

Such a provision states an equitable, simple, legally elegant test for liability. It finds a rightful place in a code that is truly Commercial: one designed to serve commerce.

THE NEW YORK AND CALIFORNIA EXPERIMENTS
WITH ACADEMIC CONTROL

Since in a democracy all men are rulers, all men
must have the education that rulers ought to have.

—ROBERT M. HUTCHINS¹

The anti-radical feeling following the first world war reached the schools through such measures as the Lusk Law² and then quickly subsided. In the long period from the early twenties to the present time the central issues of academic freedom seemed to center around causes célèbres involving individuals. Now, with such measures as the Feinberg Law in New York and the loyalty oath requirement at the University of California, the problem is broadening again. The re-evaluation of government personnel in terms of loyalty³ has spread to the personnel of state schools. Corruption of the youth joins sedition and espionage as an immediate threat to the American way of life. The private school has been dealt with by informal pressure⁴ partly because the loyalty of government personnel is the primary concern of the day and partly because the freedom the state has in choosing its employees⁵ avoids, legally at least, the problems of free speech involved in preventing private institutions from teaching disapproved doctrines or hiring disapproved personnel.⁶ As international tension mounts, the problem of balancing the traditional American freedoms

¹ Hutchins, T. S. Eliot on Education, 1 Measure 5 (Winter, 1950).

² The Lusk Law, N.Y. Laws (1921) c. 667, required the licensing of private educational institutions and forbade the licensing of institutions teaching the violent overthrow of the government. It was primarily aimed at the Rand School, a socialist school. The law was repealed after a year. N.Y. Laws (1923) c. 799. Consult Chafee, Free Speech in the United States, c. 8 (The Rand School Case) (1941), for a complete discussion of the case.

³ Consult Emerson and Helfeld, Loyalty among Government Employees, 58 Yale L.J. 1 (1948).

⁴ Some legislatures have rattled the investigative sword at private schools, as did a committee of the Illinois legislature which conducted an investigation of the University of Chicago. The committee sent an investigator and later held hearings. It made no definite assertions about the University of Chicago although it did undertake to show that some of the faculty members were members of "communist fronts." Consult Special Report of Seditious Activities Investigation, State of Illinois (1949); Report of the Seditious Activities Commission, State of Illinois (1949). The Testimony of Chancellor Hutchins, at 17 et seq. of the Special Report, is particularly noteworthy.

⁵ Consult note 49 *infra*.

⁶ Thus even the Internal Security Act, popularly known as the McCarran Act, requires only registration of private communist organizations and the labeling of communist propaganda. H.R. 9490, 81 Cong. 2d Sess. (Pub. L. No. 831, 1950).

and the need for control of subversive activities becomes more difficult. Since these freedoms include academic freedom, it is worth while to inspect the meaning of that phrase.

Academic freedom has three intelligible, if not entirely harmonious meanings: it may mean the freedom of the governing body of the school to choose curriculum, personnel, and student body;⁷ it may mean the freedom of an individual teacher to express, in his teaching, personal opinions about controversies in his field;⁸ it may mean the freedom of the teacher to conduct himself outside the classroom as any other citizen might.⁹ It is with the teacher, rather than his

⁷In the case of state schools there are notable constitutional limitations. As to curriculum, usual subject matter may not be arbitrarily excluded. *Meyers v. Nebraska*, 262 U.S. 390 (1923) (prohibition against teaching German in elementary schools, public or private, held unconstitutional). As to teachers, state school systems may not establish discriminatory wage scales in favor of certified white teachers as against certified Negro teachers. *Alston v. School Board*, 112 F. 2d 992 (C.A. 4th, 1940). As to students, where white students are given state education, Negro students must be given equivalent education. *Sweatt v. Painter*, 339 U.S. 629 (1950). Where the state chooses to meet this obligation by admitting Negro students to a school with white students the state must accord them the same (i.e., nonsegregated) treatment. *McLaurin v. Oklahoma State Board of Regents*, 339 U.S. 637 (1950).

⁸"Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science . . . without interference from political or ecclesiastical authority or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics." 1 *Encyclopedia of the Social Sciences* 384 (1930).

