

have dominated the will of third persons, causing them to sever economic relations with the actors, producers and distributors. In light of existing tort principles, therefore, harms thus inflicted appear to be actionable.

Non-governmental organizations frequently attempt to impose their will upon non-members by an effective display of power. An individual whose economic expectancy is impaired by the activities of an organization, but who is not protected by the courts for lack of a constitutional or contractual remedy, should not remain unprotected. Principles in the law of torts may provide his remedy, and at the same time offer a means for restraining the excessive zeal of a stimulated organization. When applying these principles, a court must evaluate delicately balanced private and social interests and visualize the impact upon society of permitting or disallowing continuation of the particular activity in which the organization has engaged.

## EFFECTIVENESS OF STATE ANTI-SUBVERSIVE LEGISLATION

Communism poses a unique threat to the existence of this nation. Ordinarily the enemies of democracy associate themselves with the imperialistic aspirations of certain nations; but while Communism is identified with the expansionist aims of Russia, it also constitutes an international conspiracy which defies identification of its members by the characteristics of nationality, color, or creed. An adherent to this conspiracy may be a known, respected and educated American citizen who is nevertheless subservient to the philosophy of Communism. All states have enacted laws to protect their citizens from such persons. The objective of this discussion is to examine the propriety of the trend in state legislative efforts to combat the threat of Communism.

Of the many baneful facets of Communism, perhaps the most detestable is the paradoxical utilization of constitutionally guaranteed rights by Communists to protect themselves from the imposition of punishment and disabilities by a government which they seek to overthrow by force and violence.<sup>1</sup> This "use" of the Constitution to parry

---

1. The most frequently invoked constitutional guaranty is the right against self-incrimination. The prevalence of Congressional and state hearings accounts for this. However, defenses relied upon by Communists during their prosecution under subversion and sedition statutes are those of the First and Fourteenth Amendments.

For examples of reliance on the privilege against self-incrimination see *Hearings before the Committee on Un-American Activities House of Representatives on Com-*

attempts intended to control Communism within the bounds of legality has caused emotional antipathy and thus encouraged recourse to practices of questionable constitutionality.<sup>2</sup>

A portion of the burden of combating the Communist menace falls upon the legislature. The problem which confronts it can be stated quite simply: Measures must be adopted which will provide adequate protection from Communist subversive efforts, yet those measures and their enforcement must not encroach upon constitutional rights. Simplicity ends with that statement. Endeavors to control this menace must be confined to a narrow path of legality, because one of the few distinguishing characteristics of persons dedicated to this purpose is discernible to others in manifestations of beliefs or in the exercise of constitutionally protected rights and seldom in other overt acts. Zealous

---

*Communist Activities in the Philadelphia Area*, 82d Cong., 2d Sess. 4333-4340 (1952); *Hearings before the Committee on Un-American Activities House of Representatives on Communist Activities in the Chicago Area—Pt. I*, 82d Cong., 2d Sess. 3691-3696 (1952); *Hearings before the Committee on Un-American Activities House of Representatives on Methods of Communist Infiltration in the United States Government*, 82d Cong., 2d Sess. 3388-3395 (1952). See also Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181, 213-222 (1948); Note, 51 COL. L. REV. 206 (1951). Comprehensive studies of the Congressional investigative power may be found in a symposium *Congressional Investigations*, 18 U. OF CHI. L. REV. 421 (1951), and Boudin, *Congressional and Agency Investigations: Their Uses and Abuses*, 35 VA. L. REV. 143 (1949). State investigations have been discussed too: Harper, *Legislative Investigation of Un-American Activities Exhibit A: The Tenny Committee*, 39 CALIF. L. REV. 502 (1951).

2. *E.g.*, the Oklahoma statute invalidated in *Wieman v. Updegraff*, 344 U.S. 183 (1952). The Supreme Court determined that the law violated due process because it demanded a loyalty oath of state employees and officers that they did not hold membership in any organization listed by the United States Attorney General as subversive. The basis of the decision was the statute's failure to distinguish between knowing and innocent membership.

The extent to which Congress has been encouraged to adopt legislation without considering constitutional requirements is appalling. The representative of the Veterans of Foreign Wars, while appearing before the Un-American Activities Committee, counseled: "We also insist this committee and the Congress ought not to be influenced by what a future Supreme Court might rule on some future issue involving a law that would definitely point to the elimination of the Communist Party in the United States. The enactment of such a law would once and for all sharply define the most important issue facing us today, an issue which, unless solved, bears the indelible imprint of our decline and fall as a great nation." *Hearings before Committee on Un-American Activities on H.R. 3903 and H.R. 7595*, 81st Cong., 2d Sess. 2141 (1950).

Congressmen themselves are not immune to this notion as is evidenced by the contention of Representative White of California. This excerpt is a rejoinder to previous comments endorsing deportation or internment in concentration camps for those who advocate overthrow of government by force: ". . . President Lincoln during the Civil War, because we were at war, had in effect suspended the Constitution and thrown people into jail who were sympathetic with the South and plotting against the Union. When he received complaints on the matter Lincoln answered that we could save the Constitution later—we had to save the country first. Again we are at war, and if it is necessary to save the country, we should be able to throw traitors into jail." 96 CONG. REC. 14853 (1950). For a discussion of this problem see Cohen and Fuchs, *Communism's Challenge and the Constitution*, 34 CORNELL L.Q. 182 (1948).

legislators, frustrated by the lack of discoverable Communist conduct, other than exercise of constitutional rights, enact measures approaching, and sometimes exceeding, the bounds of constitutional legislation, because they impose sanctions on rights rather than on properly prohibited conduct. As a result of such legislation, an unenviable task falls upon the courts; they are compelled either to uphold questionable measures, thereby establishing dangerous precedents for future minorities, or to strike them down, thus proscribing certain of the legislatures' attempts to protect our democratic form of government. Quite naturally all levels of legislative bodies, from Congress to City Council, have participated in the effort to enact laws which will effectively curb all subversive persons and their plots.

The Internal Security Act of 1950 presaged current federal policy on subversive activities.<sup>3</sup> This legislation, which has provoked severe criticism on the part of legal students, has served as a model for many state laws.<sup>4</sup> This imitation is probably due to a general feeling that the type of legislation enacted by the federal government would be effective because of Congress' more intimate knowledge of the intricacies of subversive activities.

While most of these laws were enacted to control Communism they are applicable to a great variety of disloyal activities whatever their motivation.<sup>5</sup> Many such statutes have been in force since the latter portion of World War I or the early 1920's,<sup>6</sup> but numerous jurisdic-

3. 64 STAT. 987 (1950), 50 U.S.C. § 781 *et seq.* (Supp. 1952).

4. For a lengthy critique see Note, 51 COL. L. REV. 606 (1951). See also Comment, 46 ILL. L. REV. 274 (1951); Senator McCarran's own analysis may be found in 12 U. OF PITT. L. REV. 481 (1951).

Many states have adopted registration provisions quite similar to those of the Internal Security Act. ALA. CODE tit. 14, § 97 (4) (Supp. 1951); ARK. STAT. ANN. § 41-4125 (1951); LA. REV. STAT. ANN. § 14:360 (Supp. 1952); MONT. REV. CODES ANN. § 94-4418 (Supp. 1951); N.M. STAT. ANN. § 3-108 (Supp. 1951); S.C. CODE §§ 16-584-16-585 (1952); TEX. STAT., REV. CIV. art. 6889-3, § 4 (Supp. 1952). Indeed five jurisdictions, California, Hawaii, Louisiana, Michigan, and New York, had enacted registration laws prior to adoption of the federal act. See GELLHORN, THE STATES AND SUBVERSION 409-410 (1952).

5. Many states have laws on several of the following subjects: Treason, rebellion and insurrection, sedition, criminal syndicalism, criminal anarchy, red flag laws, sabotage, masks and disguises, exclusion of groups from political recognition, exclusion of persons from public, elective, or state office, registration of certain groups, teacher's loyalty oaths, and use of educational facilities. *Id.* at 394.

6. There exists two major works dealing with governmental control of subversion, both of immeasurable value. They are CHAFEE, FREE SPEECH IN THE UNITED STATES (1941), and a series of volumes written under the auspices of Cornell University.

Professor Chafee's renowned book deals with post World War I sedition statutes at pages 141-195. The Cornell series on civil liberties includes as well as Professor Gellhorn's book, *op. cit. supra* note 4, GELLHORN, SECURITY, LOYALTY, AND SCIENCE (1950); BARRETT, THE TENNY COMMITTEE (1951); CHAMBERLIN, LOYALTY AND LEGISLATIVE ACTION (1951); COUNTRYMAN, UN-AMERICAN ACTIVITIES IN THE STATE OF WASH-

tions have added new laws which are the primary source of concern for those interested in controlling Communist tactics on the state level.<sup>7</sup> Counties and municipalities also have imposed restrictions on subversive persons by some of the most stringent measures yet enacted.<sup>8</sup>

---

INGTON (1951); CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES (1952); Bontecou, a forthcoming study of the President's loyalty program; and a conclusion by Professor Cushman. An extensive compilation of state subversion statutes can be found in Appendices A and B, GELLHORN, *op. cit. supra* note 4, at 393.

7. The following states have enacted at least one and in many instances several statutes concerning subversion since that date: Alabama, Arkansas, California, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Washington. The laws enacted in these jurisdictions are the product, in most cases, of one legislative session. The sessions of 1953 will probably bring forth another large quantity of subversion statutes.

8. Control of Communism by local authorities is a neglected facet of academic subversion-investigation research. Of course, the great difficulty of making any sort of systematic study is the lack of information on ordinances and unavailability of lower court decisions.

