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State Loyalty Programs and the Supreme Court

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STATE LOYALTY PROGRAMS AND THE SUPREME COURT

Since World War II, issues of loyalty and subversion have confronted the Supreme Court more than at any other time. This fact reflects a national preoccupation with loyalty which arose at the end of the war. The sudden realization of physical vulnerability coupled with the novel and complex character of the cold war engendered an atmosphere of fear and a feeling that existing laws were inadequate to protect the security of the government.[1] Communist infiltration and propaganda techniques have intensifed this apprehension.[2] As a result, broad loyalty programs affecting individual freedoms have been enacted and rigorously enforced.

Many state loyalty statutes prescribe loyalty qualifications for public employment. Generally, these statutes fall into four categories: those which require a loyalty oath as a condition of employment and result in discharge for its violation; those which likewise require an oath and also provide perjury sanctions for its violation; those which do not require an oath, but proscribe certain disloyal conduct and result in discharge for violation of the provisions; and those which require the employee to answer questions pertaining to loyalty when asked by proper authorities and which result in discharge for refusal to answer. For convenience, the respective categories of statutes will be referred to as oaths resulting in discharge, oaths subject to perjury, proscriptive statutes, and refusal-to-answer statutes. Thirty-six states, the District of Columbia, and Puerto Rico have some type of oath; twenty-six states and the District of Columbia have proscriptive statutes; and four states and the District of Columbia have refusal-to-answer statutes.[3]

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1. See Cramton, *The Supreme Court and State Power to Deal with Subversion and Loyalty,* 43 MINN. L. REV. 1025 (1959).

2. See O'Brian, *New Encroachments on Individual Freedom,* 66 HARV. L. REV. 1 (1952).

3. See J. Bryson, LEGALITY OF LOYALTY OATH AND NON-OATH REQUIREMENTS FOR PUBLIC SCHOOL TEACHERS (1963), for a detailed compilation of all state loyalty statutes. Indiana has two types of statutes: an oath resulting in discharge which applies to teachers in the public school system:

> I solemnly swear (or affirm) that I will support the Constitution and the laws of the United States and . . . Indiana, and will, by precept and example, promote respect for the flag and the institutions of the United States and of . . . Indiana, reverence for law and order and undivided allegiance to the government. . . .

IND. ANN. STAT. § 28-5112 (Burns 1933); and a proscriptive statute which applies to public officers and employees. IND. ANN. STAT. § 10-5207 (Burns 1956 Repl.). The latter bars from office or employment anyone who is

> (A) . . . a member of the Communist party or of any . . . organization which advocates in any manner the overthrow, destruction or alteration of the . . .

Three major issues are raised by these statutes. First, is the state's interest in the loyalty of employees sufficient to justify the restriction of first amendment freedoms and, if so, to what extent may they be restricted?[4] Second, when an employee has been asked by proper authorities to answer a question, can he be discharged if he invokes the fifth amendment? Third, may an individual who refuses to take an oath for conscientious reasons be denied public employment without a hearing at which he may prove his loyalty by explaining his conscientious refusal and thereby qualify for employment?

Oaths and Proscriptive Statutes

The power of the state to condition public employment on subscription to a loyalty oath has never been questioned. The purpose of this legislation has been recognized to be the protection of the government against subversion and the preservation of the integrity of public education by establishing loyalty as a qualification for employment.[5] The use of an oath has been held to be a reasonable means to effectuate this purpose, and an individual who refuses to take an oath may consequently be excluded from public employment.[6] Membership in organizations, as well as an individual's conduct, may properly be considered in determining fitness and loyalty.[7]

However, the state's power is not without limitation; due process prohibits an arbitrary or unreasonable exercise of power. In early cases, the Supreme Court held that loyalty oaths could not be enforced against an individual unless the statute required scienter; the Court, however, readily dismissed this objection by simply reading a requirement of scienter into the statutes.[8] A statute[9] declaring that membership in an

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government . . . by revolution, force, violence, sedition, or which engages in any un-American activities;

or who is found

(B) . . . by word of mouth or writing to advocate, advise or teach the duty, necessity, or propriety of overthrowing . . . the government . . . by force or violence; or [to] print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any . . . written . . . matter in any form for the purpose of advocating, advising or teaching the doctrine that the government . . . shall be overthrown by force, violence or any unlawful means.

Ind. Ann. Stat. § 10-5204 (Burns 1956 Repl.).

4. Professors and teachers have brought the majority of cases involving this issue in the name of academic freedom.

5. Garner v. Board of Pub. Works, 341 U.S. 716, 720-21 (1951).

6. Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951). For discussion of the problem raised by those who refuse to take an oath for conscientious reasons, see text accompanying notes 109-24 *infra*.

7. Adler v. Board of Educ., 342 U.S. 485 (1952).

8. Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

9. N.Y. Educ. Law § 3022 (McKinney 1953).

organization listed as subversive "shall constitute prima facie evidence for disqualification" was recognized as consitutional because the presumption was not conclusive, but allowed an individual to prove his loyalty in a hearing.[10] However, a statute which expressly provides that the fact of membership alone disqualifies is unconstitutional because it fails to distinguish between innocent and knowing membership.[11] A person may join an organization and yet be unaware of its illegal activities and goals, or an organization engaged only in legitimate activities at the time of the individual's affiliation may subsequently adopt illegal purposes. A statute which includes innocent with knowing membership raises a conclusive presumption of disloyalty from mere membership and it thus violates due process as an indiscriminate and arbitrary exercise of power.[12] Also, in *Shelton v. Tucker*,[13] the Court held that a state cannot require, as a condition of employment for a teacher, an annual affidavit listing without limitation every organization to which he has belonged or contributed within the preceding five years. The statute was objectionable because many relations which could not have any relevancy to the teacher's fitness would fall within its scope. The state's interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[14]

Recent cases have raised the issue of vague language in loyalty oath statutes. In *Cramp v. Board of Pub. Instruction*, an oath was found to be lacking in "terms susceptible of objective measurement" and to embrace certain "guiltless knowing behavior."[15] Again, in *Baggett v. Bullitt*, the statutory language was found to be applicable to an undefined class of "guiltless knowing behavior"[16] and to lack "an ascertainable standard

10. Adler v. Board of Educ., 342 U.S. 485 (1952). However, this statute was recently held unconstitutional because of pertinent doctrine which developed after this case had been decided. Keyishian v. Board of Regents, 385 U.S. 589 (1967). See text accompanying notes 46-48 *infra*.

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

12. *Id.* at 190-91.

13. 364 U.S. 479 (1960).

14. *Id.* at 488.

15. 368 U.S. 278, 286 (1961). The pertinent language of the oath was "I . . . solemnly swear or affirm . . . that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party. . . ." FLA. STAT. ANN. § 876.05 (1965).

16. 377 U.S. 360, 368 (1964). The following oath applied only to teachers:

> I solemnly swear (or affirm) that I will support the constitution and laws of the United States . . . and . . . Washington, and will by precept and example promote respect for the flag and the institutions of the United States . . . and . . . Washington, reverence for law and order and undivided allegiance to the government. . . .

