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Constitutionality of Efforts to Dismiss Public Schoool Teachers for Loyalty Reasons

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COMMENT

CONSTITUTIONALITY OF EFFORTS TO DISMISS PUBLIC SCHOOL TEACHERS FOR LOYALTY REASONS

I. INTRODUCTION

In recent years many federal legislative committees, and even some committees of the state governments, have been investigating Communism. Next to Federal Government employees, educators are most frequently under scrutiny.[1] This is because it is recognized that the Communist theory is that one of the most fertile grounds for implanting subversive doctrines is the minds of the young. Investigation of teacher activities has given rise to the use of techniques to determine loyalty which have raised issues under the due process clause of the constitution. Also the scrutiny has often resulted in dismissal efforts which raise due process issues. The endeavor of this article is to analyze the constitutional issues so raised.

The scope of this article is largely limited to public school teachers.[2] Only incidental attention is given to other public employees.

II. RIGHT TO PUBLIC EMPLOYMENT

In moving to think about the constitutional rights of teachers it is imperative in the first instance to think about the teacher's right to public employment.

There can be no inchoate right to employment in the public schools as a teacher.[3] If this were not so, anyone and everyone could demand such a position since all enjoy the same rights under the constitution.

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[1] In the year 1953 alone the House Un-American Activities Committee received testimony of 280 witnesses leading to accusations against approximately 100 past or present teachers. In public session, the Sub-committee on Internal Security of the Senate Committee on the Judiciary (Jenner Committee) heard more than one hundred witnesses in the field of education, eighty-two of whom invoked the privilege against self incrimination. While the committees have no power to prosecute, the Jenner Committee reported that in all but a few instances, University officials or local authorities suspended the teacher who used the privilege before them. See Finkelkor and Stockdale, *The Professor and the Fifth Amendment,* 16 U. PITT. L. REV. 355 (1956).

[2] The term as used here includes both publicly employed grade and high school teachers and professors in state supported colleges and universities. The decisions make no distinction between these cases and logic would call for none. Obviously since parochial school teachers and professors in privately endowed colleges are outside the realm of public employment, the considerations are so different as to preclude the examination of their status in this article. See Opinion of the Justices, 332 Mass. 763, 126 N.E.2d 100 (1955).

[3] 78 C.J.S., *Schools and School Districts* §154 (1952). 47 AM. JUR. *Schools* §114 (1943). Also see Board of Education of City of Los Angeles v. Wilkinson, 125 Cal. App. 2d 100, 270 P. 2d 82 (1954); Faxon v. School Committee of Boston, 331 Mass. 531, 120 N.E.2d 772 (1954); Lanier v. Catahoula Parish School Board, 179 La. 462, 154 So. 469 (1934); Note, 94 A.L.R. 1484. The refusal of a school board to engage the professional services of a teacher is not a denial of the latter's constitutional right to follow his chosen profession. Seattle High School Chapter v. Sharples, 159 Wash. 424, 293 Pac. 994 (1930).

To state the proposition is to refute it. The law was succintly stated in *Coleman v. School District of Rochester.*[4]

> . . . [N]o constitutional issue of personal rights is involved. No one has a guaranteed or vested right to become or to continue in a position as a public school teacher. . . . The Legislature, if it saw fit, might enact that teachers should be elected by popular vote. . . . The scope of legislative authority in the premises is virtually untrammeled and unhampered.

This is in accord with the general principal that there is no right to public employment.[5] This is necessary in order that all governmental bodies may be able to keep the public force down to the proper effective size and to provide for efficient internal management.

But to say that there is no abstract right to public employment means only that a teacher can not demand employment from the government. Since the government must employ someone, everyone has a right to be eligible to work for the government.[6] A person does not necessarily have to be employed, but he can not arbitrarily be classified as ineligible.

Furthermore, the government can not be discriminatory in its hiring procedure. In *Garner v. Board of Public Works of City of Los Angeles*[7] it was stated:

> Surely a government could not exclude from public employment members of a minority group merely because they are odious to the majority nor restrict such employment, say, to native born citizens. To describe public employment as a privilege does not meet the problem.[8]

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[4] 87 N.H. 465, 183 Atl. 586 (1936). As a practical matter, however, rights are given to teachers by teacher tenure statutes; hence no constitutional issues are ordinarily raised. Gillan v. Board of Regents of Normal Schools, 88 Wis. 7, 58 N.W. 1042 (1894). 47 AM. JUR. *Schools* §125 (1943). Also see Public School District v. Halson, 31 Ariz. 291, 252 Pac. 509 (1927); Marion v. Board of Education, 97 Cal. 606, 32 Pac. 643 (1893); Potts v. Morehouse Parish School Board, 177 La. 1103, 150 So. 290 (1933); Ansorge v. Green Bay, 198 Wis. 320, 224 N.W. 119 (1929); Baird v. School District, 41 Wyo. 451, 287 Pac. 308 (1930).

[5] City of Detroit v. Div. 26 of Amalgamated Ass'n of Street Electric Railway and Motor Coach Employees, 332 Mich. 237, 51 N.W.2d 228 (1952); Angilly v. United States, 199 F.2d 642 (2nd Cir. 1952); Frankfurter, concurring and dissenting in Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716 (1951); Meyers v. United States, 272 U.S. 52 (1926); Humphrey's Executor v. United States, 295 U.S. 602 (1935). See Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), where the history of the "spoils system" of government employment is explained and the purpose and effect of the Civil Service Statutes are considered. For the attitude of the United States Government (as an employer) in this matter see Emerson and Halfield, *Loyalty Among Government Employees,* 58 YALE L. J. 1 (1948). To the effect that there is in general no legal right to contract with the government, see Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[6] Nelson, *Public Employees' Political Activity,* 9 VAND. L. REV. 27 (1956).

[7] 341 U.S. 716 (1951).

[8] 341 U.S. at 725. To the effect that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to public office see United Public Workers v. Mitchell, 330 U.S. 75 (1947).

Once a person is employed by the government, he has certain rights which must be protected. In *Slochower v. Board of Higher Education of City of New York*[9] the Supreme Court of the United States dealt with the manner in which a public school teacher may be discharged for loyalty reasons.[10] It was recognized in that case that,

> . . . To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and non-discriminatory terms laid down by the proper authorities.[11]

The famous statement of Justice Holmes in *McAuliffe v. Mayor of New Bedford*[12] has been relied on in many cases to sustain the discharge of a teacher for loyalty reasons.[13]

> . . . The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.[14]

However even this case recognized that the state's employing power is subject to the limitations that its terms for hiring and discharging employees must be reasonable and non-discriminatory. Holmes went on to state,

> There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principal the city may impose any *reasonable condition* upon holding offices within its control. [Emphasis supplied.][15]

The discussion in this section leads to the conclusion that due process is an issue, and that every discharge can not be sustained automatically.[16] The relevant considerations in determining constitutionality will be discussed later.