⁹Mere lawfulness is probably not an adequate test. As a teacher occupies a special place in the community and exerts his influence by example, as well as by imparting formal knowledge, it may be reasonable to set a higher standard of behavior than mere observance of the penal statutes. "The Board of Examiners has the right to expect of applicants for licenses to teach a nice sense of honor which is as unlike mere honesty as the fine Damascus blade is unlike a farming implement. It has a right to expect from them a strong and delicate sense of moral values." *Epstein v. Board of Education*, 162 N.Y. Misc. 718, 721, 295 N.Y. Supp. 796, 801 (1936). There are a number of problems raised by such a position. Since few men would assert or admit that they are lacking in a sense of honor the question remains: What standard of conduct beyond mere lawfulness should be set for teachers? The danger of the requirement of "a nice sense of honor" is well illustrated by the passage following the quote above: "The contention of the petitioner is, however, that the refusal on this ground is feigned and not genuine, that it is a subterfuge merely and used to cloak the true reason, namely, dissatisfaction with her economic and political opinions."

The 1940 statement of the American Association of University Professors on academic freedom says in part:

"a. The teacher is entitled to full freedom in research and in the publication of results, subject to the adequate performances of his other academic duties; but research for pecuniary return should be based on an understanding with authorities of the institution.

"b. The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aim of the institution should be clearly stated in writing at the time of the appointment.

"c. The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at

teaching, that the New York and California actions deal. Two cases which centered around individual teachers, and which, dramatically at least, were high points in the academic freedom controversies of the period from the early twenties to today may therefore serve as an appropriate introduction to the discussion of the California and New York actions.

John Scopes, a Tennessee public school teacher, was brought to trial under a statute¹⁰ making it criminal to teach any theory which denied the story of divine creation and asserted instead that man was descended from lower animals. At the trial of the case, William Jennings Bryan and Clarence Darrow battled over the merits of "evolution." It was a great spectacle,¹¹ but the legal issues were obscured. In reversing the verdict of guilty on a technicality,¹² the Supreme Court of Tennessee took the unusual step of saying that since Scopes was no longer working for the state a *nolle prosequere* was desirable. But the court had something to say on the merits as well.

The court asserted that Scopes could not complain of a deprivation of rights without due process of law for his position was merely that of an employee who had only the choice between working on the terms offered to him or not at all. "He had no right to serve the state except on such terms as the state prescribed. . . . [T]he statute before us is not an exercise of the police power, . . . it is an act of the state as a corporation, a proprietor, an employer. . . . In dealing with its own employees engaged on its own work, the state is not hampered by the limitations of Section 8 Article 1 of the Tennessee Constitution or the 14th Amendment to the Constitution of the United States."¹³ This assertion was to be made by other courts at a later date.

Bertrand Russell was appointed in 1940 to the post of Professor of Philosophy in the City College of New York. He was to teach advanced logic, the philosophy of mathematics, and the relation of philosophy to the sciences.¹⁴ A taxpayer sued for and obtained an order declaring the appointment of Professor Russell void and prohibiting the city's Board of Higher Education from hiring him in any capacity.¹⁵ Though a number of grounds were offered, the case

all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman."¹⁶ 35 A.A.U.P. Bulletin 67 (1949).

¹⁰ Tenn. Code Ann. (Michie, 1938) § 2344.

¹¹ A transcript of the trial was published as *The World's Most Famous Court Trial* (1925).

¹² The court held that the trial judge had exceeded his constitutional powers in setting a fine of over \$50. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

¹³ *Ibid.*, at 111 and 364.

¹⁴ Minutes of the Proceedings of the Board of Higher Education of the City of New York, March 18th, 1940.

¹⁵ *Kay v. Board of Higher Education*, 173 N.Y. Misc. 943, 18 N.Y.S. 2d 821 (1940), unanimously affirmed without opinion 259 App. Div. 879, 20 N.Y.S. 2d 1016 (1940). A thorough

rested on the alleged immorality of Russell. His opinions on premarital and extramarital sexual relations were cited as urging violation of the state's penal laws, although they may as easily be read as urging their modification. Statements of Professor Russell which might well have come from medical textbooks were scored as obscene.¹⁶ "Mindful of the aphorism: 'As a man thinketh in his heart, so he is,' " the court held that the Board in appointing Professor Russell was "in effect establishing a chair of indecency and in so doing has acted arbitrarily, capriciously, and in direct violation of the public health, safety and morals. . . ."¹⁷

