LEGISLATION

State Control of Political Thought *

The years since the World War have brought forth a host of legislation directed toward the suppression of political thought and utterance deemed dangerous to the body politic. Interestingly enough, most of the state legislation directed toward this end was enacted in the year following the war. The legislative mind, exercised by the Russian Revolution abroad and the sentiment of unrest which followed the war at home, thought it wise to discourage the advocacy of revolt and sabotage by visiting heavy penalties upon the offenders. Even the outward symbol of revolt, the red flag, was condemned, so that its display as a sign of sympathy with radical activity is now punishable in all but sixteen of the United States.[1]

Unlike some legislation passed in a welter of enthusiasm for the end sought and then buried in the books, prosecutions have been fairly prolific. A cursory glance at the digests reveals that California is far and away the most vigilant in the prosecution of the radical offender, and in general the West has led the East in the number of prosecutions. For a time after 1925, legislative and prosecutorial activity directed toward this end became exceedingly small. However, with the advent of the business depression and the consequent awakening of radical movements, the last few years have seen new enactments designed to curb the spread of radical thought. This note will concern itself with some of the problems raised by legislation of this nature.

A general impression that radical ideas were being advanced in some of the schools and colleges, combined with a feeling that susceptible youth should not be exposed to radical thought, has led to the passage of what may be called Teacher's Loyalty Oath Bills.[2] This type of bill is currently extremely

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* A discussion of federal sedition legislation is to be found in Note (1935) 35 COL. L. REV. 917.

1. ALA. CODE ANN. (Michie, 1928) §§ 4104-6; ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 4875; ARK. DIG. STAT. (Crawford & Moses, 1921) § 2319; CAL. PENAL CODE (Deering, 1931) § 403a [1st section held unconstitutional in Stromberg v. California, 283 U. S. 359 (1931)]; COLO. STAT. ANN. (Courtright's Mills, 1930) §§ 1893k-n; CONN. GEN. STAT. (Rev. 1930) § 6041; Del. Laws 1919, c. 231; IDAHO CODE ANN. (1932) § 17-4609; ILL. REV. STAT. (Cahill, 1933) c. 38, §§ 592-3; IND. STAT. ANN. (Baldwin, 1934) §§ 2399, 2401; IOWA CODE (1931) §§ 12901-3; KAN. REV. STAT. ANN. (1923) §§ 21-1305-6; MICH. COMP. LAWS (1929) §§ 16561-2; MINN. STAT. (Mason, 1927) §§ 10510-13; MONT. REV. CODE (Choate, 1921) §§ 10745-6; NEB. COMP. STAT. (1929) §§ 28-1104 to 28-1107; N. J. COMP. STAT. (Cum. Supp. 1911-1924) § 52-51; N. M. STAT. ANN. (Courtright, 1929) § 35-3302; N. Y. PENAL LAW (Supp. 1935) § 2095-a [held unconstitutional in People v. Altman, 241 App. Div. 858, 280 N. Y. Supp. 248 (1st Dep't 1934) on authority of Stromberg v. California, *supra*]; N. D. COMP. LAWS ANN. (Supp. 1913-1925) §§ 9790a1-3; OHIO CODE ANN. (Baldwin's Throckmorton, 1934) §§ 12398-1-2; OKLA. STAT. (Harlow, 1931) § 2575; ORE. CODE ANN. (1930) § 14-8, 126; PA. STAT. ANN. (Purdon, 1930) tit. 18, §§ 63-4; R. I. GEN. LAWS (1923) c. 393, § 1; S. D. COMP. LAWS (1929) §§ 4351-B-C; UTAH REV. STAT. ANN. (1933) § 103-26-84; Vt. Laws 1919, c. 195; WASH. REV. STAT. ANN. (Remington, 1931) §§ 2563-7 to 2563-10; W. VA. CODE ANN. (Michie, 1932) §§ 5913-4; WIS. STAT. (1931) § 348.485.

