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# Domestic Relations - EVIDENCE-A BLOOD-GROUPING TEST HELD ONLY EVIDENCE OF NON-PATERNITY TO BE PRESENTED WITH OTHER EVIDENCE TO JURY FOR FINAL EVALUATION NOTWITHSTANDING THAT TEST HAD EXCLUDED HUSBAND FROM PATERNITY IN CHILD SUPPORT PROCEEDING / Interstate Commerce-LOCAL POLICE POWER-DANGEROUS EXPLOSIVE TRANSPORTED IN INTERSTATE COMMERCE HELD NOT SUBJECT TO LOCAL SAPETY REGULATIONS WHERE FEDERAL AUHTORITY IMPOSED LESS RESTRICTIVE CLASSIFICATION / Privilege and Immunities - SELF INCRIMNATION-REFUSAL OF EMPLOYEE OF NEW YORK CITY TRANSIT AUTHORITY TO ANSWER QUESTIONS OF NEW YORK CITY COMMISSIONER OF INVESTIGATION AS TO COMMUNIST AFFLTION HELD TO BE SUCH EVIDENCE OR DOUBTFUL TRUST AND RELIABILITY AS TO WARRANT DISCHARGE

# *DECISIONS*

DOMESTIC RELATIONS—EVIDENCE—A BLOOD-GROUPING TEST HELD ONLY EVIDENCE OF NON-PATERNITY TO BE PRESENTED WITH OTHER EVIDENCE TO JURY FOR FINAL EVALUATION NOTWITHSTANDING THAT TEST HAD EXCLUDED HUSBAND FROM PATERNITY IN CHILD SUPPORT PROCEEDING.—The Wisconsin Supreme Court, with three justices dissenting, has held that a blood test excluding the husband as the father of the child will not overcome the presumption of legitimacy.[1]

In an action for divorce brought by Joyce Prochnow against her husband, Robert, she sought support for her child David. The defendant in the action counter-claimed for divorce and contended that David was not his child, leaving open the question of support for the boy.

Mrs. Prochnow had avoided any sexual contact with her husband during any of his furloughs from the Armed Forces. While her husband was away, she was seen acting "unduly affectionate" with another man. Suddenly, she decided to visit her husband in Texas where he was stationed. She stayed with him in a hotel room for one night during which time they had sexual intercourse. Just as suddenly she left and informed him that she was going to file suit for divorce. She thereafter amended her complaint to seek support alleging that she was pregnant by her husband.

It was determined that she could have conceived during the time of this particular sexual act. Mr. Prochnow offered no testimony to contradict his wife's statement that she did not have sexual intercourse with any other man.

He insisted that he was not the father of the child. To support this contention he offered in evidence a blood test of his wife, the child, and himself by which he was excluded as the father of the child.[2]

The Court in reaching its decision proposed two questions concerning the actions of Mrs. Prochnow. Did she go to her husband's bed so that he would believe he was the father of the child; or was she making a last attempt to salvage her already broken marriage?

The Wisconsin Courts at this time were looking favorably upon blood tests as conclusive evidence excluding paternity in an affiliation proceeding.[3] No matter what the trend might be, the Wisconsin Statute[4] provides that a blood test excluding paternity will be admissible in evidence. However, there is no mention that such evidence will be binding or conclusive.

The Court in the instant case followed the statute to the letter. The evidence was not disregarded, but rather weighed with all the other evidence produced. It was then held that the husband was the father of the child and must support him.

In essence, the court ruled that notwithstanding a competent blood test which eliminates him from being the father, a husband who has had timely intercourse with his wife, and cannot prove that his wife has had adulterous relations, will not conclusively be excluded from paternity.

This decision is in direct contrast to the trend of the Wisconsin Courts. Today, for a conclusive decision, evidence must exist that will support that decision on a factual or public policy basis. The facts rather than the blood test will be decisive.

Why will the courts close their eyes to the obvious result of a blood test exclud-

[1] Prochnow v. Prochnow, — Wisc. Sup. Ct. —, 80 N. W. 2d 278 (1957).

[2] Schatkin, Disputed Paternity Proceedings, New York (2d Edition, 1947).