WASH. LAWS ch. 103 (1931). The oath requirements of a 1955 act, WASH. LAWS ch. 377 (1955), applicable to all state employees, incorporated provisions of the Washington Subversive Activities Act of 1951 which provided that no subversive person was eligible for public employment. WASH. REV. CODE ANN. § 9.81.060 (1961). "Subversive person" was defined as:

of conduct."[17] While these concepts are not very clear in themselves, the point which the Court makes is obvious. The Court could not say in either case that the oath imposed proper restrictions which the state could justifiably require. Although the state courts had construed scienter into the oaths, the language still failed to indicate clearly the extent to which an employee must know of illegal activities or purposes of an organization in order to be considered a subversive member; it also failed to define specifically what conduct was actually proscribed. While *Baggett* noted that the reasoning of prior cases[18] involving the Smith Act was not

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> any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit . . . any act intended to overthrow, destory or alter, or to assist in the overthrow, destruction or alteration of . . . the government . . . by revolution, force, or violence. . . .

WASH. REV. CODE ANN. § 9.81.010(5) (1961).

17. Baggett v. Bullitt, 377 U.S. 360, 372 (1964). The 1931 oath in this case, note 16 *supra,* is nearly identical to Indiana's oath, note 3 *supra.* The defense argued that the oath is based on a promise of future conduct, and thus a conviction of perjury could not be sustained for its breach. The Court, however, rejected this argument becaues it failed to account for the conscientious and those who believe that the law means what it says, and also "the possibility of prosecution cannot be gainsaid." *Id.* at 374. The Indiana statute does not provide for perjury sanctions; but, the Court has indicated that it does not intend to impose different standards of clarity for oaths subject to perjury and oaths resulting in discharge. The Indiana oath, then, appears to be unconstitutionally vague.

The Court also objected to the use of the term "revolution" in the 1955 oath, note 16 *supra.* The ordinary meaning of that term includes any rapid or fundamental change, and thus extends to peaceful alteration. In order to meet constitutional requirements, the scope of the statute must be expressly restricted to overthrow by force or violence. *Id.* at 370. Indiana's proscriptive statute, note 3 *supra,* includes "revolution," and consequently it is subject to the same objection. Furthermore, the Court would probably object to the phrase "any un-American activities" which also appears in Indiana's proscriptive statute. The broad phrase is not defined and it falls within that class of words which fails to be "terms susceptible of objective measurement."

18. Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951). In connection with *Cramp* and *Baggett,* the relevant language of the Act is as follows:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government . . . by force or violence . . .; or
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> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written . . . matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing any government . . . by force or violence, or attempts to do so; . . .
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> Shall be fined . . . or imprisoned. . . .

18 U.S.C. § 2385 (1964).

In these cases, the Court has interpreted this language to embrace either an advocacy to immediately overthrow the government by force or violence or a present advocacy of future action for the overthrow of the government by force or violence. The teaching or advocacy of abstract theory without the required intent and other factors cannot by themselves constitute a violation of the Act. The teaching and advocacy of violent overthrow must appear to be reasonably and ordinarily calculated to incite individuals to such action as speedily as circumstances would permit. Since the Smith

controlling in cases involving state legislation because the Court generally does not construe necessary implications into state statutes,[19] the requirements which are established in those cases are clearly reflected in both *Cramp* and *Baggett*. So, in *Cramp*, the Court objected that the oath "says nothing of advocacy of violent overthrow of the state or federal government . . . [or] . . . of membership or affiliation with the Communist Party."[20] In *Baggett*, the Court concerned itself with the objection that the oaths were not limited to advocacy directed toward the promotion of unlawful action. The range of activities which could reasonably fall within the scope of the statutory language was held to be far too wide;[21] a statute which is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law."[22]

In *Elfbrandt v. Russell*,[23] the Court was confronted with the issue of nominal and passive membership. The Arizona Supreme Court had construed the wording of an oath[24] to include virtually all knowing membership.[25] When the case was remanded for consideration in light of *Baggett v. Bullitt*, the majority of the Arizona court sustained the oath without discussing the membership clause.[26] Upon appeal, the Supreme Court again referred to principles established in the Smith Act cases, but in this opinion it relied upon them by citation and direct quotation. Recognizing that "quasi-political" groups may have both legal and illegal purposes and that knowing members may not actually support the illegal purposes, the Court held the requirement of scienter by itself

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Act is a federal statute, the Court can and must interpret as well as judge the Act; thus, implications could be properly construed into the Act. This fact distinguishes the manner in which the Court has treated state statutes.

19. Baggett v. Bullitt, 377 U.S. 360, 371 (1964).

20. Cramp v. Board of Pub. Instruction, 368 U.S. 278, 285 (1961).

21. Baggett v. Bullitt, 377 U.S. 360, 369-72 (1964).

22. *Id.* at 367; Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961).

23. 384 U.S. 11 (1966).

24. A gloss was added to the oath which subjected to a prosecution for perjury and discharge from public employment anyone who subscribed to the oath and who "knowingly and wilfully becomes or remains a member of the communist party . . . or any other organization having for one of its purposes the overthrow by force or violence of the government of the state . . . [and who] prior to becoming or remaining a member . . . had knowledge of said unlawful purpose. . . ." ARIZ. REV. STAT. ANN. § 38-231 (1965 Supp.).

25. The language of the oath "prohibits any membership in any organization having for one of its purposes the overthrow by force and violence of the government of the State of Arizona or any of its political subdivisions including passive and nominal membership . . . . There is no imputation that public officers and employees may hold or retain memberships for exclusively lawful purposes." Elfbrandt v. Russell, 94 Ariz. 1, 11, 381 P.2d 554, 560 (1963), *rev'd*, 384 U.S. 11 (1966).

26. Elfbrandt v. Russell, 97 Ariz. 140, 397 P.2d 948 (1965).

to be inadequate.[27] The oath must be clearly restricted to "active" membership with a "specific intent" to accomplish the illegal purpose.[28]

In effect, the case adopts the standard established in *Scales v. United States*[29] and *Noto v. United States*.[30] It serves as an example of the rather hazy concept of "guiltless knowing behavior"; that is, when an individual knows of an illegal purpose of an organization, such knowledge without active participation or a specific intent to further that purpose is "guiltless" and beyond the scope of the state's interest. Such members do not present a substantial threat, either as citizens or as public employees, to the security of the state.[31] Since a violation of the oath concerning membership required only scienter, the statute raised a conclusive presumption that a knowing member actively supported the illegal purposes of the organization. This presumption directly conflicted with the recognition that a group may embrace both legal and illegal goals and that an individual may join such groups provided he does not embrace the illegal goals.[32] Thus, the case reaches a proper balance of interests and provides a definite standard which can be easily understood and efficiently administered by the states.[33]

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27. While the decision of unconstitutionality is consistent with the Court's practice of refusing to construe state statutes by reading the necessary implications into the provisions, it is not exactly clear why the Court declared the entire statute invalid. Apparently, the Court objected only to the membership clause, and it would seem that the remainder of the statute could have been sustained.

28. Elfbrandt v. Russell, 384 U.S. 11, 15 (1966).

29. 367 U.S. 203 (1961).