2. That the purpose of this legislation is to curb the spread of radical thought in the schools, see Burdette, *Progress of Teachers' Oath* (Nov. 1935) NATIONAL REPUBLIC 20 at 32, where the author says: "The public has become increasingly aware and alarmed of dangerous attacks, both open and clandestine, upon the Constitution and the communistic theories that have crept into many educational institutions."

popular with legislatures. Within the last year Arizona,[3] Georgia,[4] Massachusetts,[5] Michigan,[6] New Jersey,[7] Texas [8] and Vermont [9] have enacted such statutes. With minor variations, they provide that it shall be unlawful to serve as a teacher in any educational institution unless an oath is taken to support and defend the Constitution of the United States and the constitution of the particular state. Refusal to take the oath is visited with diverse consequences in the various states. Generally such a teacher must be denied employment.[10] In other states, fine or imprisonment is provided for teaching without taking the oath; [11] sometimes those in charge of the institution are to be fined for permitting one who has not taken the oath to teach.[12] Finally, some states provide no specific penalty at all,[13] merely declaring it unlawful to teach without taking the oath.

At least one teacher has seen the possibility of such laws becoming an entering wedge in a future effort to restrict freedom of academic discussion.[14]

3. Ariz. Sess. Laws 1935, c. 67. The act applies only to teachers in public schools.

4. Ga. Laws 1935, Res. 54. This act applies only to public school teachers and states in the "whereas" clause that Georgia "is being flooded with propaganda." In addition to requiring the oath, the teachers are obliged "to refrain from directly or indirectly subscribing to or teaching any theory of government or economics or of social relations which is inconsistent with the fundamental principles of patriotism and high ideals of Americanism." The penalty is discharge. In the light of Stromberg v. California, 283 U. S. 359 (1931), discussed *infra* p. 397, this statute is probably unconstitutional in that it might be construed to forbid the advocacy of governmental change by *peaceful* means.

5. See N. Y. Times, June 27, 1935, at 44. The only ones exempted from the requirement are foreign exchange professors.

6. Mich. Public & Local Acts 1935, No. 23. This act applies to teachers in schools "whose property, or any part thereof, is exempt from taxation." A school which employs teachers who refuse to take the oath forfeits its tax exemption; a school supported by public funds will be refused state money. The statute refers only to teachers in junior colleges, colleges and universities, and supplements MICH. COMP. LAWS (Mason, Supp. 1933) §§ 7381-1, 7620-1, which applies only to educational institutions supported in part or in whole by the state, and specifically excepts the University of Michigan and the Michigan State College of Agriculture and Applied Science.

7. N. J. Laws 1935, c. 155. Applying to teachers in schools supported in whole or in part by public funds, the act demands from citizens or subjects of foreign countries teaching in the schools an oath to support the institutions of the United States during the period of employment.

8. TEX. Laws 1935, c. 330. This act requires no oath, but each applicant for a certificate to teach in the public free schools must satisfy the county superintendent that he will support and defend the constitutions of the United States and Texas.

9. Vt. Laws 1935, No. 88. This act applies to public schools, and to private schools which furnish an equivalent education. The oath is not required from foreign citizens, but such persons are prohibited from teaching subversive propaganda and must promote ethical character, good citizenship and patriotic loyalty to the United States.

10. *E. g.*, IND. STAT. ANN. (Baldwin, 1934) § 5908; N. D. Laws 1931, c. 255; WASH. REV. STAT. ANN. (Remington, 1931) § 4966-1.

11. *E. g.*, OKLA. STAT. (Harlow, 1931) § 6815.

12. *E. g.*, ORE. CODE ANN. (1930) § 35-2404.

13. *E. g.*, N. Y. ED. LAW (Supp. 1935) § 709. This statute also makes it "unlawful" for one having charge of an educational institution to permit one who has not taken the oath to teach. Perhaps the most comprehensive sanctions for teaching without taking the oath exist in West Virginia. See W. VA. CODE ANN. (Michie, 1932) § 1807, to the effect that if one teaches without taking the oath, his pay check may not be honored, and the issuer of the check is guilty of a misdemeanor and subject to a fine.

14. Professor Mather, of Harvard University, contended that the requirement of the oath from private school teachers was unconstitutional, and announced his refusal to take it. See N. Y. Times, Oct. 3, 1935, at 1. He capitulated when Dr. James B. Conant, president of Harvard University, ruled that the entire faculty must obey the law. See (Oct. 12, 1935) LITERARY DIGEST 39. The oaths have also figured in the news in connection with the ruling of Comptroller General McCarl that no checks would be issued to those who refused to comply with his order that all teachers in the District of Columbia take such an oath.

