Loyalty Requirements vs. Academic Freedom

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COMMENTS

LOYALTY REQUIREMENTS vs. ACADEMIC FREEDOM

I. Introduction and Background

Historically, there has been a tendency on the part of Americans to regard with fear and suspicion all things foreign. This deep-rooted tendency, fed by the fires of two world wars, became particularly pronounced following World War II when the so-called “Red Scare” arose and the threat of a Communist conspiracy seemed terrifyingly imminent to some.

Perhaps the concern over the growth and spread of subversion was reflected most in the area of public employment where local laws often made loyalty a pre-requisite for employment and prescribed various tests to establish an applicant’s allegiance to his country or at least his lack of patently subversive leanings.

Following the period of agitation in the early 1950’s, these local loyalty laws came to be challenged with increasing intensity and fell with increasing frequency. The judicial decisions in this area, did, however, carve out a notable exception to the general rule that loyalty oaths and similar tests would be held unconstitutional. Where a law gave the power to a municipality, board of education or other arm of government, as the hiring authority, to require its employees to take loyalty oaths and sign affidavits of non-membership in subversive organizations, it was generally upheld as constitutional.

As the Supreme Court said in Garver v. Board of Public Works of Los Angeles:¹

[A] municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.²

Actually, the Garner case was simply an affirmation of a principle announced four years earlier in United Public Workers of America v. Mitchell,³ where the Court observed that since public employment is a privilege rather than a right some reasonable restrictions may be imposed on it that would otherwise be unconstitutional. “Reasonable” is, of course, a relative term. Recognizing this both the Mitchell and Garner cases stressed that in case of litigation over a particular requirement the court must find the limitations reasonable in relation to the end sought.⁴

¹ 341 U.S. 716 (1951).
² Id. at 720.
⁴ See generally Note, 18 GEO. WASH. L. REV. 541 (1950); Note, 45 ILL. L. REV. 274 (1950); Note, 36 MINN. L. REV. 961 (1952).
II. Loyalty Requirements for Non-Teachers Upheld

In Gerende v. Board of Supervisors, the Court held constitutional a Maryland statute which denied a place on the ballot for a Baltimore election to one who refused to file an affidavit stating that “he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by force or violence,' and that he is not knowingly a member of an organization engaged in such an attempt.” This finding was prompted perhaps by the consideration that the Attorney General of Maryland agreed to accept such an affidavit as satisfying in full the statutory requirement.

The appellant in Lerner v. Casey7 had already met the necessary hiring requirements, but was dismissed from his position as a subway conductor in the New York City Transit System pursuant to the Security Risk Law of the State of New York. Under this law, the appointing authority was given power to suspend any employee if, after investigation, it was found, upon all evidence, that reasonable grounds existed for the belief that because of doubtful trust and reliability the employment of such a person in a security agency would endanger the security or defense of the nation and the state. The required finding could be based upon the employee's past conduct, including membership in some organization found by the state civil service commission to be subversive. The Communist Party had been found to be subversive. Appellant was asked under oath if he was then a member of the Communist Party. He refused to answer, claiming his fifth amendment privilege, and subsequently lost his job.

In upholding his dismissal, the Court did not become embroiled in the question of fifth amendment rights, but rather based its holding on the right of the state, as the hiring authority, to discharge employees because of doubt as to their reliability created by refusals to answer relevant questions put to them by their employer.

III. Loyalty Requirements for Teachers Upheld

A Philadelphia public school teacher was called before the Superintendent of Schools in Beilan v. Board of Education, and asked if he had been the press director of the Communist Political Association in 1944. The teacher asked permission to consult counsel before answering. After doing so, he steadfastly refused to answer that question or any questions about political or religious beliefs. A year later he was dismissed on the ground that his refusal to answer his Superintendent's questions constituted incompetency.

In upholding this dismissal, the Court used some strong language

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5 341 U.S. 56 (1951).
6 Id. at 56, 57.
7 357 U.S. 468 (1958).
8 357 U.S. 399 (1958).
to be applied in situations where public school teachers are involved. It said:

By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.

We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors.9

In his concurring opinions to Lerner and Beilan, Mr. Justice Frankfurter noted that the employees involved in these two cases were not discharged because they were labeled disloyal or because emotional and irrational parents' groups were pointing accusing fingers and yelling "Communist."

They were discharged because governmental authorities, like other employers, sought to satisfy themselves of the dependability of employees in relation to their duties. Accordingly, they made inquiries that, it is not contradicted, could in and of themselves be made. These inquiries were balked. The services of the employees were therefore terminated.10

Although Beilan must be considered a leading case on the question of loyalty and public education, its foundation was laid some six years earlier by the cornerstone case in this area, Adler v. Board of Education.11 This case concerned the constitutionality of the New York Feinberg Law12 which, together with regulations formulated by the New York Board of Regents, required the Board of Education of New York City to list organizations, found, after hearing, to advocate or teach overthrow of the government by force or violence or other unlawful means. The Feinberg Law further required that persons teaching or advocating the overthrow of the government by any of these means should not be appointed or retained as teachers in public institutions. Hearings were given to teachers before any denials of appointment or dismissals under the law, with membership in an organization listed by the Board constituting prima facie evidence of disqualification. It is important to note that before any organization was put on the list compiled by the Board, it also was given a hearing at which it could question the Board's findings and dispute their accuracy and in that way seek to keep its name off the list.

