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Excerpt from *The Los Angeles Teacher Purge: The Structures of an Anti-Communist Offensive*, A Dissertation

CHAPTER 10: THE SUPREMES

Hints of the U.S. Supreme Court's evolution on anti-communism could be seen as early as 1955, two years after Eisenhower appointed Warren to fill the Chief Justice seat opened by the death of Fredrick Vinson, and one year after the seminal *Brown v. Board*. The Court issued a handful of opinions between 1956 and 1960 that gradually chipped away at states' and institutions' most egregious anti-communist overreaches.[1]

Slochower

The Court's opinion in 1956's *Slochower v. Board of Higher Education of New York* should be of particular interest to *our* progressive teacher purge. A professor at Brooklyn College, part of the City University of New York system, Harry Slochower had been called to testify before the U.S. Senate's anti-communist committee, chaired by Senator Patrick McCarran, in 1952; when asked at the hearing about his Communist Party membership in 1941, the professor invoked his Fifth Amendment right against self-incrimination. (Heins 2013) Slochower was dismissed without a hearing in accordance with Section 903 of the New York City Charter, which provided that a city employee would be terminated if they pleaded the Fifth in response to questions from a court or investigating committee about "the property, government, or affairs of the city… or the official conduct of any officer or employee." (350 US 551, 1956, p. 552) Incidentally, Section 903 was not strictly an anti-communist measure – it was initially instituted in 1936 after police and other city officials refused to testify in the corruption trial of New York City Mayor Jimmy Walker.

In his appeal to the U.S. Supreme Court after his dismissal was upheld in New York's courts, Slochower argued Section 903 deprived him of due process. Five justices agreed and Slochower was reinstated at Brooklyn College shortly thereafter. Why the *Slochower* case didn't immediately nullify California's Dilworth Act, which also mandated the firing of public employees for invoking the Fifth Amendment, can be explained only tortuously.

According to the majority opinion written by Justice Tom Clark, the Court interpreted Section 903 as being premised on the assumption that someone who invokes the Fifth Amendment is either guilty of a crime of which they are earnestly trying to avoid incriminating themselves or is falsely invoking the Fifth and thus guilty of perjury. He wrote, "we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the

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[1] See *Slochower v. Board of Higher Education of New York City* (1956), *Jencks v. United States* (1957), *Yates v. United States* (1957), *Sweezy v. New Hampshire* (1957), *Shelton v. Tucker* (1960).

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Fifth Amendment." (p. 557) On the issue of due process, Clark found Section 903 extremely unforgiving:

> [Section 903] operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. (p. 558)

While these seem like issues that the Court might also take with a law such as Dilworth – that invoking the Fifth is taken as evidence of guilt and grounds for dismissal – another case heard by the Court a few years later, *Nelson v. County of Los Angeles*, clarified the differences between Section 903 and California's scheme, as identified by Justices Clark and Frankfurter, the two justices on the side of the majority in both cases.[2]

Nelson

In 1960's *Nelson v. County of Los Angeles*, petitioners Thomas Nelson and Arthur Globe were social workers employed by LA County; they had invoked their Fifth Amendment rights at a HUAC hearing in Los Angeles in May of 1956 and were subsequently fired per the Dilworth Act's sister legislation the Luckel Law, which extended Dilworth to all public employees in the state. Nelson was fired following a cursory hearing; as a probationary employee, Globe was fired summarily. Justice Tom Clark authored the *Nelson* opinion as well, and clarified that it was the automatic "inference of guilt, derived solely from a Fifth Amendment claim," that the Court had held to be arbitrary and unreasonable in *Slochower*. In *Nelson*, he wrote,

> …the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any 'built-in' inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing. (362 US 1, 1960, p. 7)

Thus the major difference making Slochower's firing in New York unconstitutional and Nelson and Globe's firing in Los Angeles constitutional, according to the majority, was the intermediary step written into California's law that deemed the

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[2] Clark and Frankfurter were joined by Justice Harlan as well as two justices appointed after Adler had been adjudicated, Whittaker and Stewart. Chief Justice Earl Warren recused himself from the Nelson case as he had signed the California legislation in question into law as governor.

act of refusing to testify in front of an investigative committee *insubordination* – public employees were not dismissed for invoking the Fifth Amendment, they were dismissed for insubordination due to their refusal to testify, regardless of their reasoning. Sometimes employees were afforded perfunctory hearings before their dismissal, and sometimes not, as in the case of Arthur Globe, or substitute teachers Helen Hughs and Charles Sassoon.