The mooted point whether such an oath stands in the way of pointing out to students the existence of radical dogmas, or merely closes the door to advocating these doctrines in the classroom, has not been passed on. It would seem, however, that there is nothing inconsistent in exposing students to the fact of radical thought, at the same time that one has sworn to support and defend the Constitution. Any other interpretation would be an absurd attempt to combat ideas by ignoring them.

One final observation: it must be kept in mind that all disloyal teachers will not be removed from the schools by the passage of such a statute. The pledge means no more or no less than the significance which the individual teacher attaches to the oath; if this significance is small, the statute as to him is nugatory and he will continue to teach the forbidden doctrines until he is stopped by such effective means as are provided in the statute.

To date, fourteen states have such a statute.[15] The acts express, at the least, the legislative belief that other sanctions must be added to the already existing social pressure which demands that teachers conform to the accepted ideals of thought and conduct in the community.

In contrast to the foregoing type of legislation, which achieves its end by indirection, are found the more common though less current "sedition" statutes which make it criminal for anyone to advocate radical theories and practices. These statutes subdivide into (1) criminal syndicalism, (2) criminal anarchy and (3) sedition statutes, properly speaking. Criminal syndicalism, as defined in the realm of political theory, is a political and industrial movement which demands that the means of production, distribution and government shall be turned over to all those workers who are actively useful in the community.[16] A typical statute, containing a more lurid definition, follows:[17]

> "Criminal syndicalism is the doctrine which advocates crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform. The advocacy of such doctrine, whether by word of mouth or writing is a felony . . . ."

This doctrine of syndicalism finds its chief exponent in the "Industrial Workers of the World", whose activities are confined almost exclusively to the western part of the United States;[18] of the seventeen states where the advocacy of the doctrine is officially condemned,[19] thirteen are west of the

15. Statutes of this type which have not been enumerated *supra* are: CAL. GEN. LAWS (Deering, 1931) Act 7519, § 5.128; COLO. STAT. ANN. (Courtright's Mills, 1930) §§ 6767j-1; Mont. Laws 1931, c. 19; NEV. COMP. LAWS (Hillyer, 1929) § 5686; S. D. COMP. LAWS (1929) §§ 7518-A-C. A statute in Vermont prohibits teachers from indulging in propaganda subversive of the constitutions of the United States or Vermont. Vt. Laws 1931, c. 22. In Florida and South Carolina, teachers must satisfy the examiners of their loyalty to the national Constitution. FLA. COMP. GEN. LAWS (1927) § 618; S. C. CODE (1932) § 5342 (3). Oaths are required in District of Columbia, Guam, Panama Canal Zone, and the Philippine and Virgin Islands. See Burdette, *Progress of Teachers' Oath* (Nov. 1935) NATIONAL REPUBLIC 20.

16. 26 ENCYC. AM. (1925) 171. For both a more extensive definition and the history of this worldwide movement, see 21 ENCYC. BRIT. (14th ed. 1929) 706.

17. IOWA CODE (1931) § 12906.

18. See 12 ENCYC. BRIT. (14th ed. 1929) 310; OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) 160 *et seq.*

19. CAL. GEN. LAWS (Deering, 1931) Act 8428, §§ 1, 2; COLO. STAT. ANN. (Courtright's Mills, 1930) §§ 1893a-e; CONN. GEN. STAT. (Rev. 1930) § 6072; IDAHO CODE ANN.

Mississippi River. That the statutes were aimed at this organization is borne out by an investigation of the cases arising under the statute.[20] Advocacy of the doctrines of the Communist party has also been held to be within the condemnation of this type of statute.[21]

The criminal anarchy statutes follow generally the original New York statute [22] which was passed soon after the assassination of President McKinley.[23] The following is a typical statute: [24]

> "Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of the executive officials of government, or by any unlawful means. The advocating of such doctrine either by word of mouth or writing is a felony."

This is law in ten states.[25]

Sedition statutes proper fail to reveal the same uniformity in wording. However, Michigan's new statute is a fair representative: [26]

> "Any person who advocates . . . the overthrow by force or violence of the government of the United States and/or of any state of the United States is guilty of a felony."

