

## LOYALTY TESTS FOR LAWYERS\*

The information we have received from the Report of the Conference Working Group,<sup>1</sup> together with the recent survey published by Brown and Fassett,<sup>2</sup> indicate the extent to which loyalty tests are being imposed upon lawyers and the nature of the tests imposed. At a time when various agencies of government are concerning themselves with the loyalty of labor leaders, entertainers, United Nations employees, teachers, authors, newspapermen, and public employees generally, it is not surprising to find such tests imposed upon lawyers. What is unique about the lawyers' experience is that, with very few exceptions, these tests have been imposed by, or at least at the instance of, the bar itself.

That bar associations alone should solicit such treatment for their members cannot, I believe, be taken as evidence that lawyers generally are more susceptible to the hysteria of our times than are other men. What it does demonstrate is that we lawyers have allowed the hysterical men among us to exercise a disproportionate amount of influence. And in this instance the hysterical men have had the full support of the American Bar Association, which organization, representing as it does less than 25% of the lawyers in the country, itself has a disproportionate influence on state and local bar associations.

The welter of political tests which the ABA has proposed since 1950, together with the tests now in effect in some states, employ one of two *methods* for detecting disloyalty: (1) the test oath, and (2) investigation, including interrogation of the suspect, either in admission or in disbarment proceedings. The *objectives*—the sorts of men to be excluded from the profession—can only be described as those with some sort of attachment, fraternal, philosophical or coincidental, to the Communist Party or to policies attributed to the Communist Party.

In my judgment, each of these methods and each of these objectives is not only unwise but positively harmful—and this for reasons which, in calmer times and even in some instances now, would lead to their being held unconstitutional. I do not rest this conclusion on any defects in the form of the proposals which could be cured, without altering their substance, by improved draftsmanship. Nor do I rest on any argument about *ex post facto* laws—an argument which, as Brown and Fassett observe, would render many of the proposed tests "a little bit unconstitutional" at the outset, but

which would lose its applicability with the passage of time.<sup>3</sup> Rather, I base my conclusion on the following four propositions:

1. Government action to exclude an individual from the legal profession for any reason should be based on a rational system of proof, and this requirement should be found, and has in times past been found, in the due process clause.

To the extent that loyalty tests for lawyers direct administrative agencies or courts to exclude from the profession on the basis of membership in, affiliation with, support of, or fellow-traveling with the Communist Party (whether the Party be specifically named or otherwise described), they attempt to impose upon the agency or court an irrational system of proof. Obviously, the policy behind such tests, and any argument in defense of their constitutionality under the First Amendment, cannot be aimed at the bare fact of the individual's connection with the organization. This connection is a subject of concern, and a valid basis for exclusion from the profession, only if three assumptions are made: (1) That at least one purpose of the organization is such that, if entertained by an individual, it would be a proper ground for excluding him from the profession; (2) that every person connected with the organization in the proscribed manner has, by his connection, become aware of that purpose; and (3) further by his connection has adopted that purpose as his own.

The last two of these assumptions are so contrary to all human experience that they can be made only by one who goes beyond the position taken by the ABA, that those covered by its tests have "ceased to be Americans,"<sup>4</sup> and concludes also that they have ceased to be human.

Ten years ago in the *Schneiderman* case<sup>5</sup>—which involved an admitted member and national officer of the Communist Party—the Supreme Court refused to adopt this sort of reasoning. "[U]nder our traditions," the Court said, "beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."

Two weeks earlier, in *Tot v. U. S.*,<sup>6</sup> the Court had decided that the due process clause forbade Congress, in

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1. 13 Law. Guild Rev. 158 (1954).

2. Brown and Fassett, *Loyalty Tests for Admission to the Bar* (1953) 20 U. Chi. L. Rev. 480.

3. *Ibid.*, 486-487.

4. ABA, *Brief on Communism: Marxism-Leninism* (1951), 28.

5. *Schneiderman v. U. S.*, 320 U. S. 118 (1943).

6. 319 U. S. 463 (1943).

its attempt to prevent ex-convicts from receiving firearms in interstate commerce, to resort to a presumption—even a rebuttable presumption—that all firearms found in the possession of such persons had been received by them in interstate transactions. There was, it was apparent to the Court, “no rational connection between the fact proved and the ultimate fact presumed,” and due process is violated when “the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience”—“where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them.” The *Tot* case announced no new constitutional principle—it merely reiterated a due process requirement which has long been applied to statutory presumptions, whether the statute involved defined a crime,<sup>7</sup> prescribed a measure of tort liability,<sup>8</sup> laid down rules governing the operation of business,<sup>9</sup> or defined grounds for revoking citizenship.<sup>10</sup> Due process forbids the legislature, for whatever purpose, to impose irrational presumptions upon adjudicatory bodies.