30. 367 U.S. 290 (1961). The relevant language of the Smith Act for *Elfbrandt* is as follows:

> Whoever organizes or helps or attempts to organize any . . . group . . . of persons who teach, advocate, or encourage the overthrow . . . of any . . . government by force or violence; or becomes or is a member of, or affiliates with, any such . . . group . . . knowing the purposes thereof—
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> Shall be fined . . . or imprisoned. . . .

18 U.S.C. § 2385 (1964).

Scales and *Noto* held that the membership clause does not extend to all affiliations with an organization which has an illegal purpose. The Court declined "to attribute to Congress a purpose to punish nominal membership, even though accompanied by 'knowledge' and 'intent' . . . . It is more reasonable to believe that Congress contemplated an objective standard fixed by the law itself, thereby assuring an even-handed application of the statute." Scales v. United States, 367 U.S. 203, 222 (1961). There must be clear proof of active membership and a specific intent to further the illegal purposes of the organization by resort to violence. These requisites "must be judged *strictissimi juris*, for otherwise there is danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." Noto v. United States, 367 U.S. 290, 299-300 (1961).

31. Elfbrandt v. Russell, 384 U.S. 11, 17 (1966).

32. *Id.* at 15-17.

33. The objection that proof of "specific intent" and "active" membership imposes an impossible or impractical burden upon the state is without merit. Similar burdens permeate the law in many areas. This is not an unprecedented burden of proof, nor is

Although *Elfbrandt* took a further step in limiting the impact of loyalty oaths, the Court did not clearly indicate whether the standard was to be imposed upon all oaths and proscriptive statutes; this uncertainty also existed in the cases which introduced the concept of guiltless knowing behavior. *Elfbrandt*, as well as *Cramp* and *Baggett*, involved an oath subject to perjury. The earlier cases,[34] which simply required scienter, involved oaths resulting in discharge. The dissent in *Elfbrandt* felt that the majority was concerned solely with the consequence of the perjury sanction and that the application of the opinion should have been accordingly limited.[35]

However, this question has been answered by *Keyishian v. Board of Regents*.[36] This case involved the complicated New York program which at the time of the hearing did not require any disclaimer oath. The Education Law[37] and the Civil Service Law[38] provided that "the utterance of any treasonable or seditious word . . . or the doing of any treasonable or seditious act" constituted cause for removal from public employment. The Education Law did not define "treasonable or seditious," and while the Civil Service Law defined those terms as they were defined in the Penal Law,[39] the Court still held the meaning of "seditious" to be too vague. The statutes did not present any clear distinction between a "seditious" utterance and a mere statement of abstract doctrine, nor did they indicate the extent to which the utterance "must be intended to and tend to indoctrinate or incite to action in furtherance of the defined

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it unjustifiable in view of the fundamental interests involved. If the statute is not narrowly drawn to specifically define conduct "as constituting a clear and present danger to a substantial interest of the State," it unnecessarily infringes upon the freedoms protected by the first amendment. Elfbrandt v. Russell, 384 U.S. 11, 18-19 (1966). The Court itself has remarked on this point:

> The distinction between 'active' and 'nominal' membership is well understood in common parlance . . ., and the point at which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case.

Scales v. United States, 367 U.S. 203, 223 (1961).

34. Wieman v. Updegraff, 344 U.S. 183 (1952); Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

35. Elfbrandt v. Russell, 384 U.S. 11, 20-23 (1966).

36. 385 U.S. 589 (1967).

37. N.Y. EDUC. LAW § 3021 (McKinney 1953).

38. N.Y. CIV. SERV. LAWS § 105(1)(a) (McKinney 1959).

39. The term "seditious word or act" was equated with "criminal anarchy" as defined in the Penal Code:

> Criminal anarchy is the doctrine that organized government should be overthrown by force or violence . . . or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

N.Y. PEN. LAW § 160 (McKinney 1944).

doctrine."[40] No individual who had read these statutes could possibly have known how to distinguish between "seditious" and nonseditious utterances and acts.

The Civil Service Law further provided that any person who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine that the government . . . should be overthrown by force, violence or any unlawful means" would be barred from public employment.[41] Since "advocacy" of the doctrine of forceful overthrow was separately prohibited, the Court felt that this provision raised a serious question as to whether the individual "teaching" or "advising" this doctrine must advocate that doctrine himself in order to fall within the scope of the act. The language of the provision could reasonably extend to the mere advocacy of abstract doctrine.[42] Similar uncertainty was found in a section which excluded from employment anyone who "prints, publishes, edits, issues or sells any . . . printed matter in any form containing or advocating, advising or teaching the doctrine" of forceful overthrow and who "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein."[43] Since there was no express requirement of specific intent to effectuate the doctrine, this language also could reasonably extend to the mere expression of belief.[44] Furthermore, these provisions were wholly lacking in "terms susceptible of objective measurement," and the vagueness of the language was intensified by the complexity and profusion of the entire program. Because the intricate network of statutes did not "clearly inform teachers what is being sanctioned," the Court held that this legislation plainly violated the principle that the government may regulate first amendment rights only with narrow specificity.[45]

Finally, the Court considered provisions of the Civil Service Law and the Feinberg Law which made membership in "subversive" organizations prima facie evidence of disqualification for employment.[46] Member-

40. Keyishian v. Board of Regents, 385 U.S. 589, 599 (1967). Indiana's proscriptive statute, note 3 *supra,* includes but does not define "sedition." Consequently, the same objections raised in respect to New York's statute could apply here.

41. N.Y. Civ. Serv. Law § 105(1)(a) (McKinney 1959).

42. Keyishian v. Board of Regents, 385 U.S. 589, 599-600 (1967).

43. N.Y. Civ. Serv. Law § 105(1)(b) (McKinney 1959).

44. Keyishian v. Board of Regents, 385 U.S. 589, 601 (1967). The New York courts had not yet interpreted the scope of the loyalty statutes, and the Court, therefore, did not have the benefit of a judicial gloss. In view of the complicated plan and other factual circumstances, the Court noted that this was not a proper case for abstention pending state court interpretation. *Id.* at 601 n.9.

45. *Id.* at 604. Again, the language of Indiana's proscriptive statute, note 3 *supra,* is very similar to §§ 105(1)(a) and (b) of the Civil Service Law in this case. The same objections, therefore, could be raised in respect to Indiana's statute.

46. The Civil Service Law barred from public employment any individual who "organizes or helps to organize or becomes a member of any . . . group of persons which

ship as used in these statutes was qualified only by scienter; citing *Elfbrandt* as establishing the governing standard, the Court held that the absence of statutory language relating to active membership and to specific intent to further the unlawful goals violated constitutional limitations.[47] The presumption raised by the statute could be rebutted only by "(a) a denial of membership, (b) a denial that the organization advocates the overthrow of the government by force, or (c) a denial that the teacher has knowledge of such advocacy."[48] Proof of inactive membership or of the absence of intent to further unlawful purposes would not rebut the presumption; consequently, the impact of the statute exceeded that which the state was justified to impose.

