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Case Comments

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CASE COMMENTS

CONSTITUTIONAL LAW — JUVENILE PROCEEDINGS — JUVENILES MUST BE PROVEN GUILTY BEYOND A REASONABLE DOUBT WHEN ACCUSED OF CRIMINAL VIOLATIONS. — On March 28, 1967, Mrs. Rae Goldman, a saleswoman at the Normandie Furniture Store in the Bronx, placed her pocketbook in a small, unlocked locker in a room at the rear of the store. Approximately forty-five minutes later a boy ran from the adjoining employees' lavatory, through the store, and into the street. Mrs. Goldman thereafter discovered her pocketbook on the floor of the lavatory with $112.00 missing.[1]

On March 30, 1967, a petition was filed in the New York Family Court against Samuel Winship, a twelve-year-old, charging him with juvenile delinquency[2] for the larceny of Mrs. Goldman's $112.00.[3] At a fact-finding hearing[4] held the same day, a judge determined that Winship had stolen Mrs. Goldman's money.[5] The judge admitted that the evidence presented at the adjudicatory hearing did not establish "guilt beyond a reasonable doubt," but denied a dismissal motion claiming that such proof was not required by the fourteenth amendment.[6] He relied upon § 744(b) of the New York Family Court Act: "Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on a *preponderance* of the evidence."[7] [Emphasis added.] At a subsequent hearing, Winship was placed in the New York State Training School for an initial period of eighteen months, subject to annual extension until his eighteenth birthday.[8]

On appeal, the Appellate Division of the New York Supreme Court, First Department, affirmed the order of the Family Court without opinion.[9] The New York Court of Appeals affirmed the Appellate Division by a four-to-three vote, holding that proof of guilt by a preponderance of the evidence was constitutionally permissible.[10] The Supreme Court of the United States reversed and *held*: the due process clause of the fourteenth amendment requires that proof of guilt beyond a reasonable doubt must be made during the adjudicatory stage of a juvenile proceeding when a youth is charged with an act which would be a crime if committed by an adult. *In re Winship*, 397 U.S. 358 (1970).

At common law, a child under the age of seven was not accountable for criminal acts because he was considered incapable of *mens rea*. A child between the ages of seven and fourteen was also considered incapable of criminal intent,

1 Brief for Appellant at 3-4 and Brief for Appellee at 2, In re Winship, 397 U.S. 358 (1970).

2 The New York Family Court Act states that a juvenile delinquent is a person between the ages of seven and sixteen who commits an act which would be a crime if committed by an adult. N.Y. FAMILY CT. ACT § 712(a) (McKinney 1963).

3 Brief for Appellant at 2, In re Winship, 397 U.S. 358 (1970).

4 A fact-finding hearing is defined as a hearing "to determine whether the respondent did the act or acts alleged in the petition which, if done by an adult, would constitute a crime." N.Y. FAMILY CT. ACT § 742 (McKinney Supp. 1970).

5 Brief for Appellant at 7, In re Winship, 397 U.S. 358 (1970)

6 *Id.*

7 N.Y. FAMILY CT. ACT § 744(b) (McKinney Supp. 1970).

8 Brief for Appellant at 8, In re Winship, 397 U.S. 358 (1970). The eighteen-month period was, in fact, extended for one year and expired October 13, 1969. *Id.*

9 In re W., 30 App. Div.2d 781, 291 N.Y.S.2d 1005 (1968).

10 In re W., 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969)

but if evidence showed that he could judge right from wrong and recognize the consequences of his misconduct, he could be tried and punished as an adult. A youth over the age of fourteen, on the other hand, was considered legally responsible for his acts and was treated the same as an individual who had reached adulthood.[11]

With only slight modifications,[12] this traditional system of juvenile justice prevailed in the United States until the beginning of this century. At that time, however, Illinois passed an act[13] creating a statewide court especially for children — implementing the dream of an independent judicial system that would offer individualized treatment and rehabilitation instead of punishment to the child offender.[14] In 1903, Colorado enacted a juvenile court law, and one year later, ten other states followed suit.[15] By 1917, all but three states had some form of juvenile court legislation;[16] and today there are juvenile courts in every state of the Union, the District of Columbia and Puerto Rico.[17]

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11 For the common law rules as to a child's responsibility for criminal acts see 4 W. BLACKSTONE, COMMENTARIES *22-24.

12 The following are three of the more noteworthy modifications:

(1) In the 1820's, Houses of Refuge were established in New York and Pennsylvania. These institutions separated child offenders from adult offenders and offered corrective treatment rather than punishment.

(2) In 1861, the mayor of Chicago was authorized to appoint a commissioner to hear and decide minor charges against boys aged six through seventeen with the power to place them on probation or in a reformatory.

(3) A law of 1870 required separate hearings of children's cases in Suffolk County, Massachusetts, and authorized a representative of the Commonwealth to investigate cases, attend trials and protect children's interests.

See P. TAPPAN, JUVENILE DELINQUENCY 171-72 (1949); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967) [hereinafter cited as TFR ON DELINQUENCY].

13 Act of April 21, 1899 [1899] Ill. Laws 131 (repealed 1965).

14 There is some disagreement as to the historical origin of the juvenile court. Some say the roots of the juvenile court are found in English chancery court. *E.g.*, Newman, *Legal Aspects of Juvenile Delinquency*, in JUVENILE DELINQUENCY 32-33 (J. Roucek ed. 1958). Another opinion is that the juvenile court owes more to the criminal law than to chancery. *See* R. POUND, INTERPRETATIONS OF LEGAL HISTORY 134-35 (1923). Other writers, while recognizing that chancery has played a role, attribute at least part of the credit for the juvenile court to the common law of crimes. *See* E. GLUECK & S. GLUECK, ONE THOUSAND JUVENILE DELINQUENTS 16 (1934). One author has said "these courts have developed as part and reflection of the growth of contemporary administrative and quasi-judicial tribunals . . . ." P. TAPPAN, JUVENILE DELINQUENCY 169 (1949). The Children's Bureau of the Department of Health, Education and Welfare has preferred to look upon the juvenile court as a special statutory creation rather than as a direct descendant of chancery. U.S. CHILDREN'S BUREAU, DEP'T OF HEALTH, EDUCATION AND WELFARE, PUB. NO. 346, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN 55 (1954).

In spite of the disagreement over the origin of the juvenile court, most authorities agree that the catalysts which brought it into being were the social conditions existing at the turn of the century and the prevailing interest in social science. *E.g.*, N. TEETERS & J. REINEMANN, THE CHALLENGE OF DELINQUENCY 277-80 (1950).

15 Newman, *Legal Aspects of Juvenile Delinquency*, in JUVENILE DELINQUENCY 34 (J. Roucek ed. 1958).

16 Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7. The federal government was much slower than the state governments in enacting laws dealing with procedures for juvenile offenders. In 1932, Congress provided for the transfer of individuals under twenty-one years of age who violated federal laws to state juvenile authorities willing to receive them. Act of June 11, 1932, ch. 243, 47 Stat. 301. In 1938, the Federal Juvenile Delinquency Act was passed. Act of June 16, 1938, ch. 485, 52 Stat. 764. It provided that youths under eighteen years of age, charged with the violation of federal laws (except offenses punishable by life imprisonment or death), must be tried before United States district courts. The procedures used were similar to those prescribed in state juvenile court laws.

17 In re Gault, 387 U.S. 1, 14 (1967); TFR ON DELINQUENCY at 3.

In making the switch from regular courts to special juvenile courts, the youth gave up many of the procedural safeguards of the criminal law. For example, it was held that a juvenile need not be given a public trial;[18] hearsay evidence could be used against him;[19] he could be made a witness against himself;[20] he could be denied bail[21] and the right to be represented by counsel.[22] The only return which the youth obtained for sacrificing these rights was the promise of individualized treatment and rehabilitation.

This exchange of criminal procedural rights for the promise of rehabilitation was most often justified on the grounds of *parens patriae*,[23] a concept derived from the English chancery courts.[24] *Parens patriae* suggested that the state had a fatherly interest in the salvation of wayward children and could act *in loco parentis* to help them.[25] A child was thought to have a right not to liberty but to custody. In theory, a child is subject to a parent or guardian and can be made to obey such a person, but should the custodians fail to carry out their role, the state may intervene. When it does so, the state does not deprive the child of any rights but simply provides the custody to which the child is entitled.[26] These justifications helped to characterize a juvenile proceeding as a "civil case,"[27] a "special statutory civil proceeding,"[28] "sui generis,"[29] a "civil inquiry,"[30] an "adjudication of a status,"[31] or, at most, a "quasi-criminal" action.[32]

Although there was early criticism of juvenile court methods (e.g., the use of hearsay evidence,[33]) and although the criticism became increasingly severe,[34]

The juvenile court is not purely an American institution. Most European countries, beginning with England in 1908, have enacted juvenile court laws. A study conducted by the League of Nations in 1931 showed that at that time juvenile courts or some substitute for them existed in thirty foreign countries. C. VEDDER, JUVENILE OFFENDERS 145 (1963).

18 *E.g.*, State v. Cronin, 220 La. 233, 56 So.2d 242 (1951).

19 *E.g.*, In re Holmes, 379 Pa. 599, 109 A.2d 523, *cert. denied*, 348 U.S. 973 (1954).

20 *E.g.*, In re Mont, 175 Pa. Super. 150, 103 A.2d 460 (1954).

21 *E.g.*, Espinosa v. Price, 144 Tex. 121, 188 S.W.2d 576 (1945).

22 *E.g.*, In re Rich, 125 Vt. 373, 216 A.2d 266 (1966).

23 *E.g.*, Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905).

24 The English chancery court has exercised protective jurisdiction over all the children of the kingdom on behalf of the *pater patriae*, the King, since the days of feudalism. Chancery court traditionally had broad authority over the welfare of children, but its jurisdiction was used almost exclusively on behalf of children whose property rights were in jeopardy on the theory that it lacked the means to provide for impoverished, neglected minors. When the English legal system was brought to the United States, chancery's activities were expanded to include the protection of minors in danger of personal as well as property injury. TFR ON DELINQUENCY at 2.

25 The doctrine of *parens patriae* was never used in connection with children accused of criminal law violations. Chancery court dealt only with neglected and dependent children. In In re Gault, 387 U.S. 1 (1967), Justice Fortas challenged the validity of applying *in loco parentis* to proceedings involving a child accused of committing a crime. *Id.* at 16-17.

26 *E.g.*, Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719, 720 (1962).

27 State v. Thomasson, 154 Tex. 151, 275 S.W.2d 463 (1955).

28 Kahm v. People, 83 Colo. 300, 264 P. 718 (1928).

29 In re Diaz, 211 La. 1015, 31 So.2d 195 (1947).

30 Scire v. Mecum, 19 Conn. Supp. 373, 114 A.2d 385 (1955).

31 United States v. Hoston, 353 F.2d 723 (7th Cir. 1965).

32 Monk v. State, 238 Miss. 658, 116 So.2d 810 (1960). For a thorough listing of cases which support the proposition that juvenile court proceedings are not criminal see Pee v. United States, 274 F.2d 556, 561-62 (D.C. Cir. 1959).

33 Van Waters, *The Socialization of Juvenile Court Procedure*, 1922 J. AM. INST. CRIM. L. & CRIMINOLOGY 61, 65.

34 The following was said about the juvenile court system by Roscoe Pound in 1937: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . ." R. Pound, *Foreword* to P. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY at xxvii (1937).

it was not until the 1950's and early 1960's that the juvenile court came under full-scale attack.[35] The denial of counsel[36] and the absence of protection against self-incrimination[37] were two of the procedures most often questioned by writers and jurists. As a result of postwar criticisms, the courts and legislatures of some states began to give juveniles more rights in juvenile proceedings.[38]

In spite of this growing concern over juvenile courts, the United States Supreme Court for a considerable time adhered to a tradition dating from the inception of the juvenile court—namely, declining to consider any question which directly involved juvenile proceedings. In 1966, however, it parted with tradition and held its first "Children's Hour"[39] in *Kent v. United States.*[40] In *Kent* the Supreme Court interpreted the District of Columbia Juvenile Court Act[41] which allowed the juvenile court to waive jurisdiction over children aged sixteen and seventeen so that they could be tried as adults. The Court held that the act entitled a juvenile to a hearing on the waiver issue, access to any probation office files on him, and a statement of the reasons for the disposition of his case.[42] *Kent* was decided strictly on statutory grounds, but it did give some attention to the constitutional question:

> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial . . . but we do hold that the hearing must measure up to the essentials of due process and fair treatment.[43]

It also hinted that bigger things were in the offing:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections ac-

35 *See* Ketcham, *Legal Renaissance in the Juvenile Court,* 60 NW.U.L. REV. 585, 587 (1965).

