A Critique of Recent Ohio Anti-Subversive Legislation

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I. INTRODUCTION

In the present world crisis, one's views on the scope to be accorded basic civil liberties, such as the rights of free speech and assembly, depend on a number of variables too complex for convenient labelling as politically "liberal" or "conservative." If we assume a consensus among American leaders of opinion on the value of protecting and preserving the personal immunities guaranteed by the state and federal "bills of rights," there is still the vexing problem of means, choice of which may not only be dictated by intelligence and experience, but by the degree of attachment to these fundamental rights, a matter more of faith than empirical demonstration. Thus we find at one pole of opinion, the view that now, as never before in our nation's history, civil liberties should be upheld and even extended, for it is our respect for the individual conscience that spells the essential difference between our system and the totalitarian regime which opposes us. If by limitation of the sphere of individual freedom of choice we destroy this respect for and tolerance of dissent, there will be nothing in America worth saving.[1] The opposing view, which tends on the whole to assess the internal danger to security as much greater, holds that restrictions are necessary to protect the efficient operation of government "which is an essential precondition to the existence of all civil liberties."[2] Dealing as we are with imponderables in the field of social dynamics, neither view can be dismissed out-of-hand as "unrealistic." The tide at present, however, is setting in the direction of the latter perspective, accelerated, some fear, by an emotional impulse to do anything nominally "anti-communist" if it has

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[1] Some recent writings by adherents to this view are: BARTH, THE LOYALTY OF FREE MEN (1951); BIDDLE, THE FEAR OF FREEDOM (1951); Carr, *National Security and Individual Freedom*, XLII YALE REVIEW 496 (June, 1953); Davis, *Are We Worth Saving? And If So, Why?* 207 Harpers 23 (Aug. 1953); Douglas, *The Black Silence of Fear*, N.Y. Times Magazine, Jan. 13, 1952, p. 7; Kennan, *Communism and Conformity*, N.Y. Herald Tribune, May 20, 1953.

[2] Quotation from the dissenting opinion of Vinson, C.J., in Trupiano v. United States, 334 U.S. 699,715 (1948). The most outspoken advocates of restraints on political liberties are often the erstwhile "left-wingers" such as WEYL, THE BATTLE AGAINST DISLOYALTY (1951); Book Review, 44 J. CRIM. L. & CRIMINOLOGY 84 (1953). However, not all former "insiders" of the Communist apparatus are of this persuasion. See, e.g., PHILBRICK, I LED THREE LIVES 299-300 (1952).

the least chance of exorcising the troubles that plague us. In its recent session, the Ohio Legislature by certain enactments has taken the "calculated risk" that we do not "burn down the house to kill the rats."[3]

By way of background to discussion and analysis of the three anti-subversive measures recently passed by the General Assembly, it will be well to describe what preceded this legislative action, in terms of investigation of the nature and extent of the evil to be dealt with, and pre-existing statutes aimed generally at the same problem. So much of a high quality has been written in the professional periodicals and treatises on the subject of resolving the conflict of "freedom versus internal security" and on specific control measures both state and national,[4] that no attempt will be here made to survey the whole field, but an endeavor will be made to bring in these outside matters only when they seem to be germane to an evalution of the new Ohio laws. Because these laws will be executed both in conjunction with federal anti-subversive legislation and within the limitations imposed by the United States Supreme Court through the Fourteenth Amendment to the Constitution, it will be necessary to allude frequently to recent national legislation and federal court decisions. The scope of this paper forbids treatment of these national matters on their merits, both constitutional and otherwise, and they will be accepted as established conditions within which the Ohio laws will operate and be tested.[5]

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[3] This phrase was used by Governor Adlai Stevenson of Illinois in his message accompanying the veto of Senate Bill No. 202, a criminal and investigatory measure substantially similar to the Ohio Devine Law, here discussed. Reproduced in BUSCH, ADLAI E. STEVENSON OF ILLINOIS 135-144 (1952).

[4] Chafee, *Thirty-five Years with Freedom of Speech*, 1 KAN. L. REV. 1 (1952); Cohen and Fuchs, *Communism's Challenge and the Constitution*, 34 CORNELL L. Q. 182-219, 352-375 (1948); Meiklejohn, *What Does the First Amendment Mean?* 20 U. OF CHI. L. REV. 461 (1953); O'Brien, *New Encroachments on Individual Freedom*, 66 HARV. L. REV. 1 (1952); Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383 (1951). See also GELLHORN, THE STATES AND SUBVERSION 358-392 (1952); LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1950).

[5] Much of the federal legislation aimed at the control of the Communist conspiracy has not been tested in the courts, notably the criminal and registration features of the "Subversive Activities Control Act of 1950," 64 STAT. 987 (1950), 50 U.S.C. §§ 783 (a), 786 (Supp. 1952), and the Smith Act of 1940 as applied to membership and individual advocacy of overthrow rather than to conspiracy, 54 STAT. 670 (1940), as amended, 18 U.S.C. § 2385 (Supp. 1952). The major Supreme Court decisions upholding restrictive measures have been rendered by a divided court, with either no affirming opinion securing a majority as in Dennis v. United States, 341 U.S. 494 (1951), leaving the rationale of constitutionality unclear, or no opinions at all because of an equal division of the Justices, as in Bailey v. Richardson, 341 U.S. 918 (1951).

II. The Ohio Background

As in the present instance, so in the past, the Ohio legislature has seen fit to shape its program for control of subversive activities substantially in accord with national trends or "fashions" in statute law. This observation is not made with any deprecatory intent, but only to indicate that the Ohio law-makers are not alone in apprehending at certain crucial times in the course of the country's history certain dangers of political subversion. Thus, a large number of states including Ohio enacted their laws against treason and misprision of treason during the perilous times of the Civil War, punishing knowing adherence to enemies of the state, or giving them aid and comfort, or suppressing information that any person has committed or is about to commit this offense.[6] Between 1917 and 1923, twenty-five states passed criminal syndicalism or criminal anarchy statutes in response to the activities of the I.W.W. and the "Bolsheviks." Ohio is among those jurisdictions having the former type of law and in addition, a law, enacted during the same period of the "Red Raids" of Attorney General Palmer, prohibiting the display of red and black flags and other emblems as symbols of the advocacy of or belief in activities antagonistic to our form of government.[7] When the United States Supreme Court in 1931 held an identical "flag" statute of California void on its face for indefiniteness, only California amended it so as to conform with the decision, putting in grave question the validity of the Ohio-type law.[8] The "criminal syndicalism" law punishes the support of the doctrine or of any organization advocating or teaching "the commission of crime, sabotage (as defined in the act), or

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[6] Ohio Rev. Code §§ 2921.01, 2921.02 (1953).

[7] *Id.* §§ 2923.12, 2923.13, 2923.14, 2923.15 and § 2921.07. Two-thirds of the states passed such laws from 1917 to 1921. See Dowell, A History of Criminal Syndicalism Legislation in the United States (1939). The criminal anarchy, as distinct from syndicalism, laws were patterned after the New York Law of 1902 (Penal Laws, §§ 160, 161) and denounced the written or oral advocacy of "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means."

[8] Stromberg v. California, 283 U.S.359 (1931). The Ohio "flag" statute denounces the display not only of the banner of an anarchistic society, but a red or black flag with an inscription (a) opposed to organized government; (b) which is sacrilegious; or (c) which may be derogatory to public morals. As only a stimulus to anarchistic action necessarily involves an incitement to violence, the portion of the statute specifying the other modes of violation is fatally "vague and indefinite" in permitting "the punishment of the fair use of the opportunity of free political discussion." Because a narrowing judicial construction of clauses a, b, and c is of dubious propriety, the unamended statute could probably not be applied even to conduct which is not constitutionally protected. Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 Harv. L. Rev. 1208 (1948).

unlawful acts of force and violence or unlawful methods of terrorisms as a means of accomplishing industrial or political reform." Although the earliest model for this type of law was drafted to meet the menace of anarchism and not Communism, its progeny were successfully used in a number of states in the post-World War I era against the latter society, and were upheld as to their inherent constitutionality by appellate court majorities on both the state and national level.[9] As will be discussed later, its "membership" and "unlawful assembly" provisions certainly went to the very limit allowable under the First Amendment. Yet the Ohio Un-American Activities Commission, which recommended the legislation to be discussed here, felt the old law was inadequate to counter the threat of modern conspiratorial "fifth column" activities, largely, it would seem, because the term "criminal syndicalism" has passed out of common usage, and "there is no public feeling against a concept of which few, if any, are aware."[10]

Prior to America's entry into the last great war, during the tense period of preparedness, Ohio, along with thirteen other states,[11] excluded from recognition as political parties, and hence from a place on the ballot, any group "which advocates, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government.... or is connected in any way with any foreign government or power."[12] Although the threat of industrial sabotage and espionage issued from both Bundist and Communist undergrounds prior to June of 1941, after that date the danger came mainly from the Nazi quarter whose Wehrmacht had

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[9] Whitney v. California, 274 U.S. 357 (1927); State v. Kassay, 126 Ohio St. 177 (1932). The results were the same in most other jurisdictions, with little uniformity, however, in the frequency or manner of application. See Note, *Criminal Syndicalism and the Civil Liberties*, 36 ILL. L. REV. 357 (1941). Anarchists and Communists, though antithetical in ideology, are as one in desiring the abolition of the present system—hence both may engage in incendiary mouthings in their writings or speeches. Thus, while the syndicalism statutes, loosely construed, literally describe Communist activity, the serious legal question which divided both the United States and Ohio Supreme Courts was whether the states under the constitutional free speech and assembly clauses could punish speech which advocated crime where there was a remote "pernicious tendency" or only language which under the particular circumstances clearly and imminently threatened violence and violation of the law. Holmes and Brandeis, J.J., and the dissenting judges in the Kassay case felt that the "clear and present danger" test should be applied regardless of whether the legislature had defined the crime in speech or non-speech terms. See dissent in Gitlow v. New York, 268 U.S.652, 660 (1925).

[10] Report of the Un-American Activities Commisison, State of Ohio 30-31 (1953). Hereafter cited as "Ohio Report."

[11] See Prendergast, *State Legislatures and Communism: The Current Scene*, 44 AM. POL. SCI. REV. 556,557 (1950).

[12] OHIO REV. CODE § 3517 07.

suddenly turned its guns on Russia, ending the period of the denounced "imperialist war." We know now to our dismay that wartime friendship with the Soviet Union did not preclude even acts of espionage, especially in the applied sciences of war.[13] The legal exclusion from the ballot, however, struck not at fifth column activity but at the democratic process which traditionally has offered its elective machinery to all comers.[14] While there may or may not be an anomaly in barring a group from the use of democratic methods on the basis of the fact that the group itself does not use democratic methods, there would seem to have been little real justification for it in view of the chronic *political* impotence in this country of all foreign totalitarian groups.[15] The effect of such a denial of suffrage could only confirm the visionary radical in his belief that underhanded methods are alone efficacious in securing power. Exclusion under the Ohio-type statute resulted either from refusal to file a party affidavit disavowing advocacy of what the law forbade or an *ex parte* determination by the secretary of state of facts contrary to those asserted by the group. The cases construing and applying these statutes being few and somewhat inconclusive, their validity is as yet uncertain.[16]

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[13] See, e.g., Rosenberg et al. v. United States, 195 F2d 583 (2d Cir. 1952), *cert. den.* 344 U.S. 838 (1952). The extent of pre-war and wartime Communist infiltration of the various departments and agencies of the national government is summarized in the report of the Senate Judiciary Subcommittee to Investigate the Administration of the Internal Security Act, etc., SEN. MISC. REP., 83D. CONG., IST. SESS. 26-46 (1953).

[14] As in most states, Ohio recognizes a group seeking public office as a "political party" only if (a) it polled for its candidate for governor in the preceding election at least ten per cent of the entire vote cast therein; or (b) it files with the state secretary a petition signed by "qualified electors equal in number to at least fifteen per cent of the total vote for governor at the last preceding election." After being accorded a place on the ballot, a subsequent failure to obtain ten per cent of the votes cast for governor cancels state recognition. OHIO REV. CODE § 3517.01 (1953).

[15] The high water mark of Communist voting strength was reached in 1932, a few months before the bank holiday, when its candidate for the presidency, William Z. Foster, received 102,991 ballots at the polls. Since then its popular support has declined so that candidate Earl Browder received only 48,579 votes in 1940. Information Please Almanac, 206-208 (1953).

"If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that *as a political party* they are of little consequence. . . . I would doubt that there is a village, let alone a city or county or state which the Communists could carry in any election. Communism in the world scene is no bogey-man; but Communists as a political faction or party in this country plainly is. . . . The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it." Douglas, J., dissenting in Dennis v. United States, 341 U.S. 494, 544 (1951).

[16] Upheld by an Ohio court of appeals in State *ex* Berry v. Hummel, 42

With the end of the "Popular Front against Fascism" in 1945 and the beginning of the "Cold War," a flood of state laws against subversion was loosed, evincing many and diverse ends and methods of approach. Certain legislative goals, however, are common to this mass of recent state statute law, and their articulation here may be helpful in evaluating the appropriateness of the Ohio anti-subversive measures adopted during the recent sessions of the legislature. These are:

(1) To take additional security measures to prevent communist infiltration into positions of state employment, or at least those positions which involve trust or influence.
(2) To prevent communists from gaining support, financial or otherwise, from those who would withdraw their aid if the true nature and purpose of the supported organizations were disclosed.
(3) To take such measures as will enable consumers of Communist propaganda to become cognizant of its origin.
(4) To acquire such information as will enable the state government to know the identity and whereabouts of all those whose "allegiance" is to the communist party.
(5) To make criminal those activities which have as their purpose the setting up in the United States of a totalitarian government under foreign control.
(6) To deny the Communists the use of the ordinary means of the democratic process, and the privileges of state citizenship.[17]

III. The Genesis of The Recent Enactments

Prior to the convening of the 100th General Assembly in Ohio, the only post-War anti-subversive legislation that had gone on the books sought to make unemployed Communists ineligible to receive benefits from the state. This statute, passed in 1949, bars the payment of such compensation to anyone who advocates, or is a member of a party which advocates, the overthrow of government by force. The jobless person must file an affidavit declaring

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Ohio L. Abs. 40, 59 N.E. 2d 238 (1944); see also Johnson v. Sweeney, 140 Ohio St. 279, 43 N.E. (2d) 239 (1942). The California Supreme Court held in Communist Party v. Peek, 20 Calif. 2d 536, 127 P. 2d 889 (1942) that a similar provision in its election law could be applied to any particular party only after opportunity for notice, hearing and judicial review; *cf.* State ex rel. Huff v. Reeves, 5 Wash. 2d 637, 106 P. 2d 729 (1940). *But cf.* Field v. Hall, 201 Ark. 77, 143 S.W. 2d 567 (1940).

[17] This formulation of the immediate goals of such legislation is taken with some modification from the excellent analysis of the Mundt-Nixon Bill by Cohen and Fuchs in *Communism's Challenge to the Constitution,* 34 Cornell L.Q. 182, 186-187 (1948). A recent resume of all the state anti-subversive laws enacted prior to the 1953 legislative sessions can be found in *The States and Subversion,* A.C.L.U., 1953.

that he is in neither of the proscribed classes.[18] In June of 1951, however, with the Korean War in full tilt, the Ohio legislature set up an interim study commission, to be known as the Ohio Un-American Activities Commission, to, *inter alia,* investigate and report to the 1953 session of the General Assembly on "the operation and effect of the laws of this state, of the several other states, and of the United States, which purport to outlaw and control the activities [of subversive persons and groups] and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary."[19] The "Blackburn Commission," as it came later to be called, was endowed, in addition, with a fact-finding function with the attendant authority to compel testimony and the production of books and records, which placed it in a field already occupied by a number of Congressional investigating committees and, on the state level, recently abandoned by six other "little un-American activities committees."[20] By holding public hearings, whereat witnesses both friendly and unfriendly were examined, issuing press releases and reports, initiating prosecution of recalcitrant witnesses,[21] and compiling central files and dossiers

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[18] OHIO REV. CODE § 4141.29 (1953). Upheld in Dworken v. Collopy, 56 Ohio L. Abs. 513, 91 N.E. 2d 564 (1950).

[19] OHIO GEN. CODE §§ 76-28 to 76-35, inclusive (Supp. 1952). The additional terms of reference of the Commission were: "(1)To investigate, study and analyse (a) all facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means; (b) all facts concerning persons, groups, and organizations known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government or the industrial potential of this state; (2) To maintain a liaison with any agency of the federal, state, or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage or threats of the same." (§76-31).

[20] California (1941-1950), see BARRETT, THE TENNEY COMMITTEE (1951); Washington (1947-1949), see COUNTRYMAN, UN-AMERICAN ACTIVITIES IN THE STATE OF WASHINGTON (1951); Illinois (1947-1949), see HARSHA, *The Broyles Commission* IN THE STATES AND SUBVERSION 54 (Gellhorn ed. 1952); Massachusetts (1950), no hearings were held—report issued; New Hampshire (1949), no hearings were held—report issued recommending reliance on federal enforcement; New Jersey (1947), closed meetings—no report. In addition, Arizona and Florida appointed committees which did not function.