Twenty other jurisdictions have such a statute.[27]

(1932) §§ 17-4401 to 17-4404; IOWA CODE (1931) §§ 12906-9; KAN. REV. STAT. ANN. (1923) §§ 21-301 to 21-304; KY. STAT. ANN. (Carroll, Baldwin Rev. 1930) §§ 1148a-1, 1148a-3 to 1148a-14; MICH. COMP. LAWS (1929) §§ 16559-60; MONT. REV. CODE (Choate, 1921) §§ 10740-4; NEV. COMP. LAWS (Hillyer, 1929) §§ 10560-3; OHIO CODE (Baldwin's Throckmorton, 1934) §§ 13421-23 to 13421-26; OKLA. STAT. (Harlow, 1931) §§ 2571-4; ORE. CODE ANN. (1930) §§ 14-3, 110 to 14-3, 113; S. D. COMP. LAWS (1929) §§ 3644-7; UTAH REV. STAT. ANN. (1933) §§ 103-54-1 to 103-54-5; WASH. REV. STAT. ANN. (Remington, 1931) §§ 2563-1 to 2563-5; W. VA. CODE ANN. (Michie, 1932) § 5912.

20. While the prosecutions for advocacy of the doctrines of the Industrial Workers of the World have been general throughout the west [*e. g.*, Burns v. United States, 274 U. S. 328 (1927); Fiske v. Kansas, 274 U. S. 380 (1927); State v. Tonn, 195 Iowa 94, 191 N. W. 530 (1923); State v. Lowery, 104 Wash. 520, 177 Pac. 355 (1918) (prosecution under criminal anarchy statute)], the California reports show about as many prosecutions for I. W. W. activity as the rest of the western states combined. *E. g.*, People v. Roe, 58 Cal. App. 690, 209 Pac. 381 (1922); People v. LaRue, 62 Cal. App. 276, 216 Pac. 627 (1923); People v. Wagner, 65 Cal. App. 704, 225 Pac. 464 (1924); People v. Stewart, 68 Cal. App. 621, 230 Pac. 221 (1924); People v. Powell, 71 Cal. App. 500, 236 Pac. 311 (1925).

21. People v. Ruthenberg, 229 Mich. 315, 201 N. W. 358 (1924); State v. Boloff, 138 Ore. 568, 7 P. (2d) 775 (1932).

22. N. Y. PENAL LAW (1916) §§ 160-6.

23. For an illuminating discussion of the history of these acts see CHAFEE, FREEDOM OF SPEECH (1920) 187 *et seq.*

24. ALA. CODE ANN. (Michie, 1928) § 3208.

25. *Id.* §§ 3208-11; ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 2318-9; COLO. STAT. ANN. (Courtright's Mills, 1930) §§ 1893a-g; MASS. GEN. LAWS (1932) c. 264, § 11; N. J. COMP. STAT. (1911) 1744, §§ 5a-f; N. Y. PENAL LAW (1916) §§ 160-6; R. I. GEN. LAWS (1923) c. 393, § 2; Vt. Laws 1919, c. 194; WASH. REV. STAT. ANN. (Remington, 1931) §§ 2562, 2563 to 2563-5; WIS. STAT. (1931) §§ 347.15 to 347.18.

26. Mich. Public & Local Acts 1935, No. 168.

27. COLO. STAT. ANN. (Courtright's Mills, 1930) §§ 1893a-g; CONN. GEN. STAT. (Rev. 1930) §§ 6039-40; Del. Laws 1931, c. 268; FLA. COMP. LAWS ANN. (Skillman, 1927) § 7133 (passed in 1866, it prohibits attempts at insurrection as well as sedition); ILL. REV. STAT. (Cahill, 1933) c. 38, §§ 587-93; IND. STAT. ANN. (Baldwin, 1934) §§ 2400-1; IOWA CODE (1931) §§ 12900-5; KY. STAT. ANN. (Carroll, Baldwin Rev. 1930) §§ 1148a-2 to 1148a-14; LA. CODE CRIM. PROC. ANN. (Dart, 1932) §§ 1185-7; MASS. GEN. LAWS (1932) c. 264, § 11; MISS. ANN. CODE (1930) § 1162; MONT. REV. CODE (Choate, 1921) §§ 10737-9; N. H. Public Laws 1926, c. 394, § 26; N. J. COMP. STAT. (Cum. Supp. 1911-1924) §§ 52-1a-c; N. M.