Professor Gellhorn declares that thirty cities and three counties have laws concerning Communism including Birmingham, Alabama; Jersey City, New Jersey; McKeesport, Pennsylvania; Miami, Florida; Los Angeles, California; Cumberland, Maryland; and New Rochelle, New York. Jacksonville, Florida, concluded that all persons distributing Communist literature or communicating with former or present Communists were themselves Communists and should be excluded from the city. Among other constitutionally questionable ordinances and practices Professor Gellhorn recounts the practice of the chief of police of a western city who, because he had no statutory authority prohibiting Communists to assemble or read their literature, was forced to arrest five persons for "disorderly conduct." For further instances see GELLHORN, *op. cit. supra* note 4, at 382-385.

The tribulations of Detroit's extensive program are retold at length by Professor Mowitz. *Id.* at 204-230.

IN EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (1952), the authors set forth this example of local subversion legislation:

"Whereas the City of Lafayette, Indiana, is chargeable with the responsibility of preserving the individual rights guaranteed by the Constitution of the State of Indiana, the Constitution of the United States of America and our Declaration of Independence, now therefore

"BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF LAFAYETTE, INDIANA, AS FOLLOWS:

"Section 1. Hereafter it shall be unlawful for any person, group of persons or corporation, either singly or collectively to promote, advocate, support, encourage, advertise, disseminate or otherwise advance either by words, signs, gestures, writings, pictures or other form of communication the ideology known as Communism as herein defined." *Id.* at 463 n.5.

"Loyalty programs for municipal or county employees exist in a number of areas, including, in addition to Los Angeles County, Columbus, Detroit, Topeka, Kansas City and Dade County, Florida. . . ." *Id.* at 578 n.3.

Anti-subversive ordinances are of two types; those requiring registration of Communists, and those banning Communists from the municipality. While there is no need to describe the familiar registration law, the interdiction type mandate is worthy of notice. For example, Birmingham provided that Communists were to be fined \$100 and imprisoned up to 180 days. In addition there was a presumption that one belonged to the Communist Party if he was found "in any secret or non-public place in volun-

While Congress was divided as to what specific means should be adopted to control Communist-instigated disloyalty, the states have manifested even greater dissimilarity as to the precise measures most appropriate for this purpose. Therefore, while all these enactments have but one underlying objective, obviation of all activities directly or indirectly furthering the purpose of overthrowing government by force, some unusual and seemingly unrelated provisions now purport to add their effectiveness to the struggle against subversion. While most subversion legislation will undergo constitutional challenge, these unusual provisions will be subjected to strenuous objections both as to their constitutionality and their wisdom. This will be the legal arena in which the states' attempts to combat Communism will be tested and out of which may evolve a new concept of personal liberties as guaranteed by the First and Fourteenth Amendments.

Examination of several representative statutes will afford opportunity to consider the propriety of the trend in state subversion legislation. Some legislation proscribes membership in the Communist Party, in a subversive organization, or in any group advocating overthrow of government by force or violence.<sup>9</sup> With one exception, these statutes are so drafted as to require knowledge of the organizations' purpose before sanctions can be imposed which inflict in one instance, up to twenty years' imprisonment.<sup>10</sup> The nation's educational system has often been the target of those individuals whose task it is to ferret out disloyal persons and their activities, consequently, it is not surprising

---

tary association or communication with any person or persons established to be or to have been members of the Communist Party." *Id.* at 599 n.7.

"The number of these ordinances passed has not been officially calculated, but it is probably in the neighborhood of 100. See Marquis Child's estimate of 150, *New Haven, Journal Courier*, Feb. 16, 1951. Some of them have been declared unconstitutional by state and Federal lower courts, including those in Birmingham, Jacksonville, Miami, Los Angeles, Erie and McKeesport." *Ibid.*

See also Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383, 388 n.25 (1951).

9. Of course, there is great dissimilarity in the various state acts proscribing membership in subversive organization. A list of states which have these laws can be found in GELLHORN, *op. cit. supra* note 4, at 396. Statutes enacted since that date are: IND. ANN. STAT. § 10-5204 (Burns Supp. 1951); MISS. ANN. LAWS c. 264, §§ 16A, 17, 18 (1952); PA. STAT. ANN. tit. 18, § 3811 (Supp. 1952); unlawful to hold membership in the Communist Party or any group advocating alteration or overthrow of government by revolution or which engages in any un-American activities; MD. ANN. CODE GEN. LAWS art. 85A, § 3 (1951); N.Hamp. LAWS 1951, c. 193, § 3; WASH. REV. CODE § 9.81.030 (1951); unlawful to hold membership in subversive organizations.

10. The Indiana statute, *supra* note 9, does not on its face require knowledge of the organization's purposes. However, Indiana courts could construe the act to require scienter. *Cf. Lederman v. Board of Education*, 276 App. Div. 527, 530, 96 N.Y.S.2d 466, 470-471 (1950), *aff'd sub nom. Thompson v. Wallin*, 301 N.Y. 476, 494, 95 N.E.2d 806, 814-815 (1950), *aff'd sub nom. Adler v. Board of Education*, 342 U.S. 485, 494 n.8 (1952).

that a portion of the laws under consideration are concerned with that subject.<sup>11</sup> Some states deny the use of educational facilities to organizations which would use them to accomplish the overthrow of government by force.<sup>12</sup> The laws of other states act directly against the student either by requiring a loyalty oath at enrollment or by prohibiting advocacy of, or membership in an organization which advocates, violent governmental resolution.<sup>13</sup> Another jurisdiction directs that no part of state funds shall be used to pay travel expenses of a visitor to institutions of higher learning if he is listed as subversive.<sup>14</sup>

11. Education and subversion have received the attention of several scholars. EMERSON AND HABER, *op. cit. supra* note 8, at 823-829, 832-839. See also Marshall, *The Defense of Public Education from Subversion*, 51 COL. L. REV. 587 (1951). The author contends that we have a "delicate balance" to maintain between intellectual freedom on the one hand and protection of our educational system from subversion on the other. Of particular interest is the section on proof at 598-602. For an extensive analysis of New York's efforts to provide a democratic educational system without inviting Communist indoctrination see Comment, *The 'Little Red Schoolhouse' and the Communist*, 35 CORNELL L.Q. 824 (1950); as to Nebraska's experiment with subversion and education see Note, 29 NEB. L. REV. 485 (1950).

The problem of loyalty and the education system in New York are considered at length by CHAMBERLIN, *op. cit. supra* note 6, at 153-202; in California by BARRETT, *op. cit. supra* note 6, at 105-176; in Washington by COUNTRYMAN, *op. cit. supra* note 6, at 72-149, 186-285; in Illinois, GELLHORN, *op. cit. supra* note 4, at 54-139.

The effects of the security program on university research and scientific discovery are elaborated in GELLHORN, SECURITY, LOYALTY, AND SCIENCE 175-202 (1950).

12. CAL. EDUC. CODE § 19440 (1952); ILL. ANN. STAT. c. 138, § 138-042(8) (Supp. 1934-1949).

The Illinois statute is typical: "Whereas, the universities of America have been the breeding ground of a series of invidious Communist inspired organizations which have sought to instill in the hearts of American youth contempt and hatred for ideals to which the people of this great nation have been dedicated. . . .

"No trustee, official, instructor, or other employee of the University of Illinois shall extend to any subversive, seditious, and un-American organization, or to its representatives, the use of any facilities of the University for the purpose of carrying on, advertising or publicizing the activities of such organization."

13. TEX. STAT., REV. CIV. art. 2908(b) (Supp. 1950). Grounds for expulsion are quite comprehensive: No person may be enrolled or re-enrolled who (a) knowingly advocates the necessity or desirability of overthrowing government by force or adherence to a foreign nation in time of war between the United States and that country, (b) publishes or displays any matter urging overthrow of government by force or adherence to the foreign nation, (c) organizes or becomes a member of any group which advocates or encourages governmental overthrow by force or adherence to a foreign country, § 4. It should be noted that subsection (a) requires scienter while neither (b) nor (c) do.

LA. REV. STAT. ANN. § 42:51 *et. seq.* (Supp. 1952). Section 4 provides that no student shall knowingly advocate the necessity or desirability of violent governmental revolution or adherence to a foreign nation in the event of war between that country and the United States. Coverage of the statute is exceedingly broad: "Student in a public educational institution" as used in this act shall mean and include every student enrolled in any public school of the State, or in any state-supported trade school, vocational school, college, or university."

14. S.C. Laws 1950, c. 1053, § 68. Trustees of Ohio State University have reached a similar result by adopting a resolution banning disloyal public speakers

Some subversive-control statutes deny an applicant admission to the bar or prescribe that an attorney may be disbarred if he is a subversive person or advocates overthrow of government by force.<sup>15</sup> Other states forbid the payment of welfare funds to persons proposing a change in the form of government by extra-constitutional means or to members of an organization which advocates overthrow of government by force.<sup>16</sup> An expression of legislative policy urges that vacancies in employment due to induction into the armed forces not be filled by Communist Party members.<sup>17</sup> Another measure stipulates that a subversive organization shall not transmit any anonymous printed matter to non-members.<sup>18</sup> One enactment invalidates bequests and devises made to any association "so constituted as to use" them for subversion.<sup>19</sup>

Although only one of these statutes has been ruled upon by courts whose opinions are reported, an analysis of their constitutionality will suggest the probable arguments and defenses which could be plausibly urged and may predict possible results of litigation. Constitutional challenge of the subversion statutes under consideration will probably be posited on the grounds that certain of these laws are bills of attainder, that they deny equal protection of the law, that they violate the requirements of due process of law, either as to "reasonableness" or as to specific rights guaranteed by the First Amendment, or that they "conflict" with federal law and thus must fall as unconstitutional impositions on the Congressional domain.<sup>20</sup>

The bill of attainder interdiction of the federal constitution proscribes any state or national legislative conviction imposing some form

---

from the campus. There have been similar occurrences on other campuses. EMERSON AND HABER, *op. cit. supra* note 8, at 832-836.