Keyishian expressly holds that the *Elfbrandt* standard governs all loyalty statutes. Although the New York statutes, unlike those in *Elfbrandt,* did not provide for criminal punishment, the Court nevertheless concluded that "mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion" from public employment.[49] The Court regarded as immaterial the question of whether the loss of public employment constitutes "punishment" because "there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial."[50] When an individual must guess as to what conduct will cause him to lose his position, he will necessarily restrict his conduct to that which is unquestionably safe and clearly within the lawful zone. Since knowing membership by itself cannot be punished,[51] it would be quite anomalous to allow an individual to be discharged for such lawfully protected conduct.[52] Any discharge for mere knowing membership would

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teaches or advocates that the government . . . shall be overthrown by force or violence, or by any unlawful means." N.Y. CIV. SERV. LAW § 105(1) (c) (McKinney 1959).

The Feinberg Law directed the board of regents to make a list of organizations, after notice and hearing, which advocate the violent overthrow of the government. "The board of regents shall provide . . . that membership in any such organization included in such listing . . . shall constitute prima facie evidence of disqualification" for public employment. N.Y. EDUC. LAW § 3022(2) (McKinney 1953).

47. Keyishian v. Board of Regents, 385 U.S. 589, 608 (1967).

48. *Id.* Indiana's proscriptive statute concerning membership in subversive organizations, note 3 *supra,* does not expressly define membership with the necessary qualifications of "specific intent" and "active" membership. Thus, it appears to be unconstitutional in its scope.

49. *Id.* at 606.

50. *Id.* at 607 n.11.

51. Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961).

52. In a case which involved the power of the state to deny tax exemptions to persons who engaged in conduct proscribed by an oath, the Court assumed without deciding that the state could deny tax exemptions on the basis of conduct "for which they might be fined or imprisoned." Speiser v. Randall, 357 U.S. 513, 520 (1958). The Court did not recognize any justification to deny a right or privilege on the basis of lawful conduct.

not be justified by the state's interest since knowing membership by itself does not seriously endanger the security of the state. In support of this conclusion, the Court reasoned: "[a] law which applied to membership without the 'specific intent' to further the aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."[53]

The dissent in *Keyishian* strongly contended that the majority opinion was erroneous and inconsistent with the prior loyalty cases which merely required scienter.[54] The early decisions had been quoted with approval in several cases over a period of fifteen years, and their validity had never been questioned. The dissent asserted that "state statutes of similar character and language have been approved by this Court."[55] Furthermore, the Court had considered the same statutes in *Adler v. Board of Educ.* and had concluded: "[w]e find no constitutional infirmity in [the respective section] of the Civil Service Law of New York or in the Feinberg Law which implemented it. . . ."[56] Nevertheless, there are strong policy arguments for the majority's position, and support can be gleaned from the cases themselves.

Professors and teachers in public schools have advanced the majority of contentions in this area. Since most statutes apply to all public employees, the professor cannot claim special treatment; this would raise serious questions of equal protection. However, the Court has recognized that the relation of the academic profession to the freedoms protected by the first and fourteenth amendments "brings the safeguards of those amendments vividly into operation."[57]

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53. Keyishian v. Board of Regents, 385 U.S. 589, 607 (1967); Elfbrandt v. Russell, 384 U.S. 11, 19 (1966). The application of this standard to all loyalty statutes was hardly unexpected. Language in other cases involving oaths subject to perjury supported this result. Thus, in two cases, the Court said: "It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be no standard at all." Baggett v. Bullitt, 377 U.S. 360, 374 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961). The primary concern in those cases was not the perjury sanctions, but the undue infringement of individual freedom. For other language which serves to emphasize this point, *see* Baggett v. Bullitt, *supra* at 372; and Cramp v. Board of Pub. Instruction, *supra* at 287-88.

54. The dissent in *Elfbrandt* assumed that the majority did not intend to impose the requirements of "specific intent" and "active" membership upon all loyalty statutes because the majority did not mention or purport to overrule the earlier cases. Elfbrandt v. Russell, 384 U.S. 11, 20-23 (1966).

55. Keyishian v. Board of Regents, 385 U.S. 589, 623-25 (1967). The dissent cited Beilan v. Board of Educ., 357 U.S. 399 (1958), Lerner v. Casey, 357 U.S. 468 (1958), and Garner v. Board of Pub. Works, 341 U.S. 716 (1951); but, these cases did not involve issues of vagueness, and they also preceded the *Elfbrandt* decision. The dissent also stated that the Court had approved of similar language in the Smith Act cases, but it failed to mention the requirements which were established in those cases.

56. 342 U.S. 485, 496 (1952).

57. Shelton v. Trucker, 364 U.S. 479, 487 (1960); Wieman v. Updegraff, 344 U.S. 183, 195 (1952).

Education in a democratic society performs two major functions: first, the transmission of existing knowledge and values, and second, the development of a critical attitude toward such knowledge and values for the purpose of facilitating orderly change.[58] Substantial freedom is required to fulfill both of these functions effectively. The first is not restricted to the mere indoctrination of students in the values of a narrow or provincial majority; rather, in a pluralistic society, its proper scope is the broader range of values in the community of civilized men in general. The second obviously demands free inquiry and experimentation both within and without the classroom. Education must reflect the current and future needs of society and this necessitates direct contact by the professor with the changing society itself.[59] Activity outside of the classroom, including membership in organizations, serves as a useful and, in some cases, necessary source of information and experience for the professor. To establish knowing membership alone as the standard, or to allow broad language to prevail, would result in a serious impairment of the professor's ability to fulfill these functions. The Court has recognized this fact.[60]

Many professors have become apprehensive and fearful of joining any political or quasi-political organization.[61] The professor's occupa-

58. Emerson & Haber, *Academic Freedom of the Faculty Member As Citizen*, 28 LAW & CONTEMP. PROB. 525, 547-48 (1963).

59. *Id.* at 548-49.

60. Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the grouping endeavors of what are called the social sciences, the concern of which is man and society. . . . For society's good . . . inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

Sweezy v. New Hampshire, 344 U.S. 234, 261-62 (1957).

It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.

Wieman v. Updegraff, 344 U.S. 183, 197 (1952).

61. One teacher is quoted in an interview as follows:

In the present state of affairs, I won't join any political group. Almost any group that is trying to protect what it thinks is civil liberties, I think could end up on the Attorney General's list. I know for a fact that in the past contributions by check to certain organizations were photographed, and it goes on now. I send no checks to such things.

tion consists of the use of his thought and speech, and if he loses his position because of his conduct, it will be difficult for him to remain in his profession. This apprehension may be slight if the professor's particular field is far removed from the proscribed area, but this fact points to the very reason for which most of the professors are indifferent to the danger of the statutes. A great majority of them deal with "safe" subjects and limit themselves to "safe" conduct without objection or difficulty. But in many areas, such as political science, sociology, and philosophy, the professor is seriously restrained if he is forced to restrict his conduct to that which is unquestionably safe.[62] Broad loyalty statutes which establish knowing membership as grounds for discharge are not conducive to the promotion of the sense of freedom necessary to fulfill the educational functions. Here, again, the Court has expressed an awareness of the situation.[63]

It cannot be denied that the position of a teacher offers unique advantages for subversive purposes; the teacher is constantly in contact with a receptive audience not ordinarily available to the subversive. It is the teacher who "shapes the attitudes of young minds toward the society in which they live"[64] and, for this reason, the state does have a vital interest in the preservation of the integrity of the schools. However, broad loyalty statutes tend to distort the proper balance between the functions of education by overemphasizing the indoctrination to present values. Academic freedom does not cease to exist in the realm of ideas

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Morris, *Academic Freedom and Loyalty Oaths,* 28 LAW & CONTEMP. PROB. 487, 512 n.139 (1963). See *id.* at 501 n.80 for a detailed presentation of the percentages of professors affected by oaths and the nature of their apprehension.

