Issues of Legal Policy in Social Science Perspective

The call for studies of the social impact of particular judicial, legislative, administrative and executive rules, decisions and practices is sounded sporadically and acted upon but rarely. To read the recent decisions of the Supreme Court of the United States overruling established precedents in many areas of our constitutional law is to catalogue a long list of missed opportunities for social scientists. As an example of the cause for this lament, I shall present *Keyishian* v. *Board of Regents*[1] which for all practical purposes overruled *Adler* v. *Board of Education*.[2]

In *Adler*, decided in 1952, the Supreme Court, by a vote of six to three, upheld the constitutionality of (1) the New York Civil Service Law which barred from employment in the civil service and the educational system anyone who (a) advocated the overthrow of the Government by force, violence or any unlawful means, or (b) published material advocating such overthrow, or (c) organized or joined any society advocating such doctrine; and (2) the Feinberg Law which required the Board of Regents to adopt and enforce rules to effectuate these provisions of the Civil Service Law and list the organizations advocating the proscribed doctrine. Membership in such organizations was made prima facie evidence of disqualification for employment.

Justice Minton wrote the Court's opinion, in which Chief Justice Vinson and Justices Jackson, Burton, Reed, and Clark joined.

Justice Black dissented, attacking the New York legislation as another of the enactments "which make it dangerous—this time for school teachers —to think or say anything except what a transient majority happen to approve at the moment." [3]

Justice Douglas also wrote a dissenting opinion in which Justice Black joined. Justice Douglas castigated "this kind of censorship" imposed on the public school system and the "witch hunt" which it would produce.[4] He also predicted that the New York legislation "is certain to raise havoc

1. Keyishian v. Board of Regents, 385 U.S. 589 (1967).
2. Adler v. Board of Education, 342 U.S. 485 (1952).
3. 342 U.S., at 497.
4. 342 U.S., at 508, 509.

with academic freedom." [5] "Any organization committed to a liberal cause, any group organized to revolt against an hysterical trend, any committee launched to sponsor an unpopular program" will become suspect.[6] Teachers "will tend to shrink from any association that stirs controversy" and "freedom of expression will be stifled." [7] "Inevitably," Justice Douglas claimed, the school system will be turned "into a spying project." [8]

> Regular loyalty reports on the teachers must be made out. The principals become detectives: the students, the parents, the community become informers. . . .
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> What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. . . . Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.[9]

Justice Frankfurter also dissented, but not on the merits of the New York legislation. He pointed out that the case had been brought to the Supreme Court by eight municipal taxpayers; two were parents of children in New York City schools and four were teachers in these schools.[10] All the plaintiffs sought a declaratory judgment that the New York legislation was unconstitutional and an injunction against its effectuation; their motion for judgment on the pleadings was denied by the highest New York court.[11] No steps had been taken to enforce the legislation from the time the suit began.[12] Under these circumstances, Justice Frankfurter objected that the Court was indulging in constitutional adjudication "on merely abstract or speculative issues" instead of "on the concreteness afforded by an actual, present, defined contro-

5. 342 U.S., at 509.
6. *Id.*
7. *Id.*
8. *Id.*
9. 342 U.S., at 509, 510.
10. 342 U.S., at 501, 502.
11. 342 U.S., at 501.
12. 342 U.S., at 500.

versy, appropriate for judicial judgment, between adversaries immediately affected by it." [13]

> . . . as the case comes to us we can have no guide other than our own notions—however uncritically extra-judicial—of the real bearing of the New York arrangement on the freedom of thought and activity, and especially on the feeling of such freedom, which are . . . part of the necessary professional equipment of teachers in a free society.[14]

Fifteen years later, by a vote of five to four, the Supreme Court in *Keyishian* declared the New York legislation at issue in *Adler* to be unconstitutional. Justice Brennan wrote the Court's opinion, in which Chief Justice Warren and Justices Black, Douglas and Fortas joined. Justice Clark wrote the dissenting opinion, in which Justices Harlan, Stewart and White joined. Only Justices Black, Douglas and Clark had been on the Court that decided *Adler*.