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[9] 350 U.S. 551 (1956).

[10] This case will be thoroughly analyzed *infra*, part V,B.

[11] 350 U.S. at 555. This doctrine was not new to the court. It was foreshadowed in Adler v. Board of Education, 342 U.S. 485 (1952), where it was said that school teachers had no right to work for the state on their own terms. They could be employed on the reasonable terms laid down by the proper authorities; if they did not wish to do so, they could go elsewhere. That a school teacher may not be arbitrarily dismissed was recognized in Wieman v. Updergraff, 344 U.S. 183, 192 (1952), where it was stated, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory."

[12] 155 Mass. 216, 29 N.E. 517 (1892).

[13] Annot. 44 A.L. R. 2d 789 (1955).

[14] 29 N.E. at 517.

[15] *Id.*, at 517-518.

[16] Board of Education of City of Los Angeles v. Swan, 41 Cal. 2d 546, 261 P.2d 261 (1953); Pickus v. Board of Education of City of Chicago, 9 Ill.2d 599, 138 N.E.2d 532 (1956); Reinecke v. Laper, 77 F. Supp. 333 (D.C. Hawaii 1948). To like effect see Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); United Public Workers of America v. Mitchell, 330 U.S. 75 (1947); Emerson and Helfield, *supra*, note 5.

The constitutional relationship existing between a public school teacher and the Board of Education[17] was clearly analyzed in a case in which negro school teachers sought to force the Board to pay them salaries commensurate with those received by white teachers:

> . . . As teachers holding certificates from the state, plaintiffs have acquired a professional status. It is true that they are not entitled by reason of that fact alone to contracts to teach in the public schools of the state; for whether any particular one of them shall be employed is a matter resting in the sound discretion of the school authorities. . . . [T]hey are qualified school teachers and have the civil right, as such, to pursue this profession without being subjected to discriminatory legislation on account of race or color. It is no answer to this to say that the hiring of any teacher is a matter resting in the discretion of the school authorities. Plaintiffs as teachers qualified and subject to employment by the state, are entitled to apply for the positions and to have the discretion of the authorities exercised lawfully and without unconstitutional discrimination. . . .[18]

An analysis of these considerations, with an attempt to reconcile them, leads to certain conclusions. A person does not have a right to a job as a school teacher in the sense that he may demand the position. However, he does have a right to be eligible for the job, to be considered for it by the board. Whether or not he or someone else is selected is in the sound discretion of the board, but that discretion is not unbounded. It may be exercised only within the area of reasonable qualifications for the position in question. Obviously a rule or statute clearly showing discrimination in hiring policies could not withstand judicial attack.[19]

As a corollary to the rule of equal treatment in selection of public servants, there is the rule of equal treatment in their discharge. If a person has a right to be considered for the job on equal terms, he has a right to retain the job on equal terms. But the discretion of the employing agency is so broad and there is such a strong presumption of official regularity[20] that the courts, unless required by tenure legislation, will not inquire into the justification for a discharge for which

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[17] The public authority employing the teacher may be designated under local law in various ways: Board of Education, School Board, School District, Board of Trustees, etc. The term "Board of Education" will, unless otherwise indicated, be used here to designate the local school authority, regardless of what its official designation may be. This will also apply to officials of state managed universities.

[18] Alston v. School Board of City of Norfolk, 112 F.2d 992, at 996 (1940).

[19] In Garner v. Board of Public Works, 341 U.S. 716, 725 (1951), it was stated by Frankfurter, concurring, "But doubtless unreasonable discrimination if avowed in formal law, would not survive constitutional challenge."

[20] Friedman v. Schwellenbach, 159 F.2d 22 (D.C. Cir. 1957), "The court will not review managerial acts, not clearly arbitrary, of executive officials performing within the scope of their authority, and will not substitute their judgment in such matters for that of the officials."

the government does not give a reason. (But in practice, tenure statutes do require that the Board of Education must state the reasons for its action when it releases a teacher.) When a "qualifiication" is set forth in a rule or formal law that has no reasonable relation to the position in question, it will not be allowed to stand.[21] When the case for a dismissal is given, that cause must be adequate in the face of judicial inquiry. This analysis would seem to explain the cases hereinbefore considered.

III. The Relation of Teacher to Pupil and Public as a Factor in Discharge

To train the pupil properly for a full and useful life the teacher needs more than academic qualifications. He must instill in a student the ideals necessary for good citizenship.[22] The courts have recognized this in dealing with the discharge of teachers:

> The competency of a teacher does not depend alone upon academic equipment. With technical qualifications for the position must go character, moral fiber, and respect for the glorious traditions of the teaching professions. Without these attributes a teacher is but a speaking blackboard or a walking textbook. A teacher must not only teach, he must inspire the boys and girls who look to him, in addition to classroom instruction, for moral and inspirational guidance.[23]

The teacher's duty of teaching the all-important ideals does not cease when he leaves the school building. Children respect their teachers and look to them for guidance. Their immature minds are influenced not only by what is actually taught in the classroom but also by the personality of their teacher.[24] A teacher instructs not by words alone, but also by precept and example.[25] A person who by example would teach his students lessons they should not learn is not fit to be a teacher, regardless of his academic qualifications. These facts are recognized by the courts:

> But the teacher is intrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterance, his association, all are involved [in determining his usefulness]. His ability to inspire children and to govern them, his power as a teacher, and the character for which

[21] Note, *Mandatory Dismissal of Public Personnel and The Privilege Against Self Incrimination*, 101 U. Pa. L. Rev. 1190 (1953).

[22] Davis v. The University of Kansas City, 129 F. Supp. 716 (W.D. Mo. 1955); Adler v. Board of Education, 342 U.S. 485 (1952); Goldsmith v. Board of Education of Sacramento, 66 Cal. App. 157, 225 Pac. 783 (1924).

[23] Kaplan v. School District of Philadelphia, 388 Pa. 213, 130 A.2d 762 (1957).

[24] Appeal of Albert, 372 Pa. 13, 92 A.2d 663 (1952); Comment, *A Defense of Teacher Dismissal for Claiming The Privilege Against Self Incrimination*, 1955 U. Ill. L. Forum 611.

[25] State ex. rel. Schweitzer v. Turner, 155 Fla. 270, 19 So.2d 832 (1945); Kaplan v. School District, 388 Pa. 213, 130 A.2d 672 (1957).