[3] Euclide v. State, 231 Wisc. 616, 286 N. W. 3, 4 (1939).

[4] Wisc. Laws Chap. 531 (1935), as amended by Wisc. Laws, Chap. 524, Sect. 166.105 (1939).

ing paternity and rely on testimonial evidence of witnesses? The only grounds that can be advanced to support such reliance is the great presumption of legitimacy. In support of this holding there are many jurisdictions that will hold that the test is not enough to rebut this presumption.

In a California case,[5] the court was not even faced with the problem of legitimacy and they, nevertheless, held that a blood test excluding paternity was inconclusive when weighed with all the other evidence. The court, when reaching its decision said, "no evidence is by law made conclusive or unanswerable unless so declared by this code".[6] More reliance was placed on the testimony of neighbors and shopkeepers who observed the defendant on the scene than on the blood test made by competent people.

"A man having premarital relations will be deemed the father of the child born of the marriage even though the blood test excluded him."[7] It is submitted that it does not logically follow that the man who has married the woman after she informed him of her pregnant condition is the father of that child, even though the husband has admitted premarital relations with her. It is rather, more probable, that another man is the father where a blood test excludes the husband. However, the court in the *Harding* case held that the presumption of legitimacy was too great to be overcome by evidence of a competent blood test, where the alleged father has admitted numerous sexual acts before the marriage. This decision has been severely criticized.[8] It would be indeed difficult for a court to justify a decision that has deemed the man the father where the blood test has excluded him and where there is a strong question of the man's sterility.

In a New York decision[9] the blood test was held conclusive, but it may well have been the question of access, coupled with the blood test, that decided the case. In another New York case,[10] which very closely parallels the *Prochnow* case, the husband was excluded as the father on the basis of the blood test. The difference between the New York case and the *Prochnow* case was the contradiction pertaining to the wives' adulterous acts. Both wives testified that they did not have sexual intercourse with any other man. This was strongly contradicted in the New York case, while it was not contradicted in the *Prochnow* case.

New York has rendered decisions which might give the impression that it is a jurisdiction which renders the test conclusive evidence. However, with careful scrutiny it will be observed that in addition to the test there is justification, either by law or public policy, to support the decision. The blood test will not stand alone and be held conclusive.

EVIDENCE—WITNESSES—FALSE SWORN TESTIMONY IN PRIOR SUBVERSIVE ACTIVITIES HEARING BY PAID GOVERNMENT INFORMER HELD SUFFICIENT GROUND FOR NEW TRIAL WHERE SAME INFORMANT IS A MATERIAL WITNESS AGAINST SMITH ACT DEFENDANTS IN A SUBSEQUENT TRIAL.—The Supreme Court has held that disclosure by the Government that sworn testimony, by one of its paid informers, in a prior subversive activity hearing, was false when this informant was a material witness against Smith

5 Arais v. Kalensnikoff, 89 Cal. Dec. 537, 74 Pac. 2d 1043 (1939).
6 Arais v. Kalensnikoff, *supra*, 1046.
7 Harding v. Harding, 22 N. Y. S. 2d 810 (1940).
8 Houston v. Houston, 199 Misc. 469, 99 N. Y. S. 2d 199, 472 (1950).
9 Schulze v. Schulze, 35 N. Y. S. 2d 218 (1942).
10 "C" v. "C", 200 Misc. 631, 109 N. Y. S. 2d 276 (1951).

Act defendants is sufficient grounds for granting a new trial.[1] The Government is not entitled to have the case remanded so that the trial judge might determine the truthfulness and credibility of the infromant.

The petitioners were convicted of conspiring to violate the Smith Act.[2] The Court of Appeals affirmed,[3] the United States Supreme Court granted certiorari[4] and the case was scheduled for argument on October 10, 1956.