[21] According to the Report of the Blackburn Commission twenty witnesses were cited for contempt (p. 13). To the writer's present knowledge none has yet been convicted in the common pleas courts. Witness Oscar Smilack (see Report, p. 229), allegedly the "angel" for the Franklin County branch of

on suspect individuals and groups, the Commission in effect could subserve most, if not all, of the particular legislative goals heretofore mentioned. That it was aware of the contribution it could make to public education on the subject of domestic communism for the purpose of discouraging unwitting support and membership in certain private organizations cannot be gainsaid.[22] That it ever pursued the object of laying a basis for the discharge of balky witnesses by private and state employers is less clear, although that incidental effect did in fact follow.[23] On the credit side, it must be observed that the Commission conducted itself with fairness and scrupulosity in most instances, considering the sensational and emotionally-laden subject with which it dealt, avoiding the excesses of some of its institutional forerunners.[24] On the debit side,

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the Ohio Communist Party, was committed, at the time of arraignment, to the Lima State Mental Hospital for examination into sanity. He protested the commitment which was made solely on motion of the prosecutor and without the introduction of any evidence beyond the unverified statement by counsel for the state. The legality of Smilack's detention was tested by habeas corpus proceedings, and on April 22, 1953, the Ohio Supreme Court unanimously affirmed the order of discharge granted by the Court of Appeals, holding the summary commitment in violation of both state and federal "due process." State, *ex rel.* Smilack v. Bushong, 159 Ohio St. 259, 111 N.E. 2d 918 (1953). The reluctance of the state to press for trial in the contempt cases (in which indictments have already been returned) may be partly due to doubts concerning the applicability of either the legislative or court contempt statutes contained in the Criminal Code. The statute setting up this Interim Investigating Commission expressly referred to the court contempt sections (OHIO REV. CODE §§ 2705.02-2705.09) for sanction, while witness Smilack, cit. supra, was apparently indicted for contempt of the legislature (OHIO REV. CODE § 2917.42).

[22] See, e.g., portions of the colloquies with witnesses Baxter and Cvetic dealing with the utility of a "commission such as this" in appraising members of subversive or "front" groups of Communist control or manipulation. Ohio Report, pp. 38, 49, 72.

[23] Two of the witnesses before the Commission were employees of Ohio State University, viz., graduate assistant George D. Pappas and fine arts instructor Marston A. Hamlin. Both proved to be extremely uncooperative witnesses during a public hearing in Columbus on May 20, 1952, and shortly thereafter were relieved of their positions at the University. See Ohio Report, pp. 365-378. Columbus Citizen, Jan. 18, 1953, p. 20, col. 1.

[24] See especially the accounts of the Tenney and Broyles committees, note 20, *supra*. The Commission as a matter of policy permitted legal counsel to accompany the witness into the hearing room to advise on questions of constitutional rights, and allowed witnesses the right to offer signed statements to supplement testimony. Persons "adversely mentioned" in any public hearing were accorded the privilege of appearing before the body and an opportunity to rebut. See Report, p. 12. The Commission, however, incurred some unfavorable publicity by releasing to Cincinnati newspapers the secret testimony of one Cecil Scott which labelled a number of respectable citizens as Communists or "pro-Communist." Four of those named publicly denied the accusation and demanded an immediate hearing—this was fi-

as observed by Governor Lausche in his veto message on the recommended anti-sedition measure, hereafter discussed, the body "has not brought to the bar of justice a single person guilty of sedition, treason, or acts contemplating the overthrow of our government."[25]

In January of this year, the Commission filed its report to the General Assembly, a document of over four-hundred pages, consisting of twenty-six pages of conclusions and recommendations. Part II of the report contained transcripts of testimony of twenty-nine selected witnesses, (a) seventeen of whom were manifestly uncooperative, if not verbally defiant, and repeatedly invoked the constitutional privilege against self-incrimination making the interrogation for large sections of record wholly unilateral; (b) nine of whom were formerly Communist Party members, some recanting their past beliefs and others paid agents of the Federal Bureau of Investigation who had successfully infiltrated the Party's secret enclaves; and (c) the remaining three were experts on education, called to give their views on how the schools and colleges should be safeguarded from Communist subversion and their pupils immunized against indoctrination of alien ideology.[26] Besides the findings which duplicate those of previous federal investigations with regard to the structure, methods, and purposes of the Communist Party, U.S.A.,[27] which have become common knowledge to any-

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nally accorded nine months later. The Cincinnati Chapter of the American Civil Liberties Union characterized Scott as a former F.B.I. paid informer with a felony record and a past history of mental disorder. The four citizens named as Communists were, reportedly, never permitted to cross-examine their accuser. See printed statement re Ohio Un-American Activities Commission (A.C.L.U., Cincinnati Chapter, Jan. 1953) circulated to public officials and civic organizations throughout the state.

[25] House Calendar, 100th Gen. Assembly, July 31, 1953, p. 2.

[26] These last three expert witnesses were Sidney G. Kusworm, Chairman of the American Citizenship Committee, Ohio State Bar Association; R. M. Garrison, Director of the Secondary Elementary Department, State Board of Education; Douglas McGregor, President Antioch College, Yellow Springs, Ohio. Dr. McGregor was the only witness, whose testimony was published, who challenged the "unarticulated assumption" that young people's minds were passive receptacles into which either dangerous ideologies were poured or "Americanism." He went on to say:

> One thing that seems to me to be perfectly clear is that young people never take an idea at face value and accept it and swallow it. They spend most of their time arguing about the things that are told to them in the classroom or that they read in the textbooks. So long as that is true, I have much less fear of the indoctrination idea that comes from just straight propaganda. I think experience generally would bear me out on other college campuses as well." (Ohio Report, p. 351.)

[27] See, e.g., H.R. REP. No. 1844, 80TH CONG., 2d SESS. (1948); H.R. REP. No. 209, 80TH. CONG., 1ST. SESS. (1947).

one who even occasionally peruses the public prints, the Commission found several Ohio labor, civic, and youth organizations to be "fronting" for the Party, and assessed active Party membership in the state for 1952 at thirteen hundred, about half of whom operate in the Cleveland metropolitan area.[28] No estimate was attempted of the number of non-registered sympathizers or "fellow travellers" in the jurisdiction who are "ready, willing, and able to do the Party's work" if called on, though the Director of the F.B.I. is quoted as quoting a Communist boast that there exist in this country ten for every one on the party rolls.[29]

Of the Commission's five recommendations for new state anti-subversive legislation, the first four were ultimately enacted by the 100th General Assembly, two of which required overriding a vigorous gubernatorial veto. Representative Samuel Devine of Franklin County introduced a bill to effectuate the 5th object of denying from the state and local governments "special privileges or licenses to members of the Communist Party or subversive organizations."[30] The bill contemplated the filing by an applicant for *any* license issuable by the state or its subdivisions of an affirmation disavowing present membership in any subversive organization or, by name, the Communist party. A subversive group was defined as one advocating forcible overthrow of state or national government, but what official or agency was supposed to so characterize particular groups, and whether an applicant need only deny affiliation with groups whose unlawful objectives were known to him at the time of filing, was left to administrative omniscience. This bill died in the House Judiciary Committee. The three bills which have finally become law in Ohio are (1) a strict sedition statute, which not only creates new crimes against the state but establishes its own enforcement and investigative machinery; (2) a law making advocacy of forcible overthrow or membership in a society so advocating sufficient cause for removal of public employees and teachers in state supported institutions; and (3) a measure which makes claim of privilege against self-incrimination in response to questions propounded by a governmental body concerning membership in a subversive group, conclusive on the question of fitness

[28] Ohio Report, p. 32.

[29] The quotation is taken from the testimony of J. E. Hoover, Hearings before the House Committee on Un-American Activities on H.R. 1884 and H.R. 2122, 80TH CONG., 1ST. SESS. 37 (1947). Recently United States Attorney General Herbert Brownell was reported as stating that Party membership "is cut down to about 25,000 now from 100,000 — one-fourth of what it was before the Smith Act trials started." He felt, however, that the present hard core presented a greater menace than before in view of better organization and increased difficulty of detection. U.S. News & World Report, Sept. 4, 1953, p. 40.

[30] H.B. No. 630, 100th Gen. Assembly (1953).

of such person to hold a state job. Of less significance, but related functionally to the enforcement provisions of the new sedition law, is the statute continuing the life of the Ohio Un-American Activities Commission to January 31, 1954, at which time all its "records, books, documents, and other property shall be committed to the attorney general," who, as will be discussed, *infra,* will be vested with general supervisory powers over the enforcement of the new sedition law.[31] For convenience the latter measure will be referred to in the ensuing discussion as the Devine Law, after its first legislative sponsor.

IV. The Devine Sedition Law

A. *Its Criminal Provisions.*

The Devine Law,[32] with a few minor modifications, and minus a lengthy preamble setting forth a description of the world Communist conspiracy, is a carbon-copy of Maryland's Ober Law,[33] passed in that state in 1949.[34] Within a year of its passage there, it was adopted in New Hampshire and Mississippi, and was twice proposed and twice rejected by the state of Illinois.[35] As distinct from the Massachusetts-type statute which outlaws *eo nomine* the American Communist Party,[36] the present law mentions no groups by name in any of its sections, but attacks the Communist movement by describing its characteristics. The three most salient of

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[31] Ohio Rev. Code §§ 103.31 to 103.38 (1953).

[32] Ohio Rev. Code §§ 2921.21 to 2921.27, incl. Effective date, November 7, 1953. The voting on this bill was as follows: 1st passage, House — yeas 119, nays 2; Senate — yeas 21, nays 11. 2d passage over Governor's veto, House — yeas 92, nays 26; Senate — yeas 20, nays 12. Bulletin, 100th Gen. Assembly p. 244 (20th ed. 1953).

[33] The Maryland "Ober" law and its now numerous progeny were the brainchild of Harvard-trained lawyer, Frank B. Ober. His basic ideas regarding legislative control of Communism can be found in a speech he delivered to the Maryland State Bar Association, published as *"Communism versus the Constitution,"* 34 A.B.A.J. 645 (August, 1948). His thinking with reference to academic freedom can be gathered from his correspondence with Harvard President James Conant and Grenville Clark regarding the continued retention by the University of two allegedly "fellow-traveling" professors. See *Freedom at Harvard,* 35 Bulletin 313-334 (A.A.U.P., 1949). See generally, Prendergast, *The Ober Anti-Communist Law,* in States and Subversion 140 (Gellhorn ed. 1952).

[34] Md. Ann. Code Art. 85A (1951).

[35] N. H. Rev. Laws c. 457-A (1951); Miss. Ann. Code §§ 4064-01 to 4064-11 (Supp. 1952). The Illinois experience is related in Burnett and DeBoer, *Resistance in Illinois,* 177 Nation 112 (1953).

[36] Mass. Ann Laws c. 264, §§ 16 to 23 (Supp. 1952): "The Communist Party is hereby declared to be a subversive organization." (§ 16a.) Most draftsmen of anti-Communist legislation have deliberately avoided this technique of outlawing the Party for fear that such a finding by a non-judicial body of guilt of a readily determinable class might come within the modern concept of the "bill of attainder" formulated in United States v. Lovett, 328 U.S. 303 (1946).

these is (1) advocacy of activities intended to overthrow the constitutional form of government of the United States or of this state by force, violence or other unlawful means; (2) domination, direct or indirect, by a foreign nation, or group of nations; and (3) advocacy of activities intended to supplant the present constitutional government by any form of government the control of which is to be vested in any foreign government or foreign organization. A "subversive organization" within the meaning of the statute is any group judicially found to have as one of its purposes the objective described by criterion (1); a "foreign subversive organization," on the other hand, to fall within the ban need not aim at the advocacy or teaching of the use of unlawful means but must satisfy both of the last two criteria. To prevent the forcible overthrow of government and to forestall the erection in Columbus or in Washington of a government subservient to a foreign power, the Devine Law declares felonious (a) any *act* intended to bring about overthrow of the present American governments by "force, violence or other unlawful means" (b) speech advocating or teaching any person to commit such *act* "under such circumstances as to constitute a clear and present danger to the security of the United States or of this state"; (c) conspiracy to commit any such *act;* (d) assistance in the formation, participation in the activities or management, or contribution to the support of any subversive or foreign subversive organization, "knowing such organization to be a subversive organization or a foreign subversive organization"; and lastly, (e) becoming or remaining a member of either type of organization with knowledge of its subversive character. The offense of mere membership is punishable by imprisonment up to five years while defendants convicted of any of the other crimes may be imprisoned for as long as twenty years. An organization of either type is to be dissolved after being found illegal by a court; its property is to be forfeited to the state, and its records are to be turned over to the attorney general of Ohio — presumably for the initiation of prosecution against individual members.[37]

It is gross oversimplification to contend as some of the backers of the Devine Act did that the constitutional validity of the Ober-type law has been passed on favorably by the courts.[38] The only

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[37] The Ohio legislature apparently relented when it came to permanently depriving ex-convicts under the Act of their civil rights to hold public office or employment, to stand for election in the state, and to vote in any election held in the state. See MD. ANN. CODE c. 85A, § 4 (1951). A forfeiture of these rights and privileges follows automatically from conviction of *any* felony in Ohio. (OHIO REV. CODE § 2961.01). However, after final release from service of sentence, the pardon and parole commission must restore these rights. (OHIO REV. CODE § 2965.17).

[38] See, e.g., Columbus Dispatch, August 8, 1953, p. 2, col. 1.

portion of the Maryland law which has as yet survived United States Supreme Court scrutiny is the provision requiring an affidavit from a candidate for municipal election forswearing engagement "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."[39] This provision[40] of the Ober Act dealing with the determination of loyalty of persons on the state payroll was not carried over into the Ohio enactment. More germane to the present question of the validity of the criminal sanctions which *were* adopted in Ohio, is the decision of the Baltimore Circuit Court in 1949 holding these provisions on their face in conflict with "the basic freedoms guaranteed by the First and Fourteenth Amendments," a bill of attainder, and a violation of the due process clause because of vagueness.[41] This decision was reversed by the Maryland Court of Appeals on the procedural ground that those who had challenged the Ober Act under the State Declaratory Judgment Statute presented no justiciable case to the courts.[42] Thus, as yet, on the question of the inherent validity of this particular type of control measure we have no authoritative ruling but only judicial "straws in the wind" from the federal and sister state jurisdictions. Let us see where these lead us in attempting to resolve some of the major issues surely to arise in any future criminal prosecution in which the new Act is invoked.

(i) *The Problem of Federalism.*

One of the arguments frequently advanced against state prohibitory legislation of the sort considered here is that it operates in a field that is or should be reserved to the national government. This contention goes both to the necessity and the validity, under our federal system, of such state efforts to guard the security of the country from internal subversion. On the latter score of invalidity as an encroachment upon a province exclusively entrusted to the Federal Government under its power to provide for the common defense[43] the opposition's case would seem to be weak.[44] It is true that to the extent the state law and its administration is more

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[39] Gerende v. Board of Supervisors of Elections of Baltimore, 341 U.S. 56 (1951).

[40] MD. ANN. LAWS c. 264, § 15 (1951).

[41] Lancaster et al. v. Hammond, Baltimore Circuit Court No. 2; Sherbow, J., Daily Record (Baltimore), August 16, 1949.

[42] Hammond v. Lancaster, 194 Md. 462, 71 A. 2d 474 (1950); Hammond v. Frankfeld, 194 Md. 471, 71 A.2d 483 (1950).

[43] U.S. CONST. ART. I, § 8.

[44] *See* Gilbert v. Minnesota, 254 U.S. 325 (1920) (state statute punishing obstruction of war effort upheld as exercise of concurrent power; Brandeis, J., dissenting).

stringent than the federal program for internal security, the conduct of foreign affairs by the Government in a "particularly sensitive international area" might be seriously embarrassed.[45] Yet the right of the state to exercise its police power to protect itself is as important to it as the same attribute of the Federal Government, "and in the absence of any delegation of that right by the state to the Federal Government it would still remain with it under the Tenth Amendment to the Constitution."[46] Assuming that concurrent jurisdiction does exist, both sovereignties may punish the same act or acts as criminal, and no defense of double jeopardy will lie.[47] Nevertheless, if it could be satisfactorily demonstrated that state action herein conflicts with national policy with respect to the regulation of Communist activities as evinced by Congressional action in the field, the "supremacy" of the federal laws would be held to forbid inconsistent state anti-subversive programs.[48] It thus may be possible to argue that the Devine Act "conflicts" with federal policy as expressed in the Internal Security Act of 1950, in that it brands mere membership as criminal. In enacting the "McCarran Act" Congress rejected proposals to outlaw the Communist Party,[49] choosing instead a policy of exposure by requiring the registration of "Communist-action" and "Communist-front" organizations.[50] This choice was dictated partly by the desire to avoid driving the Party underground, lest it avoid police surveillance and public scrutiny.[51] Prosecution by the states for membership *per se* is certainly not calculated to further the federal objective. Yet there is no clear indication that Congress intended to "preempt the field" to the exclusion of state anti-subversive legislation.[52]

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[45] Quotation from dissenting opinion in Albertson v. Millard, 106 F. Supp. 635 (E.D. Mich. 1952). Suppressing Communists criminally here will detract from our ability to criticize "iron curtain" countries for suppressing free thought.

