"A *pall of orthodoxy*"

THE PAINFUL PERSISTENCE OF LOYALTY OATHS

MARJORIE HEINS

Who could object to Ohio's anti-terrorist oath? Created as part of the 2006 "Ohio Patriot Act," it merely requires every new public employee to answer "no" to six questions regarding affiliation with, or "material support" to, any organization on the U.S. State Department's "Terrorist Exclusion List." The oath also applies to anybody who has state or city contracts worth more than $100,000 in a given year.

Beneath the uncontroversial veneer of this anti-terrorist measure, however, is a reincarnation of the "test oath" that has long been used by governments to coerce their subjects into religious or political conformity. When Ohio attorney Marc Triplett, who contracts with the state to represent indigent defendants, was confronted with the oath in 2006, he secured the help of the American Civil Liberties Union and filed a legal challenge.

Test oaths operate by reversing the usual presumptions of law. That is, as Supreme Court Justice William O. Douglas explained in a cold war-era case involving anticommunist oaths, they "place the burden of proving loyalty on the citizen," whereas our constitutional system presumes every person innocent "until guilt is established." Douglas quoted Alexander Hamilton's argument that it would be an obvious infringement of the Constitution if, "instead of the mode of indictment and trial by jury," the legislature were simply to declare "that every citizen who did not swear he had never adhered to the King of Great Britain, should incur all the penalties which our treason laws prescribe."

The vice of test oaths, then, is that if a person, for whatever reason, fails to swear innocence, he or she is presumed guilty (those who resisted loyalty oaths in the early 1950s suffered a variety of penalties, including job loss and the right to live in public housing). In Ohio's case, a blank, or "yes," answer to any of the anti-terrorist oath's six questions about organizational affiliations or material support is a disqualification from public employment, from a contract with a city or state agency, and in some cases from a license to practice a trade. This is perhaps why the American Association of University Professors calls Ohio's certification "the most egregious" requirement currently imposed on any public employee or contractor.

A law-abiding Ohioan could well be confused by the questions. For example, how does the State Department choose what organizations to place on its list, and do these groups have any chance to contest their listings? Terrorism is a scary word, but the government's definition is a broad one: any group that either commits, attempts, or conspires to commit any unlawful act involving, among other things, the use of a weapon with the intent to endanger human safety or damage property. Today's terrorists, certainly under this expansive definition and even under a narrower one, could be tomorrow's legitimate governments. For years, the State Department listed the African National Congress as a terrorist organization—correctly, under the government's definition, because the ANC used violence, among other tactics, in its struggle against apartheid.

"Material support" is equally problematic. Ohio's definition (taken from federal law) does not require specific knowledge of or intent to support an organization's violent aims. As the

legal scholar David Cole points out, if the material-support provision had been on the books in the 1980s, the thousands of Americans who donated to the ANC would have been criminals.

Then there will be some Ohioans—admittedly a minority—who simply object to the oath's ritual of compelled conformity. Most of them will sign reluctantly, uncomfortably, perhaps not quite able to articulate just what it is they find obnoxious about it.

Until Ohio created its contemporary version, the test oath had become a rarity in America. The excesses of loyalty testing and communist-hunting in the 1940s and 1950s were sobering even for the most ardent of cold warriors, and by the late 1960s, the Supreme Court had invalidated a number of oaths on combined grounds of undue vagueness—and consequent chilling effect on free thought—and direct infringement of First Amendment rights. What was left, and remains common today, is the affirmative oath—the kind that simply requires sworn fealty to the Constitution as a condition of a government job or other benefit. A recent case involving an American Studies professor who lost her job with California's state university at Fullerton in 2007 suggests that affirmative oaths also have their perils.

Wendy Gonaver, a Quaker, would not sign the oath that California requires of all public employees because she understood its pledge to defend the constitutions of the United States and California "against all enemies, foreign and domestic" as a promise to bear arms, in violation of her pacifist beliefs. The oath applies to all state, city, and county workers except noncitizens and those "as may be by law exempted." It has been on the books in one form or another since 1879.