36 *E.g.,* McKesson, *Right to Counsel in Juvenile Proceedings,* 45 MINN. L. REV. 843, 850-51 (1961); Paulsen, *Fairness to the Juvenile Offender,* 41 MINN. L. REV. 547, 568-73 (1957).

37 *E.g.,* In re Holmes, 379 Pa. 599, 610, 109 A.2d 523, 528 (1954) (dissenting opinion of Musmanno, J.); Powell, *Constitutional Safeguards in Juvenile Courts,* 35 NOTRE DAME LAWYER 220, 223 (1960).

38 *E.g.,* United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd on other grounds,* 271 F.2d 487 (D.C. Cir. 1959) (privilege against self-incrimination); Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956) (right to counsel); Act of Sept. 15, 1961, ch. 1616, § 679 [1961] Cal. Stat. 3481 (codified as amended at CAL. WELF. & INST'NS CODE § 679 (West Supp. 1970) (right to counsel).

39 Monrad Paulsen was the first to use this phrase in describing the Supreme Court's initial step into the juvenile court area. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 S. CT. REV. 167.

40 383 U.S. 541 (1966).

41 Act of May 15, 1947, ch. 56, 61 Stat. 92 [now D.C. CODE ANN. § 11-1553 (1966)].

42 Kent v. United States, 383 U.S. 541, 557-63 (1966).

43 *Id.* at 562.

corded to adults nor the solicitous care and regenerative treatment postulated for children.[44] (Footnotes omitted.)

One year after *Kent* the Supreme Court set out to remedy matters with *In re Gault*.[45] In *Gault* the Court found some of the informal procedures which characterized juvenile court practice for over sixty years violative of the Constitution. *Gault* first held that the fourteenth amendment's due process clause applies to the adjudicative stage of the juvenile process.[46] The Court went on "to ascertain the precise impact of the due process requirement upon such proceedings,"[47] holding that the juvenile was entitled to four safeguards: first, adequate notice of the charges against the child must be given to the child and his parents or guardians;[48] second, notification must be given to the child and his parents of the child's right to be represented by counsel;[49] third, the child is entitled to the privilege against self-incrimination;[50] fourth, the child must also have the rights of confrontation and cross-examination.[51]

In re Gault is significant not only for what it decided, but also for what it did not decide.[52] *Gault* decided nothing about the pre-adjudicative or intake phase and post-adjudicative or dispositional phase of the juvenile process;[53] only the adjudicative stage was dealt with.[54] In spite of the fact that the Court so limited itself, it left unanswered many questions concerning the adjudicative stage. One of these concerned the appropriate burden of proof.[55]

Prior to the *Gault* decision, it was well settled that a child offender in a juvenile court proceeding was to be proven guilty by a preponderance of the

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44 *Id.* at 555-56.

45 387 U.S. 1 (1967).

46 *Id.* at 13. The Court limited itself solely to the adjudicative stage of the juvenile process in *Gault*:

> We do not even consider the entire process relating to juvenile "delinquents." For example, we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process. . . . We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a "delinquent" as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. *Id.*

47 *Id.* at 13-14.

48 *Id.* at 33-34.

49 *Id.* at 41.

50 *Id.* at 55.

51 *Id.* at 57.

52 Several articles written after *Gault* discussed what was not decided in the case. *See* Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law*, FAM. L.Q. 1 (Dec., 1967); Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700 (1967); Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A.J. 811 (1967).

53 *See* note 46, *supra*.

54 For a short discussion of the three phases of the juvenile process and how they operate see TFR ON DELINQUENCY at 4-7.

55 The Court in *Gault* stated:

> We shall not consider other issues which were passed upon by the Supreme Court of Arizona. We emphasize that we indicate no opinion as to whether the decision of that court with respect to such other issues does or does not conflict with requirements of the Federal Constitution. In re Gault, 387 U.S. 1, 10-11 (1966). (Footnote omitted.)

One issue which the Supreme Court of Arizona decided and which the United States Supreme Court refused to consider was burden of proof. The Arizona Supreme Court ruled in favor of the clear and convincing evidence standard. *Id.* at 11 n.7.

evidence.[56] This rationale was clearly stated by an Ohio court in *State v. Shardell*,[57] wherein a boy of sixteen appealed from the judgment of a juvenile court contending that since he had been charged with a crime which would be a felony if he were an adult, he should have been proven guilty beyond a reasonable doubt instead of by a mere preponderance of the evidence. To this, the court answered:

> With this contention we do not agree. The philosophy of the state . . . is not to consider the child, although in violation of law, a criminal but rather to take him in hand for the purpose of protecting him from evil influences. The state thus becomes the *parens patriae* of the child on the theory that he needs protection, care and training as a substitute for parental authority that has broken down and failed to function. The proceedings instituted in a Juvenile Court, therefore, are not criminal in nature nor are they conducted with the object of convicting the minor of a crime and punishing him therefore. It is an informal hearing through the medium of Juvenile Court to determine whether the child needs the intervention of the state as guardian and protector of his person. . . .
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> * * * *
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> We conceive the procedure to be civil rather than criminal in nature and to carry with it the juridical connotations of a civil action. That being so, a mere preponderance of the evidence, in our opinion, is sufficient to warrant the finding of a minor to be a delinquent even though such determination involves the finding that a criminal statute of the state had been violated by the minor.[58]

There was some departure, however, from the general rule. The reasonable doubt standard was recognized for policy reasons in *Jones v. Commonwealth*.[59] Two boys had been found delinquent by a juvenile court for an offense akin to breach of the peace in spite of the fact that the evidence was inconclusive. In reversing, the highest court of Virginia recognized that proceedings under juvenile court procedures were civil rather than criminal in nature.[60] The court nevertheless felt compelled to demand the criminal standard of proof because of the effects of a finding of delinquency:

> The judgment against a youth that he is delinquent is a serious reflection upon his character and habits. The stain against him is not removed merely because the statute says no judgment in this particular proceeding shall be deemed a conviction for crime or so considered. The stigma of conviction will reflect upon him for life. It hurts his self-respect. It may, at some inopportune, unfortunate moment, rear its ugly head to destroy his opportunity for advancement, and blast his ambition to build up a character and reputation entitling him to the esteem and respect of his fellow man. . . . Guilt should be proven by evidence which leaves no reasonable doubt.[61]

56 Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928); People v. Lewis, 260 N.Y. 171, 183 N.E. 353 (1932), *cert. denied*, 289 U.S. 709 (1933). *See* cases collected in In re Agler, 19 Ohio St.2d 70, 81 n.1, 249 N.E.2d 808, 815 n.1 (1969).

57 107 Ohio App. 338, 153 N.E.2d 510 (1958).

58 *Id.* at 340-41, 153 N.E.2d at 512.

59 185 Va. 335, 38 S.E.2d 444 (1946).

60 *Id.* at 342, 38 S.E.2d at 447.

61 *Id.* at 341-42, 38 S.E.2d at 447.

Courts in New York came to different results over the proper quantum of proof in juvenile proceedings. *People v. Fitzgerald,*[62] decided by the Court of Appeals in 1927, held that a juvenile charged with burglary and larceny could not be found delinquent on a standard of proof different from that on which an adult charged with the same offenses could be convicted.[63] Four years after *Fitzgerald,* the Appellate Division of the Supreme Court decided that an alleged juvenile arsonist must be proven guilty beyond a reasonable doubt.[64] In 1932, *People v. Lewis*[65] evidenced a departure by the New York Court of Appeals from its position in *Fitzgerald.* Nevertheless, a lower New York Court subsequently determined that the criminal standard of proof was required in a juvenile court proceeding where a fifteen-year-old was charged with a crime which would have been murder or manslaughter if committed by an adult.[66]

Before *Gault,* a number of states had statutory enactments specifically stating what standard of proof was to be used in juvenile courts.[67] The standard commonly mentioned was the preponderance standard, the rationale being that of the *Shardell* case.[68] In speaking of these statutory enactments, the authors of an extensive survey on juvenile courts stated: "Some judges nevertheless demand 'clear and convincing' proof. One Denver judge, like the present Los Angeles judges, prefers to require proof beyond a reasonable doubt."[69]

A model statute for juvenile courts appeared in 1925. It was called the Standard Juvenile Court Act and was the joint work of the United States Children's Bureau and the National Probation Association. The last revision of the Act (1959)[70] contained no specific section on evidentiary rules and thus had no provision dealing with burden of proof. The Children's Bureau, however, did draft such a section; in the comment to § 19, the Bureau expressed its preference for the preponderance standard.[71] In 1966, however, the Bureau retreated from this position in a publication in which it recommended the standard of clear and convincing evidence as a compromise between the reasonable doubt and preponderance standards.[72]

After *Gault* and the initial application of constitutional protections to juvenile court proceedings, much thought was devoted to the question of what standard of proof should be utilized in dealing with juveniles.[73] The Illinois

62 244 N.Y. 307, 155 N.E. 584 (1927).
63 *Id.* at 313, 155 N.E. at 587.
64 In re Madik, 233 App. Div. 12, 251 N.Y.S. 765 (1931).
65 260 N.Y. 171, 183 N.E. 353 (1932), *cert. denied,* 289 U.S. 709 (1933).
66 In re Rich, 86 N.Y.S.2d 308 (Dom. Rel. Ct. 1949).
67 *E.g.,* CAL. WELF. & INST'NS CODE § 701 (West 1966) (the preponderance standard).
68 *See* text accompanying notes 57-58, *supra.*
69 Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice,* 79 HARV. L. REV. 775, 795 (1966).
70 Since its initial publication, the Act has been revised five times: 1928, 1933, 1943, 1949, and 1959.
71 The comment states: "Findings of fact by the judge of the validity of the allegations in the petition shall be based upon a preponderance of evidence admissible under the rules applicable to the trial of civil causes . . . ." STANDARD JUVENILE COURT ACT rule 19, Comment (1959).
72 U.S. CHILDREN'S BUREAU, DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 437, STANDARDS FOR JUVENILE AND FAMILY COURTS 72 (1966).
73 *See* Bellfatto, *The Constitution in the Juvenile Court,* 13 N.Y.L.F. 1 (1967); Cohen, *The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt,* 68 MICH. L. REV. 567 (1970); Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law,* FAM. L.Q. 1 (Dec., 1967); Paulsen, *Juvenile Courts and the Legacy of '67,* 43 IND. L.J. 527 (1968);

Supreme Court faced the matter in *In re Urbasek*.[74] Robert Urbasek, an eleven-year-old boy, was charged with murdering another eleven-year-old. According to the Illinois law then in effect, a juvenile who violated a state law was to be declared delinquent.[75] At an adjudicative hearing, the Urbasek boy was accordingly adjudged delinquent. The case was appealed to the Illinois Court of Appeals at a time when *Kent*, but not *Gault*, had been decided. In weighing the arguments against the preponderance standard, the court concluded:

> As we find the hearing measures up "to the essentials of due process and fair treatment," we do not believe that the interests of justice require that the delinquency proceedings should have been governed by the "beyond a reasonable doubt rule."[76]

When the case reached the Illinois Supreme Court, *Gault* had been decided. That court reversed in light of *Gault*:

> We need not be reminded that the *Gault* decision did not pass upon the precise question of the quantum of proof that must be shown to validate a finding of delinquency. We believe, however, that the language of that opinion exhibits a spirit that transcends the specific issues there involved, and that, in view thereof, it would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction. Since the same or even greater curtailment of freedom may attach to a finding of delinquency that results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive the minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults.[77]

The Illinois Supreme Court's decision not only reversed the finding of delinquency but also rendered void an Illinois statute which specified the preponderance standard as proper for delinquency proceedings.[78]

In a Nebraska case[79] involving a youth who had been declared delinquent for the forgery of a check, four of the seven judges of the Nebraska Supreme Court felt that

> a finding of delinquency, for misconduct which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged. [Citing cases.] To the extent that those provisions of the Juvenile Court Act [Citing the Act] incorporating a preponderance of the evidence standard for delinquency proceedings are in conflict, . . . they are unconstitutional and void.[80]

Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966); Note, *Extending Constitutional Rights to Juveniles—Gault in Indiana*, 43 IND. L.J. 661 (1968).