From these two individual cases the scene shifts to the current attempt to deal with what is considered the widespread problem of the subversive teacher. Thoughtful attention has been given the problem of whether the known communist should be allowed to teach.¹⁸ Whether the communist teacher is thought to be merely an espouser of an unpopular belief and to be kept on hand for the health of democratic processes, or is thought to be an agent of a conspiratorial party bound by oath to lie, cheat and steal to further the destruction of our democracy, the problems raised by the New York and California actions remain. Both actions are attempts to check the corruption of the youth by methods which can be easily applied to the large group of teachers in a uniform, almost mechanical way. Both actions avoid the methods of the criminal law¹⁹ and adopt an indirect approach to the desired end.

I

New York statutes prohibit the employment of persons who advocate the overthrow of the government by illegal means.²⁰ Though these statutes have never been challenged in court, there would seem to be no valid objection to them; their language closely follows the state and federal sedition statutes which have been upheld.²¹ The state may properly discharge one guilty of im-

note examining all the legal questions and sharply criticizing the outcome appeared in 53 *Harv. L. Rev.* 1192 (1940). A less technical but more basic essay on the case appears as chapter 21, *The Bertrand Russell Case*, in Cohen, *Faith of a Liberal* (1946).

¹⁶ For example at 173 N.Y. Misc. 943, 952, 18 N.Y.S. 2d 821, 830 (1940), a passage on masturbation is quoted as an example of Professor Russell's "obscenity." It should be compared with the statement on masturbation in English & Pearson, *The Common Neuroses of Children and Adults* 173 (1937).

¹⁷ 173 N.Y. Misc. 943, 953, 18 N.Y.S. 2d 821, 831 (1940).

¹⁸ Consult Hook, *Academic Freedom and Communism*, 2 *The People Shall Judge* 705 (1949) (yes); Meiklejohn, *Professors on Probation*, *ibid.*, at 715 (no).

¹⁹ Consult text *infra* at page 302.

²⁰ N.Y. Education Law (McKinney, 1947) § 3021; N.Y. Civil Service Law (McKinney, 1946) § 12-a.

²¹ *Gitlow v. New York*, 268 U.S. 652 (1925); *Dunne v. United States*, 138 F. 2d 137 (C.A. 8th, 1943), cert. den. 320 U.S. 790 (1943), rehearing denied *ibid.*, at 814, second petition for rehearing denied *ibid.*, at 815.

proper conduct of a criminal nature even when the evidence is such that the district attorney asks that the indictment be dropped,²² or even where the jury finds a verdict of not guilty.²³

Apparently determining that these measures were inadequate, the New York legislature, after finding that there was "common report" that subversives had infiltrated into the state's public schools,²⁴ enacted the Feinberg Law at the 1949 session.²⁵ The law directs the Board of Regents to promulgate and enforce regulations for the removal of such subversives and to prepare a list of organizations which are subversive in that they advocate the overthrow of the government by illegal methods proscribed in the earlier statutes. Membership in any listed organization is made prima facie evidence of disqualification for employment in the public schools of the state. The litigation so far has seen the New York supreme court holding the statute unconstitutional and the appellate division reversing and holding the law constitutional.²⁶ The new law will prob-

²² In a recent New York case the petitioner was indicted for sodomy and the indictment dropped at the request of the district attorney. The court upheld a dismissal, after a hearing, on the same charges. *Berman v. Gilroy*, 97 N.Y.S. 2d 521 (1950).

²³ The New York court has upheld the discharge of a petitioner acquitted of rape. *People v. Dep't of Health*, 144 App. Div. 628, 129 N.Y.S. 255 (1911).

²⁴ "The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the State. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge, or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The Legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. . . ." Declaration of Policy in note to N.Y. Education Law (*McKinney, Supp.*, 1950) § 3022.

²⁵ N.Y. Education Law (*McKinney, Supp.*, 1950) § 3022.

