The Feinberg Law

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THE FEINBERG LAW

THROUGH a resolution adopted March 29, 1940 by the Legislature of the State of New York, a joint legislative committee was appointed to investigate procedures and methods of allocating state monies for public school purposes and to investigate subversive activities. Pursuant to this resolution, a Joint Legislative Committee, thereafter known as the Rapp-Coudert Committee, was formulated consisting of members of both major political parties. The Committee decided that in relation to subversive activities, it could perform its duties more efficiently were a sub-committee from within its own membership appointed to devote itself exclusively to the special tasks involved in following the legislative mandate to investigate the public educational system of the City of New York. Its first task was to consider the presence and extent of subversive activities in our public schools.

RAPP-COUDERT COMMITTED REPORT

That such activities, particularly and almost exclusively on the part of the Communist Party, existed in the educational institutions of New York City, was soon apparent. In its first report, the Joint Legislative Committee stated in part as follows:

Ready recognition by the sub-committee that Communism might not be the only subversive doctrine being spread in the educational system early impelled its staff to seek evidence of Fascist and Nazi activities. Thus far no substantial evidence has been unearthed of organized activity of this character. Work will be continued along

1 1941 Leg. Doc. No. 54, 1941 Report, N. Y. Joint Legislative Com- mittee 60.
this line and such evidence as may be uncovered, if any, will subsequently be spread upon the Committee's records.

After alluding to the merciless discipline by which the Communist Party binds its members and to the tactics employed to realize its disruptive objectives, the report continued:

Thence from a general consideration of the broad picture of Communism, the Committee turned to the specific determination of its penetration into New York City's public educational system.

At public hearings held in December and in March, there was presented a highly evidential and well documented story of communist activity in Brooklyn College and the College of the City of New York. In preparing for these hearings, 256 private hearings were held, over 225 persons were interviewed and masses of records, publications and documents were carefully studied.

The pattern of what is going on in the educational system of New York City in respect to these activities, is gradually taking form. It will not be completely clear until this phase of the Committee's work is finished. The search for evidence has met with the determined opposition of certain organized groups of teachers. This opposition has manifested itself, not only in a constant barrage of publicity against the Committee and its work, but also in court proceedings which have caused the sub-committee's counsel to argue four motions in the Supreme Court, two appeals in the Appellate Division thereof, and two in the Court of Appeals. The Committee was successful in all.

Enough evidence, however, has been unearthed, despite these delays, to make it clear that organized subversive activities do exist in the public schools and colleges of the City of New York, carried on by a small but very active group.

The teachers and students who have been infected by the virus, even though a relatively small percentage, have had enough influence by reasons of organized direction to cast discredit on the institutions and organizations with which they are connected. The termination of such activities will be in the interest of the colleges and schools and helpful to the great body of students who attend these institutions for the serious purpose of getting an education.

Definite proof that the Communist Party aims to undermine American youth by spreading its alien and subversive principles among them was but a confirmation of an article
published in the official organ of the Communist Party, which declared: "... the Party must take careful steps to see that all teacher-comrades are given thorough education in the teaching of Marxism-Leninism. Only when teachers have really mastered Marxism-Leninism, will they be able to inject it into their teaching at the least risk of exposure and at the same time to conduct struggles around the schools in a truly Bolshevik manner." ²

The Rapp-Coudert inquiry into our public schools conclusively established that communist influence was widening in the school system and that the customary Red, divisive stratagem was flourishing in secret, disciplined cells. Unfortunately, the disclosures of this investigation were not followed up. Aside from the Schappes' conviction for perjury in swearing that he was not a member of the Communist Party,³ and the dismissal of about twenty teachers, the major accomplishment of the inquiry was the revelation of the pronounced evidence of seeds of Moscowism growing in our public schools. In its final report,⁴ the Rapp-Coudert Committee recommended special remedial legislative proposals, two of which are peculiarly relevant to our discussion of the Feinberg Law:

4. The vesting of power in the Board of Education to appoint special examiners, with power of subpoena, to investigate the conduct of its employees and to act as trial examiners on the hearing of charges, such special examiners to be appointed from the regular professional staffs or otherwise, as the Board of Education may determine;

5. A legislative declaration of the duty of Boards of Education and Higher Education to maintain adequate standards of conduct as well as constant vigilance in ascertaining the facts relative to subversive activity in the schools, and a requirement of periodic reports to the Legislature on the discharge of such duty for at least the next two years.

² THE COMMUNIST, May, 1937.
⁴ 1942 LEG. DOC. NO. 49, 1942 REPORT, N. Y. JOINT LEGISLATIVE COMMITTEE.
Had these recommendations been adopted and integrated at the time by state and local legislative authorities, the Law we are about to discuss might not have been necessary at a later date.