On September 27, 1956, the Solicitor General of the United States filed a motion calling the attention of the United States Supreme Court to the testimony given in other proceedings by one Mazzei, who was one of the seven witnesses for the United States Government. In his motion, he stated that the Government, on the information in its possession, had serious reason to doubt the truthfulness of Mazzei's testimony in those proceedings. While the Government adhered to the view that Mazzei's testimony was entirely truthful and credible, the motion stated that taking these incidents cumulatively "lead us to suggest that the issue of his truthfulness at the trial of these petitioners should now be determined by the District Court after a hearing."[5] The petitioners filed a counter-motion asking for a new trial.

In its motion the Government set forth three instances in which it asserted its belief that Mazzei's testimony had been untruthful before the Senate Permanent Subcommittee on Investigation and the Senate Subcommittee on International Security. It also set forth two instances in civil proceedings where it claims that Mazzei gave testimony as to his working relationship with the Federal Bureau of Investigation, none of which "is supported or corroborated by information in the possession of the Government."[6]

At the oral argument, however, the Solicitor General stated that although he believed this testimony was untrue, he was not prepared to say that Mazzei was guilty of perjury in giving his testimony. He felt that Mazzei's untrue statements might have been caused by a psychiatric condition which might have arisen subsequent to the trial. Therefore, the Solicitor General moved to have the argument on the main case stricken from the calendar and the case remanded to the District Court for full consideration of the credibility of Mazzei's testimony.

The Supreme Court found this contention to be untenable, stating that "the question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here . . . [since] Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General."[7] It appears, therefore, that there could be no other consideration since the testimony of the discredited witness tainted the conviction.

It is necessary to distinguish between this motion brought by the Government and a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure. The latter motion presents untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense generally will not support a motion for a new trial because new evidence which is merely cumulative or impeaching, is not an adequate basis for the grant of a new trial.[8]

[1] Mesaroash v. United States, 352 U. S. 1, — S. Ct. —, — L. Ed. — (1956).
[2] 54 STAT. 670, 18 U. S. C. § 2835 (1956).
[3] 228 F. 2d 449 (3d Cir. 1955).
[4] 350 U. S. 922, 176 S. Ct. 217, 100 L. Ed. 807 (1955).
[5] See note 1, *supra.*
[6] See note 1, *supra*
[7] See note 1, *supra.*
[8] United States v. Johnson, 327 U. S. 106, 66 S. Ct. 464, 90 L. Ed. 414 (1946);

Since Mazzei's testimony gave color and reality to all of the communist literature read to the jury, to show advocacy of violence by the Communist Party, no court would be able to determine conclusively that his testimony was insignificant in the general case against all of the defendants. Therefore, the Court held that it had tainted the trial as to all of the petitioners.

In this respect, the present case can be distinguished from *Communist Party* v. *Subversive Activities Control Board.*[9] There, the petitioners challenge that a finding of subversive design was in part the product of three perjurious witnesses, was uncontested. The Court there held that the taint is not removed by the reviewing court finding that there is ample innocent testimony to support the Board's findings.[10] The Court remanded the case to the Subversive Activities Control Board for a reconsideration of its original determination in the light of the record, shorn of the tainted testimony. But there the Board, an administrative agency, was the original finder of fact. In the instant case in a criminal trial the original finder of fact was a jury. Therefore, the district judge could not properly determine the question of the sufficiency of the evidence at the trial, absent Mazzei's testimony, to uphold a conviction of any of the defendants. Only a jury can properly determine what result it would reach on a different accumulation of evidence, and the jury could no longer act in this case.

The present case may also be distinguished from *United States* v. *Flynn.*[11] There the defense counsel moved for a new trial on the basis of an affidavit in which a witness recanted his testimony after the trial. The Government charged that the recantation, rather than the testimony which is contradicted, was the lie. Hence, unlike the present case, there was a factual issue to be determined at the outset. In the present case, there is no conflict between the trial testimony and the matter subsequently brought forward by the Government as bearing on credibility. This difference has been recognized by the courts as calling for the application of different tests in passing on a motion for a new trial, even without the added distinction of this case where the Government questions the credibility of the witness.