Even more than the test oaths of the cold war era that abjured any belief in the overthrow of the government by force, violence, or other "unlawful means," California's affirmative oath is plagued with uncertainties. The U.S. Constitution is a complex, detailed document, and California's constitution currently runs to thirty-nine articles and more than three hundred sections. The oath's defenders might argue that this is far too literal an interpretation: the oath is merely a ritual affirmation of fidelity, not a forced agreement with every constitutional provision. But for Gonaver, the sticking point was the part about defense against "all enemies."

She explained her objection to college officials and asked to append a statement that she could not agree to bear arms. Other branches of the state's public university system had made this accommodation; indeed, according to the *Los Angeles Times*, the University of California system advises employees "on how they can register their objections yet still sign the pledge." But Cal State-Fullerton would not budge, and Gonaver lost her job for the 2007-2008 academic year.

In the spring of 2008, the *LA Times* picked up Gonaver's story. Another conscientious objector, at Cal State-Hayward, had been in the news a few months before. Now, prodded by Gonaver's pro bono lawyers, the college changed its mind. For unlike the communists and suspected communists who had been widely despised during the heyday of loyalty oaths in the 1950s, Gonaver was a sympathetic victim. About three weeks after the publicity began, Fullerton allowed Gonaver to append her statement. She added a general objection to the compelled signing of the oath, as a violation "of my right to free speech."

Conscientious objection is a venerable tradition, but swearing oaths is even older. We find oaths in *The Iliad* and the Greek tragedies. Oscar Wilde's Salome makes Herod swear to give her anything she asks if she will dance for him. Besotted, he doesn't just swear, but swears "by my life, by my crown, by my gods." He tries to wriggle out of it when she demands John the Baptist's head, but an oath is an oath, even in the most debauched environment. Hamlet also knew that an unsworn promise would not do for a solemn occasion: he forces his companions to swear that they will "never make known what you have seen tonight."

In feudal times, test oaths were the normal cement between vassals and lords. One historian traces oaths of political allegiance to England's Henry VIII, whose serial marriages famously caused him trouble with the Church of Rome. Henry had Parliament pass a law not only validating his marriage to Anne Boleyn but prescribing an oath that forced his subjects to renounce Catholicism. "Having thus fixed the succession," another student of the period notes, "Henry proceeded within two years to do

away with Anne Boleyn. What now? Nothing simpler. He amended the acts, the oath, and his subjects' loyalty by changing 'Quene Anne' to read 'Quene Jane.'"

Justice Hugo Black, like Justice Douglas a frequent dissenter in cold war-era loyalty cases, summarized the history of the test oath in one such dissent. It was, he wrote,

> one of the major devices used against the Huguenots in France, and against "heretics" during the Spanish Inquisition. It helped English rulers identify and outlaw Catholics, Quakers, Baptists, and Congregationalists—groups considered dangerous for political as well as religious reasons. And wherever the test oath was in vogue, spies and informers found rewards far more tempting than truth. Painful awareness of the evils of thought espionage made such oaths "an abomination to the founders of this nation."

Loyalty oaths came to America with the Puritans—those freedom-seekers who, as an old *New Yorker* cartoon had it, left England so that they could practice more religious tyranny in the new world than they were able to at home. The American colonies' oath requirements for holding land or public office shifted with the English political tides—the Stuart kings, Parliament under Oliver Cromwell, more Stuarts, then the Protestant monarchs William and Mary. The Pennsylvania Quakers, who took literally Jesus' injunction to "swear not at all," substituted affirmation for swearing, an alternative that persists in most oath rituals today.

In a new nation where no single denomination prevailed, the framers of the government made the sensible decision to ban test oaths, at least religious ones. Article VI of the Constitution mandates that executive, legislative, and judicial officers, both state and federal, be "bound by Oath or Affirmation" to support the Constitution, but adds that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Alexander Hamilton went further, as we have seen. He denounced all test oaths, not just religious ones. But despite Hamilton's warnings, America could not resist oaths. George Washington used them during the American Revolution. North and South alike used them during the Civil War. Inquisitions into political belief by President Abraham Lincoln's emissaries rehearsed the range of abuses that flourished a century later during the cold war: freelance compilers of blacklists, informers of dubious credibility, anonymous sources, innuendo, guilt by association. Historian Harold Hyman reports that although neither security nor the cause of independence was "rendered a whit stronger by all the oaths taken and refused," by the end of the Civil War, oaths had become a convenient way to strip those unwilling or unable to swear past and present fealty to the winning side of their property, their civil rights, and even their ability to buy food or marry.