> he stands are matters of major concern in a teacher's selection and retention. . . . There may be causes for the removal of a teacher affecting the discipline of the school over which he presides entirely outside of any question of his learning, ability, power of enforcing discipline, or moral qualities. . . .[26]

A teacher's acts outside of the classroom may have the joint effect of setting bad example for students and undermining the confidence of the public in the school system. In *McLellan v. Board of President and Directors of the St. Louis Public Schools*,[27] the teacher's wife filed a cross bill in a divorce action alleging adultery by her husband with various women, and other gross indignities toward her. The newspapers commented on this in editorials. Consequently, when it came to a question of the right of the Board to discharge, the court upheld the discharge saying,

> It was not for the Board of directors to prejudge, or even to examine, the charges brought against this teacher by his wife, but the mere fact that charges of this character were brought against him and that the fact had become notorious, rendered it highly inexpedient that he should remain as a teacher of higher classes frequented by youths between the ages of fourteen and twenty. . . . Such would be the common sense of all fathers and mothers having a parental regard for the morals of their children.[28]

In such a case it is the notoriety of the alleged fact that is ground for removal. The truth of the fact itself is immaterial. In justice to the teacher the Board of Education should not by its hasty action imply credence in rumors that prove to be unfounded, and give the power of discharge to the scandal monger. It should allow the teacher a reasonable time to meet and refute any allegations against him. But if the teacher has not been able to clear his name in the minds of the public, he is no longer qualified for continued employment. The fact that the charge *may* be untrue, and that the teacher has been wronged by another is of no consequence in considering his qualifications for continued employment. The situation is analagous to that where a

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[26] Board of Education of City of Los Angeles v. Swan, 41 Cal.2d 546, 261 P.2d 261 (1953). If a teacher does acts or makes statements outside of the classroom that would tend to undermine the patriotism of the students, he is subject to dismissal. State *ex. rel.* Schweitzer v. Turner, 155 Fla. 270, 19 So.2d 832 (1945) (Making public statement that he would not bear arms in time of war); McDowell v. Board of Education of N.Y., 104 Misc. 564, 172 N.Y.S. 590 (1918) (making statement that he would not resist invasion and would not urge students to do so); Joyce v. Board of Education of Chicago, 325 Ill. App. 543, 60 N.E.2d 431 (1945) (urging former student to avoid the draft). Obviously, making statements to class that the U.S.S.R. had the best government and the United States the worst, that the United States was the worst, that the United States was the aggressor in every war, and that it took advantage of smaller nations was ground for dismissal. Board of Education of Eureka v. Jewett, 21 Cal. App.2d 64, 68 P.2d 404 (1937).

[27] 15 Mo. App. 362 (1884).

[28] *Id.*, at 365.

person may have innocently contracted a communicable disease and has to be discharged. The Board's sole interest is in his qualifications, not in the source of their deprivation.[29]

The public's confidence in the school system is essential if the system is to do an effective job.[30] A teacher who creates suspicion in the minds of the public as to his own or the system's competency is not fit to remain a teacher. This was recognized in *Faxon v. School Committee of Boston,*[31] where the court upheld the dismissal of a school teacher who refused to answer question of a congressional sub-committee as to loyalty to the government. The court stated:

> But the question here is not one of guilt or innocence. It is a question of administration by a public school board in the public interest. Neither the school committee nor the court exists in a vacuum. Neither can profess ignorance of the currents of opinion which sway great masses of the people. It cannot be doubted that multitudes of people in the community regard with abhorrence the Communist Party. . . . Nothing the courts can do or say will prevent the public from drawing its own inferences from refusals to testify. . . . The school committee could find that a great many parents and others would be seriously disturbed if the petitioner were allowed to continue teaching, and that this could undermine public confidence and react unfavorably upon the school system. Considering the position of the petitioner entirely apart from any question of fault on his part and as if he had merely suffered some misfortune, such as a terribly disfiguring personal injury, the best interests of the school are paramount. . . .[32]

IV. Disloyalty as a Ground for Dismissal

It seems axiomatic that the government could not be forced to retain in its employ a person disloyal to it and actively seeking its violent overthrow. Indeed, this would seem so basic that the number of cases in which this proposition has been challenged is startling. The question ordinarily comes up in relation to the state's power to inquire as to the loyalty of its employees as a necessary qualification for continued employment. The United States Supreme Court gave its answer in *Garner v. Board of Public Works*:

> We think that 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 revelant to their fitness and suitability for the public service. Past conduct may well relate to

[29] Wormuth, *Legislative Disqualifications as Bills of Attainder,* 4 VAND. L. REV. 603 (1951).

[30] Opinion of the Justices, 332 Mass. 785, 127 N.E.2d 663 (1955); Beilan v. Board of Education, 78 Sup. Ct. 1317 (1958); Harlan, dissenting in Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Spence, dissenting in Board of Education v. Mass, 47 Cal.2d 494, 304 P.2d 1015 (1956). *But see* Board of School Directors v. Gilies, 343 Pa. 382, 23 A.2d 447 (1942).

[31] 331 Mass. 531, 120 N.E.2d 772 (1954).

[32] *Id.,* at 774.

present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry[33] and are not less relevant in public employment.[34]

The *Garner* case involved civil service employees. That loyalty should be required of all civil servants seems all the more reasonable when it is remembered that at common law an agent owed his principal a duty of loyalty and fidelity.[35] It could hardly be said that the constitution could abrogate such a fundamental rule of the law of Agency when applied to the states.

One more ground could be urged for the above principle. Present disloyalty which is a basis for discharge is now a crime.[36] Certainly the government, state or federal, can not be forced to keep in its employ one who is a criminal.

The importance of loyalty in a teacher has been recognized by the United States Supreme Court which said, in *Adler v. Board of Education*:

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[33] An examination of arbitration reports indicate that even present membership in Communist Party is not ground for dismissal under "just cause" provisions in Collective bargaining agreements in private industry, in the absence of special circumstances. Comment, *Is Invocation of the Fifth Amendment or Alleged Subversive Activities "Just Cause" for Dismissal of a Privately Employed Individual?*, 11 RUTGERS L. REV. 745 (1957). *But see* Black v. Cutler Lab, 351 U.S. 292 (1957).

[34] 341 U.S. at 720. This result has been reached in many cases. Fitzgerald v. City of Philadelphia, 376 Pa. 379, 102 A.2d 887 at 890 (1954): "No employee of a government agency, whether teacher, nurse, or anyone else, should be allowed, while in such employ to disseminate disloyal and seditious doctrines or encourage their spread by membership in a subversive organization." (This case applied to a nurse, but recognized that there would be more compelling reasons in the case of a teacher.) See Wormuth, *supra,* note 29. This qualification for teachers has been recognized in many cases. Laba v. The Board of Education of Newark, 23 N.J. 364, 129 A.2d 273 (1957); The Board of Education v. Mass, 47 Cal.2d 494, 304 P.2d 1015 (1956); Steinmetz v. Calif. State Board of Education, 44 Cal.2d 816, 285 P.2d 617 (1955); Pickus v. Board of Education of City of Chicago, 9 Ill.2d 599, 438 N.E.2d 532 (1956); Laguna Beach United School District v. Lewis, 146 Cal. App.2d 69, 305 P.2d 59 (1956); Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267 (1952). Also see cases cited, *infra,* note 39.