9 Id. at 405, 406.
10 Id. at 410.
If the plea of the group was unsuccessful at the hearing or it did not choose to make use of the hearing and its name was placed on the list, a teacher-member of that organization was placed in a rather difficult position. Still teachers were given the right to a hearing to prove either (1) that they did not know what the organization stood for or advocated or (2) that the organization did not in fact advocate or teach overthrow of the government by force or violence.

Before it had been on the books for even a year the Feinberg Law's constitutionality was challenged in two actions before the New York Supreme Court. The court found the law to be unconstitutional and restrained the Board of Regents from preparing and publishing a list of subversive organizations. This holding was reversed by the Appellate Division of the New York courts in L'Hommedieux v. Board of Regents. In a strongly worded opinion, Justice Heffernan refuted the alleged vagueness and failure of the act to establish definite standards of prescribed conduct.

The most important qualification of a teacher is loyalty to our government. It necessarily follows that disqualification is advocacy of the overthrow of that government.... To avail oneself of the privilege of teaching certain qualifications must be possessed, certain rights renounced. This is not an unconstitutional classification.

This philosophy apparently prevailed when the Feinberg Law came before the United States Supreme Court in the Adler case. The Court stressed that the Feinberg Law laid down reasonable terms for teachers and that if the teachers did not choose to work on these terms they were free to retain their beliefs and go elsewhere.

The teacher's important position in society was recognized by the Court as it described the classroom as a "sensitive area" where the teacher shapes the young minds of his students toward the society in which they live so that the State has a vital interest in a teacher's work. This means, the Court reasoned, that school authorities have the right and the duty to screen prospective teachers as to their fitness to maintain the integrity of the schools.

From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.

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15 Id. at 452 (footnotes omitted).
17 Id. at 493. Just prior to Adler there was a flurry of law review articles, about
IV. Post-Adler Rumblings

The Adler, Beilen, Garner line of cases continued to prevail past the mid-1960's, and although there were signs that the Court's basic policy toward loyalty requirements was undergoing a considerable shift, whenever the state or some other governmental body was involved as the hiring authority, the exception created by these earlier cases was recognized and the requirements were not overturned. The general tone of the Court's decisions in this area, however, was hostile.

In the same year that Beilan was decided (1958), the Court handled a loyalty case that arose in an entirely different context, Speiser v. Randall. There, solely because they refused to subscribe oaths that they did not advocate the overthrow of the Federal or State government by force, violence or other unlawful means or advocate the support of a foreign government against the United States in the event of hostilities, the appellants were denied tax exemptions provided for veterans by the California Constitution. The Court wasted little time and minced few words in finding that the California statute which set up these requirements denied the taxpayers freedom of speech without the procedural safeguards required by the due process clause of the fourteenth amendment. Still it was careful to distinguish the Garner and Gerende cases on the ground that the principal aim of the statutes in those cases was not to penalize political beliefs, but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.

The appellant whose rights under the due process clause of the fourteenth amendment were found to have been violated in Sweezy v. New Hampshire was a teacher, but the board of education or similar agency was not involved and there was no dismissal or refusal of appointment. Rather, he had refused to answer some questions about the content of some of his past lectures at the University of New Hampshire put to him by the State Attorney General. His refusal to answer in the face of a direction by a state court resulted in his being adjudged guilty of contempt.

the Feinberg Law and most of them took the view that the Court in Adler followed. While law review articles are notorious for their lack of agreement with the prevailing judicial philosophy of the time, a random sampling of these articles suggests that legal thinking around the time of Adler apparently favored the imposition of various loyalty tests for teachers as long as they could withstand the test of reasonableness. For a general sampling of these articles and opinions see: Marshall, The Defense of Public Education from Subversion, 51 COLUM. L. REV. 587 (1951); Dayton, The "Little Red Schoolhouse" and the Communist, 35 CORNELL L. Q. 824 (1950); Twohy, The Feinberg Law, 24 ST. JOHN'S L. REV. 197 (1950); Note, 18 GEO. WASH. L. REV. 541 (1950).

22 The Attorney General was acting on behalf of the state legislature under a
It would seem clear that even if the Superintendent or some other board of education official had asked the questions as the hiring authority, the Court would have held the same way on the ground that this was not a reasonable loyalty requirement. The impingement on academic freedom implicit in allowing searching questions about the content of a teacher's lectures would doubtless have lead the Court to the same result regardless of who had asked the questions.

