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Recent Decisions

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RECENT DECISIONS

CONFLICT OF LAWS — DEATH ON THE HIGH SEAS ACT — U.S. LAW APPLIES TO DEATH ACTION ARISING FROM CRASH OF FOREIGN AIRCRAFT ON HIGH SEAS. — Libellants, executors of the estate of decedent, a New Jersey citizen, brought suit in admiralty pursuant to Section 1 of the Death on the High Seas Act,[1] alleging that negligence of the respondent led to the decedent's death in a crash of an airliner of Venezuelan registry about thirty miles off the coast of New Jersey. Respondent, a New Jersey corporation, inspected and serviced the aircraft immediately before it left Idlewild Airport on a scheduled flight to Venezuela. Respondent moved to dismiss the libel urging that section 1 of the act did not create a cause of action for wrongful death where, as here, the death occurred on board foreign aircraft over the high seas. Respondent further contended that Venezuelan law, which does not recognize a cause of action for wrongful death, should be applied under the traditional maritime law principle that the law follows the flag. *Held:* motion denied. The libel states facts sufficient to constitute a cause of action under Section 1 of the Death on the High Seas Act, as the most significant components of the wrong occurred within the jurisdiction of the United States. *Noel v. Airponents, Inc.* 169 F. Supp. 348 (D.N.J. 1958).

Section 1 of the Death on the High Seas Act, passed in 1920, had as its general purpose the creation of a cause of action for wrongful death occurring more than one marine league from the coast of the United States. It was to supplant the common law rule that a decedent's right of action for negligence leading to his death died with him. Section 4[2] was enacted to abolish the limitation of liability imposed by federal law regarding actions for death arising on foreign ships which were litigated in federal courts under foreign law.[3] Suits under the act must be brought in admiralty[4] but it has been applied consistently to airplane-crash-death actions.[5]

Traditionally the place of the wrong, *i.e.*, the place where the last event necessary to make the actor liable for the alleged tort occurs, has been determinative of the law to be applied in a tort action.[6] In maritime law this view is expressed in the principle that the law of the flag, the law of the ship's ownership or registry, will govern all

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1 41 Stat. 537 (1920), 46 U.S.C. § 761 (1952):
Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from shore of any State . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty. . . .

2 41 Stat. 537 (1920), 46 U.S.C. § 764 (1952):
Whenever a right of action is granted by the law of any foreign state on account of the death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

3 The statute was passed to overrule the holding the The Titanic, 233 U.S. 718 (1914). See S. REP. No. 216, 66th Cong., 2d Sess. (1919): But as the Supreme Court has held that the liability limitation statute of the United States applies to foreign vessels seeking such limitation of liability in our courts, the Committee recommends that the bill be amended by the insertion of a new section to be numbered section 4. . . .

4 Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir. 1957).

5 See, *e.g.*, Wilson v. Transocean Airlines, 121 F. Supp. 85, 93 (N.D. Cal. 1954); Sierra v. Pan Am. World Airways, 107 F. Supp. 519 (D. Puerto Rico 1952).

6 Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914); Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904); Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198 (1918).

internal matters while the ship is at sea.[7] This principle is usually based on one of two considerations: first, that the ship is constructively a part of its homeland, and therefore the accident has constructively occurred in the homeland; and secondly, the rather pragmatic consideration that since some law must apply, the law of the ship's ownership is the most intelligent choice.[8] However, the law of the flag has not been applied in cases where the ship was within the territorial jurisdiction of the forum.[9]

Of the various theories of conflicts of laws, the law of the flag principle finds its foundation in the vested rights theory advocated by Holmes, Cardozo and Beale.[10] However, a strict and unbending application of this theory in all situations seems undesirable.[11] This is particularly apparent where the forum state is asked to apply foreign law to a wrong beginning within its territorial jurisdiction, the "last event" of which occurs in another jurisdiction which does not recognize a cause of action for the wrong. In such a situation the forum may rigidly adhere to the technical requirement of "last event" and deny recovery in accordance with the foreign law, or refuse the formalism of this theory when unwarranted by the facts and apply its own law in resolution of the controversy.[12]

This latter and more flexible approach has found favorable expression in practice. For example, in *Fernandez v. Linea Aeropostal Venezolana*[13] (separate action arising from the same crash as the instant case), the action was tried under the Death on the High Seas Act, Section 1, disregarding the fact that both plaintiff and defendant were Venezuelan citizens.[14] The court said : "This power [to grant a right of action under section 1] granted to the courts is applicable even though the wrong occurred in an area not subject to the laws of the U.S." Again, in *Noel v. Linea Aeropostal Venezolana*,[15] a companion case of the instant decision, the same acceptance is indicated, although the applicability of foreign law was not expressly decided. There the court ruled that the Warsaw Convention was inapplicable to the case,[16] and dismissed the libel under Section 1 of the Death on the High Seas Act. But significantly, in dismissing the claim under the act, the court did so without prejudice, and solely on the ground that the case was not brought in admiralty. The court never discussed the applicability of Venezuelan law over the United States statute. Under the vested rights theory, the court could have dismissed the claim under the act on the fact that the death occurred on a Venezuelan aircraft, thus requiring the case to be tried under Venezuelan law. Mr. Justice Holmes, a foremost advocate of the vested rights theory, indicated the flexibility

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7 Lauritzen v. Larsen, 345 U.S. 571 (1953); Windelhuss's Case, 120 U.S. 1 (1886); Cain v. Alpha, 35 F.2d 717 (2d Cir. 1929); The Oriskany, 3 F. Supp. 805 (D. Md. 1933).

8 Lauritzen v. Larsen, *supra* note 7, at 585.

9 Uravic v. Jarka, 282 U.S. 234 (1931); Shorter v. Bermuda, 57 F.2d 313 (S.D.N.Y. 1932).

10 *Cf.* BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS § 15, at 4 (1935): "Whenever a question arises concerning the recognition or enforcement of a right which, it is claimed, accrued in another state, it must therefore be solved by the law of the state in which the question arises."

11 COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 313-46 (1949); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

12 See COOK, *op. cit. supra* note 11, at 328-41.

13 156 F. Supp. 94 (S.D.N.Y. 1957).

14 This analysis was criticized in 71 HARV. L. REV. 1152 (1958), where it was maintained that the scope of § 1 was limited to those actions within the jurisdiction of the United States, and that only § 4 can be utilized when foreign law is to be applied. This is correct, but it also assumes the very issue in the case, *i.e.*, whether foreign law applies. This criticism can be supported only if it is assumed that the intention of Congress was to resolve the conflicts issue and adopt the law-of-the-flag principle in § 1. *But see* Lauritzen v. Larsen, 345 U.S. 571, 585 (1953), where the Court implied that there might be circumstances when this principle would be inapplicable.

15 247 F.2d 677 (2d Cir. 1957).

16 On this issue, the court stated that "the effect of Article 17 [of the Warsaw Convention, 49 Stat. 3000, 3005 (1934)] . . . was only to create a presumption of liability, leaving it for the local law to grant a right of action." It appears that this same reasoning bars a recovery based on the Warsaw Convention in the instant case.

of the theory in his decision in *The Titanic*,[17] where he applied a United States liability limitation[18] to actions brought under the English wrongful death statute.[19]

The instant case stands in contradiction to the weight of authority when viewed in terms of a strict compliance with the vested rights requirement of "last event." If, as the proponents of this theory have contended,[20] the basis of any right for a tort of which the lex loci delecti is a foreign country (or a foreign ship, since the law follows the flag) is the law of that country and that law only, then the instant libellants could have sued only under Venezuelan law, which would have left them remediless. The present court recognized this principle but was not disposed to follow it, stating: "We are of the opinion that there cannot be a slavish adherence to this principle, in total disregard of other considerations, where the Court is called upon to resolve conflicts between competing laws."[21] In rejecting this principle, the court based its decision on *Uravic v. Jarka*[22] and *Lauritzen v. Larsen*,[23] neither of which seems particularly favorable to the court's position. In *Uravic*, the law of the United States was applied to a dispute between a United States citizen and a foreign ship, but the dispute arose out of acts committed and completed while the ship was docked in New York Harbor. Thus, federal law was applied by virtue of territorial jurisdiction. In *Lauritzen*, the Court was asked to determine the applicability of Danish law in opposition to the Jones Act.[24] But in this case both libellant and repondent were Danish citizens, the ship was Danish, and libellant had signed a contract upon entering service of the ship to the effect that all disputes were to be settled according to Danish law. However, in finding the Jones Act inapplicable, the Court emphasized the principle that the law follows the flag when it said: "It is significant to us that the weight given the ensign overbears most other connecting events in determining the applicable law."[25]

In terms of traditional conflict-of-laws theory and in terms of the court's authority, the position of the instant court is rather weak. An analysis of the practical considerations involved, however, demonstrates that this is a situation where the vested rights requirement of "last event" should not find application. The more significant components of the wrong were within United States' jurisdiction, except for the final act, the crash. The respondent performed his service in the United States, and in ordinary contemplation would be expected to conform to standards of federal law. The avowed policy of Congress is to allow actions for wrongful death under the Death on the High Seas Act. Most significantly, Venezuela was not involved in this dispute either as a Republic or through one of her citizens. Viewed in this light, it appears that the instant decision is correct in its rejection of the oversimplification implicit in an unbending application of the vested rights theory. The court must be lauded for its balancing of tradition against the practical factors at the heart of the case, and its finding that a just result is more compelling than one which is technically impeccable.

Paul B. Coffey

COMMERCE CLAUSE — HOBBS ACT — UNION OFFICIAL'S EXTORTION OF MONEY FROM EMPLOYER HAS POTENTIAL EFFECTS ON INTERSTATE COMMERCE. — An owner of a ready-mixed concrete business contracted to supply concrete for the construction of a local steel mill, which, upon completion, would send its products into two other states. Defendant, a labor union official, threatened the owner with the loss of this contract unless he was given certain sums of money. Defendant was subsequently indicted and

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17 The Titanic, 233 U.S. 718 (1914).
18 REV. STAT. §§ 4283-85 (1875).
19 Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93.
20 Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904).
21 169 F. Supp. at 350.
22 282 U.S. 234 (1931).
23 345 U.S. 571 (1953).
24 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).
25 345 U.S. at 585.

convicted of an alleged violation of the Hobbs Act,[1] whereupon he appealed, claiming *inter alia* that his interference did not "affect" interstate commerce. *Held,* affirmed. Interstate commerce was affected when defendant extorted money from an individual who was to furnish material to be used in the construction of a steel mill, which, on completion, would send its products into other states. *United States v. Stirone,* 262 F.2d 571 (3d Cir. 1958), *cert. granted,* 27 U.S.L. WEEK 3303 (U.S. April 28, 1959) (No. 722).

In 1934 Congress passed the Federal Anti-Racketeering Act[2] to protect commerce from racketeering after some of the states had demonstrated their inability or unwillingness to do so.[3] However, a proviso excepted activities involving employer-employee relations.[4] The Hobbs Act was subsequently passed to remove this exception,[5] and therefore its main purpose was to extend federal protection to persons coerced and intimidated by labor unions or their members. The authority utilized by Congress in providing this protection was the commerce clause;[6] thus the statute is limited by the extent of this power. The basic issue in the instant case was whether the facts placed this situation beyond the scope of this power.[7]

For the first hundred years of our constitutional history the emphasis was on the negative effects of the power of Congress to regulate commerce.[8] The affirmative possibilities were ignored mainly because Congress failed to exercise the power extensively until after the Reconstruction era.[9] Early in this history Chief Justice Marshall gave commerce a broad interpretation,[10] but the Court later retreated from his position,[11] and it was not until the 1930's that the concept was really tested in time of crisis. It was at first limited,[12] later expanded,[13] and finally extended to its broadest and most comprehensive scope.[14] At the present time commerce covers, at least, transportation of persons[15] and things,[16] communication,[17] transportation of women for immoral purposes,[18] escaping witnesses,[19] and fleeing kidnapers.[20] The power is qualified, however, by the word "interstate," a non-constitutional addition, which excludes matters local in nature, the so-called intrastate commerce.[21] But a literal construction of the term inter-

1 18 U.S.C. § 1951(a) (1952). The statute punishes "whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do. . . ."