A general provision in almost all of the three foregoing types of statute makes it criminal to join any society, or voluntarily to assemble with any group teaching or advocating the proscribed doctrines. As a further measure, the owner or person in charge of any building who knowingly permits it to be used for the purposes mentioned is also punishable, generally with a lighter penalty.

The third and surprisingly enough, the most common type of legislation, is the "red flag" statute. These exist in all but sixteen of the United States.[28] They read substantially as follows:

> "It shall be unlawful for any person to have in his possession or to display any red or black flag, or to display any other flag, emblem, device or sign of any nature whatever, indicating sympathy with or support of ideals, institutions or forms of government, hostile, inimical or antagonistic to the form or spirit of the Constitution, laws, ideals and institutions of this State or of the United States." [29]

The last and most direct legislative efforts are completely new phenomena in legislation of this type. They have been described as "Ballot Bills" and provide that no political party that advocates the overthrow by force or violence or that carries on a program of sedition or treason toward local, state or national government shall be recognized or given a place on the ballot. Within the year, Arkansas,[30] Delaware,[31] Indiana,[32] and Tennessee [33] have enacted such statutes.

While the theory of democratic elections makes it legitimate to refuse to recognize a party whose doctrines are opposed to peaceful change, it is difficult to see what affirmative evil exists in the presence of such parties on the ballot. It is well known that this type of party is rarely a factor in any given election.

The Common Law

The only case which could be found affirmatively indicating without the assistance of a statute, that utterance of seditious words was punishable, is *Respublica v. Dennie.*[34] This was a case at *nisi prius* in which the defendant was indicted for publishing, shortly after the foundation of the Republic: "A *democracy* is scarcely tolerable at any period of national history. . . . No wise man but discerns its *imperfections,* no good man but shudders at its *miseries,* no honest man but proclaims its *fraud* and no brave man but *draws his sword against its force.*" [35]

STAT. ANN. (Courtright, 1929) §§ 35-3101 to 35-3105 [unconstitutional; see State v. Diamond, 27 N. M. 477, 202 Pac. 988 (1921)]; OKLA. STAT. (Harlow, 1931) § 2573; PA. STAT. ANN. (Purdon, 1930) tit. 18, §§ 121-2; R. I. GEN. LAWS (1923) c. 393, § 1; TENN. CODE ANN. (Michie, 1932) § 11026; WASH. REV. STAT. ANN. (Remington, 1931) §§ 2563-1 to 2563-5.

28. See *supra* note 1.

29. W. VA. CODE ANN. (Michie, 1932) § 5913.

30. Ark. Acts 1935, Act 33.

31. Del. Laws 1935, c. 144.

32. Ind. Acts 1935, c. 325. The act goes so far as to require any political party which has been previously awarded a place on the ballot to insert a plank in its platform stating that it does not advocate the overthrow of local, state or national government by force or violence, nor carry on a program of sedition or treason.

33. Tenn. Public Acts 1935, c. 72.

34. 4 Yeates 267 (Pa. 1805).

35. *Id.* at 268. The defendant was found not guilty.

The jury was charged that if "the publication was *seditiously, maliciously,* and *wilfully* aimed at the independence of the United States, or the constitution thereof or of this state," they should convict; but if it "was *honestly* meant to inform the public mind, and warn them against supposed dangers in society",[36] they should acquit. It is quite plain that the judge had carried over some of the English experience with seditious words.[37] The very important controversy over the Alien and Sedition Acts,[38] which took place at the inception of the Union of the States, demonstrates how greatly the experience of the founding fathers with English Star Chambers contributed to their feeling against the suppression of adverse political comment. It is perhaps for this reason that more cases are not to be found asserting that there is a common law of sedition.