**FAILURE TO IMPLEMENT REPORT**

The failure to pursue the leads afforded and the proposals suggested by the Rapp-Coudert Committee only emboldened the communistic followers in the public school system to greater and more zealous effort. The Rapp-Coudert report and the conclusions of the New York City sub-committee relative to subversive activity among the students in the public high schools and the colleges in the City of New York, were not furthered either by investigative machinery in the school system or by legislative mandate. Pre-occupation with the World War II conflict, coupled with relaxation of vigilance against internal communist infiltration afforded the zealots of Stalin excellent opportunities to consolidate their gains in every form of organized human activity in this country. Education and schools of learning were particularly vulnerable to the onslaughts of Red activity. That they were successful in other lines of endeavor, particularly in governmental circles, is not peculiarly within the scope of this paper. However, it is apparent that while this country was engaged in a major world war conflict, the devotees of Communism were not asleep.

After the war, and specifically on September 27th to 30th and October 1st and October 19th, 1948, hearings were held before a special sub-committee of the Committee on Education and Labor of the House of Representatives, pursuant to House Resolution 111, 80th Congress. The testimony 5 addressed particularly to the investigation of Teachers Union Local 555, United Public Workers of America, a Communist-dominated unit, abundantly established through the statements of educational representatives

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affiliated with the public school system of the City of New York that the Communist line of endeavor had in no wise changed in the intervening years; if anything, its influence in education had been widened and enlarged since the Rapp-Coudert disclosures.

Dr. Abraham Lefkowitz, an avowed foe of Communist influence in teaching circles, described the clever and unscrupulous techniques employed by Communist-dominated groups since as far back as 1922. He dramatically detailed the customary Communist planning, plotting and divisive methods in matters concerning educational activities, and the ensnaring of brilliant students in the meshes of Communist cells.

He further recounted the diverse methods used to gain control of teacher groups in the City of New York, and revealed that the Communist philosophy of sabotaging democratic processes had in no wise changed in the intervening years.

Mrs. May Andres Healy, a school teacher assigned to the Board of Education and chairman of the Joint Committee of Teachers Organizations representing 68 affiliated teacher organizations in the City of New York, confirmed the resourceful and vehement efforts of the Communists to take over the helm of teacher labor relations.

George A. Timone, a member of the Board of Education of the City of New York, through well detailed and documented proof outlined the precise, deliberate and well organized policy of the Teachers Union of recommending reading matter in more than a score of pamphlets and publications which hewed closely to Communist ideology.

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Recognizing fully the deadly effects of teaching Marxism to our future citizenry and the urgent need for exposure and dismissal of the exponents of Red anarchy who are entrenched in our educational system, Senator Benjamin Fein-
berg introduced in the 1949 session of the State Legislature a bill which the devotees of Marx, Lenin and Stalin immediately denounced. Despite such opposition and that of some misguided liberals and innocents, the law was passed and approved by the Governor.

In answer to some assertions originating chiefly from Communist sources that the bill was ill-conceived, we need only refer to the brief history which is presented above. Only an outright leftist would refuse to concede and only a thoroughly misguided person would fail to evaluate properly the disclosed danger to our democracy, should Communist anarchy prevail in our land.

The bill was introduced in the State Senate on March 11, 1949. It was widely publicized; and while a formal legislative hearing was not held, discussion on the merits, implications and operations of the proposed law was thorough and searching.

The vote on the bill cut across party lines and was supported enthusiastically by Democrats and Republicans alike. In both houses the bill was overwhelmingly approved—in the Senate by a vote of 41 to 14 and in the Assembly by a vote of 122 to 25.

It should be pointed out here that even before enactment of the Feinberg Law, there had been a statutory enactment empowering the removal of superintendents, teachers and employees for treasonable or seditious acts or utterances. The Education Law provides that “a person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterances of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.”

Furthermore, the Civil Service Law prescribes that persons who are guilty of treasonable or seditious acts or who publish, print, edit, issue or sell any book, paper or document in any form containing or advocating, advising or teaching the doctrine that the Government of the United States or any

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9 N. Y. Education Law § 3021.
political subdivision thereof should be overthrown by force, or who organizes or helps to organize or becomes a member of any society or group of persons teaching or advocating overthrow of the government by force or violence or any other unlawful means, shall be ineligible for appointment to any office or position in the service of the state or of any civil division or city thereof; and that no such person presently employed should be continued in such employment. As to the realm of education, it further provides that no such person shall be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state normal school or college or any other state educational institution.¹⁰

But the mind of the Legislature evidently held the firm opinion that sufficient effort had not been exerted by educational authorities throughout the state in removing from the system Communists and other subversives; and that the authority which the educational authorities already possessed was not being thoroughly or effectively exercised. Accordingly, the Feinberg Law is a direction to such educational authorities through the Board of Regents to accomplish this purpose. As will be seen, the Legislature has now provided the legal machinery to enable all public school authorities to ferret out, expose and dismiss the traitor who would scheme and plot to inculcate into the impressionable minds of our young people the virus of proletarianism or any other form of dictatorship.