2 48 Stat. 979 (1934).

3 See United States v. Local 807, Teamsters Union, 118 F.2d 684, 688 (2d Cir. 1941), *aff'd,* 315 U.S. 521, 528-531 (1942), where the legislative history of the act is examined.

4 Federal Anti-Racketeering Act, ch. 569, § 6, 48 Stat. 979 (1934). There was some doubt of the extension of this exception prior to 1942, but in United States v. Local 807, Teamster's Union, 315 U.S. 521, 530 (1942), the Court held that the act was intended to eliminate "terroristic activities by professional gangsters," but not to interfere with traditional labor union activities, *e.g.,* forcing the employer to pay wages.

5 *Cf.* United States v. Green, 350 U.S. 415, 421-422 (1956).

6 U.S. CONST. art. I, § 8, cl. 3.

7 Numerous other errors were argued on appeal. However the scope of this article will include only the alleged erroneous charge of the trial court. 262 F.2d at 574.

8 Even the classic case of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) concerned the limitation placed upon the states by the power.

9 FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 8 (1937).

10 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

11 United States v. E. C. Knight Co., 156 U.S. 1 (1895); see also Hammer v. Dagenhart, 247 U.S. 251 (1918), which was expressly overruled in United States v. Darby, 312 U.S. 100, 116-17 (1941).

12 Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

13 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

14 Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

15 Edwards v. California, 314 U.S. 160 (1941).

16 Castle v. Hayes Freight Lines, 348 U.S. 61 (1954).

17 Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

18 Caminetti v. United States, 242 U.S. 470 (1917).

19 Hemans v. United States, 163 F.2d 228 (6th Cir.), *cert. denied,* 332 U.S. 801 (1947).

20 Gooch v. United States, 297 U.S. 124 (1936).

21 The Minnesota Rate Cases, 230 U.S. 352 (1913).

state is not the measure of the power granted Congress because, as the Supreme Court explained in *Wickard v. Filburn*,[22] even though an activity

> be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . whether . . . "direct" or "indirect."[23]

In enacting the Hobbs Act, Congress intended to reach the perimeter of the power it possesses in this field.[24] Consequently, in the application of this act, courts have had no trouble finding interference with interstate commerce when the affected transportation crosses state lines.[25] Convictions have been affirmed against state officers, who, under the guise of enforcing state laws, extorted money from employers and their truck drivers,[26] of labor leaders who threatened to halt the unloading of sugar from ocean-going vessels,[27] and of a business agent who stopped the unloading of an interstate shipment and insisted that a union member do the unloading.[28] *Hulahan v. United States*,[29] however provides the frame of reference for the indirect interference with commerce which complicated the instant case. In *Hulahan* the interference was occasioned by a labor union official's extortion of money from several local construction companies which were working on the construction of a flour mill and an airport, both of which would not affect interstate commerce until completed. In affirming the conviction, the court emphasized Congress' power to deal with interferences which "actually" or "potentially" affect interstate commerce and stated that interference with contractors "who are engaged in constructing facilities to serve commerce, is . . . proscribed by the [Hobbs Act]."[30]

With these precedents the court had ample authority to support a finding of interference with interstate commerce under the instant facts. However, in support of its decision, the court used several cases concerning the Fair Labor Standards Act of 1938,[31] principally *Mitchell v. C. W. Vollmer & Co.*[32] In this decision the Supreme Court held that employees working on the construction of a water lock, which, when completed, would improve interstate avenues of transportation were "engaged in commerce within the meaning of the act." But it should be noted that this case is a narrow exception to the "new construction rule" which has been applied in countless FLSA cases,[33] whereby original construction is said not to be within the coverage of that statute even though the building would ultimately be used in conjunction with interstate commerce.[34] Logically, then, one must admit that construction of a steel mill would fall within this rule and not within the narrow exception covering "improvement of a facility or instrumentality of interstate commerce."[35] The dissent correctly criticized the majority for its use of these cases, but in turn used the same cases to formulate a contrary opinion.

Both opinions fail to realize that there is a substantial difference in the area purported to be encompassed by the two statutes. In the Hobbs Act, Congress, by express language, evidenced the intention that their implementation of the commerce power be

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22 317 U.S. 111 (1941).
23 *Id.* at 125.
24 The definition of commerce in the act concludes with the following phrase: "and all other commerce over which the United States has jurisdiction." 18 U.S.C. § 1951(b)(3) (1952).
25 U.S. v. Sweeney, 262 F.2d 272 (3d Cir. 1959); United States v. Postma, 242 F.2d 488 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957); United States v. Masiello, 235 F.2d 279 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956).
26 Ladner v. United States, 168 F.2d 771 (5th Cir. 1948).
27 United States v. Varlack, 225 F.2d 665 (2d Cir. 1955).
28 United States v. Kemble, 198 F.2d 889 (3d Cir.), *cert. denied*, 344 U.S. 893 (1952).
29 214 F.2d 441 (8th Cir.), *cert. denied*, 348 U.S. 856 (1954).
30 *Id.* at 445.
31 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-19 (Supp. V, 1958).
32 349 U.S. 427 (1955).
33 Hartmaier v. Long, 238 S.W.2d 332, 336 n.9, *cert. denied*, 342 U.S. 833 (1951) contains an extensive collection of such cases.
34 Hartmaier v. Long, *supra* note 33, at 336.
35 Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, 430 (1955).

coextensive with the constitutional grant extending coverage to "all . . . commerce over which the United States has jurisdiction." whereas the Fair Labor Standards Act was expressly limited to those workers "engaged in commerce or in the production of goods for commerce. . . ."[36] The majority, therefore, was more justified in rejecting the applicability of the "new construction rule"[37] to the Hobbs Act than the dissent in its insistence upon application of the rule to the instant situation. The majority's use of *Mitchell* and allied FLSA cases does serve to support the assertion that a potential effect on commerce is sufficient, but more appropriate authority could have been utilized.[38]

The opinion in the case in comment is open to analytical objections although the decision is justified by precedent and the historical evolution of the commerce clause. The use of FLSA cases was an unfortunate choice since the "new construction rule" still has life in that field. The rule is not constitutional doctrine but is a practical indication of activities not covered by one particular statute. Since the Hobbs Act is a much broader exercise of congressional power over commerce, the decisions enunciating the "new construction rule" are not controlling. The court's extension of the power of Congress under this act to reach activities which have a potential effect on interstate commerce is clearly correct and vitally necessary. Since the states have demonstrated their unwillingness or inability to act, federal action based on the commerce power is desirable if racketeering of "the predatory criminal gangs of the Kelly and Dillinger types"[39] or by labor union officials who use their great power for improper purposes is to be effectively controlled.

Joseph A. Marino

COPYRIGHT — DRESS DESIGNS — DESIGN PRINTED ON DRESS FABRIC IS PROPER SUBJECT OF COPYRIGHT. — Plaintiff, a manufacturer of dress fabrics, copyrighted an original fabric design. The design was described in the copyright application as a "work of art." Shortly afterwards, defendant marketed cloth substantially identical to plaintiff's form both in color and design, but at a lower price. Plaintiff moved to enjoin the further manufacture and marketing of defendant's print on the grounds of copyright infringement and irreparable injury. *Held:* motion granted. A design printed upon a dress fabric is a proper subject of copyright both as a "work of art" and as a "print." *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D.N.Y. 1959).

Manufacturers of dress fabrics have long sought copyright protection for their fabric designs. The very nature of the industry makes the originality of these designs critical since the designs of themselves often do the selling, and the commercial life of the design is usually ephemeral, often lasting less than six months. Under the common law, the product of one's imagination, intelligence and skill was a vested property right protected by copyright.[1] However, this protection was extinguished by general publication; the creator was deemed to have willed his originality to the public domain to be copied by anyone for any purpose.[2] The nature of the fabric industry demands that the dress fabric designs be "published" immediately to be profitable, which renders

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36 18 U.S.C. § 1951(b)(3) (1952). See note 24 *supra.*

37 Fair Labor Standards Act, 52 Stat. 1060 (1938), as amended, 29 U.S.C. § 202(a) (1952).

38 See cases cited in notes 14 & 29 *supra; cf.* United States v. Dale, 223 F.2d 181 (7th Cir. 1955), in which a petition for enlargement on bail was denied for want of a substantial question for appeal. This ruling followed a conviction under the Hobbs Act for a conspiracy to obstruct the construction of a power plant which upon completion would furnish electric power for an atomic energy plant in another state, and for extortion from a subcontractor working on this construction.

39 United States v. Local 807, Teamsters Union, 315 U.S. 521, 530 (1942).

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1 Weikart, *Design Piracy*, 19 IND. L.J. 235, 241 (1944).

2 Fashion Originators' Guild of America, Inc. v. FTC, 114 F.2d 80 (2d Cir. 1940).

meaningless the common law copyright. Consequently, over the years the technique of design "copying" has evolved to such a degree that as quickly as the design is marketed, a "copy" appears to compete with it.[3]

As a result, the manufacturers have looked elsewhere for protection. The theory of unfair competition seems to be precluded at this date.[4] The one approach which has met with some measure of success is that of the statutory copyright. The present copyright statute, based in the main on the Copyright Act of 1909,[5] includes thirteen subsections classifying the subject matter permitted to be copyrighted.[6] Of these, subsection (g) is claimed to favor dress designs in providing for the copyrighting of "works of art; models or designs for works of art." The manufacturer insists that his fashions or designs are "works of art" within the meaning of the act. The article in question in the instant case also brings into play subsection (k) providing copyright for "prints and pictorial illustrations including prints or labels used for articles of merchandise." The article is a dress fabric whose design may be a "work of art," but the design itself is also printed on the dress fabric and may be a protected "print."[7]

The copyrightability of designs for dress fabrics was first adjudicated in 1929 in *Kemp & Beatley, Inc. v. Hirsch.*[8] In this case, plaintiff sought to enjoin defendant from copying a dress pattern which plaintiff had copyrighted as a "work of art." The court, relying on an 1880 case involving pattern prints of balloons,[9] held that a design for dress goods, whether stamped on paper or on the goods themselves, was not copyrightable as a "work of art." Subsequent courts have been in accord with this view and have consistently held that articles of wearing apparel are not works of art.[10] The tenor of the opinions and periodicals on the subject indicates that Congress has been apprised of the problem of design piracy in the field of wearing apparel,[11] but thus far no legislation has been passed to amend the copyright laws and provide a solution. As a result, the courts have refused to extend copyright protection through judicial interpretation to obviate the difficulty.[12]

The last decision on point prior to the instant case was *Verney Corp. v. Rose Fabric Converters Corp.*,[13] decided in 1949, where plaintiff had copyrighted a design for use upon textiles as a commercial print. The court held that plaintiff's copyright was invalid since the design was printed and used as part of the merchandise *itself* and not merely in connection with its sale and advertisement. The court also stated that this was an attempt by plaintiff to obtain a monopoly of the design in the manufacture of dress fabrics and dresses, to which it was not entitled. It should be noted that the plaintiff in *Verney* had copyrighted its design as a "commercial print." This should not be confused with one of the issues in the instant case, *i.e.*, the copyrightability of a dress fabric design as a "print."[14]

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3 See Young, *Freebooters in Fashions*, 9 ASCAP COPYRIGHT LAW SYMPOSIUM 76 (1958).