15. CAL. BUS. AND PROF. CODE §§ 6064.1, 6106.1 (Supp. 1951); Md. Laws 1952, c. 27, § 1, amending MD. ANN. CODE GEN. LAWS art. 10, § 3c (Cum. Supp. 1947).

16. OHIO GEN. CODE ANN. § 1345-6 c(4) (Supp. 1952), this law does not on its face require knowledge of the proscribed organization's purposes; PA. STAT. ANN. tit. 62, § 2509 (Supp. 1952).

17. MONT. REV. CODES ANN. § 77-606 (1947).

18. MONT. REV. CODES ANN. § 94-4424 (Supp. 1951).

19. Mich. Laws 1951, No. 157, amending MICH. STAT. ANN. § 27-3178 (71a).

20. Of course, other modes of challenge may be available under state constitutions, but these lie beyond the scope of this discussion.

Another forceful argument can be made that many Communist control laws are unconstitutionally vague. Since many of these statutes inflict criminal sanctions, the familiar judicial maxim, void for vagueness, is particularly applicable. For example, Indiana declares one a felon and imposes three years of imprisonment because of membership in a group which engages in "any un-American activities." IND. ANN. STAT. § 10-5204 (Burns Supp. 1951). Reasonable men quite probably would differ as to what were un-American activities. On the other hand Michigan invalidates bequests made to organizations which would use them for subversion and adds that "subversion" is defined in its constitution. Mich. Acts 1951, No. 157, amending MICH. STAT. ANN. § 27-3178 (71a). Thus, this law enables everyone to learn precisely the proscribed conduct.

of punishment on a specified individual or clearly identified group.<sup>21</sup> It may, although does not necessarily have to, be *ex post facto*. An Indiana enactment authorizes one to three years imprisonment merely because of membership in the Communist Party or in any organization which advocates overthrow or alteration of government by force or which "engages in any un-American activities."<sup>22</sup> Nothing in the statute requires the prosecutor to establish scienter; mere affiliation with such groups renders one a felon. The Supreme Court has invalidated a much less stringent provision on due process grounds because it imposed disabilities for membership in similar organizations without requiring knowledge of the groups' purposes.<sup>23</sup> Of course, Indiana

---

21. U.S. CONST. Art. I, §§ 9, 10.

In *Cummings v. Missouri*, 4 Wall. 277, 323 (U.S. 1866), Mr. Justice Field, speaking for the Court, thus defined a bill of attainder: "A bill of attainder is a legislative act, which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

"These bills are generally directed against individuals by name; but they may be directed against a whole class. . . ."

22. IND. ANN. STAT. § 10-5204 (Burns Supp. 1951).

23. *Wieman v. Updegraff*, 344 U.S. 183 (1952). While there is a substantial difference between the Indiana and Oklahoma statutes, the former law presents even stronger grounds for requiring knowing membership because under its provisions an individual will not merely lose state employment, as in the *Wieman* case, but will be subjected to extended imprisonment and severe fine. Therefore, on this basis alone the Indiana law may be unconstitutional because it contravenes due process. Of course, the state courts could interpret it to require scienter thus obviating all bill of attainder contentions; see note 10 *supra*.

Speaking for the Court, Mr. Justice Clark warned: "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. They had joined, [but] did not know what it was; they were good, fine young men and women, loyal Americans, but they had been trapped into it—because one of the great weaknesses of all Americans, whether adult or youth, is to join something.' [quoting J. Edgar Hoover] At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influence which originally led to its listing.

". . . Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner*, *Adler* and *Gerende* is decisive. Indiscriminate classification of innocent with knowing activity must fall as



courts could construe the statute to require scienter, as did the New York Court of Appeals with its Feinberg Law,<sup>24</sup> thus removing the bill of attainder objection because the prosecutor would then have to establish the defendant's personal knowledge of the Communist Party's purposes. When proof of some portion of the crime is required in court, then the necessary characteristic of legislative conviction is not present. A Massachusetts mandate proclaims the Communist Party a subversive organization and declares that the property of subversive organizations shall escheat to the state.<sup>25</sup> Thus, in neither of these statutes is any judicial action required save the effectuation of the punishment or penalty.

While there is a possibility that the Montana law stipulating the legislative policy that employment vacancies not be filled with members of the Communist Party could also be questioned on this same ground, the "punishment" requirement seems to weaken this challenge.<sup>26</sup> However, there are well-justified reasons for urging that certain Maryland and California statutes constitute bills of attainder because they purport to deny subversive persons admission to the bar, or direct disbar-

an assertion of arbitrary power. The oath offends due process." *Wieman v. Updegraff*, *supra* at 190-191.

24. See note 10 *supra*.

25. MASS. ANN. LAWS c. 264, §§ 16A, 17, 18 (1952).

26. Finding "punishment" in some form has been one of the greatest barriers to declaring legislation a bill of attainder. The majority in *United States v. Lovett*, 328 U.S. 303, 316 (1946), proclaimed that "[t]his permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." Mr. Justice Frankfurter, concurring, declined to find a bill of attainder. ". . . The amount of punishment is immaterial to the classification of a challenged statute. But punishment is a prerequisite.

". . . The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomfiting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. . . ." Thus, harm must be inflicted with the intent to punish by such action; since it was clear that neither the Senate nor the President intended the harm imposed by the Congressional statute, there could be no "punishment." *Id.* at 324.

In *Garner v. Board of Public Works*, 341 U.S. 716 (1951), the Court relied heavily on Mr. Justice Frankfurter's words in the *Lovett* case and resolved that "[w]e are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment." *Id.* at 722. Therefore, a Los Angeles ordinance requiring an affidavit of city employees that they had not in the five previous years advocated or belonged to an organization which advocated violent governmental revolution was merely a means of testing the qualifications of an employee and not punishment. *Id.* at 720-723. *Cf.* *Hawker v. New York*, 170 U.S. 189 (1898); *Dent v. West Virginia*, 129 U.S. 114 (1889).

The Supreme Court struggled with this same "qualification-punishment" issue in *Cummings v. Missouri*, 4 Wall. 277 (U.S. 1866). However, in this instance the tribunal found that a Congressional law was actually not a qualification but a form of punishment administered in the guise of a qualification.

ment of such individuals.<sup>27</sup> These laws compel both applicants for the bar and practicing attorneys to forego their chosen profession merely by legislative decree. While there may be a serious question as to whether the classification "subversive person" is sufficiently precise to satisfy the "definite person or class" requirement, there should be little doubt that this deprivation of profession is punishment within the meaning necessary for finding a bill of attainder.<sup>28</sup>

Equal protection concerns, of course, legislative classification and its reasonableness in relation to the purposes of the act.<sup>29</sup> Some scholars maintain that, as the courts have interpreted this mandate of the Fourteenth Amendment, it requires that those similarly situated be similarly treated.<sup>30</sup> Examination of two statutes should illustrate the possible value of this challenge to all such legislation.

Ohio denies unemployment compensation to persons who are members of proscribed organizations or who advocate violent governmental

27. See note 15 *supra*.

28. See note 26 *supra*. As revealed by the cases in the cited note, the Court must draw a fine distinction between punishment and qualification. Since judicial acceptance of the exercise of state police powers, the imposition of minimum acceptable standards on certain callings is not uncommon. Yet under present attitudes on substantive due process, many courts hesitate to invalidate any exercise of the police power. However, when the exercise of such power contravenes the constitutional proscription against bills of attainder, no court should hesitate to invalidate a statute. Thus, the ultimate question facing the courts is whether statutes purporting to prescribe qualifications are actually qualifications to be measured against the constitutional yardstick of due process or whether they are in reality merely forms of punishment to be judged by the bill of attainder criterion.

In *United States v. Lovett*, 328 U.S. 303 (1946), Mr. Justice Frankfurter, concurring at 318-330, urged the courts to look to the intent with which the legislature inflicts the alleged qualifications. If they are intended to be punishment, then, of course, the statute may be a bill of attainder. Yet hinging the constitutionality of a statute on the tenuousness of legislative "intent" when not absolutely necessary should be avoided. The courts might well pass over legislative intent and first examine the effect of the statute on the circumstances to which it has been applied. And if the legislature can prove that in the circumstances the "qualification" is actually just that and thus a proper exercise of the police power, then no inquiry need be made into the argument that the statute is a bill of attainder. Thus, even if the legislature intended to inflict punishment but in so doing created a reasonable qualification as manifested in the facts of the case, the law would not be a bill of attainder. See Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 VAND. L. REV. 603 (1951); Norville, *Bill of Attainder—A Rediscovered Weapon Against Discriminatory Legislation*, 26 ORE. L. REV. 78 (1947).

29. ". . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, §1.

30. Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949). The equal protection of the laws mandate has been but seldom used by the Supreme Court, and in those instances where it has been employed there is confusion as to its precise meaning. Since due process has fallen into disfavor, this guarantee may be the weapon used by the Court to protect personal liberties under subversion statutes. See also Antieau, *Equal Protection Outside the Clause*, 40 CALIF. L. REV. 362 (1952).

revolution.<sup>31</sup> The reasonable relation of such membership or disloyal advocacy of an applicant for compensation to the unemployment compensation program of the state is without expressed legislative justification and is not otherwise apparent.<sup>32</sup> Pennsylvania's welfare assistance act provides benefits for dependent children, aged persons, blind persons, and others who cannot maintain decent and healthful living standards, except that no person who advocates forceful governmental overthrow is eligible for assistance. But another proviso stipulates that blind persons shall not be denied assistance whatever they advocate. The relation between the maintenance of "decent and healthful" living standards and the propriety of denying welfare aid to a person who advocates revolution is not readily discernible. If it were, no reasonable distinction appears warranting the denial of assistance to, for example, aged subversives and permitting aid to blind subversives. Conjecture urges the conclusion that the legislature did not wish to enable subversive persons to "bite the hand that feeds them," yet it did not feel justified in withdrawing assistance from those who could not see. It can be argued that there is nothing unreasonable about treating subversive persons differently from loyal citizens, yet perhaps this does not justify their exclusion from these welfare laws. The need for welfare aid remains regardless of any advocacy or affiliation; consequently, the burden should fall on the state to prove that there is a need for making such a distinction.