These two cases might be thought both to establish the constitutional principle upon which the doctrine of guilt-by-association is rejected and to evidence what the Court considered to be permissible inferences from Communist Party membership in view of “the circumstances of life.” But these decisions were ten years ago and many things—including the personnel of the Court—have changed. In the interval have occurred the Korean war, additional revelations of Congressional committees, some espionage trials, and the Smith Act prosecutions which are taken to have established that the Communist Party advocates forcible overthrow of the government.<sup>11</sup>

While these developments may be thought to improve our understanding of the objectives of the Communist Party, they do not, it seems to me, so alter our understanding of human nature that we can now assume that every member of the Party—and certainly not every one connected with the Party in the manner described in the loyalty tests—(1) understands the Party objectives as we do, and (2) takes them as his own.

The Supreme Court obviously agrees as to the first assumption. It has twice<sup>12</sup> avoided a constitutional question by reading into loyalty tests for public officers and

employees, based upon membership or affiliation in organizations, the requirement that the individual involved know of the organization's proscribed purpose; and only last year in the *Wieman* case<sup>13</sup> it found due process violated by an Oklahoma loyalty test which excluded the knowledge requirement.

But, while the first assumption is still regarded as constitutionally irrational, the second one—that every person connected with the organization accepts all its purposes as his own—apparently has gained rationality in the past ten years. Loyalty tests based on knowing membership are now perfectly constitutional so far as the due process clause is concerned.<sup>14</sup>

True, none of these cases involve loyalty tests for lawyers. But I would not attempt to distinguish them by pointing out that the assumption on which they are based is clearly erroneous as applied to lawyers—that, to cite just one instance, at least twenty-six members of the ABA, being fully informed of the position taken by the Association on loyalty oaths for lawyers, rejected the position but retained their membership.<sup>15</sup> Such facts do not demonstrate that lawyers are not human, or that they differ in some fundamental respect from other humans. Such facts demonstrate that the Court is wrong.<sup>16</sup>

2. The application in individual cases of any government policy of exclusion from the legal profession should not be made by the legislature, and any such legislative adjudication used to be,

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

14. *Gerende v. Board of Supervisors*, note 12, supra; *Garner v. Los Angeles Board*, note 12, supra; *Adler v. Board of Education*, 342 U. S. 485 (1952). *Adler* is most explicit on this point: “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. Disqualification follows therefore as a reasonable presumption from such membership and support.” True, the Court made much of the fact that the Feinberg Law makes membership in proscribed organizations only “prima facie evidence of disqualification,” so that the final conclusion was, “Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied.” But the fact that the presumption is rebuttable does not make it more rational. *Tot v. U. S.*, note 6, supra. In any event, the similar presumptions employed in *Gerende* and *Garner* are not rebuttable—knowing membership disqualifies absolutely.

15. The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy (1951) 37 ABAJ 123.

16. I do not overlook the argument made by some—though not by the Supreme Court—that people who join the Communist Party put themselves in a unique position: they dare not disagree with official Party policy for fear of expulsion from the Party, and they dare not be expelled for fear of other dire consequences which may follow. This argument takes its information about the “iron discipline” and terroristic methods of the Party from the self-contradictory testimony of ex-Party members who also testify that they departed from the Party because of disagreements over policy and that they departed unscathed.

7. *Morrison v. California*, 291 U. S. 82 (1934); *Manley v. Georgia*, 279 U. S. 1 (1928); *Bailey v. Alabama*, 291 U. S. 82 (1911).

8. *Western & Atlantic R. Co. v. Henderson*, 279 U. S. 639 (1929); *Mobile J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35 (1910).

9. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79 (1916); *Lindsey v. National Carbonic Gas Co.*, 220 U. S. 61 (1911).

10. *Luria v. U. S.*, 231 U. S. 9 (1913).

11. See *Dennis v. U. S.*, 341 U. S. 494 (1951).

12. *Gerende v. Board of Supervisors*, 341 U. S. 56 (1951); *Garner v. Los Angeles Board*, 341 U. S. 716 (1951).

and should still be, held invalid as a bill of attainder.

The due process objection which I have discussed above is applicable to the situation where the legislature leaves the determination of individual cases where it should be left—to the adjudicatory process—but attempts to encroach upon that process by imposing irrational presumptions. Somewhat related to that problem, but different from it and objectionable in even greater degree, is the situation where the legislature seeks to eliminate the adjudicatory process entirely, and take over for itself the determination of individual cases. In such instances, the legislature runs afoul of the prohibition against bills of attainder.<sup>17</sup>

"A bill of attainder," said the Supreme Court on the first occasion of its considering the question,<sup>18</sup> "is a legislative act which inflicts punishment without judicial trial"—and it defined punishment to embrace exclusion from a profession, including specifically the legal profession. About the vice of such acts the Court was clear: the legislature is "creating the deprivation *without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.*" (Emphasis added.)

Or, as Story put it:

"In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions."<sup>19</sup>

The objection, in other words, is to the *process* by which the determination is made—a process in which the individual affected is deprived of all the safeguards available when a judicial body imposes punishment.<sup>20</sup> It matters not that in any particular case the legislature may have acted on rational and adequately tested proof in applying a perfectly constitutional standard. The

difficulty is that the legislative process does not *insure* such a basis for action and does not provide a record showing that such proof was present or, indeed, showing what standard was applied.