4 Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929).

5 35 Stat. 1075 (1909).

6 17 U.S.C. § 5(a)-(m) (1952).

7 Prints may also come within the language of the design patent provision of the Patent Law. 35 U.S.C. § 171 (1952). However the laborious and time-consuming process of obtaining a patent has made it useless to the fabric industry. *Cf.* Pogue, *Borderland — Where Copyright and Design Patent Meet*, 6 ASCAP COPYRIGHT LAW SYMPOSIUM 8-10 (1955).

8 34 F.2d 291 (E.D.N.Y. 1929).

9 Rosenback v. Dreyfuss, 2 Fed. 217 (S.D.N.Y. 1880).

10 Belding Hemingway Co. v. Future Fashions, 143 F.2d 216, 218 (2d Cir 1944); White v. Leanore Frocks, 120 F.2d 113, 114-15 (2d Cir. 1941); Nat Lewis Purses v. Carole Bags, 83 F.2d 475, 476 (2d Cir. 1936); see also Young, *supra* note 3, at 85.

11 See Weikart, *supra* note 1, at 245-51.

12 Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929).

13 87 F. Supp. 802 (S.D.N.Y. 1949).

14 A "commercial print" is a print published in connection with the sale or advertisement of an article or articles of merchandise. 37 C.F.R. § 202.14(b) (Supp. 1958). A "print" is a work usually produced by lithographic or similar process from drawings or sketches which serve no further purpose than as a basis for the reproduction. 37 C.F.R. § 202.14(a) (Supp. 1958).

In recent years the fabric and garment industry has been given encouragement in its struggle for copyright protection in this area through a gradual expansion of the "work of art" concept. The expansion began in 1948 when the copyright office promulgated a new regulation broadening the definition of "work of art" to include the artistic aspects of jewelry, glassware, tapestries, and other works of applied arts.[15] The current Regulations of the Copyright Office, published in 1956, are even more favorable. The section defining "works of art" included the following:

> In order to be acceptable as a work of art, the work must embody some creative authorship in its delineation or form. The registrability of a work of art is not affected by the intention of the author as to the use of the work, the number of copies reproduced, or the fact that it appears on a textile material or textile product.[16]

The courts have also begun to take a more liberal approach to the problem. One court, in holding that ceramic models of a cocker spaniel were copyrightable, reemphasized the principle that it was not the subject but the subject's *treatment* that is protected.[17] Another court was of the opinion that "original" in reference to copyright works meant little more than that the particular work owed its origin to the particular author, and that no large measure of novelty was necessary.[18] From the often-cited case of *Mazer v. Stein*,[19] involving the copyrightability of lamp statuettes, came the proposition that the intended use of an article does not preclude copyright protection.

In 1955, two cases were decided which may be in favor of extending copyright protection to fabric and garment designs.[20] In the first case, *Ruston v. Vitale*,[21] plaintiff had copyrighted a doll in the form of a chimpanzee named "Zippy." The doll had been marketed in order to take advantage of a seasonal demand created by a popular television program on which "Zippy" appeared. The court, after deciding that "mere judges can hardly risk condemning Zippy for lack of artistry and thus prove themselves false prophets to the far-flung faithful Howdy Doody audience,"[22] reversed a lower court decision which denied plaintiff injunctive relief. In its opinion, the court said that "copyright protection extends to any production of any originality and novelty, regardless of its commercial exploitation or lack of artistic merit."[23]

In the second case, *Trifari Kressmann & Fishel, Inc. v. Charel Co.*,[24] defendant plagiarized plantiff's design for costume jewelry which had been copyrighted as a "work of art." Characterizing plaintiff's product as "junk jewelry," defendant contended that the copyright was invalid because the jewelry did not "rise to the dignity of a work of art." The court, in granting plaintiff a preliminary injunction, stated that the statutory concept "work of art" need not be an expression of "pure" or "fine" art. "All that is needed is that the author contribute more than a mere trivial variation, something recognizably his own."[25]

The instant court made no mention of past decisions concerning the copyrightability of fabric and garment designs. It did adopt, however, the interpretation of "work of art" as stated by Dr. Herbert Putnam in 1906 and cited in the recent Supreme Court case of *Mazer v. Stein*:[26]

> The term 'works of art' is deliberately intended as a broader specification than 'works of the fine arts' in the present statute with the idea that there is subject-matter

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15 37 C.F.R. § 202.8(a) (1949).
16 37 C.F.R. § 202.10(b) (Supp. 1958).
17 F. W. Woolworth Co. v. Contemporary Arts, Inc., 193 F.2d 162 (1st Cir. 1951). This principle was formulated by Justice Holmes in Bleisten v. Donaldson Lithographing Co., 188 U.S. 239 (1903).
18 Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).
19 347 U.S. 201 (1954).
20 See Young, *supra* note 3, at 86.
21 218 F.2d 434 (2d Cir. 1955).
22 *Id.* at 436.
23 *Id.* at 435.
24 134 F. Supp. 551 (S.D.N.Y. 1955).
25 *Id.* at 553.
26 347 U.S. 201, 213 (1954).

> (for instance, *of applied design, not yet within the province of design patents*), which may properly be entitled to protection under the copyright law.[27] (Emphasis added.)

The court then concluded that the scope of the term "work of art" encompassed applied designs and that the design in question was properly a subject of copyright both as a work of art and as a print.

Because of the expansion of copyright protection through copyright office regulations and the recent liberal interpretation of the "work of art" concept by the courts, the *Verney* case and those preceding it[28] have lost their validity as controlling precedents in this area. The instant decision provides a definite solution to a major problem in the textile industry. Because the design is the sum and substance of commercial success in the industry, manufacturers incur great expense in obtaining distinctive designs for their products. Due to the ephemeral nature of these designs, copying by a competitor jeopardizes the manufacturer's opportunity to recover the investment and retain the profit of his efforts. Copyright protection is ideal for this type of industry. There seems to be no logical reason to aid design pirates by a further denial of this needed protection.

But the disturbing aspect of this decision is not the correctness of its application of a copyright on the instant facts, but rather its probable precedent. The decision will evidently be heralded as an intelligent progression of the trend toward extending copyright to the fabric industry. The next step will be the fashions themselves. However, it is difficult to discern the beneficial aspects of strangling the garment industry by extending protection to the monopolistic property rights of a Dior or Cassini in such creations as the "New Look." Prior to such an extension, careful thought should be given to its effect on the industry and the ultimate consumer. Perhaps a middle ground can be struck via the regulations and court decisions to give as much protection to the property right of "originality" as is warranted by the common good.

Thomas Kavadas, Jr.

CRIMINAL LAW — EUTHANASIA — DEFENDANT ALLOWED TO WITHDRAW GUILTY PLEA OF MANSLAUGHTER TO ACCOMMODATE FINDING OF NOT GUILTY ON ARRAIGNMENT. — Sixty-nine-year-old defendant suffocated his wife, a hopelessly crippled bedridden arthritic. In arraignment proceedings in the trial court, the state waived the murder charge and permitted the defendant to enter a plea of guilty to manslaughter.[1] The court found the defendant guilty of manslaughter on the defendant's stipulated admission of the killing. After hearing testimony of defendant's children and pastor concerning his unfailing care and devotion during the deceased's two-year illness, and a letter from her doctor attesting to her excruciating pain and mental despair, the court allowed the defendant to withdraw his plea and entertained a plea of not guilty. *Held,* not guilty. Because, under the circumstances, a jury "would not be inclined" to convict, and because there was no reason to be concerned about recidivism as to this or any other crime, the court withheld the "stigma" of a finding of guilty and allowed the defendant "to go home . . . and live out the rest of [his] life in as much peace as [he] can find it in [his] heart to have." *People v. Werner,* Criminal No. 58-3636, Cook County Ct., Ill., Dec. 30, 1958.

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27 Arguments before the Committees on Patents of the Senate and House of Representatives, conjointly, on S. REP. No. 6330 and H.R. REP. No. 19853, *To Amend and Consolidate the Acts Respecting Copyright,* 59th Cong., 1st Sess. 11 (1906). Dr. Putnam was then the Librarian of Congress.

28 Cases cited notes 4, 7, 9 & 12 *supra.*

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1 ILL. ANN. STAT. ch. 38, § 364 (Smith-Hurd 1934).

The instant case is another in a steadily expanding galaxy of examples of apparent disrespect for the written law in euthanasia cases.[2] A brief examination of the more featured cases discloses the impact of this charge. The *Greenfield* case,[3] the *Repouille* case,[4] and the celebrated New Hampshire case of Dr. Sander,[5] all exemplify verdicts returned in open disregard of the facts.[6] Others, such as the *Brownhill* case,[7] the *Johnson* case,[8] the *Noxon* case,[9] the *Long* case,[10] the *Paight* case,[11] and the *Braunsdorf* case,[12] illumine the means often utilized to exonerate an accused through the convenient niches of "temporary insanity" and executive clemency existing under our present system of criminal law. The exceptions to this leniency are few, the classic example being the early case of *Rex v. Simpson.*[13]

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2 "The Law in Action is as malleable as the Law on the Books is uncompromising." Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation,* 42 MINN. L. REV. 969, 971 (1958). See also Silving, *Euthanasia: A Study in Comparative Criminal Law,* 103 U. PA. L. REV. 350, 353 (1954); see notes 3-12 *infra.*

3 Louis Greenfield chloroformed his imbecile son to death. N.Y. Times, May 9, 1939, p. 48, col. 1. Although the District Attorney did not want to prosecute the case, Time, Jan. 23, 1939, p. 24, Greenfield was tried and acquitted of first degree manslaughter, N.Y. Times, May 12, 1939, p. 1, col. 6.

4 Repouille read the account of the *Greenfield* case and did likewise, N.Y. Times, Oct. 13, 1939, p. 25, col. 7, and was found guilty of manslaughter in the second degree. N.Y. Times, Dec. 10, 1941, p. 27, col. 7. He was subsequently freed on suspended sentence of 5-10 years. N.Y. Times, Dec. 25, 1941, p. 44, col. 1.

5 In Dr. Sander's own notation he related that he had given the patient "ten cc of air intravenously four times," and that the patient died only after these injections. N.Y. Times, Feb. 24, 1950, p. 15, col. 5. The nurse in attendance testified that the patient was still "gasping" when Sander injected the air. N.Y. Times, Feb. 28, 1950, p. 1, col. 2. Yet, Sander was acquitted, N.Y. Times, March 10, 1950, p. 19, col. 2; and, although his license to practice medicine was revoked, it was soon restored. N.Y. Times, June 29, 1950, p. 31, col. 6.

6 See Judge Learned Hand's remarks in Repouille v. U.S., 165 F.2d 152, 153 (2d Cir. 1941), referring to a jury verdict of second degree manslaughter as "utterly absurd."

7 Mrs. Mary Brownhill murdered her thirty-one-year-old imbecile son by giving him an overdose of aspirins and placing a gas tube in his mouth. The Times (London), Oct. 2, 1934, p. 11, col. 2. Although sentenced to death (with a strong recommendation of mercy), The Times (London), Dec. 3, 1934, p. 11, col. 4, she was reprieved two days later, The Times (London), Dec. 4, 1934, p. 14, col. 2, and subsequently pardoned and set free in response to national sentiment. The Times (London), March 4, 1935, p. 11, col. 3; N.Y. Times, March 3, 1935, p. 3, col. 2.