²⁶ Two companion cases, *Thompson v. Wallin* (Case #1), and *L'Hommedieu v. Board of Regents* (Case #2) decided together at 196 N.Y. Misc. 686, 93 N.Y.S. 2d 274 (1949), found the Feinberg Law was unconstitutional in that it was a bill of attainder, in that it failed to establish a definite standard of proscribed conduct, and in that it failed to meet the minimum requirement of due process as applied to administrative agencies. The Appellate Division reversed the first case brought on behalf of the Communist Party on the grounds that the preamble of a statute is not part of it, and cannot attain anyone, and that when and if listed they have a right of judicial review if denied due process. *Thompson v. Wallin*, 276 App. Div. 463, 95 N.Y.S. 2d 784 (1950). The appellate division reversed the second case, brought on behalf of five persons presently employed in the New York City school system and one retired teacher, on the same basis and the additional grounds that the State may prescribe qualifications for its employees, and that the Feinberg Law does not abridge any of the

ably come before the court of appeals at this term.²⁷

The Feinberg Law raises the problem of "guilt by association."²⁸ The term may of course be nothing but a cliché of disapproval. It may, however, mean the use of an individual's associations, entirely apart from anything else the individual has done or said, as proof of "disloyalty."²⁹ All of an individual's actions, including his associations, may be relevant to judgments about his character or the doctrines he advocates, and where an attempt is being made to determine qualification for a position of trust, there is no reason to exclude them. The Feinberg Law, however, gives authority for going well beyond membership in associations, along with other matters, in determining fitness for a position of trust. It sets a standard far more restrictive than the President's Loyalty Order,³⁰ which merely provided that membership in an organization listed as subversive by the Attorney General was one of six elements to be considered in determining the loyalty of an employee. The Feinberg Law ignores the well-recognized fact that men belonging to a political party do not necessarily adhere to every one of its aims. In short, the law changes the aphorism used in the *Russell* decision to read: "As a man's associates think, so the man is."

Membership in a proscribed organization is prima facie evidence of disqualification for employment as a teacher. How may a teacher defend himself? He may deny that the organization³¹ advocates the illegal overthrow of the government. This, substantially, puts on the individual teacher the burden of disproving what the government took eleven months to prove in the relatively

constitutional freedoms. As direct authority for the statute's constitutionality, the court cited *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), which upheld the Hatch Act provisions forbidding federal employees to take an active part in political campaigns. *L'Homme-dieu v. Board of Regents*, 276 App. Div. 494, 95 N.Y.S. 2d 443 (1950).

In the second round of litigation, a taxpayer's suit, the supreme court held the Feinberg Law unconstitutional in that it provided for guilt by association and denial of due process. *Lederman v. Board of Education*, 196 N.Y. Misc. 873, 95 N.Y.S. 2d 114 (1949). The appellate division reversed on the same grounds as in the other cases, and on the grounds that the Feinberg Law did not provide for guilt by association, since an employee might defend by denying membership, denying the organization advocates the overthrow of the government by violence, or denying that he had knowledge of such advocacy. *Lederman v. Board of Education*, 276 App. Div. 527, 96 N.Y.S. 2d 466 (1950). As a result of these actions the Board of Regents has been stayed from making any determination under the Feinberg Law. Consult note, 35 *Corn. L. Q.* 824 (1950), for detailed discussion of the litigation.

²⁷ Letter from the Attorney General dated October 6th, 1950.

²⁸ Consult the perceptive comment *Guilt by Association: Three Words in Search of a Meaning*, 17 *Univ. Chi. L. Rev.* 148 (1949).

²⁹ *Ibid.*, at 157 et seq.

³⁰ 12 *Fed. Register* 1935 (1947). Consult Durr, *The Loyalty Order's Challenge to the Constitution*, 16 *Univ. Chi. L. Rev.* 298 (1949).

³¹ As to the right of proscribed organizations, consult *Joint-Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (App. D.C., 1949) (no justiciable controversy), and *Designation of Organizations as Subversive*, 48 *Col. L. Rev.* 1051 (1948), on the parallel federal question.