The Court's reasoning gives the impression of a *Highlights Magazine*-style spot-the-difference exercise where the exact same image was accidentally printed twice but a printing error resulted in a tiny smudge on one of the images and the Court squinted at that smudge and proclaimed, "found it!" But in fact, the language Harold Kennedy used in drafting the LA Board of Education rules, the Dilworth Act, and the Luckel Law was not accidental – quite the opposite. Kennedy had studied the Court's opinion in *Adler* and made very deliberate choices about the language included in his proposals. And he chose *wisely*.

Distinctive verbiage aside, the practical applications of the laws in New York and California were indistinguishable – if a public employee invoked the Fifth while being questioned about their communist ties, either in New York or in California, they would be fired. It was the *appearance* of due process in the California law, however flimsy that process may be in practice, that was necessary for the Court to consider the law constitutional. Consider this visual representation of the difference:

Plead the Fifth → Fired = Bad
Plead the Fifth → "Insubordination" → Fired = Good

As Justice Brennan argued in his dissent, co-signed by Douglas,

> The [*Slochower*] case involved an inference of unfitness for office… drawn arbitrarily and without opportunity to explain, from the assertion of the [Fifth Amendment] privilege. The same is involved here, and the thin patina of 'insubordination' that the statute encrusts on the exercise of the privilege does not change the matter. (p. 14)

ACADEMIC FREEDOM REVISITED

The string of losses suffered by academic freedom proponents across the country came to an indisputable end in 1961, however, with the U.S. Supreme Court ruling unanimously in favor of a Florida public school teacher who defied that state's oath in *Cramp v. Board of Public Instruction of Orange County*. This was followed by a 1964 ruling, seven-to-two in favor of faculty and staff at the University of Washington in *Baggett v. Bullitt*. In both of these cases the court found the oaths unduly vague or lacking means of objective measurement. In their vagueness, the Court ruled that the oaths in question limited the due

process of signees and potentially served to deter the free exercise of First Amendment freedoms.

Keyishian

Then in 1967 the Court took up another loyalty oath case, this one from New York State, *Keyishian v. Board of Regents of the University of the State of New York*. In 1962, the faculty and staff of the private University of Buffalo became employees of New York State when the university was acquired by the State University of New York system, a move championed by Governor Nelson Rockefeller. State employees were still obligated to sign a loyalty oath as prescribed by the Feinberg Law – the law at the center of the original *Adler v. Board of Ed* case of 1952. Five employees of the former University of Buffalo refused to sign the oath in 1963, including Harry Keyishian, who had witnessed the impact of loyalty purges as a student at Queens College in the early 1950s and had since served in the Navy and earned a PhD at New York University, joining the English department at the University of Buffalo in 1961.

The plaintiffs alleged that the Feinberg Law[3] was overly broad, vague, and an infringement of their First Amendment rights as a bill of attainder – a legislative act that designates a person or group of people or entity to be guilty of one thing or another, and imposes some sort of extrajudicial punishment. Bills of attainder are expressly forbidden in the Constitution – Article I, Section 9, Clause 3 reads, "No Bill of Attainder or ex post facto Law shall be passed."