In 1866, the Supreme Court found two Civil War-era oaths to be unconstitutional bills of attainder (laws that target specific individuals or groups for punishment without benefit of trial) and ex post facto laws (retrospectively criminalizing what had been legal). Missouri's oath, struck down in one of these cases, contained thirty separate tests, including a promise that the swearer had never manifested "adherence to the cause" of the country's enemies or a "desire" for their triumph and had never been a "member of, or connected with, any order, society, or organization inimical to the government of the United States." Clergy were among the professions covered; a priest was convicted for preaching without having taken the oath. The Court in *Cummings* v. *Missouri* denounced the oath with Hamiltonian logic: it subverted the presumption of innocence, altered the rules of evidence, and required individuals to prove their innocence "only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties."

Loyalty purges in America have had their peaks and valleys; the time during and after the First World War was one of the peaks. States outlawed sedition, syndicalism, anarchism, and even the display of red flags. And while Congress in this era also enacted its broadest restrictions on political dissent since the 1798 Sedition Act (enacted by the Federalists to wipe out their opposition), it was primarily the states and localities that embraced test oaths.

Congress caught up in 1939 with passage of the Hatch Act to govern the federal civil service. It disqualified anybody who was a member of a

group that advocated the overthrow of the government. The next year, a Hatch Act amendment specified that "an affidavit shall be considered prima facie evidence" that the person swearing does not advocate, and is not a member of a group that advocates, overthrow of the government by force or violence. The Civil Service Commission implemented this by requiring an anticommunist affidavit from all employees.

Ironically, the Supreme Court ruled three years later that schoolchildren could not be forced to pledge allegiance to the flag. In what is probably the Court's most celebrated explanation of both the danger and inefficacy of forced rituals of loyalty, Justice Robert Jackson wrote, in *West Virginia State Board of Education* v. *Barnette*,

> Compulsory unification of opinion achieves only the unanimity of the graveyard.... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Jehovah's Witness children were the pledge refusers in the *Barnette* case. But neither the logic nor the rhetoric of *Barnette* was much use to loyalty oath objectors, at least not at the outset of the cold war era.

On the contrary, with the Taft-Hartley law in 1947, Congress extended noncommunist oath requirements from federal employees to labor unions. Section 9(h) of Taft-Hartley mandated affidavits of noncommunist affiliation from all union officers as a condition of collective bargaining and other labor law rights. When the Supreme Court upheld section 9(h) in 1950, it effectively drove communists from leadership in all but a few beleaguered unions.

President Harry Truman, although opposed to Taft-Hartley, did not want to be outflanked by Republicans on the anticommunist issue; he also recognized that affidavits were hardly a guarantee of loyalty or security in federal employment. Truman's response, in 1947, was to create an elaborate loyalty program that occupied the energies of many thousands of investigators and bureaucrats. Truman's loyalty boards, housed in every federal agency, used anonymous informers; refused to allow the accused to confront their accusers or see the evidence against them; and inquired into their reading choices, their taste in art, their political and social activities; and their beliefs in anti-fascist, anti-poverty, and civil rights causes.

States and municipalities created additional loyalty programs, often with test oaths. Los Angeles's 1948 oath required employees to abjure subversive beliefs or associations and disclose any past Communist Party membership, with dates and durations. In 1951, rejecting a constitutional challenge to the L.A. requirement, the Supreme Court interpreted the oath, and the accompanying loyalty investigations, to punish organizational associations only if accompanied by *scienter*—knowledge of a group's subversive aims. Innocent, "unknowing" membership in the Communist Party or one of its front groups could not be punished, said the Court (though of course it had to be disclosed).

It was a fine distinction, and one that ignored the basic problem the Court had identified in the Civil War cases: oaths turn due process upside down because anyone who does not sign is assumed guilty and punished without evidence or trial. The decision was also blind to the impact of a program that forces people to forswear beliefs, investigates their thoughts to discern whether membership was "knowing," and inquires into petitions signed or donations made to left-leaning causes.

