the Imperialism of one nation can prosper only by limiting the economic opportunity of another nation. New problems of power must necessarily arise, producing new antagonisms, new wars of agression and conquest—unless the revolutionary proletariat conquers in the struggle for Socialism.

The concentration of industry produces monopoly, and monopoly produces Imperialism. In Imperialism there is implied the *socialization of industry, the material basis of Socialism.* Production moreover, becomes international; and the limits of the nation, of national production, become a fetter upon the forces of production. The development of Capitalism produces world economic problems that break down the old order. The forces of production revolt against the fetters Capitalism imposes upon production. The answer of Capitalism is war; the answer of the proletariat is the Social Revolution and Socialism.

THE COLLAPSE OF THE INTERNATIONAL.

In 1912, at the time of the first Balkan war, Europe was on the verge of a general imperialistic war. A Socialist International Congress was convened at Basle to act on the impending crisis. The resolution adopted *stigmatized the coming war as imperialistic and as unjustifiable on any pretext of national interest.* The Basle resolution declared:

1. That the war would create an economic and political crisis; 2. That the workers would look upon participation in the war as a crime, which would arouse "indignation and revulsion" among the masses; 3. That the crisis and the psychological condition of the workers would create a situation that Socialists should use "to rouse the masses and hasten the downfall of Capitalism"; 4. That the governments "fear a proletarian revolution" and should remember the Paris Commune and the revolution in Russia in 1905, that is, a civil war.

The Basle resolution indicted the coming war as imperialistic, a war necessarily to be opposed by Socialism, which should use the opportunity of war to wage the revolutionary struggle against Capitalism. The policy of Socialism was comprised in the struggle to transform the imperialistic war into a civil war of the oppressed against the oppressors, and for Socialism.

The war that came in 1914 was the same imperialistic war that might have come in 1912, or at the time of the Agadir crisis. But, upon the declaration of war, *the dominant Socialism, contrary to the Basle resolution, accepted and justified the war.*

Great demonstrations were held. The governments and war were denounced. But, immediately upon the declaration of war, there was a change of front. The war credits were voted by Socialists in the parliaments. The dominant Socialism favored the war; a small minority adopted a policy of petty bourgeois pacifism; and only the Left Wing groups adhered to the policy of revolutionary Socialism.

It was not alone a problem of preventing the war. The fact that Socialism could not prevent the war, was not a justification for accepting and idealizing the war. Nor was it a problem of immediate revolution. The Basle Manifesto simply required opposition to the war and the fight to develop out of its circumstances the revolutionary struggle of the proletariat against the war and Capitalism.

The dominant Socialism, in accepting and justifying the war, abandoned the class struggle and betrayed Socialism. The class struggle is the heart of Socialism. Without strict conformity to the class struggle, in its revolutionary implications, Socialism becomes either sheer Utopianism, or a method of reaction. But the dominant Socialism accepted "civil peace," the "unity of all the classes and parties" in order to wage successfully the imperialistic war. The dominant Socialism united with the governments against Socialism and the proletariat.

The class struggle comes to a climax during war. National struggles are a form of expression of the class struggle, whether they are revolutionary wars for liberation or imperialistic wars for spoilation. It is precisely during a war that material conditions provide the opportunity for waging the class struggle to a conclusion for the conquest of power. The war was a war for world-power—a war of

the capitalist class against the working class, since world-power means power *over* the proletariat.

But the dominant Socialism accepted the war as a war for democracy—as if democracy under the conditions of Imperialism is not directly counter-revolutionary! It justified the war as a war for national independence—as if Imperialism is not necessarily determined upon annihilating the independence of nations!

Nationalism, social-patriotism, and social-Imperialism determined the policy of the dominant Socialism, and not the proletarian class struggle and Socialism. The coming of Socialism was made dependent upon the predatory war and Imperialism, upon the international proletariat cutting each other's throats in the struggles of the ruling class!

The Second International on the whole merged in the opposed imperialistic ranks. This collapse of the International was not an accident, nor simply an expression of the betrayal by individuals. It was the inevitable consequence of the whole tendency and policy of the dominant Socialism as an organized movement.

MODERATE SOCIALISM.

The Socialism which developed as an organized movement after the collapse of the revolutionary First International was moderate, petty bourgeois Socialism. It was a Socialism adapting itself to the conditions of national development, abandoning in practice the militant idea of revolutionizing the old world.

This moderate Socialism initiated the era of "constructive" social reforms. It accepted the bourgeois state as the basis of its activity and *strengthened* that state. Its goal became "constructive reforms" and cabinet portfolios—the "co-operation of classes," the policy of openly or tacitly declaring that the coming of Socialism was the concern "of all the classes," instead of emphasizing the Marxian policy that the construction of the Socialist system is the task of the revolutionary proletariat alone. In accepting social-reformism, the "co-operation of classes," and the bourgeois parliamentary state as the basis of its action, moderate Socialism was prepared to share responsibility with the bourgeoisie in the control of the capitalist state, even to the extent of defending the bourgeoisie against the working class and its revolutionary mass movements. The counter-revolutionary tendency of the dominant Socialism finally reveals itself in open war against Socialism during the proletarian revolution, as in Russia, Germany and Austria-Hungary.

The dominant moderate Socialism was initiated by the formation of the Social-Democratic Party in Germany. This party united on the basis of the Gotha Program, in which fundamental revolutionary Socialism was abandoned. It evaded completely the task of the conquest of power, which Marx, in his *Criticism of the Gotha Program*, characterized as follows: "Between the capitalistic society and the communistic, lies the period of the revolutionary transformation of the one into the other. This corresponds to a political transition period, in which the state cannot be anything else than the revolutionary dictatorship of the proletariat."

Evading the actual problems of the revolutionary struggle, the dominant Socialism of the Second International developed into a peaceful movement of organization, of trades union struggles, of co-operation with the middle class, of legislation and bourgeois State Capitalism as means of introducing Socialism.

There was a joint movement that affected the thought and practice of Socialism; on the one hand, the organization of the skilled workers into trade unions, which secured certain concessions and became a semi-privileged caste; and, on the other, the decay of the class of small producers, crushed under the iron tread of the concentration of industry and the accumulation of capital. As one moved upward, and the other downward, they met, formed a juncture, and united *to use the state to improve their conditions.* The dominant Socialism expressed this unity, developing a policy of legislative reforms and State Capitalism, making the revolutionary class struggle a parliamentary process.

This development meant, obviously, the abandonment of fundamental Socialism. It meant working on the basis of the bourgeois parliamentary state, instead of the struggle to destroy that state; it meant the "co-operation of classes" for State Capitalism, instead of the uncompromising proletarian struggle for Socialism. Government ownership, the objective of the middle class, was the policy of moderate Socialism. Instead of the revolutionary theory of the necessity of conquering Capitalism, the official theory and practice was now that of *modifying* Capitalism, of a gradual peaceful "growing into" Socialism by means of legislative reforms. In the words of Jean Jaures: "we shall carry on our reform work to a complete transformation of the existing order."

But Imperialism exposed the final futility of this policy. Imperialism unites the non-proletarian classes, by means of State Capitalism, for international conquest and spoilation. The small capitalists, middle class and the aristocracy of labor, which previously acted against concentrated industry, now compromise and unite with concentrated industry and finance-capital in Imperialism. The small capitalists accept the domination of finance-capital, being allowed to participate in the adventures and the fabulous profits of Imperialism, upon which now depends the whole of trade and industry; the middle class invests in monopolistic enterprises, an income class whose income depends upon finance-capital, its members securing "positions of superintendence," its technicians and intellectuals being exported to undeveloped lands in process of development; while the workers of the privileged unions are assured steady employment and comparatively high wages through the profits that come from the savage exploitation of colonial peoples. All these non-proletarian social groups accept Imperialism, their "liberal and progressive" ideas becoming factors in the promotion of Imperialism, manufacturing the democratic ideology of Imperialism with which to seduce the masses. Imperialism requires the centralized state, capable of uniting all the forces of capital, of unifying the industrial process through state control and regulation, of maintaining "class peace," of mobilizing the whole national power in the struggles of Imperialism. *State Capitalism is the form of expression of Imperialism,*—precisely that State Capitalism promoted by moderate, petty bourgeois Socialism. What the parliamentary policy of the dominant moderate Socialism accomplished was to buttress the capitalist state, to promote State Capitalism,—to strengthen Imperialism!

The dominant Socialism was part and parcel of the national liberal movement,—but this movement, under the compulsion of events, merged in Imperialism. The dominant Socialism accepted capitalistic democracy as the basis for the realization of Socialism,—but this democracy merges in Imperialism. The world war was waged by means of this democracy. The dominant Socialism based itself upon the middle class and the aristocracy of labor,—but these have compromised with Imperialism, being bribed by a "share" in the spoils of Imperialism. Upon the declaration of war, accordingly, the dominant moderate Socialism accepted the war and united with the imperialistic state.

Upon the advent of Imperialism, Capitalism emerged into a new epoch,—an epoch requiring new and more aggressive proletarian tatics. Tactical differences in the Socialist movement almost immediately came to a head. The concentration of industry, together with the subserviency of parliaments to the imperialistic mandates and the transfer of thetr vital functions to the executive organ of government, developed the concept of industrial unionism in the United States and the concept of mass action in Europe. The struggle against the dominant moderate Socialism became a struggle against its perversion of parliamentarism, against its conception of the state, against its alliance with non-proletarian social groups, and against its acceptance of State Capitalism. Imperialism made mandatory a reconstruction of the Socialist movement, the formulation of a practice in accord with its revolutionary fundamentals. But the representatives of moderate Socialism refused to broaden their tactics, to adapt themselves to the new conditions. The consequence was a miserable collapse under the test of the war and the proletarian revolution,—the betrayal of Socialism and the proletariat.

THE PROLETARIAN REVOLUTION.

The dominant Socialism justified its acceptance of the war on the plea that a revolution did not materialize, that the masses abandoned Socialism.

This was conscious subterfuge. When the economic and political crisis *did* develop potential revolutionary action in the proletariat, the dominant Socialism immediately assumed an attitude *against* the Revolution. The proletariat was urged *not* to make a revolution. The dominant Socialism united with the capitalist governments to prevent a revolution.

The Russian Revolution was the first act of the proletariat against the war and Imperialism. But while the masses made the Revolution in Russia, the bourgeoisie usurped power and organized the regulation bourgeois-parliamentary republic. This was the first stage of the Revolution. Against this bourgeois republic organized the forces of the proletarian Revolution. Moderate Socialism in Russia, represented by the Mensheviki and the Social-Revolutionists, acted against the proletarian revolution. It united with the Cadets, the party of bourgeois Imperialism, in a coalition government of bourgeois democracy. It placed its faith in the war "against German militarism," in national ideals, in parliamenetary democracy and the "co-operation of classes."

But the proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of "all power to the Soviets;"—organizing the new transitional state of proletarian dictatorship. Moderate Socialism, even after its theory that a proletarian revolution was impossible had been shattered by life itself, acted against the proletarian revolution and mobilized the counter-revolutionary forces against the Soviet Republic,—assisted by the moderate Socialism of Germany and the Allies.

Apologists maintained that the attitude of moderate Socialism in Russia was determined not by a fundamental policy, but by its conception that, Russia not being a fully developed capitalist country, it was premature to make a proletarian revolution and historically impossible to realize Socialism.

This was a typical nationalistic attitude, since the proletarian revolution in Russia could not persist as a national revolution, but was compelled by its very conditions to struggle for the

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international revolution of the proletariat, the war having initiated the epoch of the proletarian revolution.

The revolution in Germany decided the controversy. The first revolution was made by the masses, against the protests of the dominant moderate Socialism, represented by the Social-Democratic Party. As in Russia, the first stage of the Revolution realized a bourgois parliamentary republic, with power in the hands of the Social-Democratic Party. Against this bourgeois republic organized a new revolution, the proletarian revolution directed by the Spartacan-Communists. And, precisely as in Russia, *the dominant moderate Socialism opposed the proletarian revolution,* opposed all power to the Soviets, accepted parliamentary democracy and repudiated proletarian dictatorship.

The issue in Germany could not be obscured. Germany was a fully developed industrial nation, its economic conditions mature for the introduction of Socialism. In spite of dissimilar economic conditions in Germany and Russia, the dominant moderate Socialism pursued a similar counter-revolutionary policy, and revolutionary Socialism a common policy, indicating the international character of revolutionary proletarian tactics.

There is, accordingly, a common policy that characterizes moderate Socialism, and that is *its conception of the state.* Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism; accordingly, it conceived the task of the revolution, in Germany and Russia, to be the construction of the democratic parliamentary state, after which the process of introducing Socialism by legislative reform measures could be initiated. Out of this conception of the state developed the counter-revolutionary policy of moderate Socialism.

Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat.

The proletarian revolution in action has conclusively proven that moderate Socialism is incapable of realizing the objectives of Socialism. Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletarian dictatorship.

AMERICAN SOCIALISM.

The upsurge of revolutionary Socialism in the American Socialist Party, expressed in the Left Wing, is not a product simply of European conditions. It is, in a fundamental sense, the product of the experience of the American movement—the Left Wing tendency in the Party having been invigorated by the experience of the proletarian revolutions in Europe.

The dominant moderate Socialism of the International was equally the Socialism of the American Socialist Party.

The policy of moderate Socialism in the Socialist Party comprised its policy in an attack upon the larger capitalists, the trusts, maintaining that all other divisions in society —including the lesser capitalists and the middle class, the *petite bourgeoisie*—are material for the Socialist struggle against Capitalism. The moderate Socialism dominant in the Socialist Party asserted, in substance: Socialism is a struggle *of all the people* against the trusts and big capital, making the realization of Socialism depend upon the unity of "the people," of the workers, the small capitalists, the small investors, the professions,—in short, the official Socialist Party actually depended upon the *petite bourgeoisie* for the realization of Socialism.

The concentration of industry in the United States gradually eliminated the small producers, which initiated the movement for government ownership of industry—and for other reforms proposed to check the power of the plutocracy; and this bourgeois policy was the animating impulse of the practise of the Socialist Party.

This party, moreover, developed into an expression of the unions of the aristocracy of labor,—of the A. F. of L. The party refused to engage in the struggle against the reactionary unions, to organize a new labor movement of the militant proletariat.

While the concentration of industry and social developments generally conservatized the skilled workers, it developed the typical proletariat of unskilled labor, massed in the basic industries. This proletariat, expropriated of all property, denied access to the A. F. of L. unions, required a labor movement of its own. This impulse produced the concept of industrial unionism, and the I. W. W. But the dominant moderate Socialism rejected industrial unionism and openly or covertly acted against the I. W. W.

Revolutionary industrial unionism, moreover, was a recognition of the fact that extra-parliamentary action was necessary to accomplish the revolution, that the political state should be destroyed and a new proletarian state of the organized producers constructed in order to realize Socialism. But the Socialist Party not only repudiated the form of industrial unionism, it still more emphatically repudiated its revolutionary political implications, clinging to petty bourgeois parliamentarism and reformism.

United with the aristocracy of labor and the middle class, the dominant Socialism in the Socialist Party necessarily developed all the evils of the dominant Socialism of Europe,—and, particularly, abandoning the immediate revolutionary task of reconstructing unionism, on the basis of which alone a militant mass Socialism could emerge.

It stultified working class political action, by limiting political action to elections and participation in legislative reform activity. In every single case where the Socialist Party has elected public officials they have pursued a consistent petty bourgeois policy, abandoning Socialism.

This was the official policy of the Party. Its representatives were petty bourgeois, moderate, hesitant, oblivious of the class struggle in its fundamental political and industrial implications. But the compulsion of life itself drew more and more proletarian masses in the party, who required simply the opportunity to initiate a revolutionary proletarian policy.

The war and the proletarian revolution in Russia provided the opportunity. The Socialist Party, under the impulse of its membership, adopted a militant declaration against the war. But the officials of the party sabotaged this declaration. The *official* policy of the party on the war was a policy of petty bourgeois pacifism. The bureaucracy of the party was united with the bourgeois People's Council, which accepted a Wilson Peace and betrayed those who rallied to the Council in opposition to the war.

This policy necessarily developed into a repudiation of the revolutionary Socialist position. When events developed the test of accepting or rejecting the revolutionary implications of the declaration against the war, the party bureaucracy immediately exposed its reactionary policy, by repudiating the policy of the Russian and German Communists, and refusing affiliation with the Communist International of revolutionary Socialism.

PROBLEMS OF AMERICAN SOCIALISM

Imperialism is dominant in the United States, which is now a world power. It is developing a centralized, autocratic federal government, acquiring the financial and military reserves for aggression and wars of conquest. The war has aggrandized American Capitalism, instead of weakening it as in Europe. But world events will play upon and influence conditions in this country—dynamically, the sweep of revolutionary proletarian ideas; materially, the coming constriction of world markets upon the resumption of competition. Now all-mighty and supreme, Capitalism in the United States must meet crises in the days to come. These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. American Capitalism is developing a brutal campaign of terrorism against the militant proletariat. American Capitalism is utterly incompetent on the problems of reconstruction that press down upon society. Its "reconstruction" program is simply to develop its power for aggression, to aggrandize itself in the markets of the world.

These conditions of Imperialism and of multiplied aggression will necessarily produce proletarian action against Capitalism. Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being.

A minor phase of the awakening of labor is the trades unions organizing a Labor Party, in an effort to conserve what they have secured as a privileged caste. A Labor Party is not the instrument for the emancipation of the working class; its policy would in general be what is now the official policy of the Socialist Party—reforming Capitalism on the basis of the bourgeois parliamentary state. Laborism is as much a danger to the revolutionary proletariat as moderate, petty bourgeois Socialism, —the two being expressions of an identical tendency and policy. There can be no compromise either with Laborism or the dominant moderate Socialism.

But there is a more vital tendency,—the tendency of the workers to initiate mass strikes,—strikes which are equally a revolt against the bureaucracy in the unions and against the employers. These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state.

Revolutionary Socialism must base itself on the mass struggles of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of Socialism and the proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism.

Our task is to encourage the militant mass movements in the A. F. of L. to split the old unions, to break the power of unions which are corrupted by Imperialism and betray the militant proletariat. The A. F. of L., in its dominant expression, is united with Imperialism. A bulwark of reaction,—it must be exposed and its power for evil broken.

Our task, moreover, is to articulate and organize the mass of the unorganized industrial proletariat, which constitutes the basis for a militant Socialism. The struggle for the revo-

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lutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and deepen the action of the militant proletariat, developing reserves for the ultimate conquest of power.

Imperialism is dominant in the United States. It controls all the factors of social action. Imperialism is uniting all non-proletarian social groups in a brutal State Capitalism, for reaction and spoliation. Against this, revolutionary Socialism must mobilize the mass struggle of the industrial proletariat.

Moderate Socialism is compromising, vacillating, treacherous, because the social elements it depends upon—the *petite bourgeoisie* and the aristocracy of labor—are not a fundamental factor in society; they vacillate between the bourgeois and the proletariat, their social instability produces political instability; and, moreover, they have been seduced by Imperialism and are now united with Imperialism.

Revolutionary Socialism is resolute, uncomprising, revolutionary, because it builds upon a fundamental social factor, the industrial proletariat, which is an actual producing class, expropriated of all property, in whose consciousness the machine process has developed the concepts of industrial unionism and mass action. Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class.

POLITICAL ACTION

The class struggle is a political struggle. It is a political struggle in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state.

Revolutionary Socialism does not propose to "capture" the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly, repudiates the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. This state is a bourgeois state, the organ for the coercion of the proletarian by the capitalist: how, then, can it introduce Socialism? As long as the bourgeois parliamentary state prevails, the capitalist class can baffle the will of the proletariat, since all the political power, the army and the police, industry and the press, are in the hands of the capitalists, whose economic power gives them complete domination. The revolutionary proletariat must expropriate all these by the conquest of the power of the state, by annihilating the political power of the bourgeoisie, before it can begin the task of introducing Socialism.

Revolutionary Socialism, accordingly, proposes to conquer the power of the state. It proposes to conquer by means of political action,—political action in the revolutionary Marxian sense, which does not simply mean parliamentarism, but the *class action* of the proletariat *in any form* having as its objective the conquest of the power of the state.

Parliamentary action is necessary. In the parliament, the revolutionary representatives of the proletariat meet Capitalism on all general issues of the class struggle. The proletariat must fight the capitalist class on all fronts, in the process of developing the final action that will conquer the power of the state and overthrow Capitalism. Parliamentary ac-

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tion which emphasizes the implacable character of the class struggle is an indispensable means of agitation. Its task is to expose through political campaigns and the forum of parliament, the class character of the state and the reactionary purposes of Capitalism, to meet Capitalism on all issues, to rally the proletariat for the struggle against Capitalism.

But parliamentarism cannot conquer the power of the state for the proletariat. The conquest of the power of the state is an extra-parliamentary act. It is accomplished, not by the legislative representatives of the proletariat, but by *the mass power of the proletariat in action.* The supreme power of the proletariat inheres in the *political mass strike,* in using the industrial mass power of the proletariat for political objectives.

Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is *the political mass strike.* Parliamentarism may become a factor in developing the mass strike; parliamentarism, if it is revolutionary and adheres to the class struggle, performs a necessary service in mobilizing the proletariat against Capitalism.

Moderate Socialism refuses to recognize and accept this supreme form of proletarian political action, limits and stultifies political action into legislative routine and non-Socialist parliamentarism. This is a denial of the mass character of the proletarian struggle, an evasion of the tasks of the Revolution.