[35] MECHEM, AGENCY §500 (4th ed. 1952).

[36] 70 STAT. 623, 18 U.S.C.A. §2385: "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assasination of any officer of any such government; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, encourage the overthrow or destruction of any such government by force or violence, or becomes or is a member of, or affiliates with any such society, group, or assembly of persons, knowing the purpose thereof —

"Shall be fined not more than $20,000 or imprisoned not more than 20 years, or both, and shall be ineligible for employment by the United States or any department or agency thereof for the next 5 years next following his conviction."

Past disloyalty, including membership in a subversive organization with knowledge of its purpose, is ground for discharge on the theory that it is a reasonable indication of present disloyalty.

> That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, can not be doubted. One's associates, past and present, as well as one's conduct may properly be considered in determining fitness and loyalty.[37]

It is worthy of consideration that in the field of public school teachers additional grounds for requiring loyalty from employees can be urged that have not heretofore been recognized by the court. The court in the *Adler* case seemed to treat school teachers as any other civil servant. The Court made mention of loyalty as fitness necessary to maintain the integrity of the school system.[38] Aside from this incidental statement, the language parallels that in the *Garner* case.

As has been seen, a school teacher must at all times hold himself above reproach. His conduct must be a lesson to his students in the ideals which the school system seeks to impart to those it is training. The board of education should not be required to retain in the classroom, impliedly vouching for his conduct, one who by example teaches students that which they should not learn. Membership in a subversive organization is a violation of the duty to teach honesty and patriotism. Some cases have recognized this.[39] Of course, once a teacher is found disloyal, and it is admitted he may be discharged, it could be said that the exact reasoning on which the discharge is based is unimportant. But a recognition of the fact that the status of the teacher differs from that of other civil servants in his relation to public and pupil has far reaching implications in a consideration of the constitutionality of the methods of ascertaining that loyalty. The reasoning of the United States Supreme Court in this area is still to be considered.

V. Use of the Privilege Against Self-Incrimination as Ground for Dismissal

A. Use of the Privilege in General

Often a teacher is discharged for refusal to answer questions as to his loyalty. These questions may be asked by the Board of Education or by some other lawfully constituted body, such as a legislative committee. Before any conclusions can be reached as to the correctness of the discharge, the nature of the privilege against self-incrimination and its purpose and place in our system of jurisprudence should be ascertained.

It is clear that the purpose of the privilege is not to protect the

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[37] 342 U.S. at 493.

[38] However, in the Slochower Case, the Court refused to give effect to the logical implication of this statement.

[39] Appeal of Albert, 372 Pa. 13, 92 A.2d 663 (1952); (also see opinion of lower court in this case, 99 Pitt. Leg. J .445 (1952)); Reinecke v. Lapen, 77 F. Supp. 333 (D.C. Hawaii 1948).

guilty since the purpose of the entire criminal procedure is to apprehend and punish malfactors. The privilege is to protect the innocent. Dean Wigmore describes its operation thus:

> The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system.[40]

The privilege enjoys a preferred position in this country. It is considered more as a constitutionally secured right than as a privilege.[41] The purpose of the privilege itself is to protect from prosecution the person who invokes it. There is no constitutional guarantee that one who sees fit to exercise the privilege against self-incrimination shall be entitled to do so in private or without notoriety. The person must recognize the fact that his use of the privilege will probably cause the loss of his reputation.[42] There can be no doubt that the public usually does draw unfavorable inferences from the use of the privilege.

It is often stated that no inference may be drawn from the invo-

[40] WIGMORE, EVIDENCE §2251 (3rd Ed. 1940). To like effect see Byse, *Teachers and the Fifth Amendment*, 102 U. PA. L. REV. 871 (1954); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949); School v. Bell, 125 Ky. 750, 102 S.W. 248 (1907); Slochower v. Board of Higher Education, 350 U.S. 351 (1956).

[41] Thus, the existence of a privilege which would otherwise be enjoyed cannot be conditioned on the invasion of this right. Although the formation of a corporation is a "privilege" granted by the state, a statute which called for revocation of a corporation charter when the officials of that corporation refused to waive their self incrimination right was invalid. State v. Simmons Hardware Co., 109 Mo. 118, 18 S.W. 1125 (1891). A statute called for the revocation of the liquor licenses ("privileges") of persons who claimed their right against self incrimination when called to testify before the liquor commission. The court said that no law can be valid which directly or indirectly compels a party to incriminate himself. Pick v. Cargill, 167 N.Y. 391, 60 N.E. 775 (1901). On the practice of making the exercise of a right depend upon the forefiture of a privilege, see Frost and Frost Trucking Co. v. Railroad Comm., 271 U.S. 583 (1925). Obviously, the exercise of any other right can not be made dependent on the waiver of the right against self incrimination. Opinion of the Justices, 332 Mass. 763, 126 N.E.2d 100 (1955) (teacher in private schools); In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1951) (lawyer). But a lawyer may be disbarred for asserting privilege in bad faith: In re Levy, In re Becker, 255 N.Y. 223, 174 N.E. 461 (1931). For the argument as applied to public school teachers see Note, 101 U. PA. L. REV. 1190 (1953).

[42] Nelson v. Wyman, 99 N.H. 33, 105 A.2d 756 (1954). See Faxon v. School Committee, 331 Mass. 531, 120 N.E.2d 772 (1954).

cation of the privilege. Upon reflection it becomes apparent that this statement is not literally correct. It is more accurate to say that the privilege as spelled out in the Fifth Amendment of the United States Constitution forbids any official from basing action on an inference drawn from its use.[43] This is supported on the proposition that the federal constitution sought to give the greatest possible protection to the accused. It is not based on the idea that no logical inference could be drawn from its use. The United States Supreme Court has recognized that permission to draw an inference does not violate Fourteenth Amendment due process if the state statute or constitution permits such inference.[44] This attitude seems logical enough in view of the the probability that most users of the privilege are guilty.[45] At any rate there seems to be no great need to debate the reasonableness of this attitude if the drawer of the inference is confined to merely making further inquiry once suspicions have been aroused. This seems to be the requirement of the courts that will not allow the Board of Education to draw a conclusive presumption from a teacher's invocation of the privilege in loyalty inquiry.[46] However, the courts can hardly deny the Board's right to make further inquiry once its suspicions are thus aroused.[47]

B. Refusal to Answer Loyalty Questions of Legislative Committees

Quite often the Board of Education seeks to discharge a teacher who invokes the privilege against self-incrimination in testimony before a legislative committee. The leading case in this field is *Slo-*

[43] Laba v. Board of Education of Newark, 23 N.J. 364, 129 A.2d 273 (1957); Davis v. The University of Kansas City, 129 F. Supp. 716 (W.D. Mo. 1955). *Contra,* Spence, dissenting in Board of Education v. Mass, 47 Cal.2d 494, 304 P.2d 1015 (1956).

