1926

Case Note, *Gitlow v. New York*

James Parker Hall

NOTES

CONSTITUTIONAL LAW — DUE PROCESS OF LAW—LIBERTY—FREE SPEECH *

Gitlow v. *New York*

In *Gitlow* v. *New York*[1] the federal Supreme Court for the first time unanimously assumes that freedom of speech and of the press are among the "liberties" protected from state impairment by the due process clause of the Fourteenth Amendment.[2] Gitlow was convicted in New York of violating a statute that forbade the advocacy of the doctrine that organized government should be overthrown by force or by the assassination of rulers or by any unlawful means.[3] This was affirmed by the state appellate courts[4] and brought to Washington on writ of error. It was urged for the defendant that, while he had advocated the forcible overthrow of government, the liberty clause of the Fourteenth Amendment protected such utterances save under circumstances where some actual evil was likely to flow from such advocacy—which, it was argued, was not the case here, it being very unlikely that anyone would be moved to illegal action by the defendant's manifesto, published in an organ of the Left Wing socialist.

The Supreme Court upheld the conviction (Holmes and Brandeis, JJ., dissenting) as no impairment of legitimate free speech, though admitting that the Fourteenth Amendment protected proper "liberties" of this sort. In view of the earlier decisions of the same court that Congress did not violate the First Amendment in forbidding certain utterances designed to interfere with the conduct of the war (even though there was no proof of a "clear and present danger" that such utterances would have such actual effect),[5] this result was to be expected. It would

* Republished from April issue of the Illinois Law Review, V. 20, p. 809.

1 (1925) 45 S. Ct. Rep. 625.

2 Ibid. at p. 630.

3 (1909) N. Y. Laws, c. 88; N. Y. Penal Law, ss. 160-161.

4 People v. Gitlow (1921) 195 App. D. 773; affd. (1922) 234 N. Y. 132, 539.

5 Abrams v. United States (1919) 250 U. S. 616; Schaefer v. United States (1920) 251 U. S. 466; Pierce v. United States (1920) 252 U. S. 239.

have been extraordinary to hold that the Fourteenth Amendment (and the Fifth, in the same language) protected speech of a character not privileged by the First Amendment. In none of the prior federal cases was the effect of the Fifth Amendment discussed, but it must have been assumed that it did not go further than the First as regards free speech.

In addition to the important assumption that within proper limits free speech and a free press are a part of the "liberty" guaranteed against state deprivation of the Fourteenth Amendment, the majority of the court persuasively distinguishes the doctrine of *Schenck* v. *United States*[6] from the *Abrams, Schaefer,* and *Pierce* cases.[7] In the *Schenck* case a federal statute forbidding conspiracies to obstruct the recruiting service was held to be violated by circulating among drafted men an appeal to oppose the draft, even though such appeal was not actually successful, Mr. Justice Holmes saying, for the court:

> "The question in every case is whether the words used in such circumstances are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[8]

In the other cases what was forbidden was not merely a certain *likelihood of undesired results* that might or might not be caused by the use of language, but the *use of certain language itself*: e. g., in the *Abrams* case, language intended to incite resistance to the war and to curtail the production of ammunition; and, in the *Schaefer* and *Peirce* cases, language making false statements intended to interfere with the military success of the United States. In such cases—

> "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

[6] (1919) 249 U. S. 47.
[7] See note 5, *supra.*
[8] (1919) 249 U. S. at 52.

statute itself be constitutional and that the use of the language comes within its prohibition." [9]

Of course, speech that could seldom, if ever, threaten such dangers could not be arbitrarily forbidden, but—

> "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 legislation 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. . . . . 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." [10]

Whatever may have been the original conception of "liberty" in our due process clauses, it was practically inevitable that some freedom of speech should be included within it after the unanimous statement of the Supreme Court in *Allgeyer* v. *Louisiana* that it "Embraced the right of the citizen to be free in the enjoyment of his faculties." [11] The possibilities of a further extension of its meaning are discussed somewhat apprehensively in a recent leading article by Charles Warren,[12] who concludes that—

> "If the doctrine of the *Gitlow* case is to be carried to its logical and inevitable conclusion, every one of the rights contained in the Bill of Rights ought to be and must be included within the definition of 'liberty', and must be held to be guaranteed by the Fourteenth Amendment against deprivation by a State 'without due process of law'." [13]

[13] Id. at 460.

[9] 45 S. Ct. Rep. at 631.
[10] 45 S. Ct. Rep. at 631.
[11] 165 U. S. 578, 589 (1897).
[12] 39 Harv. L. Rev. 431 (1926).