The power of the proletariat lies fundamentally in its control of the industrial process. The mobilization of this control in action against the bourgeois state and Capitalism means the end of Capitalism, the initial form of the revolutionary mass action that will conquer the power of the state.

UNIONISM AND MASS ACTION.

Revolutionary Socialism and the actual facts of the class struggle make the realization of Socialism depend upon the industrial proletariat. The class struggle of revolutionary Socialism mobilizes the industrial proletariat against Capitalism,—that proletariat which is united and disciplined by the machine process, and which actually controls the basic industry of the nation.

The coming to consciousness of this proletariat produces a revolt against the older unionism, developing the concepts of industrial unionism and mass action.

The older unionism was implicit in the skill of the individual craftsmen, who united in craft unions. These unions organized primarily to protect the skill of the skilled workers, which is in itself a form of property. The trades unions developed into "job trusts," and not into militant organs of the proletarian struggle; until to-day the dominant unions are actual bulwarks of Capitalism, merging in Imperialism and accepting State Capitalism. The trades unions, being organized on craft divisions, did not and could not unite the workers as a class, nor are they actual class organizations.

The concentration of industry, developing the machine process, expropriated large elements of the skilled workers of their skill, but the unions still maintained the older ideology of property contract and caste. Deprived of actual power, the dominant unionism resorts to dickers with the bourgeois state and an acceptance of imperialistic State Capitalism to maintain its privileges, *as against* the industrial proletariat.

The concentration of industry produced the industrial proletariat of unskilled workers, of the machine proletariat. This proletariat, massed in the basic industry, constitutes the militant basis of the class struggle against Capitalism; and, deprived of skill and craft divisions, it turns naturally to mass unionism, to an industrial unionism in accord with the integrated industry of imperialistic Capitalism.

Under the impact of industrial concentration, the proletariat developed its own dynamic tactics—mass action.

Mass action is the proletarian response to the facts of modern industry, and the forms it imposes upon the proletarian class struggle. Mass action starts as the spontaneous activity of unorganized workers massed in the basic industry; its initial form is the mass strike of the unorganized proletariat. The mass movements of the proletariat developing out of this mass response to the tyranny of concentrated industry antagonized the dominant moderate Socialism, which tried to compress and stultify these militant impulses within the limits of parliamentarism.

In this instinctive mass action there was not simply a response to the facts of industry, but the implicit means for action against the dominant parliamentarism. Mass action is industrial in its origin: but its development imposes upon it a political character, since the more general and conscious mass action becomes the more it antagonizes the bourgeois state, becomes *political* mass action.

Another development of this tendency was Syndicalism. In its mass impulse Syndicalism was a direct protest against the futility of the dominant Socialist parliamentarism. But Syndicalism was either unconscous of the theoretical basis of the new movement; or where there was an articulate theory, it was a derivative of Anarchism, making the proletarian revolution an immediate and direct seizure of industry, instead of the conquest of the power of the state. Anarcho-Syndicalism is a departure from Marxism. The theory of mass action and of industrial unionism, however, are in absolute accord with Marxism—*revolutionary Socialism in action.*

Industrial unionism recognizes that the proletariat cannot conquer power by means of the bourgeois parliamentary state; it recognizes, moreover, that the proletariat cannot use this state to introduce Socialism, but that it must organize a new "state."—the "state" of the organized producers. Industrial unionism, accordingly, proposes to construct the forms of the government of Communist Socialism—the government of the producers. The revolutionary proletariat cannot adapt the bourgeois organs of government to its own use: it must develop its own organs. The larger, more definite and general the conscious industrial unions, the easier becomes the transition to Socialism, since the revolutionary state of the proletariat must reorganize society on the basis of union control and management of industry. Industrial unionism, accordingly, is a necessary phase of revolutionary Socialist agitation and action.

But industrial unionism alone cannot conquer the power of the state. Potentially, industrial unionism may construct the forms of the new society; but only potentially. Actually the forms of the new society are constructed under the protection of a revolutionary proletarian government; the industrial unions become simply the starting point of the Socialist reconstruction of society. Under the conditions of Capitalism, it is impossible to

organize the whole working class into industrial unions; the concept of organizing the working class industrially *before* the conquest of power is as utopian as the moderate Socialist conception of the gradual conquest of the parliamentary state.

The proletarian revolution comes at the moment of crisis in Capitalism, of a collapse of the old order. Under the impulse of the crisis, the proletariat acts for the conquest of power, by means of mass action. Mass action concentrates and mobilizes the forces of the proletariat, organized and unorganized; it acts equally against the bourgeois state and the conservative organizations of the working class. The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation.

The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat.

DICTATORSHIP OF THE PROLETARIAT

The attitude toward the state divides the Anarchist (and Anarcho-Syndicalist), the moderate Socialist and the 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. The moderate Socialist proposes to use the bourgeois state, with its fraudulent democracy, its illusory theory of the "unity of all the classes," its standing army, police and bureaucracy oppressing and baffling the masses. The revolutionary Socialist maintains that the bourgeois parliamentary state must be completely destroyed, and proposes the organization of a new state, the dictatorship of the proletariat.

The state is an organ of coercion. The bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state. But the conquest of political power by the proletariat does not immediately end Capitalism, or the power of the capitalists, or immediately socialize industry. It is therefore necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie.*

Capitalism is bourgeois dictatorship. Parliamentary government is the expression of bourgeois supremacy, the form of authority of the capitalist over the worker. The bourgeois state is organized to coerce the proletariat, to baffle the will of the masses. In form a democracy, the bourgeois parliamentary state is in fact an autocracy, the dictatorship of capital over the proletariat.

Bourgeois democracy promotes this dictatorship of capital, assisted by the pulpit, the army and the police. Bourgeois democracy seeks to reconcile all the classes; realizing, however, simply the reconciliation of the proletariat to the supremacy of Capitalism. Bourgeois democracy is political in character, historically necessary, on the one hand, to break the power of feudalism, and, on the other, to maintain the proletariat in subjection. It is precisely this democracy that is now the instrument of Imperialism, since the middle class, the traditional carrier of democracy, accepts and promotes Imperialism.

The proletarian revolution disrupts bourgeois democracy. It disrupts this democracy in order to end class divisions and class rule, to realize that industrial self-government of the workers which alone can assure peace and liberty to the peoples.

Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. The new society organizes as a communistic federation of producers. The proletariat alone counts in the revolution, and *in the reconstruction of society on* a Communist basis.

The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is this state alone, functioning as a dictatorship of the proletariat, that can realize Socialism.

The tasks of the dictatorship of the proletariat are:

a) to completely expropriate the bourgeoisie poitically, and crush its powers of resistance.

b) to expropriate the bourgeoisie economically, and introduce the forms of Communist Socialism.

Breaking the political power of the capitalists is the most important task of the revolutionary dictatorship of the proletariat, since upon this depends the economic and social reconstruction of society.

But this political expropriation proceeds simultaneously with an immediate, if partial, expropriation of the bourgeoisie economically, the scope of these measures being determined by industrial development and the maturity of the proletariat. These measures, at first, include:

a) Workmen's control of industry, to be exercised by the industrial organizations of the workers, operating by means of the industrial vote.

b) Expropriation and nationalization of the banks, as a necessary preliminary measure for the complete expropriation of capital.

c) Expropriation and nationalization of the large (trust) organizations of capital. Expropriation proceeds without compensation, as "buying out" the capitalists is a repudiation of the tasks of the revolution.

d) Repudiation of all national debts and the financial obligations of the old system.

e) The nationalization of foreign trade.

f) Measures for the socialization of agriculture.

These measures centralize the basic means of production in the proletarian state, nationalizing industry; and their partial character ceases as reconstruction proceeds. Socialization of industry becomes actual and complete only after the dictatorship of the proletariat has accomplished its task of suppressing the bourgeoisie.

The state of proletarian dictatorship is political in character, since it represents a ruling class, *the proletariat,* which is now supreme; and it uses coercion against the old bourgeois class. But the task of this dictotorship is to render itself unnecessary; and it becomes unnecessary the moment the full conditions of Communist Socialism materialize. While the dictatorship of the proletariat perform its negative task of crushing the old order, it performs the positive task of constructing the new. Together with the government of the proletarian dictatorship, there is developed a new "government," which is no longer government in the old sense, since it concerns itself with the management of production and not with the government of persons. Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism,—industrial self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual automony of the Communist order.

THE COMMUNIST INTERNATIONAL.

The Communist International, issuing directly out of the proletarian revolution in action and in process of development, is the organ of the international revolutionary proletariat: just as the League of Nations is the organ of the joint aggression and resistance of the dominant Imperialism.

The attempt to resurrect the Second International, at Berne, was a ghastly failure. It rallied the counter-revolutionary forces of Europe, which were actually struggling against the proletarian revolution. In this "International" are united all the elements treasonable to Socialism, and the wavering "centre" elements whose policy of miserable compromise is more dangerous than open treason. It represents the old dominant moderate Socialism; it based affiliation on acceptance of "labor" parliamentary action, admitting trades unions accepting "political action." The old International abandoned the earlier conception of Socialism as the politics of the Social Revolution—the politics of the class struggle in its revolutionary implications—admitting directly reactionary organizations of Laborism, such as the British Labor Party.

The Communist International, on the contrary, represents a Socialism in complete accord with the revolutionary character of the class struggle. It unites all the consciously revolutionary forces. It wages war equally against the dominant moderate Socialism and Imperialism,—each of which has demonstrated its complete incompetence on the problems that now press down upon the world. The Communist International issues its challenge to the conscious, virile elements of the proletariat, calling them to the final struggle against Capitalism on the basis of the revolutionary epoch of Imperialism. The acceptance of the Communist International means accepting the fundamentals of revolutionary Socialism as decisive in our activity.

The Communist International, moreover, issues its call to the subject peoples of the world, crushed under the murderous mastery of Imperialism. The revolt of these colonial and subject peoples is a necessary phase of the world struggle against capitalist Imperialism; their revolt must unite itself with the struggle of the conscious proletariat in the imperialistic nations. The communist International, accordingly, offers an organization and a policy that may unify all the revolutionary forces of the world for the conquest of power, and for Socialism.

It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power.

The old order is in decay. Civilization is in collapse. The proletarian revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. This is the message of the Communist International to the workers of the world.

The Communist International calls the proletariat of the world to the final struggle!

GITLOW *v.* PEOPLE OF NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 19. Argued April 12, 1923; reargued November 23, 1923.—Decided June 8, 1925.

1. *Assumed*, for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States. P. 666.
2. Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language. P. 666.
3. That a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question. P. 667.
4. For yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. P. 667.
5. A statute punishing utterances advocating the overthrow of organized government by force, violence and unlawful means, imports a legislative determination that such utterances are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized under the police power; and this determination must be given great weight, and every presumption be indulged in favor of the validity of the statute. P. 668.
6. Such utterances present sufficient danger to the public peace and security of the State to bring their punishment clearly within the range of legislative discretion, even if the effect of a given utterance can not accurately be foreseen. P. 669.
7. A State can not reasonably be required to defer taking measures against these revolutionary utterances until they lead to actual disturbances of the peace or imminent danger of the State's destruction. P. 669.
8. The New York statute punishing those who advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning organized government by force, violence, or any unlawful means, or who print, publish, or knowingly circulate any book, paper, etc., advocating, advising or teaching the doctrine that organized government should be so overthrown, does not penalize the utterance or publication of abstract doctrine or academic discussion having no quality of incitement to any concrete action, but denounces the advocacy of action for accomplishing the overthrow of organized government by unlawful means, and is constitutional as applied to a printed "Manifesto" advocating and urging mass action which shall progressively foment industrial disturbances and, through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government; even though the advocacy was in general terms and not addressed to particular immediate acts or to particular persons. Pp. 654, 672.
9. The statute being constitutional, it may constitutionally be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute; and the question whether the specific utterance in question was likely to bring about the substantive evil aimed at by the statute, is not open to consideration. *Schenck* v. *United States*, 249 U. S. 47, explained. P. 670.

195 App. Div. 773; 234 N. Y., 132, 539, affirmed.

ERROR to a judgment of the Supreme Court of New York, affirmed by the Appellate Division thereof and by the Court of Appeals, sentencing the plaintiff in error for the crime of criminal anarchy, (New York Laws, 1909, c. 88), of which he had been convicted by a jury.

Messrs. Walter Nelles and *Walter H. Pollak*, with whom *Messrs. Albert De Silver* and *Charles S. Ascher* were on the brief, for plaintiff in error.

Messrs W. J. Weatherbee, Deputy Attorney General of New York, and *John Caldwell Myers*, Assistant District Attorney of New York County, with whom *Messrs. Carl Sherman*, Attorney General of New York, *Claude T. Dawes*, Deputy Attorney General of New York, *Joab H. Banton*, District Attorney of New York County, and *John F. O'Neil*, Assistant District Attorney of New York County, were on the briefs, for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

Benjamin Gitlow was indicted in the Supreme Court of New York, with three others, for the statutory crime of criminal anarchy. New York Penal Laws, §§ 160, 161.[1] He was separately tried, convicted, and sentenced to imprisonment. The judgment was affirmed by the Appellate Division and by the Court of Appeals. 195 App. Div. 773; 234 N. Y. 132 and 539. The case is here on writ of error to the Supreme Court, to which the record was remitted. 260 U. S. 703.

The contention here is that the statute, by its terms and as applied in this case, is repugnant to the due process clause of the Fourteenth Amendment. Its material provisions are:

"§ 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.

"§ 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

[1] Laws of 1909, ch. 88; Consol. Laws, 1909, ch. 40. This statute was originally enacted in 1902. Laws of 1902, ch. 371.

form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means . . . ,

"Is guilty of a felony and punishable" by imprisonment or fine, or both.

The indictment was in two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled "The Left Wing Manifesto"; the second that he had printed, published and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.

The following facts were established on the trial by undisputed evidence and admissions: The defendant is a member of the Left Wing Section of the Socialist Party, a dissenting branch or faction of that party formed in opposition to its dominant policy of "moderate Socialism." Membership in both is open to aliens as well as citizens. The Left Wing Section was organized nationally at a conference in New York City in June, 1919, attended by ninety delegates from twenty different States. The conference elected a National Council, of which the defendant was a member, and left to it the adoption of a "Manifesto." This was published in The Revolutionary Age, the official organ of the Left Wing. The defendant was on the board of managers of the paper and was its business manager. He arranged for the printing of the paper and took to the printer the manuscript of the first issue which contained the Left Wing Manifesto, and also a Communist Program and a Program of the Left Wing that had been adopted by the conference. Sixteen thousand

copies were printed, which were delivered at the premises in New York City used as the office of the Revolutionary Age and the headquarters of the Left Wing, and occupied by the defendant and other officials. These copies were paid for by the defendant, as business manager of the paper. Employees at this office wrapped and mailed out copies of the paper under the defendant's direction; and copies were sold from this office. It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the State to speak to branches of the Socialist Party about the principles of the Left Wing and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way and he knew of its publication afterwards, and is responsible for its circulation."

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

No witnesses were offered in behalf of the defendant.

Extracts from the Manifesto are set forth in the margin.[2] Coupled with a review of the rise of Socialism, it

[2] Italics are given as in the original, but the paragraphing is omitted.

"The Left Wing Manifesto"

"Issued on Authority of the Conference by the National Council of the Left Wing.

"The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. . . . Humanity can be saved from its last excesses only by the Communist Revolution. There can now be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. . . . The class struggle is the heart of Socialism. Without strict conformity to the class struggle, in its revolutionary implications, Socialism becomes either sheer Utopianism, or a method of reaction. . . . The dominant Socialism united with the capitalist governments to prevent a revolution. The Russian Revolution was the first act of the proletariat against the war and Imperialism. . . . [The] proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of 'all power to the Soviets,'—organizing the new transitional state of proletarian dictatorship. . . . Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism. . . . Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat. . . . Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletarian dictatorship. . . . Imperialism is dominant in the United States, which is now a world power. . . . The war has aggrandized American Capitalism, instead of weakening it as in Europe. . . . These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. . . . Strikes are developing which verge on revolutionary action, and in which the suggestion of proletarian dictatorship is apparent, the striker-workers trying to usurp functions of municipal government, as in Seattle and Winnipeg. The mass struggle of the proletariat is coming into being. . . . These strikes will constitute the determining feature of proletarian action in the days to come. Revolutionary Socialism must use these mass industrial revolts to broaden the strike, to make it general and militant; use the strike for political objectives, and, finally, develop the mass political strike against Capitalism and the state. Revolutionary Socialism must base itself on the mass struggles

condemned the dominant "moderate Socialism" for its recognition of the necessity of the democratic parliamentary state; repudiated its policy of introducing Socialism by legislative measures; and advocated, in plain and unequivocal language, the necessity of accomplishing the "Communist Revolution" by a militant and "revolutionary Socialism", based on "the class struggle" and mo-

bilizing the "power of the proletariat in action," through mass industrial revolts developing into mass political strikes and "revolutionary mass action", for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a "revolutionary dictatorship of the proletariat", the system of Communist Socialism. The then recent strikes in Seattle and Winnipeg [8] were cited as instances of a development already verging on revolutionary action and suggestive of prole-

of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of Socialism and the proletarian movement. The mass strikes of the American proletariat provide the material basis out of which to develop the concepts and action of revolutionary Socialism. . . . Our task . . . is to articulate and organize the mass of the unorganized industrial proletariat, which constitutes the basis for a militant Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and deepen the action of the militant proletariat, developing reserves for the ultimate conquest of power. . . . Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class. The class struggle is a political struggle . . . in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state. Revolutionary Socialism does not propose to 'capture' the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly, repudiates the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. . . . It proposes to conquer by means of political action . . . in the revolutionary

(*Footnote 2 continued on following pages.*)

[8] There was testimony at the trial that "there was an extended strike at Winnipeg commencing May 15, 1919, during which the production and supply of necessities, transportation, postal and telegraphic communication and fire and sanitary protection were suspended or seriously curtailed."

tarian dictatorship, in which the strike-workers were "trying to usurp the functions of municipal government"; and revolutionary Socialism, it was urged, must use these mass industrial revolts to broaden the strike, make it general and militant, and develop it into mass political strikes and revolutionary mass action for the annihilation of the parliamentary state.

At the outset of the trial the defendant's counsel objected to the introduction of any evidence under the

Marxian sense, which does not simply mean parliamentarism, but the *class action* of the proletariat *in any form* having as its objective the conquest of the power of the state. . . . Parliamentary action which emphasizes the implacable character of the class struggle is an indispensable means of agitation. . . . But parliamentarism cannot conquer the power of the state for the proletariat. . . . It is accomplished, not by the legislative representatives of the proletariat, but by *the mass power of the proletariat in action.* The supreme power of the proletariat inheres in the *political mass strike*, in using the industrial mass power of the proletariat for political objectives. Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is *the political mass strike.* . . . The power of the proletariat lies fundamentally in its control of the industrial process. The mobilization of this control in action against the bourgeois state and Capitalism means the end of Capitalism, the initial form of the revolutionary mass action that will conquer the power of the state. . . . The revolution starts with strikes of protest, developing into mass political strikes and then into revolutionary mass action for the conquest of the power of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation. The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat. . . . The bourgeois parliamentary state is the organ of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat must, accordingly, destroy this state. . . . It is therefore necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie.* . . . Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the

indictment on the grounds that, as a matter of law, the Manifesto "is not in contravention of the statute," and that "the statute is in contravention of" the due process clause of the Fourteenth Amendment. This objection was denied. They also moved, at the close of the evidence, to dismiss the indictment and direct an acquittal "on the grounds stated in the first objection to evidence",

bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. . . . The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is this state, alone, functioning as a dictatorship of the proletariat, that can realize Socialism. . . . While the dictatorship of the proletariat performs its negative task of crushing the old order, it performs the positive task of constructing the new. Together with the government of the proletarian dictatorship, there is developed a new 'government,' which is no longer government in the old sense, since it concerns itself with the management of production and not with the government of persons. Out of workers' control of industry, introduced by the proletarian dictatorship, there develops the complete structure of Communist Socialism,—industrial self-government of the communistically organized producers. When this structure is completed, which implies the complete expropriation of the bourgeoisie economically and politically, the dictatorship of the proletariat ends, in its place coming the full and free social and individual autonomy of the Communist order. . . . It is not a problem of immediate revolution. It is a problem of the immediate revolutionary struggle. The revolutionary epoch of the final struggle against Capitalism may last for years and tens of years; but the Communist International offers a policy and program immediate and ultimate in scope, that provides for the immediate class struggle against Capitalism, in its revolutionary implications, and for the final act of the conquest of power. The old order is in decay. Civilization is in collapse. The proletarian revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. This is the message of the Communist International to the workers of the world. The Communist International calls the proletariat of the world to the final struggle!"

and again on the grounds that "the indictment does not charge an offense" and the evidence "does not show an offense." These motions were also denied.

The court, among other things, charged the jury, in substance, that they must determine what was the intent, purpose and fair meaning of the Manifesto; that its words must be taken in their ordinary meaning, as they would be understood by people whom it might reach; that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice or advocacy of action, would not constitute the advocacy, advice or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, unless there was a teaching, advising and advocacy of employing such unlawful acts for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did teach, advocate or advise the duty, necessity or propriety of using unlawful means for the overthrowing of organized government, the defendant was entitled to an acquittal.