The Communist Party in the 1930s attracted plenty of enthusiasts who were neither spies nor saboteurs, but whose responses to poverty and racism at home, fascism abroad, and the uglier aspects of capitalism persuaded them that the Party, or one of its satellite organizations, was the best means of advancing social justice. Historians may continue to argue about how long it should have taken any such idealist or youthful rebel to be repulsed by the doctrinal rigidity and anti-democratic character of communism as embodied in organizations worldwide that answered to Joseph Stalin, but the cold war purges in the United States punished thousands who at worst had been naïve or who now simply refused to go through the ritual of self-blame, and of naming names of former comrades during legislative hearings or FBI interviews.

Once the Supreme Court had approved the L.A. oath, states and municipalities competed in zeal to exact similar loyalty pledges, on pain of

perjury for anyone who swore falsely. By 1956, forty-two states and more than two thousand county or city governments had created test oaths for public employees. Some states demanded them as well from private-school teachers, pharmacists, barbers, insurance or piano salespeople, lawyers, voters, wrestlers and boxers, junk sellers, and applicants for unemployment benefits, tax exemptions, public housing, or fishing licenses. Historian Robert Goldstein reports that Texas banned "the use of any books in the public schools unless the author filed an oath disclaiming communism; in the case of books whose authors were no longer living, such as Aristotle or Shakespeare, the book could be used only if the publisher filed an oath on the author's behalf."

California was a particular battleground. In 1949, state senator Jack Tenney introduced seventeen bills aimed at subversion, including oath requirements for doctors, lawyers, and professors. "The lawyers and doctors protested at once," one historian recounts, "with a vigor that put an end to this nonsense as regarded their own professions. But a kind of palsy apparently overcame Robert Gordon Sproul, president of the nation's largest institution of higher learning" (the University of California). Sproul proposed, and the state university's Board of Regents soon established, an oath modeled after Taft-Hartley for all faculty. About 300 professors, including some conservatives, refused to sign, and by 1950 disobedience was lively enough to sustain a vote of opposition to the oath by the UC Academic Senate during a meeting at Berkeley's Greek Theater, with about 8,000 students cheering the professors on. Eighteen professors who were fired for refusing to sign eventually prevailed in court, but meanwhile, legislative investigations, collaboration by the university in checking the political beliefs of faculty and staff, and the pressures of interrogation and dismissal either drove out most dissenters or persuaded them to abandon their objections.

The professors' battle became moot once California created an antisubversive oath for all employees, not just academics. This "Levering Oath" remained on the books until 1967, when California's high court invalidated the anti-subversive portion, but left in place the part that plagued Wendy Gonaver thirty years later, requiring that all public workers swear to defend the state and nation "against all enemies, foreign and domestic."

New York, which according to one historian rivaled California in its "unrestrained and vicious" purge of leftist employees, had passed its first antisubversive law in 1917. It made "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act" grounds for dismissal from the public school system. A partially duplicative 1939 law disqualified from the state civil service or employment in public education anyone who "advocates the overthrow of government by force, violence, or any unlawful means" or publishes material or joins any group with such an aim.

But neither New York law had been implemented with administrative machinery thorough enough to investigate the beliefs and associations of each employee. The 1949 Feinberg Law was designed to remedy this oversight. And although the law covered all public workers, teachers were a special concern because, according to the legislative preamble, "there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations," had infiltrated classrooms and, as a result, "subversive propaganda" might be "disseminated among children of tender years." Worse, "such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection."

The Feinberg Law therefore instructed the state Board of Regents to establish a procedure for investigating teachers and firing those found to be in violation of New York's 1917 or 1939 loyalty laws. The board was to create a list of subversive organizations; membership in one would be "prima facie evidence" of disqualification for employment. Of course, the preamble had already named one such organization.

Communists in New York City schools may not have been poisoning children's minds, but the Party did have a following among city schoolteachers from the mid-1930s through the early 1950s. It agitated for educational reform and dominated the Teachers Union. (The more conservative teachers and administrators joined the Teachers Guild.) The CP and the Teachers Union soon filed separate suits challenging the

Feinberg Law. Irving Adler, the math teacher and CP activist who became lead plaintiff in the Teachers Union case, joined the suit because he was, at the time, chair of the union's salary and legislative committee. A nonagenarian now living in Vermont, Adler did not participate in the legal strategy; he simply considered the lawsuit one among many means for fighting the anti-communist hysteria.