An Arkansas statute in *Shelton v. Tucker*\(^23\) required every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization he had belonged or regularly contributed within the preceding five years. The contracts of the appellant teachers were not renewed when they refused to file the required affidavits. The Court attacked the statute's "indiscriminate sweep" and its "comprehensive interference with associational freedom" in holding that it went far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers.\(^24\)

Perhaps the strongest expression of the Court's increasingly anti-loyalty requirements attitude came in the 1966 case of *Elfbrandt v. Russell*.\(^25\) In that case, two public school teachers in Arizona, a husband and wife, violated a state statute by refusing to take a loyalty oath required by all state employees. The controversial statute contained provisions subjecting to criminal penalties and discharge from employment any employee who took the oath and then knowingly and willingly became or remained a member of the Communist Party or any other group having for one of its purposes the violent overthrow of the government, if the employee had knowledge of the unlawful purpose of the organization.

In finding the statute violative of first amendment freedom of association and guilty of unconstitutional vagueness, the Court emphasized that mere *knowing* membership is not sufficient to allow

\[^23\] 364 U.S. 479 (1960).

\[^24\] The statute in this case was, of course, far broader and considerably more vague than the provisions of the Feinberg Law which were in question in *Adler* or any of the other requirements that the Court had upheld in previous cases involving teachers. Another feature of the case, although admittedly in the background facts, was that it arose out of considerable racial turmoil in and around Little Rock, and there was apparently some indication that the listing requirements were being used to determine members of the then despised National Association for the Advancement of Colored People (N.A.A.C.P.). This, of course, can hardly be considered a reasonable requirement for teaching in any context.

sanctions of an individual's conduct. Specifically, the Court said that a statute of this type must require a showing that an employee was an active member with the specific intent of assisting in achieving the unlawful ends of an organization which had as one of its purposes the violent overthrow of the government before it will become constitutionally acceptable.

Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or public employees. Laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization.

In his dissent, Mr. Justice White concluded that the majority opinion must have been aimed at the criminal provisions of the Arizona law which exposed a public employee to a perjury prosecution if he swore falsely about membership when he signed the oath or if he later became a knowing member while remaining in public employment. He based this conclusion on the fact that the majority did not mention or purport to overrule the "hiring authority exception" line of cases nor did it expressly hold that a state must retain in its most sensitive positions those who lend such support as knowing membership entails to organizations whose purposes include the violent destruction of democratic government. Though he would have upheld the state's right to criminally punish employees violating loyalty requirements, White argued that even if you concede that a state cannot make mere knowing membership a crime, it need not retain the member as an employee and it is still entitled to insist that its employees disclaim under oath knowing membership in the prescribed groups and to condition future employment upon future abstention from membership.

Two cases involving public school teachers and loyalty requirements set the stage for Elfbrandt and made its outcome predictable. While

26 See Apthecker v. Secretary of State, 378 U.S. 500 (1964) for the proposition that mere knowing membership without any showing of specific intent violates the first amendment.

27 Elfbrandt v. Russell, 384 U.S. at 17.

28 Lerner v. Casey, 357 U.S. 468 (1958); Adler v. Board of Education, 342 U.S. 485 (1952); Beilan v. Board of Education, 357 U.S. 399 (1958); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); Garner v. Board of Public Works, 341 U.S. 716 (1951); Nelson v. County of Los Angeles, 362 U.S. 1 (1960); and Wieman v. Updegraff, 344 U.S. 183 (1952). In Wieman a loyalty oath for teachers was struck down, not because teachers and public employees should not be subjected to such a requirement by the state, but rather because it created a conclusive presumption of disloyalty of one who had been a member of or affiliated with a proscribed group, regardless of whether the employees had any knowledge of the organization's nature and purpose at the time he was a member.

29 For elaboration on Mr. Justice White's views and reasoning, see his dissent in Elfbrandt, 384 U.S., beginning at page 19.
neither of the statutes involved in those cases provided any criminal sanctions, the Court subjected their wording to close scrutiny and analysis, concluding in both cases that the language used simply did not meet constitutional standards.

A Florida statute in *Cramp v. Board of Public Instruction*\(^{30}\) required every state employee to swear in writing that he had never lent his "aid, support, advice, counsel, or influence to the Communist Party." The penalty for failing or refusing to sign this oath was immediate discharge. The Court held that the quoted words were so vague and uncertain that no one could be sure of their meaning. "What do these phrases mean? . . . [C]ould anyone honestly subscribe to the oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?"\(^{31}\)

A similar action was brought in *Baggett v. Bullitt*\(^{32}\) by faculty members, staff, and members of the student body of the University of Washington who sought a judgment declaring unconstitutional two Washington statutes requiring the execution of two different oaths by state employees. One of the statutes was passed in 1931 and applied only to teachers, who, upon applying for a license to teach or renewing an existing contract, were required to subscribe to this oath:

> I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and individual allegiance to the government of the United States.\(^{33}\)

The oath requirements of the 1955 Act,\(^{34}\) which applied to all state employees, not just teachers, incorporated various provisions of the Washington Subversive Activities Act of 1951, which provided generally that no subversive person would be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business of the state or any of its political subdivisions.\(^{35}\) Among other things, the teachers

\(^{30}\) 368 U.S. 278 (1961).

\(^{31}\) Id. at 286.

\(^{32}\) 377 U.S. 360 (1964).

\(^{33}\) WASH. REV. CODE § 28.70.150 (Supp. 1966).