The defendant's counsel submitted two requests to charge which embodied in substance the statement that to constitute criminal anarchy within the meaning of the statute it was necessary that the language used or published should advocate, teach or advise the duty, necessity or propriety of doing "some definite or immediate act or acts" of force, violence or unlawfulness directed toward the overthrowing of organized government. These were denied further than had been charged. Two other requests to charge embodied in substance the statement that to constitute guilt the language used or published must be "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness,

with the object of overthrowing organized government. These were also denied.

The Appellate Division, after setting forth extracts from the Manifesto and referring to the Left Wing and Communist Programs published in the same issue of the Revolutionary Age, said:[4] "It is perfectly plain that the plan and purpose advocated . . . contemplate the overthrow and destruction of the governments of the United States and of all the States, not by the free action of the majority of the people through the ballot box in electing representatives to authorize a change of government by amending or changing the Constitution, . . . but by immediately organizing the industrial proletariat into militant Socialist unions and at the earliest opportunity through mass strike and force and violence, if necessary, compelling the government to cease to function, and then through a proletarian dictatorship, taking charge of and appropriating all property and administering it and governing through such dictatorship until such time as the proletariat is permitted to administer and govern it. . . . The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown . . ."

The Court of Appeals held that the Manifesto "advocated the overthrow of this government by violence, or by unlawful means."[5] In one of the opinions represent-

[4] 195 App. Div. 773, 782, 790.

[5] Five judges, constituting the majority of the court, agreed in this view. 234 N. Y. 132, 138. And the two judges, constituting the minority—who dissented solely on a question as to the construction of the statute which is not here involved—said in reference to the

ing the views of a majority of the court,[6] it was said: "It will be seen . . . that this defendant through the manifesto . . . advocated the destruction of the state and the establishment of the dictatorship of the proletariat. . . . To advocate . . . the commission of this conspiracy or action by mass strike whereby government is crippled, the administration of justice paralyzed, and the health, morals and welfare of a community endangered, and this for the purpose of bringing about a revolution in the state, is to advocate the overthrow of organized government by unlawful means." In the other[7] it was said: "As we read this manifesto . . . we feel entirely clear that the jury were justified in rejecting the view that it was a mere academic and harmless discussion of the advantages of communism and advanced socialism" and "in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes. It is true that there is no advocacy in specific terms of the use of . . . force or violence. There was no need to be. Some things are so commonly incident to others that they do not need to be mentioned when the underlying purpose is described."

And both the Appellate Division and the Court of Appeals held the statute constitutional.

The specification of the errors relied on relates solely to the specific rulings of the trial court in the matters hereinbefore set out.[8] The correctness of the verdict is not

Manifesto: "Revolution for the purpose of overthrowing the present form and the established political system of the United States government by direct means rather than by constitutional means is therein clearly advocated and defended . . ." p. 154.

[6] Pages 141, 142.

[7] Pages 149, 150.

[8] Exceptions to all of these rulings had been duly taken.

questioned, as the case was submitted to the jury. The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable "in circumstances involving likelihood of substantive evil," the statute contravenes the due process clause of the Fourteenth Amendment. The argument in support of this contention rests primarily upon the following propositions: 1st, That the "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press; and 2nd, That while liberty of expression "is not absolute," it may be restrained "only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely," and as the statute "takes no account of circumstances," it unduly restrains this liberty and is therefore unconstitutional.

The precise question presented, and the only question which we can consider under this writ of error, then is, 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.

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. It was so construed and applied by the trial judge, who specifically charged the jury that: "A mere grouping of historical events and a prophetic deduction from them would neither constitute advocacy, advice or teaching of a doctrine for the overthrow of government by force, violence or unlawful means. [And] if it were a mere essay on the subject, as suggested by counsel, based upon deductions from alleged historical events, with no teaching, advice or advocacy of action, it would not constitute a violation of the statute. . . ."

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass in-

dustrial revolts usurping the functions of municipal government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 543, that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question.[9]

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. 2 Story on the Constitution, 5th ed., § 1580, p. 634; *Robertson* v. *Baldwin*, 165 U. S. 275, 281; *Patterson* v. *Colorado*, 205 U. S. 454, 462; *Fox* v. *Washington*, 236

[9] Compare *Patterson* v. *Colorado*, 205 U. S. 454, 462; *Twining* v. *New Jersey*, 211 U. S. 78, 108; *Coppage* v. *Kansas*, 236 U. S. 1, 17; *Fox* v. *Washington*, 236 U. S. 273, 276; *Schaefer* v. *United States*, 251 U. S. 466, 474; *Gilbert* v. *Minnesota*, 254 U. S. 325, 338; *Meyer* v. *Nebraska*, 262 U. S. 390, 399; 2 Story On the Constitution, 5th Ed., § 1950, p. 698.

U. S. 273, 276; *Schenck* v. *United States*, 249 U. S. 47, 52; *Frohwerk* v. *United States*, 249 U. S. 204, 206; *Debs* v. *United States*, 249 U. S. 211, 213; *Schaefer* v. *United States*, 251 U. S. 466, 474; *Gilbert* v. *Minnesota*, 254 U. S. 325, 332; *Warren* v. *United States*, (C. C. A.) 183 Fed. 718, 721. Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. *Robertson* v. *Baldwin*, *supra*, p. 281; *Patterson* v. *Colorado*, *supra*, p. 462; *Fox* v. *Washington*, *supra*, p. 277; *Gilbert* v. *Minnesota*, *supra*, p. 339; *People* v. *Most*, 171 N. Y. 423, 431; *State* v. *Holm*, 139 Minn. 267, 275; *State* v. *Hennessy*, 114 Wash. 351, 359; *State* v. *Boyd*, 86 N. J. L. 75, 79; *State* v. *McKee*, 73 Conn. 18, 27. Thus it was held by this Court in the *Fox Case*, that a State may punish publications advocating and encouraging a breach of its criminal laws; and, in the *Gilbert Case*, that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies.

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press, said Story (*supra*) does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *State* v.

Holm, supra, p. 275. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. *People* v. *Most, supra,* pp. 431, 432. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. *People* v. *Lloyd,* 304 Ill. 23, 34. See also, *State* v. *Tachin,* 92 N. J. L. 269, 274; and *People* v. *Steelik,* 187 Cal. 361, 375. In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. *Turner* v. *Williams,* 194 U. S. 279, 294. In *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 419, it was said: "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler* v. *Kansas,* 123 U. S. 623, 661. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest." *Great Northern Ry.* v. *Clara City,* 246 U. S. 434, 439. That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. In *People* v. *Lloyd, supra,* p. 35, it was aptly said: "Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there

would be neither prosecuting officers nor courts for the enforcement of the law."

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. This principle is illustrated in *Fox* v. *Washington, supra,* p. 277; *Abrams* v. *United States,* 250 U. S. 616, 624; *Schaefer* v. *United States, supra,* pp. 479, 480; *Pierce* v. *United States,* 252 U. S. 239, 250, 251; [10] and *Gilbert* v. *Minnesota, supra,* p. 333. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language

[10] This reference is to so much of the decision as relates to the conviction under the third count. In considering the effect of the decisions under the Espionage Act of 1917 and the amendment of 1918, the distinction must be kept in mind between indictments under those provisions which specifically punish certain utterances, and those which merely punish specified acts in general terms, without specific reference to the use of language.

used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. *Schenck* v. *United States, supra,* p. 51; *Debs* v. *United States, supra,* pp. 215, 216. And the general statement in the *Schenck Case* (p. 52) that the "question in every case is whether the words 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,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should

have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article may be an encouragement or endeavor to persuade to murder, although not addressed to any person in particular. *Queen* v. *Most*, L. R., 7 Q. B. D. 244.

We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant's brief. These are so unlike the present statute, that we think the decisions under them cast no helpful light upon the questions here.

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE HOLMES, dissenting.

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, 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, 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, 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.

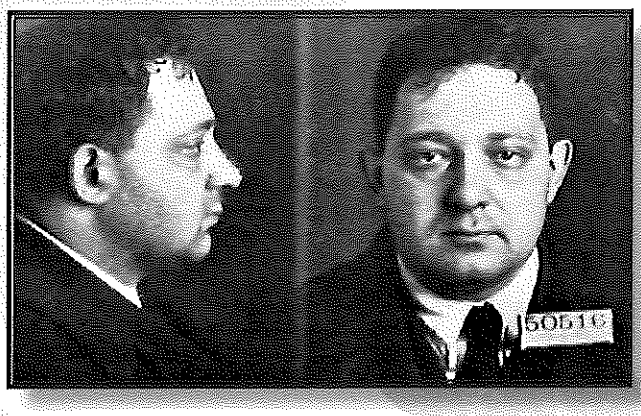
If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there 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.

ELOQUENCE, REASON AND NECESSITY

GITLOW AND NEW YORK AFTER 9/11

DANIEL J. KORNSTEIN

Famous cases can have checkered careers. Such cases may represent the felt necessities of their times, but those necessities may change as times change. A good example, especially for New York after 9/11, is *Gitlow v. New York*.[1]



Benjamin Gitlow
Revolutionary Radicalism: Its History, Purpose and Tactics, Part I, Volume I
(Albany: J.B. Lyon Company, 1920), p. 680

Decided by the U.S. Supreme Court in 1925, *Gitlow* is one of the Red Scare free speech cases. In 1920, amid widespread public hysteria, a state court jury in Manhattan convicted 29-year-old Benjamin Gitlow of advocating criminal anarchy because he helped publish a pamphlet in favor of "revolutionary Socialism" and the ultimate overthrow of the existing government by class struggle, strikes and other "revolutionary" action. Although the pamphlet had no practical effect or consequence, Gitlow's conviction was affirmed all the way up to the Supreme Court. Free speech paid the price.

Since then, however, *Gitlow* has been largely discredited. The Supreme Court has eroded it to the vanishing point. By 1969, in *Brandenburg v. Ohio*, the Court seemed to repudiate *Gitlow* in all but name by holding that advocacy could not be constitutionally prohibited unless it was "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action."[2] *Gitlow* might thus be regarded as an historical curiosity, were it not for current events. Our anxious post-9/11 world, beset as it is by the new face of terrorism, has much to learn from *Gitlow*, if only as a cautionary tale.

The High Court's decision in *Gitlow* matters for several reasons. *Gitlow* was the first case to "assume" that the First Amendment is "protected by the due process clause of the Fourteenth Amendment from impairment by the States." That "assumption" started the selective application of the Bill of Rights to the states via the process of incorporation.

Gitlow is also important because it provoked our modern approach to free speech. The Supreme Court in *Gitlow* relied on the "bad tendency" test, which made speakers and writers liable for the reasonable, probable outcome of what they said, regardless of how likely it is that their words would actually cause an overt criminal act. Once the legislature determined that certain speech—advocacy of anarchy, for example—was likely to cause harm, the inquiry was over. The idea behind the "bad tendency" test was to "suppress the threatened danger in its incipiency."[3] This test marked a low point in free speech jurisprudence; *Gitlow* set a bad precedent. But a bad precedent can be a good catalyst for change, and *Gitlow* precipitated a long-term reaction, really a transformation in First Amendment law, favoring the more tolerant positions taken by the dissenting justices.

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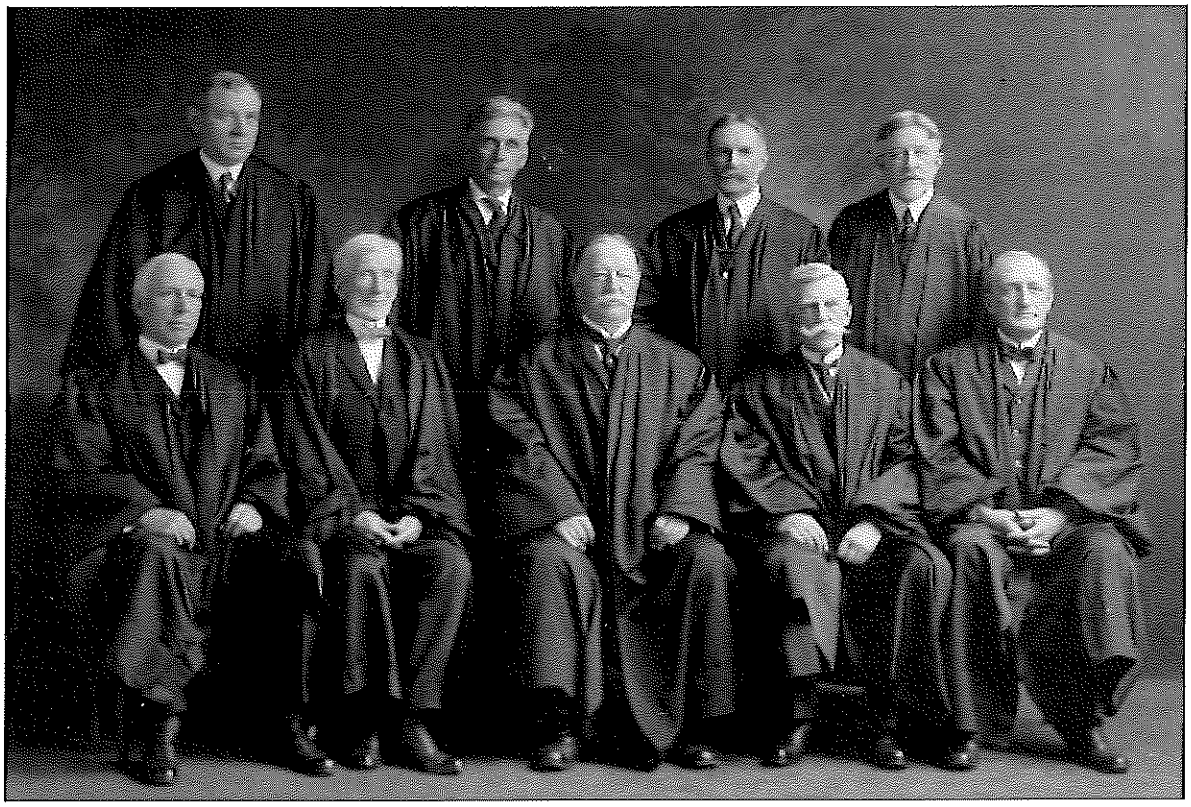


The Taft Court, 1923-1925
Left to Right Standing: Pierce Butler, Louis D. Brandeis, George Sutherland, Edward T. Sanford
Sitting: Willis Van Devanter, Joseph McKenna, William Howard Taft, Oliver W. Holmes, Jr., James C. McReynolds
Library of Congress, Prints & Photographs Division, photograph by Harris & Ewing, LC-DIG-hec-20429

Indeed, some of us remember *Gitlow* not so much for what the majority did, but for what one dissenting justice said; the brief, impassioned dissent of an elderly Civil War veteran named Holmes, joined in by Brandeis, still rings in our mind's ear more than 40 years after first reading it. Holmes disagreed with the majority's description of Gitlow's left-wing polemics as a "direct incitement." "Every idea is an incitement," responded Holmes. "It offers itself for belief," he went on, "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." Invoking his fledgling "clear and present danger" test, Holmes found "no present danger of an attempt to overthrow the government by force."[4]

Eloquence may also set fire to a law student's (and a lawyer's) enthusiasm, and ignite intellectual passion. Holmes's inspiring dissent is part of what made us want to study and then spend our lives practicing law.

Much more than a case name forever yokes together *Gitlow* and New York. The case traces its origins to an anarchist's assassination of President McKinley in Buffalo in September 1901. The New York authorities felt frustrated by their inability to prosecute those whom they saw as the real perpetrators of the McKinley murder: anarchist orator Emma Goldman (at least one of whose lectures the assassin

The Sun.

IT SHINES FOR ALL

NEW YORK, TUESDAY, JUNE 3, 1919.

PRICE TWO CENTS.

BOMBS SENT TO OFFICIALS IN MANY CITIES; ONE EXPLODES AT A. MITCHELL PALMER'S HOME; ATTEMPT MADE TO KILL JUDGE NOTT IN N. Y.

Explosions Occur Also in Boston, Philadelphia, Pittsburg, Cleveland and Paterson—Man Killed by Bomb Set Off in Judge Nott's House.

Left: Home of Mitchell Palmer following the bombing, Prints & Photographs Division, NYWT&S Collection, LC-USZ62-136235

Above: The Sun. (New York, N.Y.), 03 Jun. 1919. Chronicling America: Historic American Newspapers. Library of Congress.

had attended) and her like. Quickly reacting to fill this perceived gap, the New York Legislature in 1902 made it a felony to advocate the "doctrine that organized government must be overthrown by force or violence."

Both before and after the 1902 law was enacted, there was frequent labor unrest and other social protests punctuated by violence. Opposition to World War I and the draft produced more angry demonstrations. Then, in 1917, came the Russian Revolution, encouraging leftists in America to be even more aggressive.

The turning point was 1919. In that year, turmoil spread as bombs exploded around the country at the homes of several judges and other prominent figures, including U.S. Attorney General Mitchell Palmer. This growing wave of violence, coming as it did on the heels of the Russian Revolution, frightened many people and became known as the Red Scare. In late 1919, in so-called "Palmer Raids" named for the Attorney General, federal and state authorities entered homes and meeting places in 15 cities in search of Communists and anarchists. The national atmosphere filled with fear.

New York breathed this same highly charged air. In 1919 the New York Legislature formed a Joint Committee to Investigate Seditious Activities. The Committee obtained search warrants and, months before the Palmer Raids, suddenly invaded several left-wing offices and organizations in New York. This was the frenzied, tense climate in New York and America when Ben Gitlow walked on stage.

Gitlow, one of ten Socialists elected to the New York State Assembly in 1917, was arrested in November 1919 at a New York celebration of the second anniversary of the Russian Revolution. He was apprehended, along with hundreds of others, in raids by police on 73 "Red-Centers" in New York. Gitlow's crime: violating the state's 1902 criminal anarchy law by publishing a polemical tract called the "Left Wing Manifesto." It was the first time the criminal anarchy statute had ever been invoked.

New York Tribune

Hundreds Arrested Here in 71 New Raids on Reds; Court Orders Coal Strike Off, Calls It "Rebellion"; Senate, 50-35, Reserves Right to Quit World League

Union Given 72 Hours to Revoke Call

State Police Aid in Hunt For Plotters

Parley of Leaders Of Workers Called

Ban on Strikes Is Rejected in House Rail Bill

Above: New-York Tribune. (New York, N.Y.), 09 Nov. 1919. Chronicling America: Historic American Newspapers. Library of Congress.

Left: IWW headquarters, New York City, after the raid of November 15, 1919. Joseph A. Labadie Collection, University of Michigan.

Gitlow's Manifesto was a fairly typical example of Communist rhetoric. In overheated, hyperbolic style, the Manifesto reviewed the rise of Socialism, condemned "moderate Socialism" for relying on democratic means, and advocated a "Communist Revolution" by a militant Socialism based on antagonism between classes. It referred favorably to mobilizing the "power of the proletariat in action" through mass industrial revolts, political strikes, and "revolutionary mass action," with the aim of destroying the parliamentary state and replacing it with Communist Socialism and a dictatorship of the proletariat.

With the public jittery to begin with, the Manifesto's language only aggravated antagonism toward Gitlow, as he learned almost immediately. A week after his arrest, Gitlow was hauled into Magistrate's Court for a hearing to determine if grand jury action was warranted. William McAdoo, the chief magistrate and a former New York City police commissioner, not only ruled that the grand jury should act, but wrote a vitriolic opinion excoriating Gitlow and his colleagues as "mad and cruel men," and "positively dangerous men."

McAdoo set the tone for the rest of the case by interpreting the Manifesto as implicitly calling for force and violence as part of a "militant uprising of the red revolutionists." "Are we to lose ourselves," asked McAdoo, "in legal subtleties and nice disquisitions and historical references, and bury our heads in clouds of rhetoric about liberty of speech?"[5]

At his trial in January and February 1920, Gitlow was represented by Clarence Darrow. Parachuting in at the last minute, Darrow met Gitlow for the first time only the night before the trial began.

For a trial strategy, Darrow chose a minimalist presentation that resembled the successful approach used in the most famous New York free speech trial. In 1735, when John Peter Zenger was tried for seditious libel, his lawyer Andrew Hamilton admitted publication, called no witnesses for the defense, yet argued that Zenger committed no crime. Darrow closely followed this model, presenting essentially no defense—giving no opening statement, call-

The Left Wing Manifesto

Top: The First Page of Gitlow's Manifesto. The Revolutionary Age (New York, N.Y.), 05 Jul. 1919.

Right: William McAdoo, 1853-1930, Library of Congress, Prints & Photographs Division, LC-USZ62-54248

ing no witnesses on Gitlow's behalf, and (to avoid cross-examination) persuading Gitlow not to take the stand. Darrow even stipulated that Gitlow was responsible for publishing and circulating the Manifesto.

The state, by contrast, sought to harness the public's fear and hostility toward Gitlow and what he stood for, hostility that spilled beyond the courtroom; three weeks earlier, the New York State Assembly, reflecting the public's mood, had expelled all the Socialists elected to it.[6] The prosecutor, Alexander Rorke, read Gitlow's Manifesto to the jury. Darrow told the trial judge that the Manifesto would probably put the jury to sleep; Rorke said it would make their hair stand on end. Rorke thundered that Gitlow "would make America a red ruby in the red treasure chest of the Red Terror."

Although Gitlow did not take the stand, he made an unusual request of the judge: to personally address the jury. The judge, Bartow Weeks, granted the request, presumably because he thought Gitlow would only make matters worse for himself. Gitlow mounted his courtroom soapbox and proudly delivered a spirited, unrepentant, unremorseful defense of his views. "I am a revolutionist," he declared. "No jails will change my opinion." "[T]o bring about socialism, capitalist governments must be overthrown. . . . I ask no clemency."