[46] Commonwealth v. Nelson, 172 Pa. Super. 125, 130, 92 A.2d 431 (1952).

[47] United States v. Lanza, 260 U.S. 377 (1922).

[48] Hines v. Davidowitz, 312 U.S. 52 (1941) (state statute requiring the registration of aliens held precluded by a subsequently enacted federal registration law).

[49] H.R. REP. No. 2980, 81ST CONG., 2D. SESS. 5 (1950.

[50] 64 STAT. 993 (1950), 50 U.S.C. § 786 (Supp. 1952).

[51] See McCarran, The Internal Security Act of 1950, 12 U. OF PITT. L. REV. 481 (1951).

[52] Section 4(f) of the Internal Security Act of 1950 provides that "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of . . . this section *or of any other criminal statute.* (50 U.S.C. § 783(f)-emphasis added). That this latter clause applies only to the Smith Act (18 U.S.C. § 2385, par. 3) and not to state legislation is arguable in view of its purpose to remove the Fifth amendment objection of compulsory self-incrimination. Possible incrimination under state

But even if the division-of-powers argument is not likely to be judicially accepted, one can question the practical wisdom of establishing independently-operated state programs of this sort. Certainly the local and state police are ill-equipped to engage in the delicate work of counterespionage, and may do more harm than good by effecting an untimely arrest which disrupts F.B.I. plans for keeping tabs on a whole spy ring.[53] Governor Lausche in his veto of the Devine Bill disclosed that in the Spring of 1951, a committee of seven governors of which he was chairman, acting for the Conference of Governors, met with Mr. J. Edgar Hoover to discuss the problem of coordinating efforts against "sabotage and communistic activities." After the Director of the F.B.I. and his staff explained what the Government was doing to keep under surveillance "persons suspected of Communism," the Governors' committee was of the unanimous opinion "that the problem should be left completely and fully in the hands of the F.B.I."[54] Finally, because it is inevitable that federal and state anti-subversive functions will overlap, the state enforcement officers will be driven to investigating matters involving no real threat to national security but comprising only heretical utterances or behavior out of conformity with current conventions. The danger this type of thought surveillance will pose to uninhibited individual expression need hardly be elaborated.

(ii) *Non-organizational offenses.*

Section 2921.22 (B) of the Revised Code creates the crime of "knowingly and willfully" advocating, abetting, advising, or teaching by any means "any person to commit, attempt to commit, or assist in the commission of any act intended to overthrow... or alter or to assist in the overthrow,... or alteration of the constitutional form of the government... by force, violence or other unlawful means, under such circumstances as to constitute a clear and present danger to the security of the United States or of this state." To actually commit, or attempt to commit "such acts" as those whose advocacy is forbidden, is also made punishable under *any* circumstances by subsection (A). In contrast with the Federal

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law is no ground for claiming the federal privilege in a federal proceeding. See United States v. Murdock, 284 U.S. 141 (1931). *But cf.* United States v. DiCarlo, 102 F. Supp. 597 (N.D.Ohio 1952).

[53] See Lowenthal, The Federal Bureau of Investigation 439 (1950). The federal agency might also be forced to sacrifice some of its underground informants if they are picked up unknowingly by state enforcement officers. To secure their release would obviously destroy their continued usefulness as counter-spies.

[54] Veto Message on H.B. No. 308, cited supra, n. 25. For a more detailed discussion of some of the problems raised in this subsection, see Note, *State Control of Subversion: A Problem in Federalism*, 66 HARV. L. REV. 327 (1952).

Smith Act,[55] a conspiracy to so advocate is not expressly denounced,[56] but practically identical group conduct could probably be reached under the organizational features of subsection D, which utilizes the new concepts of "subversive" and "foreign subversive" organizations hereafter discussed. The Maryland "Ober" Commission apparently tried to improve on the language of the Federal Sedition Law, which at the time the pattern for the present state law was concocted, had not yet been tested in the United States Supreme Court.[57] A comparison indicates two essential differences insofar as non-group criminality is concerned.

First, the Smith Act, patterned after the old New York "criminal anarchy" law, prohibits individual advocacy of the "duty, necessity, desirability, or propriety" of forcible overthrow (an idea or doctrine), while the Ober-type law speaks only of advocacy of *acts* intended to assist in forcible overthrow. If the "acts" being advocated were restricted to substantive violations of the criminal code, such as espionage, sabotage, destruction of property, or assassination, the verbal change would have the beneficial effect of clarifying the foggy distinction under the Smith-type law between "discussion" of the revolutionary teachings of Marx, Lenin, and

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[55] 62 STAT. 608 (1948), 18 U.S.C. § 2385 (1948).

[56] Subsection (C) of section 2921.22 creates the crime of "knowingly and willfully" conspiring to commit an act intended to assist in forcible overthrow of the government. Advocacy of such "acts" is denounced in a separate but parallel subsection. Technically speaking, there being no general conspiracy section in the Ohio criminal code, it would not be possible under this Act to prosecute for the same offenses as in the federal Smith Act trials, *viz.*, conspiracy to advocate, etc., and conspiracy to organize a group of persons who advocate, etc. The difference between the national and state acts, however, may be purely verbal as participation and membership in a "subversive" group probably comprehends at least conspiring to talk and publish certain ideas at a later date and "assisting in the formation" of a group which when organized will have as one of its purposes the forbidden advocacy will in most instances be indistinguishable from conspiring to organize such a group. If there is any doctrinal difference in the latter case it is between criminal conspiracy (merely a joint plan) and a criminal attempt to organize an assembly of persons who advocate overthrow by force and violence, *viz.*, only the federal law reaches "preparation" by two or more persons to organize a "subversive group." Procedurally, the Smith Act prosecutions may be facilitated by invocation of the general conspiracy section (18 U.S.C. § 371) instead of the substantive provisions, in view of the peculiarly hospitable rules of evidence which then come into play. See Holman, *Evidence in Conspiracy Cases*, 4 AUST. L. J. 247 (1930).

[57] See Report of Commission on Subversive Activities to Governor Lane and the Maryland General Assembly (Jan., 1949), hereafter cited as Maryland Report. The Federal Sedition Act as applied to the top leaders of the American Communist Party was upheld by the United States Supreme Court in a decision handed down June 4, 1951. Dennis et al. v. United States, 341 U.S. 494 (1951).

Stalin, and "advocacy" of them.[58] For the fact that the utterance sought to be punished contained some reference to a particularized wrongful act useful in facilitating forcible overthrow is some safeguard against confusing "seminars in political theory" with counseling in crime. But the unrestricted statutory term *acts* could conceivably also cover constitutionally protected incidents of free speech, press, assembly, such as contributions and membership. Construed so broadly, however, the section would probably be held unconstitutional on its face since it is not "narrowly drawn to cover the precise situation giving rise to the danger."[59] Furthermore, the judicial adoption of such an interpretation seems doubtful in view of the appendage of the First Amendment "clear and present danger" test[60] to only the advocacy and teaching proscription, thus indicating an intentional discrimination between speech and non-speech conduct, and the usual presumption that the legislature did not intend to infringe upon protected freedoms.[61]

The term *acts* thus must mean physical overt acts of an indeterminate character with respect to legality.[62] If the particular

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[58] "The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result." Holmes, J., dissenting in Gitlow v. New York, 268 U.S. 652, 673 (1952); "If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation." Hand, L., in Masses Publishing Co. v. Patten, 244 Fed. 535 (S.D.N.Y., 1917); "It is true that there is no divining rod by which we may locate 'advocacy.' Exposition of ideas readily merges into advocacy." Frankfurter, J., concurring in Dennis v. United States, supra n. 57, p. 521. And see, Antieau, *Dennis v. United States—Precedent, Principle or Perversion?* 5 VAND. L. REV. 141, at 148 (1952).

[59] Thornhill v. Alabama, 310 U.S. 88 (1940). *Cf.* § 4(a) (2) of the Mundt-Nixon Bill, H.R. 5852, 80TH. CONG., 2D. SESS. (1948): "It shall be unlawful for any person to perform or attempt to perform any act with intent to facilitate or aid in bringing about the establishment in the United States of a [ed. foreign-directed] totalitarian dictatorship."

[60] Formulated in the World War I Espionage Act (50 U.S.C. § 33) cases as a test for the sufficiency of the evidence where speech was used as proof of an "attempt" to obstruct recruiting and enlistment and cause insubordination in the armed forces. See Schenck v. United States, 249 U.S. 47 (1919).

[61] See, e.g., United States v. CIO, 335 U.S. 106, 120 (1948). Note, *Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions*, 53 COL. L. REV. 633, 644 (1953).

[62] Even if the term "acts" is judicially narrowed so as to exclude conduct protected under the First Amendment, it might be argued that the existing proscription violates due process for excessive vagueness. But it has been recognized that the vices inherent in vagueness are minimized if a culpable mental state is an element of the conduct which the statute proscribes. See Screws v. United States, 325 U.S. 91,101 (1945); Gorin v. United States, 312 U.S. 19 (1943).

acts alleged to have been committed, attempted, aided and abetted, conspired over, advocated, advised or taught had already an unlawful character under the common law or criminal code, conduct falling short of direct consummation could in most instances be punished, though frequently not as severely, without the new statute under the traditional doctrines of incitement, solicitation, accessoryship, criminal attempt and conspiracy.[63] In a case, for example, of solicitation by A of B to commit false swearing in taking a loyalty oath, the only effect of the new sedition law is to enhance the penalty to twenty years imprisonment if it can be proved that A's motive in so counseling B was to assist in capture of the existing government through the process of infiltration. On the other hand, the particular acts relied on by the prosecution might not independently constitute substantive violations, so that the question arises whether the objective behavior contemplated may be of any sort, no matter how trivial. If the scope of this key term is limited solely by First Amendment considerations, then almost any voluntary series of bodily movements, no matter how innocuous seeming— like the posting of a letter, traveling from one point to another, or the selling of an automobile[64]—is made criminal if accompanied by the requisite revolutionary purpose. According to this view, practically everything a good Communist *does* during his waking hours is within the reach of subsection A.[65]

That such an unnecessarily expansive interpretation would work absurd results, and hence is not likely to be adopted, can be shown by taking the case of a lone Trotskyite, unorganized and clearly not part of the present Soviet world conspiracy. To him the overthrow of capitalism and its replacement by "dictator-

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[63] On the common law crime of "solicitation," see MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 605-612 (1940). As Ohio does not recognize the common law of crimes, such a limitation to "acts" previously punishable by statute might result in an inability to prosecute for certain harmful conduct, performed or counselled with revolutionary intent. Sabotage and rebellous riot, however, could be reached, OHIO REV. CODE §§ 2923.13, 3761.13 (1953). As to conduct heretofore defined by the legislature as criminal, e.g. perjury, bribery, assault, malicious injury to property, kidnapping, the new sedition law proscribes the "inchoate" crimes of attempt, conspiracy, and incitement when engaged in for the designated revolutionary purpose.

[64] *Cf.* Alger Hiss, convicted perjurer, according to his accuser Chambers, transferred his old roadster to a Communist-run used car lot so that it could be of use "to some poor organizer in the West or somewhere." See United States v. Rosen, 174 F.2d 187 (2d Cir. 1949). It is conceivable that under a liberal interpretation of the new state law, such an *innocent-seeming* act would be equally criminal with the extraction of secret state documents.

[65] "We must train men and women who will devote to the revolution, not merely their spare evenings, but the *whole of their lives.*" Quotation from LENIN ON ORGANIZATION (1926) in GITLOW, THE WHOLE OF THEIR LIVES (1948).

ship of the proletariat" is a consummation devoutly to be wished. But no matter how much we personally detest his beliefs and objectives, to punish him for *any* act he performs which to his mind hastens the coming of the Marxist millennium, without regard to its actual harmful consequences or its mischievous tendencies due to surrounding circumstances, comes perilously close to making a mere mental condition criminal.[66] It is submitted that, even though the free speech principle be not involved in the prohibition of most forms of activity, procedural "due process" might as a minimum require for conviction proof of acts which evince a seditious design on their face and tend toward the accomplishment of violent governmental overthrow.[67] The purpose which would be served in considering insufficient the proof of commonplace or insignificant conduct with covert revolutionary intent, is not the protection of genuine subversives but the prevention of miscarriage of justice as the result of perjury, passion, or inadequate evidence. Conviction of the crime of treason requires no less, and for reasons which hold equally for the present offense of seditious activity.[68] Thus

[66] To the extent that the required "overt act" is consistent with noncriminality, the mental element or *mens rea* increases in importance. If individual crime (as contrasted with conspiracy) becomes predominantly subjective, the traditional reasons for requiring proof of the *actus reus* are defeated. These reasons are: (1) The aim of the law is not to punish sins but to prevent certain external results; no certain external results can be assigned to mere mental states. (2) Belief cannot be deterred by legal threats. (3) Proof of a violation becomes too speculative where the outward manifestation is not indicative of the intent behind it. (4) If the power of government over beliefs is as unlimited as its power over conduct, "the way is open to force disclosure of attitudes on all manner of social, economic, moral and political issues." (Jackson, J., dissenting in American Communications Ass'n v. Douds, 339 U.S. 382,402 (1950)). See generally, Hitchler, *The Physical Element of Crime*, 39 DICK. L. REV. 95 (1935).

[67] *Cf.* Proctor v. State, 15 Okla. 338, 176 Pac. 771 (1918); People v. Belcastro, 356 Ill. 144, 190 N.E. 301 (1934).

[68] The crime of treason under both state and federal law consists of two elements: adherence to the enemy; and rendering him aid and comfort. OHIO REV. CODE § 2921.01 and 18 U.S.C. § 2381. The Federal Constitution, Art. III, section 3 provides: ". . . No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." It is now settled that the requirement of an "overt act" is not met by proof of "a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent." Cramer v. United States, 325 U.S. 1 (1945). See description of the overt acts held insufficient in United States v. Robinson, 259 Fed. 685, 690 (S.D.N.Y. 1919).

Another helpful analogy, though not nearly so close as treason, may be found in the theory of preparation and attempt to commit felonies. See HALL, PRINCIPLES OF CRIMINAL LAW c.4 (1947). The *method* of proof of the seditious acts could of course be entirely circumstantial as contrasted with the ancient two-witness principle in treason trials.

in the field of organized labor, a strike called for legitimate trade union objectives should not be branded criminal under the Act because of hidden disloyal motivations but a strike manifestly "political" in character with such motivations could be. Only where the objective facts confirm the existence of the alleged criminal intent is it safe to hazard a man's liberty on the outcome of jury deliberation. It is true that a wholly innocent "overt act" suffices to complete the crime of conspiracy, but there the plot itself is the substantive evil and the requirement of some "overt act in furtherance" of the common scheme only accords a season of repentance before criminality attaches.[69] To apply the same low standard of proof to trials of individuals, acting without conspiracy, while it would facilitate enforcement of the Act against members of dissident minorities, could establish a dragnet for the non-dangerous radical, and run counter to some of our most cherished concepts of criminal jurisprudence.[70]

Secondly, the Smith Act of 1940, following the majority holding in *Gitlow v. New York*[71] makes no reference to the requirement of proof of *imminent danger* that the indicted utterances will produce a harmful effect, while the Devine Law specifies the "clear and present danger" limitation in the advocacy section itself.[72] The reason for this modification was probably the recognition by the Maryland Commission that the Holmes and Brandeis dissents were

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[69] Pinkerton v. United States, 328 U.S. 640, 643 (1945); Rabinowich v. United States, 238 U.S. 78, 88 (1914).

[70] The question discussed here is not made entirely academic by the presence in the statute of sanctions against leaders and members of subversive groups. For even if it be assumed that the state at present will only proceed against persons actively engaged in the Communist movement, proof of actual membership (not sympathetic association) may be hard to come by or a "front" group may have so concealed its true aims that an adjudication of its subversive character would not be sustained. If hypothetical defendant X cannot then be convicted of forbidden organizational activity, discussed *infra*, he may be charged instead, say, of attempting a seditious act under section 2921.22 (A). Suppose the "act" chosen by the prosecutor is the securing of a government job in an atomic energy installation. The position, if obtained, would give access to classified information or opportunity for sabotage come some national emergency. X might have applied for the job quite innocently but the state expects to show that he sought the job in order to assist in governmental overthrow when circumstances permit. X's state of mind therefore becomes crucial, and consequently any radical reading or private talking becomes relevant. Human behavior being as complex as it is, a jury could only conjecture whether a seditious design necessarily followed from the holding of certain unpopular beliefs.

[71] 268 U.S. 652 (1925).