\(^{35}\) WASH. REV. CODE § 9.81.010(5) (1951) defines a subversive person as "any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof [which subsections define what is meant by "subversive organization" and "foreign subversive
asked to swear that they were not members of the Communist Party or knowingly of any other subversive organization. The statements they made under oath were made subject to the penalties of perjury.

Significantly, Mr. Justice White, who dissented so vigorously in 
Elizbradt, wrote the majority opinion holding that these oath requirements and the statutory provisions on which they were based were invalid on their face because their language was unduly vague, uncertain and broad.

As in Cramp v. Board of Public Instruction, . . . we are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. . . . Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.38

In his dissent, Mr. Justice Clark contended that the oath required in Cramp37 was of much broader scope than the one in Baggett and it was replete with defects not present in the Washington oath. Furthermore, Clark pointed out that the oath that was upheld in Gerende38 was written in language identical to the 1955 Washington oath. Washington had copied the wording of the Maryland statute primarily because of the Court's approval of it.

V. Adler Revisited—And Overruled

With this background of a change in attitude toward loyalty requirements on the part of the Court, a number of faculty members of the State University of New York challenged the Feinberg Law, which the Court had upheld as constitutional 15 years before in the Adler case.39 Specifically, they sought declaratory and injunctive relief against a New York plan, formulated partly in the terms of the Feinberg Law and partly in administrative regulations, which the state used to prevent the appointment or retention of subversives in State employment.

Not surprisingly, the Court in Keyishian v. Board of Regents,40 held that the Feinberg Law was unconstitutional insofar as it sanctioned mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York. As a result, Adler was

40 385 U.S. 589 (1967).
summarily and unceremoniously overruled after prevailing as the law in this area for some 15 years and the "hiring authority exception," created by such cases as Lerner, Adler, Beilan, Gerende, Garner, Nelson and Wieman, is, at the very least, seriously shaken, if not totally destroyed. The Court made an attempt to distinguish Adler on the ground that the contention of vagueness urged in Keyishian was not heard or considered in Adler. A reading of Adler and the applicable sections of the Feinberg Law leave some doubt as to the validity of this reasoning, but regardless of whether Adler has been specifically overruled in law, it unquestionably has been overruled in spirit.

In attempting to justify the decision it ultimately reached, the Court in Keyishian made the bald assertion that subsequent constitutional doctrines had rejected the premises upon which Adler had sustained the provision of the Feinberg Law constituting membership in an organization advocating forceful overthrow of government a ground for disqualification from employment. Significantly, the cases cited in support of this proposition do not in any respect reject the holdings of Adler and some of them are so far off point as to make their presence meaningless.

The Court spent much time and consumed considerable space in an effort to show that the plan to test loyalty adopted by the State of New York was deficient because of its vagueness. This said the Court was "aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules." Four dissenters were not convinced by this charge of vagueness and the Court's arguments in support of this charge. As Mr. Justice Clark said: "The blunderbuss fashion in which the majority couches 'its artillery of words,' together with the morass of cases it cites as authority and the obscurity of their application to the question at hand makes it difficult to grasp the true thrust of its decision."

But, leaving the vagueness issue aside, the truly disturbing aspect of the decision is the basic policy of the Court which makes it all but impossible for the State to keep a teacher who is a knowing member of the Communist Party out of the classroom. This appears to be the only sound conclusion from the statement of the Court that "mere knowing

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42 Section 3021, New York Education Law (1949) and § 105, New York Civil Service Law (1951).

43 See Mr. Justice Clark's forceful and stinging dissent in Keyishian for elaboration on this point.

44 385 U.S. at 604.

45 Id. at 620-621.
membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants.”

It appears that other cases require active participation in the affairs of the Party or active advocacy of overthrow of the government by force, violence or other unlawful means as a basis for finding the necessary specific intent. This, as will be shown hereafter, seems unrealistic as a practical matter and not be to required by constitutional doctrine. Academic freedom simply should not be discussed as though it existed in a vacuum without any thought given to the rights of the individuals in society. In support of what it describes as “the stifling effect on the academic mind from curtailing freedom of association” by barring employment as teachers to those who are members of listed organizations, the Court cites a study appearing in the Yale Law Journal in 1952. Both the amount of time that has elapsed since this study and the fact that it was made at a time when there was considerable turmoil produced by Senate investigations of Communist infiltration made it of dubious value today.

The impression is unavoidable that the Court had at last decided to abolish the “hiring authority” exception in this area and hold loyalty requirements as a prerequisite for public employment and teaching invalid. Whatever might be said for the Court’s wisdom in holding the loyalty requirements of the New York law unconstitutional, it can at least be asserted that in Keyishian it chose a poor vehicle to achieve its purpose. As Mr. Justice Clark stated in his forceful dissent “No Court has ever reached out so far to destroy so much with so little.”

VI. Academic Freedom

It is necessary to consider one further attack on loyalty oaths and programs as they touch the teaching profession. The allegation is commonly made that such programs violate academic freedom. It seems worthwhile then to consider some of the basic policies which collide head on when the interests of academic freedom are weighed against the State’s right to protect its school system from the threat of subversive influences.