The Law itself reads plainly and simply and is free from wordy, lengthy verbiage. It is both precise and clear; it concerns itself with a major problem and proceeds directly to meet the problem. The preamble ¹¹ which defines the need and purpose of the Law, confirms the apprehension of the vast majority of our citizens. It refers to the infiltration of subversives into the public schools of the state. Implicit in this section is the acknowledgment that the machinery existing before the enactment of the Law was inadequate because the party discipline among subversive elements made it diffic-

¹⁰ N. Y. Civil Service Law § 12-a.
¹¹ Laws of N. Y. 1949, c. 360, § 1.
cult not only to assess the inroads made, but even more
difficult to detect the guilty parties.

Accordingly, the Board of Regents of the State of New
York is directed to meet "this grave menace" and to report
regularly to the State Legislature. The recent trial of eleven
top Communists in New York revealed abundantly the tact-
ics of the Reds, their admitted perjury, their assumption of
fictitious names and their chameleon-like attitudes coupled
with their utter contempt for law, justice and order. There-
fore, it is difficult to conceive any purpose or motive by the
Legislature other than patriotic endeavor to assure the pres-
ervation of our institutions.

The directive provisions of the Law are embraced in a
new section of the Education Law. It consists of three
subdivisions.

The first subdivision of the new Law directs the Regents
to adopt, promulgate and enforce rules and regulations for
the disqualification or removal of superintendents, teachers
or employees in the public schools of the state who violate
the provisions of Section 3021 of the Education Law or Sec-
tion 12a of the Civil Service Law. It then directs that ap-
propriate methods and procedures be adopted for enforcing
these sections.

Section 3021, referred to above, provides that any person
employed in the public schools shall be removed from such
position for uttering treasonable or seditious words or acting
treasonably or seditiously while so employed.

Subdivision 2 of the new Section 3022 of the Education
Law provides that the Board of Regents shall, after inquiry
and after such notice and hearing as may be appropriate,
make a listing of organizations found to be subversive in that
they advocate, advise, teach or embrace the doctrine that the
Government of the United States or of any state or of any
political subdivision thereof shall be overthrown or over-
turned by force, violence or any unlawful means, or that they
advocate, advise, teach or embrace the duty, necessity or
propriety of adopting any such doctrine, as set forth in the
Civil Service Law.

\[\text{\textsuperscript{12}}\text{ N. Y. Education Law § 3022.}\]
After providing that such listings may be amended and revised from time to time, the Law states further, "The Board, in making such inquiry may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the Board may request and receive from such federal agencies and authority any supporting material or evidence that may be made available to it." 13

This provision therefore empowers the Board to use the listings promulgated by the Attorney General of the United States and any other official agency of the government which has, or may at some future time disseminate a list of those organizations found to be subversive. The elasticity of this provision is indeed necessary, for the Legislature noted a practice which has been commonly recognized in Communist strategy: dissolving an organization and immediately thereafter resuming the same subversive activities under another society, corporate or association name. Naturally, the Regents would have to be empowered and authorized to change the list of subversive organizations from time to time to combat such ruse and device.

The concluding sentence of this subdivision of the Education Law which directly affects the teacher or candidate for employment reads: "The Board of Regents shall provide in the rules and regulations required by subdivision 1 hereof that membership in any such organization included in such listing made by it, shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state." 14

Then the Law mandates the Board of Regents annually before the 15th day of February by separate report to give an accounting to the Legislature of the measures taken by the Regents to enforce the provisions of the Law. It further directs the Regents to include a description of surveys made by them from time to time as may be appropriate in order to determine the extent to which the Law itself has been en-

13 Id. § 3022(2).
14 Ibid.
forced in the city and school districts of the state. This latter provision was evidently motivated by a desire of the Legislature to have a continuous and running account from year to year of the efforts made to stamp out Communism and other subversive influences in the public schools of the state. It is understandable in view of the Legislature's concern about the failure to implement and enforce Section 3021 of the Education Law and Section 12a of the Civil Service Law, that this subdivision of the new section was added to require the Regents to give periodic administrative reports on the success or lack of it in the functions of the new Law, so that the Legislature, if necessary, might further implement existing laws. The Feinberg Law became effective on July 1, 1949.\textsuperscript{15}

**Rules of the Board of Regents**

Under date of July 15, 1949, the Board of Regents adopted new rules,\textsuperscript{16} relative to "subversive activities." The rules are simple and understandable.