62. Machlup, *On Some Misconceptions Concerning Academic Freedom,* AM. ASS'N. OF U. PROFESSORS BULL. 753, 783 (1955).

63. The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolute. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students gain new maturity and understanding; otherwise, our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957).

There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In view of the community, the stain is a deep one; indeed it has become a badge of infamy. . . . Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.'

Wieman v. Upegraff, 344 U.S. 183, 190-91 (1952).

64. Adler v. Board of Educ., 342 U.S. 485, 496 (1952).

which does not coincide with the orthodox.[65] In order to allow for the advancement of society, the professor should be encouraged to pursue and discuss abstract theory and to advocate orderly changes. The Court has also recognized the need for such activity.[66]

Not only policy, but the cases also offer support for the majority's position. In *Keyishian*, the Court explained that its decision concerning the vagueness of the statutes did not overrule or conflict with its decision in *Adler*. In effect, *Adler* had held that "there was no constitutional infirmity" in the New York statutes "on their faces and that they were capable of constitutional application."[67] The issue of vagueness was not heard or decided in that case; concerning the Education Law, the Court had explicitly stated that it would not consider the question of vagueness.[68] The only vagueness question actually considered in *Alder* involved the term "subversive" organization in the Education Law. Without passing upon any other language in the statute, the Court held that "the

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65. Machlup, *supra* note 62, at 777. The author provides a graphic illustration which distinguishes between subversive activity and academic freedom:

> There are important differences among (1) a teacher who organizes a violent uprising, tells his students what actions they should take, what weapons to wield, what buildings to occupy at an appointed time or signal; (2) a teacher who harrangues his students, urging them to participate in a revolutionary conspiracy; (3) a teacher who presents to his students the "need" or "desirability" of a violent overthrow of the government; (4) a teacher who, in his comparative description of alternative social, political, and economic systems, is disparagingly critical of the present system and full of praise for a substitute system; (5) a teacher who, in his comparative description of social, political and economic institutions within the present system, shows a decided preference for radical changes.

The author then comments that the line of subversive activity should be drawn either before or after the third of these cases, depending on the circumstances of that case. *Id.* at 773-74.

66. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association . . . . Exercise of these basic freedoms in America has traditionally been through the media of political association. . . . All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957).

67. Keyishian v. Board of Regents, 385 U.S. 589, 594 (1967).

68. Without raising in the complaint or in the proceedings in the lower courts the question of the constitutionality of § 3021 of the Education Law of New York, appellants urge here for the first time that this section is unconstitutionally vague. The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so.

Adler v. Board of Educ., 342 U.S. 485, 496 (1952). Appellants in *Keyishian* had timely asserted the issue of vagueness in the lower court. 255 F. Supp. 981 (W.D.N.Y. 1966). Thus, the question in this case was properly before the Court for decision.

word has a very definite meaning, namely, an organization that teaches and advocates the overthrow of the government by force or violence."[69] And since the Court did not review any language in the Civil Service Law, the questions of vagueness were not decided in *Alder*.

In respect to the Feinberg Law, *Keyishian* clearly extended the holding in *Adler*. The Court frankly admitted that pertinent "constitutional doctrine has developed since *Adler*;"[70] since the issue of nominal and passive membership had not been specifically raised and decided until *Elfbrandt, Adler* was not necessarily dispositive of the issue. Furthermore, the opinion in *Adler* raises questions as to the intended extent of its holding. Considering the general framework of the statutes, the Court had stated:

> [h]as the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied . . . the privilege of working for the school system of the State . . . because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by *unexplained* membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and *known* by such persons to have such purpose.[71]

Advocacy of overthrow by force or violence implies activity with intent, as the Court indicates in *Cramp* and *Baggett,* as well as in the Smith Act cases. And the fact that the Court modified the word "membership" by "unexplained" would seem to indicate that more than mere knowing membership was contemplated. If certain circumstances concerning knowing membership were satisfactorily explained, then it would be inferred that the teacher would not be denied employment. To conclude otherwise would in effect hold the word "unexplained" to be virtually meaningless. Facts concerning activity and specific intent would seem to be inevitably involved in any "explanation" of knowing membership. Although this argument interprets the opinion much as if it were a statute, nevertheless, it indicates that the Court did not establish knowing membership alone as an absolute and unqualified standard.

In *Keyishian,* the Court stated that "constitutional doctrine which has emerged since [*Adler*] has rejected its major premise."[72] That premise, as it is stated in *Adler,* is that teachers "may work for the school

69. Adler v. Board of Educ., 342 U.S. 485, 496 (1952).
70. Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967).
71. Adler v. Board of Educ., 342 U.S. 485, 492 (1952). (Emphasis added.)
72. Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967).

system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."[73] The dissent, however, asserted that the cases have not rejected this basis.[74] While it is perhaps incorrect to proclaim that the premise has been "rejected" in the total sense of the word, it cannot be denied that the Court has seriously qualified the thrust of that premise. In the case which followed *Adler*, the Court said in respect to its statement:

> [t]o draw from this language the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.[75]

Thus, in accordance with the recent cases, the first and fourteenth amendments demand that "guiltless knowing behavior" be excluded from the scope of the statute and that proscribed membership be clearly defined with specific intent and activity. The terms laid down by proper authorities can be "reasonable" or lawful only if these requirements are satisfied. In effect, then, the individual still must choose to work for the school system upon the terms which the state may impose, but the breadth of those terms has been restricted.

In *Elfbrandt* and *Keyishian*, the Court cities *Aptheker v. Secretary of State*[76] to support the standards established in the recent loyalty cases. *Aptheker* involved a statute[77] which provided that a member of an organization which the Subversive Activities Control Board had ordered to register as a communist organization could not apply for or use a passport. The statute did not require any consideration of the member's activity or commitment to the organization's purposes. The Court stated: "[t]hese factors, like knowledge, would bear on the likelihood that travel by such a person would be attended by the type of activity which Congress

73. Adler v. Board of Educ., 342 U.S. 485, 492 (1952). The Court further stated that the teacher's "freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice." *Id.* at 493.

74. Keyishian v. Board of Regents, 385 U.S. 589, 623-25 (1967).

75. Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952). In another case, the Court said: "To say that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by proper authorities." Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956). For similar statements, see Baggett v. Bullitt, 377 U.S. 360, 380 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 284 (1961); Shelton v. Tucker, 364 U.S. 479, 485 (1960).

76. 378 U.S. 500 (1964).