74 38 Ill.2d 535, 232 N.E.2d 716 (1967).
75 Law of July 15, 1965, p. 1567, § 1 [1965] Ill. Laws 1567 (repealed 1965).
76 In re Urbasek, 76 Ill. App.2d 375, 383, 222 N.E.2d 233, 237 (1966).
77 In re Urbasek, 38 Ill.2d 535, 541-42, 232 N.E.2d 716, 719-20 (1967).
78 *Id.* at 542, 232 N.E.2d at 720.
79 DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968).
80 *Id.* at 465, 161 N.W.2d at 513.

Yet in spite of this majority view, the delinquency adjudication of the appellant was affirmed. Unlike the situation in the *Urbasek* case, the Nebraska statute providing for the preponderance standard[81] remained in force since the Nebraska constitution requires that there must be a concurrence of at least five judges before a statute may be held unconstitutional.[82]

On the federal level, the Fourth Circuit decided that the criminal standard of proof was to be applied in juvenile proceedings under the Federal Juvenile Statute[83] in order for them to be constitutional.[84] The court was of the opinion that a federal juvenile proceeding which possibly could lead to institutional confinement was criminal rather than civil. Citing *Speiser v. Randall*,[85] the court stated:

> "Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—[the Government has the burden] of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." A juvenile's liberty demands no less protection.[86]

At least one case decided after *Gault* adopted the intermediary standard of proof of clear and convincing evidence. *In re Agler*[87] reversed the delinquency adjudication of a sixteen-year-old boy who was found by a preponderance of the evidence to have maliciously damaged three tractors. The court interpreted *Gault* as demanding the categorization of the juvenile offender as a special type of offender somewhere between criminal and civil defendants. The court consequently determined:

> The standard of proof which lends itself most logically to this view of such proceedings, and which will best preserve the special nature thereof, is that of clear and convincing evidence of the truth of the allegations contained in the complaint.[88]

Not all courts were influenced by *Gault* in the same way. The California Supreme Court took a very limited view of *Gault* in the case of *In re M.*[89] A fifteen-year-old boy was found guilty of theft and involuntary manslaughter in a juvenile proceeding. On appeal it was argued that the *Gault* decision required the state to prove guilt beyond a reasonable doubt. In affirming the finding of the juvenile court, the California Supreme Court stressed that there was no specific ruling on the burden of proof issue in *Gault*. As a result, the court stated:

> [W]e adhere to the pre-*Gault* view of our courts that the established standard is valid and "No constitutional rights of the appellant have been in-

81 NEB. REV. STAT. § 43-206.03 (1968).
82 NEB. CONST. art. V, § 2.
83 Federal Juvenile Delinquency Act, 18 U.S.C. § 5032 (1964).
84 United States v. Costanzo, 395 F.2d 441 (4th Cir. 1968).
85 357 U.S. 513 (1958).
86 United States v. Costanzo, 395 F.2d 441, 445 (4th Cir. 1968).
87 19 Ohio St.2d 70, 249 N.E.2d 808 (1969).
88 *Id.* at 83, 249 N.E.2d at 816.
89 70 Cal.2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

> fringed by the use of the preponderance of the evidence test to determine the truth of the allegation that he had committed a crime."[90] (Citing *In re Johnson,* 227 Cal. App.2d 37, 40, 38 Cal. Rptr. 405, 406-7 (1964).)

A similar approach was taken by the District of Columbia Court of Appeals in *In re Ellis.*[91] In refusing to reverse the finding of a juvenile court that Ellis was delinquent, the court gave the following answer to the contention that *Gault* required allegations of a criminal nature to be proved beyond a reasonable doubt:

> While we have not failed to follow the ruling of *Gault* in those cases where it clearly applies, *Gault* did not decide the question of the quantum of proof required in juvenile cases. We are therefore not persuaded at this time that we should apply the philosophy of *Gault* in order to predict what the Supreme Court might decide if faced with the same question.[92] (Footnotes omitted.)

The highest courts in two other states also adopted restrictive views of *Gault* in holding that the preponderance standard was correctly applied to juvenile courts. The Oregon Supreme Court did so in *State v. Arenas,*[93] as did the Supreme Court of Texas in *State v. Santana.*[94]

The *Gault* case prompted not only court decisions on the burden of proof issue, but also legislative action. Five states incorporated the reasonable doubt standard into their juvenile court laws or rules.[95] The National Conference of Commissioners on Uniform State Laws also opted in favor of the reasonable doubt standard in § 29(b) of the Uniform Juvenile Court Act of 1968:

> If the court finds on proof beyond a reasonable doubt that the child committed the acts by reason of which he is alleged to be delinquent or unruly it shall proceed immediately or at a postponed hearing to hear evidence as to whether the child is in need of treatment or rehabilitation and to make and file its findings thereon.

The 1969 Legislative Guides for Drafting Family and Juvenile Court Acts prepared by the Children's Bureau favored the reasonable doubt standard.[96] The Model Rules for Juvenile Courts (1969), however, was unwilling to go as far as the Uniform Act and the Children's Bureau. The drafters of the Model Rules adopted the standard chosen by the Ohio Supreme Court in the *Agler* case—the clear and convincing evidence standard.[97]

It was against this background that the Supreme Court faced the issue of which standard of proof was to be used. In *Gault,* the Court had indicated that it would employ a cautionary, selective approach in extending procedural guar-

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90 *Id.* at 453, 450 P.2d 305, 75 Cal. Rptr. at 11.
91 253 A.2d 789 (1969).
92 *Id.* at 790.
93 —— Ore. ——, 453 P.2d 915 (1969).
94 444 S.W.2d 614 (Tex. 1969).
95 *See* COLO. REV. STAT. ANN. § 22-3-6 (Supp. 1969); MD. ANN. CODE art. 26, § 70-18 (Supp. 1969); N.D. CENT. CODE § 27-20-29(2) (Supp. 1969); N.J. JUV. & DOM. REL. CT. R. 6:9-1(f); WASH. JUV. CT. R. 4.4(b).
96 U.S. CHILDREN'S BUREAU, DEP'T OF HEALTH, EDUCATION, AND WELFARE, PUB. NO. 472, LEGISLATIVE GUIDE FOR DRAFTING FAMILY AND JUVENILE COURT ACTS § 32(c) (1969).
97 MODEL RULES FOR JUVENILE COURTS rule 26 (1969).

antees to juvenile court proceedings.[98] This was reaffirmed two years later by the Court's treatment of *In re Whittington*.[99] Thus, it is not surprising to find the issue in *Winship* stated in the following, confined manner:

> This case presents the single, narrow question whether proof beyond a reasonable doubt is among the "essentials of due process and fair treatment" required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.[100] (Footnote omitted.)

The cautionary, selective approach was further emphasized by a footnote[101] in which the following was noted: (1) the Court was dealing only with the adjudicatory stage of the juvenile process,[102] (2) nothing would be decided concerning the constitutionality of the New York Family Act's procedures in regard to children needing supervision,[103] (3) no consideration would be given to the question of whether other safeguards are required during the adjudicatory stage, (4) the Court would not find it necessary to consider the argument that the preponderance standard was a violation of equal protection.[104]

In deciding the narrow issue to which the Court bound itself, it was necessary to confirm what had long been assumed—namely, that proof of a criminal charge beyond a reasonable doubt is constitutionally required.[105] The Court utilized the due process clause and determined:

> "a person accused of crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be

98 Throughout the *Gault* opinion there are indications of a cautionary, selective approach. Most noteworthy is the Court's reiteration of the following words of the *Kent* case:

> "We do not mean . . . to indicate that the hearing to be held must conform with *all* of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." In re Gault, 387 U.S. 1, 30 (1967). (Emphasis added, footnote omitted.)

99 13 Ohio App.2d 11, 233 N.E.2d 333, *cert. granted*, 389 U.S. 819 (1967), *vacated per curiam*, 391 U.S. 341, 344 (1968). The *Whittington* case raised a number of issues which the Supreme Court had not dealt with in *Gault*. One of them was the burden of proof issue. When certiorari was granted by the Court in October of 1967, it was thought that the unresolved questions of *Gault* would be answered. The Court, however, failed to do this. Instead, it remanded the case to the state courts because "the Ohio courts have not had the opportunity to assess the impact of that decision [Gault] on petitioner's claims . . ." In re Whittington, 391 U.S. 341, 344 (1968).

100 In re Winship, 397 U.S. 358, 359 (1970).

101 *Id.* at 359 n.1.

102 This was also the case with the Court's treatment of *Gault*. *See* text accompanying note 54, *supra*.

103 The New York Family Court Act defines a "person in need of supervision" as

> a male less than sixteen years of age and a female less than eighteen years of age who does not attend school in accord with the provisions of . . . the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority. N.Y. FAMILY CT. ACT § 712(b) (McKinney Supp. 1970).

104 This echoed the Court's opinion in *Gault* where the Court refused to rest any of its various holdings on the need to prevent different treatment for children. The Court thus indicates that a state may classify child offenders and adult offenders differently.

105 *See* Speiser v. Randall, 357 U.S. 513, 525-26 1958); Holland v. United States, 348 U.S. 121, 138 (1954); Leland v. Oregon, 343 U.S. 790, 795 (1952); Brinegar v. United States, 338 U.S. 160, 174 (1949); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holt v. United States, 218 U.S. 245, 253 (1910); Davis v. United States, 160 U.S. 469, 488 (1895); Miles v. United States, 103 U.S. 304, 312 (1881).

> adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."[106] (Citing the dissenting opinion in *In re W.*, 24 N.Y.2d 196, 205, 247 N.E.2d 253, 259, 299 N.Y.S.2d 414, 422 (1969).)

It was with this part of the opinion that Justice Black took issue. For years Black has held that the fourteenth amendment made the Bill of Rights applicable in is entirety to the states.[107] He had no difficulty agreeing with the result in *Gault* since the rights given to juveniles in that case were all based upon the first ten amendments.[108] The criminal standard of proof, however, is nowhere mentioned in the Bill of Rights or in the Constitution. For four members of the Court this deficiency posed no problem, but for Justice Black this was insurmountable. He roundly condemned the " 'natural law due process' notion by which this Court frees itself from the limits of a written Constitution . . . ."[109]

In Black's view, the words "due process" are synonymous with "law of the land." Accordingly, the government must proceed in conformity with the "law of the land," i.e., according to written constitutional and statutory provisions as construed by the courts. Although he agreed that there is a strong argument for the reasonable doubt standard in juvenile proceedings, Justice Black never reached the issue which the Court had defined. He concluded with the following:

> [I]t is not for me as a judge to say for that reason that Congress or the States are without constitutional power to establish another standard which the Constitution does not otherwise forbid. . . . [W]hen . . . a State through its duly constituted legislative branch decides to apply a different standard, then that standard, unless it is otherwise unconstitutional, must be applied to insure that persons are treated according to the "law of the land."[110]

In holding that the due process clause constitutionally requires that juveniles, as well as adults, be proven guilty beyond a reasonable doubt when charged with a violation of the criminal law, the Supreme Court struck down four arguments advanced in favor of the preponderance standard. The first two of these arguments were grounded upon traditional views of the juvenile court system.

As was mentioned above, juvenile proceedings commonly are regarded as civil, rather than criminal, in nature.[111] In keeping with this traditional view, New York, as well as at least one other jurisdiction, has enacted a statutory provision designed to prevent the classification of juveniles as criminals.[112] The argument was made in *Winship* that since New York had taken steps to avoid the possibility of a delinquent being classed as a criminal, there was no need to afford the juvenile the safeguard of proof beyond a reasonable doubt. The Court found no merit in this argument, citing the fact that *Gault* had discredited the "civil label-of-convenience"[113] which had been given to juvenile proceedings and

106 In re Winship, 397 U.S. 358, 363 (1970).
107 *See* Adamson v. California, 332 U.S. 46, 71-75 (1947) (dissenting opinion).
108 U.S. CONST. amend. V-VI.
109 In re Winship, 397 U.S. 358, 381 (1970) (dissenting opinion).
110 *Id.* at 385-86.
111 *See* text accompanying notes 27-32, *supra.*
112 *See* N.Y. FAMILY CT. ACT § 781 (McKinney 1963); D.C. CODE ANN. § 16-2308(d) (1966).
113 In re Gault, 387 U.S. 1, 50 (1967).