[72] OHIO REV. CODE § 2921.22 (B) (1953).

bearing fruit in recent Supreme Court majorities.[73] Nevertheless, it would appear from recent Smith Act decisions in the federal courts that although the Holmesian formula prescribing permissible regulation of expression has survived in transfigured guise,[74] this judicial measure of constitutional applicability need not be actually referred to or recited in the statute.[75] Procedurally, however, the effect of writing the test into the law is to make it an element of the offense whose presence must be found by the jury as a condition of guilt. This is contrary to the present practice in the federal courts of treating the application of the test as a matter of law.[76]

Because of the foregoing modifications, some of the literal similarities between the state and federal sedition laws may be more apparent than real. Thus, in line with the Smith Act, the state law requires that the advocacy and teaching of the commission of the forbidden acts be done "knowingly and willfully." The United States Supreme Court in its opinion affirming the conviction of the eleven first-string Communist leaders, felt compelled by con-

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[73] The gradual erosion of the *Gitlow* case rule, followed by the majority in *Whitney v. California*, 274 U.S. 357 (1927), which rendered inapplicable the Holmesian "clear and present danger" test when the legislative body has by statute determined that utterances of a certain kind involve such danger of substantive evil that they may be punished, is described in Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule*, 38 VA. L. REV. 143, 165-177 (1952).

[74] See Note 88, *infra*.

[75] The Smith Act has been held "separable" in the sense that it may be judicially limited to those situations to which it can constitutionally be applied. See Dennis v. United States, 341 U.S. 494, 515 (1951) and lower court opinion, 183 F.2d 201, 214 (1950). If the free speech test is incorporated in the statute in *haec verba* no harm is done, however, as the statute is not thereby rendered more vague in its standard of guilt. Moreover, as an indication of legislative intention, it is superior to a formal separability clause in unequivocally drawing the line beyond which the statute may not legally be applied.

[76] Dennis v. United States, 341 U.S. 494, 512-515 (1950). The manner in which the issue was handled in prosecutions under the Espionage Act of 1917 would be similar. Thus, in *Schaefer v. United States*, 251 U.S. 466, 483 (1919), it was said: "The question whether in a particular instance the words spoken or written fall within the permissible curtailment of free speech is, under the rule enunciated by this court, one of degree. And because it is a question of degree the field in which the jury may exercise its judgment is, necessarily, a wide one. But its field is not unlimited. The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness, could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error."

stitutional doubts to construe this common phrase to mean with the specific intent "to cause the overthrow of the Government by force and violence as speedily as circumstances permit."[77] Because the Devine Act denounces advocacy and teaching of revolutionary *acts,* as contrasted with doctrines, its literal scope is probably less broad than the federal law, and hence such a straining of ordinary English may not be necessary in order to avoid a collision with First Amendment guarantees. Let us assume for illustration that the necessary evidence of violation of any of the criminal provisions of the state sedition law shows not the dissemination of Marxist-Leninist dogma, nor the organization of people to teach and advocate it, but the teaching and advocating of "techniques of sabotage, the assassination of the Governor, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like."[78] If proof of conduct of this sort alone satisfies the apparently more exacting demands of the Ober-type enactment, then because we are out of the realm of hawking ideas, the terms "knowingly and willfully" may be accorded their normal meaning. Moreover, there is no need in the Devine Act to smuggle in a

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[77] 341 U.S. 494, 501 (1951). See instructions to the jury by District Judge Medina in United States v. Foster, 9 F.R.D. 367, 391 (S.D.N.Y. 1949). This reading of the first and third paragraphs of the Federal Sedition Act so as to require proof of this specific intent, plus incitement to *action* in order to give effect to Party doctrine, though somewhat forced, was felt to be necessary to avoid constitutional objections arising from the bald terms of the law which forbid teaching of a doctrine. Some commentators have argued that this in effect makes the charge one of *conspiracy to overthrow the government by force and violence* (punishable under the Conspiracy Act of 1861, 18 U.S.C. § 2384 (1948), with which the top Party leaders were not charged, and to sustain which no proper evidentiary basis was laid. Nathanson, *The Communist Trial and the Clear and Present Danger Test,* 63 HARV. L. REV. 1167, 1172 (1950); Boudin, *op. cit. supra* note 73 at 324; Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193,219 (1952). Subsequent Smith Act indictments may as a matter of "due process" have to be drawn differently so as to allege the requisite intent. See United States v. Schneiderman 102 F. Supp. 87, 97 (S.D. Calif., 1951).

[78] Douglas, J., dissenting, *Id.* at 581. The point is made therein that the *Dennis* case transcript of evidence is lacking in proof of any such conduct. If such facts *were* evidenced, free speech protection would depend on the nature of the relationship betwen advocate and audience. Teaching the techniques of revolutionary warfare to a group of devoted disciples who have already agreed to attempt violent overthrow when the time is ripe, is scarcely distinguishable from a band of professional bank robbers giving lessons to its neophytes in the art of safe-cracking. But advocacy of political reform by unlawful means to an audience that must be convinced of the desirability of a violent change before they will join the seditious conspiracy falls within the ambit of protected utterances. In the latter case, government must stay its hand unless and until there is imminent danger that some convert will sally forth to action under the influence of the exhortations.

specific intent requirement through statutory terms ordinarily denoting a general intent, as the *act* or *activity* to be taught or advocated must in all cases be "intended to ... assist in the overthrow ... of government ... by unlawful means." The existence of such an intent on the part of the advocate obviously negates the possibility of ignorance or good faith, so that the terms "knowing" and "willful" in the state law are either somewhat redundant or take on significance only when the act whose commission is advocated was "intended" by someone other than the advocate to assist in a violent *coup d'etat.*

The term "advocacy" or "teaching" as used in any sedition statute obviously does not mean mere academic discussion of revolutionary doctrine and techniques without some provocation to unlawful conduct, whether remote or immediate.[79] And this is so even though "every idea is an incitment" in the sense that persuasion may create a desire for action.[80] What is constitutionally punishable is instigation of the hearer to unlawful acts under such circumstances that the unlawful acts will probably be attempted before public discussion can furnish the corrective of countervailing ideas.[81] Whereas the legal concept "incitement" connotes an immediate call to wrongful action, "advocacy" implies conversion of belief in preparation for future acts of violence.[82] Immediacy of

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[79] Because this distinction between advocacy and interchange of ideas may be largely subjective and hence subject to misuse by a jury, the Supreme Court will probably demand that trial courts find as a fact that the "advocacy and teaching" involved "be of a rule of principle of action and by language reasonably and ordinarily calculated to incite persons to such action." *Id.* at 502.

[80] See *supra note* 58.

[81] See Rutledge, J., in Musser v. Utah, 333 U.S. 95, 101(1947): "The Utah statute was construed to proscribe any agreement to advocate the practice of polygamy. Thus the line was drawn between discussion and advocacy. . . . The Constitution requires that the statute be limited more narrowly. At the very least the line must be drawn between advocacy and incitement and even the state's power to punish incitement may vary with the nature of the wrong induced, whether violent or merely offensive to the mores, and the degree of probability that the substantive evil actually will result."

[82] See Brandeis, J., in Whitney v. California, 274 U.S. 357, 376 (1927): ". . . But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

anticipated evil is only essential where a substantial delay between utterance and its execution may "check its effect and change its importance."[83] It has been argued that because present-day Communism cloaks its real beliefs and directives in peaceful-sounding language, the Miltonian view of truth as "that idea which can get itself accepted in the free competition of the market-place" is inapplicable to problems of control.[84] In any event, it is still clear that immunity from punishment extends not only to peaceful criticism of our laws, but also to the advocacy, no matter how radical, of change by legal processes of our basic institutional structures.[85]

As the Devine law denounces individual advocacy of the commission of the forbidden acts "by any means," the question arises as to what besides speeches, writings, or conversations urging violence to achieve political change, it embraces. Monetary gifts to a "subversive organization" to be used for urging its doctrines, and leadership in the organization of such a group might reasonably be said to be covered,[86] but it is doubtful whether under the usual canon of strict penal law construction, less conclusive nonverbal conduct would suffice. An example of the latter, which may be covered by other sections of the statute anyway, are financial contributions to the general treasury of a subversive group, membership therein, or passive attendance at meetings.

(iii) *Organizational Offenses.*

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[83] L. Hand in United States v. Dennis, 183 F.2d 201, 212 (1950).

[84] See Ernst and Katz, *Speech: Public and Private*, 53 COL. L. REV. 620 (1953). The authors suggest withdrawing First Amendment protection from speech of a "clandestine" nature because of its slight social value. Their argument is that public debate on controversial matters will be liable to restriction if both secret and public utterances are lumped together for juridicial purposes. This is an appealing contention to liberals who presumably would like to find some such simple criterion as secrecy to distinguish themselves from the Communists who have done them inestimable harm by masking their true anti-liberal beliefs with humanitarian patter, thus creating confusion in the public mind. Two exceptions might be taken, however, to the author's approach. First, secrecy is no true index of a criminal conspiracy, as legitimate groups such as trade unions and splinter parties have historically chosen to confer in secret. Second, although the covert type of speech may be suppressed without much loss to "the thinking process of the community," a silencing of all who resort to it will prevent them from making public utterances as well which may have appreciable social utility.

[85] Taylor v. Mississippi, 319 U.S. 583,589 (1943); Fiske v. Kansas, 274 U.S. 380 (1927).

[86] The Nationality Act provided that the "giving, loaning, or promising of money or anything of value" to be used for advocacy shall constitute advocacy. 54 STAT. 1141, 8 U.S. C. § 705 (1940). *Cf.* the superceding provisions of the Immigration Act of 1952, 66 STAT. 166, 240 (1952), 8 U.S.C.A. §§ 1101 (a) (2) 1424 (a) (SUPP. 1953).

With respect to organizational activity, Sections 2921.22 (D) and (E), and Section 2921.23 make criminal any participation or membership in, or support of either a "subversive organization" or a "foreign subversive organization" (both as defined in the Act) with knowledge of its illegal character. With respect to the former type of group, the new law does not differ much from the Federal Sedition law except in the following matters. As discussed previously the forbidden "advocacy" under the state measure is not of revolutionary doctrine but of revolutionary activities. Secondly, the means intended to effect overthrow or alteration of existing government may be merely unlawful, and need not, apparently, be terroristic or violent.[87] Thirdly, and possibly of greatest significance, the *mens rea* in the newer act is expressed in terms of knowledge that such organization is a "subversive organization," as contrasted with the less ambiguous Smith Act requirement of knowledge of the unlawful purposes of the organization.

Neither the Federal nor the new state anti-sedition law limits its application in so many words to organizational activity posing a clear and present danger to internal security. This intentional omission from the Ober-type law reveals a belief on the part of its drafters that "criminal conspiracies" can be prohibited absent any showing of "enough probability (of execution of the plot to overthrow) to justify its suppression."[88] It would logically follow from such a legal conception, that any "subversive" group could be dissolved and its members jailed, no matter how puny its resources, how strong and well-advised the existing government, and how stable domestic and world conditions. One looks in vain for any warrant in United States Supreme Court decisions for such a view,[89] although it is true that Mr. Justice Jackson, in a

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[87] The Maryland progenitor of the law used the series "revolution, force, or violence." MD. ANN. CODE § 85A § 1 (1951).

[88] Or, as phrased in another part of the Court of Appeals opinion, ". . . whether the mischief of the repression is greater than the gravity of the evil, discounted by its improbability." United States v. Dennis, 183 F.2d 201, 215 (2d Cir. 1950). See Maryland Report, p. 59.

[89] As the Court has not as yet been given an opportunity to pass on a conviction under the present type of law, our only source of guidance is the *Dennis* case. At least seven of the Justices in that case held the "clear and present danger" rule applicable to the sort of conspiracy there involved, but differed amongst themselves as to its meaning.

Insofar as the affirming opinions can be brought into a single focus, they declare that the systematic teaching and advocacy of revolution can be made a crime, at least, and perhaps only, if the organization for spreading such ideas is an aspect of a serious and potentially important attempt to attack the Government by other means (e.g. Soviet foreign policy and military might). The extension of free speech protection to the Smith Act defendants can only mean that advocacy of revolutionary *action* by a group is not beyond the

strangely ambivalent[90] concurring opinion in the *Dennis* case, argues the inapplicability of the free speech "rule of reason" to *groups* engaged in the teaching or advocacy of force or violence and the Court of Appeals for the Fourth Circuit in affirming the conviction of the "second-string" Communist leaders tried in Baltimore found it strongly appealing.[91] Whether it will increase in judicial adherents cannot be prophesied for all that can be stated with assurance at this point is that a substantial majority of the highest constitutional court in the land will require for affirmance a rational basis for a trial court's conclusion that violation of a sedition statute shows sufficient danger to justify the punishment despite the First or Fourteenth Amendment.[92] And this extension of constitutional protection to "subversive" groups will continue to make sense as long as the sort of speech involved has any societal value whatsoever. For today, as never before in the country's history, it is only through joining militant organizations that the individual can get his political views heard by the electorate and those in authority. That even advocacy of overthrow of the Government by force is not completely wanting in public interest was elequently argued by Mr. Justice Frankfurter, who though he concurred in upholding the constitutionality of the provisions of the Smith act as a reasonable exercise of Congressional power, doubted its effectiveness in combating Communism. He stated as follows:

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pale. See *supra* note 77. On the other hand if the defendants had been indicted for conspiracy to overthrow the government with force and violence, no free speech issue would have arisen, but the historic distinctions between criminal "preparations" and criminal "attempts" might have complicated the prosecution. While proof of a violation under the Devine Law may be more exacting in view of the substitution of seditious activity for seditious doctrines, the conspiracy which may be punished is still not one to attempt violent overthrow but an agreement to agitate for the public acceptance of an illegal course of action in order to effectuate a revolution in government. What we are still dealing with is discourse blended of varying proportions of incitement to action and appeal to reason. Tolerance of such advocacy may lead to our downfall but it is an article of our democratic faith that "no government which is worth preserving can be seriously endangered" by such conduct. Nathanson, *op. cit. supra* note 75, at 1175. See also note 78.

[90] *Id.* at 562. "Ambivalent" in the sense that while judicial self-restraint cautioned against denying Congress the power, the Justice is not only alarmed over the growth of the conspiracy doctrine because of its high susceptibility to abuse (see his concurrence in Krulewitch v. United States, 336 U.S. 440, 445 (1948), but expresses grave doubts concerning the "long-range effectiveness of this conviction to stop the rise of the Communist movement." Id. at 578.

[91] Frankfeld v. United States, 198 F.2d 679, 683-684 (1952).

[92] Vinson C. J., *id.* at 516: "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this court will review the convictions with the scrupulous care demanded by our Constitution."

> "Of course no government can recognize a 'right' of revolution, or a 'right' to incite revolution if the incitement has no other purpose or effect. But speech is seldom restricted to a single purpose, and its effects may be manifold. A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For, as the evidence in this case abundantly illustrates, coupled with such advocacy is criticism of defects in our society. Criticism is the spur to reform; and Burke's admonition that a healthy society must reform in order to conserve has not lost its force. . . . It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellent the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the conviction before us we can hardly escape restriction on the interchange of ideas."[93]

In proscribing so-called "foreign subversive organizations" and decreeing punishment for their members and supporters, the Devine Act moves into an area where direct precedents are lacking and the established constitutional landmarks seem to deny ingress. A group of this sort is statutorily defined as an organization controlled "directly or indirectly" by a foreign nation or group of foreign nations which seeks to establish a puppet government in the United States.[94] The "World Federalists" and followers of

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[93] *Id.* at 549.

[94] OHIO REV. CODE § 2921.21 (C): "'Foreign subversive organization' means any organization directed, dominated, or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in, advocate, abet, advise, or teach activities 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 this state and to establish in place thereof any form of government, the direction and control of which, is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions, or governments to be effected through constitutional means."

Cf. the statutory criteria in the Internal Security Act of 1950 for administrative determination of whether a particular group is a "Communist-action organization" for the purpose of registration with the Attorney-General. 64 STAT. 993 (1950), 50 U.S.C. § 792(e) (Supp. 1952).

Clarence Streit would seem to be exempted by a proviso forbidding construction of the section to mean an organization "the bona fide purpose of which is to promote world peace." But if the directives come from abroad and the domestic group pursuant thereto agitates for subordinating state or national government to a foreign prince or potentate by orderly discussion, by ballot, by the established processes of lawmaking and constitutional amendment, the statute is transgressed. And this is so under the Devine Act, even though the form of government of the satrapy sought to be substituted is intended to be as representative and democratic as the British Dominions before Westminster.[95] In contrast, the federal Internal Security Act of 1950 created the new crime of conspiring to perform any act which would contribute substantially to the establishment of a foreign totalitarian dictatorship.[96] Because resort to violence or other illegal means need not be engaged in or advocated for conviction, it would seem pretty obvious that both statutes, and *a fortiori,* the former, sweep within their compendious language protected incidents of free speech, press, and assembly.[97] A goverment which protects itself from peaceful overthrow could only do so by "rigged" elections if it lacks majority support among the citizenry, and this characteristic we ordinarily identify with the systems we hate. If this end-objective cannot then be prevented by legal means under the constitution, how then can a "conspiracy" to advocate it be made punishable? The draftsmen of the Ober law

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[95] *But cf.* Shub v. Simpson, —— Md. ——, 76 A.2d 332, 338, 344 (1950), interpreting the loyalty oath requirement for candidates for state office under the Ober Act as meaning only that the affiant is not a member of an organization ("subversive organization" or "foreign subversive organization") "of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence.*" The Mundt-Nixon Bill, H.R. 5852, 80TH. CONG. 2D SESS. (1948) was much more cautious in condemning only efforts to establish in the United States a *totalitarian dictatorship,* the control of which would be exercised by a foreign power.