In both cases, the lower courts found that the Feinberg Law's provisions for punishment without trial and guilt by association violated the First Amendment and the Due Process Clause of the Fourteenth Amendment. In the CP's case, the court also declared the law to be an unconstitutional bill of attainder, and found it so vague in its references (via the 1917 law) to "treasonable or seditious" words or acts that it failed "entirely in establishing a definite standard of proscribed conduct." But neither victory lasted: appellate judges in New York reversed the lower court decisions, and in 1952, the Supreme Court affirmed.

The high court's decision in *Adler* v. *Board of Education* followed the reasoning laid out the year before in upholding L.A.'s loyalty oath. The justices assumed that the Communist Party was a serious enough threat to justify firing any "knowing" member. And because the New York courts had interpreted the Feinberg Law to require *scienter* before a CP member or former member could be penalized, there was no constitutional problem. Besides, said the Court majority, although everybody has the right "to assemble, speak, think and believe as they will…they have no right to work for the State in the school system on their own terms." Teachers work "in a sensitive area in a schoolroom," where they shape young minds. "One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."

Adler was poorly reasoned. Instead of exploring the tantalizing question of "unconstitutional conditions"—that is, what, if any, disqualifications for employment might indeed violate the Constitution—the Court employed a simplistic "right/privilege distinction," assuming that the Constitution puts no limits at all on government where employment or other "privileges" are concerned. But Hugo Black and William O. Douglas did not let the moment pass. Black wrote in dissent: "This is another of those rapidly multiplying legislative enactments which make it dangerous—this time for schoolteachers—to think or say anything except what a transient majority happen to approve at the moment."

Douglas was more expansive, detailing the case against loyalty programs, particularly for teachers. The Feinberg Law, he said, "proceeds on a principle repugnant to our society—guilt by association." A teacher is disqualified because of membership in an organization "found to be 'subversive.'" And the finding of "subversive" character is "made in a proceeding to which the teacher is not a party and in which it is not clear that she may even be heard."

True, Douglas acknowledged, "she may have a hearing when charges of disloyalty are leveled against her. But in that hearing the finding as to the 'subversive' character of the organization apparently may not be reopened in order to allow her to show the truth of the matter." Instead, "the mere fact of membership in the organization raises a prima facie case of her own guilt." And "once a teacher's connection with a listed organization is shown, her views become subject to scrutiny to determine whether her membership in the organization is innocent or, if she was formerly a member, whether she has *bona fide* abandoned her membership." Thus, the law "turns the school system into a spying project." Loyalty reports on teachers must be made. "The principals become detectives; the students, the parents, the community become informers. Ears are cocked for telltale signs of disloyalty….What was the significance of the reference of the art teacher to socialism? Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of *The Grapes of Wrath*?"

Douglas warned that the system would "raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms—all long forgotten—become the ghosts of a harrowing present." Any organization "committed to a liberal cause, any group organized to revolt against an hysterical trend, any committee launched to sponsor an unpopular program becomes suspect." In language that Justice William Brennan would echo fifteen years later, reversing *Adler* and striking down the Feinberg Law, Douglas warned: "a pall is cast over the classrooms."

Although Douglas's *Adler* dissent remained a minority view until at least the mid-sixties, the Supreme Court did not wholly acquiesce in whatever loyalty oath or program the states invented. Its pattern—at least until it reversed *Adler* in 1967—was basically to accept the cold-war rationales for communist-hunting but limit the creativity of state legislatures through such constitutional doctrines as due process and overbreadth. Thus, a few months after *Adler,* a unanimous Court struck down Oklahoma's oath for public employees, which required not just the usual abjurations but denial of any support of "revolution," because it did not comply with the *scienter* standard set out in the earlier decisions.

The Oklahoma case was brought by state college faculty and staff. This academic connection inspired a concurring opinion from Justice Felix Frankfurter, the former Harvard Law professor, elaborating on Douglas's *Adler* dissent. Extolling "that free play of the spirit which all teachers ought especially to cultivate and practice," and the importance of education in teaching "habits of open-mindedness and of critical inquiry," Frankfurter worked himself up to a rhetorical flourish: to regard teachers "as the priests of our democracy," he said, is "not to indulge in hyperbole."