He got none. The minimalist gambit may have worked for Zenger, but not for Gitlow; even the skillful Darrow could not overcome the hostility that radiated from the public.

In his closing argument before the verdict, Darrow described Gitlow as a harmless "dreamer" whose ideas posed no threat, were protected by the First Amendment, and stood in the American tradition. Darrow asked the jury to separate "sense" from

Clarence Darrow
Library of Congress, Prints & Photographs Division, photograph by Harris & Ewing, LC-DIG-hec-06038

"nonsense" in the Manifesto. There was "not a word" in the Manifesto, argued Darrow, "inciting anyone to violence, not a word inciting anyone to unlawful activity." (Darrow knew his pitch would not work and, done with the case, did not even wait around for the verdict.)

The jury convicted Gitlow in less than three hours, and the judge sentenced him to the maximum five-to-ten years at hard labor.

From Sing Sing, Gitlow hired a recent former Governor of New York, Charles Whitman, to write a brief for bail pending appeal. That effort failed.

Gitlow also had no luck appealing his conviction. In 1921, the Appellate Division affirmed unanimously. After quoting extensively from the Manifesto, Judge Frank Laughlin declared it was "not a discussion of ideas and theories," but advocacy for doctrines that "are not harmless. They are a menace." To Laughlin and many others, Gitlow threatened their security and challenged their values.

Laughlin's opinion illustrates the general nervousness and clouded judgment surrounding the *Gitlow* case. Americans, Laughlin warned, should "be on their guard" against a movement that "may undermine and endanger our cherished institutions of liberty and equality." The danger could be averted, stated Laughlin, if "immigration is properly supervised and restricted," so that the "propaganda of class prejudice and hatred — by a very small minority, mostly of foreign birth," will not "take root in America." These "pernicious doctrines," Laughlin continued, should be rejected by "God-fearing, liberty-loving Americans."[7]

Gitlow fared no better in the New York Court of Appeals. Five of the seven judges voted to affirm. Judge Frederick Crane found the criminal anarchy law constitutional because freedom of speech does "not protect the violation of liberty or permit attempts to destroy that freedom."[8] Crane, it was said later, "never lingered in legal technicalities," but supposedly allowed "common sense, always with respect for the moral and social implications, to control the determination and application of the law."[9]

In a separate opinion, Chief Judge Frank Hiscock, known for his "doctrinaire legal philosophy,"[10]

Sing Sing Prison
Library of Congress, Prints & Photographs Division LC-DIG-ggbain-31293

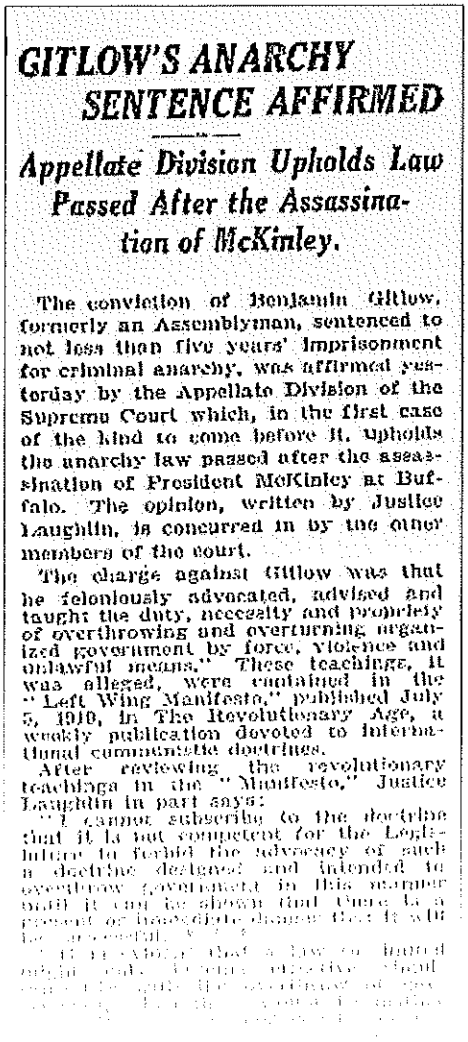
found the jury justified in rejecting the view that the Manifesto "was a mere academic and harmless discussion of the advantages of communism and advanced socialism and a mere Utopian portrayal of the blessings which would flow from the establishment of those conditions." Hiscock regarded it as "advocacy of action," even though he found "no advocacy in specific terms" of the use of force or violence. Hiscock also swept aside any constitutional objection. "We shall spend no time in discussing the proposition urged upon us that this statute is unconstitutional" as a violation of the First Amendment.[11] Hiscock's judicial opinions were said to "reflect the attitudes of the time."[12]

The most curious opinion was the dissent. Written by Judge Cuthbert Pound, with whom Benjamin Cardozo silently joined, the dissent argued for reversal, not on First Amendment grounds, but on the ground that Gitlow did not violate the criminal anarchy law because he was advocating revolution, not anarchy. According to the dissent, advocacy of revolution—change of government by unlawful means to substitute another form of government (*e.g.*, dictatorship of the proletariat)—is not advocacy of anarchy, which is, on the contrary, the total absence of government. Citing Tolstoy, Kropotkin and Marx for support, the dissent developed this line of argument, ending on a high note: "Although the defendant may be the worst of men; although Left Wing socialism is a menace to organized government; the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."[13]

Following the adverse ruling by the Court of Appeals, Gitlow, now represented by lawyers from the American Civil Liberties Union, pursued his appeal to the Supreme Court, where he lost seven to two. After that decision, Governor Al Smith pardoned Gitlow.

The common thread running through all stages of the *Gitlow* case, from Magistrate's Court up to the Supreme Court, is evergreen. That timeless theme is deciding when, if ever, it is appropriate to censor or punish subversive speech. *Gitlow* gave one answer, an answer that met with approval at the time but has since been rejected. However, the impulse behind *Gitlow's* "bad tendency" test—public fear and anxiety—waxes and wanes.

Parallels exist between our own political climate and the political climate that surrounded *Gitlow*. To paraphrase the opening of another manifesto familiar to *Gitlow*, today a new specter is haunting New York and America: the specter of terrorism. That specter may confront the ghost of *Gitlow*, if it has not already done so. Ever since the terror attacks of 9/11, New York and the rest of the country have felt an extreme but understandable anxiety and fear, with predictable results. From the USA PATRIOT Act to prosecutions of Muslim clerics who advocate jihad, from indefinite detentions to warrantless searches, from denial of habeas corpus to enhanced interrogation techniques, today's government counterterrorism policies resemble what happened around the time Ben Gitlow was arrested.



GITLOW'S ANARCHY SENTENCE AFFIRMED

Appellate Division Upholds Law Passed After the Assassination of McKinley.

The conviction of Benjamin Gitlow, formerly an Assemblyman, sentenced to not less than five years' imprisonment for criminal anarchy, was affirmed yesterday by the Appellate Division of the Supreme Court which, in the first case of the kind to come before it, upholds the anarchy law passed after the assassination of President McKinley at Buffalo. The opinion, written by Justice Laughlin, is concurred in by the other members of the court.

The charge against Gitlow was that he feloniously advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means." These teachings, it was alleged, were contained in the "Left Wing Manifesto," published July 5, 1919, in The Revolutionary Age, a weekly publication devoted to international communistic doctrines.

After reviewing the revolutionary teachings in the "Manifesto," Justice Laughlin in part says:

"I cannot subscribe to the doctrine that it is not competent for the Legislature to forbid the advocacy of such a doctrine designed and intended to overthrow government in this manner until it can be shown that there is a present or immediate danger that it will be successful. [illegible]

The New York Times Published April 2, 1921.
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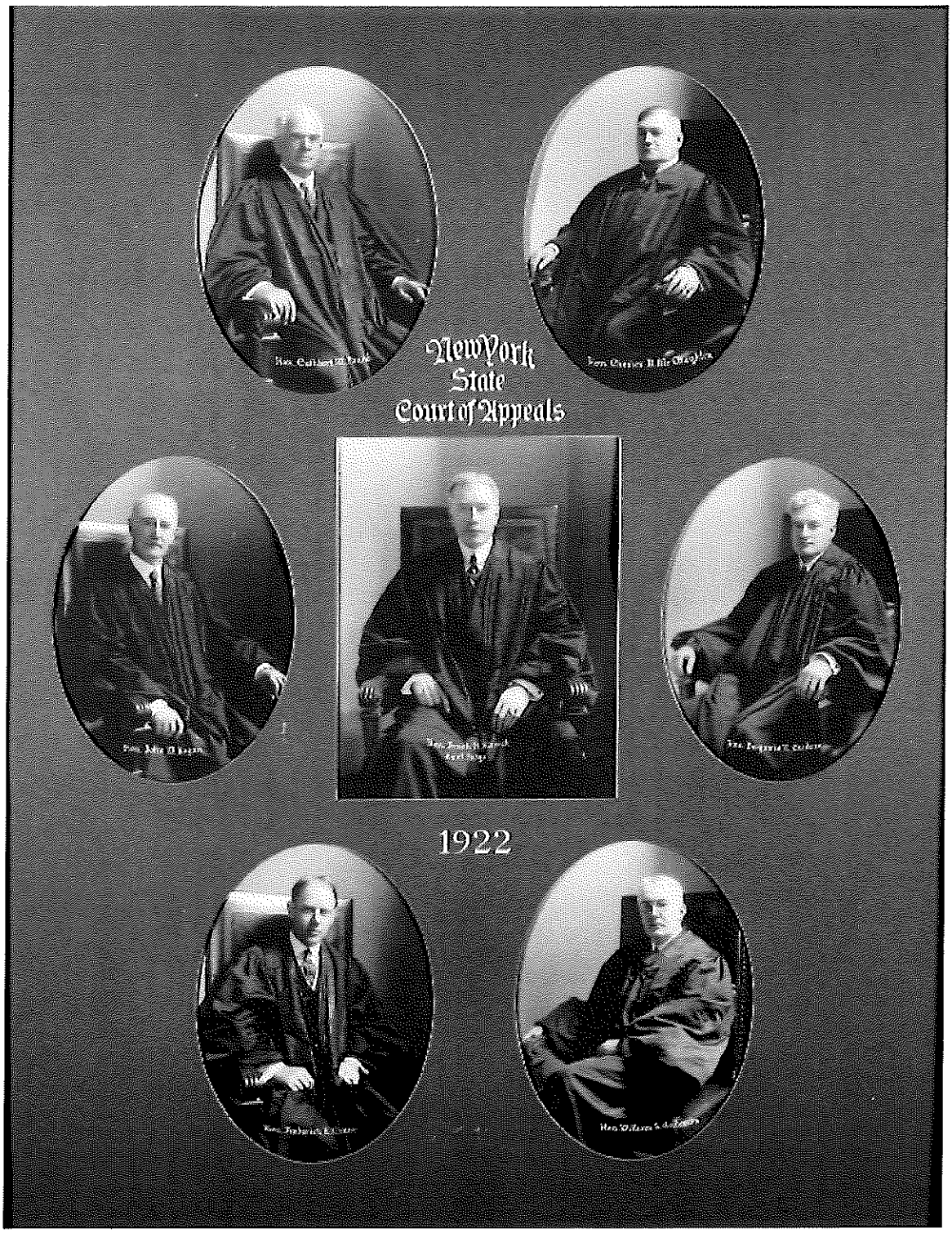


1922 Court of Appeals Bench, Clockwise from Top Left: Cuthbert W. Pound, Chester B. McLaughlin, Benjamin N. Cardozo, William S. Andrews, Frederick E. Crane, John W. Hogan. Center: Chief Judge Frank H. Hiscock. New York Court of Appeals Collection.

Gitlow is part of a pattern we see over and over again. When anger, anxiety, fear, and frustration mix with a genuine feeling of being threatened—and when they become widespread and overwhelm people's hearts and minds—there is a strong reaction, often an overreaction.

Fear begets repression. During the Civil War, Lincoln suspended habeas corpus. After the attack on Pearl Harbor, our government interned many thousands of innocent Japanese-Americans. The insecurity bred in America by the Russian Revolution abroad and by violence at home produced here an emotional response of repressive statutes, prosecutions and court decisions. The post-9/11 landscape of threat and deterrence is similar. Then it was the Red Scare; today, after 9/11, it is militant Islam.

Although a few cases initially followed *Gitlow*, favoring safety over civil liberties, by 1950 the weight of authority went the other way, giving speech more protection. But the path has not been straight. Soon after World War II, a second Red Scare frightened America. Federal statutes modeled on New York's criminal anarchy law became the basis for prosecuting American Communists for advocating their doctrines. In those cases, judges who worried about an international Communist conspiracy wrestled with many of the same issues posed by *Gitlow*.

In 1951, *Gitlow* figured in *Dennis v. United States*,[14] when the Supreme Court considered the prosecutions of the leaders of the American Communist Party. Some justices in *Dennis* indicated that time had undermined *Gitlow* and the clear and present danger test had become the law. But the same justices then distinguished *Gitlow* on its facts and affirmed the convictions in *Dennis*.

A cynic or a skeptic might say that *Dennis* paid lip service to the clear and present danger test, but then came to the same result as in *Gitlow*. One judge's clear and present danger is another's vague and far-in-the-future unlikely hazard. The end result may be the same, but at least *Dennis* requires analysis of facts and circumstances, and is not the rubber stamp of the legislature it would be under *Gitlow*.

The *Dennis* approach influenced the final ruling from the New York Court of Appeals on the *Gitlow* criminal anarchy law. In 1967, that statute again came before the New York Court of Appeals in a case arising from the 1964 Harlem riots. In that case, *People v. Epton*, Judge John Scileppi wrote for the Court of Appeals that "the Supreme Court's view of the First Amendment's protection of speech has been altered drastically since *Gitlow* was decided." All the judges on the Court of Appeals agreed that the Holmes-Brandeis dissent represents "today's law." The Court in *Epton* stated that the statute as interpreted by *Gitlow* was unconstitutional but, citing *Dennis*, ruled it would be constitutional if the government could demonstrate an intent to bring about violent acts and that there was a "clear and present danger" based on circumstances.[15] *Epton* recognized that circumstances change. The Court there said it had interpreted the same statute in 1922 "in light of the prevailing conditions of that time and in accordance with the current understanding of First Amendment freedom." The passage of time has led to a "clearer understanding of the scope of constitutional protection of speech."[16] These statements mean that different "prevailing conditions" and a different "understanding of First Amendment freedom" could bring about a different result.

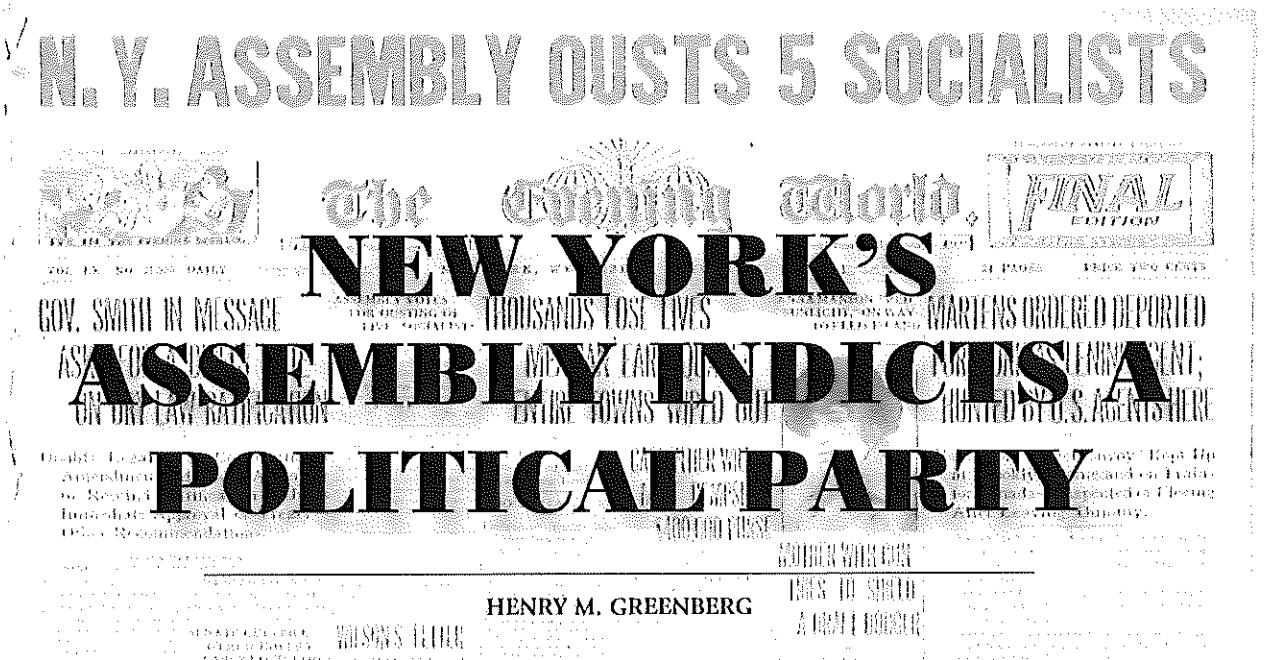
Thus old Holmes eventually had a double victory in *Gitlow*. Not only has his admirable *Gitlow* dissent become the law (and was even strengthened by *Brandenburg*), but his early reference to public policy considerations — the felt necessities of the times[17] — has won the day, and applies to our own day, when we are more aware of the effect of pressures, passions and fears on the law.

If law responds to the felt necessities of the times, as Holmes famously said, the question always is, which necessity is felt at the moment to be more pressing, civil liberties or the community's safety? One hopes they can be reconciled, so that the answer is civil liberties without sacrificing safety and security. Sharing this hope, President Obama in his first inaugural address rejected "as false the choice between our safety and our ideals." *Gitlow* was such a false choice.

On July 19, 1965, two years before the *Epton* decision, the New York Legislature repealed the criminal anarchy law. Ben Gitlow died a day earlier.

ENDNOTES

1. *People v. Gitlow*, 268 U.S. 652 (1925).
2. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
3. *Gitlow*, 268 U.S. at 669.
4. *Id.* at 672 (Holmes, J., dissenting).
5. *People v. Gitlow*, slip op. at 5 (N.Y.C. Mag. Ct. Nov. 14, 1919), *available at* http://darrow.law.umn.edu/documents/NY_versus_Gitlow_Larkin_1919_McAdoo_order_Optimized_cropped.pdf.
6. *See* Henry M. Greenberg, *New York's Assembly Indicts a Political Party*, 8 Jud. Notice 28, 34 (2012).
7. *People v. Gitlow*, 195 A.D. 773, 791–92 (1st Dep't 1921).
8. *People v. Gitlow*, 234 N.Y. 132, 137 (1922).
9. In Memoriam, 297 N.Y. ix, x.
10. Albert M. Rosenblatt & Timothy M. Kerr, *Frank Harris Hiscock*, in *The Judges of the New York Court of Appeals: A Biographical History*, 366 (Albert M. Rosenblatt ed., 2007).
11. *Gitlow*, 234 N.Y. at 145–54.
12. Rosenblatt & Kerr, *supra* note 11, at 366.
13. *Gitlow*, 234 N.Y. at 154-58 (Pound, J., dissenting).
14. 341 U.S. 494 (1951).
15. *People v. Epton*, 19 N.Y.2d 496, 504–05 (1967).
16. *Id.* at 505.
17. Oliver Wendell Holmes, Jr., *The Common Law* 5 (Mark DeWolfe Howe ed., Little Brown 1963) (1881).