Notwithstanding the questionable reasonableness of the relation of these provisions with their purpose, the present view of the equal protection of the law guarantee warns that state subversion legislation will not be invalidated on this ground. This potentially formidable judicial weapon has been successfully invoked almost exclusively where the classification racially discriminates.<sup>33</sup> Therefore the value of the equal protection mandate to those persons contesting the constitutionality of

---

31. See note 16 *supra*.

32. In addition, the Ohio statute seems to violate the necessity for scienter so recently held essential to comparable legislation by the Supreme Court. An applicant can be denied compensation if he is merely a member of an organization which advocates the overthrow of government by force. This act also demands an affidavit stating whether the affiant holds membership in such a group, again without mention of "knowing the purposes of the organization." Thus an individual seeking unemployment compensation may commit perjury with complete lack of *mens rea*. See the Supreme Court's comments in *Wieman v. Updegraff*, 344 U.S. 183 (1952), quoted *supra* note 23.

33. An example of the Supreme Court's reluctance to use the equal protection clause in cases not concerning racial issues is illustrated by *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947). There the Court upheld (5-4) a Louisiana enactment which in effect limited those who could be pilots to persons in whose family another member was already a pilot. In *Goessaert v. Cleary*, 335 U.S.

subversion legislation is minimal but contingent, of course, on alteration of present attitudes.<sup>34</sup>

It will be convenient initially to recognize two types of due process tests; that which requires legislation to have a rational basis and that which concerns due process as a medium through which the specific freedoms of the First Amendment are made applicable to the states. Of course, First Amendment guarantees would usually provide the more meritorious basis for urging the unconstitutionality of subversion laws, but the possible utilization of "rational basis" due process should not remain unexplored, particularly where it would be difficult to prove that a specific First Amendment freedom had been abridged. Michigan directs that the owner of property cannot devise or bequeath it to an organization so formed as to use it for subversion.<sup>35</sup> Yet the power to alienate and dispose of property is a property right.<sup>36</sup> If this mandate represents an unreasonable exercise of the police power, such abridgement of property rights denies due process of the law. If the purpose of the Michigan law is to prevent subversion, legislative decrees should be directed to those persons or organizations engaged in subversion actually using property for that purpose and should not abridge the right of persons to dispose freely of their property. The Massachusetts law, previously discussed as a bill of attainder, appears to offend due process.<sup>37</sup> Under its provisions, the property of a subversive organization escheats to the state; here too the reasonableness of the state's exercise of police power is questionable. While Massachusetts, unlike Michigan, addresses its enactment to subversive organizations, it boldly confiscates their property. Since such a group is defined as three or

---

464 (1948), the Court asserted the validity of a Michigan statute which prohibited women barmaids.

The only recent case deviating from this pattern is *Skinner v. Oklahoma*, 316 U.S. 535 (1942). Here a state law was invalidated because it provided for sterilization of felons convicted three times but exempted those convicted of certain crimes. Further liberalization of the Court's attitude on equal protection would make this clause a formidable weapon with which to challenge subversion legislation.

34. ". . . [T]he prohibition against discriminatory legislation [*i.e.*, equal protection of the laws] is a demand for purity of motive. It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility. . . . The imposition of special burdens . . . must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the proscribed motives replace a concern for the public good as the 'purpose' of the law, there is a violation of the equal protection prohibition against discriminatory legislation." Tussman and tenBroek, *supra* note 30, at 359.

35. See note 19 *supra*.

36. ". . . Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. . . ." *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

37. See note 25 *supra*.

more persons whose *purpose* is advocating overthrow of government by force or other "unlawful means,"<sup>38</sup> enforcement agencies need not linger until the actual advocacy. After the organization's purpose is determined, the property escheats to the state, yet the wrong (if advocacy is a wrong under the circumstances) need never occur. This closely resembles confiscating a person's automobile because sometime in the future he may operate it in a manner which would endanger human life; ordinarily the law stays its hand until a wrong has been committed or, at least, until the accused's conduct creates a clear and present danger of an evil which the state has a right to prevent. Both statutes appear to be beyond the bounds of due process.

The welfare law of Ohio, previously examined in reference to its susceptibility to challenge on equal protection grounds, represents the single instance in which one of the statutes here considered has been litigated.<sup>39</sup> An Ohio Court of Common Pleas sustained the validity of the unemployment compensation restriction when it was constitutionally questioned under both the Ohio Constitution and the First and Fourteenth Amendments.<sup>40</sup> The court considered challenges urging that the law was a bill of attainder and an imposition on the right of free speech and then surprisingly concluded that the law was "reasonable."<sup>41</sup> There was no discussion of the rational basis of the law, consequently the conclusion that it was "reasonable" appears to be a misuse of terminology. Long prior to this decision a federal district court, reviewing a federal statute requiring a loyalty oath by those seeking assistance under the Emergency Relief Appropriation Act,<sup>42</sup> remarked: "The purpose of the relief act was to alleviate human suffering throughout the United States. *There is no necessary or logical connection between the political or social beliefs of a person and his distress.*"<sup>43</sup> However, the opinion infers that inclusion of the omitted words "by force and violence" in the phrase denying assistance to those who advocate overthrow of the government would validate the statute. Yet including the omitted words found by the court to be essential to validity, one's advocacy of certain "political or social" doctrines surely does not per se render him more or less

---

38. MASS. ANN. LAWS c. 264, § 16 (1952).

39. See note 16 *supra*.

40. Dworken v. Collopy, 56 Ohio Abs. 513, 91 N.E.2d 564 (1950).

41. *Id.* at 531, 91 N.E.2d at 576.

42. United States v. Schneider, 45 F. Supp. 848 (1942).

43. (emphasis added) *Id.* at 850. In a second case reported in this same decision, the defendant was indicted for perjury because he failed to disclose that he was a Communist in order to secure employment with the Works Progress Administration. But the court refrained from ruling on the relation of employment under the W.P.A. to Communist affiliation. *Id.* at 851.

needful of assistance nor increase the logical connection between his beliefs and distress.

Among the freedoms protected in that category judicially termed due process which includes the guarantees of the First Amendment is the right to assemble peacefully. However, a number of states proscribe membership in subversive organizations or the Communist Party, with one state not even requiring knowledge of the Party's purpose.<sup>44</sup> No overt personal act, except membership, if such can be labelled "conduct" within the criminal law meaning of the term,<sup>45</sup> is prerequisite to guilt; mere affiliation and knowledge of the organization's aim exposes one to imprisonment ranging up to twenty years and/or \$10,000 fine. This expands guilt by association to entirely new areas of effectiveness for these laws inflict punishment only because a person has affiliated with others of perhaps similar convictions or perchance only with some legitimate common purpose.<sup>46</sup> The right of assembly has little meaning when laws such as these remain in force.

---

44. See notes 9 and 10 *supra*.

45. HALL, *PRINCIPLES OF CRIMINAL LAW* 13, 252-256 (1947).

46. See O'Brien, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592 (1948). Note especially the discussion at pp. 599-605 where the author reviews the youthful life of the proposition, guilt by association, and reflects on the substantive crime of conspiracy.

The determination of personal guilt by one's affiliations first found approval in *Kessler v. Strecker*, 307 U.S. 22 (1939). However, in *Schneiderman v. United States*, 320 U.S. 118 (1943), the vitality of the *Kessler* case was shaken when Mr. Justice Murphy, speaking for the Court, propounded that ". . . under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles. . . ." *Id.* at 136. The Court then held (5-3, Mr. Justice Jackson disqualified himself) that membership in the Communist Party and Communist League did not of itself establish that the defendant's United States citizenship had been procured illegally. See Balch, *Denaturalization Based on Disloyalty and Disbelief in Constitutional Principles*, 29 MINN. L. REV. 405 (1945); Maylott and Crystal, *The Schneiderman Case—Two Views*, 12 GEO. WASH. L. REV. 215 (1944).

In *Bridges v. Wixon*, 326 U.S. 135 (1945), the Court construed "affiliation" to require "less than membership but more than sympathy." *Id.* at 143. The statute under consideration made affiliation with an organization advocating forcible governmental revolution grounds for deportation. The Court refused (5-3, Mr. Justice Jackson not participating) to adopt a broad definition of affiliation thus limiting the scope of guilt by association. "Whether intermittent or repeated the acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition." *Id.* at 143-144. See Emerson and Helffield, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 91-94 (1948).

Much of the law pertaining to guilt by association concerns alien proceedings, but of course the subversion laws here considered are not restricted in applicability to aliens. Consequently, these laws demand extension of a doctrine with heretofore limited scope. The court which validates a law imposing penal sanctions for membership assumes the risk of severe criticism for adopting a doctrine not widely approved

Texas imposes a constitutionally questionable condition on the enjoyment of facilities of state-supported colleges and universities. Students who are members of an organization which, perhaps unknown to them, urges overthrow of government by force can be expelled from state-supported institutions.<sup>47</sup> Thus, the very persons likely to need education and understanding of the many benefits, rights, and freedoms of our nation could be denied that opportunity because they have affiliated with proscribed organizations.<sup>48</sup>

While the Supreme Court has declared that state infringement of the right to assemble contravenes due process of law,<sup>49</sup> nevertheless, these subversion statutes impose punishment or deny a nearly essential privilege for mere membership. The individual is not being punished for advocacy or other overt act but only for existing in a state of affiliation with a proscribed group. The Court similarly warned that while the state could abridge freedom of assembly, that was to be the exception. "The limitation upon individual liberty must have appropriate relation to the safety of the state."<sup>50</sup> The "appropriate rela-

---

in its present restricted application. See Note, 17 U. OF CHI. L. REV. 148 (1949). See note 72 *infra*.