"expressly rejected that distinction as a reason for holding the Due Process Clause inapplicable to a juvenile proceeding."[114]

The second argument for the preponderance standard was that juvenile proceedings are designed to rehabilitate, not to punish, the offender. It was thus argued that since the result of being adjudged delinquent was beneficial, there was no pressing need for the reasonable doubt standard. This argument was also dismissed with reliance upon *Gault* which "expressly rejected this justification."[115]

In tying together the two arguments that were rooted in traditional views of the juvenile justice system, the Court stated:

> We made clear in that decision [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[116] (Citing *In re Gault*, 387 U.S. 1, 36 (1966).)

The third argument the Court struck down was that use of the criminal standard of proof in juvenile courts "would risk destruction of beneficial aspects of the juvenile process."[117] The Court was of the opinion that adoption of the criminal standard would not alter New York's policy of regarding juvenile proceedings as confidential. Neither would it alter the state's view that there is no criminal conviction if a child is found guilty of a crime by a juvenile court, nor the view that such a finding is not a deprivation of civil rights. The new standard would not affect the policy of reviewing the child's social history during the dispositional phase of juvenile proceedings for purposes of individualized treatment. Lastly, the reasonable doubt standard would have no impact whatever upon the pre-adjudicatory phase of the juvenile process.[118] The Court noted that it was possible that the child bent on a course of delinquent conduct might well go free under the more stringent standard of proof. Viewing realities, however, the Court stated that possible benefits of judicial intervention were outweighed by more compelling interests:

> [T]hat intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.[119] (Footnote omitted.)

The fourth and final argument which the Court dismissed was that there is but a slight difference between the reasonable doubt and preponderance standards. The Court dismissed this contention with short shrift. When Samuel Winship was before the Family Court, the use of the preponderance standard rather than the reasonable doubt standard had made a considerable difference.

114 In re Winship, 397 U.S. 358, 365 (1970).
115 *Id.*
116 *Id.* at 365-66.
117 *Id* at 366.
118 *Id.* at 366-67.
119 *Id.* at 367.

In an exchange between the Family Court Judge and the Winship counsel at the end of the adjudicatory hearing, the conversation proceeded as follows:

> Counsel: Your Honor is making a finding by a preponderance of the evidence.
>
> Court: Well, it convinces me.
>
> Counsel: It's not beyond a reasonable doubt, your Honor.
>
> Court: That is true. . . . Our statute says a preponderance and a preponderance it is. . . . [A]nybody who really wants to know knows that I can more easily make a mistake on preponderance than beyond a reasonable doubt basis and my finding isn't that certain. . . . [The finding] is not [as] certain as a finding of an adult court because the rule is different. Somebody may not take my finding to be a solid basis [sic] as an adult finding because it's not made on the same basis. . . .[120]

In re Winship is the Supreme Court's second step in applying constitutional safeguards to the juvenile court;[121] it is the case in which the Court recognized that the freedom of a youth is no less valuable than the freedom of an adult.

The types of dispositions which a juvenile court may make of a delinquent's case are varied,[122] but the possibility of a juvenile's being institutionalized is greatest when he has committed a criminal act.[123] Although in most states institutional confinement cannot last beyond a youth's twenty-first birthday, the length of time he may be committed to a school or institution is usually indefinite.[124] In addition, the indefinite commitment power of the juvenile court often leads to sanctions more severe than those an adult could receive for the same misconduct.[125] In the context of these factors it is decidedly unfair and constitutionally unsound, as the Supreme Court recognized in *Winship,* to permit a youth to be adjudged delinquent for the commission of a criminal act when the

120 Brief for Appellant at 7, In re Winship, 397 U.S. 358 (1970).

121 In re Gault was the Court's first move in regard to constitutional rights for juveniles.

122 Most juvenile courts have a number of alternatives open to them in disposing of a case. In general: the case may be dismissed; the youth may be warned, fined, or required to make restitution; he may be referred to an agency or treatment facility; the juvenile may be placed on probation; or he may be committed to an institution. TFR ON DELINQUENCY at 5.

123 In a number of states the word "delinquent" is defined very broadly. In those states a child can be declared delinquent not only for the commission of an act which would be a crime if committed by an adult, but also for habitual truancy, habitual disobedience and various other types of conduct that are illegal for children alone. *E.g.,* PA. STAT. ANN. tit. 11, § 243(4)(a-d) (1965); TEX. REV. CIV. STAT. art. 2338-1 § 3(a-g) (Supp. 1969). If a juvenile court finds that a child fits within the broad definition of "delinquent" in one of these states, the child faces the possibility of commitment to an institution. *E.g.,* PA. STAT. ANN. tit. 11, § 250 (1965); TEX. REV. CIV. STAT. art. 2338-1 § 13 (Supp. 1969).

Some states define the term "delinquent" very narrowly. New York's definition is perhaps the narrowest. In New York " 'Juvenile delinquent' means a person over seven and less than sixteen years of age who does any act which, if done by an adult, would constitute a crime." N.Y. FAMILY CT. ACT § 712(a) (McKinney 1963). Activity which would be "delinquent" in states defining the term broadly is said to constitute the child being a "person in need of supervision" in the phraseology of New York's statute. N.Y. FAMILY CT. ACT § 712(b) (McKinney Supp. 1970). In keeping with the distinction between a "delinquent" and a "person in need of supervision," New York provides that only "delinquent" children may be institutionalized. Compare N.Y. FAMILY CT. ACT § 753 (McKinney 1963) with N.Y. FAMILY CT. ACT § 754 (McKinney 1963).

Whether the term "delinquent" is defined broadly or narrowly, one can see that the child who commits an offense which would be a crime if committed by an adult faces the possibility of commitment to an institution.

124 *See* TFR ON DELINQUENCY at 23.

125 *Id.*

quantum of proof used is anything less than beyond a reasonable doubt. The potential loss of liberty resulting from a finding that a child is guilty of a crime demands the use of the reasonable doubt formula no less than does the possible deprivation of freedom resulting from a finding by a criminal court that an adult performed a criminal act.[126]

An argument for the pre-*Winship* standard of proof might be made if institutionalization resulted in the rehabilitation of delinquent youths as the founders of the juvenile court envisioned. However, such is not the case. Institutionalization often produces the opposite of rehabilitation,[127] so much so that "about half of the persons released from juvenile training facilities can be expected to be reincarcerated."[128] This record is understandable when one realizes that "[i]nstitutionalization too often means storage—isolation from the outside world — in an overcrowded, understaffed, high-security institution with little education, little vocational training, little counseling or job placement or other guidance upon release."[129] It is also understandable when one becomes aware of the fact that "[t]here are many states in which the discipline is more humane, more reasonable, in the prison than it is in the state training school."[130]

To some extent, the long-range effects of *In re Winship* may improve the rehabilitation record of juvenile institutions and bring the juvenile court system back in line with its original, laudable purpose. One reason for the failure of juvenile institutions in rehabilitating youths committed to them is overcrowding.[131] The requirement of *Winship* that a juvenile court use the reasonable doubt standard will result in fewer youths being declared delinquent. With a decrease in the number of children sent to state institutions, the available resources in these institutions may be more efficiently utilized. As a result, state institutions may be better able to give juveniles committed to them a type of treatment which will

126 *Winship* raises serious doubts as to the validity of statutes which define "delinquent" broadly and permit institutionalization of children found delinquent for conduct other than that which would be a crime if committed by an adult. *See* note 123 *supra*. It would appear that the existence of habitual truancy or disobedience should be proven to such an extent that the juvenile court is convinced beyond a reasonable doubt just as the court must be so convinced when a youth is accused of committing a criminal offense. If the result of being found habitually truant or disobedient and that of being found guilty of a criminal act is possible confinement in an institution, should not the court be convinced of a child's truancy or disobedience and a child's guilt of a crime to the same degree?

127 Karl Menninger have given a telling description of the effects of three years of institutionalization upon one youth:

> [W]hat he received at the reformatory did not reform him; it did not correct him. It *ruined* him. The bitterness, the distrust, and the hate of older human beings which the "correction" in that institution produced became chronic, and irrational in degree. K. MENNINGER, THE CRIME OF PUNISHMENT 76 (1968).

128 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS app. A, 142 (1967) [hereinafter cited as TFR ON CORRECTIONS].

129 TFR ON DELINQUENCY at 8.

130 MacCormick, *The Essentials of a Training School Program*, 1950 YEARBOOK OF THE NAT'L COUNCIL OF JUVENILE COURT JUDGES 26, 32. Lest it be thought that Mr. MacCormick's words are outdated, it is well to note that a survey conducted by the National Council on Crime and Delinquency in 1966 for the President's Commission on Law Enforcement and Administration of Justice found that "corporal punishment is authorized in juvenile institutions in 10 states." TFR ON CORRECTIONS at 142.

131 *See generally* TFR ON CORRECTIONS at 141-49.

be truly rehabilitative.[132] It is also conceivable that the use of the reasonable doubt standard will result in those committed being more responsive to treatment than they would be if declared delinquent under the former preponderance standard. A child will not feel victimized by a proceeding which cannot deprive him of his liberty on less proof than can be used to deprive an adult of his freedom.[133] Ideally, the youth will cooperate with rather than rebel against the disposition of the court.[134]

In addition to improving the rehabilitation record of juvenile institutions, *Winship* may have beneficial ramifications on the practice of waiving jurisdiction over child offenders from juvenile courts to adult criminal courts.[135] The pre-*Winship* standard of proof placed the juvenile court in an awkward situation as to waiver. A choice had to be made between two alternatives. On the one hand, a criminal trial posed the possibility of a prison sentence, but it also offered a good chance for acquittal since guilt must be proved beyond a reasonable doubt. On the other hand, a juvenile court hearing posed the possibility of treatment in a state institution with other juveniles, but it also presented a good chance for a finding of guilt because the preponderance standard is more easily satisfied than the reasonable doubt standard. By removing the distinction between the burden of proof in a criminal trial and that in a juvenile proceeding, *Winship* has made the choice of waiving or not waiving an easier and fairer one.[136]

Complementing *Winship's* impact on waiver is the decision's impact on the right to protection against self-incrimination. *In re Gault* gave juveniles the right to protection against self-incrimination in juvenile proceedings. Until *Winship,* however, that right was incomplete. Under the standard of preponderance, a

132 Relief from institutional overcrowding through use of the reasonable doubt standard of proof in juvenile proceedings was discussed in an article written just prior to the *Winship* decision. *See* Cohen, *The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt,* 68 MICH. L. REV. 567, 578-79 (1970).

133 The President's Commission on Law Enforcement and Administration of Justice noted the following in discussing the procedural aspects of juvenile court proceedings:

> [T]here has been an increasing feeling on the part of sociologists and social welfare people that the informal procedures, contrary to the original expectations, may themselves constitute a further obstacle to effective treatment of the delinquent. The feeling is based in part upon the often observed sense of injustice engendered in the child by seemingly all-powerful and challengeless exercise of authority by judges . . . based, in the child's eyes on inconsistency, hypocrisy, favoritism and whimsy . . . . [T]here is no reliable evidence as to whether or how accurate these observations are. But the increasing doubts they cast upon the basic suppositions of the original juvenile court philosophy cannot be disregarded. TFR ON DELINQUENCY at 31.

134 Two of the dissenters in *Winship,* Chief Justice Burger and Justice Stewart, intimated that the Court's decision was a step toward ending the juvenile justice system. *In re Winship* 397 U.S. 358, 375-76 (1970) (dissenting opinion). Much of this pessimism disappears when one notes the long-range effects of *Winship.* Rather than spelling the end of the juvenile court, the Court's decision will breathe new life into it and promote the prime purpose for which it was founded — the rehabilitation of wayward youths.