After enjoining the school authorities to take all necessary action to make effective disqualification or removal of employees of the school system who violate the provisions of Section 3021 of the Education Law or Section 12a of the Civil Service Law, the rules\textsuperscript{17} direct that prior to the appointment of any superintendent, teacher or employee, the nominating official, in addition to making inquiry as to the candidate's record and professional training, shall make inquiry as to whether the candidate is known to have violated the aforesaid statutory provisions. It provides further that no person found to have so violated such provisions shall be eligible for employment.

The school authorities are required to submit to the Commissioner of Education not later than October 31, 1949 and not later than September 30th of each school year thereafter, a written report on each teacher or other employee.\textsuperscript{18}

\textsuperscript{15} Id. § 3022(3).
\textsuperscript{16} Rules of the Board of Regents § 254.
\textsuperscript{17} Id. 254(1) (a).
\textsuperscript{18} Id. 254(1) (b).
This report shall state either that there is no evidence indicating that such teacher or employee has violated the law, including the provisions with respect to membership in organizations listed as subversive by the Regents; or, where there is evidence indicating a violation, recommend that action be taken to dismiss the teacher or other employee on a specified violation or violations of the law. The Board of Regents delegates the school authorities in charge to prepare such report on the superintendent of schools and any other employees immediately and directly responsible to the school authorities.\textsuperscript{19}

The school authorities are mandated to proceed within 90 days after submission of the recommendations required in subdivision 1b, either to prefer formal charges against superintendents, teachers or other employees, or to reject the recommendations for such action.\textsuperscript{20}

The school authorities are directed to institute proceedings for the dismissal of superintendents, teachers or other employees in those cases in which, in their judgment, the evidence indicates violation of the Law. Proper safeguards are provided for the accused: “In proceedings against persons serving on probation or those having tenure the appropriate statutory procedure for dismissal shall be followed.” To those persons against whom charges are preferred who are serving under contract and not under the provisions of a tenure law, the authorities are directed to conduct such hearings as they deem the exigencies warrant before taking final action on dismissal. All rights to a fair trial, representation by counsel and appeal or court review as provided by the statute or the Constitution shall be scrupulously observed.\textsuperscript{21}

The rules then provide that the Regents will issue a list of subversive organizations and that “evidence of membership in any organization so listed on or after the 10th day subsequent to the date of official promulgation of such list shall constitute \textit{prima facie} evidence of disqualification for

\textsuperscript{19} Id. 254(1) (c).
\textsuperscript{20} Id. 254(1) (d).
\textsuperscript{21} Id. 254(1) (e).
appointment to or retention of any office or position in the school system.” It further provides that “evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, unless membership has been terminated in good faith.”

Section 3 of the rules of the Board of Regents addresses itself primarily to administrative procedures on the part of the school authorities in rendering their reports to the Commissioner of Education.

CONSTITUTIONALITY CHALLENGED

The constitutionality of the Feinberg Law was challenged in two actions, both considered by the Supreme Court, Albany County, Third Judicial Department.

The first was started by the Communist Party and the second by a group, save one, of New York City school teachers. While the petitions in both cases were procedurally different, the substantive issue raised in each was the constitutionality of the Law itself. Both cases were argued on cross-motions before Mr. Justice Schirick, sitting at Special Term, Albany County. The court's decision rendered on November 28, 1949 embraced both proceedings. The new Law was held to be unconstitutional and the court restrained the Board of Regents from preparing and publishing a list of subversive organizations pursuant to the Law and its own rules and regulations.

A third attack on the Law was launched in the Supreme Court, Kings County, Second Judicial Department in an action begun by the Teachers Union of the City of New York, Local 555 of the United Public Workers and certain taxpayers in an action seeking a permanent injunction and a judgment declaring the Law, Section 12a of the Civil Service Law and the Regents' rules and the Education Commissioner's memorandum promulgated thereunder, unconstitu-

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22 Id. 254(2).
tional. Although the court (per Hearn, J.) held that the Teachers Union and the individual teacher-plaintiffs were without standing since no list of subversive organizations had been published it nevertheless granted the motion for judgment on the pleadings as to the taxpayer-plaintiffs. It held Section 12a of the Civil Service Law (as implemented by the Feinberg Law), subdivision 2 of Section 3022 of the Education Law (Feinberg Law) and the Regents' rules promulgated thereunder to be unconstitutional.

CONSTITUTIONALITY UPHELD BY APPELLATE DIVISION

The Schirick decision involving the first two cases was appealed by the Attorney General of the State of New York to the Appellate Division, Third Department. The unanimous reversal of the lower court's decision is embraced in two separate opinions; the first written by Presiding Justice Brewster concerns itself with the suit of the Communist Party. The second decision from the pen of Mr. Justice Heffernan addresses itself primarily to the lower court's disposition of the claims of the New York City teachers.