47. See note 13 *supra*. Of course, this statute is merely an extension of guilt by association.

Louisiana, as well as Texas, has subjected the student to discriminatory regulation because of participation in subversive activities. In the former state a pupil enrolled in any public school or state-supported educational institution who advocates overthrow of government by force may be expelled. In Texas, the legislature has prescribed similar regulations though they are restricted to students in state-supported colleges and universities. Thus, students in both these states must supposedly forego educational opportunities because they urge overthrow of government by unlawful means, yet there is no mention of any danger to the state from this source. The actual cause of the Texas statute does not justify such an imposition on students.

"Irrked by a valuable Communist student from the University of Texas who insisted on testifying before legislative committees, the Texas legislature required faculty and students in state colleges to sign affidavits affirming loyalty. . . . The lone known Communist in the State University blithely took the oath and resumed his studies, since the oath did not require a renunciation of Communism by name. No action against him had been initiated as of the close of 1949." Prendergast, *State Legislatures and Communism: The Current Scene*, 44 AM. POL. SCI. REV. 556, 561 (1950).

48. Two brothers, second year law students at the Harvard Law School, refused to tell a Senate investigating committee whether they were Communists. Dean Erwin N. Griswold announced that the faculty had decided not to expel them. He stated: "If these two young men are now expelled from the law school, the experience is likely to confirm them in their attitudes which were manifest in their testimony. If they continue their studies here, we shall have grounds for hope that their viewpoint may change for the better." *Newsweek*, April 20, 1953, p. 98, col. 3.

49. *De Jonge v. Oregon*, 299 U.S. 353 (1937).

50. See *Herndon v. Lowry*, 301 U.S. 242, 258 (1937). "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. . . . If, therefore, a state statute penalize innocent participation in a meeting held with an innocent purpose

tion" between membership per se and state safety is not apparent; mere membership without more seems insufficient danger to justify extended imprisonment or even denial of educational opportunity.

Of the exalted rights guaranteed in the First Amendment, those of free speech and press are unsurpassed in importance both to the state and to the individual. From these freedoms emanates the exchange of beliefs and opinions so essential to our democratic society. Montana forbids a subversive organization to mail, or transmit any anonymous written or printed matter to non-members.<sup>51</sup> While this requirement does not appear invalid when it concerns any matter which would create a clear and present danger of harms that the state has a right to prevent, one could contend that its application is not so restricted but indiscriminately includes all material disseminated anonymously by a subversive organization. Thus, the legislature has employed the "meat axe" when it should have used the deft touch of a well-sharpened "scalpel." However, the decisive argument seems to be that this statute does not curtail speech at all, but only requires the disseminator to acknowledge authorship. This law is a proper exercise of police power because it does not contravene any constitutional right.<sup>52</sup>

Maryland and California have adopted statutes which purport to repel subversive activities aimed at undermining the bar.<sup>53</sup> These laws declare that a "subversive person" shall not be admitted to the bar, and that an attorney who advocates violent governmental overthrow shall be disbarred. On the one hand, there is the contention that justice cannot be achieved in judicial action when the attorneys are Communists because they lack the integrity and self-imposed responsibility essential to protection of clients' interests. But this argument is particularly

---

merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom. . . ." *Ibid*, citing *De Jonge v. Oregon*, 299 U.S. 353 (1937).

51. See note 18 *supra*.

52. For a discussion of the possibility of conflict between the statute and federal postal power see note 67 *infra*.

The California legislature congratulated the University of San Francisco by concurrent resolution because it had established a compulsory course to inform and warn students of Communism's evils. The actions of both the University and legislature are commendable and should be encouraged. Cal. Laws 1951, c. 139.

53. See note 15 *supra*. The threat of Communism to the legal profession has provoked some little discussion; see H.R. REP. No. 3123, 81st Cong., 2d Sess. (1950) (Report on the National Lawyers Guild); Emerson, *Answer to the Report of the House Committee on Un-American Activities on the National Lawyers Guild*, 10 LAW. GUILD REV. 45 (1950); Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. OF CHI. L. REV. 480 (1953); Canfield, *The Bar Must Repudiate the Communist Lawyer*, 74 N.J.L.J. 201 (1951); Notes, 36 IOWA L. REV. 529 (1951), 26 NOTRE DAME LAW. 498 (1951).



susceptible to attack as an unjustified extension of guilt by association. No doubt every court in the nation would disbar the practitioner who came before it and relegated his client's interests to a position inferior to Communism's objectives. This would be, quite properly, a determination made about an individual attorney because of his personal conduct before the court. It would not rely on such matters as the practitioner's associations or political and social convictions, yet this precise result obtains under both these laws.<sup>54</sup> Attorneys are officers of the court, not public officers; while legislatures may establish requirements and qualifications for practice before the bar, they should not usurp the judiciary's power to enforce and apply these restrictions and to determine the fitness of the individual who shall plead before it—particularly when the legislature adopts the guilt by association standard.<sup>55</sup> The courts do not hesitate to disbar attorneys for subversive conduct, but such action is well founded on professional demeanor rather than upon broad legislative proscriptions.<sup>56</sup>

---

54. Perhaps disbarment on such grounds is a violation of due process of law. In *Re Summers*, 325 U.S. 561 (1945), the Supreme Court upheld (5-4) an Illinois statute which precluded pacifists from admission to the bar. The petitioner contended that this was a deprivation of due process as guaranteed by the Fourteenth Amendment because it infringed upon freedom of religion. But, rejoined the Court, there was no contravention of due process by requiring an oath which states a willingness to serve in the militia ". . . when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship." *Id.* at 573. See 10 Mo. L. Rev. 316 (1945). However, the same term the Court destroyed much of the validity of the *Summers'* case by holding that non-combatant participation in efforts to uphold the Constitution would satisfy the alien oath requirement demanding that the affiant support the Constitution; *Girouard v. United States*, 328 U.S. 61 (1946).

Mr. Justice Black (dissenting) warned this was refusing an individual a semi-public position because his religious beliefs might prompt him to violate a state draft law if one were ever enacted in the future. This was a refusal of admission to the bar for beliefs and was, therefore, contrary to the Constitution. This latter criticism could be made of the state statutes which deny admission to the bar for advocacy of governmental revolution. However, since the Court refused to invalidate the Illinois law, chances are meager that it would strike down either the California or the Maryland statutes because the laws barring such advocacy are already in force and because of the view that such advocacy is beyond the realm of constitutional protection.

*But cf.* *In re Baxter*, 2 Fed. Cas. 1043, No. 1,118 (E.D. Tenn. 1866); *Ex parte Law*, 15 Fed. Cas. No. 8,126 at 7 (S.D. Ga. 1866).

55. See *Ex parte Secombe*, 19 How. 9, 14 (U.S. 1856); *In re Shorter*, 22 Fed. Cas. No. 12,811 at 18 (D. Ala. 1865); *Ex parte Law*, 15 Fed. Cas. No. 8,126 at 5-6 (S.D. Ga. 1866).

The Maryland statute recognizes that laws pertaining to attorneys should be administered through the judiciary and therefore is not amenable to the contention that the legislature has usurped the court's authority over its officers. However, the California statute appears to be a mandate without provision for judicial discretion.

56. *Re Clifton*, 33 Idaho 614, 196 Pac. 670 (1921); *Re Lindheim*, 195 App. Div. 827, 187 N.Y. Supp. 211 (1921); *Re O'Connell*, 185 Cal. 584, 194 Pac. 1010 (1920); *Cf. People v. Ellis*, 101 Colo. 101, 70 P.2d 346 (1937). For a recent decision con-

To question certain methods state legislatures have selected to curb and eliminate subversion is neither to defend such activity nor to belittle its threat to our national security.<sup>57</sup> The present effects of state subversion legislation on the great majority of the nation's population may not be great, particularly as long as the tense "cold war" continues: but the judicial precedents established as a result of these laws will indubitably have tremendous significance on future personal freedoms, perhaps long after the fearful context of such precedents has passed.

It is apparent that judicial validation of the legislation here considered will establish dangerous precedents, yet manifestly present court holdings warrant the conclusion that perhaps a substantial portion of these statutes will not be struck down on the basis of the foregoing arguments. However, there remains to be examined the possibility that state subversion legislation "conflicts" with federal statutes or policy.

Since Congress has enacted comprehensive subversive-control legislation, plausible grounds for questioning the validity of many state statutes arise from the contention that Congress has preempted the field or that state laws conflict with federal mandates. While this possibility has not been unexplored, elaboration is appropriate.<sup>58</sup> With unaltered regularity Congressmen reiterated that one of the purposes of the Internal Security Act is to expose Communism so that unwitting cooperation with its causes would be impossible.<sup>59</sup> Those measures which would tend to force Communism "underground" were rejected as contrary to the objectives of the Act. While there was considerable discord as to the precise effect of certain provisions, all agreed that the

---

cerning attorneys and their representation of Communists in judicial proceedings see *Sacher v. United States*, 343 U.S. 1 (1952).