The plaintiffs asked the Warren Court to reconsider its previous position from *Adler* regarding barriers to public employment that effectively denied people their First Amendment rights. As Richard Lipsitz argued while presenting the *Keyishian* plaintiffs' case against *Adler*, "the doctrine that 'if you don't like what you have to do in order to become employed by the state you can go elsewhere' is no longer, we think, the law" as expressed in Baggett and other recent cases. (*Keyishian* oral argument, 1966)

The Court found narrowly, five-to-four, in favor of the SUNY Buffalo faculty who had been fired for refusing to sign New York's Feinberg oath. They held that the government could regulate First Amendment rights only with "narrow specificity" and that the slate of anti-communist laws in New York was vague and broad. Justice William Brennan wrote for the majority,

> Constitutional doctrine which has emerged since [the *Adler*] decision has rejected its major premise... that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights

[3] They were actually challenging a slate of administrative laws, including Sections 3021 and 3022 of the New York Education Law, Section 105 of the New York Civil Service Law, and Section 244 of Article XVIII of the Rules of the Board of Regents of the State of New York, but for the purposes of brevity I shall refer to them collectively.

> which could not be abridged by direct government action. (385 US 589, 1967, p. 605)

Brennan's opinion cautiously paid tribute to William O. Douglas's dissent in *Adler*. Justice Minton had clearly established in *Adler* that the court considered depriving teachers their free speech entirely fair as a prerequisite to employment:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will… It is equally clear that they have no right to work for the State in the school system on their own terms… They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. (342 US 485, 1952, p. 492)

And in Douglas's *Adler* dissent, the justice warned of the effect that such anti-communist legislation had in eroding the liberties contained in the First Amendment.

> The public school is in most respects the cradle of our democracy. The increasing role of the public school is seized upon by proponents of the type of legislation represented by New York's Feinberg law as proof of the importance and need for keeping the school free of 'subversive influences.' But that is to misconceive the effect of this type of legislation. Indeed the impact of this kind of censorship on the public school system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship. (p. 508)

Brennan's *Keyishian* brief echoed this sentiment.

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. (385 US 589, 1967, p. 603)

Brennan's opinion celebrated the importance of academic freedom and addressed specifically the possibility of a "chilling effect upon the exercise of vital First Amendment rights" when teachers were faced with vague, overbroad proscriptions of their speech and associations.

Justice Clark authored the dissenting opinion, and conveniently summarized the lamentable position of anti-communists after the majority had ruled:

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> It is clear that the Feinberg Law, in which this Court found 'no constitutional infirmity' in 1952, has been given its death blow today. … And, regardless of its correctness, neither New York nor the several States that have followed the teaching of *Adler v. Board of Education*… for some 15 years, can ever put the pieces together again. No court has ever reached out so far to destroy so much with so little. (p. 622)

Adler, as law, was no more. On January 31, 1967, an op-ed by conservative columnist James J. Kilpatrick ran in the Los Angeles Times that proclaimed the effect of Keyishian "will be to make it infinitely more difficult for colleges and universities to protect themselves, and their students, from teachers who willfully advocate anarchy and violence." (LAT 01/31/1967)

MEANWHILE IN LOS ANGELES

Vogel v. LA County

Though the Dilworth Act had largely fallen out of use by the late '50s, in the wake of the *Keyishian* decision, the California Supreme Court was forced to revisit its past decisions upholding various loyalty oath legislation. In another matchup between LA County Counsel Harold Kennedy and ACLU attorney A.L. Wirin, the California Supreme Court nullified the state's Levering Oath in *Vogel v. County of Los Angeles*. In light of *Keyishian*, the state's Supreme Court ruled in a six-to-one decision in December of 1967 that the loyalty oath was unconstitutional based on the broad restrictions it placed on the First Amendment rights of public employees. Justice Raymond Peters wrote for the majority:

> When government seeks to limit [First Amendment] freedoms on the basis of legitimate and substantial governmental purposes, such as eliminating subversives from the public service, those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved (68 Cal.2d 18, 1967, p. 22)

Ball v. LA Board of Education

Alice Ball was a student at Los Angeles City College who had applied for a summer clerical position at the school in 1967. When Ball refused to answer questions about whether she had been a member of the Communist Party her application was denied. A.L. Wirin and the ACLU again took the case, ultimately forcing the Los Angeles Board of Education to repeal its requirement that employees answer specific questions about the Communist Party and part of its oath, which had remained largely unchanged since Harold Kennedy had first drafted it in 1952.

As of April 21, 1969, Los Angeles teachers no longer needed to answer for their communist ties or sympathies or fear reprisal for not doing so.