The Schirick decision which held that the Feinberg Law is unconstitutional was based on the following several grounds:

I. It is a bill of attainder, and

II. It violates due process under the Fourteenth Amendment of the United States Constitution in that it:

   (a) is vague and fails to establish a definite standard of proscribed conduct,
   
   (b) presumes guilt,
   
   (c) mandates guilt by association, and
   
   (d) fails to afford a hearing to members of the listed subversive groups.

26 196 Misc. at 876.
27 196 Misc. at 885.
We shall consider the grounds advanced by the lower court as the basis for its decision and the reasoning of the Appellate Court in reversing the lower court's determination.

I. BILL OF ATTAINDER

The lower court held that Section 1, the preamble of the Law, must be read in conjunction with Section 3, subdivision 2 which directs the listing of subversive organizations; and that since the Communist Party had, by name, been mentioned in the preamble, "... the conclusion is inescapable that the Board of Regents is directed and required to list the Communist Party as a subversive organization, with all the consequences thereto, and to its members, which the statute prescribes. ... In the absence of proof it will not be presumed that membership in such party bears any logical relation to such members’ fitness as teachers. Lacking such proof, and none is required by the statute, it follows that the disqualification must be considered as punishment.

"The statute therefore violates the constitutional proscription of bills of attainder. It is a legislative finding of guilt of advocating the overthrow of government by unlawful means without a judicial trial, and without any of the forms and guards provided for the security of the individual by our traditional judicial forms." 30

The Appellate Division, Third Department, answering this reasoning of the lower court, stated in part as follows: "To effectively refute this charge (bill of attainder) there are several answers. In the first place, the references in the preamble are expressly based on hearsay. They adjudicate nothing as to the organizations referred to. In the event that the Board of Regents, for the reasons prescribed, finds and lists any organization as subversive, even then the statute provides naught else so far as that organization is concerned—no punishment is meted out, no pains and penalties inflicted, nor forfeitures prescribed. The statute is not a criminal law, nor does it possess a penal nature. (Mahler

30 Supra note 23 at 697, 93 N. Y. S. 2d at 285.
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v. Eby, 264 U. S. 32.) For aught of the workings of the statute, the organization, even when branded as subversive, can carry on as it chooses. As to any effects upon it which may flow from other sources because of the branding, suffice it to say here that none are imposed by the statute. Plaintiffs say that their association is named in the act. Even so, it is only in the preamble which forms no part of the statute. The preamble enacts nothing. It is an expression of views. It carries no sanctions. While it may, if necessary, be looked to for aid when the statute itself is ambiguous, it cannot control the enactment (People v. Sharp, 107 N. Y. 427; Newmann v. City of New York, 137 App. Div. 55, 59; Pumpelly v. Village of Owego, 45 How. Prac. 219; Goodell v. Jackson, 20 Johns. 693, 722; Jackson v. Gilchrist, 15 Johns. 89), and no such ambiguity is found. . . . Accordingly, since as to these plaintiffs [meaning the Communist Party—Ed.] the statute in question exercises no judicial power, renders no judgment, imposes no punishment, inflicts no pain or penalties, it may not be stricken down as a bill of attainder (People v. Hayes, 140 N. Y. 484).” 31

Mr. Justice Heffernan reiterated the language of his colleague in the following language: “The only portion of the Law which the Board of Regents is required to enforce—or could enforce—is Section 3 which became 3022 of the Education Law. The introductory Section 1 of the Law cannot be read into the operative provisions thereof, cannot be strained to find in it a directive to the Regents to list the Communist Party, cannot be strained to find in it the imposition of punishment upon the Communist Party without a hearing. It does not impose (a) any penalty; (b) without a hearing; and these are the two elements of a bill of attainder. A bill of attainder is a legislative judgment of conviction, an exercise of judicial power by the legislative body; the imposition of punishment by the legislative act (People v. Hayes, 140 N. Y. 484, 490). There is not one of these elements in the Feinberg Law.” 32

31 276 App. Div. at 467, 468, 95 N. Y. S. 2d at 789, 790.
II. DUE PROCESS OF LAW

(a) Vagueness and Failure to Establish Definite Standards of Proscribed Conduct

While granting that government is empowered to proscribe and punish words which incite to its overthrow by force and unlawful means, and that the doctrine of overthrow of government by unlawful means is not indefinite (citing Whitney v. California, 274 U. S. 357; Gitlow v. New York, 268 U. S. 652; and Dunne v. United States, 138 Fed. 2d 137, cert. den. 320 U. S. 790, 814), the lower court nevertheless found that the Feinberg Law is of a nature penalizing the free expression of views by its vagueness.33 And further, that in merely implementing Section 12a of the Civil Service Law and Section 3022 of the Education Law, it failed to establish the norm or standard of proscribed conduct and is therefore "a dragnet which may enmesh anyone who agitates for a change of government," citing Herndon v. Lowry, 301 U. S. 242, 263.34 It therefore held that "the Feinberg Law fails to meet the minimum standards of fairness required of an administrative proceeding." 35 As a basis for this statement, the court stated that in setting up a procedural requirement of listing subversive organizations without a hearing except such as "may be appropriate" to the educational authorities, due process was denied the organization which may be subsequently listed.36