Either such legislative action must be forbidden or we are to continue to be treated to spectacles like that afforded in the *Douds* case.<sup>21</sup> In that case, Chief Justice Vinson found that the undeclared Congressional policy in imposing the non-Communist oath on union officers was to avoid political strikes, and that the determination that that policy applied to Communists was supported by *ex parte* and hearsay testimony in Congressional hearings. In the same case, Justice Jackson's opinion found that the policy was to protect labor unions from domination by "a conspiratorial and revolutionary junta, organized to reach ends and to use methods . . . incompatible with our constitutional system," and that the application of this policy to Communists was supported by "materials which Congress may or could have considered."

The constitutional prohibition against such legislative acts is of course violated when the legislative sanction is visited on named individuals, as was held in the *Lovett* case.<sup>22</sup> But the objection to the act is not removed if the legislature, instead of listing the individuals sought to be reached, omits their names and substitutes, as a condition of avoiding the sanction, an oath which an identifiable class of persons cannot take. Hence, the Supreme Court once struck down legislative acts which required, as a condition, pursuit of the calling of a priest or a lawyer, oaths disclaiming participation in or sympathy for the Confederate cause during the Civil War.<sup>23</sup> The attainder objection applies, the Court said, whether the statute is "directed against individuals by name" or is "directed against a whole class." "The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character."

If this were all, it would seem clear that both the reason for the constitutional prohibition and the Supreme Court's interpretation of that prohibition demonstrate the invalidity of legislative attempts to foreclose judicial inquiry into fitness for practice by imposing oath requirements which include all who cannot disclaim certain beliefs and affiliations. Unfortunately, however, Justice Frankfurter started a new trend in constitutional interpretation on this point in his concurring opinion in

17. On this point I am greatly indebted to, though not in full agreement with, Wormuth, *Legislative Disqualifications as Bills of Attainder* (1951) 4 Vand. L. Rev. 603.

18. *Cummings v. Missouri*, 4 Wall. 277 (1866); *Ex parte Garland*, 4 Wall. 333 (1866).

19. Story, *Commentaries on The Constitution* (5th Ed., 1891) §1344.

20. It is, therefore, an objection to deprivations imposed by rule of court as well as by statute. *Ex parte Garland*, note 18, *supra*.

21. *American Communications Association v. Douds*, 339 U. S. 382 (1950).

22. *U. S. v. Lovett*, 328 U. S. 303 (1946).

23. *Cummings v. Missouri*, note 18, *supra*; *Ex parte Garland*, note 18, *supra*.

the *Lovett* case,<sup>24</sup> where he undertook to explain about bills of attainder:

"There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable *ex post facto*. Frequently, a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or *ex post facto* Law shall be passed'."

This interpretation very nearly reads the bill of attainder prohibition out of the Constitution. The *ex post facto* provision will invalidate legislative attempts to give new standards retroactive application to past conduct. Save for some useless overlapping of the *ex post facto* provision, the attainder provision applies only to legislative adjudication of individual guilt under a previously-defined standard. But legislative adjudications against individuals based on present or future conduct by applying a standard which was not identified until the moment the legislature acts—if, indeed, it is identified then—are not covered by this clause at all.

Presumably such legislative action should be—though it has not been—invalidated under "other provisions of the Constitution" (certainly under the due process clauses) which Justice Frankfurter assures us are "effectively designed to assure the liberties of our citizens." But, unless those provisions are to be found outside the Bill of Rights and the Fourteenth Amendment, they throw little light on the interpretation to be given a clause in the original Constitution. As Professor Wormuth has said: "If Mr. Justice Frankfurter is right, the state legislatures, from 1789 to 1868, were in no way restrained by the Federal Constitution from putting a man to death by vote, if only his life had been so blameless that he escaped all reproach for past conduct. Probably the framers did not intend this."<sup>25</sup>

Nonetheless, Justice Frankfurter's interpretation seems now to prevail, or to be on the verge of prevailing. In the *Douds* cases,<sup>26</sup> Chief Justice Vinson, writing for himself and Justices Reed, Burton and Minton, found no objection under the attainder clause because the oaths reached only to *present* beliefs and affiliations so that anyone "by a voluntary alteration of the loyalties which impel him to action" could become eligible to sign the oath.<sup>27</sup>

24. *U. S. v. Lovett*, note 22, *supra*.

25. Wormuth, note 17, *supra*.

26. *American Communications Association v. Douds*, note 21, *supra*; *Osman v. Douds*, 339 U. S. 846 (1950).

27. In *Garner v. Los Angeles Board*, note 12, *supra*, the Court also pointed out that the test oath there involved applied "prospectively operative standards of qualification and eligibility for public employment." (Emphasis added.) But, as will be

That Justice Frankfurter's views on this question should prevail seems to me to be a serious mistake which is made only by disregarding the purpose behind the attainder prohibition. One objection to such a use of the legislative process is that it provides no safeguards as to what may be taken as proof. Another, and equally serious, objection is that the legislative process may operate without reference to a previously-defined standard. Justice Frankfurter's interpretation would apply the prohibition where the legislature acts with reference to a pre-existing standard, but would hold the prohibition inapplicable where the legislature acts without reference to such a standard.