[96] 64 STAT. 987 (1950), 50 U.S.C. § 783(a) (Supp. 1952).

[97] Previous versions of the Internal Security Act, containing the same language, were condemned by Messrs. John W. Davis and C. E. Hughes, Jr., writing letters to the Senate Committee on the Judiciary in response to invitations from Senator Wiley. Attorney General Clark (now Mr. Justice Clark) wrote a similar criticism. Hearings before Senate Committee on the Judiciary on H.R. 5852, 80TH. CONG., 2d SESS. 415-425 (1950).

Such a statute could only be saved from constitutional attack by a judicial re-drafting which would go clearly counter to the intention of the Commission which wrote the Maryland progenitor. See Maryland Report, p. 33. Some courts have already attempted this emasculation. See Note 95, *supra.* But the present section of the Devine Law, as it now stands, is void on its face, as permitting within the scope of its language the punishment of incidents fairly within the protection of the guarantees of free speech, press, assembly, and petition. See Winters v. New York, 333 U.S. 507 (1947).

doubtless considered that it would be easier to prove that the American Communist Party was run from Moscow than that it had completely eschewed the use of constitutional means to gain its end of governmental overthrow.[98] One can sympathize with the desire to insure against Soviet domination of American society without approving the means here employed. It certainly does no credit to the American people to assume they would consciously vote into office a puppet regime, and their awareness of alien manipulation in political affairs seems reasonably assured by diligent enforcement of the Federal Foreign Agents Registration Act[99] and the preservation of a free and unintimidated press.[100]

In Section 2921.23 the new Act prohibits any person from becoming or remaining a member of either type of subversive organization "knowing such organization to be a subversive organization or foreign subversive organization." For some reason no *locus poenitentae* was accorded Ohio subversives as it was by the original Maryland statute which provided a ninety day period after the effective date during which individuals and organizations could change their minds and charters, and the former withdraw if investigation showed their group to come under the ban.[101] Mere

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[98] See Maryland Report, p. 33: "This distinction (between 'subversive' and 'foreign subversive' organizations) is made because there are organizations for example, the Communist Party, which for good reasons are suspected of being dominated and controlled by a foreign government and of seeking to overthrow the government of the United States and to replace it by some form of government controlled by a foreign government, but which nevertheless contend that they no longer advocate forceful overthrow of our Government *and are merely advocating the use of constitutional means to achieve their end.*" (Emphasis supplied.)

Cf. Holmes, J., dissenting in Gitlow v. New York, 268 U.S. 652, 660 (1925): "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

[99] Since 1938, agents of foreign governments have been required to register with the Attorney General and to label their propaganda. 52 STAT. 631-33 (1938), as amended, 22 U.S.C. §§ 611-21 (1946). See also the Voorhis Act of 1940, as to native para-military groups. 18 U.S.C. § 2386 (Supp. 1950). Generally, see *Institute of Living Law, Combating Totalitarian Propaganda: The Method of Exposure,* 10 U. OF CHI. L. REV. 107 (1943).

[100] It has been argued that our form of Presidential Government, as contrasted with the coalition-type governments overturned by the European Communists, makes it "utterly impossible" for the American Communists to gain power in this country by the process of out-witting our statesmen and using methods of cunning rather than open insurrection. Boudin, *op. cit. supra* note 73, p. 346.

[101] MD. ANN. CODE ART. 85A, § 3 (1951): "It shall be a felony for any person after June 1, 1949, to become, or after September 1, 1949, to remain a member, etc." See Maryland Report, p. 32. Compare the similar relief pro-

membership is to be punished less severely than participation in the formation or management of a forbidden group, but the absence of any definition in the statute of what comprises membership makes the distinction between it and "participation" and "contribution in any way to the support" difficult of application.[102] Most judicial signposts today point in the direction of constitutionality of the provision, however.[103] It is true that the Department of Justice has so far seen fit to prosecute only the leaders of the American Communist movement, and then not for "membership" or active participation in Party activities but for conspiring to willfully advocate the necessity of forcible overthrow of the Government and to organize the Communist Party as a society which so teaches and advocates.[104] Thus the federal courts have not had to pass on the validity of a conviction solely under the membership pro-

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visions for Communist organization members in the Internal Security Act of 1950. 52 U.S.C. §§ 787, 788 (Supp. 1952).

[102] Possibly a distinction between associating with a group and participating in its activities lies in purpose or motivation. The phrase "knowingly and willfully" (discussed *supra,* note 77) does not qualify the proscription of membership in Section 2921.23. If willfully is given its usual denotation as "with an evil purpose" then an active member who knows his group is considered subversive but remains in for ulterior reasons (e.g. cheap insurance, union shop protection, or a desire to attempt to turn the group toward legitimate objectives) will not be visited with the more severe sanction.

[103] It does not aid systematic analysis of the constitutional problem of proscribing membership in certain groups by asserting them to be "conspiratorial" in nature. Even in wholly criminal operations, like operating an illicit distillery, a distinction is traditionally drawn between those who furnish supplies knowing that they will be put to unlawful use, and those who make the venture their own, and "have a stake in its outcome." United States v. Falcone, 109 F.2d 579 (2d Cir., 1940). Only the latter are "co-conspirators" who will be bound by the wrongful acts of their confederates done in furtherance of the scheme. Because the defendant in Whitney v. California, 274 U.S. 357 (1927), although charged with membership in a syndicalist group, was an organizer or leader in fact, it was probably proper to hold her responsible for the more incendiary manifestos of her colleagues. This does not mean that mere "privity" cannot be made punishable, but that the essentially hearsay evidence which would be good against the top officials would not necessarily be admissible against a member who had not actively joined the "partnership in crime," though he knew of its existence and did not withdraw his support.

[104] Whatever the original intentions of the Department of Justice as to a program "of extensive suits to prosecute members" (see Hearings on the Department of Justice Appropriations before the Subcommittee of the Committee on Appropriations, 81ST CONG. 2D SESS. 85-6 (1950)), the Internal Security Act of 1950 holds that membership shall not constitute per se a violation of "any other criminal statute"—manifestly a reference to the Smith Act. *Supra* note 53.

visions of the Smith Act.[105] Whether they will uphold one coming up from a state court will depend in large part on how broadly the highest state court construes the statutory terms[106] and whether the particular kind of membership involved in the application of the statute constitutes a clear and present danger of an attempted overthrow of the government.[107] Although one may question the wisdom of going after the small fry with such heavy artillery, if the membership clause is fairly interpreted it will not create "guilt by association."[108] Grave injustice might be done if passive membership alone in even the Communist Party is taken as the equivalent of support of force and violence.[109] For though the Party be truly as closely-knit and cohesive as it is reliably reported to be, there must still be on the rolls the names of a few dupes, illiter-

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[105] In two of the Smith Act cases which have so far reached an appellate court, "membership" was alleged in the indictments as an object of the conspiracy charged to violate the substantive provisions of the Act. Both the Fourth and Eighth Circuit Courts of Appeal held this provision independently valid. Dunne v. United States, 138 F.2d 137, 143 (8th Cir., 1943); Frankfeld v. United States, 198 F.2d 679, 683-4 (1952).

[106] Because of present unpopularity of anything smacking of Communism, proof of membership in pro-Soviet groups will in most instances be highly circumstantial. As membership cards have been destroyed (Ohio Report, p. 31), only seizure of Party rolls or an admission in court would directly tend to establish the fact. Hence, the courts in applying Section 2921.23 will have to determine what evidence will be sufficient on this issue. Incidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party could not be punished. *Cf.* United States v. Lattimore, 112 F. Supp. 507, 518-19 (D.C., D. of Col., 1953); Fiske v. Kansas, 274 U.S. 380 (1927). Nor could innocent participation in a Communist-held meeting where lawful discussion took place be made criminal by accepting such datum as proof of membership. *Cf.* Herndon v. Lowry, 301 U.S. 242, 258 (1937); DeJonge v. Oregon, 299 U.S. 353, 358 (1936). Nor even highly intemperate criticism of our institutions or official actions. Taylor v. Mississippi, 319 U.S. 583 (1943).

[107] Joining an organization, though an "overt act" in the objective sense, is probably "an exercise of free speech and free inquiry." Frankfurter, J., concurring in Wieman v. Updegraff, 344 U.S. 183, 195 (1952). This would seem to follow logically from the premise of the *Dennis* case, *supra* note 75, that at certain times and places it is lawful to organize a group of persons who advocate forcible subversion of government. But even under present "Cold War" clear and present danger, not all species of membership with guilty knowledge pose the same danger to internal security. See Note, *Conduct Proscribed as Promoting Violent Overthrow of the Government*, 61 HARV. L. REV. 1215, 1217, 1221 (1948).

[108] See *"Guilt by Association—Three Words in Search of a Meaning,"* 17 U. OF CHI. L. REV. 148 (1949). See also HOOK, HERESY, YES— CONSPIRACY, NO, 84 *et seq.* (1953).

[109] See, e.g., State v. Boloff, 138 Ore. 568, 4 P.2d 326 (1931) (ditchdigger joined because he heard the party was for the workers, convicted under membership clause of syndicalism statute although he was inactive).

ates, and others, who while cognizant of its aims, may abhor force or foreign domination but believe in the Party's social and economic objectives.[110] Membership *per se* in Communist "front" organizations is of course even more equivocal. Patent abuse of the law can only be avoided in prosecutions under the "membership" clause by requiring that the act or acts tending to prove membership "be of that quality which indicates an adherence to or a furtherance of the purposes and objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition."[111] As alluded to previously, it is difficult to say what will be required as sufficient "knowledge." The Act's language is subject to the interpretation that notice from some official source, such as the Attorney General's list,[112] is enough. No intimation is offered as to whether such notice need be actual or constructive, although acceptance of the latter involves punishing for mere ignorance or indifference. If actual notice from an official quarter that some group to which one belongs is dominated or has been infiltrated by Communists is held to suffice, the organization, even though it may have originated with lofty motives and a loyal and honest staff, must be forsaken, for one will remain behind at his peril.[113] While such an interpretation of the *scienter* ingredient is conceivably valid, the relatively heavy penalty provided (up to $5,000 and/or five years' imprisonment) suggests that the General Assembly was aiming only at members with personal

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110 *Cf.* CHAFFEE, FREE SPEECH IN THE UNITED STATES 474-482 (1941). Witness Cvetic (Ohio Report, p. 65) thought there were hundreds of party members who would like to withdraw but fear reprisal if they do.

111 Bridges v. Wixon, 326 U.S. 135, 143 (1944). This was the meaning given the term "affiliation" in the deportation statute, because "we cannot believe that Congress intended to cast so wide a net as to reach those whose ideas and program, though coinciding with the legitimate aims of such groups, nevertheless fell far short of overthrowing the government by force and violence." Though "affiliation" imports less than membership but more than sympathy, the evidence on either issue would be similar.

112 See infra, note 162. Such a listing for the limited purposes of the Federal Loyalty Program might be considered as giving some warning which would cause a reasonably prudent innocent to investigate the nature of his group. But being a purely hearsay declaration, "it has no competency to prove the subversive character of the listed associations." United States v. Remington, 191 F.2d 246, 252 (2d Cir., 1951).

113 The lower court which found the Ober Act unconstitutional pointed to a serious hardship that enforcement might inflict on members of labor unions. If a union, found subversive because it was dominated by Communists, had a union shop agreement with employer X, the employees of X would find themselves faced with the dilemma of either withdrawing with loss of job, or remaining and risking conviction of subversion. See *supra*, note 42.

knowledge of the *unlawful* purposes of the group.

(iv) *Evidentiary Problems in Suits Against Subversive Groups.*

The principal evidence used to prove subversive advocacy by organizations has been the official and unofficial literature issued or distributed by the association concerned. Articles appearing in party periodicals bear a sufficient imprint of organizational adoption to be admissible evidence against it.[114] The holding of secret classes in revolutionary doctrine and technique, and the use of party aliases and other subterfuges, attested to by ex-members and secret police agents, has been used as proof of conspiratorial preparation for action.[115] Expert testimony on communist theory and practice is also admissible.[116] But there seems to be no short cut to a judicial determination that the Communist Party of the United States has as its objective the seizure of existing government by force and violence "as speedily as circumstances would permit." Although legislative findings of fact as to the nature of the party might be given some weight, the exercise of judicial notice of the aims of subversive groups would seem unwarranted.[117] Communists in court still vigorously deny that the use of "force and violence" is

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[114] See cases cited in Note, 61 HARV. L. REV. 1215, 1219 (1948). *But cf.* Schneiderman v. United States, 320 U.S. 118 (1943) as to the interpretation to be accorded the "sacred texts" of the Party, written during a different day and age but still cited as gospel by the faithful.

[115] United States v. Foster, 9 F.R.D. 367, 391 (S.D.N.Y., 1949).

[116] Frankfeld v. United States, 198 F.2d 679, 689 (4th Cir., 1952).

[117] Morgan, *Judicial Notice,* 57 HARV. L. REV. 269, 274 (1944). The Maryland Report cites at p. 102 nine federal court cases where judicial notice was taken of this fact as so notorious as not to be the subject of reasonable dispute. Whether these cases were rightly or wrongly decided, most of them involved administrative deportation orders with consequently a relaxation of the judicial rules of evidence. See Davis, *Official Notice,* 62 HARV. L. REV. 537 (1949). Because a disputed matter has been decided one way in a number of trials, it is not taken out of the realm of controversy so as to be subject to judicial notice in subsequent litigation involving the same issue, but distinct parties. The doctrine of res judicata, however, might be argued as a basis for foreclosure of certain defenses in suits against individual members. If, for instance, an organization after judicial hearing is determined to be subversive under Section 2921.24, such finding might be argued in bar of relitigation of the general issues in individual trials. "Due process" would require at least all the safeguards of a "class suit." See Hansberry v. Lee, 311 U.S.32 (1940). This technique of severance of the general and particular issues was used in the trials of the Nazi war criminals (see JACKSON, THE NURNBERG CASE 99 *et seq.*) but has not yet taken firm root in this country (*cf.* Yakus v. United States, 321 U.S. 414 (1943)).

After finding that an organization espouses the forbidden aims, the jury or judge must also find that such activity imminently endangers some interest the state can protect. *Supra,* note 76. As to what extent notice may be taken of the setting in world and national events, see Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1, 30-31 (1951).

any part of their program except as a defensive measure once the proletariat has succeeded in securing power by constitutional means. Thus while convictions under the Act are clearly possible, its enforcement will not be easy. The Government in its first petition under the Internal Security Act of 1950, charging the Communist Party, U.S.A., with being a Communist-action organization, took over a year to present its full case to the Subversive Activities Control Board.[118] When these proceedings finally terminate in the Supreme Court the Party may change its name or even its true aims, thus causing the Government the trouble of starting anew. It is well-known that the Government's Smith Act prosecutions have been expensive, exhausting, and time-consuming. Whether under present conditions, state enforcement will be enthusiastically pushed seems doubtful when the possible benefits are balanced against the time, energy, and judicial facilities that will necessarily be absorbed.[119]

B. *Its Enforcement Provisions.*

Most new criminal laws are left for their enforcement to the traditional agencies of sheriff, urban police, city or county prosecutor, and grand jury. Within these familiar institutions there has always been a very low degree of specialization with respect to the nature of crime except where a metropolitan police force has seen fit to set up a separate squad for the handling of violations occurring in the fields of traffic regulation, narcotics, vice, and youthful offenders. The formation of "red" squads to surveil the activities of radical agitators and their hecklers is certainly not unknown. Yet if a species of serious crime is of state-wide scope and is well-organized and conspiratorial in its methods it seems perfectly reasonable to establish a central office to accumulate and maintain information and to coordinate local counter-measures. The Kefauver Committe's hearings anent organized commercial crime gave impetus to this administrative device, both in the form of "crime commissions"

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118 2nd Annual Report, United States Subversive Activities Control Board (1952). Under New York's Feinberg Law (N. Y. LAWS 1949 c.360) barring subversives from the school system, the Board of Regents must hold hearings before listing any organization, membership in which will be prima facie proof of unfitness to teach. The Regents, after the successful court fight, began hearings on the subversive character of the Communist Party in March, 1952, which were not concluded till June, 1953. During the third week of September, the Board on the voluminous record decided the Party does advocate the doctrine of violent overthrow. The case will now go back to the courts. N.Y. Times, Sunday, September 27, 1953 2 E.