If, therefore, on a remand, the District Court should rule that the verdict against some of the petitioners should stand, the Supreme Court would be obliged to reverse and order a new trial on a subsequent appeal.[12]

It would appear that from a common sense appraisal of the facts of the case and an application of previous holdings the Supreme Court has exercised its undisputed supervisory function, over proceedings in the federal courts,[13] in the best interests of justice. As the Court pointed out in *Communist Party* v. *Subversive Activities Control Board,* "This Court is charged with supervisory functions in relation to proceedings in the federal courts. Therefore, fastidious regard for the honor of the administra-

United States v. Johnson, 142 F. 2d 588 (7th Cir. 1944); *cert dismissed,* 323 U. S. 806, 77 S. Ct. 5 (1944); United States v. Rudin, 208 F. 2d 647 (3d Cir. 1953); United States v. Frankfeld, 111 F. Supp. 919, 913 (D. Md. 1953), *aff'd sub nom.;* Meyers v. United States, 207 F. 2d 413 (4th Cir. 1953); *But see* United States v. On Lee, 201 F. 2d 722, 725-726 (2d Cir. 1953) (dissenting opinion).

[9] Communist Party v. Subversive Activities Control Board, 351 U. S. 115, 76 S. Ct. 663; 100 L. Ed. 1003 (1955).

[10] 351 U. S. 115, 124, 76 S. Ct. 663, 665, 100 L. Ed. 1003, 1006 (1955).

[11] United States v. Flynn, 130 F. Supp. 412 (S. D. N. Y., 1955), *reargument denied,* 131 F. Supp. 742 (S. D. N. Y., 1955).

[12] See note 1, *supra.* Cf. Remmer v. United States, 347 U. S. 227, 76 S. Ct. 425, 100 L. Ed. 435 (1953), 348 U. S. 904, 76 S. Ct. 425, 100 L. Ed. 435 (1954), 350 U. S. 377, 76 S. Ct. 425, 100 L. Ed. 435 (1955).

[13] McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943).

tion of justice requires the court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."[14]

INTERSTATE COMMERCE—LOCAL POLICE POWER—DANGEROUS EXPLOSIVE TRANSPORTED IN INTERSTATE COMMERCE HELD NOT SUBJECT TO LOCAL SAFETY REGULATIONS WHERE FEDERAL AUTHORITY IMPOSED LESS RESTRICTIVE CLASSIFICATION.—In a recent decision the New York Supreme Court reversed a determination of the Board of Standards and Appeals of the City of New York which had affirmed a ruling by the Fire Commissioner of New York City. The court in arriving at its decision held that since there is federal regulation encompassing the same subject matter as that covered in the commissioner's ruling which subject matter is put in the federal domain by the United States Constitution, and the local ruling is in conflict with such federal regulation, the local law is ineffectual.[1]

Since 1935, Du Pont De Nemours & Co. has produced nitro-carbonitrate, under the trade name "Nitramon", as a replacement for commercial dynamite. This blasting agent is detonated by the explosion of a primer in immediate juxtaposition therewith. While not in itself an explosive unless used in conjunction with the primer, "Nitramon", composed principally of ammonium nitrate, may be detonated by an explosion or intense fire in its immediate area.

On February 2, 1955, the Fire Commissioner of New York City, under the authority vested in him by the City Charter,[2] ruled that "Nitramon" was an explosive within the purview of the Administrative Code,[3] and subject to the restrictions there set forth as to loading of explosives. The applicable section of the code provides that it is unlawful to place explosives on a dock, pier, or other landing place in the city. It further provides that while up to 2,500 pounds may be transferred from one ship to another lying at a city pier designated by the commissioner, and if between 2,500 and 5,000 pounds it may be transferred from vessel to vessel at over 1,000 feet from any pier line, there is an absolute prohibition on loading over 5,000 pounds.[4]

Under this regulation, Du Pont would, in effect, be prohibited from loading in New York City, though the shipments were bound for interstate commerce or a foreign port.

The Board of Standards and Appeals of New York City affirmed the determination of the Fire Commissioner,[5] whereupon Du Pont instituted this certiorari proceeding to review the decision of the Board of Standards and Appeals.[6]

The parties stipulated that all the proposed shipments of "Nitramon" on which the Fire Commissioner had ruled, were shipments in interstate or foreign commerce, thus placing the subject matter under federal domain through the Commerce Clause of the Constitution.[7] It is well settled that where a field of operation is placed under the fed-

[14] Communist Party v. Subversive Activities Control Board, 351 U. S. 115, 124, 76 S. Ct. 663, 665, 100 L. Ed. 1003, 1005 (1955).