This was not the Court's understanding of attainder in 1866<sup>28</sup> nor in 1946 when in the *Lovett* case<sup>29</sup> it recognized the double aspect of the attainder objection:

"No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment *without the safeguard of a judicial trial and 'determined by no previous law or fixed rule.'* The Constitution declares that that cannot be done either by a State or by the United States." (Emphasis supplied.)

That also is the effect of loyalty oaths imposed as a condition to entering or remaining in the legal profession. The change in the Court's interpretation of the attainder clause does not remove the objectionable features of attainder.

indicated later, the fact that the oaths were considered "qualifications for public employment" probably avoids the attainder objection anyway.

28. *Cummings v. Missouri*, note 18, *supra*, quotes with approval *Gaines v. Buford*, 1 Dana 481 (1833): "A British Act of Parliament might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury." And the Court in *Cummings* went on to say: "If these clauses \* \* \* had declared that all priests and clergymen within the State of Missouri were guilty of these acts \* \* \* and hence [should] be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibitions of the Federal Constitution. In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals."

29. *U. S. v. Lovett*, note 22, *supra*.

3. The power to exclude from the legal profession should not be used to compel any person to incriminate himself, and any such use of the power violates the constitutional guarantees against self-incrimination and, in some instances, the due process clause.

Objections to loyalty tests based upon the constitutional privilege against self-incrimination may arise in at least two different forms. I shall dispose of one of them briefly.

The most recent ABA proposal is that the mere fact that a lawyer invokes the privilege, should itself be treated as disclosing "disqualification for the practice of the law."<sup>30</sup> Such treatment would, in a very real sense, be an exercise of the power to exclude from the profession in such a way as to compel the attorney to forfeit the privilege, and should be held unconstitutional for that reason. I am aware that the power to discharge public employees on such grounds has been sanctioned in a number of state cases, most of them involving policemen. Most of these cases are disposed of on the argument that, since the duties of the policeman consist of "preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of" criminals, "it is a violation of said duties for any police officer to refuse to disclose pertinent facts" about crime.<sup>31</sup> From this analysis emerges the conclusion that the constitutional privilege must necessarily give way. Without taking time to discuss the infirmities of this argument<sup>32</sup> or the unhappy lot of the policeman, I put the cases to one side. For the mist which clouds the judicial eye as it contemplates the policeman derelict in his duty seems to disappear when the privilege is invoked by an attorney. So far as I can discover, in the few cases where the question has arisen, the fact that an attorney has invoked the privilege against self-incrimination has been held to constitute no evidence of unfitness for practice. The judicial verdict is apparently unanimous: "The constitutional privilege is a fundamental right and a measure of duty: its exercise cannot be a breach of duty to the court."<sup>33</sup>

That verdict, insofar as it is based on the privilege against self-incrimination, is not one which is compelled by anything in the federal constitution. The states are

30. New York Times, August 26, 1953, p. 1, col. 1.

31. The quotations are from *Christal v. Police Commission*, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939), the leading case.

32. See Notes (1953) 101 U. Pa. L. Rev. 1190, (1951) 64 Harv. L. Rev. 987.

33. *Matter of Grae*, 282 N. Y. 428, 26 NE (2d) 963, 127 ALR 1276 (1940). See also *Matter of Ellis*, 282 N. Y. 435, 26 NE (2d) 967 (1940); *In re Holland*, 377 Ill. 346, 36 NE (2d) 543 (1941); *Ex parte Marshall*, 165 Miss. 523, 147 So. 791 (1933).

not required to confer the privilege.<sup>34</sup> But if they do confer it, and then treat its invocation as evidence of facts which would disqualify for the practice of law, they may run afoul of due process in employing an irrational presumption. When the Court, in *Adamson v. California*,<sup>35</sup> upheld a California rule permitting comment upon a defendant's failure to testify in a criminal case it was careful to point out that, "This does not involve any presumption rebuttable or irrebuttable, either of guilt or of the truth of any fact that is offered in evidence. Compare *Tot v. United States*." And it hypothesized, as an example of a violation of due process, "a statute [which] might declare that a permitted refusal to testify would compel an acceptance of the truth of the prosecution's evidence."

But objections to loyalty tests based upon the self-incrimination privilege run beyond the problem in this simple form. They obtain, I believe, whenever a test oath, or answers to interrogation, on incriminating matters are required as a prerequisite to admission or continuation in the profession. For oaths and interrogations of the sort we are here considering, as distinguished from the traditional oath to support the constitution, are "instruments of compulsory disclosure."<sup>36</sup>

And it was the fight against just such forms of compulsory disclosure which led to the establishment of the privilege against self-incrimination in the first place. That fight had its origins in a period in English history when the use of the *ex officio* oath by the ecclesiastical courts, the High Commission and the Star Chamber had "degenerate[d] into a merely unlawful process of poking about in the speculation of finding something chargeable."<sup>37</sup> And it was John Lilburn's refusal to submit to just such an interrogation by the Star Chamber—an interrogation which reached into matters not covered by any charge against him<sup>38</sup>—which led Parliament to vacate his sentence and to enact statutes which abolished the High Commission and the Star Chamber and forbade the administration of the oath *ex officio* in criminal proceedings in the ecclesiastical courts.