NEW YORK'S ASSEMBLY INDICTS A POLITICAL PARTY

HENRY M. GREENBERG

Wednesday, January 7, 1920 was the opening day of New York's Legislature.[1] That morning the public woke—as it so often had the past year—to front-page newspaper stories warning of a radical conspiracy threatening the state and nation.[2] The *New York Tribune* reported that there were 20,000 aliens in New York State who were "openly organized for the overthrow of the government."[3] In a similar vein, the *New York Times* covered a speech delivered the night before at the Waldorf Astoria Hotel in New York City by U.S. Senator Warren G. Harding of Ohio. A recently announced candidate for the Republican nomination for President, Harding lashed out at American-born radicals, calling them the "worst disloyalists and effective conspirators masking as citizens." "[T]here isn't room anywhere in these United States," he said, "for anyone who preaches the destruction of the Government."[4]

In the wake of the media maelstrom, the members of the Legislature's Lower House, the Assembly, gathered at the State Capitol in Albany for the start of the legislative session. The previous November the voters elected to the Assembly 110 Republicans, 35 Democrats, and five Socialists from New York City Districts heavily populated by Jewish and Russian immigrants.[5] All but three of the 150 members were present for the opening-day ceremonies, along with hundreds of family-members, friends and spectators.[6]

A festive mood filled the Assembly's imposing Moorish-Gothic chamber, with its fifty-six-foot-high ceiling.[7] Lawmakers crossed aisles to socialize with one another. The leader of the Democrats, Charles D. Donohue, even tried to make common cause with the Socialists: August Claessens, Samuel A. DeWitt, Samuel Orr, Charles Solomon and Louis Waldman. "You have five," Donohue told them, "we [Democrats] have thirty-five, so we will have forty to fight that [Republican] crowd."[8]

The Clerk of the Assembly called for order at 12:00 P.M. After the members took their oaths of office, the Assembly turned to the election of its highest official, the Speaker, customarily chosen from the ranks of the majority party.[9] The Republicans nominated a manufacturer from Oswego County, Thaddeus C. Sweet;[10] the Democrats nominated Donahue; and the Socialists nominated the senior member of its delegation, August Claessens, beginning his third term in the Assembly. The roll was called and the three men each received their respective party's vote. As a result, the Republicans, who enjoyed a huge majority, elected Sweet, giving him all 110 of their votes.[11] Entering his seventh term as Speaker, Sweet was then the longest serving presiding officer in Assembly history.[12]

Sweet presided from a raised rostrum at the front of the members' desks arrayed in a two-thirds circle. Immaculately dressed, with white hair, mustache and

Background photo: The Evening World (New York), January 7, 1920, at 1. Library of Congress, Chronicling America

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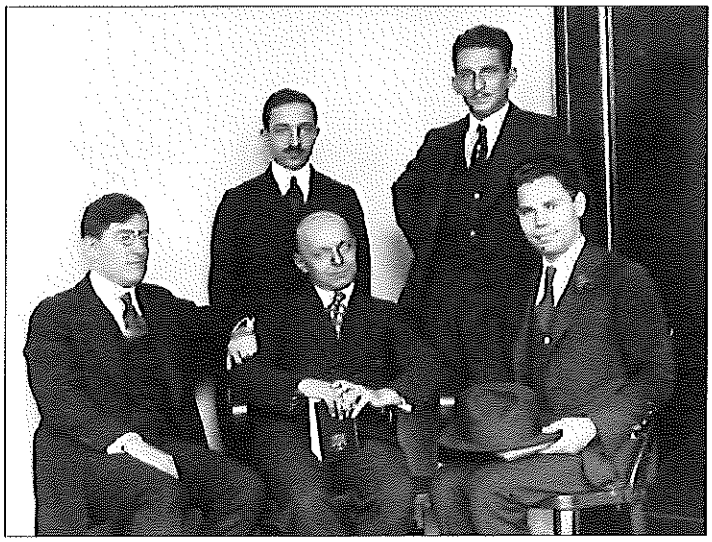


The Five Socialist Assemblymen
Left to right, standing: Samuel Orr, Samuel DeWitt
sitting: Charles Solomon, August Claessens, Louis Waldman
Charles Solomon Photographs,
Tamiment Library, New York University

glasses, the 48-year-old Sweet cut a prim figure. Upon being elected, he rose to deliver a short speech, in which he expressed gratitude for his election (which was a foregone conclusion). He also reviewed his priorities, the first of which was to promote legislation to "meet the insidious Bolsheviki"—the extreme faction of Socialists that in 1917 seized power in Russia and abolished all other political parties and factions. "I trust and hope," he concluded, that the House would discharge its duties "in a truly patriotic manner, being guided only by the desire to do the right from the standpoint of principle, forgetting self in the interest of all."[13]

In an unusual move for the first day of the legislative session, Sweet descended from the rostrum and retired to his private office.[14] Louis N. Martin, a Republican from Oneida County, took Sweet's place on the rostrum. Under Martin's direction, the Assembly continued to organize itself, with the Socialist members participating in each decision, including the selection of the Clerk, the Sergeant-at-Arms, and other officers.[15]

The Assembly heard a reading of Governor Alfred E. Smith's annual message to the Legislature.[16] In sharp contrast to Sweet's remarks, Smith tried to tamp down reactionary sentiment. He understood that during the recently-concluded First World War, in the interest of national unity and common defense, the nation took the "Constitution, wrapped it up and laid it on the shelf and left it there until it was over."[17] But "[n]ow that the war was over" the State needed to "return to a normal state of mind, . . . keep [its] balance, and an even keel." He counseled "calm consideration and cool judgment" in responding to radicalism. In so doing, he took a swipe at the State's publicity-generating legislative committee for the investigation of sedition—the so-called Lusk Committee, headed by Senator Clayton R. Lusk from Cortland County—noting that Bolsheviks were "at present receiving an unnecessary amount of advertising on which they thrive."

Smith declared his "faith in the truth of the American ideal triumphantly to resist Bolshevism . . ." He argued for the protection of the "fundamental" rights of "free speech and assemblage," without which "government by enlightened will of the majority is not possible." Repressive action, he said, would only drive discontented members of society towards Bolshevism. Instead, he offered the most progressive, far-reaching series of reform initiatives ever placed before the Legislature. His proposals included a minimum wage; an eight-hour work day for women; maternity insurance for expectant mothers; the appointment of State physicians and nurses in rural communities; State control and supervision of the milk supply; and the municipal operation of public utilities.[18]

To some, Smith's measures smacked of Socialism. Oswald Garrison Villard, the editor of the influential liberal weekly *The Nation*, quipped that if a Socialist "had offered a platform like this, the great New York dailies would have rent him limb from limb for his dangerous radicalism."[19] Just the year before, in fact, Sweet trashed Smith's legislative program as

"Bolshevik and socialistic."[20] But Smith was a brilliant political tactician. And he shrewdly packaged his new program as a prescription to defeat radicalism by making the discontented appreciate American ideals and feel at home.

Nevertheless, for one of the few times in Smith's career, his keen political ear failed him. New York, along with the rest of the nation, was in the throes of the Red Scare of 1919-1920.[21] A "monstrous social delirium"[22] held sway over millions who imagined the scourge of the Bolshevik Revolution in Russia lurking on domestic soil. The public was overrun by a "reign of terror," columnist Walter Lippmann observed, "in which honest thought is impossible, in which moderation is discountenanced, in which panic supplants reason."[23]

From coast to coast, political opportunists exploited the public's fear of the Red Menace. Some became overnight sensations. In 1919, Seattle Mayor Ole Hanson won fame and fortune (through a national lecture tour) by denouncing as a Bolshevik plot a general strike in which more than 60,000 workers participated.[24] Likewise, U.S. Attorney General A. Mitchell Palmer, who hoped to capture the Democratic Presidential nomination in 1920, raised his national profile by launching what came to be known as "Palmer Raids"—a series of mass arrests and deportations of immigrants suspected of radicalism.[25]

Thaddeus Sweet yearned for similar acclaim. It was an open secret he harbored gubernatorial ambitions.[26] Despite his long tenure as Speaker, however, he was largely unknown outside of his political base in Central New York. He needed a high-profile issue to catapult himself into the governor's mansion.[27]

And so, two and a half hours into the Assembly's proceedings, Sweet suddenly reappeared in the chamber. He climbed the rostrum and remained standing. At his elbow was Attorney General Charles D. Newton, who served as the Lusk Committee's Counsel. With an air of unquestioned authority, Sweet solemnly called on the Sergeant-at-Arms to present before him the five Socialist Assemblymen.[28]

A hush fell over the Assembly chamber. The carnival-like atmosphere of the opening ceremony came to a sudden halt. One by one, the Socialists were paraded down into the chamber's "well"—a depressed, wide circular space about six feet in front of the Speaker's rostrum. There, the five men were lined-up before Sweet.[29] The Sergeant-at-Arms, standing guard, announced: "Mr. Speaker, in accordance with your direction, I have presented the gentlemen that you have directed me to present."[30]

Noticeably tense, Sweet cleared his throat and theatrically pronounced: "You, whom I have summoned before the Bar of this House, are seeking seats in this body — you who have been elected on a platform that is absolutely inimical to the best interests of the State of New York and of the United States." Waxing warmer and warmer as he proceeded, Sweet charged that the Socialist Party was "not truly a political party," but rather, a subversive and unpatriotic "membership organization" committed to the violent overthrow of the government. Its members and elected officials agreed to be guided by the Socialist Party's constitution and platform, and were subject to suspension or expulsion for failure to follow the instructions of an executive committee composed of "aliens or alien members." Minors as well could participate in Socialist Party affairs, he said.

Sweet recalled that the Socialist Party had urged its members to refuse to fight during the War. He also suggested that the Party had sympathized with the Bolsheviks in Russia and their program of violence and civil war. Whetting his lips, Sweet supported these charges by quoting from the Party's 1917 national platform—"[a]s against the false doctrine of national patriotism we uphold the ideal of international working class solidarity;" and the *Communist Manifesto*—"[c]ivil war is forced upon the laboring classes by their arch enemies. The working class must answer blow by blow, if it will not renounce its own object and its future . . ."

Sweet found it "quite evident" that the Socialist Assemblymen were unfit for public office. They could not possibly fulfill their oaths to uphold the law, because they were obliged to abide by the instructions of Socialist party members dedicated to governments and organizations "diametrically opposed to the best interests" of the state and nation. Even so, acknowledging that every citizen was entitled to "his day in court," Sweet invited the Assembly to adopt a resolution suspending the Socialists pending a trial

Thaddeus C. Sweet
Library of Congress, Print & Photographs Division, LC-DIG-hec-21007

at which they would be given the opportunity "to prove [their] right to a seat in this legislative body."[31]

Cheers broke out in the chamber.[32] The five Socialists looked at one another in amazement. They were stunned and confused, amused yet resentful. Smiling bitterly, the thought crossed their minds that Sweet just attributed to them doctrines they opposed. None of them advocated the overthrow of the government by force, nor did their party.[33] In fact, several months earlier, the Socialist Party of America split apart on the issue of violence and violent doctrines, and Claessens, Orr, Solomon and Waldman successfully fought for their rejection as delegates at the Party's emergency national convention in Chicago.[34]

Also, it was unfair to lump together American Socialists with Russian Bolsheviks (who renamed themselves the Communist Party). For a brief time, the leaders of the Socialist Party supported the revolutionary dictatorship in Russia.[35] But the Socialist and Communist movements quickly became bitter adversaries. By March 1919, the Communist International—which Leon Trotsky called the "General Staff of the World Revolution"[36]—declared war on the Socialist Party of America for seeking social change through the ballot box. To the Communists, the abandonment of violence as a revolutionary tactic was an unpardonable sin.[37]

However, Sweet was unwilling to see the difference between a democratic Socialist and a totalitarian Communist. Radicalism in any form was painted red. As he put it, "[t]hey are all for one and one for all . . . with one object, one purpose, the overthrow of the United States government and with the red flag of anarchy floating from every state capitol and from the dome of the capitol in Washington."[38] Many New Yorkers similarly conflated the Socialist and Communist parties, given that both owed their original ideology to Karl Marx, celebrated May Day, and called fellow members "Comrade."[39]

Treated like prisoners in the dock, the Socialist Assemblymen fought back. Their floor leader, the irrepressible Claessens, spoke-up first, by asking Sweet a question: "Mr. Speaker, do I understand we have no rights until this body officially decides?" "If the House so decides," Sweet snapped.[40]

Louis Waldman clamored to be recognized. The chamber quieted.[41] A 28-year-old law student and the most outspoken of the five Socialists, Waldman invoked the Assembly's rules. He asserted that members could not be unseated unless charges were filed against them, a legislative committee issued a report following investigation, and the full Assembly voted to expel them. "Is it not true?" he asked Sweet.[42]

A master of parliamentary procedure, Sweet knew Waldman was right.[43] The applicable law authorized the Assembly to expel a member only *"after* the report of a committee to inquire into the charges against him shall have been made."[44] The Socialists had a right to participate in all Assembly proceedings until they were actually ousted. Sweet's "Alice-in-Wonderland performance of 'sentence first—verdict afterwards'"—was unprecedented.[45]

Sweet hesitated. Having no answer to Waldman's question, he ignored it and triggered a prearranged plan, by recognizing the Republican Majority Leader, Simon L. Adler. The Socialists returned to their seats, and Adler, a member of a wealthy clothing manufacturing family from Rochester, took the floor. With a smug smile of satisfaction on his face he waited for complete silence, and then moved the adoption of

a "privileged" resolution, drawn-up in advance by Attorney General Newton and his staff.[46]

The Clerk read out-loud Adler's resolution, which called for the Socialists' suspension pending a determination by the Assembly's Judiciary Committee "of their qualifications and eligibility to their respective seats." If adopted by the members, the resolution would empower the Judiciary Committee to adopt rules of procedure, subpoena witnesses and documents, and report back its findings to the Assembly.

After the Clerk finished reading the resolution, Sweet called for a vote on which no debate would be allowed.[47] All a member could do was vote "aye" or "no." But Waldman stood in the way of Sweet's steamroller, demanding answers to more questions:

> *[I]s it . . . not the rule of this House and the precedent of the State Legislature that when charges are filed against any member of this House the duly elected member is permitted to represent his district until the Judiciary Committee renders its decision and renders a report to the Legislature, whereupon the Legislature acts? Has that not been the precedent and is it not the rule?*[48]

Once again Waldman had a point,[49] but it only served to anger Sweet. He banged down his gavel and declared: "[T]he . . . House is the sole judge of the qualifications of its members and it may or may not grant a hearing. It is the purpose in this case that you shall be given a day in court." Members laughed at Waldman, and Sweet again called for a vote on the resolution.[50]

Still, Waldman would not be silenced. He asked Sweet if the resolution could be referred to a committee other than the Judiciary Committee. Waldman's goal was to take the matter out of Sweet's hands and refer it to the Assembly as a "Committee of the Whole." This would allow the members to immediately debate Adler's resolution.

The wily Sweet did not fall into Waldman's trap. Sweet brushed aside Waldman's question, ruling that the resolution carried "its own reference" to the Judiciary Committee. Unwilling to brook further interruptions, Sweet put the resolution to a vote with breakneck speed. The Clerk began calling the roll, in alphabetical order, starting with Adler, who voted "aye."[51]

Sweet caught the Assembly completely by surprise. Apart from Adler, he took no other member into his confidence. Not even the Republican colleagues who Sweet roomed with in Albany, at a boarding house they called the "House of Lords," had an inkling of the ouster plan.[52] Boxed in by Sweet's stunning charges—with no way to explain their votes or ask questions—the members were between a rock and a hard place. They could risk their political careers by defying Sweet and voting against the resolution, or indict an entire political party for disloyalty. Member after member took the latter course, voting "aye," until the Clerk reached the name "Mr. Evans."

William S. Evans was a Bronx Democrat who won his Assembly seat by defeating a Socialist opponent in a close race.[53] When Evans heard his name called by the Clerk, he said: "I wish to be excused from voting and briefly state my reasons." Under the Assembly's rules, Evans could decline to vote for good cause shown. But Sweet didn't give Evans the chance to explain himself, except to answer one question: "How does the gentlemen vote?" "I vote no," Evans replied.[54]

The roll call continued with a monotonous succession of ayes, except for no votes cast by four of the Socialists (Claessens, DeWitt, Orr and Solomon) and J. Fairfax McLaughlin. Like Evans, McLaughlin was a Democrat from a New York City Assembly district with a large Socialist bloc of voters. He also had a demonstrated capacity to buck the political tide. The year before, he was one of only eight Democrats who voted against the Lusk Committee's establishment.[55] Now, "as a matter of fair play and common justice," McLaughlin cast another courageous vote. "I do not believe in hanging a man first and trying him afterwards," he explained to a reporter afterwards.[56]

The roll-call drew to a close when the Clerk called out: "Mr. Waldman." In response, Louis Waldman stood mute, forcing Sweet to inquire, "How does Mr. Waldman vote?" "I refuse to vote," Waldman answered defiantly.

With that, the Clerk announced the result: the resolution passed by a vote of 140-6. In less than forty minutes, the Assembly temporarily ousted the Socialist Party without trial.[57]

Applause filled the chamber once more.[58] Undaunted, Charles Solomon made a last-ditch attempt to be heard. He rose to a point of personal privilege—a request to be heard rarely denied a member when their personal rights were in question. But Sweet gaveled Solomon into silence, declaring: "The gentleman who rises at this time has no privileges on the floor. The gentlemen involved will please retire to the back of the rail."[59]

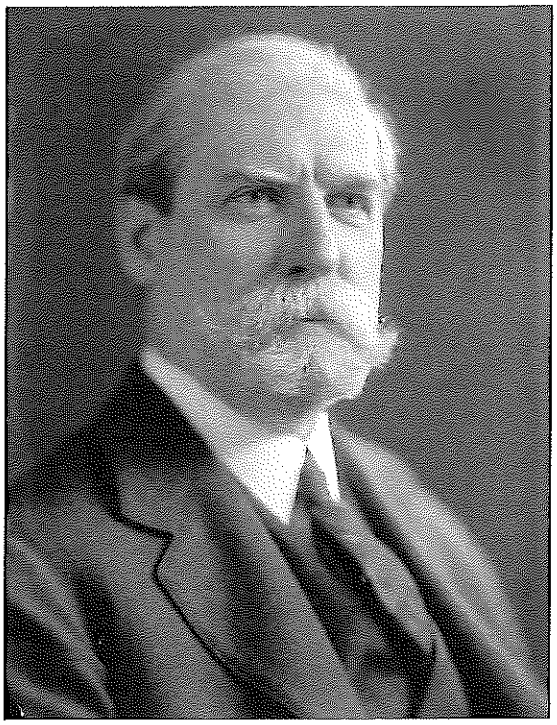
Now it was the Socialists' turn to ignore Sweet. They refused to budge from their seats. The chamber grew silent. All eyes were fixed on the Socialists. The only way to remove them was by force. And Sweet did not hesitate to use it. He commanded the Sergeant-at-Arms, Harry W. Haines, "to request the gentlemen to retire."[60] Haines approached the Socialists. After a conversation in whispers, Claessens, with a smile on his face, was escorted by Haines to the rear of the chamber. Haines next grabbed Waldman by the arm and hustled him out. Seeing the writing on the wall, Claessens, DeWitt and Orr picked up their hats, coats and papers and walked out on their own. As the Socialists passed up the aisle, the members turned their faces away from them. A few Democrats muttered under their breaths: "Sorry, boys, we couldn't help it."[61]

When the last Socialist exited the chamber, the Assembly gave itself a final round of applause.[62]

AFTERMATH

The day after the Assembly's stunning action, virtually every respected figure in New York remained silent. It took courage to stand up for one's principles during the Red Scare. People who held unpopular points of view courted ruin. That no one of stature might challenge Sweet seemed possible. But one of America's most distinguished lawyers stepped forward to make his voice heard. He was Charles Evans Hughes.

Hughes was a force to be reckoned with in 1920. At that time, he was the titular leader of the Republican Party by virtue of having been its unsuccessful candidate for President in 1916 against Woodrow Wilson. He was a former Governor of New York and Associate Justice of the U.S. Supreme Court. He also was under active consideration for high public office, including perhaps another run for the presidency. (He subsequently became Secretary of State and Chief Justice of the United States.)[63]



Charles Evans Hughes
Library of Congress, Print & Photographs Division, LC-DIG-hec-16487

Though Hughes was unalterably opposed to socialism, he risked his reputation and career by publicly criticizing the Assembly. Within 48 hours of the ouster, in an open letter to Sweet reported on the front page of newspapers throughout the State, Hughes grasped the nettle:

> *[I]t is absolutely opposed to the fundamental principles of our government, for a majority to undertake to deny representation to a minority through its representatives elected by ballots lawfully cast. If there is anything against these men as individuals. . . they should have been charged accordingly. But I understand that the action is not directed against these five elected members as individuals but that the proceeding is virtually an attempt to indict a*

political party and to deny it representation in the Legislature. This is not, in my judgment, American government.[64]

Next, Hughes enlisted support for his position from the legal profession. After a fierce battle, he persuaded the Association of the Bar of the City of New York to condemn the Socialists' suspension and appoint a committee, which he headed, to appear before the Assembly's Judiciary Committee and safeguard the principles of representative government.[65] He then led the charge at the New York State Bar Association to beat back an effort to prevent it from taking a stand.[66]

By standing up for so unpopular a cause, Hughes acted in the highest and best tradition of the legal profession. His heroism was of a piece with the courageous defences provided by John Adams for the British soldiers charged with murder in the Boston Massacre and Clarence Darrow in the "Scopes' Trial." More, as John F. Kennedy wrote in his Pulitzer Prize-winning book, *Profiles in Courage*, Hughes was a key factor in "arousing the nation to its senses" and made it safe for others to criticize the Assembly.[67]

But the Assembly had gone too far to turn back. The "trial" of the five Socialists commenced before the Judiciary Committee on January 20, 1920. Marked by moments of high drama and farce, the proceedings were highly publicized, occupied 21 days, and created a record that fills more than 2,800 closely printed pages.[68] On March 30, the Judiciary Committee, by a vote of seven to six, recommended that all five Socialists be expelled from the Assembly.[69] The debate moved to the Assembly floor, where, on April Fool's Day, an overwhelming majority of the members voted to expel the five Socialists.[70] At one stroke, 60,000 New Yorkers were denied their legally elected legislative representation.[71]

In August, Governor Smith called a special election to fill the seats vacated by the expelled Socialists. Each of the Socialists ran for re-election against a "fusion" candidate representing the combined Republican and Democratic parties.[72] The election was held on September 16, and the voters returned to office all five Socialists.[73] A few days later, the Socialists presented themselves to the Assembly for a second time.[74] Following a bitter debate, by a 90 to 45 vote, Waldman, Claessens and Solomon were denied their seats. By a similar margin, 87 to 48, Orr and DeWitt were admitted as a compromise measure to placate critics.[75] Both men, however, resigned the Assembly in solidarity with their ousted colleagues.[76]

THE FIVE NEW MEMBERS OF THE ASSEMBLY.
—Walker in the New York *Call* (Socialist).