[44] Twining v. New Jersey, 211 U.S. 78 1908*)*; Adamson v. People of California, 332 U.S. 46 (1947). For an interesting analysis see State v. Baker, 115 Vt. 94, 53 A.2d 53 (1957).

[45] It is not necessarily true that a person who claims the privilege is either guilty or a perjurer (claiming under oath that he has the privilege when in fact he does not*)*. But it may be true depending on the facts. It is possible that the person has innocently committed an ambiguous act which could be used as a link in a chain of evidence to show his guilt. A handy example can can be found in a loyalty inquiry. See Byse, *supra* note 40. Being a member of the Communist Party is not itself a crime. 64 STAT. 991 §783(f). But being a member of an organization that advocates the violent overthrow of the government with knowledge of its purpose is a crime. *Supra,* note 36. If a person were a member of the Communist party without knowledge of its purpose, he would be innocent of crime, and an affirmative answer to a question of past party membership would not incriminate him. However, it would be important evidence in a criminal prosecution. Obviously, here a person could legitimately invoke the privilege and be guilty of no crime. However, just as logically he could invoke the privilege and be guilty of a crime. The latter would seem more often to be the case rather than the former.

[46] Laba v. Board of Education of Newark, 23 N.J. 364, 129 A.2d 273 (1957); Davis v. The University of Kansas City, 129 F. Supp. 716 (W.D. Mo. 1955).

[47] Kaplan. v. School District, 388 Pa. 213, 130 A.2d 672 (1957).

chower v. Board of Higher Education of the City of New York, where a public school teacher was summarily discharged in pursuance of a provision of the city charter for invoking the Fifth Amendment when asked questions as to his loyalty by a congressional sub-committee. The *charter* made the discharge mandatory. The United States Supreme Court held that the *charter* provision, and hence the discharge, was unconstitutional. The court has not clearly defined the exact holding in this case, and its implications are not yet clear. Since it is controlling on all other courts it should be thoroughly analyzed.

The decision was based on the premise that there could be no inference of guilt from the use of the privilege. If the Board could draw no inference of disloyalty it had no reason to believe that the professor was not fit to continue as a teacher since it held no hearing into the matter but purported to support the discharge on the use of the privilege alone.

The reason for not permitting the Board to draw an inference is an important factor to be considered. The court did not say that if the inference were drawn the right given by the Fifth Amendment would be infringed. It did say that logically the conclusion of disloyalty did not necessarily follow from the mere refusal to answer the questions. The fact that the refusal to answer was based on the Fifth Amendment rather than on comparable provisions of state constitutions was unimportant, and a like result would have been reached under the due process clause of the Fourteenth Amendment even if a state constitution privilege were used.

The Supreme Court has said that even in criminal cases, with the high degree of proof required, an inference of guilt can be drawn from the use of the privilege against self-incrimination without offending due process.[48] The *Slochower* case, in denying such an inference when the privilege was invoked before legislative committee, could have been dependent on the particular facts of that case. The questions involved concerned the professor's activities twelve years before. Apparently he had been loyal at least since that time. Moreover, the details of his activity during the time in question were known to the officials of the university during the time of his employment, since the professor had testified at a state legislative committee ten years prior to testifying before the Congressional Committee. Clearly his dismissal was arbitrary if it was based on an inference from the invocation of the privilege. There could be no inference when the facts were known.

The facts of the case reveal the arbitrary element of the inference. The court condemned the charter provision in th following words:

[48] Cases cited *supra,* note 44.

> As intrpreted and applied by the state courts, it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the pleas resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive.[49]

State courts are split on the proper interpretation of this decision. Before *Slochower* the cases were uniform that such a dismissal was constitutional,[50] so the problem is solely one of interpretation of this single decision. The Supreme Court of New Jersey[51] has held that the assertion by a teacher of his constitutional privilege before a Congressional committee does not constitute an admission of guilt or justify automatic dismissal. An inquiry by the Board of Education into the circumstance of the assertion of the privilege with no regard as to the truth of the matter in issue could not be sufficient to justify a dismissal. It appears that the sole ground for dismissal recognized by the court is disloyalty.

A more reasonable appraisal of the *Slochower* decision was made in *Board of Education v. Mass*:

> We understand the holding of the *Slochower* case to be that a public employee may be dismissed for invoking the privilege against self-incrimination only if, after a full hearing in which he is afforded an opportunity to explain his reasons for claiming the privilege, it is determined that his refusal to answer is sufficient under the circumstances to warrant dismissal.[52]

The California court based this conclusion on the statement that under the New York provision no consideration was given to the circumstances of the case or the reason for use of the privilege, and hence no opportunity was given to dispel any inference arising from use of the privilege.

An inference that the teacher using the privilege against self incrimination is guilty of disloyalty is not always justified, as the facts of the *Slochower* case so graphically demosntrate. Hence a general rule or regulation such as in *Slochower* calling for mandatory dismissal for use of the privilege could not be upheld on the basis of a

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[49] 350 U.S. at 558.
[50] Annot., *supra*, note 13; Board of Education v. Eisenberg, 129 Cal. App.2d 732, 277 P.2d 943 (1954); Board of Education v. Wilkinson, 125 Cal. App.2d 100, 270 P.2d 82 (1954).
[51] Laba v. Board of Education, 23 N.J. 364, 129 A.2d 273 (1957).
[52] 47 Cal.2d 494, 304 P.2d 1015 at 1019 (1956).

conclusive presumption of guilt. A person could use the privilege and still be innocent. However, a hearing to determine loyalty in which the sole issue was the circumstance of the assertion of the privilege would seem to satisfy due process, since it would be ascertained whether the circumstance justify the inference. There could then be no objection that the assertion *may* have come from mistake or inadvertence. It would seem that it would be more fair to the teacher not to restrict the hearing to the circumstances of the use of the privilege but rather to extend it to complete issue of disloyalty.