34. *Twining v. New Jersey*, 211 U. S. 78 (1908).

35. 332 U. S. 46 (1947).

36. Koenigsburg and Stavis, *Test Oaths*; Henry VIII to The American Bar Association (1951) 11 Law. Guild Rev. 111.

37. 8 Wigmore, *Evidence* (3rd Ed., 1940), 284. See also Koenigsburg and Stavis, note 36, *supra*; Wolfram, John Lilburn, *Democracy's Pillar of Fire* (1952) 3 Syracuse Law Rev. 213.

38. Lilburn's refusal was in these terms: "I am not willing to answer you to any more of these questions, because I see you go about this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore if you will not ask me about the thing laid to my charge, I shall answer no more. \* \* \*" *The Trial of Lilburn and Wharton*, 3 How. St. Tr. 1315 (1637).

Hence, the privilege was first recognized as a protection in what Wigmore calls "preliminary inquisition of one not yet charged,"<sup>39</sup> and only came later to be recognized as available to any accused duly charged in a criminal proceeding, and to an ordinary witness in criminal and non-criminal proceedings.

In this original form, as well as in its later developments, the privilege is recognized under our constitutional guarantees. "The whole principle of the grand jury [or other formal presentment] presupposes a formal and deliberate accusation, based on probable cause, before any person is called to answer for a crime. \* \* \*" In this aspect the privilege against self-incrimination is, in history and in policy, its just complement, in so far as it exempts all persons from being compelled to disclose their supposed offences before formal process of charge is had.<sup>40</sup>

It was under this original interpretation of the privilege that coerced confessions were first,<sup>41</sup> and perhaps still are,<sup>42</sup> excluded in the federal courts; it is upon this reading of the privilege that they are excluded by many state courts.<sup>43</sup> It is the privilege in this form which is available in grand jury proceedings,<sup>44</sup> legislative investigations<sup>45</sup> and police interrogations.<sup>46</sup> In this form, the privilege should be available in proceedings for admission to or exclusion from the bar.

In Lilburn's day the compulsions employed to force self-incrimination were the lash and the pillory. In later days the more usual form came to be the commitment for contempt. But the constitutional guaranty is concerned with the fact, not the form, of compulsion. Hence it is that compulsion to testify in the form of forfeiture of goods was held to violate the guarantee.<sup>47</sup> Hence it is, also, that the English courts long ago concluded that where a disbarment proceeding against a lawyer was based upon charges which describe an indictable offense, the proceeding should not be initiated by a rule calling upon the attorney to answer personally, since this would require him to testify as to incriminating matters, but should be initiated by a show cause order, under which he might clear himself without testifying<sup>48</sup>—or might at least raise doubts as to his guilt, in which case the dis-

barment proceedings should await the outcome of criminal proceedings.<sup>49</sup> And it was with a full understanding of the English rule's basis in the privilege against self-incrimination that the Supreme Court employed that rule to test the propriety of a federal disbarment proceeding seventy years ago.<sup>50</sup>

This recognition that the threat of exclusion from a profession constitutes compulsion should lead to the invalidation of all test oaths and answers to interrogation exacted as a condition to practicing the profession where those oaths and interrogations inquire into matters incriminating under the Smith Act and the numerous other criminal seditious laws.

If this result is not dictated by precedent, neither is it forbidden by precedent. The argument has been considered by a court, so far as I can discover, only once<sup>51</sup>—and that time it was sustained. Before *Ex parte Garland*<sup>52</sup> was decided, the attorney's oath there involved was attacked in another proceeding on the ground, among others, that it compelled the attorney to be a witness against himself, and Federal District Judge Busted agreed.<sup>53</sup>

"Is not this [oath requirement] in fact to oblige a man to be a witness against himself? \* \* \* It is unworthy of the great question to say that a man is not obliged to put himself in the supposed dilemma; that all he has to do is not to attempt the practice of his profession in the national courts, and he will not run the risk of testifying to his own guilt. This is the merest and shallowest sophistry. If he keeps silence, he is thereby deprived of a constitutional right; if he speak, he becomes 'a witness against himself'."

Whatever Judge Busted may lack in judicial rank or fame he makes up in common sense. That such oaths operate to compel self-incrimination can be denied only by resort to "the merest and shallowest sophistry."

**4. Exclusion from the legal profession, regardless of the method employed, should never be based on political beliefs, affiliations or advocacy, and any such exclusion violates the guarantees of the First Amendment.**

Any such rule for exclusion from a profession constitutes, as Chief Justice Vinson recognized in the *Doubs*

39. 8 Wigmore, Evidence (3rd Ed., 1940), 307.

40. *Ibid.*, 308.

41. *Bram v. U. S.*, 168 U. S. 532 (1897).