8 Harry C. Johnson asphyxiated his cancer-stricken wife, N.Y. Times, Oct. 2, 1938, p. 1, col. 3; Oct. 3, 1938, p. 34, col. 3 Psychiatrists adjudged him "temporarily insane" at the time of the killing, N.Y. Times, Oct. 12, 1938, p. 30, col. 4, and a few days later the grand jury refused to indict him. N.Y. Times, Oct. 19, 1938, p. 46, col. 1.

9 John Noxon, a lawyer, electrocuted his six-month-old mongoloid son, claiming it was an accident. N.Y. Times, Sept. 28, 1943, p. 27, col. 2; Sept. 29, 1943, p. 23, col. 7; Oct. 29, 1943, p. 21, col. 7; Jan. 14, 1944, p. 21, col. 3; July 7, 1944, p. 30, col. 2; July 8, 1944, p. 24, col. 1. He was convicted of first degree murder, N.Y. Times, July 7, 1944, p. 30, col. 2, but his sentence was commuted to life, N.Y. Times, Aug. 8, 1946, p. 42, col. 4. Then, to make parole possible, sentence was further commuted to 6 years - life, N.Y. Times, Dec. 30, 1948, p. 13, col. 5. Noxon was paroled shortly thereafter, N.Y. Times, Jan. 4, 1949, p. 16, col. 3; Jan. 8, 1949, p. 30, col. 4, and was disbarred the following year. N.Y. Times, May 30, 1950, p. 2, col. 7.

10 Gordon Long gassed his deformed and imbecile seven-year-old daughter to death. Time, Dec. 2, 1946, p. 32. He pleaded guilty and was sentenced to death, but within a week his sentence was commuted to life imprisonment. The Times (London), Nov. 23, 1946, p. 2, col. 7; p. 15; Newsweek, p. 2, col. 7.

11 Carol Paight killed her father after his cancer operation. N.Y. Times, Jan. 28, 1950, p. 30, col. 1; Feb. 1, 1950, p. 54, col. 3; Feb. 2, 1950, p. 22, col. 5; Time, Feb. 6, 1950, p. 15; Newsweek, Feb. 13, 1950, p. 21. She was acquitted on grounds of temporary insanity.

12 Eugene Braunsdorf shot his spastic daughter and then attempted suicide. He was found not guilty by reason of temporary insanity. N.Y. Times, May 23, 1950, p. 25, col. 4; Time, June 5, 1950, p. 20.

13 11 Crim. App. R. 218, 84 L.J.K.B. (n.s.) 1893 (1915). Defendant was convicted of murder for cutting the throat of his son who was seriously ill and not expected to recover. The trial judge, in instructing the jury stated that intentional killing was murder, and they were not at liberty to find a verdict of manslaughter, though the prisoner killed the child "with the best and kindest motive." See also Repouille v. U.S., 165 F.2d 152 (2d Cir. 1941) (an alien who performed euthanasia on his son denied citizenship as not being a person of "good moral character"); People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920) (defendant convicted of murder and sentenced to life imprisonment for assisting his wife in her suicide by placing Paris Green at her disposal).

Although it is readily noticeable that the majority of these cases do not involve physicians or surgeons, this is not to imply that doctors refrain from euthanasia. Unfortunately, because of their position and their specialized knowledge, it is next to impossible to attribute the death of an "incurable" patient to euthanasia.[14] Those who advocate the legalization of euthanasia through state legislation openly admit it is being done, and consequently are interested primarily in legalizing this practice only for members of the medical profession.[15] And, were we to accept unquestioningly their statistics, it would seem as if their aim expressed the will of the medical profession, if not that of the general public.[16] In reality, the situation is exactly the reverse.[17]

The movement for legalizing "mercy-killing" is tenacious, however, and cannot be disregarded. It is based upon a purely pragmatic argument which recognizes no right to "live" unless one can "live well." As a result, it can be annihilated at the same pragmatic level without resorting to the customary moralistic attack. One has merely to weigh the alleged advantages of "voluntary" euthanasia (*i.e.*, where the infirm consents) with two apparent disadvantages: (1) the possibility of mistake, and (2) the possibility of abuse.[18]

Because of the possibility of mistake, even the layman, with but a cursory knowledge of scientific progress, would expect a doctor to be loath to contend that his diagnosis of a case as "incurable" was final unless he were simultaneously to admit that medical advancement has become both "stationary and sterile."[19]

The possibility of abuse is the more alarming problem, and it is not a satisfactory retort to contend that only "voluntary" euthanasia is advocated. Even today, one has but to look at the heralded cases to see that the "overwhelming majority of known or alleged 'mercy-killings' have occurred without the consent of the victim."[20] The Nazi euthanasia program shows to what length such a system can be carried.[21] The program begins with those who are a nuisance to themselves; it comes to a crashing finale with the painless disposition of those who are a nuisance to others.[22] Even were a doctor to ignore the above two possibilities, could he, in good conscience, disregard that part of the Hippocratic Oath which reads: "I will . . . abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked, nor suggest any such counsel."?[23]

The apparent present impregnability of "mercy-killers" is far removed from their conceptual legal status, for under both English and American codifications of the criminal law, "voluntary" euthanasia is murder for the person who administers, and suicide for the person who consents.[24] A fortiori, the perpetrator of an "involuntary"

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14 G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 325-27 (1957).

15 G. Williams, *Mercy-Killing Legislation — A Rejoinder*, 43 MINN. L. REV. 1, 9 (1958); McCormick, *Murder Will Out*, N.Y. CATHOLIC INFORMATION SOC'Y 7 (1947).

16 See G. WILLIAMS, *op. cit. supra* note 14, at 331-32; 16 U. CHI. L. REV. 141 n.11 (1948).

17 See 169 H.L. Deb. (5th ser.) 522-98 (1950); 103 H.L. Deb. (5th ser.) 466-505 (1936), which point up the legislative opposition to the legalization of euthanasia; 96 AMERICAN 573 (1957), where the results of a recent petition of New Jersey doctors point out that 98% of them refused to endorse the petition for legalizing euthanasia; McCormick, *Legalized Mercy Killing, Moral or Immoral*, N.Y. CATHOLIC INFORMATION SOC'Y 6-7 (1947); N.Y. Times, Oct. 18, 1950, p. 22, col. 4, which reported that the General Assembly of the World Medical Association approved a resolution recommending that all national associations "condemn the practice of euthanasia under any circumstances."

18 Kamisar, *supra* note 2, at 976.

19 Emerson, *Who is Incurable? A Query and Reply*, N.Y. Times, Oct. 2, 1933, § 8, p. 5, col. 1. See generally, Wolbarst, *Legalize Euthanasia!* 94 THE FORUM 330 (1935); Kamisar, *supra* note 2, at 998, 1013.

20 Kamisar, *supra* note 2, at 1020.

21 Ivy, *Nazi War Crimes of a Medical Nature*, 33 FED. BULL. 133-34 (1947).

22 Chesterton, *Euthanasia and Murder*, 8 AM. REV. 487 (1937).

23 Taylor, *Annotations on the Oath of Hippocrates and the Geneva Version of the Hippocratic Oath*, 23 LINACRE O. 34 (1956). The author points out that this section of the Oath "is a condemnation of euthanasia."

24 See G. WILLIAMS, *op. cit. supra* note 14, at 318; 2 BURDICK, LAW OF CRIMES §§ 422, 447 (1946); PERKINS, CRIMINAL LAW 721 (1957).

mercy-killing is guilty of murder, despite his altruism.[25] Illinois is no exception.[26] Some European countries have adopted different legal approaches to this problem, but they have not found acceptance in common law jurisdictions.[27]

At the present time the question of non-feasance presents the only possible valid legal argument for euthanasia advocates.[28] Perhaps they can find some solace in the late Pope Pius XII's statement that a doctor is not obligated to use extraordinary means to save a life which is "ebbing hopelessly."[29] Yet, if there is a *legal duty* to act, deliberate non-feasance with intent to cause death is usually classified as murder,[30] and negligent non-feasance as manslaughter.[31]

The court in the instant case appears to have based its decision largely on the motive of the defendant, apparently believing that the type of motive which determines the defendant's act has an important bearing on the character of the defendant.[32] Although there is wisdom in this approach, since it is not likely that a mercy-killer will become a recidivist, the fact remains that at the present time motive is not an essential criminal component either under the homicide law of Illinois,[33] or in American jurisprudence generally, for it is seldom recognized as an element of a crime or a defense to it.[34]

The procedure followed by the court in the instant case appears unauthorized. Although the defendant pleaded guilty to the manslaughter charge while aware of the implications of such a plea, the court, apparently looking askance at its statutory duty in such an instance,[35] permitted him to withdraw his plea and substitute that of "not guilty." It is true that the court in its discretion may permit the defendant to withdraw a plea of "guilty" to the indictment although he pleaded with a full understanding of the charge against him.[36] But, the discretion thus left with the judge is limited to those particular instances "where it appears that there is *doubt of his guilt,* or that he has *any defense at all worthy of consideration by a jury,* or that the *ends of justice will best be served by submitting the case to a jury. . . .*"[37] (Emphasis added.) The first two criteria are obviously not present in the instant case. Nor is the third if we equate "ends of justice" with "justice under law." Besides, it is evident that the trial judge in the instant case had no intention of submitting the case to the jury after he allowed the plea of guilty to be withdrawn.

Without speculating as to the people's right to a new trial,[38] or the possibility that the court usurped the executive pardoning power,[39] the most that can be said for the court's action is that it exemplifies the unfortunate ability of "sociological jurisprudence"

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25 Silving, *supra* note 2, at 352.

26 ILL. ANN. STAT. ch. 38, § 358 (Smith-Hurd 1934): "Murder is the unlawful killing of a human being . . . with malice aforethought, either express or implied. The unlawful killing may be perpetrated by poisoning, . . . *or by any of the other various forms or means by which human nature may be overcome and death thereby occasioned.*" (Emphasis added.)

27 See Silving, *supra* note 2, at 350, 386-89.

28 *Id.* at 360: "One might argue that since the physician's duty to act is contractual and predicated upon the patient's consent, there being no basis in such instances for presumptive consent, non-feasance should go completely unpunished even though active euthanasia remains punishable."

29 N.Y. Times, Nov. 25, 1957, p. 1, col. 3.

30 Commonwealth v. Hall, 322 Mass. 523, 78 N.E.2d 644 (1948).

31 People v. Chavez, 77 Cal. App. 2d 621, 176 P.2d 92 (1947).

32 *But see* Repouille v. U.S., 165 F.2d 152 (2d Cir. 1941), where the court held that an alien who performed euthanasia was not of the "good moral character" required for citizenship.

33 People v. Wagner, 390 Ill. 384, 61 N.E.2d 354 (1945).

34 See State v. Beard, 16 N.J. 50, 106 A.2d 265, 270 (1954); State v. King, 226 N.C. 241, 37 S.E.2d 684 (1946); State v. Taylor, 356 Mo. 1216, 205 S.W.2d 744 (1947).

35 ILL. ANN. STAT. ch. 38, § 732 (Smith-Hurd 1934): ". . . if the party persists in pleading 'guilty', such plea shall be received and recorded, and the court *shall proceed to render judgment and execution thereon,* as if he had been found guilty by a jury." (Emphasis added).