[1] Du Pont v. Board of Standards and Appeals, 158 N. Y. S. 2d 456, (Sup. Ct. N. Y. Co. 1956).

[2] Chapter 19, New York City Charter §§ 487, 488.

[3] Chapter 19, New York City Administrative Code, § 2.0.

[4] Chapter 19, New York Administrative Code, § 32.0 (d).

[5] Volume 40, Bulletin of the Board of Standards and Appeals, Number 52, pg. 1917, Calendar number 387-55-A (Dec. 27, 1955).

[6] See note 15, *supra*.

[7] U. S. CONST. art. 1, § 8, cl. 3.

eral domain in the Constitution, a federal regulation supersedes a local law on the same subject which is inconsistent or in conflict in any respect therewith, even though there is involved a matter under the police power of the local government.[8] Thus, the only issues presented for the consideration of the court were whether the local law occupied a field covered or preempted by federal law, and, if so, whether it was in conflict or inconsistent with the federal law.

The respondent urged that the federal regulation in this field did not extend to loading of "Nitramon", and thus the true rule to be applied is that when federal regulation occupies only a limited field, local law in the proper exercise of the police power outside the limited field is not forbidden.[9]

The Supreme Court rejected the contentions of respondent and found that there are federal regulations pertaining to the loading of explosives and "other dangerous articles", and the determination of the Fire Commissioner as to "Nitramon", affirmed by the Board of Standards and Appeals, is in direct conflict therewith.[10]

In 1946, in a statute transferring from the Interstate Commerce Commission to the Commandant of the Coast Guard, the power to regulate explosives and other dangerous articles transported on the navigable waters of the United States, it was provided that in cases of explosives for which a loading permit is to be required by the regulations of the Commandant, such permit will specify that the limits as to maximum quantity, isolation, and remoteness established by local authorities for each port shall not be exceeded.[11]

Pursuant to the power vested in him by the statute, the Commandant of the Coast Guard devised a comprehensive, and detailed system of regulation and supervision over the loading of explosives and "other dangerous articles".[12]

Furthermore, explosives were separated into three classes, *A*, *B*, and *C*, and "other dangerous articles" were divided into seven categories. Ammonium nitrate, the principal component of "Nitramon" was not put into any of the explosive classes, but rather was placed into one of the seven categories of "other dangerous articles".[13] Only class *A* of "explosives" requires a loading permit,[14] and thus only class *A* is subject to local loading regulations as well as federal loading regulations under the statute vesting the power in the Commandant to make regulations.[15]

[8] Southern Pacific Co. v. Arizona, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945); Hill v. Florida, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945); Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842, 81 L. Ed. 1210 (1937); Quaker Oats Co. v. City of N. Y., 295 N. Y. 527, 68 N. E. 593 (1946).

[9] Savage v. Jones, 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182 (1912); Kelly v. Washington, ex rel. Foss, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3 (1937); Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 62 S. Ct. 491, 86 L. Ed. 754 (1942).

[10] See note 1, *supra*.

[11] See 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F. R. 7875, 60 STAT. 1097 as amended 66 STAT. 730, 46 U. S. C. § 170 (1952).

[12] 33 C. F. R. § 6.12-1 (1951).
33 C. F. R. § 6.12-3 (1951).
33 C. F. R. § 6.04-5 (1951).
33 C. F. R. § 126.15 (1951).
33 C. F. R. § 126.27 (b) (1953).
33 C. F. R. § 126.29 (1953).
33 C. F. R. § 126.31 (1953).

[13] 33 C. F. R. §§ 126.09, 126.17 (1953).

[14] 46 C. F. R. § 146.02-1 through 146.02-22 as amended (1947).

[15] See note 11, *supra*.