42. See *U. S. v. Carignan*, 342 U. S. 36 (1951).

43. Morgan, The Privilege Against Self-Incrimination (1943) 34 Minn. L. Rev. 1, 28.

44. *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Blau v. U. S.*, 340 U. S. 159 (1950). The state cases are collected in 8 Wigmore, Evidence (3rd Ed., 1940), 325, note 12.

45. 8 Wigmore, Evidence (3rd Ed., 1940), 326, note 13; Morgan, note 43, supra, 30-34; Note (1949) 49 Col. L. Rev. 87.

46. Meltzer, Required Records, The McCarran Act and The Privilege Against Self-Incrimination (1951) 18 U. Chi. L. Rev. 687, 693-698; Note (1953) 5 Stanford L. Rev. 459.

47. *Boyd v. U. S.*, 116 U. S. 616 (1885).

48. *Stephens v. Hill*, 10 M. & W. 28 (1842).

49. *In re Hill*, L.R. 3 Q.B. 543 (1863).

50. *Ex parte Wall*, 107 U. S. 265 (1882).

51. The self-incrimination point was not raised in the *Doubs*, *Gerende*, *Adler* or *Weiman* cases. It was raised in the state courts in the *Garner* case (Transcript of Record, U. S. Supreme Court, No. 453, October Term, 1950, at p. 9), but was not there considered. See *Garner v. Board of Public Works*, 98 Cal. App. (2d) 493, 220 P. (2d) 958 (1950).

52. Note 18, supra.

53. *In re Shorter*, Fed. Cas. No. 12,811 (D.C. Ala., 1865).

case,<sup>54</sup> a "partial abridgment" of First Amendment rights. Since that is precisely what the First Amendment prohibits, this should be the end of the matter. But it is not the end of the matter and it never has been—because the courts have never been willing to accept, in hard cases, what they eloquently proclaim in the easy ones.

No more eloquent formulation of the principle embodied in the First Amendment has been made than that of Justice Jackson, speaking for a majority of the Court in the *Barnette* case<sup>55</sup>—a case dealing with an eccentric religious idea about requiring school children to salute the flag:

"If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

But when the Court is confronted with ideas more obnoxious or alarming than those of Jehovah's Witnesses, the star becomes unfixed and exceptions occur.

One exception exists for speech which creates a "clear and present danger"—an epigrammatic but essentially meaningless phrase conceived by Justice Holmes in an attempt to give the First Amendment more content than the Court had previously given it,<sup>56</sup> and a phrase which is now reduced to complete absurdity by the recent rendering in the *Dennis* case<sup>57</sup> which finds the requisite danger in advocacy of forcible overthrow "as speedily as circumstances would permit." (Who ever advocated any action any sooner?)

But "clear and present danger," whatever that may mean, does not exhaust the categories of exceptions. Other exceptions lie, as Chief Justice Vinson has recently reminded us, in "the considerations that gave birth" to that exception.<sup>58</sup>

In dealing with exclusions from public employment which abridge rights guaranteed by the First Amendment or by other constitutional provisions, the appropriate exception was once expressed in another Holmes epigram: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>59</sup> Later, it was explained somewhat more elaborately that since public employment was a "privi-

lege" which the state could withhold, it could impose any conditions upon a grant of that privilege—including forfeiture of constitutional rights.<sup>60</sup> Since *United Public Workers v. Mitchell*<sup>61</sup> this exception seems to have been limited somewhat—the impairment of constitutional rights may not go beyond forbidding what may be "reasonably deemed . . . to interfere with the efficiency of the public service." But the exception will still accommodate loyalty tests for public officers and employees—such tests merely establish "reasonable qualifications" for office or employment. And in such cases, at least, the exception seems to cover not only the First Amendment,<sup>62</sup> but also the prohibition against bills of attainder.<sup>63</sup>

All of this seems to me to be poor constitutional interpretation. I agree with Alexander Meiklejohn that the First Amendment was intended to guarantee the right of political advocacy, including advocacy of revolution, against legislative abridgment<sup>64</sup>—that it was intended to place such advocacy beyond legislative reach whether the legislature is attempting to suppress "clear and present dangers" or to prescribe vocational qualifications. But I shall not take time to debate that proposition here. For even under the "reasonable qualifications" exception, which has been applied in other contexts to licensed vocations as well as to public employees,<sup>65</sup> the First Amendment is violated when loyalty tests are applied to lawyers. The "reasonable qualifications" exception cannot rationally be made to accommodate such tests.<sup>66</sup>

To state my position in its baldest form—and in a form broad enough to cover all loyalty tests based on political belief, speech or association—one who personally advocates the forcible overthrow of the government does not, by such advocacy, demonstrate his unfitness to practice law. This brings me into flat conflict with

60. Hale, *Unconstitutional Conditions and Constitutional Rights* (1935) 35 Col. L. Rev. 321; Note (1953) 28 Ind. L. J. 520.

61. 330 U. S. 75 (1946).

62. *Adler v. Board of Education*, note 14, supra; *In re Summers*, 325 U. S. 561 (1945).