77. 50 U.S.C. § 785 (1964).

sought to control."[78] The relationship between the mere fact of membership, even if it were knowing, and the interest which Congress sought to protect was held to be too tenuous. Because the statute restricted basic freedoms, it had to be "narrowly drawn to prevent the supposed evil."[79] Since the first amendment applies equally to state and federal government, *Aptheker* and the Smith Act cases indicate that these standards govern all legislation which proscribes subversive conduct.[80]

Keyishian is not, therefore, erroneous or inconsistent. The earlier cases dealt only with the issue of knowing and innocent membership, but recently the Court has been faced with the task of questioning what conduct is actually embraced by the statutes. In reaching its decisions, the Court has imposed strict standards in view of the fact that first amendment freedoms are involved.

Whitehill v. Elkins[81] illustrates the intense attitude of the Court in this area of fundamental rights. The Maryland Ober Act contained an oath subject to perjury which simply provided: "I . . . certify that I am not engaged in one way or another in the attempt to overthrow the Government . . . by force or violence."[82] The attorney general and the University of Maryland Board of Regents prescribed the oath under the authority of section 11 of the Act which directed every state agency to establish procedures designed to ascertain that each applicant "is not a subversive person." Section 1 of the Ober Act defined a "subversive" in language very similar to that which was considered in *Baggett*.[83] Since sections 1, 11, and 13 were so interrelated, the Court concluded, that the oath was an integral part of the Act to be read in connection with the statutory definition of a "subversive."[84]

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78. Aptheker v. Secretary of State, 378 U.S. 500, 510 (1964).

79. *Id.* at 514.

80. *See also* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), where the Court held that mere knowing membership could not support a finding of moral unfitness justifying disbarment.

81. 389 U.S. 54 (1967).

82. MD. ANN. CODE art. 85A, § 13 (1957). Originally, the oath also required the applicant to certify that he was "not knowingly a member of an organization engaged" in an attempt to overthrow the government by force or violence. However, the Attorney General deleted this certification after the decision in *Elfbrandt*.

83. The statute defined a "subversive" as "any person who commits . . . or advocates, abets, advises or teaches by any means any person to commit . . . any act intended to overthrow, destory or *alter*, or to assist in the overthrow, destruction or *alteration* of, the . . . government . . . by *revolution*, force, or violence; or who is a member of a subversive organization . . . ." MD. ANN. CODE art. 85A, § 1 (1957) (emphasis added). The latter term was defined as a group that would, *inter alia*, "alter" the government "by revolution, force, or violence."

84. Whitehill v. Elkins, 389 U.S. 54, 56-57 (1967). MD. ANN. CODE art. 85A, § 18 (1957) contained a severability clause which provided: "[i]f any provision . . . of this article . . . is held invalid, such invalidity shall not affect other provisions . . . which can be given effect without the invalid provision. . . ." The District Court held that this was a clear case of severability. Whitehill v. Elkins, 258 F. Supp. 589, 596

Before the Court could review the definitions, it was necessary to determine the effect of *Gerende v. Board of Supervisors.*[85] That case involved an oath contained in section 15 of the Ober Act which was required of all candidates for public office. It was argued in *Gerende* that the oath incorporated section 1 of the Ober Act and that the definitions in section 1 were unconstitutionally vague. But the Court indicated in *Whitehill,* as it had previously indicated,[86] that it had rejected this interpretation and did not pass upon or approve section 1 in *Gerende.*[87] There, the state court had interpreted the words "revolution, force, or violence" to include only revolution by force or violence;[88] consequently, "alteration" was also to be restricted to alteration by force or violence. In a per curiam opinion, the Supreme Court held:

> [w]e read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged "in one way or another in the attempt to overthrow the government *by force or violence,*" and that he is not knowingly a member of an organization engaged in such an attempt. [Citing the state court.][89]

The Court had based its judgment on the fact that the attorney general during oral argument offered "to accept an affidavit in these terms as satisfying in full the statutory requirement."[90] Thus, the Court avoided the constitutional issue that was argued in *Gerende.* But, since the Court in *Whitehill* concluded that the oath was to be read in connection with the definitions in section 1, it stated "we are faced with the kind of problem which we thought we had avoided in *Gerende.*"[91]

Another relevant Maryland case[92] involved a hearing at which an

(D. Md. 1966). However, the Supreme Court refused to separate sections 1 and 13.

The Court also pointed out that the statute was enacted pursuant to art. 15, § 11 of the Maryland Constitution which provides: "No person who is a member of an organization that advocates the overthrow of the Government . . . through force or violence shall be eligible" for public employment. Since there was no severability clause applicable to this provision, the Court doubted that § 18 could restrict the membership clause in § 1 more narrowly than the constitutional provision. Whitehill v. Elkins, 389 U.S. 54, 61 n.2 (1967).

85. 341 U.S. 56 (1951).

86. Baggett v. Bullitt, 377 U.S. 360, 368 n.7 (1964). It was argued in *Baggett* that the Court had found no constitutional infirmity in section 1 of the Ober Act which contained language nearly identical to that presented in *Baggett.* It was therefore necessary to consider the effect of *Gerende* in that case also.

87. Whitehill v. Elkins, 389 U.S. 54, 58 (1967).

88. Shub v. Simpson, 196 Md. 177, 190-91, 76 A.2d 332, 337-38 (1950).

89. Gerende v. Board of Supervisors, 346 U.S. 56, 56-57 (1951). Of course, the language relating to membership has been qualified by *Elfbrandt.*

90. *Id.*

91. Whitehill v. Elkins, 389 U.S. 54, 59 (1967).

92. Character Comm. v. Mandras, 233 Md. 285, 192 A.2d 782 (1963).

applicant for admission to the Maryland bar testified that he had joined the communist party at one time because of his interest in civil liberties and in the candidacy of Henry Wallace. Since he established that he had not advocated the overthrow of the government by force or violence, he was not found to be a subversive. Thus, it could be argued that as a matter of state law an individual would not be considered a subversive on the basis of passive membership. Notwithstanding this case and the earlier case[93] which interpreted the word "revolution" to mean only "revolution by force or violence," the Court still stated "as we read §§ 1 and 13 of the Ober Act, the alteration clause and membership clause are still befogged."[94] Directing its attention to the definitions in section 1, the Court concluded:

> [t]he lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change. . . .
> . . . [w]e have another classic example of the need for "narrowly drawn" legislation . . . in this sensitive and important First Amendment area.[95]

Thus, a loyalty statute—whether an oath or a proscriptive statute—must contain "terms susceptible of objective measurement" and cannot include "guiltless knowing behavior." And, in respect to membership in organizations, the state must expressly proscribe not only knowing but also "active" membership with "specific intent" to further an illegal purpose. Although these strict requirements will undoubtedly necessitate appropriate changes in most, if not all, state loyalty programs, they nevertheless establish a proper balance between the state's legitimate interest and the individual's rights.