Constitutionality

That the guarantee of free speech in the First Amendment does not affect state legislation is well established, since the first ten amendments apply only to Congressional legislation.[39] However, the due process clause in the Fourteenth Amendment, which protects so many other rights, has been invoked by the Supreme Court to the effect that an unreasonable restriction of free speech is a deprivation of "liberty" [40] and that free speech is a "fundamental" right.[41]

When the right of free speech is alleged to have been deprived by Congressional legislation, the Supreme Court has said that it is legally justified only when the words used are sufficiently dangerous.[42] But where a state statute is under attack as a deprivation of liberty under the Fourteenth Amendment, the Supreme Court has seen fit to lay down a different rule. The condemnation by a legislature of the utterance of a particular type of

36. *Id.* at 271.

37. See, for example, the case of The King v. Cobbett, reported in HOLT, LIBEL (2d ed. 1816) 114, n. *u.* There the publisher of the "Weekly Register" printed in the form of a letter, of which he was not the author, a libel on the administration of the Irish government. Lord Ellenborough charged the jury: "It is no new doctrine, that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law."

38. 4 CHANNING, HISTORY OF THE UNITED STATES (1917) 220 *et seq.*; 2 MCMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES (1887) 393 *et seq.*

39. See Barron v. Baltimore, 7 Pet. 243 (U. S. 1833); Fox v. Ohio, 5 How. 410 (U. S. 1847); Smith v. Maryland, 18 How. 71 (U. S. 1855).

40. Gitlow v. New York, 268 U. S. 652 (1925); Whitney v. California, 274 U. S. 357 (1927); Fiske v. Kansas, 274 U. S. 380 (1927). Two cases affirmatively holding a statute unconstitutional for violation of the Fourteenth Amendment as being an unreasonable restriction of liberty are Stromberg v. California, 283 U. S. 359 (1931), and the recent case of People v. Altman, 241 App. Div. 858, 280 N. Y. Supp. 248 (1st Dep't 1934), in which the court in a memorandum opinion based its decision on Stromberg v. California, *supra.*

41. See Gitlow v. New York, 268 U. S. 652, 666 (1925).

42. The test used with regard to Congressional legislation, where the First Amendment definitely limits restrictions on freedom of speech, is usually phrased in the classic words of Mr. Justice Holmes. The words must be "used in such circumstances and [be] of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenk v. United States, 249 U. S. 47, 52 (1910). See also, with regard to the test, Abrams v. United States, 250 U. S. 616 (1919) and Debs v. United States, 249 U. S. 211 (1919) which have, perhaps, relaxed the forcefulness of the limitation laid down by Mr. Justice Holmes. In any event, as Mr. Justice Brandeis has stated, there is yet no fixed standard "by which to determine when a danger shall be deemed clear." Whitney v. California, 274 U. S. 357, 374 (1927). See Note (1927) 76 U. OF PA. L. REV. 198, 200 *et seq.*

language is said to be a finding of danger sufficient to preclude further investigation by the Court.[43]

On the other hand, both the Supreme Court [44] and two state courts [45] have struck down statutes as unwarranted restrictions of free speech when they could be construed to prohibit the advocacy of political change by peaceful means.

Objections to the statutes based on unconstitutionality for other reasons than a restriction of freedom of speech have been many. Counsel often object that the statute is so broadly worded that no ascertainable standard of guilt is fixed; [46] and therefore amounts to a legislative delegation to the court and jury of the business of defining offenses.[47] These objections are regularly brushed aside on the grounds that the words are sufficiently explicit and have such commonly understood significance that the citizenry are sufficiently warned of what is made criminal; and that the standards of criminal conduct are sufficiently laid down so that court and jury may proceed without enjoying any unbounded discretion as to the definition of the offenses. Resort to the dictionary is usually had to show the precise meaning of these terms.

A peculiar constitutional question is presented by the Pennsylvania Constitution which in Article I, Section 2 states that the people have the "inalienable right to alter, reform or abolish their government in such manner as they may think proper." When this provision was urged against the constitutionality of the minutely detailed and stringent Sedition Act of Pennsylvania,[48] it was answered by the court that the "right of self-protection is an attribute of government",[49] and later, that the Civil War demonstrated that the constitutional guarantee of free choice of courses of action was by no means unlimited, and finally, that the police power must perforce override the constitutional mandate.[50]