In this sensitive area the Court traditionally has applied a kind of balancing test (whether implicitly or explicitly) under which the rights

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46 Id. at 606.
48 385 U.S. at 607.
49 Jahoda & Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Impact of the Loyalty and Security Programs, 61 YALE L. J. 295 (1952). The Court describes this as a “recent” study. If Adler has become antiquated in 15 years, it would seem that the reliability and pertinence of a study in this area made 15 years ago would at least be subject to some legitimate doubt.
50 385 U.S. 622.
of the individual are weighed against the rights and interests of society as a whole. But the Court in *Keyishian* refuses to apply this test and, in keeping with contemporary decisions in areas other than teaching,\(^1\) considers only the rights of individuals (in this case, college professors) with no apparent reference to the rights of a society vitally affected by the quality of its schools.

It is, of course, obvious that loyalty cannot be the sole criterion of competence, particularly in the area of education. The proposition that a good, loyal teacher is *a fortiori* a competent teacher is patently false. Just as false and misleading, however, is the assertion that a Communist teacher is good for students since he can acquaint them with the "other side" of the picture and thereby give their education a pleasing balance, enabling them to place the material they have learned about the American system in proper perspective. On purely practical grounds it can be established that a Communist would not make a good teacher. If it is valid to say that a competent teacher presents both sides of a given subject then a Communist necessarily would be incompetent since he is trained to present a one-sided, albeit subtly slanted, view of history and government.

At the root of much of the controversy over loyalty requirements is the mistaken idea that they simply cannot co-exist with academic freedom. It is important to remember that on the Constitutional scale, Mr. Justice Douglas notwithstanding, academic freedom is not an absolute right, although it does merit the status of a constitutionally protected right. As such, it surely does not enjoy any more protection than freedom of speech and assembly. The majority of the Court frequently has recognized that such first amendment rights are sometimes out-balanced by considerations of public necessity.\(^2\)

If academic freedom is not absolute then it follows that limitations may be placed on it based on the state's right of self-preservation. It cannot realistically be said that academic freedom is invaded when an educational system requires that its teachers: (1) refrain from knowing membership in the Communist Party or any organization that advocates the overthrow of the government by force or violence, and (2) take a loyalty oath to the effect that they have complied with this very minimal requirement.

**VII. Teachers and Oaths**

Perhaps the most basic problem is that many teachers apparently feel insulted at being asked to take an oath and respond with an

\(^1\) Especially in the field of criminal law with such controversial cases as Escobedo v. Illinois, 375 U.S. 902 (1963) and Miranda v. Arizona, 384 U.S. 436 (1966).

indignant refusal that they feel is justified on moral and constitutional grounds. This attitude seems far more prevalent among college professors as is evidenced by the significant number of important cases in this area which involve a group of college faculty members testing the constitutionality of an oath or other loyalty requirement. This recalcitrant, almost defiant, attitude is in marked contrast to other professions where taking an oath is considered an honor rather than an attack on honor. Lawyers, doctors and judges all must take oaths and do so with a pride in the solemnity and dignity this practice adds to their profession. Supreme Court justices themselves must also take oaths before being admitted to office. But under present standards it is questionable whether even these seemingly innocuous judicial oaths could withstand the discriminating scrutiny given other oaths which have had the misfortune of coming before these same men on appeal.

As a direct result of the decisions holding oaths and various other loyalty requirements unconstitutional it seems likely that an increasing number of teachers will feel insulted at being asked to take an oath without really knowing why. Consequently, more oaths will be challenged until the point is reached where all oaths will be held unconstitutional as applied to teachers.

Those who oppose loyalty oaths often argue that they are really silly and ineffective because if a person is in truth an avowed Communist he would have no hesitancy in lying under oath if this would help him achieve his purpose of getting into the school system. But the Court has often stated that it would not employ its own wisdom to decide an argument of this nature. That a law and its requirements are deemed silly or ridiculous should not be a sufficient reason for ruling it unconstitutional. As Mr. Justice Stewart said in his dissent

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53 Mr. Justice Marshall took two oaths before being installed as an Associate Justice of the United States Supreme Court on October 2, 1967. The language of these oaths could conceivably be condemned as vague and indefinite and the same far-fetched hypotheticals that the Court often gives in its opinions could easily be raised. For example, could any Justice honestly swear that he will "well . . . discharge the duties of the office I am about to enter" when by the test of time and contemporary criticism he might be considered as having done a poor job? Such questions can always be raised.

The two oaths here quoted can be found at 88 Sup. Ct. XIX and the second oath is prescribed by 28 U.S.C. § 453 (1964).

I, Thurgood Marshall, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

I, Thurgood Marshall, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent upon me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.
in *Griswold v. Connecticut*: "I think this is an uncommonly silly law. . . . But we are not asked . . . to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do."

The oath, it would seem, cannot be found to be utterly futile. Fear is one of the most effective preventive devices and while fear of mere dismissal from a position in the school system may not serve as much of a deterrent, fear of a criminal sentence for perjury would at least prompt potential violators to think twice before applying for a job in a school system.