57. See *Hearings before Committee on Un-American Activities House of Representatives on Testimony of Paul Crouch*, 81st Cong., 1st Sess. (1949); *Hearings before Committee on Un-American Activities House of Representatives on Soviet Espionage in Connection with Jet Propulsion and Aircraft*, 81st Cong., 1st Sess. (1949); *Hearings before Committee on Un-American Activities House of Representatives Regarding Steve Nelson*, 81st Cong., 1st Sess. (1949); *Hearings before Committee on Un-American Activities House of Representatives on American Aspects of the Richard Sorge Spy Case*, 82d Cong., 1st Sess. (1951); *Hearings before Committee on Un-American Activities House of Representatives on Methods of Communist Infiltration in the United States Government*, 82d Cong., 2d Sess. (1952); *Hearings before Committee on Un-American Activities House of Representatives on Communist Activities in the Philadelphia Area*, 82d Cong., 2d Sess. (1952). These hearings reflect the many areas of Communist infiltration, and the various means they employed to execute their plots. For other comments on this topic see WEYL, *BATTLE AGAINST DISLOYALTY* (1951), and a criticism of this book in Chafee, *Book Review*, 66 HARV. L. REV. 547 (1953).

58. Many of the problems arising from dual control of subversion are discussed in Note, 66 HARV. L. REV. 327 (1952).

59. SEN. REP. No. 1358, 81st Cong., 2d Sess. 3, 7 (1950); 96 CONG. REC. 13727, 13743, 14246, 14461, 14462, 14474 (1950).

proper goal of Communist-control laws was to "smoke them out." Therefore, state legislation which tends to achieve a purpose conflicting with this aim of the McCarran Act can be forcefully challenged as contrary to, and an imposition on, federal law. However, realization that Congress probably was cognizant of and apparently approved of many state and local activities intended to combat subversion militates against according too much weight to this otherwise valid and perhaps decisive argument.<sup>60</sup> But it does not necessarily follow that Congress condones subsequently enacted measures. Of course, more importance and significance should not be given Congressional intent and knowledge than is deserved since they serve only as general indicators of the meaning and scope of federal laws.

Since the major portion of state laws here considered were enacted after the Internal Security Act and are unlike statutes then in force, no court could reach a justifiable decision as to their validity without giving some little weight to the argument that "conflict" exists. Those laws which make membership unlawful and which impose any form of punishment on Communists or disloyal individuals clearly would not encourage those engaged in the activities of a subversive organization to register under the provisions of the Internal Security Act.<sup>61</sup>

---

60. Many Congressmen were aware of state subversion legislation because such laws are referred to in the study of constitutional law and by at least one ever popular treatise, CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941). Many have been in force so long that certainly most professional legislators know of their existence. The following references indicate that there was cognizance of state and local activities.

During debate on the McCarran Act Representative McDonough commented on a recently adopted Los Angeles County ordinance which required registration of Communists and subversives. He reiterated: "The move is a pioneering step to control [the] spread of communism by specific laws. . . ." 96 CONG. REC. 13746 (1950).

Information on state control of subversion was available to Congress in at least two documents. A comprehensive digest of national and state statutes was included in a report made by the Maryland State Commission on Subversive Activities. This report was incorporated in H.R. REP. No. 1950, 81st Cong., 2d Sess. App. I (1950).

This paragraph indicates that Congress probably knew the scope of state activities. "Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the 'Red' flag; 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates appearing on the election ballot; 19 States exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths." H.R. REP. No. 2980, 81st Cong., 2d Sess. 2 (1950).

Perhaps the most correct statement of Congressional views concerning state participation in this area is that such cooperation was accepted without question. Federal legislators seem to have regarded it as an indication of public approval of Communist control laws and did not consciously consider whether this was an appropriate subject for concurrent regulation.

61. Congress refused to adopt any provision which would interdict Communism. After discussing the propriety of outlawing the Communist Party, barring it from the ballot, and making membership in that party unlawful, a Senate report concludes:

There is no question that Congress and the states may punish the advocacy of overthrow of government by force when it creates an imminent and substantial danger, but when punishment is imposed for membership and/or loss of privileges is inflicted for advocacy, open membership and advocacy cease and there is resort to more subtle, less easily recognized tactics. This, of course, constitutes the precise eventuality the McCarran Act sought to avoid. Consequently, it is quite apparent that the states have enacted measures which severely restrict the Act's effectiveness. Since the Act is the most recent expression of federal policy, perhaps the judiciary would not be incorrect in invalidating state laws which obviously render ineffectual Congressional efforts to "smoke out" the Communists. But in so doing the courts would deny the states one of the very means Congress still endorses in the Smith Act<sup>62</sup>—punishment for advocacy of violent governmental overthrow. So it can be claimed that Congress does not consider punishment of such advocacy inconsistent with the purposes of the McCarran Act. However, as to the remaining state statutes which punish other Communist activities, any court could quite plausibly find a "conflict" between state laws and federal policy.

A Michigan Communist registration statute has been constitutionally attacked with the contention that it imposes on federal legislation.<sup>63</sup>

---

"Among other policy considerations which militate against this type of approach are the following:

(1) Illegalization of the party might drive the Communist movement further underground, whereas exposure of its activities is the primary need.

(2) Illegalization has not proved effective in Canada and other countries which have tried it.

(3) If the present Communist Party severs the puppet strings by which it is manipulated from abroad, if it gives up its undercover methods, there is no reason for denying it the privilege of openly advocating its beliefs in the way in which true political parties advocate theirs. . . . Undercover methods and foreign direction cannot be tolerated on the political field." SEN. REP. No. 1358, 81st Cong., 2d Sess. 9 (1950).

62. 18 U.S.C. § 2385 (Supp. 1952).

63. *Albertson v. Millard*, 345 U.S. 242 (1952), *vacating and remanding*, 106 F. Supp. 635 (1952). The three judge district court held (2-1) that the Michigan law was constitutional and therefore refused to enjoin it. The court concluded that ". . . [i]nsofar as the objectives of the Trucks Act [*i.e.*, the Michigan law] and the McCarran Act are identical, there is no conflict or reasonable probability of conflict. Both have for their purpose the curtailment of activities recognized as subversive and inimical to democratic government. They are complementary to each other, one on the national and the other upon the local level." 106 F. Supp. 635, 641 (1952).

The dissent denied the validity of the law on two grounds. The field was preempted by Congress (the McCarran Act), and the state law does not satisfy the requirement of due process. As to the first ground the dissenting judge relied heavily on *Hines v. Davidowitz*, 312 U.S. 52 (1941), in which the Supreme Court invalidated a Pennsylvania alien registration statute which was in large part identical with a federal alien registration law. The state statute contravenes due process, continued the dissent, because it is too vague, gives a person a choice between imprisonment

The decision in this case will probably forecast the outcome of many controversies questioning the validity of state subversion legislation. If the Supreme Court finds a conflict between the purposes of the Acts, there would be excellent cause to conclude that other state measures even more unharmonious also "conflict" with federal law.

Further basis for questioning the propriety of state security laws lies in the lack of information from which each state must necessarily suffer.<sup>64</sup> The nation's welfare requires that much information be "classified" and not released to the public, yet state legislatures cannot intelligently create laws to cope with Communist subversive activities unless they have intimate knowledge of current national and international developments. Thus, they must enact statutes without complete understanding of the problem or clear comprehension of the many ramifications of such legislation. While this conflict of interests is irreconcilable, surely no one doubts that the security of the entire nation must prevail over a state's earnest desire to legislate with ready access to such information. The courts must not fail to give this factor considerable weight when determining the feasibility of state legislation and its "conflict" with federal law.

Another matter deserving attention is the enforcement provisions of these laws. The county prosecutor must assume the burden of enforcing such statutes in most states, but in a few a Special Assistant Attorney General has been appointed whose function it is to execute the subversive control program. Each alternative has disadvantages. The prosecutor, already over-burdened, has little time to devote to the tedious and delicate task of gathering evidence and convicting subversives. On the other hand, there has been criticism of the plan which creates a separate agency which concentrates on seeking out disloyal persons. Because many Americans dislike the notion of a secret police organization and perhaps because there is fear that the vast power of such an organization would be misused, this suggestion has not achieved wide popularity.<sup>65</sup> While this method has the merit of utilizing specialized skills and of permitting the devotion of full time efforts to this

---

for failure to register and an opportunity to testify under oath concerning activities punishable under the state's Little Smith Act, and is a continuing threat to freedom of speech and assembly. For further examination of the *Davidowitz* case, see 29 *Geo. L.J.* 755 (1941).

64. Access to security matters is still quite limited, oftentimes long after the need for classification has passed: see LASSWELL, *NATIONAL SECURITY AND INDIVIDUAL FREEDOM* (1950); Note, 27 *IND. L.J.* 209 (1952).

65. Michigan's subversive investigation committee proposed a secret squad of state police responsible to the State Police Commissioner. Governor Williams objected, contending this would transform the state police into a gestapo and instead suggested that a special security squad could be formed under existing law. Nevertheless, the

one end, both alternatives could severely interfere with the effectuation of Congressional policy and objectives.

The Federal Bureau of Investigation has adopted a policy of counterespionage, which entails the strategic location of FBI agents in the Communist movement itself.<sup>66</sup> This device has been carried on with such success that these "plants" have acquired positions of influence from which they can relay information to the FBI and direct the subversive efforts of the Communists into ineffectual blind alleys. There is almost never any large scale campaign of arrests or sensational revelation of the intricacies of a spy ring, rather the FBI watches and waits preferring control to exposure. Imagine, for example, the inestimable damage that could be accomplished by the arrest and conviction of an FBI "plant" because he was a despicable Communist in those states which declare membership in a subversive organization unlawful. The state enforcement officer would be completely unaware that he was destroying months of labor and all possible usefulness of the undercover agent. Yet it is not practicable to inform the multitude of prosecutors and state officials of the identity and whereabouts of "plants." Here again effectuation of state subversion legislation could quite easily impair federal efforts to combat the Communist movement.<sup>67</sup>

---

Legislature granted the Commissioner broad power to create a secret anti-subversive squad. GELLHORN, *op. cit. supra* note 4, at 202-203.