In general, objections raised on the basis of deprivation of liberty without due process of law clauses in state constitutions have been exorcised by calling on the police power of the state. The basis of this is the broad and vaguely outlined syllogism that if the state has the right to protect the health, safety and morals of its citizens, *a fortiori,* it has the right to protect the existence of the state itself. The only problem is how far removed from the prohibition of actual insurrection a state may go in preserving itself. For example, the Connecticut statute prohibits the publication of disloyal, scurrilous or abusive matter concerning the form of government of the United States, its military forces, flag or uniform; any matter intended to bring the United States into contempt; any matter which creates or

43. See Gitlow v. New York, 268 U. S. 652, 668 (1925); Whitney v. California, 274 U. S. 357, 371 (1927); dissenting opinion of Mr. Justice Cardozo in Herndon v. Georgia, 295 U. S. 441, 447 *et seq.* (1935), 84 U. OF PA. L. REV. 256.

44. Stromberg v. California, 283 U. S. 359 (1931).

45. State v. Gabriel, 95 N. J. L. 337, 112 Atl. 611 (Sup. Ct. 1921); State v. Diamond, 27 N. M. 477, 202 Pac. 988 (1921).

46. See People v. Ruthenberg, 229 Mich. 315, 324-26, 201 N. W. 358, 360-1 (1925); State v. Worker's Socialist Publishing Co., 150 Minn. 406, 407-8, 185 N. W. 931, 932 (1921).

47. *E. g.,* State v. Sinchuk, 96 Conn. 605, 607, 115 Atl. 33, 34 (1921).

48. PA. STAT. ANN. (Purdon, 1930) tit. 18, § 121.

49. See Commonwealth v. Blankenstein, 81 Pa. Super. 340, 342 (1923).

50. Commonwealth v. Widovich, 295 Pa. 311, 317, 145 Atl. 295, 297 (1929); see Commonwealth v. Lazar, 103 Pa. Super. 417, 422, 424, 157 Atl. 701, 703 (1931).

fosters opposition to organized government.[51] It is clear under the doctrine mentioned above (that advocacy of peaceful change of government may not be interdicted) that the last clause is unconstitutional.[52] The very phrase "opposition to organized government" has been held by the United States Supreme Court, construing a California statute, to encompass advocacy by a minority party of the ousting of the incumbent political party.[53] The line demarcating the limits of the police power falls somewhere between this constitutional limitation and the prohibition of actual insurrection.

On the basis of the treatment given by the courts when an issue of free speech is made under the Fourteenth Amendment, it is fair to assume that the Loyalty Oath Bills will be held constitutional. It seems clear under the cases that such a requirement is well within the police power of the state as a regulation of the "morals" of the young. This conclusion is re-enforced since most teachers are citizens; it need only be pointed out that there exists such a relationship between citizen and state which, at the extremes, will compel the citizen to bear arms in defense of his country.[54] It cannot be an arbitrary exercise of the police power to compel the citizen to swear an oath that he will support and defend the Constitution of the very country he is obliged to fight for. The fact that public schools are supported by public funds and that the teacher is by that much a public servant, bolsters an already overpowering case for constitutionality. The extreme case would be that of an alien teaching in a private school who was compelled to take the oath. But the holdings of the courts to the effect that restrictions laid on aliens as a condition of employment in a "quasi-public" occupation are constitutional under the Fourteenth Amendment, would seem to control even such a case.[55]

As to the so-called "Ballot Bills", it can only be repeated that no one may object to the exclusion of a radical party from the ballot on the ground of restriction of freedom of speech, as the law now stands. It seems clear that if, under the Constitution, one may be punished for the advocacy of certain doctrines, no one may object that a party standing for those doctrines is being deprived of a place on the ballot.

Miscellaneous Considerations

The definition of the word "sabotage", which is practically always present in criminal syndicalism statutes, has troubled the courts in at least two cases. It is clear that where the defendant has advocated the wrecking of machinery, for example, no problem is presented. But in one case where the defendant advocated striking on the job by doing the smallest amount of work possible, it was held that such conduct was not sabotage within the

51. CONN. GEN. STAT. (Rev. 1930) § 6039.

52. The statute was held constitutional in State v. Sinchuk, 96 Conn. 605, 115 Atl. 33 (1921), ten years before the Supreme Court struck down the similar California statute in Stromberg v. California, 283 U. S. 359 (1931).

53. *Id.* at 369.