The Five New Members of the Assembly
January 24, 1920
Literary Digest *(Originally printed in the New York Call)*
Newman Library, Baruch College, The City University of New York

The Assembly was beyond saving, but its actions marked a national turning point. As Zechariah Chafee, Jr., the nation's leading scholar on civil liberties in the period, observed: "The American people, long bedrugged by propaganda, were shaken out of their nightmare of revolution. . . A legislature trembling before five men—the long-lost American sense of humor revived and the people began to laugh. That broke the spell."[77]

The final coda in this remarkable story was played out over the ensuing years by the Socialists themselves. In time, each of these men—once branded "little Lenins, little Trotskys in our midst"—were honored by society.[78] All went on to successful

careers and became respected members of their communities, befriended by powerful members of the establishment.[79]

For example, Samuel Orr and Charles Solomon ascended to the bench, serving for several years as New York City Magistrates. When Solomon died in 1963, *The New York Times* (which pilloried him four decades earlier) eulogized him as "an uncompromising fighter for social justice in all its forms."[80]

August Claessens devoted his career to advocating liberal causes, teaching, and lecturing around the country. He achieved a vindication of sorts in the fall of 1921, when he won re-election to the Assembly and was finally seated. Upon his death in 1954, over 1,000 people crowded into an auditorium to attend a memorial service in his honor, with hundreds more listening to the services outside over loud-speakers.[81]

Louis Waldman became an eminent labor lawyer, representing many powerful unions.[82] By the 1940s he was a pillar of the bar. He served as president of the Brooklyn Bar Association; vice-president of the Association of the Bar of the City of New York; chairman of the New York State Bar Association's Committee on Civil Rights; and chairman of the American Bar Association's Committee on American Citizenship. He remained active in politics, too, running three times for Governor on the Socialist line and becoming the State Party chairman. He ultimately resigned from the Party to help found the more inclusive American Labor Party, which, for a time, was New York's leading minority party.[83]

Samuel DeWitt remained active in liberal and left wing politics and organizations. His primary vocation, however, was business. He owned and operated a highly successful cutting tool company that made him a rich man. He also was an accomplished poet, publishing numerous books in that genre.[84] Drawing on his love of verse, DeWitt got the last word on the Socialists' ouster in a poem entitled To Thaddeus Sweet:

Yes — you stood quite imperious
Above the single five of us —
So prim, so trim, immaculate —
Marble with thin lips of hate —
And for a gluttoned half an hour,
You fed and drunk a fill of power;
But it was pitiful to see
A Caesar in stupidity.[85]

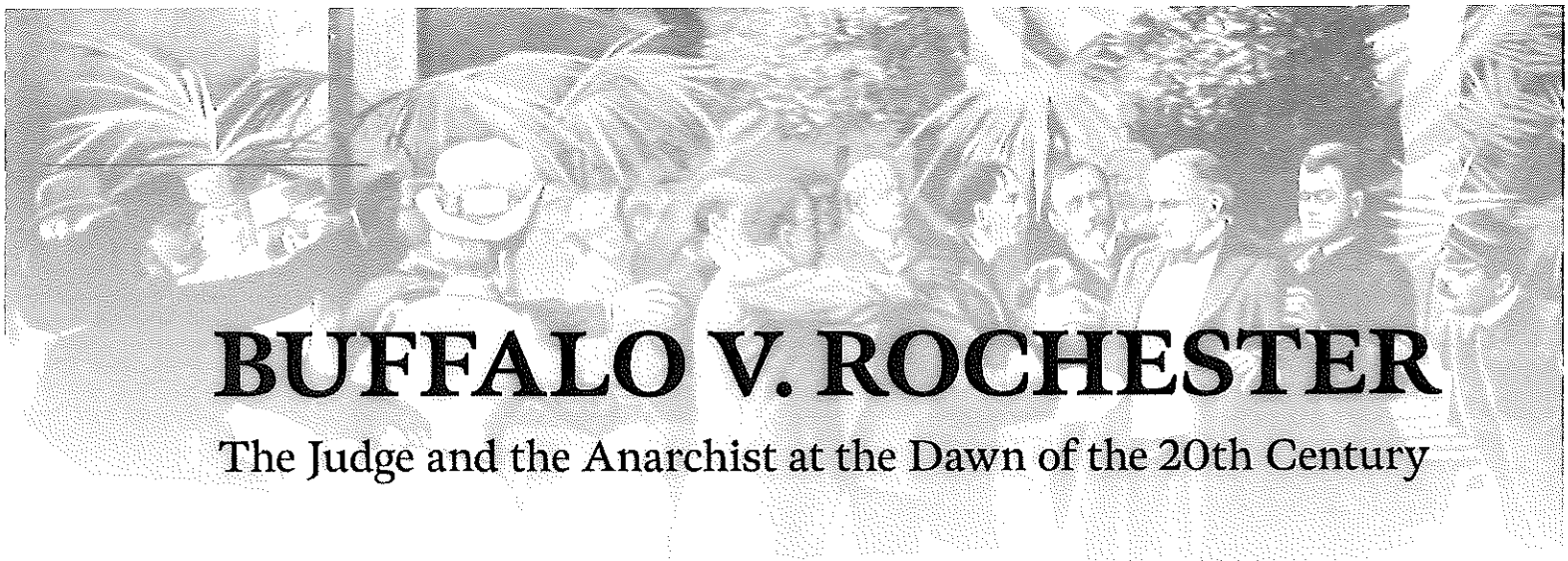
ENDNOTES

1. By law and tradition, the Legislature assembles on the first Wednesday of the first week in January. *See* N.Y. Const. Art. XIII, § 4 (which in 1920 was Art. X, § 4).
2. Zechariah Chafee, Jr., *Freedom of Speech* 33 (1920) [hereinafter cited as Chafee, *Freedom of Speech*].
3. *63 More 'Reds' Seized Here in 24-Hour Raid*, N.Y. Tribune, Jan. 7, 1920, at 1 (citing statement by State Senator Clayton R. Lusk).
4. *HARDING LASHES AMERICAN REDS*, N.Y. Times, Jan. 7, 1920, at 1, 3.
5. Thomas E. Vadney, *The Politics of Repression: A Case Study of the Red Scare in New York*, 49 New York History 56, 58 (1968) [hereinafter cited as Vadney, *Politics of Repression*].
6. Louis Waldman, *Albany: The Crisis in Government* 12 (1920) [hereinafter cited as Waldman, *Albany*]; *BARRED MEMBERS ARRAIGNED*, N.Y. Times, Jan. 8, 1920, at 1; David R. Colburn, *Governor Alfred E. Smith and the Red Scare, 1919-20*, 88 Political Science Quarterly 423, 431 (1973) [hereinafter cited as Colburn, *Governor Alfred E. Smith and the Red Scare*].
7. Daniel L. Feldman and Gerald Benjamin, *Tales from the Sausage Factory: Making Laws in New York State* 55 (2010).
8. Waldman, *Albany* xi, 3.
9. *Journal of the Assembly of the State of New York* [hereinafter cited as *Journal*], 143rd Session, Vol. I, 8 (1920).
10. Evelyn L. Sauers, *Thaddeus C. Sweet*, The Journal of the Oswego County Historical Society 82-87 (1976-77).
11. *Journal*, 143rd Session, Vol. I, 8-9.
12. *The New York Red Book* 167-168 (1920). Sweet was surpassed as the longest tenured Speaker by Republican Oswald D. Heck of Schenectady, who presided over the Assembly from 1937 to 1959. *See* Bruce W. Dearstyne, *No Gridlock in Oswald Heck's New York*, Times Union, October 22, 2011.
13. *Journal*, 143rd Session, Vol. I, 9-11.
14. Louis Waldman, *Labor Lawyer* 90 (1944) [hereinafter cited as Waldman, *Labor Lawyer*].
15. *Journal*, 143rd Session, Vol. I, 11-20; Waldman, *Albany* xi, 2.
16. Waldman, *Albany* 2-3.
17. *Quoted in* Arthur Schlesinger, Jr., *The Crisis of the Old Order: The Age of Roosevelt 1919-1933* 461 (1957).
18. *Public Papers of Governor Alfred E. Smith: 1920* at 30-38 (1921) [hereinafter cited as *Public Papers*]; Paula Eldot, *Governor Alfred E. Smith: The Politician as Reformer* 315-316 (1983).
19. Oswald Garrison Villard, *Prophets True and False* 11 (1928).
20. *Reconstruction in State Politics*, 108 *The Nation* 38, 38 (Jan. 11, 1919).
21. Todd J. Pfannestiel, *Rethinking the Red Scare: The Lusk Committee and New York's Crusade Against Radicalism, 1919-1923* (2003) [hereinafter cited as Pfannestiel, *Rethinking the Red Scare*]; Julian F. Jaffe, *Crusade Against Radicalism, New York During The Red Scare, 1914-1924* (1972).
22. Louis F. Post, *The Deportations Delirium of Nineteen Twenty* 147 (1923).
23. *Quoted in* Ronald Steel, *Walter Lippmann and the American Century* 167 (1980).
24. From his lecture tour, Hanson earned $38,000 in 7 months, 5 times his annual salary as Mayor. Robert Murray, *Red Scare: A Study in National Hysteria, 1919-1920* at 65-66 (1955).
25. Stanley Coban, *A. Mitchell Palmer: Politician* 217-267 (1963).
26. *See, e.g., Whitman Prepared to Support Hayward*, N.Y. Times, March 24, 1919 (stating that Sweet would be amongst the field of candidates seeking the Republican nomination for Governor).
27. Colburn, *Governor Alfred E. Smith and the Red Scare*, at 431.
28. *Legislative Documents of the State of New York* [hereinafter cited as *N.Y. Leg. Doc.*], 143rd Session, No. 35, Vol. II, 2053 (1920); *Five Members Suspended from Assembly by Special Resolution Because of Questioned Loyalty*, Democrat Chronicle [Rochester, NY], Jan. 8, 1920, at 1; Waldman, *Albany* 3; Pfannestiel, *Rethinking the Red Scare* 25.
29. Waldman, *Labor Lawyer* 90; Waldman, *Albany*, at 3.
30. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2053.
31. *Journal*, 143rd Session, Vol. I, 21-22; Waldman, *Labor Lawyer* 90-91.
32. *Socialist Ouster Based on Tenets of Their Society*, N.Y. World, Jan. 8, 1920.
33. Waldman, *Labor Lawyer* 90; *Socialist Ouster Based on Tenets of Their Society*, N.Y. World, Jan. 8, 1920.
34. *Suspension of the Assemblymen: A Symposium*, 3 *The Socialist Review*, 176, 176 n.1 (1920); *New York Radicals Plan New Socialist Party if Defeated*, N.Y. Tribune, Aug. 23, 1919, at 6;

David A. Shannon, *The Socialist Party of America: A History* 142-149 (1955).

35. James Weinstein, *The Decline of Socialism in America: in America* 179-180 (1984).
36. Richard Pipes, *Communism* 93 (2001).
37. Louis Waldman, *Proceedings of a Special Meeting to Commemorate The Seventy-Fifth Anniversary of the Bar of the City of New York Held on March 16, 1946*, 90 *A.B.C.N.Y. Reports* 730: 25-26 [hereinafter cited as Waldman, *Proceedings*].
38. *Democratic Minority Delays Socialist Vote By Filibuster,* Oneonta Daily Star, April 1, 1920, at 1.
39. W.A. Swanberg, *Norman Thomas: The Last Idealist* 120 (1976).
40. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2055.
41. *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
42. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2055.
43. *SWEET, Thaddeus C.*, 21 The National Cyclopaedia of American Biography 231 (1931).
44. N.Y. Legislative Law § 3 (emphasis added).
45. Chafee, *Freedom of Speech* 334, 339.
46. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2055-57; Waldman, *Proceedings,* at 26; Colburn, *Governor Alfred E. Smith and the Red Scare,* at 430; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
47. *Journal,* 143rd Session, Vol. I, 24; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920
48. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2057; Waldman, *Albany* 11; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
49. Most of the members were intimately familiar with the precedent to which Waldman referred. It was the case of Lucas E. Decker, Jr., decided less than two years earlier by the Assembly. In November 1917, Decker, a Queens County Democrat, was elected to the Assembly, but his right to sit in the Legislature was questioned on the ground of disloyalty during the War. More specifically, Decker was charged with failing to register for the draft based on a fraudulent claim of exemption. Notwithstanding the gravity of this charge, the Assembly permitted Decker to take the oath of office and participate in all affairs of the House, pending the completion of an investigation by the Judiciary Committee. Additionally, while the Judiciary Committee ultimately confirmed that Decker was a draft dodger, it recommended he be allowed to retain his seat, reasoning that there was no evidence he failed to satisfy the constitutional requirements for service in that body (e.g., U.S. citizenship). With Sweet presiding as Speaker, and by a vote of 142-0, the Assembly adopted the Judiciary Committee's recommendation and dropped the matter against Decker. *See Journal,* 141st Session, Vol. I, 105-107 (1918).
50. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2057; Waldman, *Albany* 11; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
51. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2058; *Labor Lawyer* 93.
52. *New York City 'Workers' Feel Rights Invaded,* Syracuse Journal, Jan. 8, 1920, at 1; *State, Nation Mourn Sweet, Funeral Friday in Phoenix,* Syracuse Herald, May 2, 1928, at 2; Vadney, *Politics of Repression,* at 59.
53. Evans, who ran on both the Democratic and Republican lines, received 7,881 votes; and the Socialist candidate received 6,936 votes or nearly 47% of the total votes cast. *Manual for the Use of the Legislature of the State of New York, 1920* at 832 (1920).
54. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2058; *The Clerk's Manual of Rules, Forms and Laws for the Regulation of Business in the Senate and Assembly of the State of New York* 90-91, Rules 33 and 36 (1920).
55. *State Bolsheviki Inquiry to Begin Law Week in April,* N.Y. Tribune, March 27, 1919, at 8.
56. *Socialists Unite to Fight Ouster,* N.Y. Tribune, Jan. 9, 1920, at 13.
57. *Journal,* 143rd Session, Vol. I, 24-25.
58. *New York Socialists Plan Fight for Capitol Seats,* Syracuse Herald, Jan. 8, 1920, at 1, 15.
59. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2058; Waldman, *Albany* 12; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
60. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2058; *see also Journal,* 143rd Session, Vol. I, 25 (stating: "At the direction of the Speaker, the sergeant-at-arms escorted the suspended members from the floor of the House.").
61. Waldman, *Albany* 2-3; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920; *SPEAKER SWEET SPRINGS SENSATION BY DECLARING SOCIALISTS ARE DISQUALIFIED,* The Morning Herald [Gloversville and Johnstown, NY], Jan. 8, 1920, at 1.
62. *5 Socialists Are Denied Their Seats,* Capital Times [Madison, Wisc.], Jan. 7, 1920, at 1.
63. *See* Merlo J. Pusey, *Charles Evans Hughes* (1951).
64. *E.g., Hughes Urges Reseating of 5 Socialists,* N.Y. Tribune, Jan. 10, 1920, at 1.
65. George Martin, *Causes and Conflicts: The Centennial History of The Association of the Bar of the City of New York, 1870-1970* at 209-213 (1997).
66. New York State Bar Association, *Proceedings of the Forty-Third Annual Meeting Held at New York, January 16-17, 1920 and Charter, Constitution, By-Laws, Lists of Members, Officers, Committees and Reports for 1919* at 530-555 (1920); Deborah S. Gardner and Christine G. McKay, *Of Practical Benefit: The New York State Bar Association, 1876-2001* at 45-46 (2003).
67. John F. Kennedy, *Profiles in Courage* 255 (1964).

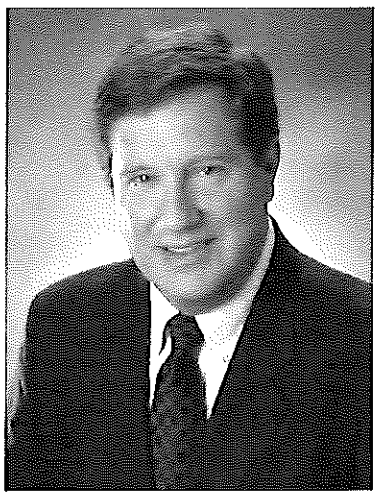
68. The trial record and related materials are contained in three volumes. *See N.Y. Leg. Doc.*, 143rd Session, No. 35, Vols. I, II and III.
69. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. III, 2673-2802.
70. The Assembly unseated Claessens, Solomon and Waldman by a vote of 116 to 28, and DeWitt and Orr by a vote of 104 to 40. *Journal*, 143rd Session, II, 1368-1370, 1387-1392.
71. Melvin I. Urofsky, *A Note on the Expulsion of the Five Socialists*, 47 New York History 41, 42 (1966) [hereinafter cited as Uroksky, *A Note on the Expulsion*].
72. *Public Papers* 582.
73. *Five Expelled Socialists Win Again at Polls*, N.Y. Tribune, Sept. 17, 1920, at 20.
74. *5 Socialists Seated; New Ouster Fails*, N.Y. Tribune, Sept. 21, 1920, at 1.
75. *See Journal*, 143rd Session, IV, 54-63; Waldman, *Labor Lawyer*, at 114.
76. *Assembly Ousts 3 Socialists; Two Resign; Expulsion Voted 90 to 45 After 11-Hour Debate*, N.Y. Tribune, Sept. 23, 1920, at 1.
77. Chafee, *Freedom of Speech* 338.
78. Foster Rhea Dulles, *The Rhode to Tehran: The Story of Russia and America, 1781-1943* 164 (1944) (quoting Assemblyman Louis A. Cuvillier).
79. Urofsky, *A Note on the Expulsion*, at 43.
80. *Charles Solomon, Unorthodox Magistrate Dies—Ex-Judge Was a Candidate for All Major Offices in State as Socialist*, N.Y. Times, Dec. 10, 1963.
81. *The New York Red Book* 104 (1922); *A. Claessens, 69, Ex-Assemblyman*, N.Y. Times, Dec. 10, 1954; Urofsky, *A Note on the Expulsion of the Five Socialists*, at 46.
82. Louis Waldman, *The Good Fight: A Quest for Social Progress* 204 (1975).
83. Urofsky, *A Note on the Expulsion*, at 46-47; Warren Moscow, *Politics in the Empire State* 102-119 (1948).
84. Urofsky, *A Note on the Expulsion*, at 43-44.
85. S. A. De Witt, *Harvest: Collected Poems* 53 (1937).



BUFFALO V. ROCHESTER

The Judge and the Anarchist at the Dawn of the 20th Century

by Hon. Richard A. Dollinger (Ret.)



Hon. Richard A. Dollinger is a retired member of the New York Court of Claims, who served as an acting Supreme Court Justice in Rochester. He served in the New York State Senate and the Monroe County Legislature. He is a Rochester native who takes no position in the Buffalo v. Rochester affairs described in this article.

Part One - Elevation

They could not have been more different. The GOP machine boss, turned federal judge, from Buffalo. The Russian immigrant, self-taught "high-priestess of anarchy" from Rochester. John R. Hazel and Emma Goldman never met, but their lives, scripted in western New York, intersected twice at a critical time in America's emergence as a world power and amid changes in its law, politics, and culture.

John R. Hazel was emblematic of prosperous and thriving post-Civil War Buffalo, which by 1900 was the nation's eighth largest city. Born in 1861, Hazel became a self-taught lawyer. In the post-Civil War period, Republicans dominated New York's political landscape. Buffalo was no different. A young Hazel ran for the state Assembly in 1881 but lost. He remained in the GOP machine politics in Erie County. As the machine "boss," Hazel oversaw judicial and state legislative elections—a role that later, when he was nominated for the federal bench, came to his rescue.

Hazel became a state committeeman and attended the 1896 GOP national convention, where Buffalo's neighbor from Ohio, William McKinley, was nominated for President. Hazel campaigned for his near-state colleague and when McKinley won, Hazel assumed a greater role in state politics.

Before the 20th century and the dominance of candidate-raised money, state committeemen held substantial sway in the state's politics. Hazel could commit his Buffalo legislative delegation to support candidates for the United States Senate, who at the time were elected by votes of the state Senate and Assembly; direct election of United States senators did not become law until two decades later, upon passage of the 17th Amendment. Hazel's real skill was in the election of judges, especially state Supreme Court judges. A number of those whom he supported ascended to the bench by the late 1890s.

Hazel's political influence extended beyond Erie County. In 1898, Hazel worked to elect the Rough Rider hero Theodore Roosevelt as governor of New York. In his autobiography,[1] Roosevelt would credit Hazel as one of three sponsors of his nomination during the GOP state convention. Roosevelt's eventual electoral victory added to Hazel's political clout.

Portrait of Emma Goldman from *Anarchism and Other Essays*, c. 1910. Library of Congress, Prints & Photographs Division, LC-DIG-ppmsca-02894.

EMMA GOLDMAN NOW ALIEN.

Deprived of Rights of Citizenship by Disfranchisement of Her Husband.

Special to The New York Times.

BUFFALO, N. Y., April 8.—Judge Hazel, in the United States Court this morning, granted an order canceling the citizenship papers of Jacob A. Kersner. Through this order all rights of citizenship also are taken from Kersner's wife, who is none other than Emma Goldman, the woman leader of the Anarchists in this country, whose fiery teachings, it was charged by many, incited Leon Czolgosz to the assassination of President McKinley.

The order was granted upon motion of Special United States Attorney P. S. Chambers of Pittsburg, and the evidence upon which it was based was presented principally by Kersner's own father, who was subpoenaed from his home at Rochester.