The recent decisions of the Court have established that mere knowing membership in the Communist Party or a similar organization that advocates the overthrow of the government by force or violence is not sufficient to justify a teacher's rejection for employment or his dismissal from a present teaching position. The Court now requires that both knowledge *and* specific intent to further the group's unlawful aims be proven. In taking this approach, the Court seems to have remembered the caution of Mr. Justice Douglas in his dissenting opinion *Adler* that innocence under a "knowing membership" statute turns on knowledge "and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed." Without doubt it can be admitted that this observation by Mr. Justice Douglas is not without perception. However, the mere fact that the burden of proving lack of knowledge may be cast upon an individual teacher seems an insufficient reason for permitting a Communist to teach in the classroom as long as he does not reveal that he is an active member or actively striving to attain the goals of the Party.

Furthermore, such an approach overlooks the basic proposition that the State has a right to conclude that the generality of experience dictates that the vast majority of those who belong to the Communist Party do believe in its goals and that, therefore the State simply does not have to take a chance by retaining them as employees. This reasoning appears particularly pertinent when applied to the field of teaching. It should not be overlooked that a teacher who believes in Communism can subtly and insidiously prepare young minds so that in the future they will be ready, when the call is sounded, to follow the Communist banner into action aimed at overthrow of the Government by force.

In light of these considerations, it does not seem unreasonable for the State to take the position that anyone who is a *knowing* member of the Communist Party should not be permitted to teach in the public schools. If a State determines that it wishes to use an oath or a similar
technique in an effort to get a statement from a teacher or prospective teacher as to his present membership in the Communist Party it is hard to understand why it should be rebuffed because some few people might take the oath and later be asked to prove that they were not in fact knowing members of the Party.

In spite of Mr. Justice Douglas' warning about the onslaught of witch hunts, it is submitted that, statistically, the existence of such an occurrence is rare. In the vast majority of circumstances the burden of proof would not be any greater than it was for the applicant for admission to the bar of the State of New Mexico when the bar examiners were concerned about his good character. In that case the Court had no difficulty in evaluating his explanations for the state of the record made against him and in finally concluding that he had met the burden of proof and was entitled to admission to the Bar of New Mexico.

It would seem that in the last analysis it would take tactics on the part of the press, radio and television to create any kind of realistic conditions that would justify being described as a witch hunt. If those conditions were to exist there seems to be no reason why the Supreme Court could not fashion a corrective as it does when undue publicity make a fair trial impossible.

Assuming that the Court would occasionally find that circumstances were such that it would be unfair to expect the accused to bear the burden of proving lack of knowledge and the Court felt that it had no alternative but to put the teacher back in the classroom, the isolated effect would not present as much potential danger to the State as would exist if there were no loyalty requirements at all. The current Court policy can only serve to hinder the State in its efforts to keep out of teaching positions those whom the State can legitimately suspect on the ground that as knowingly members of the Communist Party they generally will take the opportunity to influence and mold the impressionable minds of the young.

59 See in this connection Sheppard v. Maxwell, 384 U.S. 333 (1966) in which the Court set aside the conviction of Dr. Sam Sheppard following the celebrated Sheppard Murder Trial.
60 As the court said in Pawell v. Unemployment Compensation Board of Review, 146 Pa. Super. 147, 22 A.2d 43, 46 (1941): [T]o say that the State must supinely await an overt subversive act before it may discharge a Communist from its employ is to admit that it has none of the attributes of sovereignty." See also, Steiner v. Darby, 88 Cal. App. 2d 481, 199 P.2d 429 (1948). The United States Supreme Court granted certiorari to this case in Parker v. County of Los Angeles, 337 U.S. 929 (1949), but dismissed the writs of certiorari in 338 U.S. 327 (1949) because it appeared, after the case came to argument, that the constitutional issues sought to be raised were not ripe for decision; Hammond v. Lancaster, 194 Md. 462, 71 A.2d 474 (1950), in which the court said that the citizens and taxpayers of the State, through their representatives, are entitled to decide who shall work for them and who shall teach in those schools and colleges which are State institutions supported by State funds.
In writing the *Keyishian* decision, Mr. Justice Brennan apparently overlooked the important distinction he made in *Speiser v. Randall* regarding interests that were "clearly within the sphere of government concern." Brennan in that case felt that it was constitutionally permissible to deny positions to persons supposedly dangerous because the position might be misused to the detriment of the public. It appears then that Mr. Justice Brennan's own words could be turned against his reasoning in *Keyishian* to support the contention that there should be some kind of loyalty requirements that teachers in public education must meet in order to qualify for a teaching position.

In his stinging dissent in *Keyishian*, Mr. Justice Clark emphasized the importance of the school system and would agree with Mr. Justice Brennan's earlier opinion that teaching is a position that should be carefully regulated to avoid possible abuses that would seriously affect the public welfare. Specifically, Clark stated: "Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it."