Refusal to Answer

Garner v. Board of Pub. Works[96] established that a state may properly inquire into political conduct in order to determine its employees' fitness for public service and that refusal to answer is sufficient cause for discharge. In allowing the state's interest to prevail, however, the Court has developed a rather fine distinction between "loyalty" and "fitness." The state cannot summarily discharge on the ground of disloyalty an employee who invokes the fifth amendment. In *Slochower v. Board of Higher Educ.*, the Court stated that consideration must be given "to

93. Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950).
94. Whitehill v. Elkins, 389 U.S. 54, 61 (1967).
95. *Id.* at 61-62.
96. 341 U.S. 716 (1951).

such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege."[97] Slochower had refused to answer a question posed by a congressional committee whose inquiry was explicitly proclaimed not to concern "the property, affairs, or government of the city, or . . . official conduct of city employees."[98] Since the questioning did not directly relate to any state interest embodied in a statute, there was no ground other than disloyalty to conclude that he had disqualified himself by invoking the fifth amendment, and his dismissal was therefore held unconstitutional. The Court distinguished *Garner* by pointing out that the question of the affidavit in that case attempted to elicit information necessary to determine fitness for state employment. This distinction has been confirmed in two cases where discharges for refusal to answer were based on statutory grounds of "reliability"[99] and "incompetency";[100] it has even been extended to a discharge based on statutory ground of "insubordination" where the employee refused to answer a question asked by a congressional committee.[101] Thus, use of the fifth amendment cannot raise an inference of disloyalty; due process requires the state to prove disloyalty in an adequate hearing. But, a dismissal based on a refusal to answer a question relating to an established state interest other than disloyalty, such as "incompetency" or "insubordination," does not violate due process; the state has power to establish qualifications for public employment and dismissal for failure to satisfy the qualification is not considered as punishment.[102]

97. 350 U.S. 551, 558 (1956).

98. *Id.*

99. Lerner v. Casey, 357 U.S. 468 (1958). The employee invoked the fifth amendment when asked whether he was a member of the Communist Party; the Court held that his "lack of frankness and candor" evidenced by his refusal to answer created substantial doubt as to his "reliability" and that his doubt was independent of any reason which the employee may have had for his silence.

100. Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958). The employee invoked the fifth amendment when asked whether he was a member of the Communist Political Association; the Court held that the dismissal was based upon a refusal to answer questions pertaining to relevant activities rather than upon the activities themselves and that this "lack of frankness and candor" was sufficient to support a charge of "incompetency" and "insubordination" as opposed to a charge of disloyalty.

101. Nelson v. County of Los Angeles, 362 U.S. 1 (1960). The employee invoked the fifth amendment when asked whether he was a member of the Communist Party; the Court held that the dismissal was not based upon any inference of guilt but rather upon a charge of "insubordination" as evidenced by the employee's failure to give information in which the state had a legitimate interest.

102. Garner v. Board of Pub. Works, 341 U.S. 716, 721 (1951). The contention that an oath is an ex post facto law or bill of attainder is dismissed by the same reasoning. However, the *Garner* case involved an oath resulting in discharge. It would seem that this would be a proper defense to an oath subject to perjury if the employee were prosecuted in appropriate circumstances. The Court has not yet made such a distinction.

This distinction may seem to be without substance in that it appears to allow the state to accomplish indirectly that which it cannot do directly. Thus, the state can dismiss an employee without proving disloyalty if the employee refuses to answer a question relating to his loyalty and if the dismissal is expressly based on some ground other than disloyalty. However, if the employee is dismissed for refusing to answer the question, he cannot prove any substantial injury. By refusing to answer, the employee deprives the state of information which is relevant to his qualifications, and he also creates a substantial doubt as to his reliabilty and cooperativeness. It is well established that there is no absolute constitutional right to public employment and that the state may impose reasonable requirements for qualification.[103] If the question substantially relates to the employee's fitness, he cannot complain of a dismissal which is specifically based on his refusal to answer that question. If the employee does answer the question, he is adequately protected because the state must then provide a hearing to determine his disloyalty in order to support a dismissal. This distinction is therefore necessary to establish a reasonable and effective method of investigation for the state.

Although the public employee thus has no absolute right of silence, the state must still prove sufficient relevancy of the questioning to fitness. In *Sweezy v. New Hampshire*,[104] the employee refused to answer certain questions concerning the Progressive Party. The Court held his dismissal unconstitutional on the ground that the conduct proscribed by the statute was only a remote threat to the security of the state; the scope of the statute went "well beyond those who were engaged in efforts designed to alter the form of government by force or violence."[105]

The state must also be able to show that it has reasonable or reliable information which justified the questioning.[106] This does not mean, however, that the state's power of investigation is severely restricted; to the contrary, the Court has allowed wide latitude for investigatory legislation designed to protect the state. In defining the limits of the state's power, the Court has only objected to an "attempt to pillory witnesses," "indiscriminate dragnet procedures, lacking in probable cause for a belief that [the employee] possessed information which might be helpful," and irrelevancy of the questions.[107] Exercise of the investigatory power does not require evidence sufficient to justify the institution

103. See text accompanying notes 72-75 *supra*.
104. 354 U.S. 234 (1957).
105. *Id.* at 246.
106. Beilan v. Board of Pub. Educ., 357 U.S. 399, 405-06 (1958).
107. Barenblatt v. United States, 360 U.S. 109, 133 (1959).

of criminal proceedings for subversion.[108] In order to conduct inquiries effectively, the legislature must have reasonable leeway.

THE CONSCIENTIOUS

Although the state's power to prescribe loyalty oaths has been severely restricted in many important areas, the problem posed by the conscientious still remains unanswered. The Court has recognized that the individual is protected against exclusion from public employment on grounds which are patently arbitrary or discriminatory.[109] But, it is not yet clear whether this protection extends to require a hearing for an individual who has refused to take the oath so that he may prove his loyalty and thereby qualify for employment.

The question was brought to the Court in *Nostrand v. Little*.[110] There, the employees claimed that an oath statute violated due process because it did not provide for a hearing at which an individual could explain or defend his refusal to subscribe to the oath. The Court remanded the case to the state court since, *inter alia*, the state court had not considered the issue in this case; the opinion implied that if a hearing were not allowed, due process would be violated.[111] On remand, the state court held that only if the employee had established tenure rights would he be entitled to a hearing under his contact of employment.[112] The complainants appealed to the Supreme Court without asking for a hearing in accordance with the state decision, and the case was dismissed for want of a substantial federal question.[113]

The issue of the rights of a non-tenured employee under the same statute was raised shortly thereafter in a federal case.[114] Recognizing the effect on public opinion of a discharge for refusal to take an oath on grounds which are unrelated to disloyalty, the district court stated that the protection of due process was involved in these circumstances with compelling force. However, in view of the fact that the state urged the court not to assume that non-tenured employees would not be entitled to a hearing, the court presumed that the statute would be constitutionally

108. Uphaus v. Wyman, 360 U.S. 72 (1959).

109. Cramp v. Board of Pub. Instruction, 368 U.S. 278, 288 (1961); Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

110. 362 U.S. 474 (1960).

111. The Court noted that the state had previously required a hearing in a similar case, and, in view of this fact, it thought that the state should have had an opportunity to decide the issue. *Id.* at 475.