Kersner obtained his citizenship documents in 1884, when the statutes governing such procedure were quite lax compared with the present laws. He was two years under age at the time. Three years later he married Emma Goldman. She was a foreigner herself, but by virtue of her marriage to a citizen she was clothed with the rights of citizenship. Emma was only a girl then, and had barely begun the career that later connected her so closely with the "Reds" in the public eye.

The New York Times, April 9, 1909. Copyright the New York Times.

Hazel's work continued. In the wake of the 1898 election, a new state legislature elected Chauncey Depew as a Senator from New York. Hazel's biography describes Depew as "a strong personal friend" of Hazel.[2] Depew was well-known in the Buffalo area as a former assemblyman, lawyer of Vanderbilt railroads, and president of the New York Central Railroad System. When a new village was incorporated in Erie County that held a terminal for the railroad, the village incorporators named it after the GOP standout and railroad stalwart Chauncey Depew. In this author's view, Depew no doubt had a soft spot in his heart for Hazel, as he was aware of Hazel's work with Roosevelt, his hands on the levers of the Erie County GOP machine, and his votes from the Buffalo-area GOP delegation in the recent Senate election.

In 1900, while seeking to expand Buffalo's representation on the federal bench, Congress created the Western District of New York, a 17-county region from the Pennsylvania state line into New York's central region. Senator Chauncey Depew sponsored its creation, and together with President McKinley, immediately began seeking a candidate for the district's first judgeship. He would not have to look hard.

As Hazel collected political chits in Buffalo, a different saga unfolded in Rochester. In 1887, a young Russian immigrant woman, Emma Goldman, arrived in Rochester to live with her sister. She was contemptuous of Rochester, claiming "it was too provincial to permit an interesting life."[3] She later declared that she experienced "joy" when she left Rochester a place where she "had known so much pain, hard work and loneliness."[4] But, as one author notes, "it was amid the tenements and factories of Rochester New York...that the radicalizing of Emma Goldman" occurred.[5]

Goldman began work as a seamstress in Rochester's booming garment industry, but when she had the temerity to ask the owner of her shop for a

THE ENQUIRER LAUNCHED.

W. J. Conners's Steam Yacht One of the Handsomest on the Lakes.

BUFFALO, N. Y., June 7.—The handsomest steam yacht on the lakes, The Enquirer, the property of William J. Conners, publisher and proprietor of The Enquirer, from which the vessel takes her name, was successfully launched late this afternoon from the yard of the Union Dry Dock Company.

The Enquirer, when fully completed, which will be in about two weeks, will be one of the finest craft of her sort afloat. The total cost will be in the neighborhood of $75,000. Her hull is of steel, and the decks of white pine, while the cabin will be finished in bird's-eye maple. The deck trimmings will be of brass. The Enquirer, if she develops the speed expected, cannot inappropriately be termed the "white flier," as her hull will be painted white from stem to stern. Her dimensions are: Length, 144 feet; water line measurement, 123 feet; beam, 17½ feet, and depth, 10.6 feet. The engine is a triple expansion one, with cylinders 10½, 17, and 28 by 10. The electrical apparatus is of the very latest pattern. The dynamos are automatic, and 1 light up to 400 may be lighted or extinguished at will.

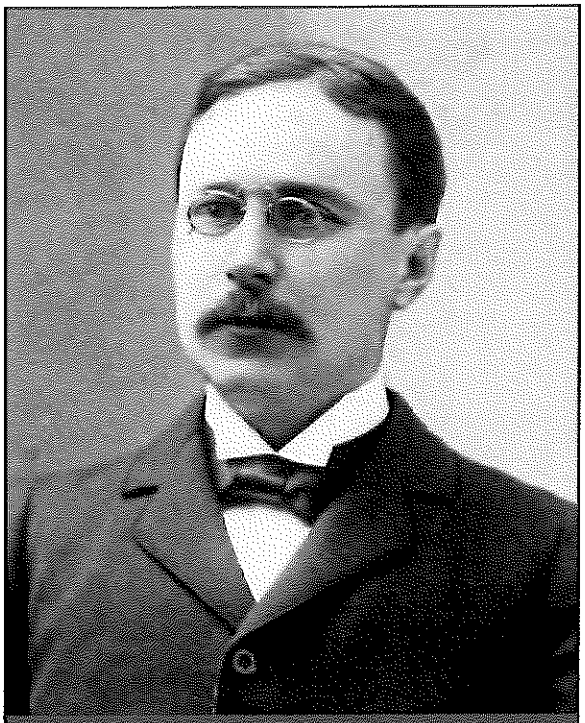
The searchlight is of 7,500 candlepower, and the rigging will be dressed with 200 colored globes of electric light. The yacht is of 140 tons burden. She will be commanded by Capt. Samuel Golden, who has sailed the lakes for a score of years.

The first trip of the new yacht will be made about the time of the Democratic National Convention, when Mr. Conners will take a large party of his friends to the metropolis of the West.

The New York Times, June 8, 1896.

raise, she was fired and changed jobs. Importantly, she married Jacob Kersner, a fellow garment worker, in 1887. At the time of their marriage, Kersner had become a naturalized citizen by claiming that he had lived for more than five years in the country. After her marriage, Goldman attended speeches by radicals who visited Rochester and argued for a utopian socialist vision for America. When some of those radicals were shot in the Chicago Haymarket massacre in 1887, Goldman was energized and began a lifelong commitment to anarchy as a solution for the ills of unjust capitalism.

When her marriage failed, she was divorced by a Jewish beth din (religious tribunal) and left Rochester for a time. She returned in 1888 and remarried



Portrait of Judge John R. Hazel, c. 1898. Originally published in *The Men of New York: A Collection of Biographies and Portraits of Citizens of the Empire State Prominent in Business, Professional, Social, and Political Life During the Last Decade of the Nineteenth Century* published by G. E. Matthews & Co., 1898.

Kersner. But when the second marriage had no greater success than the first, her family scorned her, and the Jewish community ostracized her. Without even considering a divorce, she left for New York City with just her sewing machine.

In New York City, the young and attractive Emma Goldman found love in a long-term relationship with fellow socialist/anarchist Alexander Berkman and her own voice for social justice. She quickly became proficient in English and developed a pointed and enthusiastic writing style. Jailed in 1893 for inciting a food riot, she spent a year in prison, where she worked a nurse. After her release, she published articles on anarchy and the need for social justice. She toured America giving speeches and by the spring of 1900, she was considered the "high priestess of anarchy in America."

Thus, while Goldman was on her way to becoming the "most dangerous woman" in America—as

Portrait of President William McKinley during his presidential campaign, 1896. Library of Congress, Prints & Photographs Division, LC-DIG-ppmsca-46746.

J. Edgar Hoover once reportedly described her[6]—Republican Senators Depew and Platt recommended John Hazel to President McKinley as the first judge on the newly created Western District.

The nomination, in May 1900, drew a storm of protest. The editor of the Buffalo Express, one of the city's vibrant newspapers, delivered a two-fold rebuke of Hazel. The first centered on the sale of a yacht owned by a Buffalo merchant to the United State Navy in 1898, at the commencement of the Spanish American War. Dubbed the "Enquirer," the yacht was sold to the Navy for $80,000; Hazel, as the attorney for the seller, received a $5,000 commission. The sale might have passed without mention, but a later Navy appraisal of the yacht set its value at only $20,000, suggesting that Hazel's politically connected client had been compensated handsomely for a yacht worth substantially less than what taxpayers had paid.

A detailed investigation reveals that another famous New Yorker—and, for that matter, both state and national politics—may have played a big role in the "yacht scandal" and its impact on Hazel's nomination. In May 1900, virtually simultaneous with Hazel's nomination to the bench, the United States Senate began an investigation into war-time defense spending and, particularly the purchase of yachts by the Navy at the outbreak of the Spanish American War. On May 31, 1900, the Washington Post published an article with the headline: "Yacht sold to Uncle Sam – Judge-elect Hazel helped to engineer the deal with great profit."

Former Congressman Rowland B. Mahany, a Democrat from Buffalo, had criticized Hazel in remarks made in September 1899 before his nomination. His comments were published by the Buffalo Express and then entered in the Congressional Record on May 31, 1900, during the Senate debate over naval appropriations during the war.[7] The Record transcript reveals Mahany's claim that Hazel, the well-connected GOP pol, had used "influence" to have the Navy overpay for the vessel, working together with a Republican Congressman D.S. Alexander. Mahany added: "as a member of Congress, my duty was to serve the people and not sell yachts for Democratic bosses." Mahany said that Hazel told him the owner of the vessel had received only $60,000 of the purchase price and that Hazel's commission, $5,000, left $15,000 in unaccounted-for dollars spent by the government.

Mahany also claimed that he asked Hazel, point blank, what happened to the remaining $15,000. According to Mahany, Hazel responded: "oh, come now, I can't tell you all about it." In his later remarks, Mahany added: "history does not record where the other $15,000 went."

In response to Mahany's allegations and the Washington Post article, Congressman Alexander, a Buffalo Republican, submitted an affidavit from Hazel into the Congressional Record detailing his role in the yacht sale. Significantly, in describing his work to secure purchase of the yacht, Hazel admitted that after the naval appropriations bill was passed, he contacted the "assistant secretary of the Navy" to consummate the purchase. He rebutted Mahany's allegation that the owner was paid only $60,000. The former owner of the vessel also defended the purchase by the Navy Department. Congressman Alexander, defending his role in the sale, admitted in the Congressional Record that Hazel had approached him to help secure the purchase of the yacht and that he too visited the "assistant secretary of the Navy" regarding the purchase before it occurred.[8]

Who was the "assistant secretary of the Navy" in early May 1898—lobbied by both Hazel and Congressman Alexander—when the Navy purchased the yacht? None other than Theodore Roosevelt served as the Assistant Secretary until May 10, 1898. It appears that just before Roosevelt left his office to form the Rough Riders and less than four months before he was nominated for governor, he was involved in the alleged $15,000-shortfall yacht purchase. Hazel admitted he talked to the assistant secretary of the navy about the purchase of the yacht. In an affidavit that he submitted to the Congressional Record, he never mentioned Roosevelt by name. Roosevelt, as the Assistant Secretary, would have been involved in the approval of the purchase of the yacht.

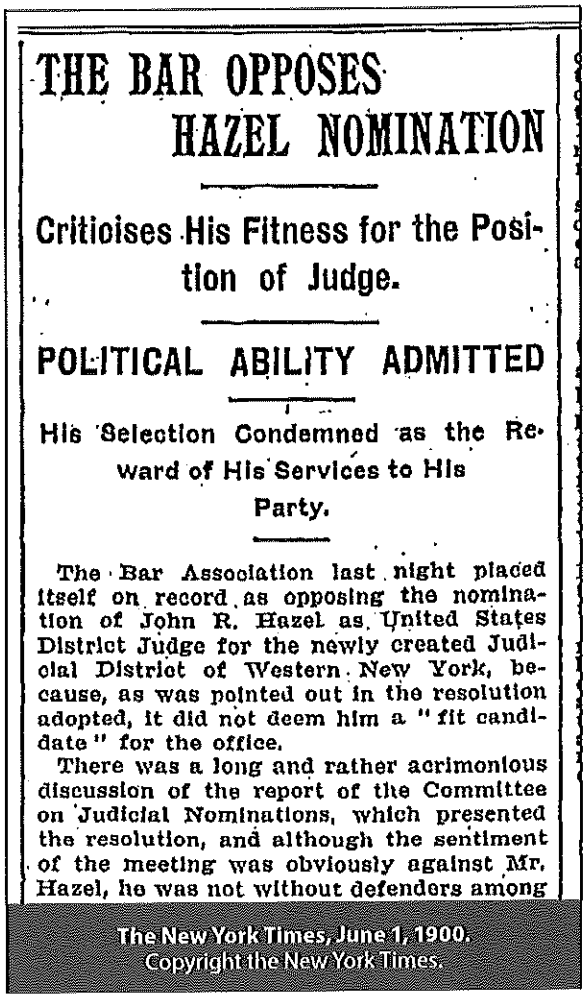
The plot thickens when the timing of the yacht dispute is cast against the backdrop of New York and federal politics both in 1898 and 1900.

In 1898, when the yacht was purchased, Roosevelt was already being considered as a possible Republican candidate for governor. Senator Thomas Platt, the statewide GOP boss, had abandoned the incumbent governor and was recruiting Roosevelt to succeed him. Hazel, with his substantial Buffalo political connections, was positioned to assist Platt in that quest. Roosevelt later acknowledged that Hazel was instrumental in securing his nomination for governor.[9] It seems that Roosevelt in 1898 had an interest in helping Hazel with his sale of the yacht while Hazel had an interest in promoting Roosevelt's claim to the governor's office. To some, turning a blind eye to the Navy's overpaying for a yacht in which a friend had an interest might be perceived as a small price to pay for helping secure a gubernatorial nomination.

The same political dynamic casts a shadow over the Senate investigation of the sale in 1900. McKinley's vice president had died, creating a vacancy for the vice president's job. Roosevelt, as the incumbent New York governor, was touted as the ideal vice president candidate; and, at the same time, Senator Platt, the GOP state party boss, was looking to dump the "too-independent" Roosevelt from the state ticket.[10]

Hazel, as a Roosevelt backer and friend of McKinley, must have known that Roosevelt could not be tied to the yacht sale scandal, brewing in Washington. Both Hazel and the yacht owner, in their affidavits to the Congress, minimized the "assistant secretary of the Navy's" involvement in the sale. The United States Senate, perhaps influenced by Senator Platt's desire to see Roosevelt booted from New York's governorship into the seemingly inconsequential vice presidency, never considered Roosevelt's involvement in the sale. A report from the Navy Department, released as Hazel's appointment was pending in the Senate, defended the Navy's decision to buy the boat for the agreed price, but the brevity of the report and its exquisite timing when Hazel's name was before the Senate suggested it was something of a fig leaf for Hazel, Roosevelt, and Senators Depew and Platt during the nomination process.

While the yacht scandal surfaced while Hazel awaited confirmation, an objection raised by the



THE BAR OPPOSES HAZEL NOMINATION

Criticises His Fitness for the Position of Judge.

POLITICAL ABILITY ADMITTED

His Selection Condemned as the Reward of His Services to His Party.

The Bar Association last night placed itself on record as opposing the nomination of John R. Hazel as United States District Judge for the newly created Judicial District of Western New York, because, as was pointed out in the resolution adopted, it did not deem him a "fit candidate" for the office.

There was a long and rather acrimonious discussion of the report of the Committee on Judicial Nominations, which presented the resolution, and although the sentiment of the meeting was obviously against Mr. Hazel, he was not without defenders among

The New York Times, June 1, 1900.
Copyright the New York Times.

Buffalo Express resounded in the New York legal community. Hazel had spent most of the last decade working in GOP politics; he was seldom seen in a courtroom and acknowledged during the debate over his nomination that he had been involved in only four courtroom matters in the decade before his nomination. While the editor of the Buffalo Express ignited this controversy, bar associations in the new western district and beyond debated the merits of Hazel's claim to the office.

The Buffalo Bar Association debated Hazel's fitness and eventually passed a resolution supporting his nomination. The most powerful support accorded Hazel came from a likely source: the region's state judges. Almost all the Republicans who had Hazel's support when running for election strongly attested to Hazel's character and swayed the Buffalo Bar Association.

In Rochester, the bar association convened a special meeting to discuss Hazel's fitness. It was described as "a more largely attended gathering of the Rochester bar and the interest at all times was intense."[11] The Buffalo judges appeared and backed Hazel, but Rochester's legal community expressed skepticism. After a fierce debate, the association took no position.

The New York City Bar Association took a more forceful stance, opposing Hazel's appointment, finding him unfit for the job, and suggesting that McKinley find another candidate. The City Bar concluded: "political ability...[is] not [a] qualification for judicial office unless accompanied by legal ability and experience, which Mr. Hazel does not possess."[12] Chicago admiralty attorneys, concerned that Buffalo was a major center for admiralty law because of the numerous issues related to Great Lakes shipping, objected to his nomination because he had no experience in that field and their protest to Washington concluded that he was "not competent" and "his appointment was made by Senator Platt, who wanted to reward him for his political work."[13]

The opposition went to Washington. Five western New York lawyers testified before the Senate Judiciary Committee in opposition to Hazel's nomination, arguing that he had practically "no legal experience." However, a Republican Congressman and State Senator, as well as three attorneys, testified in support of the nomination. While admitting Hazel "had no experience as a trial lawyer," they added that his experience as a political leader "demonstrated that he would grow on the bench."[14]

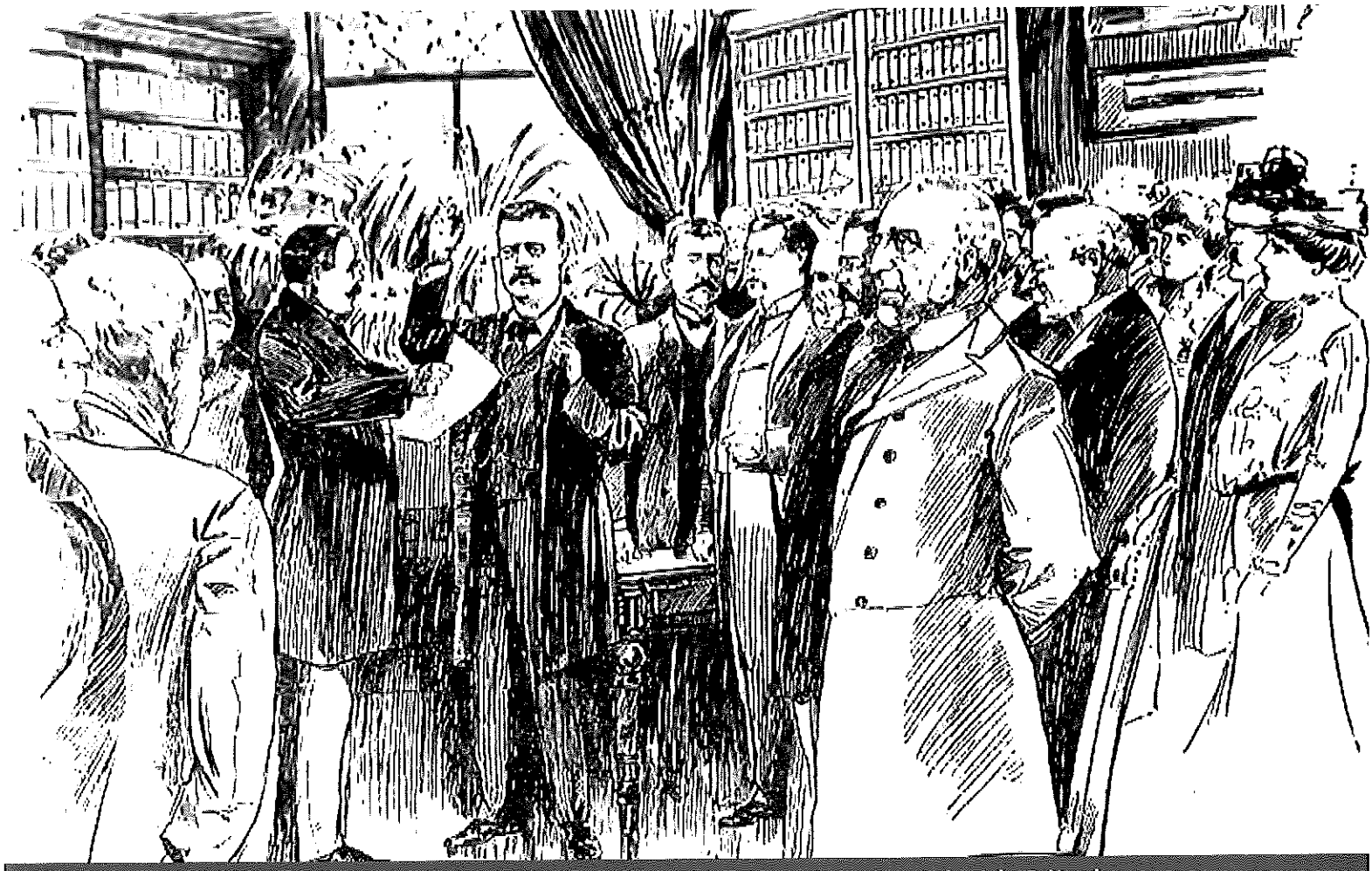
The New York Times declared on May 29, 1900, that Hazel was "eminently lacking in the qualities needed to make a good judge in United States courts" adding "it would be an insult to the bar of Western New York to call him a representative of it." The Times editorial said that both the Secretary of War and the Attorney General had objected to the appointment of Hazel. The editorial also cautioned Senator Depew:

> *It is incredible that he does not know what a judge ought to be or what a disgrace and misfortune it is to put a man on the bench who is not fitted for its duties.*[15]

The Buffalo Express noted in an editorial that the nomination was now referred to as "Now Notorious Hazel Appointment," and claimed that President McKinley had heard from the opposition and asked the objectors to take their complaints to Senator Depew for reconsideration.

The New York Times eventually took President McKinley to task over the Hazel appointment, writing:

> *This is a very shameful position for the President of the United States. It is a position politically so uncomfortable and so unpleasant morally that we do not believe Mr. McKinley will continue to occupy it. No one will much longer have the hardihood to defend the appointment. Hazel has been known only as a political worker. He has been seen in court only four times in the last 10 years. He was not ashamed to take a broker's commission in a transaction in which it is asserted that the government was cheated roundly. Mr. Depew's statement about his extraordinary recommendations prove nothing as to Hazel's fitness. It simply shows what is perfectly well-known before, that letters of recommendation are given with a reckless freedom. The President himself has virtually confessed that he now knows that Hazel is not fit to be a judge. How can he expect to escape the severest criticism if he permits the Senate to confirm the appointment?*[16]



President Theodore Roosevelt's inauguration in Buffalo, where Judge John R. Hazel swore him into office. Nashville, Tennessee News, October 13, 1901.