He enumerates these potentially protected rights as including the free exercise of religion, the right peacefully to assemble, and the right to keep and bear arms; as well as freedom from unreasonable searches and seizures, self-crimination, cruel and unusual punishments, and the rights to indictment by a grand jury and to jury trial in criminal and civil cases. As regards the first three, there is little doubt that they are logically included, though only the right to religious freedom would interpose any serious obstacle to such hostile legislation as could be easily imagined. So many plausible reasons may be given for limiting the right to assemble or to bear arms that "liberty" in these respects is rather illusory. Indeed, the same is true of free speech itself.[14] As regards the other rights mentioned by Mr. Warren, it is difficult to believe that their infringement is necessarily or usually any violation of "liberty," even in an extended sense. Of course, after a manner of speaking, it may be urged that a right to be "free" from any kind of harmful or forbidden conduct is a "liberty," because "freedom" and "liberty" are colloquially synonymous. E. g., one has a common-law right to be "free" from all manner of torts, therefore, any legislation cutting down of duties to refrain from torts would be a deprivation of "liberty" regardless of the character of the duty affected. But, obviously, serious problems of constitutional law are not to be settled by such a play upon words.

The answer to Mr. Warren's argument seems to be this: It is only interferences with human activities by *directly* preventing or forbidding or compelling them that constitute infringements of "liberty." Directly to prevent or to forbid a man from walking or talking or working or writing or praying, or indeed engaging in any other human activity is properly enough an interference with his "liberty"—and, if unreasonable, is without due process. So, likewise, to *compel* him to walk or talk or work or write or pray, against his will, interferes with "liberty," though if done in a reasonable way for a reasonable purpose it is not without due process. But to slander him, or throw a stone through his window, or to break

[14] See J. P. Hall "Free Speech in War Time" (1921). 21 Col. L. Rev. 526.

a contract with him, or to seize his property is not an infringement of his "liberty," even though the ultimate result of these acts is to diminish his social opportunities or his pecuniary substance so that he will be less able (or "free") to satisfy some of his desires. This inability, however, results not from any direct interference, with his activities as such, but from the creation of collateral conditions, like unpopularity or poverty, that afford less favorable opportunities for the exercise of such activities. Such conduct seems to affect "property" rather than "liberty." Of course, rights of "liberty" and of "property" may often overlap. A prohibition against (a) selling wholesome fruit, or (b) drinking intoxicating liquor—each lawfully in A's possession—is both an interference with his activities ("liberty") and with the usual incidents of private ownership ("property"). In case (a) this would usually be *without* due process (being unreasonable), while in case (b) it would be *with* due process (being reasonable).

Of the various guaranties of the Bill of Rights urged by Mr. Warren to be a part of "liberty" the following analysis suggests itself: The right to be free from unreasonable searches and seizures would ordinarily concern "property" rather than "liberty," the latter being only collaterally affected. Compulsory self-crimination, if understood as actually compelling a defendant to testify, would be a violation of "liberty," but no one proposes this today. What is proposed is that a court or jury be permitted to draw an unfavorable inference from a defendant's voluntary failure to testify. This, in itself, is purely a matter of procedure, not involving at this stage rights either of "liberty" or of "property." If, later, as a result of such a permissible inference, a defendant is imprisoned or fined, then indeed "liberty" or "property" is affected, and the question must be answered whether the procedure leading to this result complied with the requirements of due process. So also of a defendant's rights to a grand or petit jury in criminal or civil cases. These rights in themselves are neither a part of "liberty" nor of "property," but if, through a failure to observe them, a defendant is imprisoned, fined, or subjected to loss of substance, then it may be asked whether this result (which *does* effect "lib-

erty" or "property") was achieved by procedural due process. These questions have all been raised in the United States Supreme Court and the answer uniformly has been that such procedure was due process.[15] It would seem to be no less so, even if the procedural rights thus legislatively taken away were conceived to be a part of "liberty," for it is only deprivations of "liberty" without due process that are forbidden. The right to be free from cruel and unusual punishments may involve "liberty," as, for instance, if an outrageously long imprisonment were inflicted for some trifling offense; but, if the objectionable punishment consisted of branding, this would seem to be no violation of "liberty."

Even though one does not share Mr. Warren's fears of the possible connotations of "liberty" in the mind of the Supreme Court, one may, however, heartily agree that even its more restricted meaning should not straightjacket legislation, and that, as he puts it near the end of his article:

> "If the Court shall in the future give a broad interpretation to the words 'due process' as affecting 'liberty'; if it shall be slow and reluctant to regard a state statute as arbitrary or as bearing no reasonable relation to some object of public welfare, then the Court may, by such action, counteract some of the evils of undue interference with state legislation, which otherwise may flow from the enlarged definition of 'liberty' recently adopted by it." [16]

JAMES PARKER HALL.[17]

---

[15] Twining v. New Jersey 211 U. S. 97 (1908), (self-crimination); Hurtado v. California 110 U. S. 516 (1884), (grand jury unnecessary); Iowa Cent. Ry. v. Iowa 160 U. S. 389 (1896), (common-law jury unnecessary in civil case); Maxwell v. Dow 176 U. S. 581 (1900), (same in criminal case).

[16] 39 Harv. L. Rev. at 464 (1926).

[17] Dean of the Chicago University Law School.