36 People v. Throop, 359 Ill. 354, 194 N.E. 553 (1935); People v. Wheeler, 349 Ill. 230, 181 N.E. 623 (1932).

37 People v. Kleist, 311 Ill. 179, 142 N.E. 486 (1924).

38 ILL. ANN. STAT. ch. 38, § 747 (Smith-Hurd 1934): "in no criminal case shall the people be allowed a new trial."

to expand itself to the limit of its logic in an attempt to align the law with what is believed to be the public sentiment. To the other extreme, however, it reflects the anomaly of judges who, as triers of fact and law, render a verdict flatly in the face of both, apparently not realizing that "the public policy as expressed by legislative acts is not a matter for the courts. Their duty is to apply the law as they find it."[40]

Demands for legalizing euthanasia coupled with results similar to *People v. Werner* justify a closer scrutiny of the present law as it applies to "mercy-killers." Recent efforts in both England and the United States to re-classify those acts which should be punishable amply demonstrate that the trend of modern criminal law is to utilize punishment discriminately.[41] The manner in which both judges and juries are now disposing of euthanasia cases further exemplifies this trend. Yet their disposition of the cases is inadequate by present legal standards since euthanasia falls under the classification of "premeditated homicide." This dichotomy necessitates a reform of the law. Legislators could conceivably take mercy-killing entirely outside the scope of criminal law, and thereby fulfill the aims of those advocating the legalization of euthanasia. But in doing so, they are tacitly giving ethical approval to the act. A far better approach would be to leave "involuntary" euthanasia under the full condemnation of the criminal law, while at the same time recognizing the element of motive by providing "voluntary" euthanasia with its own special niche in the law. Since a lesser punishment would still attach, ethical approval would be withheld, the crime merely being classified as less reprehensible than other forms of premeditated homicide. This should eliminate the widespread and concerted refusal to enforce the penalties against mercy-killers, and thereby bring the actual status of the mercy-killer back into juxtaposition with his conceptual status.

John C. Hirschfeld

SEARCH AND SEIZURE — PROBABLE CAUSE — TIP OF INFORMER HELD PROBABLE CAUSE FOR ARREST WITHOUT WARRANT. — Petitioner was arrested without a warrant by a federal narcotics agent. Sole justification for the arrest, pursuant to the Narcotics Control Act of 1956,[1] was information from a paid informer of the Narcotics Bureau who had proved reliable during six months of association with arresting officers. The informer's description of the petitioner, including dress, baggage, and manner of walking, and his prediction of the petitioner's time of arrival at the point of arrest, were detailed and accurate. The arresting officers searched petitioner immediately after the arrest and seized narcotics and implements used in narcotics addiction. At trial petitioner moved to suppress this evidence on the ground that the search was incident to an illegal arrest. Motion was denied by the trial court and petitioner's subsequent conviction was affirmed by the court of appeals. On petition for writ of certiorari, *held:* affirmed. Information from a reliable informer may be probable cause for arrest without a warrant. *Draper v. United States,* 358 U.S. 307 (1959).

An arrest without a warrant can only be made upon probable cause, and evidence seized incident to an invalid arrest is not admissible in the federal courts.[2] With some dicta to the contrary,[3] probable cause for arrest or for search without a warrant does not require evidence sufficient for conviction.[4] Probable cause has been interpreted to

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39 See People *ex rel.* Milburn v. Nierstheimer, 401 Ill. 465, 82 N.E.2d 438 (1948); People v. Lueckfield, 396 Ill. 520, 72 N.E.2d 198 (1947).

40 Holmstedt v. Holmstedt, 383 Ill. 290, 49 N.E.2d 25, 28 (1943).

41 See Silving, *supra* note 2, at 350.

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1 70 Stat. 570 (1956), 26 U.S.C. § 7607 (Supp. V, 1958).

2 United States v. Lefkowitz, 285 U.S. 452 (1932); Weeks v. United States, 232 U.S. 383 (1914).

3 See, *e.g.*, Grau v. United States, 287 U.S. 124 (1932).

4 Brinegar v. United States, 338 U.S. 160 (1949); Locke v. United States, 11 U.S. (7 Cranch) 212 (1813).

mean reasonable grounds under the circumstances.[5] The existence of probable cause has been found where the officer's information was drawn from his personal knowledge[6] or observation,[7] or where guilt has been reasonably inferred from the suspect's flight.[8] Statutes defining the arrest power of narcotics agents[9] and agents of the FBI[10] do not enlarge the construction of probable cause in the fourth amendment.[11] However, a recent Fifth Circuit decision has construed the Narcotics Control Act as eliminating the necessity for a judicial determination of probable cause and has upheld an arrest made without a warrant two weeks after the arresting officer had sufficient information to justify issuance of a warrant.[12]

The courts have tended to test probable cause for arrest without a warrant by deciding *a posteriori* whether a warrant could have been issued on the basis of the information possessed by the officer before the arrest.[13] If that test is applied, mere "belief" by the officers[14] or information from undisclosed informers[15] does not constitute probable cause.

Approval of arrests made on the uncorroborated "tips" of informers has been resisted by federal courts regardless of how accurate the information proved to be in the subsequent search and seizure.[16] An exception has been made in one case where information later proved to be "reliable and positive."[17] In those cases which approve arrests made without a warrant, the probable cause on which the arrest was based usually involved corroboration by officers of the data given them by informers. In *Wisniewski v. United States*,[18] for instance, officers observed the suspect's criminal activity before arrest. In *Ard v. United States*,[19] *Husty v. United States*,[20] and *Carroll v. United States*,[21] officers had prior personal knowledge of the suspects' criminal activity; and in *United States v. Li Fat Tong*,[22] the suspect had a record of several previous arrests and admitted his guilt before he was arrested. These cases frequently included dicta that information from informers would not, standing alone, justify arrest.[23] In several instances personal observation by officers has not validated an arrest made after an investigation when the investigation was initiated as a result of a "tip" which the courts considered unreliable.[24]

The instant decision adds prestige to the informer's role by recognizing his word as a basis of probable cause, subject to confirmation by the arresting officer. It appears

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5 Stacey v. Emery, 97 U.S. 642 (1878).
6 Carroll v. United States, 267 U.S. 132 (1925).
7 United States v. Kansco, 252 F.2d 220 (2d Cir. 1958).
8 United States v. Heitner, 149 F.2d 105 (2d Cir. 1945), *cert. denied sub nom.* Cyrne v. United States, 326 U.S. 727 (1945).
9 70 Stat. 570 (1956), 26 U.S.C. § 7607 (Supp. V, 1958) ("reasonable grounds").
10 18 U.S.C. § 3052 (1952).
11 United States v. Volkell, 251 F.2d 333 (2d Cir. 1958), *cert. denied*, 356 U.S. 962 (1958); United States v. Walker, 246 F.2d 519 (7th Cir. 1957); United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1931); *cf.* Stacey v. Emery, 97 U.S. 642 (1878).
12 Dailey v. United States, 261 F.2d 870 (5th Cir. 1958); *cf.* United States v. Rabinowitz, 339 U.S. 56 (1950).
13 Worthington v. United States, 166 F.2d 557 (6th Cir. 1948); United States v. Horton, 86 F. Supp. 92 (W.D. Mich. 1949).
14 Giordenello v. United States, 357 U.S. 480 (1958).
15 Schencks v. United States, 2 F.2d 185 (D.C. Cir. 1924).
16 Contee v. United States, 215 F.2d 324 (D.C. Cir. 1954); United States v. Castle, 138 F. Supp. 436 (D.D.C. 1955). *But see* Wrightson v. United States, 236 F.2d 672 (D.C. Cir. 1956); United States v. Jackson, 159 F. Supp. 845 (D.D.C. 1958).
17 King v. United States, 1 F.2d 931 (9th Cir. 1924).
18 47 F.2d 825 (6th Cir. 1931).
19 54 F.2d 358 (5th Cir. 1931), *cert. denied*, 285 U.S. 550 (1932).
20 282 U.S. 694 (1931).
21 267 U.S. 132 (1925).
22 152 F.2d 650 (2d Cir. 1945).
23 See, *e.g.*, United States v. Hill, 114 F. Supp. 441 (D.D.C. 1953).
24 Johnson v. United States, 333 U.S. 10 (1948); United States v. Lee, 83 F.2d 195 (2d Cir. 1936); Wakkuri v. United States, 67 F.2d 844 (6th Cir. 1933).

that the officer must both first believe that the informer is reliable, and then confirm by personal observation at least part of what the informer tells him. However, this personal observation need not be of criminal activity. The officer is apparently permitted to infer that the informer's prediction that a crime will be committed is accurate if other detailed descriptive information proves to be accurate.

The instant decision leaves indefinite the precise legal status of informers in federal law enforcement. However, the right to report criminal activity, and to be free from intimidation[25] or civil prosecution[26] as a result, is firmly established. The government has been required to disclose the names of informers when such information is necessary for an adequate defense,[27] when the informer's words have been repeated in testimony,[28] or when the informer has been used to trap the defendant.[29] In the absence of one of these circumstances, "public policy forbids disclosure of an informer's identity."[30]

Conceding the necessity for prompt action in many narcotics cases, there is no necessity for pre-empting judicial determination of probable cause where, as in this case, there is time and opportunity to obtain a warrant. The statute defining the arrest power of FBI agents[31] has been construed more narrowly than the provisions of the Narcotics Control Act[32] although the language is almost identical.[33] This may indicate that the judiciary considers narcotics violations more critical than other federal crimes. There is, however, the danger that law enforcement officials will ignore constitutional safeguards when the courts give them the opportunity.[34] An officer employed to invade privacy is not the most reliable judge of when to respect it.

Thomas L. Shaffer

UNEMPLOYMENT INSURANCE — DISQUALIFICATION — RESIGNATION PURSUANT TO SENIORITY PROVISION OF COLLECTIVE BARGAINING AGREEMENT PRECLUDES EMPLOYEE FROM COMPENSATION. — Claimant, though a member of the international, was a non-member of a local union, working as a moving picture projectionist under a permit issued by the local union. He resigned his position in obedience to an order of the local union's business agent issued pursuant to a seniority regulation which provided that non-members had no seniority status in the local union and were subject to being displaced by any local union member unemployed through no fault of his own. The regulation was part of a collective bargaining agreement between the employer and the local union; the employer was required to comply strictly with the regulation in making all changes of employees. Claimant subsequently applied for work at the state employment office and filed a claim for benefits, which was granted by the Commissioner of Employment Security. On certiorari, *held,* reversed. Employment discontinued in accordance with seniority provisions of a collective bargaining agreement

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25 *In re* Quarles, 158 U.S. 532 (1895).
26 Vogel v. Grauz, 110 U.S. 311 (1884).
27 Roviaro v. United States, 353 U.S. 53 (1957).
28 United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937).
29 Portomene v. United States, 221 F.2d 582 (5th Cir. 1955).
30 Scher v. United States, 303 U.S. 251 (1938); *cf.* Cannon v. United States, 158 F.2d 952 (5th Cir. 1947), *cert. denied,* 330 U.S. 839 (1947); Nichols v. United States, 176 F.2d 431 (8th Cir. 1949).
31 18 U.S.C. § 3052 (1952).
32 70 Stat. 570 (1956), 26 U.S.C. § 7607 (Supp. V, 1958).
33 United States v. Bianco, 189 F.2d 716 (3d Cir. 1951); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).
34 *Cf.* the detailed statistical survey of arrest practices in seven eastern states in Tresolini, Taylor & Barnett, *Arrest Without Warrant: Extent and Social Implications,* 46 J. CRIM. L., C. & P. S. 187 (1955).

is voluntary and without good cause attributable to the employer within the meaning of MINN. STAT. ANN. § 268.09(1) (1959).[1] *Anson v. Fisher Amusement Corp.*, 93 N.W.2d 815 (Minn. 1958).