But in the 1950s, neither the niceties of the Oklahoma case nor Frankfurter's paean to intellect slowed enthusiasm for loyalty purges. New York extended its Feinberg Law to higher education in 1953, while the state Board of Regents duly listed the Communist parties of the United States and of New York as subversive organizations. In 1956, the board decided to require job applicants and employees to sign a "Feinberg Certificate" declaring that they were not CP members, and that if they had ever been, they had communicated that fact to the president of the state university system.

The new Feinberg Certificate spawned outrage among New York's professoriat and set the stage for another constitutional challenge. By the mid-1960s, the legal prospects were brighter. The Supreme Court had struck down Arizona's loyalty oath for overbreadth (it punished people whether or not they shared a group's subversive aims) and found Florida's and Washington's so vague that a conscientious employee could not know what ideas were prohibited. A 1958 case, invalidating a test oath that California imposed on anybody applying for a tax exemption, had reiterated the fundamental historical objection: the Court assumed that the beliefs targeted by the law could be punished, but said the means of enforcement violated due process because they relieved the state of its burden of proving wrongdoing. Not only that, but because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn,…the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."

These precedents led Buffalo, New York, attorney Richard Lipsitz to think that a new challenge to the Feinberg Law might succeed. He represented five teachers at the local state university who refused to sign the certificate, and it did not hurt that, unlike the lead plaintiff in *Adler,* they were conscientious objectors rather than CP activists. Harry Keyishian, who gave his name to the case, was an English instructor who would go on to become a Renaissance scholar and expert on the theme of revenge in Shakespeare. Newton Garver, a lecturer in philosophy, a Quaker, and according to his co-plaintiff Keyishian, "a campus celebrity," later published works on Jacques Derrida and Ludwig Wittgenstein. Ralph Maud and George Hochfield, both assistant professors of English, were experts on poetry and transcendentalism, respectively. George Starbuck was already a prominent poet and, according to Lipsitz, had been lured to SUNY-Buffalo because of its first-rate English department. As the university's board of trustees acknowledged in one of its briefs, the plaintiffs' refusal to sign the Feinberg Certificate "was based upon principle...there is no indication that any of the appellants are, in fact, members of any communist party."

In *Keyishian* v. *Board of Regents,* Justice Brennan assembled a squeaky majority of five justices to overrule the *Adler* decision. Parsing the 1917 New York civil service law (which the Feinberg Law was supposed to enforce), Brennan asked whether "the teacher who carries a copy of the *Communist Manifesto* on a public street" thereby advocates sedition. "Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?" In a rhetori-

cal flourish, Brennan improved upon the language of Douglas's *Adler* dissent:

> 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.

The *Keyishian* decision jeopardized many state loyalty programs, but affirmative oaths to support and defend the Constitution remained untouched, and when one was challenged in a 1972 case from Massachusetts, the Supreme Court was not impressed. The oath in question contained not only the familiar "uphold and defend" language, but a promise to "oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." The Court casually dismissed the argument that this language uncomfortably resembled the cold war loyalty programs condemned in *Keyishian* five years before. Even Justices Brennan and Thurgood Marshall, who thought the second part of the Massachusetts oath was unconstitutional, said the part about upholding and defending the state and federal constitutions was "nothing more than the traditional oath of support that we have unanimously upheld as a condition of public employment."

Today, most public employees in states that require affirmative oaths sign them with varying degrees of enthusiasm, resentment, or indifference, but occasionally there is a Quaker or other variety of pacifist, a Jehovah's Witness, an objector to coerced oaths in general, a close reader of language who is puzzled about the meaning of "enemies," "support," or "defend," or a dissident from specific government policies or constitutional provisions, who kicks up a fuss. Objectors in California over the years fought for exemptions or at least the opportunity to append a qualifying statement; in 1974, the *Atlantic* published an account by the journalist and gadfly Jessica Mitford of this and other troubles she encountered after San Jose State invited her to be a "distinguished professor." The annotated Constitution of California "runs to three hefty volumes," Mitford explained, "and covers all manner of subjects. Do I uphold and defend, for example, Article 4, Section 25¾, limiting championship boxing and wrestling matches to 15 rounds?"