In 1954, by amendment to the regulations, the blanket provisions applying to ammonium nitrate were further refined, and "Nitramon" was expressly placed in a far safer classification than many of the other products composed principally of ammonium nitrate.[16]

Thus, it is clear from the foregoing that not only has the federal government acted in the area of regulating the loading of "Nitramon", but it has placed "Nitramon" in an entirely different category from that into which the Fire Commissioner has placed it.[17]

Since the parties to the special proceeding had stipulated that the shipments affected by the Commissioner's ruling were shipments in interstate or foreign commerce, placing them under federal domain, and the local rulings were inconsistent with the federal regulation of the same subject matter, the local law must yield to the federal law, and the loading of "Nitramon" must be governed solely by the federal regulations.

PRIVILEGE AND IMMUNITIES—SELF INCRIMINATION—REFUSAL OF EMPLOYEE OF NEW YORK CITY TRANSIT AUTHORITY TO ANSWER QUESTIONS OF NEW YORK CITY COMMISSIONER OF INVESTIGATION AS TO COMMUNIST AFFILIATION HELD TO BE SUCH EVIDENCE OF DOUBTFUL TRUST AND RELIABILITY AS TO WARRANT DISCHARGE.—The New York Court of Appeals, in a four to two decision, has recently held that a subway conductor's refusal to answer the New York City Transit Authority's question as to whether he was then a Communist, on the grounds that it might tend to incriminate him, was such "evidence" of "doubtful trust and reliability" as to constitute grounds for discharge under the Security Risk Law.[1]

Max Lerner, a subway conductor, was called into the office of the New York City Commissioner of Investigation on September 14, 1954, and was asked whether he was then a Communist. Lerner refused to answer, basing his refusal on the Fifth Amendment. After being advised of the provisions of the Security Risk Law and having been given an opportunity to reconsider his refusal, Lerner appeared with counsel and again repeated his refusal. These facts were brought to the attention of the Transit Authority, which thereupon suspended Lerner, explained the reasons, and notified him of his opportunity for reinstatement upon proper explanation. Lerner failed to take advantage of this opportunity and his employment was accordingly terminated on November 24, 1954.

Legislative concern over Communist infiltration in the civil service ranks has been crystallized in the Security Risk Law,[2] adopted in 1951,[3] extended in 1956,[4] and reextended in 1957[5] so that its terminal date is now June 30, 1958. The Law provides for suspension, removal, or transfer of a person from a "security agency" when upon proper investigation and upon all the evidence "reasonable grounds exist for the belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state." The Law further provides that upon notification of the statutory basis of the action and upon

[16] 46 C. F. R. § 146.22-30 as amended (1953).
[17] See note 16, *supra*.

[1] Lerner v. Casey, 2 N. Y. 2d 355, — N. E. 2d — (1957).
[2] N. Y. UNCONSOL. LAWS §§ 1101-08 (1951).
[3] L. 1951, c. 233.
[4] L. 1956, c. 310.
[5] L. 1957, c. 176.

disclosure (so far as is possible without disclosing confidences) of the sources of such information and the reasons for such action, a 30 day period shall be granted to afford an opportunity to submit statements to show reasons why the person should be reinstated or restored to duty.

Lerner brought this action to compel the Transit Authority to reinstate him. The Appellate Division,[6] affirmed a decision of the Supreme Court, Special Term, Kings County,[7] which had granted the Authority's motion for dismissal. The Court of Appeals affirmed that decision.

The Court dispatched several preliminary issues before attacking the crux of the problem. The Court found that the requirements of the Law had been satisfied. The New York City Transit Authority is a "board, body or commission of the state or of any civil division thereof"[8] within the intendment of the Law because, although the City's interest in the transit system is chiefly that of lessor of the physical properties thereof, its status is that of a "public benefit corporation"[9] which vitally affects governmental function. The City Commission of Investigation had authority to conduct the inquiry for two reasons: first, because its power to investigate all matters of concern to the city[10] empowered it to protect proprietary interests of the City so necessary to the existence of the City itself; and secondly, because it was authorized by the Transit Authority, which is permitted to consider and weigh evidence from any source, when the Transit Authority ordered Lerner to appear for questioning. The Transit Authority was properly designated a "security agency" because of its indispensable function as regards private as well as public welfare.