119 See, The States and Subversion (A.C.L.U., April, 1953) at p. 4 for survey of recent action taken under the new flood of state laws. The Maryland attorney general "has displayed a marked reluctance to proceed in carrying out the provisions of the [Ober] law." Prendergast, *op. cit supra* note 34 at p. 167.

and increased centralization of law enforcement authority in the state attorney-general.[120] The Devine Law, following the Ober Commission's recommendations, adapts this technique to the problems of internal subversion. Section 2921.25 of the Revised Code creates the new post of "special assistant attorney general" to investigate subversive activities and to assemble and deliver to the approporiate county grand jury "all information and evidence" relating in any manner to suspected violations of the new criminal sections, heretofore discussed, "and relating generally to the purposes, processes, and activities of any subversive organization or foreign subversive organization." To implement his investigative function, the special assistant, who is to be appointed and supervised by the attorney general, may employ such personnel as he deems necessary, and may, in addition, call upon existing local and state police authorities for information and assistance. Although his access to the files of the F.B.I. is limited,[121] he no doubt will be able to cultivate common sources of information, such as informants, the files of certain Congressional committees, and sister state officials engaged in the same type of police work. Although the various judges of the courts of common pleas, spontaneously or at the prompting of the local prosecutor, can initiate grand jury investigations into subversion, the special assistant attorney general may participate to the extent of testifying to matters within his special competence, examining any witnesses summoned, and subpoenaeing additional witnesses. So far we are still in the realm of accepted machinery of law enforcement. But the Act prescribes a marked divergence from traditional functions when it imposes upon the grand jury "the direct obligation to investigate and report upon 'Communism'" and imposes on the new special assistant attorney the obligation to print, publish, and distribute such grand jury reports on "Communist subversion."[122] The various county grand juries under the aegis of the new state official thus are intended to take over the functions of public education and exposure in and of Communism when these are relinquished by the expiring Ohio Un-American Activities Commission.

Whether this sort of role can be satisfactorily engrafted onto the historic functions of the common law grand jury without perverting its basic purposes may well be questioned. Although a body

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120 See Report of American Bar Association Commission on Organized Crime, "Organized Crime and Law Enforcement," Vol. 1, p. 67 (Ploscowe ed., 1952).

121 Such reports and official information are confidential and may not be disclosed without the assent of the United States Attorney General. Department of Justice Order No. 3229, 11 FED. REG. 4920 (1946).

122 OHIO REV. CODE §§ 2921.25, 2921.26 (1953).

possessing plenary inquisitorial powers, "the most valuable function of the grand jury is not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."[123] As contrasted with legislative investigating committees, grand juries *must* function in secrecy. In Ohio the jurors are admonished and sworn to secrecy, as is the official shorthand reporter, and no unauthorized person is allowed to intrude upon its hearings or deliberations.[124] The proceeding is strictly *ex parte*, with the prospective accused accorded no right to present his defense or cross-examine his accusers. The convening court will ordinarily only permit inspection of the transcript of record by the accused after indictment returned, and then only when the "interest of justice" so demands.[125] The main purpose of all this secrecy is not alone to avoid flight by the accused or to encourage freedom of action in the grand jury room, but to protect the reputation of an innocent accused from public knowledge that charges are being preferred against him.[126] It is false analogy to point to the duty of the jury to investigate the condition of the county jail,[127] for the treatment and disciplining of prisoners is a fairly objective phenomenon and does not entail the assessing of imponderables in the area of politics and personal belief. It is hard to conceive of a report on local Communism couched in anything but the vaguest generalities that does not "name names" of persons not yet indicted for crime.[128] Even the "un-American" committees which have been most maligned

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123 Hale v. Henkel, 201 U.S. 43 (1906).

124 OHIO REV. CODE §§ 2939.06, 2939.07, 2939.10, 2939.11 (1953).

125 State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910).

126 See ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 171 *et seq.* (1947).

127 Maryland report, p. 36. *Cf.* OHIO REV. CODE § 2939.21 (1953).

128 The courts have allowed an aggrieved subject of a grand jury report several remedies. If the jury has acted outside the ambit of its authority a motion to expunge will be granted. Hayslip v. State, 249 S.W.2d 832 (Tenn., March 7, 1952); *In re* Presentment by Camden County Grand Jury, 89 A.2d 416 (N.J., June 16, 1952). Under Section 2921.27 of the present enactment, if the Ohio Attorney General permits disclosure of damaging innuendo, a motion to expunge would probably not lie, and hence, no suit for libel would be entertainable against the members of the jury. *Cf.* Rector v. Smith, 11 Iowa 302 (1860). But even if the report is not held privileged, newspaper re-publication may constitute "fair comment" and not be actionable. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 61 So. 345 (1913).

In the absence of a group libel law, a civil action can generally not be brought for defamation of a "class" unless the individual can show that the publication applies to him in a special way. See Note, 98 U. OF PA. L. REV. 865 (1950). On whether the Communist label is defamatory per se, see Note, 11 OHIO ST. L. J. 577 (1950).

by the liberal faction, have provided the victim of a public charge of disloyalty the opportunity to appear and publically rebut.[129]

That this danger of irrevocably blasting innocent reputations was recognized not only by the Devine Bill's opponents is seen from the last section of the measure which forbids (with no sanction attached) the disclosure prior to indictment of any information reflecting on the loyalty of any resident of the United States "except with the permission of the attorney general."[130] But skepticism about the effectiveness of this exhortation seems justified in view of the lack of any specified standards to control that official's discretion and the avowed purpose of the law's original drafters to expose by grand jury report secret Communist Party members "who are diligent in seeking to operate *within* the laws."[131] Conceding that prosecutions of the few persons who run afoul of the laws is difficult for having to meet exacting standards of proof, and even if successful are not alone sufficient to deal with the menace, respect for American standards of decency and fair-play would seem to counsel resort to methods of eliminating the underlying causes of Communist allegiance[132] rather than letting accusation of treachery stand for proof of guilt.[133]

V. *The Hoffman Law, Excluding Subversive Persons from State Employment.*

Section 143.272 provides for the dismissal of any state employee, including teachers in the public schools and state-supported colleges and universities, who either advocates unlawful overthrow of the state or national government, or "willfully retains

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129 Carr, *The Un-American Activities Committee,* 18 U. OF CHI. L. REV. 598 (1951).

130 OHIO REV. CODE § 2921.27 (1953).

131 Maryland report, p. 36: ". . . it is impossible to deal with the menace only by prosecution of the few persons who run afoul of the laws. . . Constant reports of the Grand Juries of this State, exposing secret activities, identifying and indicting persons engaged in advancing the Communist conspiracies, describing the Communist 'line' as it may currently be, all based upon evidence considered and weighed by a representative group of representative citizens, will unquestionably inform the public accurately, properly and forcibly."

132 As to why Americans become Communists, see ERNST AND LOTH, REPORT ON THE AMERICAN COMMUNIST (1952).

133 Governor Lausche in his Devine Bill veto message, *op. cit. supra* note 25, stated: "Regardless of the sincerity of the Attorney General or the assistants whom he hires to operate this separate agency of government, I can see nothing but grave danger to the reputations of innocent people against whom accusations can be made on the basis of rumor and frequently rooted in malice. I can see the reputations of innocent persons actually ruined by rumors, doubts, innuendos, and guilt inferred through association, as we are now witnessing nationally through unbridled and unharnessed public investigations."

membership" in an organization so advocating. No one can argue with the manifest purpose of such a measure to deny the privilege of state employment to those who seek the forcible overthrow of existing government. And even though it is often argued that internal security does not require the extension of loyalty guarantees to public jobs not involving trust, influence, or opportunity for espionage, the irony of financially supporting through state funds persons committed to the aid of a foreign power would tend to justify an all-embrasive prohibition. Without regard to how the Act may be administratively implemented, it is certainly safe, in view of recent Supreme Court decisions,[134] to consider it constitutionally valid. As was recently stated: "City, State and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it."[135] The fact that the Act in its enforcement might directly or indirectly operate to discourage the exercise of certain of the constitutionally protected freedoms is not fatal where the means adopted bear a reasonable relationship to a proper legislative purpose.[136] Because there is no constitutional right to a position on the state payroll no showing of imminent infiltration or threatened undermining of state functions need be made to justify efforts to bar persons of inimical beliefs and inconsistent loyalties. Although under state civil service, inquiry into political opinion or affiliation is forbidden,[137] the general attitude of the courts today is to interpret such provisions as not intended to protect any individual or group advocating the overthrow of the government by force or violence.[138]

The Act by its terms applies to all public employees at both state and local levels in both classified and unclassified civil service. There is express inclusion of teachers in the public school system and in state supported universities and colleges. Whereas in the case of employees in the classified service of the state removed for any of the hitherto specified causes,[139] the decision of the civil

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134 Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951); Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951). *Cf.* Adler v. Board of Education, 342 U.S. 485 (1952).

135 Frankfurter, J., concurring in Garner v. Board of Public Works, *Id.* at 724.

136 United Public Workers v. Mitchell, 330 U.S. 75, 102-103 (1947).

137 OHIO REV. CODE §§ 143.16, 143.18 (1953).

138 *Cf.* Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 28 Cal.2d 481, 485, 171 P.2d 21,24 (1946).

139 OHIO REV. CODE § 143.27 (1953): ". . . such officer or employee may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral con-

service commission is final, an appeal to the court of common pleas "to determine the sufficiency of the cause of removal" is afforded where the ground alleged is disloyalty.[140] Judicial review of orders of termination by the boards of education of teachers' contracts has always been available.[141] Procedure for the removal of instructors and professors in the state universities is of course determined by the appropriate board of trustees.[142] Court review of dismissals in this area could only be had by suing for breach of the tenure and fair "hearing" terms of the academic contract.[143]

The extension of the availability of judicial review to all classified state civil servants implies a recognition of the dire consequences visited upon a person excluded from public employment on disloyalty grounds. Though not technically punishment,[144] such a discharge may continue to impair his ability to earn a livelihood, and inflict a lasting disgrace to the individual concerned.[145] But the granting of judicial review is a hollow boon if the fundamentals of "due process" such as specificity of charge, confrontation, and cross-examination of accusers need not be observed by the administrative officials concerned. Important also is the standard of proof that

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duct, insubordination, discourteous treatment of the public, neglect of duty, . . . or any other violation of the rules of the commission."

140 Only in the case of removal of a chief of police, or of a fire department, or any member of either, does appeal lie as a matter of right from the decision of the municipal civil service commission for dismissals on grounds other than disloyalty. Where an appeal is taken to the court of common pleas, the questions of removal must be tried *de novo*. Landrey v. Harmon, 5 Ohio App. 217, 39 Ohio C.C. 303 (1916).

141 OHIO REV. CODE § 3319.16 (1953). The court appeal here does not require a trial *de novo*, but the common pleas judge may supplement the transcript and record of the hearing before the school board if deemed advisable. A teaching contract may be terminated for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause.

142 OHIO REV. CODE §§ 3335.09 (Ohio State University), 3343.06 (Central State College), 3341.04 (Bowling Green State University; Kent State University), 3349.03 (Municipal educational institutions). Although no express grant of the power to remove was made to the trustees of Ohio and Miami Universities, it is assumed to be inherent. See §§ 3337.01, 3339.01.

143 *Cf.* State *ex. rel.* Keeney v. Ayers, 108 Mont. 547, 92 P.2d 306 (1939).

144 Bailey v. Richardson, 182 F.2d 46 (D.C., C.A., 1950). *But cf.* concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1950) and majority rationale in United States v. Lovett, 328 U.S. 303 (1946).

145 Private employers are increasingly imposing loyalty standards on job applicants and have frequently resorted to governmental "loyalty boards" for information about grounds of discharge of an applicant. See Comment, *Loyalty and Private Employment: The Right of Employers to Discharge Suspected Subversives*, 62 YALE L. J. 954, 956 (1953).

must be met to substantiate a dismissal of this kind,[146] and the quality of the evidence that can be admitted.[147] As the Act is silent on the question of procedural safeguards for verifying the charge of forbidden advocacy or membership in subversive organizations, the school boards and state and municipal civil service commissions will have to spell them out by means of their rule-making powers.[148]

The Act is also silent as to means of implementation. This is not uncommon in many states today having similar laws[149] but it leaves to administrative discretion the large and vital question of how and in what manner the facts relevant to the charge are to be ascertained. Should an affirmative effort be made by every state agency to ferret out secret subversives or should the matter of detection be left to chance such as newspaper or magazine reports linking an employee with a subversive group or public hearings featuring the employee as witness or defendant? Viewed objectively, the answer would seem to depend not only on the amount of Communist infiltration that has actually occurred in state govern-

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146 Because the Communist Party is essentially an underground organization, proof of membership can seldom be conclusively established unless the evidence of confidential informants is obtained. As it is often officially claimed to be infeasible to expose these informants to public examination, the agency head must either forebear or proceed on essentially hearsay evidence which may have only created a suspicion of disloyalty. The Hoffman Act, unlike the corresponding sections in the Maryland Law (MD. ANN CODE ART. 85A, § 14) sets up no standard of proof, like "reasonable grounds to believe," or "reasonable doubt as to loyalty," so that the charge of present and personal advocacy of forcible overthrow would at least have to be supported by "substantial evidence." See Horowitz, *Report on the Los Angeles City and County Loyalty Programs*, 5 STAN. L. REV. 233,242 (1953).

147 Rule XIII, § 6 of the Civil Service Commission provides that the reception of evidence at such hearings shall be governed in general by the rules applied by the courts in the trials of civil actions. The Commission's decision is reviewable by trial de novo in the court of common pleas, thus seeming to assure a full hearing in disloyalty cases. The various boards of education are required by statute to take testimony under oath, allow cross-examination by counsel, keep a record of the proceedings, and issue subpoenas for defense witnesses. OHIO REV. CODE § 3319.16 (1953). The nature of the tenure hearing accorded at the state universities is determined by each board of trustees. At Ohio State University in Columbus, "termination for cause shall only be accomplished by strict adherence to the procedures of due notice, written charges, reasonable opportunity to reply, and a fair hearing, including the right of representation and submission of evidence. . ." *Academic Appointments, Tenure, and Promotions* (Appr'd by the Ohio State University Board of Trustees, Oct. 15, 1951).

148 OHIO REV. CODE §§ 143.13 (B), 143.30, 3313.20 (1953). And see *supra*, note 142.

149 See THE STATES AND SUBVERSION, Appendix A, pp. 407-8 (Gellhorn ed. 1952).

ment and public educational institutions[150] but an assessment of the risk of injury to the morale and efficiency of civil servants and teachers[151] necessarily incident to an investigation into political belief and affiliation. If in view of these factors and, in addition, the unavailability of the necessary facilities and funds, a full-blown state loyalty program is not administratively feasible,[152] the most popular alternative today is the device of the loyalty or test oath. Though it seems doubtful that the actually disloyal would cavil at taking it, its proponents argue that proof of false statements in an affidavit will not only facilitate removal of suspected subversives but may lay a basis for a perjury prosecution.[153] But aside from the question of the wisdom of such measures,[154] their legal and constitutional validity in Ohio today can not be assailed if such oaths are couched in terms of a disavowal of present advocacy of violent overthrow and knowing membership in groups which engage in such advocacy[155] and a promise to forbear from such action while in office.[156] Even without the present statutory background, several state and local educational authorities have required the taking of such an oath from both present and prospective teachers, an action which was upheld in a lower court decision involving the Cleveland Board of Education.[157] How much further

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150 The Report of the Ohio Un-American Commission contains no findings with respect to Communist infiltration of either state agencies or the public school system.

151 In this connection see Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs,* 61 YALE L.J. 295 (1952).

152 Ohio is the only state thus far which has adopted the criminal provisions of the Maryland Ober Law while failing to enact its loyalty program provisions. However, Los Angeles city and county have by exercise of administrative rule-making power established small-scale programs statutorily based on Government Code provisions (CAL. GOV'T. CODE §§ 1028, 13200) substantially similar to the Hoffman Law. See Horowitz, *op. cit. supra* at note 146. New York has by statute set up an elaborate system of loyalty hearings and investigations for teachers. See the analysis in Adler v. Board of Education, 342 U.S. 485 (1952). The "Pechan" Loyalty Act of 1951 adopted in Pennsylvania is evaluated in Byse, *A Report on the Pennsylvania Loyalty Act,* 101 U. OF PA. L. REV. 1-29 (1953). The forerunner of the state programs is of course President Truman's Order of March 2, 1947 (EXEC. ORDER No. 9835, 12 FED. REG. 1935) which affected all federal employees. Its operation is critically discussed in BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM (1953).

153 For the arguments pro and con, see Byse, *op. cit. supra* note 152 at 5-7.

154 See *e.g.,* Stewart, THE YEAR OF THE OATH—THE FIGHT FOR ACADEMIC FREEDOM AT THE UNIVERSITY OF CALIFORNIA (1950); THE STATES AND SUBVERSION c.4 (Michigan) (1952).