The problem of interlacing unemployment compensation laws with the demands required of the employee by labor law and the union movement has resulted in numerous cases of statutory construction. The usual case involves a claim for compensation from an employee who terminated his employment because of some sort of labor dispute, *e.g.*, wages or working conditions.[2] Most unemployment compensation statutes disqualify a claimant for benefits where employment termination is voluntary.[3] However, to avoid a strained construction of the term "voluntary," most states have a special disqualification provision for termination due to labor disputes even though the union ordered the termination.[4] This provision works well in the usual case, but it does not include the cases which cannot be fit into the "labor dispute" category. Consequently, a troublesome problem of construing the term "voluntary" arises when an employee is required to terminate employment because of one or more provisions in the collective bargaining agreement. Normally, whenever a union is designated as the exclusive bargaining agent by a majority of the employees, union and non-union members are bound by the provisions of an agreement between the union and the employer. Also non-union members employed during the life of the agreement and who accept work under its provisions are similarly bound by it.[5]

Prior to the instant case, the Minnesota court had encountered this problem in somewhat analagous situations involving plant shut-downs for vacation purposes and compulsory retirement plans. In *Jackson v. Minneapolis-Honeywell Regulator Co.*,[6] a collective bargaining agreement provided for a plant shut-down for vacations, but granted vacation pay only to those employees with one year's seniority. The employees ineligible for vacation pay were denied unemployment compensation during the shut-down because their unemployment was said to be "voluntary."[7] In its decision the court adopted the reasoning of the Washington court in *In re Buffelen*[8] where the claimants were said to have agreed to the plant shut-down through their bargaining agent, the union, when the collective bargaining agreement contained a vacation shut-down provision. They therefore were unemployed by their own election and were ineligible for benefits.

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1 The statute provides:
> An individual shall be disqualified for benefits: (1) if such individual voluntarily and without good cause attributable to the employer discontinued his employment with such employer. . . .

2 For numerous cases involving this issue, see Annot., 26 A.L.R.2d 291 (1953).

3 See, *e.g.*, ARK. STAT. ANN. § 81-1106(a) (Supp. 1957) (voluntarily without good cause connected with such work); DEL. CODE ANN. tit. 19, § 3315 (Supp. 1958) (voluntarily without good cause attributable to such employment); IDAHO CODE § 72-1366(f) (Supp. 1957) (voluntarily without good cause); N.J. STAT. ANN. § 43:21-5(a) (1950) (voluntarily without good cause); see generally, Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307 (1955); Kempfer, *Disqualification for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147 (1946).

4 See, *e.g.*, ILL. ANN. STAT. ch. 48, § 223(d) (Smith-Hurd 1950); MO. ANN. STAT. § 288.040(4) (Supp. 1958); N.J. STAT. ANN. § 43:21-5(d) (1950). The disqualification is usually applied only to the employees who were participants in the labor dispute. *But see* Drylie v. Unemployment Compensation Bd., 162 Pa. Super. 211, 56 A.2d 272 (1948), where the term "voluntary" was used to disqualify employees whose employment terminated because of a labor dispute.

5 Division of Labor Law Enforcement v. Standard Coil Prod. Co., 136 Cal. App. 2d 919, 288 P. 2d 637, 639 (1955).

6 234 Minn. 52, 47 N.W.2d 449 (1951).

7 *Accord*, Mattey v. Unemployment Compensation Bd. of Review, 164 Pa. Super. 36, 63 A.2d 429 (1949); Beaman v. Bench, 75 Ariz. 345, 256 P.2d 721 (1953); Moen v. Director of Div. of Employment Security, 324 Mass. 216, 85 N.E.2d 779 (1949). *But see* MASS. ANN. LAWS ch. 151A, § 1(r)(2) (1949) altering the rule in the *Moen* case.

8 32 Wash. 2d 205, 201 P.2d 194 (1948). *But see* WASH. REV. CODE § 50.20.115 (Supp. 1958) changing the rule in this case.

The *Jackson* rationale was followed in a similar case, *Johnson v. LaGrange Shoe Corp.*[9] However, this case differed with *Jackson* in that the collective bargaining agreement did not expressly provide for a plant shut-down but it did authorize vacations when the employees desired them. Because too many employees desired vacations at the same time, the plant was forced to shut down. The court held that the union, as agent for the employees, had *impliedly* agreed to the shut-down and therefore the employees ineligible for vacation pay were precluded from unemployment benefits under the rule in the *Jackson* case.[10] In passing, the court noted that the rule of *In re Buffelen*, on which the *Jackson* case was based, had been overruled by statutory amendment.[11] However, the court felt that its decision was based on sound reasoning, and change, if any, was a matter for the legislature.

Similar reasoning has been applied in cases involving employment termination pursuant to a compulsory retirement plan in a collective bargaining agreement. In *Bergseth v. Zinsmaster Baking Co.*,[12] a majority of the court found that those employees who were forced to terminate their employment because of this plan did so voluntarily and without good cause attributable to the employer.[13] The majority rejected the theory that the collective bargaining agreement was a waiver of unemployment benefits and therefore illegal under a provision in the act.[14] The dissenting opinion followed the reasoning of the New Jersey court in *Campbell Soup Co. v. Division of Employment Security*,[15] where, under essentially the same facts, the court held that the employee was involuntarily unemployed. The test applied was whether, at the time of leaving employment, the decision to go or stay rested with the worker alone. The court indicated that the unemployment compensation act was to be liberally construed in order to further its remedial purposes and that it was irrelevant to consider whether an employee was acting voluntarily through a union as his agent. The majority in *Bergseth* rejected this reasoning on the ground that no weight was given to the collective bargaining agreement by the New Jersey court.[16] However, it should be noted that the court in the *Campbell* case did consider the collective bargaining agreement. The court stated that the agreement operated as an adverse surrender of benefits and was inconsistent with the statutory objectives of unemployment compensation.[17]

In light of its prior decisions the court in the instant case experienced no difficulty in finding a "voluntary" termination. As in prior decisions, the act of the union was considered the act of the employee. The policy of the act was said to provide benefits only to persons "unemployed through no fault of their own."[18] Equating "fault" with "cause," the court stated that the test to distinguish voluntary from involuntary unemployment was whether the employee directly or indirectly exercised a free-will choice in the separation.[19] Since the union was the agent of the employees and had bargained for the seniority provision in the collective bargaining agreement, the employee ratified the union's act by accepting employment under the auspices of the

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9 244 Minn. 354, 70 N.W.2d 335 (1955).

10 *Contra,* Schettino v. Administrator, Unemployment Compensation Act, 138 Conn. 253, 83 A.2d 217 (1951). *Compare* Golubski v. Unemployment Compensation Bd. of Review, 171 Pa. Super. 634, 91 A.2d 315 (1952) *with* Hubbard v. Michigan Unemployment Compensation Comm'n, 328 Mich. 444, 44 N.W.2d 4 (1950).

11 See note 8 *supra.*

12 89 N.W.2d 172 (Minn. 1958).

13 *Contra,* Campbell Soup Co. v. Division of Employment Security, 13 N.J. 431, 100 A.2d 287 (1953). *Cf.* Krauss v. Karagheusian, Inc., 13 N.J. 447, 100 A.2d 277 (1953) (employee selected optional retirement plan).

14 MINN. STAT. ANN. § 268.17(1) (1959) provides that "any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under sections 268.03 to 268.24 shall be void. . . ."

15 13 N.J. 431, 100 A.2d 287 (1953).

16 89 N.W.2d at 176.

17 100 A.2d at 290.

18 MINN. STAT. ANN. § 268.03 (1959).

19 93 N.W.2d at 819.

local union. The employee was therefore at fault and caused his own unemployment, disqualifying him for unemployment benefits.

Aside from the questionableness of its "ratification" theory,[20] the court's construction of the term voluntary cannot pass without criticism. This term has various meanings in various situations. In a sense it must be admitted that the unemployment here was voluntary, that the employee agreed to the condition of being "bumped" by his senior. However, the employee agreed because he *had* to agree, in order to obtain employment in this particular industry. In this industry, as in many others involving closely-knit unions, the senior members exact this condition in order to keep themselves in employment and subjugate the junior and non-members. This is the scheme of many present-day labor unions; to deny it is to accept a view prevalent twenty-five years ago. It could be said that the employee could have refused to work under such conditions; he could have looked elsewhere for work. But the instant union is not the only union with this seniority provision. Claimant would have been confronted with the same "choice" wherever he sought employment. As for the objection to charging benefits to the employer's experience rating account,[21] it can only be said that this is part of the consideration he must pay in accepting this particular collective bargaining agreement.

Perhaps the reluctance of the court to find an involuntary resignation under the instant facts is based on the fear that union policy may dictate the distribution of unemployment benefits.[22] Even so, the approach taken is inconsistent with the basic purpose of unemployment compensation, which is to ease the burden of involuntary unemployment by distribution of unemployment benefits. In determining whether separation from employment was voluntary or involuntary, the test should be juridical, not metaphysical. The court itself has recognized the validity of this approach. In *Fannon v. Federal Cartridge Corp.*,[23] the court reasoned that "fault" should not be interpreted narrowly, in the sense of "culpability," but rather in the light of the broad social policy behind the act. Technical subtlety, exercised with an eye to an employer's experience rating table, has no place in the interpretation of a statute based on the needs of employees out of work.

If the rule of the instant case is followed, then any employee working under any type of seniority provision, whether it be merely a union regulation or part of a collective bargaining agreement, will be disqualified for unemployment benefits when he is forced to leave his employment because of lack of seniority. Public policy obviously does not dictate such a result.

W. R. Kennedy

UNEMPLOYMENT INSURANCE — FIFTH AMENDMENT — DISQUALIFICATION FOR REFUSAL TO ANSWER CHARGES OF COMMUNIST AFFILIATION. — Petitioner was notified by his employer that he was suspended from employment and that his discharge was pending because he was a security risk and had engaged in conduct detrimental to the business interests of the company, then under defense contracts with the federal government. Petitioner requested and was granted a company hearing on the question of his discharge. At this hearing he refused to discuss the reason for pleading the fifth amendment to charges of communist affiliations made against him before a con-

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20 See Campbell Soup Co. v. Division of Employment Security, 13 N.J. 431, 100 A.2d 287 (1953).

21 The employer's contribution rate is raised when his experience rating ratio is raised. The experience rating ratio is the quotient obtained by dividing the total benefits chargeable to the employer's account for the period by his total taxable payroll for the period. MINN. STAT. ANN. § 268.06(6), (8) (1959).

22 See Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 322 (1955).

23 219 Minn. 306, 18 N.W.2d 249 (1945).

gressional committee. Petitioner was discharged and applied for unemployment compensation. At the hearing before the unemployment compensation referee, he again refused to answer questions concerning his alleged communist affiliations. Petitioner appealed the board's denial of compensation. *Held*: affirmed. Claimant's refusal to answer charges of communist affiliation while an employee of a company with defense contracts was willful misconduct in connection with his employment. Also, his refusal to answer the compensation referee's questions relevant to the claim constituted waiver of the claim. *Ault v. Unemployment Compensation Bd.*, 188 Pa. Super. 260, 146 A.2d 729 (1958).