135 A number of states have statutory waiver provisions. These provisions generally vary with respect to the age of the youth and the offense with which he is charged, while some are based on both age and offense. Others allow transfer of a juvenile case to an adult criminal court for any offense, but only if the child is above a certain age. Still others restrict the type of case which may be waived according to the type of offense involved and make no specifications about age. Nearly half of the existing waiver provisions include no limitations whatsoever. TFR ON DELINQUENCY at 24.

For an overall view of waiver in juvenile proceedings see Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited,* 43 IND. L.J. 583 (1968).

136 *See* Cohen, *The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt,* 68 MICH. LAW REV. 567, 580-85 (1970) for a discussion of the improvement which the use of the reasonable doubt standard will make in the area of waivers.

court had to be persuaded only that it was more probable than not that a youth was guilty of a criminal act. In short, a youth could be found delinquent and subject to all the consequences of that finding on evidence not particularly convincing. A youth was virtually forced to sacrifice his right to self-incrimination in order to rebut a weak case. With the advent of the *Winship* decision, a juvenile court now must be convinced beyond any reasonable doubt that a youth was guilty of a crime. No longer will he be induced to sacrifice his right to protection against self-incrimination when the evidence against him is not particularly strong.[137]

In the future one may expect that more of the criminal safeguards guaranteed to an adult will be given to the juvenile during an adjudicatory hearing. The Supreme Court seems mindful, however, that the extension of too many aspects of the criminal trial to a juvenile hearing could spell the end of the juvenile court system. The Court is thus adopting a wait-and-see approach, observing the effects of cases such as *Gault* and *Winship* before acting.

It is well to remember that *Winship* was a four-to-three decision with no real majority opinion.[138] As Justice Harlan mentioned in his concurring opinion, "[n]o one, I daresay, would contend that state juvenile court trials are subject to *no* federal constitutional limitations. Differences have existed, however, among the members of this Court as to *what* constitutional protections do apply."[139] *Winship* illustrates this in a striking manner. Fortunately, four members of the Supreme Court agreed that a youth charged with crime in a juvenile proceeding is entitled to be proven guilty by the same standard as an adult.

David B. Levendusky

CONSTITUTIONAL LAW — NATURALIZATION MAY BE GRANTED TO AN ALIEN WHO CLAIMS CONSCIENTIOUS OBJECTION TO BEARING ARMS BY REASON OF A PERSONAL MORAL CODE.—Brenda Barbara Aronowitz, a native of South Africa, married Ronald Weitzman, an American citizen, in Tel Aviv, Israel in 1962. The following year the Weitzmans came to the United States and in 1966 Mrs. Weitzman, being "attached to the principles of the Constitution of the United States and well disposed to the general order and happiness of

137 *See id.* at 576-77 for a discussion of the improvement the use of the reasonable doubt standard will make as to self-incrimination.

138 At the time *Winship* was decided there were only seven Justices on the Supreme Court. Justice Brennan delivered the opinion of the Court; Justice Harlan wrote a concurring opinion; Chief Justice Burger wrote a dissenting opinion joined by Justice Stewart; and Justice Black wrote a separate, dissenting opinion.

139 In re Winship, 397 U.S. 358, 368 (1970) (concurring opinion). Justice Harlan agrees with the opinion of Justice Brennan in regard to using the due process clause as a vehicle for imposing constitutional restraints on the procedures a government implements in dealing with its citizens. Nevertheless, he was compelled to write a separate opinion to indicate he had not retreated from his position in *Gault*. In *Gault*, Harlan concurred in part and dissented in part. He disagreed with the Court's opinion as to the method by which the procedural requirements of due process should be measured. He stated:

> The Court should . . . measure the requirements of due process by reference both to the problems which confront the State and to the actual character of the procedural system which the State has created. The Court has for such purposes chiefly examined three connected sources: first, the "settled usages and modes of proceeding," *Murray's Lessee v. Hoboken Land Improvement Co.*, 18 How. 272, 277; second, the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert v. Louisiana*, 272 U.S. 312, 316; and third,

the United States," applied for naturalized citizenship. Although she had signed the Oath of Allegiance, Mrs. Weitzman stated that she could not abide by the provisions to bear arms or to perform other noncombatant service in the armed forces when required by law because of her pacifist beliefs which she stated were based on a personal moral code. The United States District Court for the District of Minnesota denied the petition for naturalization[1] and Mrs. Weitzman appealed to the United States Court of Appeals for the Eighth Circuit on the grounds that § 337(a) of the Immigration and Nationality Act of June 27, 1952 was unconstitutional.[2]

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the character and requirements of the circumstances presented in each situation. In re Gault, 387 U.S. 1, 68 (1967).

Justice Harlan then set forth three guides by which to measure the procedural requirements of due process in regard to juvenile proceedings:

> first, no more restrictions should be imposed than are imperative to assure the proceedings' fundamental fairness; second, the restrictions which are imposed should be those which preserve, so far as possible, the essential elements of the State's purpose; and finally, restrictions should be chosen which will later permit the orderly selection of any additional protections which may ultimately prove necessary. In this way, the Court may guarantee the fundamental fairness of the proceeding, and yet permit the State to continue development of an effective response to the problems of juvenile crime. In re Gault, 387 U.S. 1, 72 (1967).

When he applied these three criteria to the facts of *Gault,* Harlan came to the conclusion that these procedural requirements should be required of state juvenile courts by the Fourteenth Amendment: first, adequate notice; second, the right to counsel in cases where the child may be confined; and third, a written record for purposes of adequate review. Contrary to the majority in *Gault,* he did not feel it was necessary at the time *Gault* was decided to require the privilege against self-incrimination and the right to confrontation and cross-examination.

In *Winship,* Justice Harlan agreed with the majority that the reasonable doubt standard in criminal cases was an expression of fundamental fairness and it apparently passed muster under the three criteria he set out in *Gault* for applying the procedural requirements of due process in regard to juvenile proceedings.

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1 In re Weitzman, 284 F. Supp. 514 (D. Minn. 1968).

2 8 U.S.C. § 1448(a) (1964). This section provides: (a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law. Any such person shall be required to take an oath containing the substance of clauses (1) to (5) of the preceding sentence, except that a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of clauses (1) to (4) and clauses (5) (B) and (5) (C) of this subsection, and a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to any type of service in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of said clauses (1) to (4) and clause (5) (C). The term "religious training and belief" as used in this section shall mean an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. . . .

In the district court Mrs. Weitzman pleaded in the alternative that her pacifism was based on her "religious training and belief," thus complying with the parallelism test approved in United States v. Seeger, 380 U.S. 163 (1965), which dealt with conscientious objection to military service as regulated by the Universal Military Training and Service Act. On appeal she rejected this argument and petitioned for review solely on the constitutionality of the statute.

In a per curiam opinion a divided court of appeals reversed the decision of the district court and *held*: naturalization may be granted to an alien who claims conscientious objection to bearing arms by reason of a personal moral code. *In re Weitzman, 426* F.2d *439* (8th Cir. 1970).

Since each member of the three-judge panel filed a separate opinion, the underlying rationale of the divided court in its ruling is unclear. Judge Blackmun,[3] convinced that the petitioner had raised a valid constitutional question voted to affirm the trial court's denial of naturalization. Judge Heaney, while agreeing with Judge Blackmun that a legitimate constitutional issue was conceivably before the court, reached an opposite conclusion as to the merits of the appeal and advocated reversal on the grounds that the Supreme Court's ruling in *United States v. Seeger*[4] controlled the present appeal. Judge Lay, refusing to recognize that a constitutional issue had been validly presented, nevertheless concurred with Judge Heaney's opinion and held that Mrs. Weitzman in spite of her denial, was a conscientious objector within the *Seeger* doctrine.

Section 337(a) of the Immigration and Nationality Act of June 27, 1952[5] requires *inter alia* that a person seeking to qualify for naturalization must take an oath "to bear arms," unless "by reason of religious training and belief" he is conscientiously opposed to the bearing of arms, or conscientiously opposed to any type of service in the armed forces. "Religious training and belief" is defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code. . . ."

Under this definition, since Mrs. Weitzman based her conscientious objection on a "personal moral code," the district court held that according to the language of the statute she had not satisfied the requirements for naturalization.[6] In her petition to the court of appeals, Mrs. Weitzman contended *inter alia* that § 337(a) of the Immigration and Nationality Act as presently constructed, was unconstitutional on the grounds that it: (1) violated the Establishment Clause of the first amendment, (2) violated the Free Exercise Clause of the first amendment, and (3) denied to her the Due Process and Equal Protection guarantees of the fifth amendment.[7]

Certain general principles have evolved upon which the laws regulating the naturalization of aliens have been framed. The first of these basic principles is that the power to confer citizenship through naturalization is vested in the Congress — the only restriction being that this power be exercised in a uniform fashion. This authority stems from article I, § 8 of the United States Constitution which provides, "The Congress shall have power . . . to establish a uniform Rule of Naturalization . . .,"[8] and the judiciary has subsequently in-

3 Judge Blackmun has since been appointed by President Richard M. Nixon, with the unanimous approval of the Senate, to be an associate justice of the United States Supreme Court.

4 380 U.S. 163 (1965). See discussion in text at note 30, *infra*.

5 8 U.S.C. § 1448(a) (1964).

6 284 F. Supp. at 518.

7 426 F.2d at 448.

8 U.S. CONST. art. I, § 8, cl. 4.

terpreted this responsibility to be exclusive.[9] The second guiding principle provides that no person has an inherent right to naturalization. Rather, it is a privilege to be conferred, qualified or withheld as the Congress may determine.[10] A third fundamental rule places the burden upon the petitioner to show that he possesses the required qualifications for naturalization.[11]

Congress first exercised its authority to establish national rules and procedures governing naturalization by the Act of March 26, 1790.[12] This legislative enactment required every petitioning alien to subscribe to an oath stating that he would support the Constitution of the United States. The Act of January 29, 1795[13] expanded the requirements for naturalization to include a provision that the applicant be "attached to the principles of the Constitution . . . and well disposed to the good order and happiness of the same." Later, in the Act of June 29, 1906,[14] the Congress supplemented the existing requirements by compelling the applicant to take an oath in open court ". . . that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." Since 1923 the application for naturalization has included the question, "If necessary, are you willing to take up arms in defense of this country?"[15] with citizenship qualified on an affirmative answer. Since naturalization was considered to be a privilege which Congress had an exclusive power to confer, there were no exceptions to the oath for conscientious objectors.

The question, whether conscientious objection constituted a valid exemption to the requirement of agreeing to bear arms in defense of the country was soon raised in *United States v. Schwimmer*.[16] Mrs. Schwimmer, a forty-nine-year-old, petitioned for American citizenship while professing an uncompromising pacifism. Since she refused to bear arms in defense of the country, the United States district court denied her petition for naturalization. After granting *certiorari*, the Supreme Court concluded that Mrs. Schwimmer was not "attached to the principles of the Constitution" because she refused to take the oath of allegiance without reservation. Referring to the privileges conferred by citizenship, the majority observed that in order to prevent the naturalization of undesirables or others who fail to meet the required standards, the burden is placed upon the petitioning alien to affirmatively show that he possesses the necessary qualifications.[17]

Following *Schwimmer* came *United States v. Macintosh*.[18] In that case, a Canadian citizen and World War I chaplain applied for naturalization but refused to take the oath of allegiance with the provision "to bear arms in de-

9 Chirac v. Chirac, 15 U.S. (2 Wheat.) 124, 128 (1817); In re Fabbri, 254 F. Supp. 858, 861 (E.D. Mich. 1966).
10 In re Thanner, 253 F. Supp. 283, 285-86 (D. Colo. 1966); In re Dobric, 189 F. Supp. 638, 640 (D. Minn. 1960).
11 In re Sittler. 197 F. Supp. 278, 286-87 (S.D.N.Y. 1961), *aff'd* Sittler v. United States, 316 F.2d 312 (2d Cir. 1963), *cert. denied*, 376 U.S. 932 (1964).
12 Act of March 26, 1790, Ch. 3, § 1, 1 Stat. 103.
13 Act of Jan. 29, 1795, Ch. 20, § 1, 1 Stat. 414.
14 Act of June 29, 1906, Ch. 3592, § 4, 34 Stat. 598.
15 426 F.2d at 446.
16 279 U.S. 644 (1929).
17 *Id.* at 649.
18 283 U.S. 605 (1931).

fense of this country" unless he believed the war to be morally justified. The Court denied the petition and held that according to the principles laid down in *Schwimmer* the applicant did not meet the requirements for naturalization.[19] Mr. Justice Sutherland, delivering the opinion of the Court, concluded:

> It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship.[20]

Decided on the same day as *Macintosh* was *United States v. Bland*,[21] in which the applicant had refused to take the oath of allegiance to defend the country against all enemies, etc., without the insertion of the words, "as far as my conscience as a Christian will allow." The Court noted that the substance of the oath had been specifically prescribed by Congress and, following the rationale of earlier decisions, denied the petition. In summary then, by 1931 the law clearly held that an alien who refused to bear arms was not eligible for naturalization.