155 Garner v. City of Los Angeles, 341 U.S. 716 (1951).

156 United Public Workers v. Mitchell, 330 U.S. 75 (1947).

157 See Dworken v. Cleveland Board of Education, 42 Ohio Ops. 240, 94 N.E. 2d 18 (1950). On April 19, 1948, the Board of Trustees of Ohio State

such test oaths can go in eliciting information considered germane to a finding of disloyalty, such as singling out certain organizations by name, incorporating certain official listings of subversive groups by reference, and delving into past affiliations and actions, is still an open question.[158] It is clear however that the affiliation which must be forsworn has to be, or have been, with knowledge of the subversive aims of the group and cannot be innocent.[159] To require otherwise would be to penalize individuals for exercising the rights of free speech and inquiry, for the oath could not be conscientiously taken by any employee uncertain of the ends of groups with which he is now or has in the past been affiliated and "is bound to operate as a real deterrent to people contemplating even innocent associations."[160] Not only might a person be duped into joining a subver-

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University prescribed the filing of an Oath of Allegiance for all officers, instructors, and employees. In addition to the traditional oath to uphold the Constitution, University employees must forswear present and future advocacy of violent overthrow of government and membership in any political party or organization that does.

It is interesting to note that the General Assembly imposed a traditional-type loyalty oath requirement on teachers in 1919 but repealed the law in 1935. OHIO GEN. CODE § 7852-2 (1938). The Ohio Constitution, Art. XV, § 7 (implemented by OHIO REV. CODE § 3.23) requires of "public officers" an oath to support the state and federal constitutions and of office. As the organic law does not forbid the imposition of additional qualifications, it is doubtful that the constitutional oath is exclusive. *Cf.* Tolman v. Underhill, — Cal. App. 2d —, 229 P.2d 447 (1951).

[158] To the extent that a particular form of oath requires the disclosure of present and past affiliations and beliefs it is a fact-finding mechanism and not a pledge of future fidelity. Viewed as a compulsory questionnaire, its validity will depend mainly on the relevency of the facts it seeks to elicit to the statutory grounds for dismissal, viz., present and personal advocacy of violent overthrow. If the oath or affidavit requirement is a valid one, refusal to take it would be "insubordination" independently justifying dismissal. Note 139, *supra*. Consequently, the Fourteenth Amendment is no bar to inquiring as to past or present membership in the Communist Party. Garner v. Los Angeles Board, 341 U.S. 716, 720 (1950). Similar inquiries with reference to association with other groups such as suspected "front" organizations raises difficult problems of "due process" if the determination of "subversiveness" was made *ex parte* by some official and for limited purposes. Weiman v. Updegraff, 344 U.S. 183, 192 (1952). The validity of such official action would certainly be affected by whether a forced admission of membership in a suspect group could be used as evidence in a dismissal hearing, and the weight to be accorded the fact of membership in an adjudication of forbidden advocacy. For the California practice, see Horowitz, *op. cit. supra* note 146 at pp. 238-9.

[159] Weiman v. Updegraff, 344 U.S. 183 (1952). (Oklahoma Supreme Court's holding that guilty knowledge is not a factor held violative of due process).

[160] Concurring opinion of Frankfurter, J., in Garner case, *Id.* at 728: "How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a State or National official to advocate overthrow of government by 'unlawful means'? All but the hardiest may well

sive group but the character of the listed group might have been legitimate when he affiliated or even after designation as subversive have freed itself, at the time of his joining, from the disloyal influences.

For purposes of removal for disloyalty the employee must be found either to personally advocate overthrow of the existing state or national government by unlawful means or to "willfully retain" membership in an organization which does. The experience under the Federal Loyalty Program indicates that should hearings be held under the new Act main reliance will probably be placed on the criterion of membership.[161] In such event the question of the determination of whether a particular organization is subversive or communistic will inevitably arise. A determination of this sort, involving as it does the diverse aims of ofttimes large and complex organizations, could not practicably be made at the removal hearing itself, so that recourse is likely to be had to prior state or federal court adjudications or authoritative listings by attorneys general or legislative investigating committees. Because proceedings against an employee for disloyalty are administrative in character, the limited use of such *ex parte* designations will doubtless be countenanced by the courts.[162] With regard to the weight to be accorded such evidence, it must not be forgotten that even the United States Attorney General's designations of organizations "seeking to alter the form of Government of the United States by unconstitutional means," were submitted to the Loyalty Review

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hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment. These are considerations that cut deep into the traditions of our people. Gregariousness and friendliness are among the most characteristic of American attitudes."

[161] "Not one single case or evidence directing towards a case of espionage has been disclosed in the record . . . I say it is an extraordinary thing that not one single syllable of evidence has been found by the FBI, efficient as they are, indicating that a particular case involves a question of espionage . . . all of these cases that we have had have had to do with this question of association, affiliation, membership with organizations which have been certified by the Attorney General to be subversive." Chairman Seth Richardson of the Loyalty Review Board testifying before the Senate Committee on Foreign Relations, Hearings on State Department Employee Loyalty Investigation, 81st Cong., 2d Sess. pt. I, p. 409 (1950). See also on the indicia of disloyalty, Bontecou, *op. cit supra* note 152 at c. IV.

[162] Bailey v. Richardson, 182 F.2d 46 (D.C., C.A., 1950), *aff'd* (by an equally divided court), 341 U.S. 918 (1950). However, if the individual is precluded from attacking the propriety of a group designation in his removal hearing, the group itself as representative of all its members, is entitled to notice and administrative hearing and judicial review before being characterized as "Communist." Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1950). This practice is now being followed under Attorney General Brownell. See U.S. News & World Report, Sept. 4, 1953, p. 42.

Board with the caveat that membership in any named organization "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case."[163] As a consequence of this limitation, a federal court of appeals has recently held that admitted present membership in the Socialist Workers Party is not alone sufficient for discharge; the test is still individual disloyalty to the government.[164]

[164] Kutcher v. Gray, 199 F.2d 783 (D.C., C.A., 1952)

As this involves finding the state of a man's mind it of course may be proved circumstantially by considering "one's associates, past and present, as well as one's conduct."[165] The nature of the evidence, however, adduced at disloyalty hearings should not lead us to confuse the method of proof with the ultimate fact to be proved. To blur this distinction may not create "guilt by association" but runs grave risk of injustice to innocent individuals.

VI. *The Devine-Corrigan Law,*[166] *Making Refusal to Answer Official Inquiries into Subversion a Ground for Dismissal from Public Office or Employment.*

Section 143.271 provides that the fact that a public employee or officer refuses to testify on the basis of the privilege against self-incrimination concerning his membership in a subversive organization before a "duly authorized tribunal, or in an investigation under authority of law" shall constitute "unfitness" of such person for retaining his position under the state government. The type of organization referred to is one which "advocates overthrow of the government of the United States or of this state, by force, violence or other unlawful means." The new law is clearly intended to extend to all persons on the public payroll, from Governor to unskilled laborer, and seems to dispense with the necessity for any notice or hearing, or opportunity for the urging of extenuating circumstances. The sole operative fact being the act of the officer or employee claiming his privilege against self-incrimination in response to a particular question, there is probably no need for provision for hearing, as the commission of such acts are usually matters of public record or otherwise capable of ascertainment beyond dispute.

The enactment of this law is obviously a legislative reaction to the recurrent spectacle of witnesses, notably educators, pleading the protection of the Fifth Amendment before congressional com-

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[163] 5 C.F.R. § 200.1 (1949 ed.) (Quoting a statement by President Truman, Nov. 14, 1947).

[165] Minton, J., in Adler v. Board of Education, 342 U.S. 485, 488 (1952).

[166] H.B. No. 575 becomes effective Oct. 29, 1953. The voting on it was as follows: House — yeas 108, nays 13; Senate — yeas 22, nays 10. Bulletin, 100th Gen. Assembly (20th ed., 1953).

mittees engaged in the exploration and exposure of Communist activities. Ever since the Kefauver crime hearings the nation at large has undergone an extensive course of instruction in the history and legal meaning of the self-incrimination privilege to the point where the veriest moppet when interrogated by his mother relative to pantry depredations sullenly justifies his refusal to "come clean" with an invocation of the privilege. Ohio has had its own peculiar experience of this phenomenon in the form of witness defiance of both the state "un-American" commission[167] and Representative Harold Velde's (R.-Ill.) House Committee which held televised hearings involving Ohio residents both within and without the jurisdiction.[168] An administrative precedent for the new general measure can be found in the action of the Board of Trustees of Ohio State University in the rulings incident to the removal in May of 1953 of physics professor Byron T. Darling.[169] Almost identical cases and dispositions have occurred elsewhere in the country during the last year or so,[170] giving rise to extensive and impassioned public debate concerning not only the policy and wisdom behind the constitutional privilege but its relation to academic and personal freedom as well. Issuing out of these controversies have come a number of differing answers to the question of the significance to be accorded the claim of privilege in the context of present international strife and domestic remobilization. Perhaps the solution that comes the closest to the present enactment is the section of the New York City Charter which provides that public employment shall "automatically cease" upon refusal of such employee to testify "regarding the property, government or affairs of the city or of any county included within its territorial limits" before either state, local or national authorities.[171]

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167 See, e.g., *supra* note 26.

168 Columbus Journal, June 18, 1953, p. 1, col. 3.

169 At a hearing on March 13, 1953, before the House Un-American Activities Committee in Washington, Darling declined on Fifth Amendment grounds to testify under oath whether or not he was a Communist. Later at his tenure hearing before the President of the University, he denied that he ever was or had been a Communist. See opinions of the President and Board of Trustees in 14 Ohio St. U. Faculty Review, May 1953, pp. 5-10.

170 The Harvard Crimson of June 10, 1953 was devoted exclusively to a report on "Education and the Fifth Amendment." According to this source, as of June first of this year, "over 100 university teachers had declined to answer questions on grounds of the Fifth Amendment. Fifty-four had been dismissed or suspended from their jobs. Others were on probation or under official censure."

171 New York City Charter, § 903 (1943). *Cf.* Philadelphia Home Rule Charter, § 10-110 (1951), and La. Rev. State. tit. 33, § 2426 (1950). For a comment on a similar measure proposed in the Pennsylvania legislature, see 101 U. OF PA. REV. 1190 (1953). During its 1953 session the California legislature is reported to have passed a similar measure. A.C.L.U. Weekly Bulletin No. 1615, Oct. 12, 1953.

Unfortunately for determining the validity of such a prescription, there are as yet no authoritative judicial holdings strictly in point.[172]

A. *The Nature of the Privilege.*

Recourse to the wording of the federal and state constitutional sections dealing with the self-incrimination privilege does not advance appreciably our understanding and knowledge of its scope or implications for our present inquiry. Both the Ohio and United States constitutions read as follows, insofar as pertinent: "No person . . . shall be compelled in any criminal case to be a witness against himself."[173] The Ohio charter was amended in 1912 by adding the proviso: ".... but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel." Such an amendment of the fundamental law of the state was necessary as numerous courts had previously intimated that the traditional phraseology forbade giving any probative value to the accused's exercise of his option to refuse to take the stand and attempt to explain the charges lodged against him.[174] The reason why the defendant's silence could not be officially exploited was not because it would be unreasonable in all instances to draw an incriminating inference from such naturally suspicious conduct, but because if silence were taken for proof of guilt or comments by judge or prosecutor drove the accused to choose the only tenable alternative of subjecting himself to cross-examination, the protection of the privilege would tend to become illusory.[175] While this might not work an injustice to the average criminal defendant, the "extrinsic policy" behind the privilege which worked in the long-run in favor of the innocent accused,[176] and "for conservative and

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172 A dismissal without hearing under the more circumscribed New York City Charter provision was upheld in *Matter of Koral v. Board of Education*, 197 Misc. 221, 94 N.Y. Supp.2d 378 (1950).

173 U.S. Const. Amendment V; Ohio Const. I, § 10. Despite the apparent restriction to "criminal cases," it is uniformly held that the privilege is one which may be invoked in *any* legal investigation. See Liacos, *Rights of Witnesses Before Congressional Committees*, 33 B.U.L. Rev. 337, 372 (1953).

174 See, e.g., Wilson v. United States, 149 U.S. 60, 66 (1892). The jury is often cautioned to disregard the defendant's silence. See Bruce, The Right to Comment on the Failure of the Defendant to Testify, 31 Mich. L. Rev. 226 (1932).

175 8 Wigmore, Evidence, § 2272a (3d ed., 1940).

176 *Id.* at § 2251, p. 309. The argument here is that closing off the accused as one source of information compels law enforcement officers to rely on proficient crime detection techniques rather than grilling suspects. Another reason often given for the defendant's privilege not to testify is that the proceedings determinative of his guilt are thereby rendered more dignified and impartial, without the contest, "in which the pride and ingenuity of the magistrate are arrayed against the caution or evasions of the accused" which is implicit in the Continental "inquisitorial system."

healthy principles of judicial conduct" would be defeated.[177] An additional "extrinsic" support for the privilege, also irrelevant to the establishment of individual guilt, is a humane attitude which saves even the guilty from a harsh choice among perjury, recalcitrance, or confession.[178] Thus the logic of proof had nothing to do with the reason for the nearly universal prohibition against comment on refusal of the defendant to testify. Ohio was free to diminish the value of the privilege to the accused (by sanctioning comment) in view of the "settled law that the clause of the (federal) Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights."[179] Consistent with this present authoritative interpretation of the United States Constitution, Ohio could, if it so desired, utterly abolish the privilege in state proceedings.

B. *The Law As A Restriction On Exercise Of The State Privilege.*

But the Ohio legislature has in a sense gone further than abolition of the state privilege in one area by imposing the present restriction on its public servants. This is so in that the Devine-Corrigan law attaches the condition on continued retention of state employ of waiver of the federal "Fifth Amendment" privilege in federal hearings involving subversion, in addition to waiver of the state privilege in state and local proceedings. Application of the statute in the state-federal situation raises some distinct problems from a wholly "horizontal" application. Discussing the latter situation first, it would seem unlikely that an Ohio court would hold that a discharge of a public employee for claiming his state constitutional privilege in response to interrogation about Communist membership by a county grand jury violates the state self-incrimination clause;[180] if judicial displeasure is encountered it will doubtless be articulated in different terms. Such reluctance to find the privilege violated does not necessarily imply a rejection of the historic rule that a privileged refusal to testify is not a legal admission of guilt, but instead would be premised on the popular aphorism

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177 *Id.* at p. 310.

178 See Meltzer, Required Records, the McCarren Act, and the Privilege against Self-incrimination, 18 U. OF CHI. L. REV. 687, 692-3 (1951).

179 Adamson v. California, 332 U.S. 46, 47 (1947).

180 *But cf.* Peck v. Cargill, 167 N.Y. 391, 60 N.E. 775 (1901) (statute invalid which called for revocation of liquor license of persons who claimed self-incrimination before the Liquor Commission).

that "there is no constitutional right to a public job."[181] The trouble with this plausible-sounding generality is that it asserts both too much and too little. It is a truism that there is no civil right to any particular employment, public or private, but once the duty of performing certain occupational tasks is voluntarily assumed certainly not all rights as a citizen are suspended.[182] It is specious reasoning to contend that the exercise of a right is not precluded by conditioning continued employment on non-exercise, for the loss of a job, especially under a shadow of suspicion, may be considered by the employee a more serious deprivation than the infliction of penal sanctions. Unless reasonably limited such a doctrine of forfeiture might place all but the lonely desert anchorite in the category of second-class citizens, so pervasive today is reliance for business and pleasure on governmental grants of license or "privilege." To be anything more than an arbitrary curtailment of the Bill of Rights the suspension demanded should be such as in the absence of such express restriction would be read into the contract of employment as an implied term.

Though not explicitly decided on the "self-incrimination" ground, most of the analagous cases would seem to impose a "rule of reason" on terminations of public office for exercise of constitutional rights. Thus a police officer has the right of free speech but he can hardly expect to keep his badge if he exercises the right by warning the proprietors of an illegal establishment of an impending raid.[183] It would also probably constitute "unbecoming conduct" for the same officer to refuse to testify concerning the discharge of his specific duties to prevent crime and disclose any evidence that would assist in the apprehension of criminals.[184] Similarly it would be perfectly proper to remove a state auditor who exercised his privilege in response to an inquest into book-keeping irregularities. When there is a duty of disclosure touching official acts, the bare manifested unwillingness to cooperate with law enforcement is clearly incompatible with satisfactory official functioning, regardless of what may be inferred of guilt of an infamous crime from that act

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[181] In McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), which involved the dismissal of a policeman for engaging in political activities contrary to police regulations, the court, per Holmes, J. said, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

[182] In State *ex rel.* Christian v. Barry, 123 Ohio St. 458, 175 N.E. 855 (1931) it was held that a policeman could ignore a departmental regulation forbidding the filing of civil suits and still keep his job.

[183] This is the example used by the California District Court of Appeal in *Christal v. Police Commission of San Francisco,* 33 Calif. App.2d 564, 92 P.2d 416 (1939).