112. Nostrand v. Little, 58 Wash. 2d 655, 344 P.2d 216 (1959).

113. Nostrand v. Little, 368 U.S. 436 (1962).

114. Baggett v. Bullitt, 215 F. Supp. 439 (W.D. Wash. 1963).

applied.[115] Thus, *Nostrand* and the district court opinion imply that a hearing would be required.[116]

However, it might be contended that there is no constitutional necessity for a hearing. In accordance with the distinction established in the refusal-to-answer cases, refusal to comply with a requirement imposed by the state could be grounds for exclusion because of insubordination or lack of cooperation.[117] But such grounds would need to be explicitly designated because an inference of disloyalty cannot be raised from a mere refusal to comply.[118] If such grounds were designated, it could be argued that no conclusive presumption of disloyalty has resulted and that the individual is unfit for public service because he has failed to fulfill the state-imposed requirements for his employment.

This argument, however, demands careful consideration. While most people will take a loyalty oath with a feeling of pride and without objection, there is a significant number of qualified people of unquestioned loyalty who refuse to do so because of some conscientious reason.[119] The only justification for the oath is the protection of the government by the exclusion of the disloyal from public employment. If there is no opportunity for a hearing to explain or defend the refusal, then the oath would eliminate the conscientious as well as the disloyal.[120] Obviously, such high principles pose no threat to the security of the state; in fact, those who adhere to them are usually model citizens. A statute which allows subversives, trained to commit perjury, to take the oath and thereby qualify, and which at the same time disqualifies those who refuse to take the oath for reasons other than disloyalty, does not accomplish any legitimate objective. The injury to the conscientious cannot be justified by any state interest.

It has been argued that there is a significant distinction between discharge for refusal to answer a question and discharge for refusal to

115. *Id.* at 452. The Supreme Court later declared this statute unconstitutional on grounds of vagueness, but it did not consider the hearing issue. Baggett v. Bullitt, 377 U.S. 360 (1964).

116. Although this conclusion is based largely on inferences, it is certainly doubtful that the Court would distinguish between tenured and non-tenured employees, or between employees who already have a contract and those who are seeking employment, since such distinctions for the purpose of establishing loyalty would raise serious problems of equal protection.

117. See Comment, *Loyalty Oaths, Conscience, and the Constitution,* 5 ARIZ. L. REV. 254, 259-60 (1963).

118. Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

119. See Byse, *A Report on the Pennsylvania Loyalty Act,* 101 U. PA. L. REV. 480 (1953); Horowitz, *Report on the Los Angeles City and County Loyalty Programs,* 5 STAN. L. REV. 233 (1953); Morris, *Academic Freedom and Loyalty Oaths,* 28 LAW & CONTEMP. PROB. 487 (1963).

120. Elfbrandt v. Russell, 94 Ariz. 1, 15, 381 P.2d 554, 561 (1963) (concurring opinion).

take an oath.[121] In the former, the employee refuses to answer any questions which are relevant to his qualifications, and the ground for his refusal bears a direct relation to disloyalty or lack of cooperation. In the latter, however, the individual refuses to do an act which he finds repugnant; generally, he is willing to answer questions relating to fitness,[122] but he will not subscribe to an oath. Under these circumstances, the ground for his refusal does not stem from disloyalty or lack of cooperation, but rather it relates to conscience. If a hearing were provided, then the individual could explain his refusal. The burden of proof should, however, rest upon the individual since the state concededly has the power to require subscription to an oath.[123] The state could then determine whether the individual's refusal related to disloyalty, lack of cooperation, or merely to conscience. If the individual adequately proves his loyalty and cooperativeness, he should be able to obtain employment.[124] By providing such a hearing, the ideal standard excluding only the disloyal and the insubordinate would be achieved. Since the state could thus establish that a discharge or exclusion from public employment was not arbitrary or discriminatory, the requirements of due process would be satisfied.

CONCLUSION: OATHS VS. PROSCRIPTIVE STATUTES

While the oath represents one method by which the state can require an affirmation of loyalty as a qualification for employment, there is no compelling argument which establishes it as the best means available for the state's objective of securing loyalty. Two arguments are frequently advanced in support of the oath.[125] First, in connection with oaths subject to perjury, it is argued that the oath operates to convict subversives. This argument is based on a misconception of the purpose of perjury statutes. It is not their function to stamp out the

121. *Id.* at 16-17, 381 P.2d at 564-65.

122. See Byse, *supra* note 119, at 482 n.5, for illustrative statements of such individuals.

123. See Comment, *Loyalty Oaths, Conscience, and the Constitution,* 5 ARIZ. L. REV. 254, 264 (1963).

124. The contention that this would impose an unreasonable burden on the state by resulting in a multiplicity of hearings is unjustified. Most people subscribe to an oath without objection. Elfbrandt v. Russell, 94 Ariz. 1, 14, 381 P.2d 554, 563 (1963) (concurring opinion).

125. Byse, *supra* note 119, at 484-87. The author also surmises three reasons for which legislatures have enacted broad loyalty oaths. First, the problem of subversion and the available means for its control have been erroneously estimated. Second, emotion rather than reason motivates the legislature to enact another law to demonstrate a hatred of communism. And finally, in view of the fact that the legislators are elected by popular ballot, they are very reluctant to vote against any loyalty statute; such action can be, and has been as the author illustrates by example, misrepresented by one's political opponent. And, it can be, as it has been in fact, the cause of popular reaction against the individual and his family. *Id.* at 507.

Communist Party and its affiliates; that purpose lies in statutes such as the Smith Act. The true purpose of perjury statutes is to force individuals to submit to public officials information required for the fulfillment of state functions. A person who intentionally lies should be punished to protect the investigatory process. Thus, the prejury sanction is a means to an end, not an end in itself. Secondly, it is argued that the oath provides an investigatory method of identifying subversives for the purpose of excluding them from public employment. But, few, if any, subversives have been revealed by an oath requirement; they do not hesitate to subscribe to the oath.[126] This argument also fails to consider the problem of the conscientious and the atmosphere of fear and apprehension caused by subscription to an oath.

Loyalty oaths are neither necessary nor desirable in view of their consequences. The state can achieve virtually the same objective by enacting a proscriptive statute forbidding all activities which may be required to be renounced by an oath. The state would merely need to inform the employee of the statute and its consequences, and it could ask the employee to answer the relevant questions in an application form; there is no compelling reason to require the employee to swear to the provisions. The state can protect the efficiency of its investigatory process by enacting a refusal-to-answer statute requiring an employee to answer questions relevant to his fitness. Loyalty would thus remain a requirement for qualification. But since the provisions would probably be equivalent to the prescriptions contained in an oath, it is admitted that similar apprehension and fear would still exist. However, it would not exist to the same extent. Those who are serious-minded about taking oaths would restrict their conduct much more if an oath were required[127] and when an oath subject to perjury is involved, needless to say, the apprehension and fear would be even further augmented. The use of proscriptive statutes would also avoid the problems posed by the conscientious.

It does not seem likely that the Court will declare an oath unconstitutional as a means for achieving security. The Court does not concern itself with the wisdom of legislative enactments. However, considering the nature of the possible alternatives, the use of proscriptive and refusal-to-answer statutes constitutes the wisest policy.

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126. See also Horowitz, *supra* note 119; Morris, *Washington's Loyalty Oath and "Guiltless Knowing Behavior,"* 39 WASH. L. REV. 734 (1964).

127. Baggett v. Bullitt, 377 U.S. 360, 371-72 (1964).