In 1946, possibly in relation to the conclusion of World War II, the Supreme Court abruptly overruled *Schwimmer, Macintosh* and *Bland* by deciding *Girouard v. United States*.[22] Girouard was a Seventh-Day Adventist who refused to take the oath of allegiance on purely religious grounds. In the majority opinion Mr. Justice Douglas noted that Congress has made certain exceptions for conscientious objectors from the selective service law, and observed, "One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle."[23] The Court asserted that an alien who is willing to subscribe to the oath of allegiance and perform noncombatant duties in the armed forces could still qualify for naturalized citizenship even though he refused to bear arms in defense of the country because of his religious convictions.[24]

Following the Supreme Court's ruling in *Girouard*, the United States Senate undertook a detailed study of the existing immigration and naturalization laws.[25]

19 *Id.* at 626.
20 *Id.*
21 283 U.S. 636 (1931).
22 328 U.S. 61 (1946).
23 *Id.* at 64.
24 *Id.* at 70.
25 A special Senate subcommittee headed by Senator McCarran of Nevada presented a voluminous report urging extensive revision of existing immigration and naturalization legislation. On the question of whether a compulsory promise to bear arms in defense of the country should be required of an applicant for naturalization, the subcommittee concluded:

> The subcommittee has given careful and serious consideration to all of the arguments for and against requiring a petitioner for naturalization to promise to bear arms in defense of this country. The subcommittee realizes that religious freedom and freedom of conscience is basic in our political and social life. The subcommittee is not prepared to affirm that, in every case, an alien petitioner for naturalization who has conscientious and religious scruples against bearing arms, even in defense of his country, would not, in all other respects, make a good American citizen and contribute his full share to the American way of life. Nevertheless, the subcommittee recommends that the oath of allegiance be amended to require specifically that the alien shall promise to bear arms if the defense of the United States shall so require, unless the alien is conscientiously opposed to participation in war in any form, by reason of his religious training and belief. In such cases, in lieu of a promise to bear

The Act of September 22, 1950[26] amended the oath of allegiance contained in the Nationality Act of 1940 by providing that an alien petitioning for naturalization shall take an oath "to bear arms on behalf of the United States when required by law, or to perform noncombatant service in the Armed Forces of the United States when required by law," unless "he can show to the satisfaction of the naturalization court that he is opposed to the bearing of arms or the performance of noncombatant service . . . by reasons of religious training and belief."[27] Congress subsequently defined "religious training and belief"[28] and expanded the oath by providing that those conscientiously opposed to bearing arms or to performing noncombatant service in the armed forces could perform civilian work of national importance.

In interpreting the conscientious objector language of the oath of allegiance, the courts in naturalization proceedings have traditionally referred to the judiciary's interpretation of a nearly identical conscientious objector provision contained in the Universal Military Training and Service Act.[29] Thus it was natural that the court of appeals in deciding *Weitzman* took notice of the Supreme Court's determination in *United States v. Seeger*[30] and subsequent proceedings under the selective service laws.[31]

In *Seeger* the defendant had been criminally prosecuted for willfully refusing induction into the armed forces. On appeal to the Supreme Court, Seeger claimed that he was entitled to conscientious objector status by reason of his moral beliefs. Although he did not profess a belief in a "Supreme Being" he did claim a "religious faith in a purely ethical creed" and an objection to war from a "practical and moral standpoint."[32] In giving a broad interpretation to the language of the statute, the Court held that the test for religious belief is not whether the individual professes a belief in an orthodox God, but whether he possesses a "sincere and meaningful belief which occupies in the life of its

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arms, the alien shall take an oath to defend the United States by noncombatant service. When any alien shall assert his opposition to participation in war of any form because of his personal religious training and belief, his opposition and his religious training and belief shall be made to appear to the court by clear and convincing evidence. S. REP. No. 1515, 81st Cong., 2d Sess., 745, 746 (1950).

26 Act of Sept. 23, 1950, Ch. 1024, § 2, 64 Stat. 987.

27 *Id.* § 29 at 1017.

28 8 U.S.C. § 1448(a) (1964) defines "religious training and belief" to be "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

29 Prior to 1967 the definition of "religious training and belief" contained in § 337(a) of the Immigration and Nationality Act of June 27, 1952, 8 U.S.C. § 1448(a) (1964) was identical to the language of § 6(J) of the Universal Military Training and Service Act, 50 U.S.C. § 456(J) (1964). In the Military Selective Service Act of 1967 the reference to "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation," was dropped from the definition. The statute presently provides: "the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code." 50 U.S.C. App. § 456(J) (Supp. IV 1969).

30 380 U.S. 163 (1965).

31 United States v. Levy, 419 F.2d 360 (8th Cir. 1969); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); Bates v. Commander, First Coast Guard District, 413 F.2d 475 (1st Cir. 1969); United States *ex rel.* Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969); Fleming v. United States, 344 F.2d 912 (10th Cir. 1965); United States v. Shacter, 293 F. Supp. 1057 (D. Md. 1968); United States v. St. Clair, 293 F. Supp. 337 (E.D. N.Y. 1968).

32 United States v. Seeger, 326 F.2d 846, 848 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965).

possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[33]

Seeger almost eliminated entirely the "personal moral code" exception by confining it to those situations in which it "is the sole basis for the registrant's beliefs."[34] This interpretation of the term "Supreme Being" has been followed and expanded by subsequent decisions. In *United States v. Levy*,[35] for example, a registrant was prosecuted for failing to report and submit to induction. He appealed his conviction on the grounds of religious conscientious objection, but listed several literary works as the basis for his beliefs thereby implying them to be at least in part the product of logic and not of faith. The Eighth Circuit Court of Appeals ruled that Levy still qualified for exemption since his beliefs were also the product of prior religious training, and not solely derived from a "personal moral code."[36]

Several other courts have also considered the criterion for exemption set forth in the statute and have broadened it to include traditionally non-religious objectors. In *In re Nomland*[37] the court allowed an admitted atheist to qualify for conscientious objection by reason of her prior "religious training and belief," and thus granted her petition for naturalization. The district court found that the petitioner had received religious training as a child in the Lutheran Church, that she had been associated with the Quaker religion, and that she was well read in philosophy and psychology. Although she did not believe in a God, she did not deny an ordered universe. The court ruled that Mrs. Nomland came within the *Seeger* holding, emphasizing that her personal belief occupied a position in her life otherwise occupied by recognized religious beliefs. In granting citizenship, the court noted that Mrs. Nomland's main difficulty was in expressing her convictions in traditional religious terms.[38]

The most recent treatment of the non-religious objector was in *United States v. Sisson*,[39] which dealt with criminal prosecution of a selective service registrant whose refusal to be inducted was not based on traditional religious concepts but on conscientious opposition to the character of American military operations in Vietnam. The court concluded that the granting of conscientious objector status to religious objectors but not to those non-religious objectors of Sisson's class violated the Free Exercise and Establishment clauses of the first amendment:

> In short, in the draft act Congress unconstitutionally discriminates against atheists, agnostics, and men, like Sisson, who, whether they be religious or not, are motivated in their objection to the draft by profound moral beliefs which constitute the central convictions of their beings.[40]

The above cases have all relied on *Seeger* as the basis for giving a broad

33 380 U.S. at 176.
34 *Id.* at 186.
35 419 F.2d 360 (8th Cir. 1969).
36 *Id.* at 366-68.
37 Petition No. 264215 (C.D. Cal., filed Jan. 30, 1968).
38 *Id.* at 2-3.
39 297 F. Supp. 902 (D. Mass.), *cert. granted*, 396 U.S. 812 (1969).
40 297 F. Supp. at 911.

construction to the meaning of "religious" within the terms of the statute. The trend prior to *Weitzman* appeared to be whether the beliefs possessed by the petitioner or registrant are the product of previous exposure to traditional religious training. *In re Nomland* suggests that an atheistic, non-religious objector may nevertheless have beliefs that are "religious" for the purpose of qualifying for statutory exemption. Thus, an individual's classification of his own beliefs as being non-religious as that term is traditionally defined, does not mean that they will be judicially labeled as non-religious within the meaning of the statute.[41] One authority has interpreted the test enunciated in *Seeger* to be whether the beliefs held by the objector are "similar to those held by acknowledged religious men about the fundamental questions of life."[42] This would suggest that even if a petitioner for naturalization or a selective service registrant based his beliefs on a "personal moral code," when those beliefs were similar to those of an acknowledged religious person then they conceivably would be treated by the courts as "religious" within the meaning of the statute.

Prior to *Weitzman* the district court in *Sisson* had undertaken the only recent consideration of the merits of the constitutional issue[43] and found the conscientious objector provision of the selective service statute to be unconstitutionally violative of the first amendment of the Constitution. It is, however, conceivable that Sisson's conscientious beliefs could have been reconciled with the language of the statutory exemption as interpreted by *Seeger* and subsequent decisions.[44] In this sense it might be argued that the district court in *Sisson* took a premature step in deciding the constitutional question.

In *Weitzman*, after considering the question of constitutional infirmity advanced by Mrs. Weitzman, Judge Blackmun urged the court of appeals to reject the petitioner's contention, arguing that the present construction of the phrase "religious training and belief" was not an attempt on the part of Congress to inhibit the free exercise of religious or personal beliefs, but was specifically enacted as a legislative recognition and accommodation of religious freedom.[45] Citing the historical language of the earlier *Macintosh* and *Girouard* decisions, Blackmun characterized § 337(a) of the Immigration and Nationality Act as "another example of what Mr. Chief Justice Hughes referred to as 'our happy tradition' of avoiding conflicts between belief and governmental necessity."[46]

41 A case in point is the Supreme Court's recent determination in Welsh v. United States, 398 U.S. 333 (1970), in which the Court observed: " . . . very few registrants are fully aware of the broad scope of the word 'religious' as used in § 6(J), and accordingly a registrant's statement that his beliefs are non religious is a highly unreliable guide for those charged with administering the exemption." *Id.* at 341.

42 Note, *Religious and Conscientious Objection,* 21 STAN. L. REV. 1734, 1746 (1969). The author notes that several sources have attempted to elaborate on the parallelism test developed by the Supreme Court in *Seeger.* One authority holds that "a metaphysical belief ('cosmic warrant') supplies the link between one's views and 'religion' necessary to qualify" for exemption, while another feels the test requires "a psychological commitment to and a system of moral practices resulting from the belief." A third source suggests that "the sincerity or strength of the petitioner's belief be compared to that of those who hold a belief in God," and a fourth test holds that "beliefs asserted concerning certain fundamental questions and a 'concept of ultimate dependence . . . or subordination are in fact the basis of the *Seeger* Rule.' " *Id.* at 1745-46.

43 297 F. Supp. 902, 911-12.

44 *See* cases cited in note 31 *supra. See also* Welsh v. United States, 398 U.S. 333 (1970).

45 426 F.2d at 449.

46 *Id.* at 450.

Blackmun reinforced his argument by citing past instances where the judiciary had seemingly adopted a position of neutrality rather than one of preference to certain forms of religious belief. He noted that previous judicial determinations have attempted to accommodate all forms of religious beliefs, while denying similar accommodation to personally held philosophical or sociological beliefs.[47] Blackmun cautiously observed that should the congressional policy of recognizing religious conscientious objection be held as unconstitutionally favoring religious beliefs over non-religious beliefs, this might result in the termination of the exemption to all objectors, rather than extending it to the non-religious objector.