[184] Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 723 (1949).

alone. The same accountant interrogated about private matters could be dismissed if he were *convicted* of auto larceny, but it would be irrational and unnecessary to predicate his removal on his failure to furnish the prosecution incriminating evidence against himself. Thus, the Illinois Supreme Court in 1941 reversed a disbarment order against a lawyer (who was also a municipal court judge) which was based solely on a refusal to sign an immunity waiver when called before the grand jury.[185] This, even though a *general* duty to assist the investigation of crime was recognized.

The decided cases therefore emphasize the distinction between the claim of privilege *per se* as the disqualifying act and the witness's claim as a probative fact tending to establish guilt of some serious felony. If we look at the present statute not as creating a conclusive presumption of Communist affiliation[186] but as a moral precept which condemns as inconsistent with professional competency for any assignment a good faith refusal to cooperate with crime detection, we must revise our thinking about the moral character of the kind of people the constitutional privilege was meant to protect. Certainly obstruction of proper official inquiry for its own sake shows a want of good citizenship. But few witnesses today, especially those who have been entrusted with positions of respect, are so quixotic as to risk conviction of contempt by frivolously invoking the privilege when no personal danger is apprehended either to liberty or other fundamental values.[187] We must assume that the claim of the right to be silent is viewed by most as a necessary evil to be invoked only to subserve some principle which overrides considerations of present discomfort from public ridicule. The principle might be that of self-preservation which could motivate both guilty and innocent. The witness who has never engaged knowingly in criminal behavior could in perfect good faith and conscience

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[185] *In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941). Two other similar holdings involving attorneys who refused to testify to incriminating matters before a board of inquiry into unlawful and unethical practices, are Matter of Ellis, 282 N.Y. 435, 26 N.E.2d 967 (1940) and Matter of Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940).

[186] The particular rationale behind the Devine-Corrigan Law may have undergone a change in its passage through the legislature. Whereas now the act of claiming the privilege "shall constitute unfitness," the original bill made proof of such act "prima-facie evidence that he is a Communist or a knowing member of a Communist front or subversive organization." H.B. No. 575, 100th Gen. Assembly (1953).

[187] The witness is not the sole judge of the validity of the claim of privilege. He can be required, on pain of punishment for contempt, to disclose enough to show a real possibility that an answer to the question will tend, rightly or wrongly, to convict him of a crime. Hoffman v. United States, 341 U.S. 479 (1951).

validly refuse to disclose *apparently* self-incriminatory facts.[188] Does a public career exact selflessness to the extent of voluntarily putting one's head in a noose intended for others? Another motivating principle might be a disinclination to "peach" on past and present friends and associates.[189] In America the informer is undoubtedly useful and possibly indispensable to adequate law enforcement, but he has seldom in our ethos and folklore been attractively depicted. Lastly, a non-Communistic, wholly loyal American might disapprove so strongly of the investigation itself or its methods that he cannot give it any more cooperation than the bare minimum he believes is legally demanded of him. To hold that such a principled stand, on a legal ground probably suggested by counsel, would in all cases betray subversive tendencies is to overindulge the wisdom and integrity of all present and future official investigators into the matter of disloyalty. Only last term the United States Supreme Court reversed a congressional contempt conviction of a witness of an extremely conservative stripe on the ground that Congress had no business delving into the shaping of public opinion through the

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188 In investigations of traditional crime, the case would be comparatively rare where an innocent accused could validly maintain that disclosure of some fact (such as presence at the scene of the murder of his worst enemy) would furnish a link in a chain of evidence needed for prosecution. Such perplexing situations, unfortunately, may become more frequent under criminal statutes outlawing certain groups because of their attachment to certain beliefs. For example, a liberal might in the past have been considerably active in a group working for slum clearance. Subsequently, he may learn to his surprise that the Government considers the group Communist-dominated and intends to prosecute its members. The liberal might have been somewhat incautious in choosing his associates but he is not thereby a dangerous enemy agent. Assuming prosecution of him is not barred by limitations, he might validly refuse to furnish additional proof from which a jury might infer knowing support of seditious activity. As to when the statute of limitations begins to run on conspiracy, see United States v. Rosen, 174 F.2d 187 (2d Cir., 1949).

As to fear of an ill-founded perjury prosecution based on denial of membership, see letter of Dean Paul Andrews to N. Y. Herald Tribune, Oct. 26, 1953. *But Cf.* Meltzer, *Invoking the Fifth Amendment—Some Practical Considerations* 9 BULLETIN OF THE ATOMIC SCIENTISTS 176 (1953).

189 The privilege, of course, is personal and may not be invoked in behalf of others. If the witness is willing to testify about his own past activities but not willing to implicate others, he must claim the privilege regarding his own affairs or go to jail. This seems to be true even if the revelation of the names of associates tends further to incriminate by furnishing the names of potential prosecution witnesses, for the prior incriminating admission will be taken as "waiver" of the privilege as to further details. Rogers v. United States, 340 U.S. 367 (1951). Of course, if there exists a real danger of increasing the risk of prosecution, the fact that there is also present in the witness various other motivations, such as the desire to protect his friends and to protest, is immaterial.

printing and distribution of political tracts.[190] Does the attempt to vindicate the principle of a free press tell us anything unfavorable about moral character?[191] It is true that objections to pertinancy and scope of inquiry should not be asserted under the guise of the self-incrimination clause, but the acceptance of inept legal advice might be responsible for resort to the Fifth Amendment where rights under the First are felt to be in jeopardy.[192] One need not subscribe to the viewpoint expressed by our greatest living scientist to maintain that persons of great worth and intellectual ability may feel today or tomorrow that the legislative power to investigate has been corrupted to the point where a show of civil disobedience is the last alternative in efforts to preserve free institutions.[193]

C. *Due Process And Equal Protection*

But if the claim of privilege standing by itself is ambiguous with respect to the moral character of the claimant, it is even more so with respect to whether past or present membership in the Communist Party is involved. There is no need here to restate the arguments, pro and con, as to whether a known Communist should be employed by the state even as a washroom attendant; it must be assumed that such a discrimination *eo nomine* would be today uni-

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190 United States v. Rumley, 345 U.S. 41 (1952). In the case of Emspak v. United States, 203 F.2d 54 (D.C., 1952) the Supreme Court has recently agreed to review the question of whether Congress has the authority to compel disclosure of political views and affiliations — U.S. —, 74 S. Ct. 23 (1953).

191 To the extent that claiming the Fifth when the First Amendment is the actual ground is a misrepresentation, such conduct is morally questionable. To claim only the latter will probably result in a jail sentence. Barsky v. United States, 167 F.2d 241 (D.C., C.A., 1948). Moral courage might call for martyrdom, but a considerable body of legal opinion apparently supports the view that the privilege is not being misused when the intent is only to curb investigatory power felt to be unduly oppressive. See, e.g., Redlich and Franz, Does Silence Mean Guilt? 176 Nation 471, 476 (June 6, 1953); cf. Remarks of Professor Kalven in "The Use and Meaning of the Fifth Amendment," U. of Chi. Round Table, No. 802, Aug. 23, 1953. In any event it can hardly be maintained that delinquency of this order of refinement threatens to impair "the discipline and efficiency of the public service."

192 See remarks of Professor Maggs at the "Round Table" discussion of "The Use and Meaning of the Fifth Amendment": "The ordinary witness is not a lawyer. He does not have a lawyer at his side. He may have claimed the privilege (in response to the question as to present Communist affiliation). The committee may have permitted him to rest on the privilege though it actually was not applicable. Even then, with the universities' rule of thumb that present membership in the Communist Party does disqualify, each case should be investigated to see whether my rule of law really applies. (*viz.*, that a proper claim of the privilege requires an inference that the witness is now a member of the Communist Party.)" *op. cit. supra* note 191.

193 Open letter from Dr. Albert Einstein advising intellectuals to refuse to testify before Congressional investigating committees probing beliefs and affiliations. N.Y. Times, June 12, 1953, p. 1, col. 6.

versally upheld.[194] But if the statute creates an irrebuttable presumption that anyone refusing to deny Communist membership is a member in fact, the reasonableness of such a coerced nexus may come in question under "due process."[195] Once we accept the possibility that the non or ex-Communist may seek shelter under the privilege, to accept the statute we must approve the elimination from public service of actually loyal functionaries about whom there is only a suspicion of subversive designs. Whether it is "patently arbitrary or discriminatory"[196] for a state to so protect itself from subversion of its functions (and public disfavor for harboring "unfriendly witnesses") cannot be answered with certainty. Even if discharge under taint of disloyalty is not technically punishment, a rule requiring such a deprivation of livelihood from a class of persons whose only distinguishing feature is the performance of a highly ambiguous act, consistent both with loyalty and disloyalty, is not immune from attack under the Fourteenth Amendment "due process" and "equal protection" clauses, simply because public hire is not "property." The high court has never accorded *carte blanche* to any and all terms of public employment devised by state and national governments and has in fact emphasized that "Congress could not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work."[197] One's

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194 Cases cited note 134 *supra*. These cases, however, do not involve dismissals for Communist affiliation but the validity of loyalty oath requirements. If United States v. Lovett, 328 U.S. 303 (1946) is still good law, then deprivation of the right to follow one's profession under an imputation of disloyalty is "punishment" which can only be inflicted by procedures satisfying due process. The text statement assumes a professing Communist Party member active in furthering the revolutionary aims of his group. Notice however the reasoning which must be employed to reach the ultimate finding of present disloyalty, even when it is assumed that only the *guilty* invoke the privilege: (1) Claim of privilege equals "knowing" membership in the Party at any time during the past period within the statute of limitations; (2) Such membership has continued up till the present; (3) Such present membership is equivalent to present and personal advocacy of forcible overthrow of the government (the ground for dismissal under the recent Hoffman Law). *Cf.* partial dissent of Mr. Justice Burton in Garner v. United States, 341 U.S. 716, 729:

> "It [the oath] leaves no room for a change of heart. It calls for more than a profession of present loyalty or promise of future attachment. It is not limited in retrospect to any period measured by reasonable relation to the present."

195 *Cf.* Tot v. United States, 319 U.S. 463 (1943).

196 Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

197 United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947). In both the Wieman case, *ibid*, and Adler v. Board of Education, 342 U.S. 485 (1951) the Court expressly or tacitly rejected the argument that the fact of membership alone disqualifies an employee. "Indiscriminate classification of in-

final assessment of the validity of the new Ohio statute will depend on a prophecy on where the judicial line will be drawn "at which freedom or 'privilege' begins to be qualified by duty or obligation."[198] Few could find fault if the statute only created "a heavy burden of proof" of fitness to serve the state and laid upon each appointing authority an "obligation to re-examine (an employee's) qualifications" in the light of the display of a lack of candor. If, on the other hand, no hearings were contemplated whereat the claimant's personal motivations could be explored, to constitute automatic grounds of discharge the coverage of the statute could be contracted to apply to situations where the shield of privilege violates a *special* duty, inhering in the nature of the particular office involved, to make full and voluntary disclosure touching official acts.[199] There is really no urgent necessity to go the limit in such cases. If the Act is really aimed at ridding the public service and schools of subversives, and not solely intended to punish a non-conformist professor whose worst offense is incurring the displeasure of public opinion and hence casting suspicion in the patriotism of his employer, its purpose could be more justly realized by utilization of the clearly valid Hoffman Act[200] which specifies the new disloyalty "causes for removal." There is no call to act on unsupported surmise when an employee fails to affirm or deny publicly that he is a Communist. The appropriate administrative official could examine the witness

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nocent with knowing activity must fall as an assertion of arbitrary power." *Id.* at 191. Under the Feinberg Law approved in *Adler* proof of *knowing* membership in a subversive organization (so determined after notice and hearing) created only a rebuttable presumption of unfitness to teach. The presumption under the Devine-Corrigan Law is conclusive of unfitness to hold any state job — garbage collector or head of the state police alike.

198 Quotation from statement of March 24, 1953, issued by the *Association of American Universities.*

199 It is certainly open to argue that a special duty of candor rests on university professors, and possibly teachers at all levels, concerning Communist connections. Certainly intellectual integrity and honesty are only possible when the mind is free, and the free and unbiased pursuit of truth is impossible for anyone under the Communist discipline. See Hook, Heresy,*yes* — Conspiracy, *no,* c. 11 (1953). In this sense, a faculty member's thinking in relation to his field of study is as much an "official act" as the routine functions of the policeman — both in order to be effective have to be beyond suspicion of any incompatible commitments. But there the similarity ends. The pedagogue, having no duty to suppress crime, is answerable only to the university when his intellectual independence is put in question. Should he refuse to affirm or deny his subjection to some absolutism before his colleagues, they would be remiss if they kept him. But his duty to aid law enforcement is no different from the average citizen's. Hence, his claim of privilege before a congressional committee, which has no proper interest in his academic integrity, is *toto coelo* different in its bearing on the obligations of teaching than a similar silence at a tenure hearing.

200 See Section V, *supra.*

personally, inquiring into his present, recent, or pertinently past membership in, or submission to the discipline of, the Communist Party or other totalitarian organizations. A persistent refusal to answer the affiliation questions before the employer or a Civil Service Board would by itself satisfy the traditional ground of insubordination.

D. *Privileges and Immunities of National Citizenship*

There are some additional legal problems that may arise in the "vertical" federal hearing-state removal situation. The state officer or employee queried about Communist affiliation by a national court or committee knows that if he resorts to the Fifth Amendment privilege to refrain from incriminating himself under the Smith Act[201] he will forthwith lose his occupational status in his home state. Such a deterent operates effectively to deprive him of a possibly quite valuable "privilege" of national citizenship. Can the states make continued retention of public employment turn on the bare exercise of a constitutional privilege specifically guaranteed to all citizens? The Fourteenth amendment and implementing legislation denies the states the right to deprive a citizen of the United States of "a privilege or immunity arising out of the nature and essential character of the national government and granted or secured by the Constitution of the United States."[202] While the self-incrimination privilege in purely state proceedings is not such a "privilege or immunity of United States citizenship"[203] there is no reason to exclude from this category the Fifth amendment privilege which is invocable in federal proceedings.[204] As contrasted with qualifications for federal jury service and voting in elections for federal offices,[205] both "federal privileges," the Constitution demands that *no person* (in a federal hearing) shall be compelled to be a witness against himself. The present statute may be vulnerable as it is not aimed at the abuse of a constitutional right but makes the bare claim of privilege the ground for discharge. If it only treated such a claim as an evidentiary fact of appropriate weight going to the question of membership in a revolutionary or totalitarian group, disentitling the employee to perform the functions of his office, it would constitute no "de-

201 62 Stat. 808, 18 U.S.C. § 2385 (1948). See Blau v. United States, 340 U.S. 159 (1950).

202 United States v. Cruikshank, 92 U.S. 542, 552 (1875). Civil redress at law or equity is provided by the Civil Rights Act, 17 Stat. 13 (1871), 8 U.S.C.A. § 43 (1940).

203 See Snowden v. Hughes, 321 U.S. 1, 11 (1943).

204 See Note, 34 Ill. L. Rev. 989, 1001, at n. 18 (1940) for digest of cases recognizing various federal "privileges."

205 The federal statutes in these areas allow qualifications to vary from state to state. 36 Stat. 1164 (1911), 28 U.S.C.A. § 411 (1928) (federal jurors); U.S. Const. Art. I, § 2(1); U.S. Const. Amend. XV—16 Stat. 140 (1870), 8 U.S.C.A. § 31 (1942) (voters in federal elections).

privation," as the reprisal of discharge from employment would be attributable not to the bare exercise of a federal right but to the past or present conduct or associations of the employee.[206]

Whether the blanket imposition of the duty to make truthful and candid answers to pertinent questions about Communist affiliations is reasonable or not will ultimately depend on balancing the state interest sought to be protected, i.e. maintenance in the public's mind of the integrity and good repute of state functions, and the public interest in preserving an accusatorial rather than inquisitorial system of criminal justice in political trials.[207] If the beam is tipped in favor of present state interest it will probably be because the historic privilege has undergone a devaluation in relation to other fundamental civil liberties. It may well be that the privilege has outlived its usefulness, unduly hampering the efficient administration of justice, and that we need no longer fear the establishment of inquisitorial agencies, like the hated English Court of Star Chamber, which can bring religious and political non-conformists within the penalties of the law by means of their own testimony. Yet others have argued, and not without cogency, that the events and atmosphere of today are dramatically and significantly parallel to those in which the privilege had its origin.

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[206] See Bomar v. Keyes, 162 F. 2d 136 (2d Cir., 1947), Cert. den. 332 U.S. 825 (1947). (Brooklyn high school teacher discharged for accepting federal jury service; complaint for damages against school board upheld).

[207] For discussion of the incidents of these two systems of criminal justice, see Frankfurter, J., in *Watts v. Indiana,* 338 U.S. 49, 53 (1949).

In such a weighing of competing values, the court would consider not only whether a rational connection existed between means and end, but the substantiality of the interest whose protection is sought (*cf.* Schneider v. State, 308 U.S. 147, 161 (1939)), the limited scope of the abridgement (all public employees for whom the choice between retention of job and exercise of constitutional right is unreal), and the existence of reasonable alternatives which do not involve infringement of rights. *Cf.* American Communications Ass'n v. Douds, 339 U.S. 382,392 (1950).