The *Slochower* case, by imposing a duty on the teacher to answer only the questions of the Board of Education overlooked some forceful arguments for imposing a duty on a public school teacher to answer all incriminating questions of any proper investigating body. A consideration of analogous situations would be proper. A policeman has the duty to answer incriminating questions, not only of his superiors, but ot a grand jury or any other official body.[53] If the policeman were allowed to withhold information relating to his unlawful activity and to keep his job, society would not be able to protect itself. Obviously, it would be inconsistent to permit the policeman to retain his job of investigating crime but to remain silent about his own crime. On the other hand, a lawyer does not, by the nature of his particular relation to the state, have the duty of waiving the privilege and hence is not subject to disbarment for refusal to do so.[54] Although he is considered an offiicer of the court, he is not as such a servant of the state. The public school teacher would seem to have a duty to the state not as stringent as that of the policeman, but more demanding than that of a lawyer. He is an employee of the state, entrusted with the obligation to uphold the integrity and work for the betterment of the education system. Legislative committees and other bodies which are empowered to inquire as to the teacher's conduct, are also seeking these objectives. It would seem that it would be only reasonable to require the teacher to cooperate fully with these bodies in achieving their mutual end. Knowledge by the proper state agencies relating to his loyalty would seem imperative. But *Slochower* has said no such duty to testify to bodies other than the Board of Education can be imposed on the public school teacher.

Additional grounds can be advanced for discharging a teacher for use of the privilege against self incrimination. Teachers must possess qualifications other than academic proficiency and loyalty. Once they lose their reputation for honesty, morality, and patriotism, they can

[53] Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949); School v. Bell, 125 Ky. 750, 102 S.W. 248 (1907); Sounder v. City of Philadelphia, 305 Pa.2, 156 Atl. 246 (1931); Cristal v. Police Commission, 33 Cal. App. 564, 92 P.2d 416 (1949).

[54] In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1941).

not do an efficient job in the classroom and, hence, lack the essential qualifications for members of the teaching profession. The public is bound to draw an unfavorable inference from the use of the privilege when questions relating to loyalty are asked. The court should allow the Board of Education to recognize that the public in general and the students in particular will probably conclude that the teacher is disloyal. However, as *Slochower* showed, a conclusion of loss of confidence is not a necessary deduction for the use of privilege, since the public may know the whole story and refuse to draw the inference. Hence a statute providing for summary dismissal for the use of the privilege would be unreasonable. But if an inquiry by the Board of Education disclosed that such disqualifying public sentiment did exist, it would not seem constitutionally objectionable to discharge the teacher.[55] Possibly it would be more fair to the teacher for the Board to hold an inquiry into the entire issue of disloyalty, but a hearing restricted to the scope above indicated would seem to be constitutional. Such a ground for discharge is a possibility that a teacher should keep in mind when testifying before legislative committees. Such a consideration may prompt him to waive the immunity and testify fully. Obviously, if he were in fact guilty he would not be likely to do so. But in that case he should not retain his job. If he had the fear of being engulfed by ambiguous circumstances he would be well advised to testify fully in the hope of allaying whatever suspicions that might otherwise arise.

C. Refusal to Answer Loyalty Questions of the Board of Education

In the recent decision of *Beilan v. Board of Education*,[56] the Supreme Court of the United States held that a public school teacher may be discharged for failure to answer a question asked him by the Board of Education concerning that teacher's loyalty. That the refusal to testify to the Board was based on possible self-incrimination is unimportant when the issue is solely the correctness of the teacher's discharge. This decision is in accord with the uniform holding of the lower courts.[57]

[55] Faxon v. School Committee of Boston, 331 Mass. 531, 120 N.E.2d 772 (1954). This case was subsequently considered in Opinion of the Justices, 332 Mass. 785, 127 N.E.2d 663 (1956).

[56] 78 Sup. Ct. 1317 (1958).

[57] Annot., *supra*, note 13; Board of Education v. Cooper, 136 Cal. App.2d 80 (1955); Davis v. The University of Kansas City, 129 F. Supp. 716 (W.D. Mo. 1955); Steinmitz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617 (1955); Laba v. The Board of Education of Newark, 23 N.J. 364, 129 A.2d 273 (1957); Adler v. Wilson, 282 App. Div. 418, 123 N.Y.S. 2d 655 (1953); Paplan v. School District, 388 Pa. 213, 130 A.2d 726 (1957). A refusal to answer may be found to be a violation of the general grounds listed for dismissal in the statutes; "lack of professional fitness" (Paplan); "oncompetency" (Beilan); "adequate cause" (Davis). Refusual to answer loyalty questions at a grievance hearing is not "just Cause" for remmoval under col-

The discharge in the case of the refusal to answer the Board's questions is not based on any inference of guilt therefrom. If no inference could be made from the assertion of the privilege before a legislative committee, clearly none could be made under these similar circumstances.

The discharge is based on a violation of a duty which his position imposes on the teacher. He must, under the pain of discharge, answer pertinent questions as to his qualifications for continued employment. To be constitutional the requirement must be reasonable. The public school teacher works for the state, which has undertaken the job of providing a good educational system for its citizens in the interest of the common good. The state is spending tax money in pursuance of this aim, and in so doing has acquired a moral obligation to provide a system that will produce well-trained, honest, patriotic men and women. The student is entrusting his future to the educational system. This again enforces an extraordinary responsibility upon the state. The Board of Education is charged with making education function. Hence it is on the Board that the moral duty is realistically imposed. It must make sure that the teaching staff is competent. Therefore it must weed out professionally unfit teachers.

There rests with the Board the power and duty to inquire into the revelant qualifications of a teacher. There is the reciprocal duty on the part of the teacher to cooperate fully and frankly. His job is to help provide a proper educational system for the community; to assist the Board in its task. This includes disqualifying himself when necessary. He may not block the Board's proper inquiry by secretiveness and concealment.[59] He has the right not to answer loyalty questions, but the duty to do so.[60] Naturally this inquisitorial power of the Board of Education is not unlimited. It is conferred by the nature of the Board's purpose, and hence, it is limited thereby. The proper area of inquiry is any matter necessary in determining fitness of a teacher. Loyalty is such a necessary qualification.

Is any question relating to loyalty within this area? Being a member of a subversive organization with no knowledge of its purpose is not disloyalty. But a question concerning mere membership with no mention of knowledge of purpose of the organization would legally justify the use of the privilege. However, an affirmative answer alone would not be ground for dismissal.[61] A refusal to answer such a ques-

lective bargaining contract in private industry. Comment, 11 RUTGERS L. REV. 745 (1956).

[58] The Beilan case, *supra,* note 56, and all the cases in note 57, *supra,* so held. However, the Kaplan case indicated an inference could be drawn.

[59] Laba v. Board of Education, 23 N.J. 364, 129 A.2d 273 (1957); Beilan v. Board of Education, 78 Sup. Ct. 1317 (1958).

[60] Cristal v. Police Commission, 33 Cal. App. 364, 92 P.2d 416 (1939).

[61] Wieman v. Updergraff, 344 U.S. 183 (1952).

tion is ground for removal, since the matter is a proper subject of inquiry.[62] The question as to whether a teacher is a present member of a subversive organization is related to the questions of whether he is presently a member with knowledge of its purpose and is preliminary thereto. The answer to such a question would normally indicate whether any further inquiry with respect to membership with knoweldge of the organization's purpose or personal advocation of violent overthrow was necessary.