The decision in this case rested on two bases: 1) willful misconduct in connection with employment, and 2) actions constituting waiver of the claim for compensation. Generally, under state statutes, "misconduct in connection with employment," which is the cause of discharge, will disqualify a claimant from the benefits of unemployment compensation.[1] The Pennsylvania statute adds the requirement of "willful" misconduct.[2] In its analysis of the misconduct issue the instant court found willful misconduct in the breach of a duty of employee to employer in refusing to answer sworn charges publicly made against him. The duty imposed on public service employees to answer charges affecting their office was apparently extended by this decision to employees of private industries with defense contracts. The public service employee's duty of explaining charges has long been recognized as a requirement of continuing employment.[3] The rationale seems to be that there is a privilege to refuse to answer, but that the privilege does not include protection against loss of employment by virtue of the refusal.[4] Official action may not be taken on the implications that arise from refusal to answer, but the person who avails himself of the privilege cannot expect to hold the same position of public trust that was once vested in him. He is free from criminal prosecution, but he is not free from public opprobrium. This sentiment was accentuated in a recent Supreme Court decision concerning the discharge of a transit conductor. The Court held that "lack of candor" on the part of the conductor under investigation for communist affiliation evidenced sufficient doubt of his trust and reliability to constitute grounds for discharge as a security risk.[5] Collaterally, when school teachers refused to answer charges of communist affiliation posed by the school board and invoked the fifth amendment before a congressional committee, the Supreme Court upheld their discharge.[6] The reasoning was that they had violated a public trust vested in them by refusing to answer the questions.

The court in the instant case was reluctant to make communist affiliation misconduct in itself. This is understandable since to do so the court would have had to conclude that the petitioner was a Communist which would have been an imputation of guilt from refusal to answer. Furthermore, at present there is no statutory prohibition of employment of a Communist by a defense contractor. The existing regulation only requires a security clearance for employees having access to classified material.[7] The employer is allowed to give such clearance at low levels and there is no requirement to discharge an employee who cannot secure clearance.[8]

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1 As of 1958, forty-one states and the District of Columbia provided for disqualification from unemployment compensation benefits for discharge due to "misconduct in connection with employment" of the claimant. Five states require "willful misconduct in connection with employment." Delaware and Ohio specify disqualification for discharge for "good cause in connection with employment." DEL. CODE ANN. tit. 19, § 3315(2) (Supp. 1958); OHIO REV. CODE ANN. § 4141.29C(17(4) (Supp. 1958). West Virginia provides for disqualification for discharge due to misconduct without reference to connection with employment. W. VA. CODE ANN. § 2366(78) (1955).

2 PA. STAT. ANN. tit. 43, § 802(e) (Supp. 1958).

3 Souder v. City of Philadelphia, 305 Pa. 1, 196 Atl. 245 (1931).

4 Christal v. Police Comm'r, 32 Cal. App. 564, 92 P.2d 416 (1939).

5 Lerner v. Casey, 357 U.S. 468, 476 (1958).

6 Beilan v. Board of Educ., 357 U.S. 399 (1958); Kaplan v. School Dist. of Philadelphia, 388 Pa. 213, 130 A.2d 672 (1957).

7 32 C.F.R. §§ 67.1-2(c), 1-3(a) (Supp. 1958); see generally, 1 INDUSTRIAL PERSONNEL SECURITY REVIEW PROGRAM REPORT 11 (1956).

8 See 32 C.F.R. § 67.1-3(b) (Supp. 1958); REPORT OF THE SPECIAL COMMITTEE ON THE

Although the question of communist affiliation as misconduct was not faced by the court, the probable result may be inferred from a decision handed down by the instant court on the same day as the *Ault* decision. In *Darin v. Unemployment Compensation Bd.*,[9] the claimant had been discharged without any company hearings for alleged communist affiliation. The claimant refused to tell the unemployment compensation board whether she had communist affiliations and was disqualified for not answering questions relevant to her claim. The question of communist affiliation became relevant to her claim even though the claimant committed no positive acts of misconduct. The relevancy must stem from the implication that party membership is misconduct which should result in discharge. Thus, in order to determine whether the company discharged the claimant for misconduct, it was necessary to determine whether the claimant was a Communist or not.

In equating industries engaged in defense work with public service organizations, it might be supposed that the instant court was partially swayed by the aforementioned regulations as to clearance for employees working for defense plants. The court stated:

> Every patriotic citizen would expect an employer engaged in defense work to ask an employee whether such charges are true, and would expect an employee to discuss such charges frankly and honestly with his employer . . . .
>
> The claimant in this case refused to frankly and fully discuss with his employer the sworn charges of misconduct which had been made publicly against him. This refusal was a *willful disregard of the employer's interests and a disregard of the standards of behavior which the employer has a right to expect.*[10] (Emphasis added.)

Thus petitioner's "lack of candor" as expressed in *Lerner v. Casey*[11] was said to be within the traditional judicial definition of willful misconduct[12] if the claimant's employer were involved in defense contracts.

Ordinarily, if the misconduct fell within the express or implied terms of the employment contract it was held to be in connection with employment.[13] However, since the misconduct in the instant case was a refusal to answer company questions, it was necessary to connect this refusal with the employment to fulfill the statutory disqualification provision. In answer the court said, "Communist Party activity is a matter connected with work of an employee in a manufacturing concern with government orders."[14] Therefore, the court held that there was a duty on the part of such an employer to determine whether his employees were Communist or not. The court would have more rightly said that suspicion of communist activity was connected with such employment and that refusal to dismiss the suspicion was misconduct because it disregarded the employer's interests. However, again this would presuppose the imputation of guilt from refusal to answer; the court very nicely avoided this awkward inference by stressing a clarification of *actual* party membership.

Moreover, the court noted that the claimant's conduct 1) threatened his employer with loss of defense contracts, 2) aroused fellow employees which caused work stoppage, and 3) created unfavorable publicity for the company. These factors were also said to connect the misconduct with the employment. The first point leads to two implications of questionable validity. Since there is no proof of communist affiliation, the refusal to answer must in fact cause a presumption of untrustworthiness which is the foundation

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FEDERAL LOYALTY-SECURITY PROGRAM OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 64-65 (1956).

9 146 A.2d 740 (Pa. 1958).

10 146 A.2d at 734.

11 357 U.S. 468, 476 (1958).

12 See Moyer v. Unemployment Compensation Bd., 177 Pa. Super. 72, 110 A.2d 753, 754 (1955):

> 'Willful misconduct' is not defined in the law but it has been held to comprehend an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer.

13 Sewell v. Sharp, 102 So. 2d 259 (La. 1958); Chalker v. First Fed. Sav. & Loan Ass'n, 71 Ohio L. Abs. 87, 126 N.E.2d 457 (1955).

14 146 A.2d at 735.

for the dismissal of public service employees. Also, the invocation of the constitutional privilege must impute guilt because the government supposedly would not withdraw the contracts unless there were a Communist working for the company with access to classified information. As to the second ground for establishing connection, it is difficult to grasp the notion that the expressed or implied contract of employment creates a duty on the employee to insure industrial tranquility. Work stoppage is a matter that is beyond the control of the individual employee, and to make it a connecting link to his particular employment introduces a somewhat strained theory of causation.

The question of unfavorable publicity as relating to connection with employment was dealt with in *Fino v. Maryland Employment Security Bd.*[15] This court held that invocation of the fifth amendment before a congressional committee might be grounds for discharge if it caused unfavorable publicity to the employer. However, it refused to disqualify the claimant, a waitress in a restaurant, because the misconduct was not connected with the employment, if there were misconduct at all. The Maryland court indicated that the misconduct must be connected with the particular job performed by the individual. If the employee performs satisfactorily, but because of extenuating circumstances causes bad publicity, the Maryland court apparently will affirm the discharge but is not ready to disqualify the individual from unemployment benefits.

The second basis for petitioner's disqualification in the present case was his refusal to answer relevant questions put to him by the unemployment compensation board. The principle followed was that a claimant may not testify to facts which will justify his claim and then refuse to testify to matters which might defeat his claim. Here an inconsistency arises in the decision. Granting the soundness of the principle, it still must be determined what questions were relevant to the claim so as to make them fit questions to be put to the employee. The court refused to imply that the instant claimant was a Communist and that Communist Party membership in itself was grounds for disqualification.[16] They said that the misconduct was the refusal to answer questions asked by the company board. Therefore, it is submitted that as far as the unemployment compensation board was concerned, the membership or lack of membership in the Communist Party was completely irrelevant to the claim. The only relevant point was whether the claimant refused to answer questions put to him by the *company* board. These queries, it may be assumed, he was prepared to answer. If the court is to be consistent with its first premise for disqualification, the questions concerning petitioner's party membership must be irrelevant. Therefore, his refusal to answer those questions could not be the basis of an abandonment of his claim.

In summary, the instant case evidences an extension of the status of private industry engaged in defense contracts to that of a quasi-public organization. The security risk in having a Communist in a defense plant is considered so serious that the charge of communist affilication imposes a duty on the accused to exonerate himself or suffer the consequences of loss of employment and unemployment benefits. It would seem that the suggestion of guilt arising out of the exercise of the fifth amendment by the accused has been made a rule of law in reference to such persons working in defense plants.

Further decisions indicate that the bases upon which the decision rest are exclusive of each other and may stand alone. In *Ostrofsky v. Maryland Employment Security Bd.*,[17] refusal to answer questions of the company board concerning charges of communist affiliation was held to be disqualifying misconduct even though no similar questions were asked by the unemployment compensation board. In *Darin v. Unemployment Compensation Bd.*,[18] the company discharged the claimant solely on the basis of

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15 147 A.2d 738 (Md. 1959).

16 Ohio automatically disqualifiies anyone who "advocates, or is a member of a party which advocates, the overthrow of our government by force . . . ." OHIO REV. CODE ANN. § 4141.29C(4) (Supp. 1958).

17 147 A.2d 741 (Md. 1959).

18 146 A.2d 740 (Pa. 1958).

the claimant's refusal to answer questions concerning communist affiliation put to her by the unemployment compensation board. She was held to have waived her claim.

However, it is submitted that the tenability of the position that a claimant is disqualified for refusal to answer questions asked by the company board destroys the tenability of the position that refusal to answer the questions of the unemployment compensation board is a waiver of his claim. The dubious validity of the instant court's conclusion of willful misconduct, in that it is founded on unwarranted implications from a constitutional privilege and the misconduct's tenuous connection with employment, joined with the inconsistency of the "waiver of claim" argument would suggest that the coming appeal may be rewarded with a reversal.[19]

John R. Martzell

WORKMEN'S COMPENSATION — FEDERAL LONGSHOREMEN'S ACT — INJURED "TWILIGHT-ZONE" EMPLOYEE HAS RIGHT TO BRING NEGLIGENCE ACTION UNDER STATE LAW. — Petitioner, a waterfront employee, was injured while working on a barge in navigable waters. Compensation was available to him under the Federal Longshoremen's and Harbor Worker's Compensation Act.[1] Petitioner's employer had made provision for payment of compensation as required by this act[2] but had elected not to be subject to the Oregon Workmen's Compensation Act. Petitioner brought a negligence action against the employer pursuant to a provision in the Oregon statute permitting the action when an employer had chosen not to participate in the state workmen's compensation plan.[3] The Oregon Supreme Court held that petitioner's sole remedy was under the Longshoremen's Act.[4] On writ of certiorari to the Supreme Court, *held*, reversed. A waterfront employee injured in the "twilight zone" has an election to recover compensation under either the Longshoremen's Act or the applicable state workmen's compensation law. Therefore, petitioner could maintain the negligence action for damages permitted by the Oregon statute. *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959).