Once again the Court was guided by its "own notions" of "the real bearing" of the New York arrangement on "freedom of thought and activity, and especially on the feeling of such freedom." Justice Brennan never asks whether the dire predictions made by Justice Douglas in *Adler* came true. Not once does his opinion refer to the fifteen years of experience under the New York legislation. So we are again presented with a series of assumptions and renewed predictions unsupported by any facts stated in the opinion. "The very intricacy of the plan [set up by the New York legislation] and the uncertainty as to the scope of its proscriptions make it," asserts Justice Brennan, "a highly efficient *in terrorem* mechanism." [15]

> It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. . . . The result must be to stifle that free play of the spirit which all teachers ought especially to cultivate and practice. . . .
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> . . . the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.[16]

In also declaring unconstitutional a provision, added to the New York laws in 1958, that made Communist Party membership, as such, prima

13. 342 U.S., at 498.
14. 342 U.S., at 505.
15. 385 U.S., at 601.
16. 385 U.S., at 601, 603.

facie evidence of disqualification for employment, the Court states flatly that "the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest, and has been documented in recent studies." [17] But none of these studies seeks to ascertain the results of the fifteen years of experience under the New York legislation.[18] Only the Jahoda and Cook and Lazarsfeld and Thielens studies make any effort at scientific inquiry. None of these studies document or otherwise make manifest, as Justice Brennan claims, the "stifling effect on the academic mind from curtailing freedom of association" with the Communist Party.

Keyishian itself did not give the Court any opportunity to evaluate the New York legislation in action. The suit was brought by five members of the faculty of the University of Buffalo which had become part of the State University of New York in 1962. At that time, four of them—members of the teaching faculty—refused to sign certificates that they were not Communists, and that if they had ever been Communists, they had communicated that fact to the President of the State University. As a result, Keyishian's one-year-term contract as an instructor in English was not renewed. Two others, an Assistant Professor of English and a lecturer in Philosophy, were allowed to continue to teach because their contracts still had time to run. The fourth, an Assistant Professor of English, voluntarily resigned and the Supreme Court held he had lost his standing to maintain the suit. In June 1965, shortly before the case came to trial, the certificate requirement was rescinded.

The fifth person involved in the litigation was a library employee and part-time lecturer in English. Personnel in this classification were not required to sign the certificate but were asked to answer in writing under oath the question, "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?" When he refused to answer the question, he was dismissed.

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17. 385 U.S., at 607.

18. The studies cited are P. F. LAZARSFELD & W. THIELENS, THE ACADEMIC MIND 92-112, 192-217 (1958); F. B. BIDDLE, THE FEAR OF FREEDOM 155 *et seq.* (1951); M. Jahoda & S. Cook, *Security Measures and Freedom of Thought: An Explatory Study of the Impact of Loyalty and Security Programs*, 61 YALE L.J. 295 (1952); R. M. MACIVER, ACADEMIC FREEDOM IN OUR TIME (1955); M. R. KONVITZ, EXPANDING LIBERTIES 86-108 (1966); C. Morris, "Academic Freedom and Loyalty Oaths" 28 LAW & CONTEMP. PROB. 487 (1963).

Neither the plaintiffs nor the defendants in the lawsuit—nor the American Civil Liberties Union or American Association of University Professors which filed briefs as amici curiae—thought it necessary to deal with the question of the impact of the New York legislation now declared unconstitutional upon New York's educational system during the fifteen years the legislation was in effect. I do not know that anybody has written or even attempted such a study. Yet I hope that someone may be encouraged to undertake it. It would no longer affect the Supreme Court's authoritative judgment of the New York legislation in question. But it would contribute to the continuing evaluation of the work of the Supreme Court. Equally important, it would add a significant chapter to the history of the Supreme Court, for should not the most meaningful core of the Court's history be the account of the consequences of its decisions for American society?

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