As to the stake of the Communist Party in this issue, Mr. Justice Brewster wrote: "Plaintiffs also contend that in subjecting their organization to inquiry and possible listing, the statute transgresses constitutional safeguards as to due process. This fails, because as to whatever action may be taken as to it, appropriate notice and a right to be heard is afforded, and judicial review of any determination may be had as regards any justiciable question." (Civil Practice Act, Art. 78; Matter of New York Edison Co. v. Maltbie, 271

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33 196 Misc. at 701, 93 N. Y. S. 2d at 288.
34 Ibid.
35 Id. at 703, 93 N. Y. S. 2d at 291.
36 Ibid.
N. Y. 103, 111, 112; City of Newburgh v. Park Filling Station, 273 App. Div. 24, affirmed 298 N. Y. 649; Estep v. United States, 327 U. S. 114, 119-120.) "Any inquiry here as to the manner of the inquiry directed to be made by the Board of Regents of its mode of gathering evidence or as to the 'nature or source of the information of proof' upon which it may act, is premature and irrelevant. (Matter of Newbrand v. City of Yonkers, 285 N. Y. 164, 177.) We may not impute to the Legislature the use of vain and futile words in providing that the Board of Regents' inquiry and the listing of a subversive organization be made after appropriate notice and hearing. Rather we must regard this to mandate a full compliance with all the applicable requirements of due process." 37

Answering the reasoning of the lower court, Mr. Justice Heffernan stated: "The sole issue in this case is that which makes one activity — membership in an organization which advocates the overthrow of our government by force — prima facie a disqualification to teach in the public schools of this state. The issue is not, as claimed by respondents, freedom of speech, freedom of thought, freedom of assembly or freedom of the press. The Feinberg Law prohibits none of these freedoms. 38 . . . The Law is not a criminal statute. The effect of its application is not criminal punishment. As to a listed organization, there is no provision in the statute for taking any action against it. A teacher found to be a member of a listed organization is subject to an administrative hearing at which such membership is received as prima facie evidence of disqualification, and if such evidence is not rebutted, the teacher is disqualified from employment as such. Thus neither a listed organization nor a disqualified teacher is subject to criminal proceedings. 39 . . . The disqualification to be a teacher is for individual action." 40

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37 276 App. Div. at 468, 95 N. Y. S. 2d at 790.
38 276 App. Div. at 503, 95 N. Y. S. 2d at 452.
40 276 App. Div. at 504, 95 N. Y. S. 2d at 453.
(b) Presumption of Guilt

Mr. Justice Schirick felt that the provision of Section 3022, subdivision 2 of the Education Law and the rules implementing such Law, making membership in a subversive organization "prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of this State," was a burden on the teacher or other employee. Further, that it failed to honor the constitutional guarantee that a person shall be deemed to be innocent until proved guilty; and that the promulgation of a rule that membership in an organization, even though subversive, constitutes prima facie evidence of disqualification, creates a presumption of guilt (citing Manley v. Georgia, 279 U. S. 1; McFarland v. American Sugar Co., 241 U. S. 79; People v. Mancuso, 255 N. Y. 463).\(^{41}\)

The evident misunderstanding of the learned court at Special Term prompted Mr. Justice Heffernan to write: "Again we reject this is not a criminal statute. Even criminal statutes frequently declare certain circumstances to be presumptive evidence against the individual charged with crime. Such presumption, even in criminal statutes where the presumption of innocence is a vital principle, is held not to violate that constitutional protection" (citing People v. Farina, 290 N. Y. 272, 275-276; People v. Pieri, 269 N. Y. 315, 324; People v. Adams, 176 N. Y. 351, 360-362, affirmed sub nom. Adams v. New York, 192 U. S. 585, 598-599; Board of Commrs. v. Merchant, 103 N. Y. 143; People v. Cannon, 139 N. Y. 32, and other cases).\(^{42}\)

Presiding Justice Brewster was no less direct: "The provision that membership in a listed organization is prima facie evidence of disqualification is a rule of evidence. No vested right obtained to the absence of that rule (citing People v. Turner, 117 N. Y. 227; Preston Co. v. Funkhouser, 261 N. Y. 140, 144) and no restrictions are laid upon the rebuttal of the presumption arising from its application. The statute is equally applicable to all public school em-

\(^{41}\) 196 Misc. at 704, 93 N. Y. S. 2d at 291.
\(^{42}\) 276 App. Div. at 509, 95 N. Y. S. 2d at 457.
ployees and to all who may seek such employment, in a matter which is purely a state concern and which allows the exercise of its police power. It deprives no citizen of rights or privileges except 'by the law of the land.'"  