The Washington legislature attempted to create a special assistant attorney general but the Governor vetoed this provision. The special assistant was authorized, in the vetoed sections, to compile secret files. Wash. Laws 1951, c. 254, §§ 6, 7, 8, 10.

Maryland has created a special assistant attorney general in charge of subversive activities. MD. ANN. CODE GEN. LAWS art. 85A, § 6 (1951). This officer and his agents were severely criticized by Governor McKeldin and Attorney General Rollins because they attended a rally of a group supporting the United Nations taking notes on the proceedings and recording ". . . license numbers from a dark doorway. . . ." One of the agents told a newspaperman that he was looking for Communists. Louisville Courier-Journal, May 12, 1953, § 1, p. 2, col. 3.

66. See LOWENTHAL, *THE FEDERAL BUREAU OF INVESTIGATION* 443 (1950); Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 IOWA L. REV. 175, 187-189 (1952). Director Hoover commented: "[The FBI's] approach to the internal security problem . . . safeguards civil rights. The blunderbuss method, shooting widely, hoping that in the broadside the guilty will be hit, unmindful of the number of innocent injured—that method is wrong, the very antithesis of democratic law enforcement. Security investigations can be conducted fairly, accurately and without injustice. That is the aim of the FBI." *Id.* at 189.

67. During the debate on the Internal Security Act Senator Lehman related that ". . . a high official of the FBI has been quoted as saying that the operations of the McCarran bill would set the FBI back a decade in its work." 96 CONG. REC. 15536 (1950). State "aid" in the subversive control program would undoubtedly have more harmful effects. Conflict between federal laws and state anti-subversive statutes appears in fields other than subversion control. Regulation of the postal service seems always to have been considered an exclusively federal function. Under the provisions of the Internal Security Act, it is unlawful for a subversive organization to send through the mails any publication intended or reasonably intended to be circulated among two or more persons unless the wrapper identifies the sender by the phrase—Disseminated

United States foreign policy affords yet another example of probable conflict between national and state policies. Since Communism is closely associated with Russia and its satellite countries, control of subversion necessarily affects international relations and its many complex, technical, and long range problems.<sup>68</sup> International protocol demands that many situations be delicately and discreetly handled by diplomats with knowledge of the implications of their conduct and aptitudes for administering foreign policy. Failure to observe the unwritten rules of comity could easily provoke an international incident. Consider for a moment the effect of the arrest and attempted conviction of a prominent Russian

---

by —, a Communist organization. 64 STAT. 996 (1950), 50 U.S.C. § 789(1) (Supp. 1952).

However, without precedent, Montana also prescribes substantially similar regulations upon use of the mail. See note 18 *supra*. The occurrence of alleged conflict between state and federal governments over control of the mail has so seldom been litigated that it is impossible to determine precisely the constitutionality of this imposition. While the Supreme Court has described Congress' postal power as "complete" and quoted language labeling it "exclusive," the Court has recently reiterated that "in at least one instance this Court has sustained direct state interference with transmission of the mails where the slight public inconvenience arising therefrom was felt to be far outweighed by inconvenience to a state in the enforcement of its laws. . . ." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 96 (1945).

A reconciliation of pertinent state and federal court decisions justifies this possible rule; while the states may not regulate the postal system directly, they can validly enact laws which only incidently impose some restriction on the use of the mail. Under this particular view the Montana statute would be invalid as a direct attempt to prescribe regulations prerequisite to enjoyment of the postal service. The most recent Supreme Court decision considering the amenability of states over the postal system included this declaration. ". . . [T]he decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . ." *Ibid*. Enforcement of the Montana statute would necessitate inspection of the mail to determine whether its regulations were being followed; this requires that either federal postal employees do this inspecting or that state inspectors be permitted to scrutinize the flow of mail. It would be impractical to enforce the law any other way than by postal inspection. Since the Internal Security Act accomplishes the same goal except that it does not require the names and addresses of officers of subversive organizations, there is no necessity for this law in the first instance. See also *Ex parte Rapier*, 143 U.S. 110, 134 (1891); *In re Jackson*, 96 U.S. 727, 730 (1877).

The states uphold their power to restrict use of the mails but do so only insofar as use of the mail would encourage a situation which they are attempting to remedy. It will be noted that while Montana attempts this, it in addition prescribes very definite regulations on the mail itself. ". . . [A]ll letters, documents, leaflets, or other written or printed matter issued by a subversive organization which are intended to come to the attention of a person who is not a member of the organization shall bear the name of the organization and the name and residence of its officers." MONT. REV. CODES ANN. § 94-4424 (Supp. 1951). Cf. *Ex parte Phoedovius*, 177 Cal. 238, 170 Pac. 412, 413 (1918); *Traveler's Health Ass'n v. Commonwealth*, 188 Va. 877, 896, 51 S.E. 2d 263, 271 (1949).

68. H.R. REP. No. 3135, 81st Cong., 1st Sess. (1949). This report, entitled "Background Information on the Soviet Union in International Affairs," provides an excellent analysis of successes the Communists have had with their conquest by conspiracy.

citizen in either Massachusetts or Pennsylvania. Both states make it a crime merely to be a Communist. If a renowned Yugoslavian scientist addressed a group of students at the University of California and during his discourse praised the Communist movement, laws in that state would enable the prosecutor to take this "subversive person" into custody. Reflect on the controversy which might arise in Michigan by an attempted devise of property to an association composed of iron-curtain-nation diplomats or official representatives. To the contention that these incidents might happen only once or twice, the rejoinder would be that one or two such occurrences might be quite ample to cause serious embarrassment to the federal government.<sup>69</sup>

It is apparent that those arguments which urge that conflict exists between federal law and policy and state subversion statutes should not be hastily dispatched by the judiciary. State legislators should also realize that in the area of subversive control state statutes may have far-reaching implications which are not apparent on superficial examination.

Unfortunately, legislative investigation followed by enactment of subversion legislation has been too frequently used as a political stepping stone to publicity and acclaim. At least equally significant is the irresistible pressure the "red hunters" can impose on the unquestionably loyal, but more cautious legislator. There have been numerous instances when bonefide opposition to legislation has literally vanished in the face of this challenge: "Who are you for, the Communists or the United States? Now the loyal Americans will make themselves known." Thus, poorly drafted, ill-considered measures are spread upon the statute books, not necessarily because they represent the actual product of the legislature's experience or good judgment, but because few legislators can withstand such a challenge.<sup>70</sup> But when such laws fail to result in the

---

69. An example of inept state interference with Communists who were foreign officials is related in GELLHORN, *op. cit. supra* note 4, at 234-237. New York's infamous Lusk committee actually seized a file labelled diplomatic correspondence. Had the incident occurred now instead of in 1919, it could have caused further strain on already tenuous relations with Communist controlled nations.

70. GELLHORN, *op. cit. supra* note 4, at 363-369. Another example of unrestricted legislative approval of subversive control statutes is the vote of the Texas legislature as it enacted its Communist control law in the House 136 to 0 (1 abstaining) and in the Senate 28 to 0. Tex. Laws 1951, c. 8.

A vivid example of the personal views of a conscientious legislator are recounted in Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. OF P.A. L. REV. 480, 507-508 (1953). State Senator Dent proclaimed during the debate on the act that he could not stigmatize his party by voting against the proposed loyalty measure. Furthermore, the Senator relates, when he voted against a 1945 bill "... the people in my community, who felt that they were doing what they thought was right, burned me in effigy upon my front lawn and, although I was characterized as a Red and a near Red or 'pink,' or whatever you want to call it, there was never an apology made to my family, there



conviction of a horde of saboteurs or even uncover anyone more harmful than a steadfast Quaker, the legislator's assumptions are not that the legislation was directed improperly so as to snare innocent persons but instead that more statutes are essential to catch those who have evaded the previous mandates.

Lastly, the courts should well consider the effect on the individual of the current trend in state subversion legislation. Unfortunately, a Communist is not manifestly distinguishable from the most loyal citizen until he reveals his convictions by overt acts. As is all too apparent, the Communist prefers clandestine operation, thus shielding himself from all laws punishing open advocacy and other discoverable subversive conduct. Therefore, current state laws tend to have as their practical result not the punishment of overt acts which are properly the subject of such penalization but the punishment of an individual for his associations and for his expression of certain ideas notwithstanding that no apparent danger accrues thereby. In short, state subversion statutes here considered subject persons to fine, imprisonment, and deprivation of privilege because they harbor beliefs which are not consonant with those of a majority of the nation's citizens.<sup>71</sup>

---

was never a word of retraction made after the bill was declared unconstitutional. So . . . in the face of that injustice, in fairness to my family, I will vote for this legislation. . . . We are living in a day when men will hide behind the decent emblem of patriotism to do the things they would not do openly, but as a leader of my party, I must subscribe to the days that we live in. . . . I will vote for this measure because the injustices of the day demand me to vote for it."

71. Results of the first scientific work on the subject of thought control by subversion legislation have recently been published; Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 *YALE L.J.* 295 (1952). The authors suggest that ". . . [n]ew standards are being established, and traditional ones reinterpreted to provide guidance for behavior on a more concrete level." *Id.* at 306. Thus one respondent commented: "Why lead with your chin? If things are definitely labeled I see no point in getting involved with them. If communists like apple pie and I do, I see no reason why I should stop eating it. But I would." *Id.* at 307.