The nomination attracted letters to the editor. One to the Times, published on June 3, 1900, noted that another philanthropist had donated his yacht to the war effort and added: "is it strange that patriots of the [philanthropist] type are rare while those of Hazel variety are as thick as blackberries?"[17]

Senators Depew and Platt were unswayed. During the Senate confirmation process, one Senator—referenced but unnamed in the New York Times—suggested that "in order to get rid of a very unpleasant difference of opinion and to relieve the President of the embarrassment into which he has been drawn," Hazel's nomination should be withdrawn.

It is unclear whether Roosevelt, who was then the Governor of New York, joined forces but, given his relationship with Hazel it seems inconceivable to this author that Governor Roosevelt did not help Hazel attain the confirmation.

On June 4, 1900, the Senate Judiciary Committee approved Hazel with one dissenting vote from Alabama Senator Edmund Pettus, for whom the famous Selma, Alabama bridge is named. Pettus expressed doubts over Hazel "lacked the legal training and practice to qualify him for a seat on the bench."[18] Hazel's nomination passed through the Senate less than a month after his selection. Senator Platt, backed by a substantial Republican majority in the Senate, had the last word: "Hazel is an honest man and he will make a good judge."[19] So, after weathering a storm of accusations and challenges, but backed by his political friends, John R. Hazel took the federal bench in Buffalo on June 8, 1900.

Meanwhile, Emma Goldman barnstormed through the United States with a message of social compassion and justice, and a suggestion that anarchy was the only solution to America's ills. She wrote extensively in newspapers and other periodicals. She campaigned for free love and opposed marriage.

Her moment to collide with Federal District Court Judge John R. Hazel was right around the corner.

Part Two – Deportation

In the early summer of 1901, while Hazel was ending his first year on the bench, a Polish immigrant picked up one of Goldman's writings about the challenge of the capitalist society evolving in America. He was determined to hear Goldman speak, and had his chance in Chicago. He later said her speech set him "on fire."[20] He tried to meet and talk with Goldman but, although they were together for a short time during a meeting in Chicago, they never actually conferred. Spurred by her words and emboldened by her crusade, Leon Czolgosz decided it was his duty to assassinate the president of the United States.

In August 1901, Goldman returned to Rochester to visit her sister and spent a month in her American hometown. In September 1901, President McKinley went to Buffalo. He met with Judge Hazel and other dignitaries and traveled to view Niagara Falls on September 6 before attending the Pan-American Exposition.

When McKinley was receiving visitors in Hall of Music that afternoon, Leon Czolgosz fired two shots at close range.

In the ensuing melee, Czolgosz was arrested immediately. In short order, when asked why he had shot the President, Czolgosz told investigators that he had been inspired by reading and listening to Emma Goldman.

A pursuit ensued. Goldman was seen in Rochester several days before the shooting. She was in St. Louis when she heard of the shooting, but returned to Chicago where she was living at the time. Buffalo police immediately demanded Goldman's arrest, seeing a conspiracy to kill the president.

When confronted by the Chicago police, Goldman initially said she was an illiterate servant but, when pressed, admitted her identity. She was taken into custody to await McKinley's fate and the confession of his assassin.

The President's fate and Goldman's hung in the balance. A legal paradox arose. Based on his familiarity with both McKinley and Roosevelt, there is little doubt in this author's mind that Hazel wanted Goldman to be charged with federal offenses, which would allow him to try her—who most Americans believed had orchestrated the shooting—in his own courtroom. But Czolgosz had committed no federal offense. At the time, shooting a president was not a federal crime unless it occurred on federal property. Interestingly, Congress considered several bills after the McKinley assassination to make shooting the president a federal crime, but the bills were never enacted until after the assassination of President John F. Kennedy more than 60 years later.

The only crime committed by Czolgosz was a state penal law offense of assault or murder. Czolgosz could only be tried in state court.

Goldman was another matter. Federal law did provide that conspiracy to kill a federal employee was a federal crime. Therefore, if Goldman had conspired with Czolgosz, she could be tried in federal court in Buffalo, with Hazel presiding.

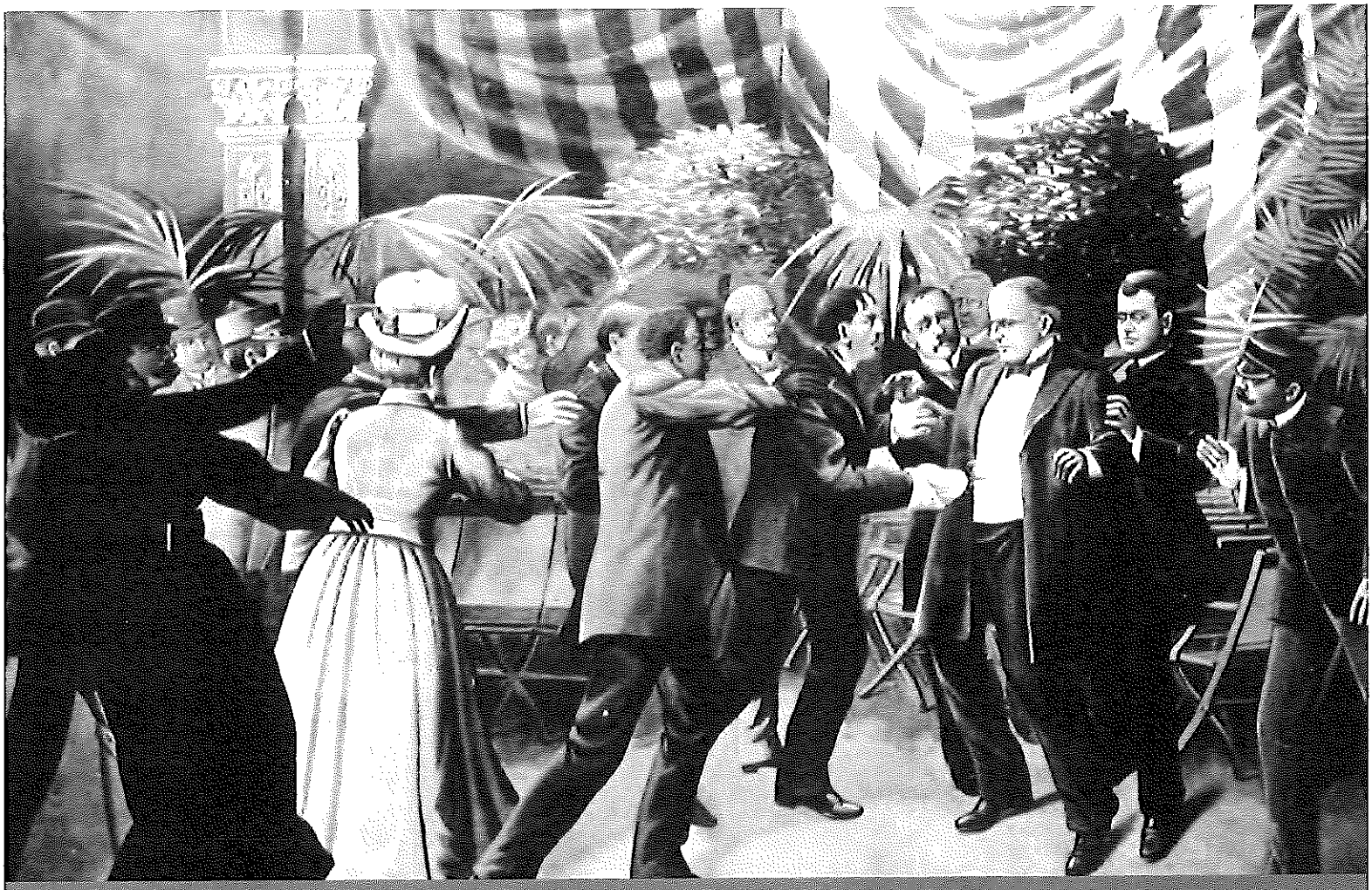
With McKinley's life in the balance, authorities in Buffalo grilled both Czolgosz and police in Chicago questioned Goldman. They both denied ever having discussed the shooting of McKinley. Czolgosz, while acknowledging Goldman's influence, conceded that he had never discussed McKinley with her. And when asked whether she approved the shooting, Goldman said:

> *Certainly not. What a foolish question to ask me. We have hearts; we are grieved to see persons suffer, whether they suffered from assassin's bullets or from starvation due to the greed of capital.*[21]

Still, resentment against Goldman inflamed Americans near and far.

When the president died, Hazel, still hoping to avenge the death of his sponsor, temporarily put aside his interest in Goldman. On September 14, 1901, in the Ansley Wilcox House, he swore in his political ally as McKinley's successor. John Hazel's friends now included not only Senators, elected state officials, and judges, but also the President of the United States.

By contrast, Goldman had hardly a friend in America. Sitting in a police jail and reviled for her incitement of the assassin, Goldman faced an onslaught of investigators, including federal officials, seeking to tie her to Czolgosz's crime. There are no known letters or papers from Hazel regarding Goldman's involvement in the assassination. But, in this author's view, Hazel was personally and profes-



President William McKinley's assassination when Leon Czolgosz shoots him at the Pan-American Exposition by T. Dart Walker, c. 1905. Library of Congress, Prints & Photographs Division, LC-DIG-ds-09329.

sionally hoping to tie Goldman to the crime, especially because if the charge was federal conspiracy, the anarchist-provocateur would be tried in his court in Buffalo. There is no evidence that Hazel ever opined that Goldman was responsible for the president's death but it is an easy speculation to this author that he harbored such antagonism.

The wheels of justice quickly dispatched the hapless assassin. Czolgosz was tried less than three weeks after the crime. The prosecutor was District Attorney Thomas Penny, who had been appointed to the job two years earlier by the then governor of New York Theodore Roosevelt. Two former state senators and retired Supreme Court Justices—Loran L. Lewis, a Republican, and Robert C. Titus, a Democrat and former district attorney himself—represented Czolgosz. Both would have been well known to Hazel. Certainly, Penny and Lewis, who were Republicans when Hazel was the Erie County "boss," would have been closely aligned politically with Hazel.

Representing a presidential assassin, neither attorney mounted much of a defense in the face of eyewitnesses and Czolgosz's confession. Insanity was the only option, but a series of experts who interviewed Czolgosz opined that he was sane. The defense never presented any witnesses to the contrary. Following a two-day trial that cost less than $5,000, and needing no longer than 40 minutes of deliberation, the jury found him guilty. Less than six weeks later and without an appeal, he was electrocuted in the Auburn Prison.

But on his death bed, Czolgosz absolved Goldman of any role in the crime. He admitted that he had read her writings and listened to her speeches, but she had never told him or encouraged him to assassinate McKinley.

Faced with no evidence and Goldman's assertion that she could not be penalized for her free speech, state and federal authorities decided she could not be prosecuted under any state laws or the federal conspiracy statute. In this author's view, John Hazel,

sitting in the federal bench, no doubt experienced the frustration that Rochester's Emma Goldman's anarchist speeches, translated by a lowly immigrant into justification for assassination, had escaped the law. But, while he may not have known it, he would have his chance to exact some form of revenge eight years later.

After the McKinley assassination, Goldman was "spiritually dead," in her own words.[22] She went underground, shunned the public light and avoided speechmaking. It did not last. In 1904, she returned to Rochester speaking to garment workers on behalf of the Free Speech League. In 1905, she founded *Mother Earth* magazine as a forum for her anarchist views. Over the next few years, as she toured the country, she was arrested frequently as a "suspicious person," for "inciting a riot" and producing "incendiary statements."[23] She was refused forums in Washington State, arrested in California for "conspiring against the government," and arrested in Oregon for violating the Comstock laws by distributing information on birth control. She toured the west, touting such speeches as "Women under Anarchism" and "The Relation of Anarchism to Trade Unionism."[24]

Emma Goldman's America in the first decade of the 20th century was unlike the nation today. While some extolled the virtues of thriving American capitalism, most barely eked out a living. Infant mortality soared. Child labor was not uncommon. Minimum wages were non-existent. Workers compensation was part of the public debate but without government support. Workers could be required to work more than eight hours a day. Overtime pay was virtually unheard of. Women could not vote in federal elections.

Immigrants, who flooded the country, were exploited. Blacks were segregated. *Plessy v. Ferguson*—separate but equal—was the mouthed slogan, but the reality was a pervasive and deep-seated racism throughout the country. Governments at all levels and a cautious and conservative Supreme Court stood idly by while most Americans struggled. Against this landscape, Goldman's words suggested that anarchy alone was the only tool to change the deplorable status of most Americans.

As she evaded local laws, her speeches gathered more crowds, and her following grew. In response and as part of a broader initiative to curb the growing power of new immigrants, the federal government in 1907 under President Theodore Roosevelt enacted new immigration laws to streamline the process for deporting illegal immigrants. Almost simultaneously, Goldman traveled to the anarchist Congress in Europe. Federal officials saw an opening. The Immigration Service was ordered to detain her from re-entering the country until her citizenship could be verified.

Goldman outwitted them. Aware that she might encounter problems re-entering the country, she traveled to Montreal and returned to New York by train, escaping a challenge at the border. The Secretary of Commerce issued an arrest warrant for her, but wary that any arrest would only spark protests and raise significant contributions for the anarchist movement, withdrew the warrant in November 1907.

Meanwhile, the Congress, concerned by the huge influx of immigrants and the status of women married to non-citizens, passed the Expatriation Act of 1907, which provided for the loss of citizenship by American women who married aliens.

In short, by 1908, governments at all levels were out to get immigrants and anarchists; and Emma Goldman, an immigrant and anarchist, was a prime target. Federal immigration officials began an investigation of her citizenship in mid-March 1908. As it proceeded, the government concluded that Goldman's claim to citizenship could not be derived from her father and rested solely on her marriages to Kersner. An 1855 immigration act had permitted a woman who married an American citizen to acquire American citizenship. Government investigators went to the records in the Monroe County Clerk's Office for further investigation. President Roosevelt, with the investigation of Emma Goldman obviously in mind, said in April 1908:

> *"When compared with the suppression of anarchy every other question sinks into insignificance. The anarchist is the enemy of humanity, the enemy of all mankind, and his is a deeper degree of criminality than any other. No immigrant is allowed to come to our shores if he is an anarchist; and no paper published here or abroad should be permitted circulation in this country if it propagates anarchist opinions."*[25]

Roosevelt, in another moment, called Goldman "a madwoman...a mental as well as a moral pervert."[26] J. Edgar Hoover, the soon-to-be director of the Federal Bureau of Investigation, later claimed that Goldman's activism made her among "the most dangerous anarchists in America."[27]

By the end of May 1908, federal investigators had concluded that Kersner had been improperly accorded citizenship because he was less than 21 years old at the time it was conferred.[28] If Kersner was not a citizen, then Goldman was not a citizen either. But removing citizenship required more than government investigation. It needed a federal court order annulling Kersner's citizenship.

On September 24, 1908, the government filed the petition in the appropriate federal court: the Western District of New York, where Judge John R. Hazel—the same man who was in Buffalo when McKinley was shot and had sworn-in Roosevelt—now held Goldman's citizenship, obtained through her marriage, in his hands.

Several unusual turns occurred in the legal proceeding to strip Kersner of his citizenship. First, the government could not find Kersner to serve him with the papers to initiate the proceeding. It was reputed that Kersner had gone underground and moved to Chicago. To acquire jurisdiction, the federal prosecutors published the notice of the pending claim in the Rochester newspapers. Kersner never appeared in the action.

Second, the prosecutors debated whether to join Goldman in the action. Ultimately, the Attorney General and the Secretary of Commerce concluded that Goldman should not be joined in the action because it would reveal the government's true intent: to strip Goldman of her citizenship. Goldman became aware of the pending action, but she never sought to intervene.

The case went to trial, without Kersner or Goldman, on April 8, 1909. Kersner's father and his former employer both testified to Kersner's age at the time of his supposed naturalization. He was only 17 and not an adult, as the law required.

Hazel heard all the testimony and, while considering the government's application, he well knew that the real target of the government's efforts was Emma Goldman. He knew that by stripping Kersner's citizenship, he left Goldman without American citizenship and an inability, under then current law, to return to the country if she left its shores.

After more than seven years, there is little doubt in this author's mind that Hazel now knew he could finally affect the life of the provocateur that changed America. The court order removing her former husband's citizenship was filed. A New York Times article on April 9, 1909 described Goldman as "the woman leader of the anarchists" in America and said the evidence presented to strip Kersner of his citizenship because he was underage at the time of his naturalization was "presented principally by his own father," who had been subpoenaed from Rochester.[29] The New York Times left no doubt who was the target of the federal court, identifying the subject, "as none other than Emma Goldman, the woman leader of the anarchist in this country, whose fiery teachings, it was charged by many incited Leon Czolgosz to the assassination of President McKinley."[30]

Goldman knew that her future was changed by Hazel's court order. She confided in a letter that she was "worried to death over it,"[31] and later wrote a famous pamphlet "Woman without a Country" to document her disillusionment.[32]

Hazel's order did not affect Goldman for a decade. She still toured the country, spoke, and wrote about her beliefs in anarchy. In 1911, she published *Marriage and Love*, in which she extolled love as "the strongest and deepest element in all life" but characterized marriage as a "poor little state and Church-begotten weed."[33] The same year, she offered a fierce critique of capitalism as a speaker at the inauguration of the Ferrer School, which later became the Modern School in New York City. In 1916, she was among the first American women to broach the subject of birth control. She was arrested, convicted and offered either jail or to pay a $100 fine. When she chose jail, her supporters in the court room cheered. The Little Review Magazine said Goldman was sent to jail for "advocating that women need not keep their mouths shut and their wombs open."[34]

When World War I began in Europe, Goldman spoke at a gathering of almost 1800 in Rochester against the war. She spoke elsewhere during that time on subjects as varied as education, Russian literature, birth control, sexuality and anarchism.

In 1917, at the dawn of America's involvement in World War I, she agitated against conscription, in a somewhat personal fashion because her nephew was an accomplished violin prodigy who served in the Army and was later killed in France. In Washington, President Wilson signed the Espionage Act of 1917, which prohibited interfering with the draft. On the day of its enactment, federal agents arrested Goldman for conspiring to violate the new law. Less than a month later, she was found guilty and jailed.

She served almost two years. Then, in September 1919, she was arrested again while still in jail and subject to deportation. The Hazel order stripping Kersner of citizenship, immigration officials had concluded, canceled her citizenship as well.

Almost simultaneously, and despite his antagonism to Goldman, Hazel was given another chance to deal with anarchists. In 1919, the government prosecuted an anarchist society in Buffalo for publication of a pamphlet that advocated anarchy and communism. In what can only be considered a surprising decision, Hazel dismissed the case, holding that the federal law "does not make it an offense to circulate or distribute literature of this kind." Whatever antagonism Hazel bore to Goldman, his fealty to the First Amendment—the very free speech that Goldman espoused—had prevailed.

J. Edgar Hoover led the prosecution to deport her. Goldman was deported to Russia. She later fled Russia and, despite her misgivings about marriage, married a Welsh miner in 1925. She only met him twice and never lived with him. As a result of the marriage—the institution she fled in Rochester and criticized throughout her life—she obtained citizenship in the British Commonwealth and ended up in Canada.

On one occasion, with the intervention of Theodore Roosevelt's cousin, President Franklin D. Roosevelt, she obtained a visa and returned to Rochester under her married name—Mrs. James Colton—and spoke to Rochester's City Club. She told the assembled crowd:

> *Please don't feel that I have made sacrifices, that I'm a martyr. I have followed my bent, lived my life as I chose, and no one owes me anything. I'm no more respectable than I ever was. It's you who have become a little more liberal.*[35]

The crowd gave her a standing ovation. She added that her mission was "to make people thinkers...I don't want converts to my credo – I want thinkers. I am not an agitator: I am an educator."[36] Two local newspapers noted her transformation after her speech:

> *The Rochester radical not only embraced the terrifying cult of anarchism, but took provoking delight in the title of "Red Emma." Shocking Conservatives was her specialty.*[37]

Another piece added:

> *Some of the radical views of the Red Emma of a generation ago, which aroused the natives, now appear as shocking as the daring bathing suits of that time.*[38]

Another noted:

> *Rochester welcomed...the stocky gray haired woman. Red Emma no longer scares the little boys nor fidgety old men. She's just a nice old lady.*[39]

As the articles note, the America and Rochester that greeted Emma Goldman in 1934 was changed. Minimum wages, a ban on child labor, limits on working hours, Social Security, and recognition of unions were all part of the public discourse. By the end of the decade, most had become law.

Both Hazel and Goldman lived to see the transformation. Hazel retired from the federal bench in 1931. Goldman died in 1940 in Toronto and is buried in Chicago, near the site of the victims of the Haymarket Massacre. Hazel died in Buffalo in 1951 at age 90.

In an evolving nation, the clash between Buffalo's political son and Rochester's adopted radical daughter encapsulated the changes and turbulence that heralded the new American century.

Buffalo v. Rochester - Endnotes

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A CENTURY OF FREE SPEECH IN THE STATES:
THE STORY OF *GITLOW v. NEW YORK*

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