There are those who scoff at the suggestion that even an avowed Communist actually intends to pervert the minds of the young and use the classroom as a launching pad for his segment of the much-discussed world takeover. To dispel any lingering doubt that a Communist-inspired teacher could, in the words of Mr. Justice Brennan, misuse the position "to the detriment of the public," the following quotation from the May, 1937 issue of *The Communist* should be instructive:

Communist teachers are, therefore faced with a tremendous social responsibility. They must consider not only their own teacher problems, but the problems of the children. They must fight for the latter. They must mobilize the other teachers in the fight. They must *take advantage of their positions*, without exposing themselves. . . .

The further argument is often made that even though a teacher may be a dedicated Communist there is no reason to believe that he will exert any detrimental influence upon his children. The implausibility of this position was perhaps best pointed out by the New York

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62 *Id.* at 527.
63 385 U.S. at 628.
64 Frank, *The Schools and the People's Front*, *The Communist*, May, 1937 at 438. This article, of course, is by almost any standards extremely dated. However, its age does not necessarily destroy its validity or relevance. While it is undoubtedly true that the Communist Party in America has undergone some significant changes and upheavals in the last 30 years, there is no reason to believe that its basic tenets have changed notably. Rather the approach and procedure have been updated and polished to become more palatable to the "enlightened" generation, but the underlying principles are presumably still very much intact and the schools continue to be an area ripe for intensive concentration.
Appellate Court in *L'Hommedieux v. Board of Regents*, one of the state cases preceding the decision on the Feinberg Law by the Court in *Adler*. In dealing with this contention the court stated:

We are not so naive as to accept as gospel the argument that a teacher who believes in the destruction of our form of government will not affect his students. It is not necessary to impart a thought by direct statement. The result may be accomplished by indirect, subtle insinuations; by what is left unsaid as well as by what is said.66

**VIII. Conclusions**

Before *Keyishian* the Court began to indicate a hostility to loyalty oaths and other loyalty qualifications for teaching and similar areas of sensitive public service. With this as a background, the *Keyishian* decision carried the Court's new policy to its logical conclusion. It seems unlikely under present standards that any loyalty oath will be drafted sufficiently well to meet the stringent criteria apparently applied by the Court in these situations.

As if to reinforce this observation, the Court in November, 1967, struck down a Maryland loyalty oath as being unconstitutionally vague in *Whitehill v. Elkins*.67 In doing so it attempted to distinguish the *Gerende* case on the ground that the Court there did not pass upon or approve the statutory definition of a “subversive” person. The oath involved in *Whitehill* was notable for its lack of incendiary or ambiguous terms and represented the culmination of what Mr. Justice Harlan, in his dissent, described as Maryland's “meticulous efforts” to conform it to the requirements of *Gerende*. It did not even include the limited sort of “membership” clause which the Court had also approved in *Gerende*.

Perhaps realizing the futility of trying to attack the language of the oath itself, the Court insisted that the oath was not to be read in isolation, but in connection with sections 1 and 13 of a Maryland law known as the Ober Act,68 which defined “subversive” and other similar terms in a way that the Court found unacceptable under current constitutional standards.

In finding that the oath was not to be read in isolation, the Court was able to fall back on the now familiar refrain that it was invalid.

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66 *276 App. Div. 494, 95 N.Y.S.2d 443 (1950).*
67 *Id. at 453.*
68 *389 U.S. 54 (1967).*
69 The actual wording of the oath was:

I, __________________________, do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

I further certify that I understand the foregoing is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition).

69 *Md. Ann. Code, art. 88A (1957).*
because of vagueness. This finding was made even under the assumption that the State Attorney General and the Board of Regents were authorized so to construe the Ober Act as prescribing a narrow oath that excluded alteration of government by peaceful revolution and excluded all specific reference to membership in subversive groups. Just as they did in Keyishian, the dissenters again responded to the charge of vagueness by questioning its validity and criticizing the majority's reasoning. Writing for the three dissenters, Mr. Justice Harlan said:

The Court concludes, however, that the oath must be read 'in connection with' certain sections of the Ober Law because, as a state matter, the authority of the Board of Regents to require an oath derives from that law. The Court does not pause to tell us what the 'connection' is or to explain how it serves to invalidate the unambiguous oath required of this appellant. ... The oath does not refer to the statute or otherwise incorporate it by reference. It contains no terms that are further defined in the statute. In short, the oath must be judged on its own bottom.

After the Whitehill decision it seemed difficult, if not wholly impossible, under the stringent standards set by the Court, to conceive of any loyalty oath or even a simple affirmation of allegiance to one's country that would be acceptable. But, as if to clarify its position and underscore the hazards of predicting its mood and philosophy, the Court in a per curiam decision in Knight v. Board of Regents (January 22, 1968) affirmed a decision of the Federal District Court for the Southern District of New York which upheld the constitutionality of a New York law requiring teachers to sign an affirmative oath as a prerequisite of employment in any public school or any private school whose property was wholly or partly tax exempt.

In the Knight case, twenty-seven faculty members at Adelphi University, a private, non-profit institution of higher learning in Garden City, New York, brought an action to enjoin the enforcement of an oath provision that they were required by state law to sign.