The Court then held that refusal to reply to a question as to present Communist Party membership was such "evidence" of "doubtful trust and reliability" as to constitute grounds for discharge under the Security Risk Law. Stressing the fact that the discharge was due to the *doubt created* by his failure to answer and not to his *failure* to answer, the Court maintained that recourse to the Fifth Amendment should not automatically erase a doubt created as to an employee's untrustworthiness and unreliability.

Holding that the Security Risk Law is constitutional, the Court approved the holding of the Appellate Division, distinguishing the situation from that presented in the recent and important decision of the United States Supreme Court in *Slochower* v. *Board of Higher Education*.[11] This involved a New York statute which provided that whenever a City employee invoked the Fifth Amendment to avoid answering questions relating to his official conduct, his employment should terminate.[12] Slochower, a Brooklyn College professor, did just this while appearing before a congressional committee investigating subversive influences in American education. The majority of the United States Supreme Court, though recognizing that there is no constitutional right

[6] 2 App. Div. 2d 1, 154 N. Y. S. 2d 461 (2d Dep't 1956).

[7] 138 N. Y. S. 2d 777 (1955).

[8] N. Y. UNCONSOL. LAWS § 1105 (1951).

[9] N. Y. PUB. AUTHORITIES LAW § 1801, subd. 1 (1955).

[10] GEN. CITY LAW §§ 30 (21), 23 (1); N. Y. C. CHARTER § 803 (1936).

[11] 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692, rehearing denied 351 U. S. 944, 76 S. Ct. 843, 100 L. Ed. 1470 (1956); *Constitutional Law—Due Process—Summary Dismissal of Teacher for Invoking the Fifth Amendment,* 41 MINN. L. REV. 526 (1956); *Constitutional Law—Due Process—Constitutionality of City Charter Providing for Summary Dismissal of Teacher Invoking Fifth Amendment,* 25 FORDHAM L. REV. 526 (1956).

[12] N. Y. C. CHARTER § 903 (1956).

to government employment, held that continued employment could not be made conditional on failure to invoke the privilege. The United States Supreme Court declared that "the privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.[13] Commenting that "it is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at the "property, affairs, or government of the city, or . . . official conduct of city employees,"[14] the United States Supreme Court criticized the absence of consideration of such factors as "remoteness of the period" to which the questions were addressed, as well as "justification for exercise of the privilege."[15] The New York Court of Appeals noted that the present case concerned Lerner's *present* membership in the Communist Party, that the question was not remote, that no inference as to membership was drawn from Lerner's refusal to reply, that there was an opportunity for explanation, and that the dismissal was for creating the doubt as to his trustworthiness and reliability, and not for avoiding the question.

Fuld, J., in his dissent, though doubting that the Transit Authority is either a "security agency" or even a state agency, and although denying that the job of subway conductor is a "security position," concentrated the brunt of his argument on the constitutional issue. Judge Fuld observed that the question here was not whether the state could impose an absolute duty upon public employees to answer questions relating to their official conduct as a condition of continued employment, but rather whether the exercise of the right to remain mute may serve as the basis for inferring the existence of the facts prescribed by the Statute as a condition of discharge. He charged that this imputation of guilt from the claim of privilege constituted "arbitrary action" and violated due process. The fact that a city investigation was involved here, said the dissent, in no way lessened the "sweeping condemnation" of the Supreme Court. Call it an admission of membership or an engendering of doubt as to reliability, the fact remained, said the dissent, that there was a "sinister" inference and "arbitrary action"; the failure of Lerner to avail himself of the opportunity afforded for reinstatement was irrelevant, since eventually the choice would be the same—to answer or invoke the privilege.

Van Voorhis, J., in his concurring dissent, claimed that Lerner was charged not with insubordination, but rather was discharged because of his status as a bad security risk. He agreed with Judge Fuld that invoking the Fifth Amendment does not establish subversive conduct nor prove the existence of a security risk, and that using the denial as evidence thereof constituted a denial of due process.