54. U. S. CONST. Art. I, § 8. Selective Draft Law Cases, 245 U. S. 366 (1918); see United States v. MacIntosh, 283 U. S. 605, 623-5 (1931); Jacobson v. Massachusetts, 197 U. S. 11, 29 (1905).

55. See Note (1934) 83 U. OF PA. L. REV. 74, 77. It is interesting to note that Governor Lehman of New York vetoed the bill when presented to him for the first time on the ground that private school teachers would be affected. N. Y. Times, May 17, 1934, at 4.

statute.[56] On the other hand, where a jury was charged that the advocacy of "scamped work" would be within the statute, the United States Supreme Court affirmed the charge.[57] It was thought necessary, however, to bolster the decision by investigating the offered evidence, which clearly showed advocacy of more than merely "scamped work".

A practical problem in the law of evidence is presented in almost all the cases. Once it is shown that the defendant is a member of an organization alleged to have been guilty of the advocacy of violence, it does not avail him to protest that the statements made at authorized meetings and writings showing the purposes of the organization are not admissible against him.[58] This sort of evidence is held admissible under the familiar head of declarations of co-conspirators engaged in the furtherance of an unlawful purpose.[59] This represents probably the furthest extension of the rule, since the number of conspirators who may make admissible statements becomes very large in a radical organization of any size. Furthermore, it is probable that internal factions therein may disagree with the tactics acceptable to a majority of the membership. It seems that enthusiasm for the extirpation of radical thought and utterance may have dulled the judicial perception of the function of the rules of evidence.

In no case has it been thought necessary to investigate the harm resulting from the defendant's utterances. The difficulty lies in the fact that "the expectancy of life to be ascribed to the persuasive power of an idea" [60] can only be guessed at. However, the lack of probable danger has not bothered any of the state courts. The conviction is allowed to stand on the showing made by pamphlets, speeches and party platforms. In *State v. Moilen* [61] the defendant was convicted merely on a showing that he posted stickers on buildings reading, *e. g.*, "Join the one big union"—"Abolition of the Wage System"—"Join the I. W. W. for freedom"—"Beware of Sabotage". The unsubstantial social harm resulting from activity of this sort would not seem to warrant the stigma of conviction for a felony plus the more effective sanction of imprisonment and fine.

Conclusion

The concept of state carries with it the right to punish those who would overthrow it. But the nature of the democratic state is such that encroachment by statute on the free expression of ideas, though aimed at revolutionary movement, inevitably discourages those who would peacefully reform. Militancy of language should not thus be allowed to be confused with advocacy of violence. If one believes with Mr. Justice Holmes that "the

56. *In re* Moore, 38 Idaho 506, 224 Pac. 662 (1924).

57. Burns v. United States, 274 U. S. 328 (1927). The evidence showed advocacy of loading ships so as to cause them to list unnecessarily, compelling the ship to put into port again, thereby reducing the employer's profits. Brandeis, J., dissented, on the ground that the charge was faulty and that it went clearly beyond the meaning of sabotage in the statute. The act involved was Cal. Gen. Laws (Deering, 1931) Act 8428, §§ 1, 2.

58. *E. g.*, State v. Boloff, 138 Ore. 568, 7 P. (2d) 775 (1932). The defendant was a member of the Communist Party. In the prosecution under the criminal syndicalism statute, it was held that statements made at party meetings were admissible.

59. See State v. Lowery, 104 Wash. 520, 525, 177 Pac. 355, 357 (1918) (inflammatory pamphlets published by I. W. W. held admissible).

60. Cardozo, J., in Herndon v. Georgia, 295 U. S. 441, 454 (1935).

61. 140 Minn. 112, 167 N. W. 345 (1918).

best test of truth is the power of the thought to get itself accepted in the competition of the market," [62] and that the American way of life has been to allow even the most inflammatory words to circulate freely, these statutes are not a legitimate exercise of the police power but an unwarranted stifling of freedom of expression. That the beliefs and emotions of the majority must be embodied in statutes punishing the expression of ideas inimical to the existence of the *status quo* is an admission by that much that democracy has failed. Faith in democracy would allow all dangerous political ideas to reach the eyes and ears of all, trusting in their repudiation by the ultimate governing body, the electorate.

A. G. V.

62. Abrams v. United States, 250 U. S. 616, 630 (1919).