Blackmun rejected the application of *Seeger* to Mrs. Weitzman's situation since she had voluntarily abandoned her claim for "religious" exemption and had appealed solely on the constitutionality of the naturalization statute.[48] He distinguished *United States v. Sisson* on the grounds that it was a criminal prosecution under a different statute than the one challenged by Mrs. Weitzman, and noted that Sisson's objection was only directed to military service in Vietnam rather than the broad pacifism held by Mrs. Weitzman.[49]

Although noting that citizenship may not be unconstitutionally denied,[50] Blackmun viewed naturalization as a highly valued privilege carrying with it certain benefits.[51] He therefore implied that the test for exemption to the oath to bear arms should be narrowly construed and concluded that the petitioner did not meet the requirements for naturalization.

In contrast to Judge Blackmun's findings, Judge Lay noted a relation between Mrs. Weitzman's personal convictions and the Supreme Court's interpretation of "religious training and belief" as enunciated in *Seeger*. Referring to the district court's record he cited the petitioner's failure to classify her moral beliefs as "religious" (1) for want of a definition of the term "religious" and (2) because she was not a member of any organized religious sect.[52] Observing the honesty and sincerity with which she expressed her personal convictions, Judge Lay characterized them as showing the shallowness of prior judicial interpretations of "religious" beliefs. He effectively avoided treatment of the constitutional issue emphasizing, "A person who holds a sincere religious belief should be judged under the law by the substance of that belief and not as to what she or he may call it."[53] From her answers at the naturalization hearing, Judge Lay concluded that the beliefs of the petitioner fell within the parallelism test adopted in *Seeger* in spite of her own classification of them as based on merely a personal moral code. He noted that the Court's opinion in *Seeger* placed the substance of her beliefs free from judicial inquiry.[54]

47 *Id.* at 452.
48 *Id.* at 448.
49 *Id.* at 454.
50 *See* Speiser v. Randall, 357 U.S. 513 (1958).
51 426 F.2d at 450.
52 *Id.* at 455.
53 *Id.*
54 *Id.* Judge Lay observed:

> The following language of the Unites States v. Seeger . . . is controlling here:
> "The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. *But these are inquiries foreclosed to Government.* As Mr. Justice Douglas stated in United States v.

Judge Heaney agreed with Lay's conclusion that to recognize Mrs. Weitzman's beliefs as "religious" would not be an illegitimate extension of *Seeger*. Addressing himself to Blackmun's treatment of the constitutional issue (i.e., whether it is unconstitutional to exempt a religious conscientious objector but not a non-religious conscientious objector), Heaney felt that Congress had never specifically acted to exclude non-religious believers from the statutory exemption.[55] Judge Heaney's opinion is ultimately tied to the fundamental principle that *Seeger* and subsequent cases have all but given statutory recognition to non-religious conscientious objection,[56] and he urged that "conscience" be recognized as within the meaning of the statutory exemption.

Judge Blackmun chose to reject Mrs. Weitzman's constitutional argument by adopting the rationale that Congress and the federal judiciary have traditionally maintained a position of accommodating religious beliefs where those beliefs conflict with governmental service. But while he adopts a neutral position when orthodox religious beliefs are involved, he does not seem willing to extend the same accommodation to personal moral convictions when they are not of a traditionally religious nature. Judge Lay's approach is more closely characteristic of the current trend in the courts[57] which strains to interpret the beliefs held by the non-religious conscientious objector as "religious," thus reconciling those beliefs with the language of the statutory exemption.[58] Judge Heaney took perhaps the most forward approach by arguing for formal statutory recognition of those persons "who sincerely object in conscience to bearing arms."[59]

In light of the district court's decision in *Sisson*, it is questionable how much longer the judiciary can legitimately expand the *Seeger* doctrine to similar factual situations as those faced in *Weitzman*. By granting exemption on "religious" grounds to the admitted non-religious objector it can be argued that the courts have adopted a far broader interpretation of the statutory language than originally anticipated by Congress in enacting the legislation. At the same time, this approach has allowed the courts to avoid a direct confrontation of the constitutional issue.

Ballard, 322 U.S. 78, 86 . . . (1944): 'Men believe what they cannot prove. They may not be put to the *proof of their religious doctrines or beliefs.*'" 380 U.S. at 184-85.

55 426 F.2d at 462.

56 *Id.* at 460-61. Judge Heaney cited as indicative of such recent decisions: United States v. Levy, 419 F.2d 360 (8th Cir. 1969); United States v. Haughton, 413 F.2d 736 (9th Cir. 1969); Bates v. Commander, First Coast Guard District, 413 F.2d 475 (1st Cir. 1969); United States *ex rel.* Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969); Fleming v. United States, 344 F.2d 912 (10th Cir. 1965); United States v. Shacter, 293 F. Supp. 1057 (D. Md. 1968); United States v. St. Clair, 293 F. Supp. 337 (E.D. N.Y. 1968).

57 Subsequent to the Eighth Circuit's determination in *Weitzman* the Supreme Court handed down its decision in Welsh v. United States, 398 U.S. 333 (1970). In *Welsh* the petitioner had been convicted of refusing to submit to induction in violation of the Draft Act. One of his defenses to the prosecution was that under § 6(J) of the Universal Military Training and Service Act he could qualify for conscientious objector exemption by reason of his "religious training and belief." Without passing on the constitutional argument the Supreme Court reversed the conviction because of what it considered to be "its fundamental inconsistency with United States v. Seeger," and extended judicial recognition to personal religious, ethical and moral beliefs when they are held "with the strength of more traditional religious convictions." *Id.* at 342-44.

58 426 F.2d at 455-59. The only exception to this trend is the decision of the district court in *Sisson*, 297 F. Supp. 902 (D. Mass.), *cert. granted*, 396 U.S. 812 (1969).

59 426 F.2d at 460.

Congress should amend the language contained in the present oath of allegiance to exempt all persons conscientiously opposed to service within the armed forces; there should be only an inquiry to determine the sincerity of these beliefs. Under such a statute, the applicant would carry the burden of proving to the full satisfaction of the district court, by clear and convincing evidence, the sincerity of the beliefs he professes to practice. Such an approach might be criticized due to the difficulty of proving the validity and sincerity with which those beliefs are held in the conscience of the claimant. It is likewise conceivable that such an extension of conscientious objector exemption to personal moral codes would result in the courts being swamped with insincere fraudulent claims, incapable of detection, by those shirking military service. As noted by the district court in *Sisson*,[60] however, this contention underestimates the function which the judicial process is faced with every day. The courts are consistently required to determine the state of a man's mind, whether he possesses the sufficient criminal intent to rule a homicide murder, whether the plaintiff was in actual apprehension of a harmful contact such as would constitute a tort, etc. And this proposed task is no more difficult than trying to judicially determine whether the beliefs claimed to be held by a naturalization petitioner or selective service registrant are actually based on religious concepts.

Although the Supreme Court has agreed to review the district court's decision in *Sisson* this term, it is likely that the Court will continue to take the approach it has utilized in the past, i.e., expanding the *Seeger* doctrine to include the beliefs professed by the claimant. Regardless of the action taken by the Supreme Court, however, it is time that Congress recognizes that there are non-religious individuals who possess a sincere, conscientious objection to military service; and it is time that Congress takes steps to grant those individuals statutory exemption.

The Eighth Circuit Court's consideration of the problems posed by *Weitzman* characterizes the difficulty which the federal judiciary is faced with in determining conscientious objector status in those situations where the beliefs of the claimant are not based on orthodox religious principles. Although the Court's decision left a great deal of uncertainty remaining in the area, its broad treatment and thorough analysis may have laid the foundation upon which future courts will reconcile conscientious objector exemption with non-religious personal moral codes.

Michael J. Duff

CONSTITUTIONAL LAW — STATE ACTION AND THE FOURTEENTH AMENDMENT — PROPERTY REVERTS TO HEIRS BY OPERATION OF GEORGIA LAW WHEN TRUST PROVIDING PUBLIC PARK FOR WHITES ONLY FAILS.—In 1911 United States Senator Augustus Octavius Bacon executed a will devising a tract of land, known as Baconsfield, to the Mayor and Council of Macon, Georgia, to be held in trust for the use and enjoyment of white people as a

60 297 F. Supp. at 909-10.

park and pleasure ground.[1] The trust was to vest in the city after the death of the last survivor among the Senator's wife and daughters, but by virtue of an agreement between the city and the heirs, Macon acquired possession of the park in 1920.[2] The park was operated on a segregated basis as required by the will until eventually the trustees, feeling it was not constitutionally permissible to exclude blacks,[3] allowed the park to be integrated.

As a result, on May 4, 1963, members of the park's Board of Managers petitioned a state court to remove the current trustees from their position and to replace them with private citizens who could enforce the restriction.[4] A number of Negro citizens of the city intervened, claiming that the racial restriction violated the laws and public policy of the United States. Heirs of Senator Bacon were also represented in the suit and requested the court to declare a reversion should it refuse to uphold the restriction.

Before the court reached a decision, the city resigned as trustee. The resignation was accepted and private citizens were appointed by the Georgia court to fill the vacated positions. The court ruled that this action rendered it unnecessary to pass on other claims. On appeal the state supreme court affirmed, holding that Bacon had an absolute right to bequeath property to a limited class and that the court had a duty to appoint trustees when vacancies occurred to prevent

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1 The relevant passages of Senator Bacon's will read as follows:

> [I]t is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions of every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for; the said property under no circumstances, or by any authority whatsoever, to be sold or alienated or disposed of, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized. For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall be first selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors . . . . The Board of Managers shall have the power to admit to the use of the property white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion . . . .
>
> . . . I take occasion to say that in limiting the use and enjoyment of the property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.
>
> I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common . . . .

Brief for Respondents at 4-7, Evans v. Abney, 396 U.S. 435 (1970).

2 Brief for Petitioners at 11, Evans v. Abney, 396 U.S. 435 (1970).

3 City Park Improvement Ass'n v. Detiege, 358 U.S. 54, *aff'g mem.* 252 F.2d 122 (5th Cir. 1958); Mayor and City Council v. Dawson, 350 U.S. 877, *aff'g mem.* 220 F.2d 386 (4th Cir. 1955), *rev'g* 123 F. Supp. 193 (D. Md. 1954); Holmes v. Atlanta, 350 U.S. 879, *vacating* 223 F.2d 93, (5th Cir. 1955), *aff'g* 124 F. Supp. 290 (N.D. Ga. 1954).

4 Newton v. Macon, 9 RACE REL. L. REP. 309 (Bibb County, Ga. Super. Ct. 1964).

the trust from failing.[5] The United States Supreme Court, however, granted certiorari and reversed the judgment.[6] The court stated:

> the momentum it [the park] acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of "private" trustees . . . . A public institution [is] subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.[7]

Immediately after this decision, the Supreme Court of Georgia delivered a second opinion setting forth the view that because the purpose for which the Baconsfield trust was created had become impossible to accomplish, the trust had terminated. The court vacated its previous judgment, substituted the United States Supreme Court's opinion for its own, and remanded the case to the lower court to pass on contentions of the parties not previously decided.[8] The lower court granted the successor trustees' and heirs' motion for summary judgment, holding that the property had reverted to them since the essential purpose of the trust was illegal. This ruling was upheld by the state supreme court.[9] The United States Supreme Court affirmed the decision and *held*: in declaring a reversion of the trust, no equal protection rights were violated because the result was attributable solely to the wishes expressed by Senator Bacon in his will. *Evans v. Abney*, 396 U.S. 435 (1970).

The constitutional question of whether or not a reversion violated petitioners' equal protection right under the fourteenth amendment could have been avoided had the Georgia courts decided to strike the restrictive clause in the will by applying the equitable doctrine of *cy pres*.[10] Although there is substantial authority for such an application,[11] the court rejected the suggestion on the grounds that

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5 Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).
6 Evans v. Newton, 382 U.S. 296 (1966).
7 *Id.* at 301-2.
8 Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966).
9 Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).
10 If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

The Georgia *cy pres* statutes provide:

> When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will nearly as possible effectuate his intention. GA. CODE ANN. § 108-202 (1959).

> A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator. GA. CODE ANN. § 113-815 (1959).