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70 The number of dissenters has been reduced by one since the departure of Mr. Justice Clark from the Court last summer. Mr. Justice Marshall sided with the majority so that only Justices Harlan, Stewart and White remain as opposed to the full-scale condemnation of loyalty requirements for teachers in the state public education system.

71 389 U.S. at 63 (1967).


73 Section 3002, New York Education Law (1934) requires every citizen teacher, instructor or professor in any public school or in any private school with property wholly or partly tax exempt to execute an oath which reads as follows:

I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the Constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of ......................

(title of position and name or designation of school, college, university or institution to be here inserted) to which I am now assigned.

The teachers relied heavily on *West Virginia State Board of Education v. Barnette*[^1] in which the Court held unconstitutional a state statute requiring school children to salute and pledge allegiance to the American flag. In answering the plaintiffs' arguments, the federal court said that the pledge of allegiance involved in *Barnette* was far more elaborate than the affirmation required of the New York teachers. The Court further distinguished *Barnette* on the ground that the plaintiffs in that case were members of a religious group who claimed that the requirement of the oath and accompanying salute violated their religious beliefs while the teachers in this case made no claim based on religious freedom. As might be expected, the main thrust of the teachers' attack against § 3002 was that it was vague and indefinite and they supported this contention by citing the line of Supreme Court cases which struck down "negative loyalty oaths."[^2]

The Court distinguished these negative oaths on the ground that they required the affiant to state that he was not and never had been a member of certain organizations while the oath in question required no more than a simple affirmation that the subscriber would support the federal and state constitutions and that he would be a dedicated teacher. In fact, the Court equated the statutory language used in the required oath to "that allegiance which, by the common law, every citizen was understood to owe his sovereign."[^3]

In conceding that it was constitutionally permissible to demand an oath or affirmation, like the one they refused to take, from state and federal public officials, the teachers contended that their speech must be totally free of interference. The Court said that it interpreted the statute and oath as imposing no restrictions upon political or philosophical expressions by teachers.

A state does not interfere with its teachers by requiring them to support the governmental systems which shelter and nourish the institutions in which they reach, nor does it restrict its teachers by encouraging them to uphold the highest standards of their chosen profession. Indeed, it is plain that a state has a clear interest in assuring '...careful and discriminating selection of teachers' by its publicly supported educational institutions.[^4]

Since the Court affirmed this decision *per curiam* without opinion it is difficult to estimate its full significance. If, however, it means that the Court is now making a distinction between negative and positive loyalty oaths it will supply something of a concrete guideline for legislators and public boards of education to follow. It is submitted, how-

[^1]: 319 U.S. 624 (1934).
[^2]: See, for example, Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Elfbrandt v. Russell, 384 U.S. 11 (1966); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (all of which have been discussed previously in this article).
[^3]: 269 F. Supp. at 341.
[^4]: Id. at 341-42.
ever, that if this is the distinction the Court is now disposed to make it is at best artificial. There seems to be little difference, except perhaps in literary style, between an oath that the subscriber will support the state and federal Constitutions and one in which he simply swears that he is not a knowing member of a group which advocates the overthrow of the government by force or violence, in that it would be inconsistent for an avowed Communist to refuse to swear to the one and not the other.

It is true, of course, that a person could be a knowing member of a subversive organization and vehemently disagree with its ends and purposes. One might join purely out of curiosity or because of a desire to learn more about the group so as to oppose more effectively the achievement of its objectives. In these instances it seems clear that the distinction between these two kinds of oaths would be justified, but it must be admitted that the instances of such curiosity seekers and Herbert Philbrick-type "infiltrators" is on the broad scale of experience the exception rather than the rule. In any case it does not seem to be the proper basis for an all-embracing distinction among the various kinds of loyalty oaths in the public education field.

To avoid the confusion and uncertainty of interpretation of the Court's position on loyalty oaths, which must result inevitably from the Keyishian and Knight cases, the Court could clarify the entire area by offering a more workable formula. If this concept of a "positive" oath is to be the standard then the Court should attempt to make this crystal clear in an opinion notably free of ambiguity and judicial hedging.

This use of a "positive" oath, however, seems to be a much too simple answer to a complicated and vexing problem. If the Court were to make this the standard it probably would have to overrule at least portions of prior cases that held positive-worded oaths unconstitutional. For example, a Washington statute\(^7\) which the Court ruled unconstitutional in Baggett v. Bullitt\(^8\) used words in its opening phrase identical to those in the New York statute upheld in Knight. In both of them the oath is positive throughout.

The most dramatic contribution the Court could make in the important but puzzling area of academic freedom and loyalty oaths would seem to be the definition of what it considers an acceptable oath and the establishment of some type of workable standard for public employers to follow in their efforts to preserve public education from the taint of subversion. Perhaps the Court has made its first step in this direction by its per curiam upholding of the Knight oath, but if legislators and public employers are not to proceed on pure speculation the Court must undertake to set the matter to rest in a detailed opinion.

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\(^7\) Wash. Laws 1931, Ch. 103.
\(^8\) 377 U.S. 360 (1964).