(c) Guilt by Association

An additional defect in the Feinberg Law found by the lower court was that membership in a subversive organization as prima facie evidence of disqualification is sufficient to establish the member's guilt by mere association and accordingly does violence to our Constitution.

As a rejoinder to this contention of the lower court, Mr. Justice Heffernan wrote: "This prima facie evidence of disqualification the teacher has full and complete opportunity to rebut. It does not restrict anyone's right to join and be a member of the Communist Party or of any other organization. . . . It does not decree 'guilty by association' nor direct that a teacher suffer any disqualification for mere association."

(d) Fails to Afford a Hearing to Members of the Listed Subversive Groups

Finally, Mr. Justice Schirick determined that since the member of the organization involved is given no notice of a hearing concerning the nature of such organization and is not afforded either an opportunity to be present or to confront the witnesses and adduce evidence of his own, the Feinberg Law is therefore constitutionally defective.

The Appellate Division (per Mr. Justice Heffernan) succinctly answered this objection in the following language: "The court below also finds that there is a denial of procedural due process because every member of an organization as to which the Regents hold a hearing to determine whether it is to be listed, is not required to be given notice of the hearing or opportunity to participate.

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43 276 App. Div. at 471, 95 N. Y. S. 2d at 792.
44 196 Misc. at 705, 93 N. Y. S. 2d at 292.
46 196 Misc. at 703.
"The same argument was made and rejected in Matter of Kaney v. New York State Civil Service Commission, 190 Misc. 944, affirmed 273 App. Div. 1054, affirmed 298 N. Y. 707, and to refute it again is but to slay the slain." 47

(e) Ex Parte Determination

The third assault on the Feinberg Law was made by a group of teachers and taxpayers. As stated above, the lower court ruled that the Teachers Union and the teacher-plaintiffs had no standing because no list had been published by the Board of Regents and that therefore there was no justiciable controversy as to them. However, he advanced two additional reasons for declaring the Law unconstitutional. First, that the determination of the subversiveness of the organization is made by an administrative body on evidence which is hearsay as to the teacher involved and that the latter has no opportunity to meet such evidence. Accordingly, he ruled that the person involved is disqualified by an ex parte determination. 48

Mr. Justice Carswell, who wrote the opinion of the Appellate Division, Second Judicial Department, decided March 27, 1950, 49 stated as follows: "The presumption in the statute is not conclusive, merely *prima facie*, and is a prescribed rule of evidence clearly within legislative competence. The presumed facts moreover are subject to defenses available to an employee at his own hearing. He may deny (a) membership, (b) that the organization advocates the overthrow of the government by force, and (c) that he has knowledge of such advocacy. The disqualification referred to in Section 12a, subdivision c, in respect to membership of an employee in a described organization means with knowledge of the employee of its subversive character. And the whole case is to be borne by the one preferring the charges against him. The statute is prospective in operation and conforms with due process of law (citing *Morgan v. United States*, 304 U. S. 1, 15, and other cases)." 50

48 196 Misc. at 881.
50 Id. at 530, 96 N. Y. S. 2d at 470, 471.
A second additional ground of unconstitutionality ascribed to the Law by Mr. Justice Hearn was that the Regents' rules create a presumption of continuance of past membership "in the absence of a showing that such membership has been terminated in good faith" in violation of the constitutional guarantee against an ex post facto law.\(^{51}\)

As was pointed out in the opinion of Mr. Justice Heffernan\(^ {52}\) a constitutional ban on ex post facto legislation applies to criminal or penal statutes. While not ruling directly on the point, Mr. Justice Carswell decided the question inferentially in the following language: "A finding pursuant to the statute [Section 3022] as to an organization and its listing, upon sufficient proof and after a hearing on notice, bears rational relation to the facts to be presumed under Section 3022, subdivision 2, Education Law, namely, that the organization does unlawfully advocate overthrow of the government and that a member-employee has knowledge thereof. The listing serves to apprise him of the character of the organization. The presumption in the statute is not conclusive, merely prima facie and is a prescribed rule of evidence clearly within legislative competence."\(^ {53}\)

**FURTHER OBSERVATIONS**

As of this writing the two decisions of the Appellate Division, Third Department, are being appealed to the Court of Appeals. It would be presumptuous in this article to indicate either what the Court of Appeals will or should rule. However, so much inaccurate and even misleading information, rumor and castigation have been hurled at the Feinberg Law that a few observations seem to be in order.