clear case of the Communist Party.³² His right to appeal to the courts for review of the administrative finding in this matter is questionable.³³ He may deny membership or plead resignation in good faith. The rule of evidence runs from ten days after the publication of the listings, but the presumption runs despite resignation before that time in the absence of a showing of good faith.³⁴ If good faith means merely accepting the Regents' determination as to the organization's character the law operates to deprive organizations of members.³⁵ Or it operates to inform stupid teachers of the aims of the organizations they belong to. If it means good faith in that he no longer subscribes to the doctrines of the organization, it raises the guilt by association problem in an acute form for the teacher who wishes to defend himself in the last, alternative way: he may deny that his membership in the organization was such that it shows any personal advocacy of the illegal overthrow of the government. The possibility of a teacher joining a proscribed organization for other reasons, such as support of limited local objectives, or in the hope of altering the aims of the organization, is neatly disposed of by the Attorney General. "As the Court pointed out in *National Maritime Union v. Herzog*, 78 F. Supp. at page 170, aff'd 334 U.S. 854 'if a member of such [a] group is ignorant of its aims, his ignorance is enough to disqualify him for a responsible post. If he is aware of the aims his enmity to them is too weak to compel him to forego association with a group pursuing those aims.'"³⁶ If a teacher is a member of a proscribed organization there are two simple and exhaustive possibilities: he is a fool or a knave. This being so, membership in a proscribed organization must disqualify the teacher. If the doctrine of guilt by association does not prove to be part of the Feinberg Law, it will be because the Board of Regents interprets the law in a manner radically different from that of the Attorney General.

The Appellate Division asserted that the prima facie provision of the law was merely a change in an evidentiary procedure and that no one had a vested right in a rule of evidence. This is hornbook law, but it does not follow that a rule of evidence may abridge the basic requirement of due process of law in regard to a fair hearing by administrative agencies. If the question is, as the State says, "personal advocacy," the association merely being presumptive evidence thereof, it is difficult to see how an individual might have a fair hearing on the personal "guilt" question under the law or at least under the interpretation of the law given by the Attorney General.

³² Consult Judge Medina's charge to the jury in the Communist case, *United States v. Foster*, 9 F.R.D. 367, 373 (1949).

³³ See *Friedman v. Schwellenbach*, 159 F. 2d 22 (App. D.C., 1946), cert. den. 330 U.S. 838 (1947).

³⁴ Regents Rules on Subversive Activities § 255(2). The law itself mentions only membership.

³⁵ This would seem to raise a free speech question. But see *American Communication Ass'n v. Douds*, 339 U.S. 382 (1950).

³⁶ *Thompson v. Wallin*, New York Court of Appeals (1950), respondent's brief at 77.

II

The University of California has for over a year been torn by controversy³⁷ over various "loyalty" oaths and contract clauses³⁸ that have been added to the constitutionally required oath³⁹ as a condition of employment. In April the Board of Regents adopted a compromise whereby nonsigners might appear before the Faculty Committee on Privilege and Tenure as an alternative to signing the oath.⁴⁰ The Regents, however, reserved final judgment in such cases to themselves.⁴¹ In July the Regents followed the recommendation of the Committee and reappointed forty nonsigners. They did not reappoint 157 nonfaculty employees (below the rank of instructor or nonacademic). This may be attributed in part to the normal labor turnover.⁴² In August the Regents reversed their action on the "approved" nonsigners, who because of five signings and three resignations were only 32 in number, and ordered them to sign.⁴³ Thereupon a group of twenty "approved" nonsigners petitioned the third district court of appeals for a writ of mandate ordering the Regents to issue them letters of appointment.⁴⁴

The petitioners urged that their positions were public offices, and therefore their appointments at the July meeting were irrevocable.⁴⁵ While the California law is to the effect that appointments to public offices are irrevocable,⁴⁶ there is no holding as to whether professors are public officers. In view of the fact that the University of California is a constitutional department of government⁴⁷ and that its most vital functions are performed by the faculty, it would seem the better rule to hold that faculty members are public officers.

³⁷ Consult Stewart, *The Year of the Oath* (1950).

³⁸ Typical of the various oaths and contract clauses is: "Having taken the constitutional oath of office required of public officials of the State of California, I hereby formally acknowledge my acceptance of the position and salary named, and also state that I am not a member of the Communist Party or any other organization which advocates the overthrow of the Government by force or violence, and that I have no commitments in conflict with my responsibilities with respect to impartial scholarship and free pursuit of truth. I understand that the foregoing statement is a condition of my employment and a consideration of payment of my salary." Resolution of the Regents of the University of California, April 21st, 1950.

³⁹ Calif. Const. Art XX, § 3.

⁴⁰ Resolution of the Regents of the University of California, April 21st, 1950.

⁴¹ *Ibid.*

⁴² Minutes of the Regents' Meeting of July 21st, 1950; Stewart, *The Year of the Oath* 139 (1950).