63. *Gerende v. Board of Supervisors*, note 12, supra; *Garner v. Los Angeles Board*, note 12, supra.

64. See Meiklejohn, *What Does The First Amendment Mean?* (1953) 20 U. Chi. L. Rev. 461.

65. *Hawker v. New York*, 170 U. S. 189 (1898); *Gray v. Connecticut*, 159 U. S. 74 (1895); *Dent v. West Virginia*, 129 U. S. 114 (1889).

66. Nor can it rationally be made to accommodate a requirement that a lawyer be willing to serve in the state militia. *In re Summers*, note 62, supra, makes no attempt to demonstrate anything to the contrary. The decision is justified solely on the ground that Illinois treats lawyers no worse than the federal government—under the Supreme Court's interpretation of a federal statute—treats aliens seeking citizenship. Since the Supreme Court revised its interpretation of the statute in *Girouard v. U. S.*, 328 U. S. 61 (1946), that justification—if it was a justification—is no longer available.

54. *American Communications Association v. Douds*, note 21, supra.

55. *West Virginia State Board of Education v. Barnette*, 318 U. S. 624 (1942).

56. *Schenck v. U. S.*, 249 U. S. 47 (1919).

57. *Dennis v. U. S.*, note 11, supra.

58. *American Communications Association v. Douds*, note 21, supra.

59. *McAuliffe v. Mayor*, 155 Mass. 216, 29 N.E. 517 (1892).

Brown and Fassett,<sup>67</sup> who regard a loyalty test based on such personal advocacy as at least acceptable and constitutional, though perhaps not desirable.

Their defense of such a test is under the "reasonable qualifications" exception. They consider the test to have a bearing on the lawyer's professional fitness. To demonstrate the connection, they begin with a resolution recently adopted by the Association of American Law Schools<sup>68</sup> which says in part:

"A belief in lawful procedures may properly be demanded of one who undertakes to be a teacher of law. Whatever ideals he may cherish, he must be willing to work for a realization of them within the framework of orderly, lawful and democratic processes. The teacher of law with no real belief in the principle of legality is a contradiction in terms."

To this they add: "Since constitutions are our fundamental source of legality, a willingness to support and defend our constitutional system (which includes procedures for its orderly alteration) would seem to be a prerequisite for a lawyer's faithful performance of his duties as a lawyer."<sup>69</sup>

This seems to me to be as large a piece of nonsense as saying that a man who advocates forcible overthrow of the government can be excluded from the plumber's trade because he may break the pipes.

The analogy highlights the error. Our hypothetical plumber believes in force as a method of altering government, not as a method of plumbing. So a lawyer may believe in force as a method for governmental change without believing in it as a method of practicing law. The fact that he believes in, and advocates, such a method of governmental change cannot be rationally made to show that he will ever represent the interests of any client, in court or outside of court, by any other than

peaceful and legal means. Augustus H. Garland, who went beyond advocacy and actually participated in armed rebellion against the government,<sup>70</sup> later enjoyed a peaceful and "legal" career, both in his representation of private clients and in his representation of the United States as its Attorney General.<sup>71</sup>

And it is only for the purpose of representing clients in the settlement or avoidance of their private disputes and disputes with the existing governments that any attorney needs a license to practice law. No license is—and I suppose no license could be—required for the purpose of attempting to change the government. To put it another way, changing the government is not, and cannot be made, the exclusive province of lawyers. The state may not confine advocacy of change of government, though it may confine the practice of law, to those who hold a lawyer's license. The lawyer is not practicing law when he advocates governmental change, whether he advocates that it be achieved by vote or by force. He functions in such matters in the same capacity as political scientists, plumbers and other citizens.

To hold the lawyer to a belief in a "principle of legality" in the practice of law is one thing. To hold him to a belief in a "principle of legality" as a means of governmental change is quite another—and the connection between the two is not made closer than the connection between the technical competence and the political views of the plumber by referring to "constitutions as our fundamental source of legality." The extent of the state's licensing power—its power to exclude from the ranks of lawyers or plumbers—is reached when it imposes standards designed to affect the manner of practicing law and plumbing. The power to license professions is not a power to license methods of governmental change.

In addition to their "principle of legality," Brown and Fassett have a principle of morality. The lawyer who advocates forcible overthrow of the government, they say, may also be excluded from his profession on the ground that "he is not of good moral character because he contemplates criminally reprehensible conduct."<sup>72</sup> This idea is the more remarkable because its

70. *Ex parte Garland*, note 18, supra.

71. See *Garland*, Experience in The U. S. Supreme Court (1898). True, there is evidence that in matters of extra-legal propriety Attorney General Garland was not as sensitive as he should have been to possible conflicts between his private investments and his official duties. See Nevins, *Grover Cleveland* (1933), 293-295. But this shortcoming does not seem to be confined to Attorneys General with revolutionary backgrounds—or even to Attorneys General.

72. Brown and Fassett, note 2, supra, at 502. Since these remarks were delivered Professor Brown has advised me that I misinterpreted his and Fassett's position on this point—that they suggest "good moral character" as an established test which might be employed to embrace the loyalty test, but that they regard it as a term of art which, at least in this application, would involve no moral judgment.