Mitford did not receive an exemption, though others did—as the *L.A. Times* reported, some school districts and community colleges have been known not only "to let employees change the wording of the oath," but "to ignore the requirement altogether." The ultimate question, however, remains: what are the virtues of loyalty oaths—whether affirmative or negative—and what are the costs?

On the "virtue" side of the ledger, one might posit the value of ritual in impressing upon employees a sense of solemnity, common enterprise, and the importance of the jobs they are undertaking. Even office clerks, firefighters, janitors, and myriad others not charged with policy making, one might argue, can benefit from such a ritual. Not much is left to this argument, however, when the ritual is just another paper in the bureaucratic maw. The ritual is perhaps only meaningful when high officials take the oath publicly and ceremonially, as Article VI of the Constitution suggests.

A related argument is that a bit of enforced patriotism—or at least, protestation of patriotism—isn't a bad idea. Cynics would disagree: Samuel Johnson famously called patriotism "the last refuge of a scoundrel"; Ambrose Bierce called it the first. Patriots don't need to sign a paper or speak an oath to reinforce their sentiments, and those who dislike such ceremonies will not love their country more for having been forced to swear fealty to its constitution. But how about those in the middle? Perhaps the oath, like the national anthem, makes otherwise indifferent hearts beat a little faster.

One's feeling about oaths as promoters of patriotism is likely to reflect one's more general attitude about citizenship. Coerced oaths are an expression of the mentality that favors patriotism. Objectors to loyalty oaths may see themselves as "citizens of the world" rather than "patriots." They don't plan to commit treason or other crimes, but they may see flag-waving as more harmful than helpful to world peace or other humanitarian aims.

One California court stated the obvious when it doubted "whether an oath in any form can achieve employee loyalty," whether from ordinary workers or from that smaller number

who might actually have knowledge or responsibility affecting national security. To assure that kind of loyalty, a background check is needed. Oaths are thus at best gratuitous additions to an investigation, and at worst, if they substitute for an investigation, false assurances of security, for anyone actually desiring to overthrow the government will likely lie and sign.

On the negative side of the ledger, one can argue that the loyalty oath is not only a waste of time and paper, but a source of resentment and confusion. Affirmative oaths even more than test oaths are excruciatingly vague. What does it mean, as Mitford pugilistically asked, to support and defend a lengthy document with thousands of detailed provisions? What if an employee opposes a ban on same-sex marriage added by referendum to a state constitution? During the Gonaver controversy, a blogger posed the reverse question: did his opposition to a constitutional ruling in favor of gay marriage mean that he was violating the oath? Indeed, the list of potential disagreements is a long one. Even if "constitution" is thought to denote only the form of government, not every detailed provision, a teacher or other employee who thinks the European parliamentary system superior to ours would either have to conceal her views or violate her oath.

And then there is the much-debated "chilling effect." Even affirmative oaths, which don't require abjuration of beliefs or associations but merely a promise to defend one or more constitutions, can intimidate. How much dissent is too much? Should I sign the antiwar petition? Wear the "Dump Cheney" button? Does supporting the Constitution mean supporting the present government?

At least one state oath, in fact, requires sworn fealty to constitutions *and* governments. In 2006, *Las Vegas City Life* reported that Brian Kral, a theater teacher at the Community College of Southern Nevada, was fired after refusing to swear to support and defend the "Constitution and government" of the U.S. and Nevada. He had been teaching for fifteen years, the paper reported, and never before been asked to sign the oath. "I don't think it's the role of the teacher to defend the Constitution or the government," Kral said in explaining his refusal to sign.

Loyalty oath battles have been liveliest in schools and universities: the argument is about academic freedom or, stated otherwise, about educational philosophy. Is the classroom a venue for open debate or for inculcating values? And if it is both, in what state of uneasy balance should the two functions exist? The Supreme Court has made a muddle of this question. But it has sometimes embraced the critical-thinking approach, notably in the *Keyishian* case.

On the other hand, First Amendment expert Geoffrey Stone is not alone when he questions whether affirmative oaths have any appreciable chilling effect:

> I wonder how often anyone has been fired or prosecuted for violating an affirmative oath. If the answer is essentially "never," then the harm of this sort of oath is arguably trivial. Although there might be the idiosyncratic person, like Gonaver, who won't take the oath, the overall negative impact would seem to be pretty minor.