In his charge to the jury which passed on the guilt of the Communist leaders in New York City recently, Judge Medina succinctly dealt with this valuable right of free speech in language peculiarly pertinent to the enforcement

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\(^{51}\) 196 Misc. at 881.
\(^{52}\) 276 App. Div. at 507, 95 N. Y. S. 2d at 455.
of the Feinberg Law: 

"... Among the most vital and precious liberties which we Americans enjoy by virtue of our Constitution are freedom of speech and freedom of the press. We must be careful to preserve these rights unimpaired in all their vigor. ... But no one could suppose nor is it the law that any person has an absolute and unbridled right to say or to write and to publish whatever he chooses under any and all circumstances. ... Words may be the instruments by which crimes are committed, as in many familiar situations; and it has always been recognized that the protection of other interests of society may justify reasonable restrictions upon speech in furtherance of the general welfare. ...

The words of Mr. Justice Heffernan are particularly appropriate to the concern, not only expressed by leading educators and writers, but deeply felt by the parents of our pupils studying in schools and colleges where the impressionable minds of our youth may be, and, in fact, have been exposed to the insidious virus of Communist doctrinaires: "We are not dealing here with the propaganda of soap-box orators, or the utterances of those who preach from housetops or pray on street corners. We are dealing with a statute pertaining solely to teachers whose influence upon the children who come under their instruction is extraordinary. It is therefore of paramount importance that the association of teacher and pupil should imbue the latter with love of country, respect for its laws and should inculcate in the childish mind principles of justice and patriotism. We are not so naive as to accept as gospel the argument that a teacher who believes in the destruction of our form of government will not affect his students. It is not necessary to impart a thought by direct statement. The result may be accomplished by indirect, subtle insinuations, by what is left unsaid, as well as by what is said." 54

The Feinberg Law does not deny any teacher the right to follow his profession, if he pursues the philosophy and discipline exacted by membership in the Communist Party. He may teach his ideology in whatever institution or school will employ him. He does not, however, have an unqualified

54 276 App. Div. at 505, 95 N. Y. S. 2d at 453.
right to public employment as a teacher or employee. Government has a right without impairment of any constitutional privilege of the individual, to set up standards, rules and regulations even though the individual's outside activities may be somewhat circumscribed. (United Public Workers v. Mitchell, 330 U. S. 75.)

The shibboleth "witch-hunt" hurled at the Feinberg Law and the Regents' rules, is baseless. In the memorandum of the late Commissioner Spaulding, Education Commissioner of the State of New York, anent the function of the Law and the operation of the rules, the school authorities were admonished to examine all evidence concerning any suspected teacher or employee "promptly, dispassionately and thoroughly."

The consequence of irresponsible and baseless accusation was emphasized in the following language: "The designated officials should bear in mind for their own guidance, and where appropriate should bring to the attention of others, the fact that while statements made in connection with an official charge of disloyalty are legally privileged, no privilege attaches to gossip and the circulation of rumor. In this latter connection, attention is called to Matter of Mencher v. Chesney, 297 N. Y. 94 (101), in which the Court of Appeals stated: 'The courts have held that a false charge that one is a Communist is basis for a libel action.'"

Concerning the matter of subversive activity, the memorandum advised the school authorities against hasty or unjust accusation and it inveighed against hearsay statements and uncorroborated statements. It exhorted a complete examination of the evidence and not fragmentary proof or mere opinion as to the guilt of the individual involved. Of course, hearsay statements, while not to be considered sufficient for preferring charges could reasonably be used as the basis for furthering the investigation of the charges.

The startling and disturbing disclosures of traitorous activities of Sovietized operatives in our own governmental structure and the equally revolting revelations of a well-organized subversive minority in the public school system of New York City, have aroused our citizenry.
One need not be an expert either in pedagogy or child psychology to know and appreciate that by subtlety and slanting of presentation, a teacher who is so disposed can insinuate into the impressionable minds of our youth the doctrine of overthrow of our democratic system. Cynical and debasing appraisement of the heroic figures of our American history, coupled with praise of the revolutionary characters of current and past history; satirical reference to patriarchic, spiritual and moral standards, linked with laudations of the philosophy of Marx, Lenin and Stalin; and suggestions directed to the flaunting of all lawfully constituted authority with accompanying hints to pioneer in the forceful and unlawful overthrow of such authority, are the weapons of subversive teachers.

The Feinberg Law takes cognizance of this methodology and addresses itself to tightening already existing law to determine the traitorous teacher who teaches such ideology.

In recent years the pleas for correction of the abuses in our public educational system have been shouted down by the clamor of either misinformed, misguided or outright leftist teachers. Individual rights — of freedom of speech, freedom of thought and academic freedom — have been the vehicles shielding guilty subversives from detection, discovery and dismissal.

Constitutional guarantees should, of course, be observed, honored and defended. But under the guise of freedom, no teacher may claim a right to advocate and teach doctrines whose fulfillment will mean the elimination of all the freedoms we happily enjoy and which have been ruthlessly destroyed in those countries where statism and totalitarianism have prevailed.

JAMES F. TWOHY.