The privilege against self-incrimination, though frequently criticized,[16] has generally been regarded as a fundamental civil liberty[17] by both federal and state courts.[18]

[13] See note 11, *supra* at 557, 76 S. Ct. 637, 640, 100 L. Ed. 692, 700 (1956).

[14] See note 11, *supra* at 558, 76 S. Ct. 637, 641, 100 L. Ed. 692, 700 (1956).

[15] *Ibid.*

[16] See Knox, *Self-Incrimination,* 74 U. PA. L. REV. 139 (1925).

[17] See GRISWOLD, THE FIFTH AMENDMENT TODAY (Cambridge 1955); Corwine, *The Supreme Court's Construction of the Self-Incrimination Clause,* 29 MICH. L. REV. 1, 191 (1930); Williams, *Problems of the Fifth Amendment,* 24 FORDHAM L. REV. 19 (1955).

[18] The privilege is in all but 2 state constitutions, Iowa and New Jersey, and in these states it is included in the common law of the states. State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); State v. Williams, 245 Iowa 494, 62 N. W. 2d 742 (1954); State

The privilege of public employment, on the other hand, has long been regarded as such an object of public concern that it entails a waiver of certain constitutional protections, such as actively engaging in certain political activities.[19] How far the conditions accompanying the privilege of public employment may infringe upon the privilege against self-incrimination has been a question of judicial concern.[20] The Supreme Court of the United States has spoken on this topic and, although the states are not bound to honor this privilege at all,[21] the decisions of this high court are persuasive. The case of *Garner* v. *Board of Public Works of Los Angeles*[22] held that states may require public employees to reveal past or present Communist membership as a prerequisite of continued employment. This is in line with the general rule that public employees may be dismissed for not waiving the privilege against self-incrimination. The New York Court of Appeals, in the present decision, relied heavily upon the holding of the *Garner case.* The case of *Wieman* v. *Updegraff*[23] held that a statute which excluded persons from state employment solely on the basis of membership in subversive organizations, whether or not such persons were ignorant of the activities or purposes of such groups, was unconstitutional. Thus the Court set down the rule that constitutional protection does extend to the public servant, whose exclusion pursuant to a statute is patently arbitrary and discriminatory. The *Slochower case*[24] went one step further and held that automatic termination of employment without hearing for asserting the privilege against a federal committee was unconstitutional. The Court itself said that a city's authority to inquire into a public employee's fitness was not the question decided by the Court. In the *Slochower case,* there was no inquiry made before a required proceeding, there was no opportunity for hearing or appeal; invoking the Fifth Amendment was made the basis for a discharge which could be had only for cause after notice, hearing and appeal. The *Lerner case*[25] emerged from this background. Here, the failure to answer whether the employee is a member of the Communist Party was held by the New York Court of Appeals sufficient evidence to warrant his discharge, which, under the Security Risk Law, required only a finding that reasonable grounds existed for doubt concerning his trustworthiness and reliability as a security risk.

v. Zdanowicz, 69 N. J. L. 619, 55 Atl. 743 (1903); State v. Fary, 19 N. J. 431, 117 A. 2d 499 (1955). The N. Y. provision is: N. Y. CONST. art. 1, § 6 (1938).

[19] Christal v. Police Commission of San Francisco, 33 Cal. App. 2d 564, 92 P. 2d 416 (1939) (policemen); Bell v. District Court of Holyoke, 314 Mass. 622, 51 N. E. 2d 328 (1943) (firemen); Canteline v. McClellan, 282 N. Y. 166, 25 N. E. 2d 972 (1940) (policemen).

[20] Note, *Waiver of the Privilege against Self-Incrimination by Public Officers,* 30 COL. L. REV. 1160 (1930); Note, *Denying the Privilege against Self-Incrimination to Public Officers,* 64 HARV. L. REV. 987 (1951); Note, *Mandatory Dismissal of Public Personnel and the Privilege Against Self-Incrimination,* 101 U. PA. L. REV. 1190 (1953).

[21] Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908); Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947).

[22] 341 U. S. 716, 71 S. Ct. 904, 95 L. Ed. 1317 (1951).

[23] 344 U. S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952). See also Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1950).

[24] See note 11, *supra.*

[25] See note 1, *supra.*