Yet for Brian Kral, the chill was not trivial, and even if Wendy Gonaver is considered idiosyncratic, she is not the only conscientious objector for whom "support and defend" oaths create dilemmas with real-life consequences. Although it would be impossible to count them, there are probably thousands of public employees who find loyalty oaths obnoxious, who are puzzled about their meaning, and whose political speech may be chilled, but who go ahead and sign because they don't want to make trouble and do want to keep their jobs. (The author, a visiting lecturer at the University of California-San Diego, is in this category.)

During the Gonaver controversy, the *Baltimore Sun* printed a letter from an angry reader. Loyalty oaths, he wrote,

> function simply as a mean-spirited attempt to intimidate persons of conscience. I know this because I refused to sign a similar oath in the Fresno County school system in 1970. I was then alternately bullied and cajoled to sign it because people argued, in the first place, that doing so was a matter of the highest civic duty and, in the second, that I

> could be sure that no one would pay any attention to the oath after I had signed it. What pitiful nonsense.

Whatever their possible virtues and costs, affirmative oaths are probably here to stay, but what about Ohio's revival of the test oath? The ACLU won a small victory in Marc Triplett's case when the state's Supreme Court interpreted the Ohio Patriot Act to exempt any contractor who earns less than $100,000 per year from the state. But the law remains intact; the American Association of University Professors reported in late 2008 that "Ohio universities are currently requiring that academic employees hired after April 2006 sign the declaration (though at least one institution is having an internal debate about whether to require graduate and teaching assistants to sign)."

Although the ACLU looked for plaintiffs to bring a broader challenge after the Triplett victory, it came up empty-handed. As Harry Keyishian commented in an unpublished article reminiscing about his case, there was widespread opposition to the Feinberg certificate among University of Buffalo faculty, but in the end, only five refused to sign. "Suppose there had been 25, or for that matter 500?" he wrote. "Clearly the problem would have been so serious that it is doubtful the administration could have taken any action at all. The faculty clearly underestimated its power and allowed itself to be stampeded into signing with unnecessary haste."

The Ohio Patriot Act may ensnare some dissenters, but it will not catch any terrorists. Like the Civil War-era test oaths that the Supreme Court invalidated 150 years ago, Ohio's forced abjuration of terrorist support or sympathies reverses the usual burden of proof and punishes the innocent nonconformist who, whether from orneriness, conscience, or confusion, refuses to sign.

Swearing loyalty on a stack of Bibles, or on a bureaucratic form, is an American tradition not soon likely to fade. But it is worth asking whether the ritual is justified by anything other than the gravitational pull of that "pall of orthodoxy" that threatens even the liveliest democracies. As Geoffrey Stone suggests, "[T]he oath is inconsistent with the proper relation between the citizen and the state in a self-governing society. It is the government that should take an oath of allegiance to serve its citizens, not the other way around."

Marjorie Heins is the author of *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* and founder of the Free Expression Policy Project (www.fepproject.org). She is working on a book about loyalty oaths. She wishes to thank Geoffrey Stone and Rachel Levinson for suggestions.

TO OUR CONTRIBUTORS

A few suggestions:

(1) Be sure to keep a copy of your manuscript. And please remember that we can't consider articles unless they're accompanied by a cover letter and stamped, self-addressed envelope. If you are submitting to *Dissent* electronically, please include a postal address and phone number. Our e-mail address is submissions@dissentmagazine.org.

(2) Please don't write to ask whether we're interested in such and such an article—it makes for useless correspondence. Look at our last few issues to see if your idea fits in. Or take a chance and send us your article. We will not consider manuscripts submitted simultaneously to several publications.

(3) Type your ms *double-spaced*, with wide margins. Check all your figures, dates, names, etc.—they're the author's responsibility. Please use inclusive language so that we don't have to make adjustments during editing.

(4) Notes and footnotes should also be typed *double-spaced*, on a *separate* page. As we're not an academic journal, we prefer that they, wherever possible, be dropped altogether or worked into the text.

(5) We're usually quick in giving editorial decisions. If there's a delay, it's because a few editors are reading your article.

THE EDITORS