⁴³ Minutes of the Regents' Meeting of August 25th, 1950.

⁴⁴ Petition for Writ of Mandate, District Court of Appeals, Third District, State of California, No. 7946 (1950).

⁴⁵ Points and Authorities in Support of Petition for Writ of Mandate, District Court of Appeals, Third District, State of California, No. 7946, at 8 (1950).

⁴⁶ *MacAlister v. Baker*, 139 Cal. App. 183, 33 P. 2d 469 (1934).

⁴⁷ Calif. Const. Art XX, § 3.

The relatively small number of cases expounding⁴⁸ this view may well be due to the tendency to decide these cases on the question of "the right to work for the state." If the California professors are not public officers, they have no contractual right to be employed, whatever the understanding may have been as to the "morally" binding effect of the recommendations of the Committee on Privilege and Tenure. Only after acceptance of their appointment would they have an ordinary contractual claim. The state, like any other employer, may within constitutional and statutory limits employ whom it pleases.⁴⁹ Whether the Regents have gone beyond these limits depends in large part on the position taken on the second point the petition raises.

The petitioners urged as their second point that the California Constitution provides an oath for public officers and persons executing public trusts and forbids all other oaths or tests.⁵⁰ The newly required oaths, in words which the United States Supreme Court used in a similar connection, "presumes . . . guilt" and denies the right to "teach unless the presumption be first removed by their expurgatory oath—in other words . . . [it] assume[s] the guilt and adjudge[s] punishment conditionally."⁵¹ In the absence of any showing of disloyalty it is not surprising that members of the faculty of the University of California bitterly resent presumptions that the faculty is composed of conspiratorial and seditious persons. What is the purpose of establishing constitutional oaths as exclusive? In regard to a similar provision a New York court said the purpose was "to prevent the subjection of an official to any ordeal to ascertain his political, religious or social views."⁵² The petitioners have taken the constitutional oath and consider it adequate. Even if the constitutional oath were not exclusive in terms it would have to be interpreted to be so.⁵³ The Supreme

⁴⁸ One of the few square holdings to this effect is *Eason v. Majors*, 111 Neb. 288, 196 N.W. 133 (1923).

⁴⁹ While it is true that no one has a constitutional right to a job it is also true that everyone has a legally enforceable interest in not being unconstitutionally barred from a job, public or private. Aliens may not under the police power of the states be arbitrarily excluded from private employment by statute even where it is not a total exclusion, *Truax v. Raich*, 239 U.S. 33 (1915), though citizens may be given preference by the state as employer, *Heim v. McCall*, 239 U.S. 175 (1915); *Crane v. New York*, 239 U.S. 195 (1915). The state in its capacity as employer may not constitutionally establish discriminatory salary scales on the basis of race, *Alston v. School Board*, 112 F. 2d 992 (C.A. 4th, 1940). Federal employees have a legal interest in their jobs such that a legislative act depriving them of their jobs by name is punishment within the constitutional prohibition against bills of attainder, *United States v. Lovett*, 328 U.S. 303 (1946). The proper statement of the matter seems to be one of Justice Cardozo: "It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as a contractor by the government. It does not follow, however, that he may be declared disqualified . . . unless the proscription bear some relation to the advancement of the public welfare." *People v. Crane*, 214 N.Y. 154, 160, 108 N.E. 427, 431 (1915).

⁵⁰ Calif. Const. Art. XX, § 3.

⁵¹ *Cummings v. Missouri*, 4 Wall. (U.S.) 277, 325 (1866).

⁵² *Rogers v. Buffalo*, 3 N.Y. Supp. 671, 674 (1888).

⁵³ 1 Story on the Constitution § 625 (1891).

Court of New Jersey recently struck down as unconstitutional a loyalty oath which had been added to a constitutional oath not exclusive in terms on the ground that a power to add to the required oath would in effect be a power to amend the constitution.⁵⁴ What has been said about the oath applies as well to the contract clauses which were frank substitutes. The traditional American wariness of oaths lends strong support to the petitioners' view as to the adequacy of the long established constitutional oath.

Again, as in New York, the tradition of individual culpability gives way, this time to a presumption of guilt to be purged away by an oath. Since not one charge of disloyalty has been leveled at an individual faculty member the only clear cut results of the loyalty oath have been the dropping of 48 courses at the University this autumn⁵⁵ and the recommendation of a learned society that its members refuse employment at the University of California until the situation is clarified.⁵⁶ Whatever merits the oath may ultimately prove to have,⁵⁷ it can hardly be defended as having a beneficial effect on the University in its short term application.