The argument is often advanced that an inquiry by the Board of Education into a teacher's political loyalties is a violation of academic freedom.[63] It is probably true that the chief reason for tenure of a teacher is the same as for tenure of a judge. Certainly the teacher must be free from the passions of the moment to exercise independent judgment if he is to perform his proper role in the education process.[64] But it is certainly incorrect to consider the discharge of a teacher for disloyalty as an attempt by the Board of Education to interefere with academic freedom. Such approach is actually only a sophisticated argument that disloyalty is not a ground for discharge. A teacher must be loyal to the state in order to be able to teach the ideals of honesty and patriotism.

VI. Loyalty Oaths

The use of the loyalty oath eliminates the necessity of detailed hearings by the Board of Education in order to determine a teacher's loyalty. This device simply requires the teacher, as a condition of employment, to take a certain prescribed oath relating to loyalty. If the teacher be disloyal, he is unable (in theory) to take the oath and therefore is disqualified.

The use of the loyalty oath system itself as a means of determining qualifications is constitutional, providing that the requirements that must be sworn to do not violate due process.[65] The usual form requires the swearing that one does not believe in the propriety of the

[62] Orange Coast Junior College District v. St. John, 146 Cal. App.2d 549, 303 P.2d 1056 (1956); Board of Education v. Cooper, 136 Cal. App. 2d 513, 289 P.2d 80 (1955); Steinmetz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617 (1955).

[63] Laba v. Board of Education, 23 N.J. 364, 129 A.2d 273 (1957); Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951); Byse, *supra*, note 40.

[64] Finkelkor and Stockdale, *supra*, note 1.

[65] Annot., 18 A.L.R. 2d 268 (1951); Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 292 (1952); Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951); Dwarker v. Cleveland Board of Education, 108 N.E.2d 103 (Ct. App. Ohio 1951); Pickus v. Board of Education, 9 Ill.2d 599, 138 N.E.2d 532 (1956). Local oath requirements have been held invalid on the ground that a comprehensive statute was intended to be exclusive: Fraxer v. Regents of University of California, 39 Cal.2d 717, 249 P.2d 284 (1952); Tolman v. Underhill, 39 Cal.2d 708, 249 P.2d 280 (1952). Loyalty oath requirements as applied to those other than teachers have been held valid: candidates for public office, Grende v. Board of Supervisors, 341 U.S. 56 (1950); all civil servants, Garner v. Board of Public Works, 341 U.S. 716 (1951); Fitzgerald v. City of Philadelphia, 387 Pa. 379, 102 A.2d 887 (1954).

violent overthrow of the government and is not knowingly a member of any organization with such aim. Any deviation from this form requiring additional qualifications as to loyalty may make the oath constitutionally objectionable. Since the refusal to take the oath results in automatic discharge, the requirements for the oath must be such as would justify a dismissal if such fact were found by the Board of Education after a hearing. Obviously, present belief in, or advocation of, the violent overthrow of the government would brand the person disloyal and justify his dismissal. Membership in an organization with such aims, provided there is personal knowledge of its purpose, is equivalent to personal belief and, hence, would justify dismissal. This requirement of personal knowledge is essential.[66] Disavowal implies certainty. A person could be un-certain that he does not belong to such a subversive organization, because he could belong to such an organization with no knowledge of its purpose. If he takes an oath that does not require that the membership be with knowledge of purpose, he could perjure himself. If he were uncertain and did not take the oath he would be fired for what might be mere membership without the requisite knowledge. This is not ground for removal since it is not disloyal to belong to a subversive organization without knowledge of its purpose. The problem becomes more difficult when the oath requirement relates to past membership. A person may have joined an organization and quit when he learned of its purpose. Or he may have been a member of a lawful organization which, after he severed connection with it, became disloyal. Present and future conduct may be judged by past conduct,[67] so past membership with knowledge of the organization's purpose may be ground for dismissal. But, again, past membership with ignorance of purpose can be no indication of present or future disloyalty. The purpose of inquiring as to membership in the past is to prevent a person from claiming that he severed membership just prior to taking the oath.

VII. Bills of Attainder and Ex Post Facto Laws

It is often contended, always unsuccessfully, that statutes requiring loyalty oaths are bills of attainder or ex post facto laws which are prohibited to the states by the United States Constitution.

A bill of attainder was defined in *United States v. Lovett*:

> . . . Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members

[66] Wieman v. Updegraph, 344 U.S. 183 (1952). In Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951), it was stated that the teacher was protected in that there was a requirement of knowledge of falsely swearing for conviction of perjury.

[67] Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267 (1952). See Garner v. Board of Public Works, 341 U.S. 716 (1951); and Adler v. Board of Education, 342 U.S. 485 (1952).

> of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.[68]

Statutes requiring loyalty oaths are never bills of attainder due to their content but their form resembles that set forth in the above definition. All of the school teachers of the state, all civil servants, all lawyers, etc., would be a group. Those to whom the statute was to apply would be easily ascertained by their failure to take the oath.[69] Therefore, if a statute inflicted punishment on them for their failure to take a prescribed oath, it would be unconstitutional. But loyalty oaths statutes are constitutional since they don't inflict punishment.

Statutes requiring oaths as to past loyalty could also take the form of an ex post facto law.

> By an ex post facto law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that prescribed; or changes the rule of evidence by which less or different testimony is sufficient to convict than was then required.[70]

If disloyalty were not ground for dismissal at one time, an assumption valid for this discussion, and later the same disloyalty was declared to be a disqualification, such a declaration would be ex post facto in operation — if it imposed punishment as a result.

A loyalty oath statute can not be a bill of attainder or an ex post facto law since it does not impose punishment. The deprivation of any right, civil or political, previously enjoyed, may be punishment. The circumstances attending and the cause of the deprivation determine the fact.[71] Punishment is in fact inflicted when there is an intent to inflict it, that is, when the infringement of the right is motivated by an intent to inflict punishment. The circumstances of each case indicate whether or not the punitive intent is present. Where there is such a relationship between the past conduct and the right affected that it can be said that the past conduct indicates lack of ability or capacity for the proper exercise of the function, there is no punishment. The intent of the restriction is not to harm the individual but to protect the public. Therefore, punishment is not imposed by a general regulation which merely provides standards of qualification and eligibility for employment.[72] Past loyalty may be used as a basis of qualification for future employment.

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[68] 328 U.S. at 315.

[69] Cummings v. the State of Missouri, 4 Wall. (U.S.) 277 (1866). See Note, 101 U. PA. L. REV. 1190 (1953), and Ex parte Garland, 4 Wall. (U.S.) 333 (1866).