67. Brown and Fassett, note 2, supra, at 502. Although they speak at this point of overthrow by "unconstitutional means," their later elaboration of the subject demonstrates that "force and violence" are the means with which they are concerned.

68. Proceedings of The Association of American Law Schools (1951), 61, 99.

69. Brown and Fassett, note 2, supra, at 481. I take it that while the "support and defend our constitutional system" phraseology resembles that employed in the traditional lawyers oath, that fact is not supposed to give the argument for constitutionality of loyalty tests additional weight. Brown and Fassett do not suggest that the traditional oath has any specific constitutional sanction. It has only if the oath prescribed by U. S. Const., Art. 6, Cl. 3, for state and federal legislative, executive and "judicial officers" is applicable to lawyers. But the history of that requirement indicates that it was imposed to buttress the supremacy clause, so that state judges "will \* \* \* not judicially determine in favor of their state laws," and that it was made applicable to federal officers simply to make it more palatable to the states. 1 Farrand, Records of The Federal Convention (Rev. Ed., 1937), 203, 207; 2 *Ibid.*, 87-88. The constitutional oath has been held inapplicable to grand jurors on the theory that it extends not to "all who attend the administration of justice," but only to "those who exercise the judicial functions." *Adams v. Indiana*, 214 Ind. 603, 17 N.E. (2d) 84, 118 ALR 1095 (1938).

authors apparently would not consider such advocacy necessarily either immoral or reprehensible on the part of non-lawyers:

"[A]n ordinary citizen might believe with utmost sincerity and devotion to his country that its welfare required abstention from violence under all circumstances, even against invasion. Contrariwise, another might urge immediate resort to violence to overthrow a government he believed to be corrupt. Whether such beliefs are permissible for a lawyer has been questioned."<sup>73</sup>

The suggestion that beliefs which another may hold "with the utmost sincerity and devotion to his country" are not "permissible for a lawyer" because "reprehensible" and evidence of lack of "good moral character" is not only absurd on its face. It is also absurd in the light of our national experience. It would raise serious questions about the good moral character of such lawyers (to name only three) as—

*Thomas Jefferson*, who said: "I hold it, that a little rebellion, now and then, is a good thing, and is necessary in the political world as storms in the physical . . . It is a medicine necessary for the sound health of government."<sup>74</sup>

*Alexander Hamilton*, who said in *The Federalist*: "If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government. . . ."<sup>75</sup>

*Abraham Lincoln*, who said in his First Inaugural: "This country belongs to the people who inhabit it. Whenever they shall grow weary of the existing Government, they can exercise their constitutional right of amending it or their revolutionary right to dismember or overthrow it."

That highly intelligent lawyers can today call down upon their profession a double moral standard which such distinguished lawyers in our history would never have dreamt of applying to themselves is, it seems to me, a shocking manifestation of the extent to which hysteria has carried us.

I have spoken here of that hysteria only as it is expressed in attempts to deprive lawyers of their consti-

tutional rights. I have characterized those attempts as unique in that most of them originate from the lawyers themselves. They are also unique in another respect, which makes them matters of extreme concern to non-lawyers.

The hysterical men among us are not concerned with the loyalty of lawyers alone. They have similar proposals—many of them already in effect—to assure the loyalty of non-lawyers as well. These proposals, like those for lawyers, would deprive their victims of cherished constitutional rights. And if the non-lawyer is to preserve those rights, he needs the assistance of a lawyer. But the loyalty tests imposed on lawyers operate to make that assistance more difficult to secure. Hence, those tests tend to impair another constitutional right of lawyer and non-lawyer alike—the right to effective assistance of counsel.

That this is the tendency of such tests for lawyers is not merely the view of an ivory-tower academician, or of those who might be accused of excessive preoccupation with civil liberties. In opposing the 1950 ABA loyalty oath proposal, a twenty-four-man committee of the Association of the Bar of the City of New York—a committee which included the present Attorney General, Herbert Brownell Jr.—said in part:

"The establishment of the oath requirement might lessen the freedom of the bar to accept the responsibility of representing unpopular causes. At this time, when Communists are being more frequently called upon to appear in the courts, it is essential that they should not be deprived of their conceded right to be represented by counsel of their own choice. A lawyer might hesitate to represent accused Communists lest it be said that such representation constituted support of an organization of the prohibited kind."<sup>76</sup>

Obviously, the same objection runs not only against loyalty oaths—which is all the committee was there concerned with—but against any kind of loyalty test for lawyers.

This is an additional, and particularly vital, reason for opposing such tests. If lawyers ever become so intimidated by inquiries into their own loyalty that they fear to assert the constitutional rights of others in loyalty inquiries, then indeed our liberties will be lost.

VERN COUNTRYMAN  
Associate Professor  
Yale Law School

73. *Ibid.*, 481.

74. Letter to James Madison, January 30, 1787, quoted in Padover, *The Complete Jefferson* (1943), 270.

75. *The Federalist*, No. 28.

76. *The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy* (1951) 37 ABAJ 123.