III

The actions taken in regard to teachers' loyalty in New York and California pose a grave problem. The concrete results in New York are not clear. In California, the University's curriculum has suffered. To the extent that such loyalty probing is nationwide, it sets a potentially more dangerous pattern than the relatively isolated contexts of the *Scopes* and *Russell* cases.

If the legislatures of New York and California had taken the direct route of making it unlawful for communists or fellow travelers to teach, the standards of proof required to disqualify a teacher would be more rigid. However, solving the issue in such a manner would raise more serious problems. The prohibition against bills of attainder would seem to preclude them from naming the organizations to which no teacher could lawfully belong. To have made the presumption of "guilt" operate as an irrebuttable one, with the proscribed organizations and affiliations to be determined by an administrative agency, would have set up an absolute doctrine of guilt by association, even though it would have avoided the bill of attainder objection. It would also mean a more stringent restriction on the traditional freedom of speech. This the legislatures are apparently unwilling to do. Thus the paradox remains: to avoid the buckshot approach adopted in New York and California means complete acceptance of doctrines abhorrent to democratic ideals.

One must assume that the vast majority of teachers are loyal. One must as-

⁵⁴ *Imbrie v. Marsh*, 3 N.J. 578, 71 A. 2d 352 (1950).

⁵⁵ N.Y. Times, p. 1, col. 2 (Sept. 19, 1950).

⁵⁶ The American Psychological Association has taken this action. N.Y. Times, p. 19, col. 2 (Sept. 9, 1950).

⁵⁷ The ultimate merits of loyalty oaths in California will probably be decided on quite different grounds as the State of California has enacted a law requiring a loyalty oath of all state employees. N.Y. Times, p. 23, col. 2 (Oct. 4, 1950).

sume that they are in the best position to detect disloyalty, and that they will be alert to the danger of seditious persons in the schools. It is more for the regents, the courts, and the legislatures, with whom the ultimate safeguarding of liberty rests, to guard against the schools becoming forums for partisan political maneuvering.

If it is the common report that our schools are infiltrated with "subversive persons" it is also the common report that the schools face a crisis in giving Americans the education they must have. If they are to meet that crisis, not only the physical problems of buildings and finance must be solved, but the problem of personnel must be conquered. A pattern of constant testing of teachers for political innocuousness is hardly likely to draw the sort of teacher who would imbue children with a vigorous love of justice, democratic principles, or country.

Socrates, answering the common report that he was a subversive and a corrupter of youth, said of one of his accusers: "He says that I am a doer of evil and corrupt the youth, but I say to men of Athens, that Meletus is a doer of evil in that he pretends to be in earnest when he is only in jest and is so eager to bring men to trial from a pretended zeal and interest in matters in which he really never had the smallest interest."⁵⁸

RAILROAD LABOR DISPUTES AND THE NATIONAL RAILROAD ADJUSTMENT BOARD

In two cases decided in the spring of 1950,² the Supreme Court, by a new construction of the 1934 amendments to the Railway Labor Act (RLA),² conferred upon the National Railroad Adjustment Board (NRAB) exclusive primary jurisdiction of disputes involving the interpretation and application of collective-bargaining agreements in the railroad industry. The effect of these decisions is to deny parties to the disputes initial resort to state and federal courts, and to limit judicial consideration of these controversies mainly to suits in federal courts for the enforcement of NRAB awards. This holding invites a closer scrutiny of the NRAB's internal operation and its relation to the system of collective bargaining in the railroad industry.

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The courts have come to regard collective-bargaining agreements as contracts which may be enforced by any employee who is covered by them,³ regard-

⁵⁸ Plato, *Apology*, Works of Plato 67 (Mod. Lib. ed., 1928).

² *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950); *Order of Ry. Conductors v. Southern R. Co.*, 339 U.S. 255 (1950).

² 44 Stat. 577 (1926), as amended, 48 Stat. 1185 (1934), 45 U.S.C.A. § 151 (1943).

³ An early difficulty with the suit to enforce a collective-bargaining agreement as a contract was found by some courts in the lack of consideration from the individual employee who