[70] 4 Wall. (U.S.) at 325 and 326. See Annot., *supra*, note 65.

[71] Cummings v. The State of Missouri, 4 Wall. (U.S.) 277 (1866). This view was reaffirmed in Garner v. Board of Public Works, 341 U.S. 716 (1951).

[72] Garner v. Board of Public Works, 341 U.S. 716 (1951). This was recognized in both the Cummings and Garland Decisions, and applied in Dent v. West

> . . . [T]he individuals . . . are subject to possible loss of positions only because there is a substantial ground for the Congressional judgment that their beliefs and loyalties will be transformed into future conduct. . . . [T]he history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be. . . .[73]

Questions by the Board of Education are relevant when they deal with past conduct. Therefore, requirements in loyalty oaths making past disloyalty ground for removal does not offend due process since it is reasonable to believe that past conduct is an indication of present and future conduct. The past conduct must reasonably indicate that future conduct will adversely affect the interest of society. This is the same logical relationship that is necessary for the oath to satisfy the demands of due process. Today loyalty oath statutes are never defeated as bills of attainder.[74] If the language of the statute satisfies due process, the court gives only incidental attention to the bill of attainder of ex post facto contention.[75]

VIII. Freedom of Speech

The Fourteenth Amendment prohibits the state from depriving its citizens of liberty without due process of law. Included within the term "liberty" is freedom of thought and of expression. These rights as well as the right to continued government employment on reasonable terms, must not be infringed in an unconstitutional manner by the Board of Education in its loyalty proceedings.

Freedom of thought and speech are infringed if the expression of mere unpopular beliefs and thoughts would constitute grounds for discharge.[76] But freedom of speech and thought, like all rights to be

Virginia, 129 U.S. 114 (1889), upholding a statute elevating standards of qualifications to practice medicine, and Hawker v. New York, 170 U.S. 189 (1898), upholding a statute forbidding practice of medicine by any person who had been convicted of a felony.

[73] American Communications Association v. Douds, 339 U.S. 382 (1950). For a criticism of this, see Warmuth, *supra,* note 29. That any disability to hold public employment is punishment, see Note, 101 U. Pa. L. Rev. 1190 (1953).

[74] Wieman v. Updegraff, 344 U.S. 183 (1952). In State of Missouri v. Heighland, 41 Mo. 388 (1867), the same oath that was considered in Cummings was a bill of attainder as applied to a teacher, but it was not stated whether the teacher was employed in public or private schools. This seems to be the only case involving a teacher where an oath requirement was unconstitutional as a bill of attainder. It should be noted that this case was decided before the Fourteenth Amendment was ratified.

[75] Annot., *supra,* note 65; Board of Education v. Cooper, 136 Cal. App.2d 513, 289 P.2d 80 (1955); Orange Coast Junior College District v. St. John, 146 Cal. App.2d 549, 303 P.2d 1056 (1956); Pickus v. Board of Education, 9 Ill.2d 500, 138 N.E.2d 532 (1956); Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951). A statute or rule requiring discharge if the teacher refuses to answer loyalty questions can not be a bill of attainder or an ex post facto law since there the act to be punished (assuming that there is punishment involved) is committed after the statute is passed. Faxon v. School Committee, 331 Mass. 531, 120 N.E.2d 772 (1954); Opinion of the Justices, 332 Mass. 785, 127 N.E.2d 663 (1956).

[76] Some cases state that there is no infringement of freedom of speech or belief,

enjoyed in organized society, is not absolute.[77] The rights of the public must be protected.[78] It is true that speech and thought, considered in the abstract, occupy a preferred place in our constitutional scheme, and considered alone deserve great protection.[79] However, in a loyalty inquiry more than the speech and thought are involved. The state does not fear the immediate results of the speech, but rather seeks to prevent the harmful conduct which it believes will be practiced by those who entertain beliefs and engage in speech relating to the urging of the violent overthrow of the government. The speech and belief are merely means of identification.[80]

Another important factor to be considered in determining the extent of allowable infringement on speech is the nature of its effect.[81] Do we have a sufficiently serious effect on speech in the element of loss of a job? The court has given help which assists with an answer to the question.

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional partial abridgement of speech the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances present. . . . [L]egitimate attempts to protect the public not from the remote possible effects of noxious ideologies, but from present excess of direct, active conduct are not presumptively bad be-

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if the only result is discharge. Pickus v. Board of Education, 9 Ill.2d 599, 137 N.E.2d 532 (1956); Appeal of Albert, 372 Pa. 13, 92 A.2d 663 (1952); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950).

[77] United Public Workers v. Mitchell, 330 U.S. 75 (1947); Emerson and Helfield, *supra,* note 5.

[78] The right of the Public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has been frequently and consistently recognized by the Court. The blaring sound truck invades the privacy of the home and may drown out others who wish to be heard. Kovacs v. Cooper, 336 U.S. 77 (1949). An unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of essential obligations of the local government. Cox v. New Hampshire, 312 U.S. 569, 574 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the health of children (children forbidden to sell newspapers), Prince v. Massachusetts, 321 U.S. 158 (1944), or of the whole community, (compulsory vaccination), Jacobson v. Massachusetts, 197 U.S. 11 (1905); and it may be offensive to the moral standard of the community (bigamous Marriage), Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890); or the First Amendment Rights may conflict with the government's interest in the character of members of the bar, In re Summers, 326 U.S. 561 (1945).

[79] See in particular, Schenck v. United States, 249 U.S. 47 (1919); Holmes dissenting in Abrams v. United States, 250 U.S. 616 (1919); Brandeis, concurring in Whitney v. California, 274 U.S. 357 (1927).

[80] American Communications v. Douds, 339 U.S. 382 (1950).

[81] In Dennis v. United States, 341 U.S. 494 (1951), the court adopted Judge Learned Hand's statement: "In each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

> cause they interfere with, and, in some of its manifestations, restrain the exercise of First Amendment rights.[82]

The courts have put the interest of the teacher and the public into the judicial scale and have determined that if the teacher is to retain his beliefs he must look for employment elsewhere.[83] This is only a partial, indirect invasion of the teacher's rights. The public has a great interest to be protected. To hold otherwise would be to allow freedom of speech and thought to thwart the Board of Education in fulfilling its duty of maintaining the school system. That is absurd.

IX. Conclusion

It should be apparent that before a determination can be made as to the constitutionality of acts to test loyalty of teachers or of moves to dismiss for loyalty reasons there must be a thorough analysis of each fact situation. It would appear that thus far the courts have not given proper attention to certain aspects of the problem. Certainly in a great many instances dismissal of teachers is constitutional.

John P. Miller

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[82] American Communications Association v. Douds, 349 U.S. 382, at 399 (1950).
[83] Adler v. Board of Education, 342 U.S. 485 (1952).