Other astounding yet expedient self-imposed restraints practiced by governmental employees subject to the federal loyalty program include disaffiliation with organizations on the Attorney General's list, not subscribing to their publications, using care in political conversations with strangers, not discussing work outside the office, avoiding communist associations, not signing petitions unless sponsored by a bona fide organization or person, and not reading the *Daily Worker* or the *New Masses*. As a respondent put it: "If there is only a rumor that a person reads Marx nothing will happen to him. Of course, if the rumor turns out to be true, this is a different matter." *Id.* at 307-308. Some respondents felt that ". . . joining an organization means taking a risk because if it is not now on the Attorney General's list, it might get there in the future." *Id.* at 314.

One subject of the study made this statement: "I have sometimes wanted to see a copy of the *Daily Worker* but now would not be caught within a mile of one. I believe in freedom. What bothers me is that I may have less control over myself than I thought, and I may come to feel that only certain politically pure books, people

The proper goal of state legislation is the punishment of a conspiracy to commit acts which can be constitutionally prohibited and punishment of the acts themselves. Illegalization of membership without more dictates to the individual that association with others holding undesirable beliefs is a wrong against the state,<sup>72</sup> but government will not be forcibly and violently overthrown because an individual carries a membership card in his wallet, nor because any number of persons carry in their minds the doctrines of world revolution. Only when the organization begins to effectuate its conspiracy, only when persons sow the seeds of revolution by uttering inciting language before an impatient and inflamed throng, only when beliefs are revealed in overt acts not constitutionally protected should government intervene with a deterring sanction or decree.

Those statutes which deny certain privileges to those who are members of disloyal organizations or who "advocate" overthrow of government by force and violence are really the most questionable of all. They reveal that the legislature did not really find any danger in the exercise of these privileges serious enough to justify fine or imprisonment, but that such occurrences were considered "bad" or "undesirable" and so deserving of some form of discouragement short of criminal punishment. To those who contend that these sanctions merely supplement criminal punishment for advocacy of revolution by violence, the answer is that such sanctions cannot be justified because they are only an extension of impropriety. Such action is only an attempt to conform the

---

and statements are what I want. I simply cannot say and do all the things I would like to. It's completely unreasonable to be this way, but that's how it is.'" *Id* at 322.

While the results of this survey are not claimed to be conclusive, they do reveal the present effects of loyalty programs on government employees. It would not seem incorrect to assume that the state laws here considered would have at least equal and perhaps greater influence on individual freedom than does the federal loyalty program.

72. Two recent decisions by the Supreme Court indicate that one's association may be a determiner of fitness for public employment. Whether the Court would extend this view and permit sanctions to be imposed for affiliation in certain organizations is problematical. See note 46 *supra*.

In *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 720 (1950), the Court remarked: "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship in present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

The same view was revealed in *Adler v. Board of Education*, 342 U.S. 485, 493-495 (1951). "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion." *Id.* at 494-495.

expression of beliefs to legislatively predetermined concepts of properness. If the individual will forego advocacy, he may practice before the bar; and if a distinguished lecturer is not listed as subversive, students will be able to enjoy the benefit of his knowledge. The point is, state legislatures are not, by these statutes confronting or dealing with the problem of Communism. Instead of focusing their attention on the real issues—determining the effectiveness of the Communist appeal to the nation's citizens; combating this effectiveness, if any, by adoption and enforcement of constitutional laws; and urging enforcement of present laws which punish overt acts—the legislatures are pre-occupied with enacting statutes which boast their own patriotism and which manifest loathing for a hated doctrine. For example, the denial of old age and disability assistance to an individual who advocates governmental overthrow by violence on first impression may not seem unreasonable; the argument of "not biting the hand that feeds you" is quite appealing. But on further consideration it is apparent that all those who rely on such assistance must conform to the legislatures' notions of acceptability. This is not the concept of freedom many Americans believe is guaranteed by the constitution.

But it would be unnecessarily harsh to deny states the ability or the power to protect themselves from subversion which threatens their continued existence. Of course, most scholars agree that even freedoms of the First Amendment are not absolute.<sup>73</sup> Therefore, when an individual, by his normally constitutionally protected conduct, creates an imminent and substantial danger of an evil which the state has a right to prevent, his conduct can properly be subjected to control. When the state can factually demonstrate to the court that subversion laws, seemingly unrelated and unreasonable, are actually essential to the continued welfare of its citizens, because they subdue clear and present dangers

---

73. Since *Schenck v. United States*, 249 U.S. 47 (1919), the most universally and often followed criterion by which the validity of infringement on First Amendment freedoms is judged is that of the clear and present danger. ". . . [T]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52. There is no question that a threat to the preservation of the state is a substantive evil which the state has a right to prevent if a clear and present danger exists. See Meiklejohn, *The First Amendment and Evils that Congress Has a Right to Prevent*, 26 IND. L. J. 477 (1951); Antieau, *The Rule of Clear and Present Danger: Scope of Its Applicability*, 48 MICH. L. REV. 811 (1950); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COL. L. REV. 313 (1952); Corwin, *Bowing Out "Clear and Present Danger" Rule*, 27 NOTRE DAME LAW. 325 (1952); Goldberg, *Current Limitations on Governmental Invasion of First Amendment Freedom*, 13 OHIO ST. L.J. 237 (1952); Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule*, 38 VA. L. REV. 143, 315 (1952).

which the state has a right to prevent, then those laws can be validly applied.

When the courts are called upon to determine the validity of such state laws, theirs will be the unenviable task of demanding, even in the tense conditions prevalent today, unqualified factual proof of the absolute necessity of these statutes and the sanctions they impose. Relaxation of judicial protection through laxity in the requirement of proof of actual need and pursuance of a position imposing "reasonable" restrictions on constitutional freedoms prophecies a completely new concept of personal liberty.<sup>74</sup> In the struggle to save and protect our nation

---

74. Perhaps tragically, the creation of an imminent and substantial danger which the state has a right to prevent is apparently no longer the only circumstance justifying the abridgement of First Amendment rights. The Supreme Court has seemingly engrafted another permissible area of restriction on these precious freedoms: Now statutes restricting these freedoms are constitutional if they have "rational basis." *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The defendant was charged with violation of a Chicago ordinance prohibiting the publication of matter portraying depravity of any race, color, or religion. He distributed a leaflet urging the Mayor and City Council to halt further encroachment on white people and their property by the negro race. The Supreme Court asserted the validity of the law (5-4) and sustained the conviction. Speaking for the Court, Mr. Justice Frankfurter proclaimed: ". . . [T]he precise question before us, then, is whether the protection of 'liberty' in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels. . . ." *Id.* at 258. After reciting incidents of violence, the Justice resolved: "In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without *reason* in seeking ways to curb false or malicious defamation of racial and religious groups. . . ." *Id.* at 261. (emphasis added)

Mr. Justice Black (dissenting) countered with the contention that ". . . the Court simply acts on the bland assumption that the First Amendment is wholly irrelevant." *Id.* at 268. Then quoting from *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1942), ". . . the right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."

"Today's case degrades First Amendment freedoms to the 'rational basis' level. It is now a certainty that the new 'due process' coverall offers far less protection to liberty than would adherence to our former cases compelling states to abide by the unequivocal First Amendment command that its designated freedoms shall not be abridged.

"The Court's holding here and the constitutional doctrine behind it leave the rights of assembly, petition, speech and press almost completely at the mercy of state legislative, executive, and judicial agencies. I say 'almost' because state curtailment of these freedoms may still be invalidated if a majority of this Court conclude that a particular infringement is 'without reason,' or is 'a wilful and purposeless restriction unrelated to the peace and well being of the State'. . . ." *Beauharnais v. Illinois*, 343 U.S. 250, 269-270 (1952).

No one supposed, until recently, that liberties guaranteed by the First Amendment were subject to what either the courts or the legislatures thought "reasonable." The implications of such an attitude on the legislation at hand are manifold. Too, the Supreme Court is willing to permit the legislature an opportunity to "experiment" with legislation affecting First Amendment rights. Mr. Justice Frankfurter further conceded: "It may be argued, and weightily, that this legislation will not help matters.

from destruction by Communism, there is vital need to salvage constitutionally guaranteed rights from annihilation by these same efforts. Both courts and legislatures should re-examine the Communist threat and should then determine whether recent laws do themselves present more of a threat to our freedom than does subversion.

## JUDICIAL ACQUIESCENCE IN THE FORFEITURE OF CONSTITUTIONAL RIGHTS THROUGH EXPANSION OF THE CONDITIONED PRIVILEGE DOCTRINE

Mr. Justice Douglas, dissenting in *Adler v. Board of Education of the City of New York*, declared: "I have not been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights. I cannot for example find in our constitutional scheme the power of the state to place its employees in the category of second class citizens by denying them freedom of thought and expression."<sup>1</sup> It is both surprising and noteworthy that Mr. Justice Douglas regarded as recent doctrine the prerequisite that one forego the exercise of constitutional rights before becoming eligible for participation in a governmental activity or benefit, for this stipulation has received judicial approval for nearly a century.<sup>2</sup> At first glance, such an exaction by the

---

. . . Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues. . . ." *Id.* at 261-262.

Yet in *Thomas v. Collins*, 323 U.S. 516, 530 (1945), Mr. Justice Rutledge warned that ". . . any attempt to restrict those [First Amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. . . ." See Frank, *The United States Supreme Court: 1951-1952*, 20 U. OF CHI. L. REV. 1, 24-29 (1952).

If state subversion legislation cannot be condemned as "unreasonable" or "without rational basis," then many of these laws will stand. State statutes which impose those severe regulations heretofore discussed may well be declared constitutional though the rights of speech, press, and assembly and the sanctity of the belief must be sacrificed by such a determination. The price of combating Communism and subversion by this method is too great; liberty at so large a sacrifice is not liberty at all.

1. 342 U.S. 485, 508 (1952).

2. *E.g.*, *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716 (1951); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950); *United Public Workers*