Prior to the enactment of the Longshoremen's Act, the Supreme Court in 1917 had held in *Southern Pac. Co. v. Jensen*[5] that a state workmen's compensation statute, if applied to maritime injuries, would unconstitutionally interfere with the proper harmony and uniformity of maritime law envisaged by the exclusive federal jurisdiction granted by the Constitution. In 1927, after two unconstitutional attempts by Congress to allow recovery under state compensation statutes,[6] the Longshoremen's and Harbor Workers' Compensation Act was passed creating federal compensation protection for employees injured while engaged in maritime employment on the navigable waters of the United States "if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by state law."[7]

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19 The instant case has been appealed to the Supreme Court of Pennsylvania. It will be argued the week of May 25, 1959.

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1 44 Stat. 1424 (1927), 33 U.S.C. § 901 (1952).
2 *Id.* § 932.
3 ORE. REV. STAT. §§ 656.022, 656.024 (1957).
4 Hahn v. Ross Island Sand & Gravel Co., 320 P.2d 668 (Ore. 1958).
5 244 U.S. 205 (1917).
6 40 Stat. 395 (1917), giving claimants in admiralty cases the rights and remedies available under state law, was struck down as an unconstitutional delegation in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). 42 Stat. 634 (1922) differed by exempting masters and members of crews, but it met a similar fate in Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924).
7 44 Stat. 1426 (1927), 33 U.S.C. § 903(a) (1952).

Interpreting these words in light of the cases subsequent to the *Jensen* decision, the courts at first held the remedies of the federal act and the state statutes to be mutually exclusive.[8] The problem of drawing the line between state and federal jurisdiction, however, was very troublesome, often depending upon analysis not only of whether an accident occurred on navigable water or on land,[9] but also whether it was a matter of mere local concern or one of special relation to commerce and navigation.[10] The strict logic that only the state or the federal government, but not both, had jurisdiction in a given situation, worked harsh results upon the employee who found, after the statute of limitations had run, that he had initiated his recovery under the wrong scheme of remedies.[11] Presumably, the cautious employee would have to begin actions in both jurisdictions simultaneously.[12]

In 1942 the Supreme Court in *Davis v. Department of Labor*[13] adopted what has subsequently come to be known as the "twilight-zone" rule. The Court declared that the line between activities falling within state or federal jurisdiction was so "undefined and undefinable" that presumptive weight should be given to an assumption of jurisdiction by either state or federal authorities.[14] The meaning of the *Davis* decision became further clarified by two subsequent cases which originated under state statutes. In each case a shipyard worker was injured under circumstances indistinguishable from those which, prior to *Davis,* had been held to be exclusively within federal jurisdiction.[15] In Massachusetts, state compensation was allowed in *Moores' Case,*[16] where *Davis* was read as a revolutionary decision which created a concurrent jurisdictional overlap for both the state and federal courts in all waterfront cases involving aspects pertaining both to land and sea if a reasonable argument could be made either way. The court felt that even though there might be an apparent weight of authority one way or the other, the problem after *Davis* was not to find the single line between state and federal authority, but instead, to fix the boundaries of the new "twilight zone." Meanwhile, in California, state compensation was denied in *Baskin v. Industrial Acc. Comm'n*[17] on the ground that the case was not within the "twilight zone" since the earlier precedents were unequivocal. Both cases reached the Supreme Court where *Moores* was affirmed in a per curiam decision citing *Davis,*[18] and the *Baskin* case was remanded for further consideration in the light of *Moores.*[19] On remand, the California court sent the case back

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8 *E.g.,* Continental Cas. Co. v. Lawson, 64 F.2d 802 (5th Cir. 1933).

9 *Compare* T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928) (man drowned by being knocked from wharf held to have been injured on land), *with* Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) (man knocked from vessel to wharf held to have been injured on water).

10 *Compare* Martinson v. State Indus. Acc. Comm'n, 154 Ore. 423, 60 P.2d 972 (1936) (workman loading barge not covered by state compensation), *with* Mark v. Portland Gravel Co., 130 Ore. 11, 278 Pac. 986 (1929) (engineer injured on dredge in navigable waters is covered by state compensation).

11 Ayers v. Parker, 15 F. Supp. 447 (D. Md. 1936).

12 The Longshoremen's Act provides that the statute of limitations shall not begin to run until the termination of a suit at law or in admiralty, but it makes no such allowance if the suit is brought under state compensation proceedings. 44 Stat. 1432 (1927), 33 U.S.C. § 913(d) (1952).

13 317 U.S. 249 (1942).

14 Davis v. Department of Labor, *supra* note 13, at 255-56. Typical of the cases which caused uncertainty was Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), in which recovery under the federal act was granted to an employee whose handyman duties for a boat sales firm were almost entirely on land, but who was drowned while testing an outboard motor on navigable waters. The Court stressed that the criterion was the character of the activity engaged in at the moment of the injury and not the usual duties of the employee. Professor Larson later suggested that this appeared to scrap the "local" exception to maritime employment, since this casual relationship to navigation and commerce "might seem to approach the vanishing point." 2 LARSON, WORKMEN'S COMPENSATION § 89.23(b) (1952).

15 See John Baizley Iron Works v. Span, 281 U.S. 222 (1930).

16 323 Mass. 162, 80 N.E.2d 478, *aff'd per curiam sub nom.* Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

17 89 Cal. App. 632, 201 P.2d 549 (1949).

18 Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

19 Baskin v. Industrial Acc. Comm'n, 338 U.S. 854 (1949).

to the Commission with directions to take jurisdiction.[20] In cases subsequent to *Moores*, the jurisdiction chosen by the injured employee has been generally upheld when the issue was simply a determination of the applicable compensation act.[21]

Various collateral problems have arisen from this peculiar concurrent jurisdiction principle. One such problem results when an employee has recovered under a state statute and then seeks to recover under the federal act. This has been permitted, but the state award was required to be credited against any federal award obtained.[22] On the other hand, when federal payments were secured first, the employee has been denied the right to bring a subsequent action under the state statute.[23] Also, there is an indication that concurrent jurisdiction will not be extended to other systems. In a case involving a railway brakeman, injured while working on a freight car situated on a car float in navigable water, the Supreme Court, relying on *Jensen*, refused the employee an action under FELA and held that his sole remedy was under the Longshoremen's Act.[24]

In a situation similar to that faced by the instant court, the federal district court for Oregon had previously held that the "twilight-zone" doctrine did not include a choice between an action for damages under state law and a recovery of federal compensation.[25] An injured worker's sole remedy was said to be under the Longshoremen's Act and a common law action could not be maintained. "The Act," the court said, "is automatic except in the limited circumstances provided for in the Act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act."[26]

The Oregon Workmen's Compensation Act provides that an employer who rejects the act is liable in an action by an employee for injuries occasioned by the employer's negligence, default or wrongful act as if the act had not been passed, and the traditional common law defenses of fellow servant, contributory negligence and assumption of risk are removed.[27] Counsel for petitioner urged that the Oregon act should apply in toto, that is, since the employee had an election to bring his action under either the federal or state law when injured in the "twilight zone," the negligence action under state law should be considered as part of the state statutory remedy arising when the employer had elected not to participate in the state fund.[28] The Supreme Court confirmed this reasoning in its summary opinion in the instant case.

The dissent in the instant case, with an evident eye on the seeming injustice to the employer, rebelled at this extention of *Davis*. It recognized the "theoretic illogic" of *Davis* in allowing the employee to recover under either the federal or state statute,[29] but felt that this illogical reasoning, permitted in the interests of assuring the employee simple, prompt protection, should not be extended to allow a negligence action when the employer was not covered under the state compensation statute. In a word, *Davis* should end with the ability of the claimant to obtain a compensation award. However, the dissent neglected to consider the sanction needed to enforce compliance with com-

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20 Baskin v. Industrial Acc. Comm'n, 97 Cal. App. 2d 257, 217 P.2d 733 (1950). For a more complete discussion of the foregoing history see 2 LARSON, *op. cit. supra* note 14, at §§ 89.00-89.25; Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 HARV. L. REV. 637 (1955).

21 2 LARSON, *op. cit. supra* note 14, at § 89.40.

22 Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952); Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 968 (4th Cir. 1951).

23 Dunleavy v. Tietjen & Lang Dry Docks, 17 N.J. Super. 76, 85 A.2d 343 *aff'd per curiam*, 20 N.J. Super 486, 90 A.2d 84 (1951).

24 Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953); Scrinko v. Reading Co., 117 F. Supp. 603 (D.N.J. 1954).

25 Chappell v. C. D. Johnson Lumber Corp., 112 F. Supp. 625 (D. Ore. 1953), *rev'd on other grounds*, 216 F.2d 873 (9th Cir. 1955).

26 112 F. Supp. at 627.

27 ORE. REV. STAT. § 656.024 (1957). Substantially similiar provisions exist under the Federal Longshoremen's Act. 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1952).

28 Hahn v. Ross Island Sand & Gravel Co., 320 P.2d 668 (Ore. 1958). See also Rodes, *supra* note 20.

29 Davis v. Department of Labor, 317 U.S. 249, 259 (1942) (concurring opinion).

pensation statutes. Removal of the traditional common law defenses was intended to be a sanction against employers who did not comply with such statutes.[30] Every compensation statute immunizes complying employers against this type of negligence action. Since the employer in the instant situation was possibly subject to both state and federal jurisdiction, it should have insured under both acts. For a small premium such an employer can obtain a "Longshoremen's Endorsement" on his state compensation insurance. In state-fund jurisdictions, the contributions can be reduced, since provision is made for protection in accordance with the amount of time spent on land and on water.[31] Because the "twilight zone" is a legal reality, employers should protect themselves against the possibilities of liability under state or federal law. Thus, hardship would only occur in the case of either the maritime or the land employer who had no reason to foresee that his employees might be injured in the "twilight zone."

By giving the employee a jurisdictional option in the "twilight zone," the *Davis, Moores,* and *Baskin* decisions solved the employee's jurisdictional dilemma in cases where an honest confusion concerning the applicable compensation plan existed. But at the same time it created the future problem of determining the limit to which the employee would be able to push the boundaries of the "twilight zone" in maneuvering for the highest possible award. For instance, the federal act also makes allowance for a negligence action,[32] as a sanction against the non-complying employer. Consequently, a situation exactly converse to the instant case is possible. The employer may be covered under the state compensation statute but not under the federal plan, and the injured "twilight zone" employee may bring a negligence action under the federal statute. Analytically, it seems there would be no reason why the instant case would not sustain jurisdiction in the hypothetical.[33]

The history of this issue has shown the gradual yielding of the highly artificial distinctions made as a result of the theory of mutual exclusiveness to the broader policy of allowing the employee a choice of remedies when he is injured in the "twilight zone." The remaining problem will be defining the policy limitations on this choice. Although the extension of *Davis* to provide a common law remedy when a compensation award was available may be questionable at first glance, it does seem warranted in light of the broad policy considerations of the compensation acts involved. If the "twilight zone" is permitted to exist, the collateral problems arising from the rule must conform to these policy considerations.

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30 See Sullivan v. Second Judicial Dist. Court, 331 P.2d 602 (Nev. 1958).

31 2 LARSON, *op. cit. supra* note 14, at § 89.60 n.5, citing Puget Sound Bridge & Dredging Co. v. Department of Labor, 185 Wash. 349, 54 P.2d 1003 (1936).

32 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1952).

33 In such a situation, standard provisions for workmen's compensation and employers' liability policies would apparently cover the liability, since such policies normally cover "all sums the insured shall become legally obligated to pay," excluding those sums recoverable under other workmen's compensation laws.