11 Bank of Delaware v. Buckson, 255 A.2d 710 (Del. Ch. 1969) (racial restriction struck from scholarship trust); Howard Savin's Inst. v. Peep, 4 N.J. 494, 170 A.2d 39 (1961) (Protestant-Gentile restriction eliminated from scholarship trust given to Amherst College); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969) (racial restriction struck from trust establishing convalescent home); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966) (racial restriction eliminated from trust establishing the university); In Re Dominion Students' Hall Trust, [1947] 1 Ch. 183 (1946) (racial restriction removed from charitable company's charter). *See generally* Clark, *Charitable Trusts, The Fourteenth*

Senator Bacon had no general charitable intent, which is required if *cy pres* is to be applied.[12] The court considered, on the contrary, that Senator Bacon made it quite clear that the sole purpose of the park was to benefit only white people.[13]

In *Evans v. Newton*[14] the Supreme Court ruled that Baconsfield, as a public park, could not function on a segregated basis. Senator Bacon's will, however, directed that Baconsfield was to be operated only on a segregated basis. The Georgia courts, confronted with this irreconcilable conflict, decided that well-settled state law required that the property revert to the heirs of Bacon.[15] There remained the question of whether the United States Constitution would permit such a result.

The *Civil Rights Cases* of 1883 established the proposition that the Equal Protection Clause of the fourteenth amendment is not violated by private discrimination.[16] Rather, "it is state action of a particular character that is prohibited."[17] The petitioners argued that, since state action permeated the construction of the will, the acceptance of the trust and the operation of the park, permitting a reversion would infringe upon equal protection rights.[18] Respondents, on the other hand, took the position that the "state action" had been completely eliminated when the Supreme Court decided *Evans v. Newton*. At that instant, the respondents contended, the park reverted to Bacon's heirs and no longer remained within the public sphere.

It must first be recognized that the term "state action" is meaningless by itself. If the proper test to be applied were that every racially discriminatory act which includes some state action or state involvement is violative of the Equal Protection Clause, one would be hard-pressed to find an act that did not constitute a violation. All private property exists under authority of the state. A call to police to remove an unwanted trespasser involves state enforcement. Indeed, for any discriminatory act to include state action becomes merely a matter of procedure. Consequently, when the courts speak of "state action" they are

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Amendment and the Will of Stephen Girard, 66 YALE L.J. 979, 994-1001 (1957); Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts,* 56 GEO. L.J. 272, 292-300 (1967). *Contra,* La Fond v. Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959) (refused to apply *cy pres* to remove racial restriction from trust devising property to be used as a playground for white children).

12 *See* 4 SCOTT, THE LAW OF TRUSTS § 399 (3d ed. 1967).

13 Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).

14 382 U.S. 296 (1966).

15 GA. CODE ANN. § 108-106(4) (1959) provides:

> Where a trust is expressly created, but no uses are declared, or are ineffectually declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.

16 109 U.S. 3 (1883).

17 *Id.* at 11.

18 Apparently it was not suggested that Senator Bacon's will fell within the prohibition of 42 U.S.C. § 1982 (1964) which directs:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to *inherit,* purchase, lease, sell, hold, and convey real and personal property. (Emphasis added.)

Jones v. Mayer Co., 392 U.S. 409 (1968) held that the above statute was a valid exercise of the power of Congress to enforce the thirteenth amendment through recognizing and expunging the badges and incidents of slavery. The Court in Jones determined that when property is placed on the market for whites only, the black man has been denied the same right white citizens enjoy. Thus, just as the Negro who has been racially discriminated against will be able to force the owner to sell or lease to him, so too it is arguable that Negroes must be included in a trust given to the public.

necessarily speaking of some act on the part of the state which either influences or encourages or in some manner promotes racial discrimination. The Supreme Court has made it explicit that "only by sifting facts and weighing circumstances" in each particular case can the significance of the state action be determined.[19]

Justice Black, writing for the Court in *Evans v. Abney,* stated that the will of Senator Bacon and Georgia law provided sufficient "justification" for the reversion. Assuming *arguendo* that a city could not close a park to avoid a desegregation order, Black noted that such a principle was not applicable to the instant case since Senator Bacon, rather than the city, had injected the racially discriminatory motivation.[20] The suggestion that *Shelley v. Kraemer*[21] prevented the Court from declaring a reversion was rejected on the grounds that the state court in *Shelley* had "affirmatively enforced a private scheme of discrimination," whereas the effect of the Georgia decision was to eliminate all discrimination by eliminating the park itself—a loss shared equally by all citizens of Macon.[22]

Justice Black's justification of the reversion necessarily assumes that no "state action" existed which would prevent that consequence. The Court's argument, simply stated, is that, since Bacon had a right to place a racially restrictive clause in the trust, and since this restriction could not be met, application of the neutral reversion law is unavoidable. It is irrelevant, in Justice Black's opinion, that the restriction could not be satisfied because of a constitutional command.

This argument, however, is not necessarily accurate. It may be true under Georgia law that if a trust fails, a neutral reversion law must be applied. If application of this law conflicts with the United States Constitution, however, it cannot be permitted to stand. For example, the "sit-in" cases[23] presented situations in which the private proprietors of restaurants seemingly had a right to segregate the races at lunch counters. When blacks violated this policy and refused to leave as requested, application of the neutral criminal trespass law would seem to have been unavoidable, but the Supreme Court reversed five state decisions which applied it. The reason for the reversal in four of the cases was that the respective cities involved had ordinances which required the segregation.[24] The Court in *Peterson v. Greenville,*[25] a case illustrative of the decisions, stated:

> When the State has commanded a particular result it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice. It has thus effectively determined that a person owning, managing or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons.[26]

19 Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).
20 Evans v. Abney, 396 U.S. 435, 445 (1970).
21 334 U.S. 1 (1948).
22 Evans v. Abney, 396 U.S. 435, 445 (1970).
23 Peterson v. Greenville, 373 U.S. 244 (1963); Shuttlesworth v. Birmingham, 373 U.S. 262 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Gober v. Birmingham, 373 U.S. 374 (1963); Avent v. North Carolina, 373 U.S. 375 (1963).
24 Peterson v. Greenville, 373 U.S. 244, 246-47 (1963); Shuttlesworth v. Birmingham, 373 U.S. 262 (1963); Gober v. Birmingham, 373 U.S. 374 (1963); Avent v. North Carolina, 373 U.S. 375 (1963).
25 373 U.S. 244 (1963).
26 *Id.* at 248.

It is important to note that the Court in *Peterson* rejected the argument that the managers would have discriminated regardless of whether or not there was an ordinance. The Court held,

> [T]hese convictions cannot stand, even assuming . . . that the manager would have acted as he did independently of the existence of the ordinance. . . . [T]he convictions had the effect . . . of enforcing the ordinance. . . . [S]uch a palpable violation . . . cannot be saved by attempting to separate the mental urges of the discriminators.[27]

In *Lombard v. Louisiana,*[28] the fifth "sit-in" case, there was no ordinance or statute commanding segregation. Within a week before the arrests were made, however, the Mayor and Superintendent of Police had issued public statements condemning past demonstrations. The Supreme Court reversed convictions of "criminal mischief" on the grounds that these statements by public officials had a "coercive effect" upon restaurant owners to continue the policy of segregated service.[29] Again, the reversal in *Lombard* was not conditioned upon a finding that the managers acted in reliance on a state order.

The line of "state involvement" cases was expanded in *Robinson v. Florida,*[30] decided the year after the "sit-in" cases. *Robinson* presented the familiar fact pattern: a restaurant manager refused to serve blacks and asked them to leave; the blacks declined to leave until served, and their persistence resulted in arrest and conviction for trespass. Although neither the state nor the city had a law directing racially segregated service, the Florida Board of Health did have a regulation which required that separate toilet and lavatory rooms be provided for each race in those establishments which accommodated blacks.[31] The Court was of the opinion that regulations of this type "certainly embody a state policy" burdening those restaurants which serve both races.[32] Relying solely on *Peterson* and *Lombard, t*he Court concluded:

> the State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be held to reflect that state policy and therefore to violate the Fourteenth Amendment.[33]

In 1964 the citizens of California adopted by referendum an amendment to their state constitution which pro tanto repealed prior fair housing laws.[34] The amendment (identified as Proposition 14) provided that the state could not deny any person the right to sell or to refuse to sell his real property to such person as the seller might in his discretion choose.[35] Despite the fact that the

27 *Id.*
28 373 U.S. 267 (1963).
29 *Id.* at 273.
30 378 U.S. 153 (1964).
31 Florida State Sanitary Code, c. VII, § 6.
32 378 U.S. 153, 156 (1964).
33 *Id.* at 156-57.
34 Reitman v. Mulkey, 387 U.S. 369 (1967).
35 CAL. CONST. art. 1, § 26 (1964). A portion of the section provides:
> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

amendment was permissive and on its face appeared to be neutral, the Supreme Court affirmed the California Supreme Court's decision that the proposition was invalid on the ground that it violated the Equal Protection Clause of the fourteenth amendment.[36] The California court had interpreted prior Supreme Court cases as establishing that "even when the state can be charged with only encouraging discriminatory conduct, the color of state action nevertheless attaches.[37] Based upon this interpretation, the amendment was held to constitute legislative action which encouraged private discrimination, making the state a partner in the discrimination.[38] The Supreme Court felt this decision was justified since the impact of the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State."[39]

It is at least arguable that before 1905, a racially restrictive trust for park purposes would have been invalid under Georgia law.[40] In that year, however, Georgia enacted a statute which specifically provided that racial restrictions may be included in such a gift.[41] The statute itself has several possible interpretations. It is conceivable, for example, that even though the word "may" is used, the statute could be construed to mean that the testator may select any one of the conditions listed, but may not make a bequest without any condition.[42] The statute could also be construed as it was by Justice White in his concurring opinion in *Evans v. Newton*:[43] though the statute permits exclusion of a segment of the public on racial grounds, it is silent as to the legality of discrimination based upon any other factor; therefore, under the maxim *expressio unius est exclusio alterius,* all nonracial restrictions are invalid.[44]

Even if neither of the above interpretations of the statute are correct, it remains quite obvious that the Georgia legislature gave its express approval to racial restrictions. Among all types of conceivable discriminatory restrictions, Georgia singled out the racial restriction and stamped upon it an unqualified state endorsement.[45] Just as the public statements issued in *Lombard* could be

36 Mulkey v. Reitman, 64 Cal.2d 529, 413 P.2d 825 (1966).
37 413 P.2d at 832.
38 *Id.* at 834.
39 387 U.S. at 381.
40 Evans v. Newton, 382 U.S. 296, 305-12 (1966) (concurring opinion).
41 GA. CODE ANN. § 69-504 (1967) provides:

> Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property. (Acts, 1905, p. 117.)

42 *Cf.* Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967) which involved a Virginia statute under which charitable bequests for educational purposes were valid only if given to one race.
43 382 U.S. at 302-12.
44 *Id.* at 310-11.
45 *See* Hunter v. Erickson, 393 U.S. 385 (1969) where the court held unconstitutional an amendment to the charter of the city of Akron, Ohio. The proposed law drew a distinction in

said to have a "coercive effect" upon private citizens, so too would a racially discriminatory Georgia statute enacted in 1905. Just as the Board of Health regulations in *Robinson* would discourage recognition of the equality of the races, so too would the Georgia law. Just as the impact of "Proposition 14" was to authorize and encourage private discrimination, so would be the impact of a racially oriented 1905 Georgia statute. The specific phraseology of the statute is not important. *The Slaughter House Cases*[46] determined that the mission of the fourteenth amendment is to rid the states of unjustified official distinctions based upon race. When viewing the statute's objective, effect, and historical context as required by *Reitman v. Mulkey*,[47] the undeniable conclusion is that the statute expressed a state policy of fostering segregation.[48] State action existed not only in the acceptance and operation of the Baconsfield park, but at the very inception of the trust. Justice White in *Evans v. Newton* concluded, "the State through its regulations has become involved to such a significant extent in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction must be held to reflect state policy . . . ."[49] It would seem that the reversion, just as the convictions in the "sit-in" cases, gave effect to the statute. The reversion is a reflection of state policy expressed in the statute authorizing segregated trusts, and for that reason it should not have been declared.

It is not certain whether the court rejected the "state action" argument just discussed or found it irrelevant. Justice Black stated that there was no indication that "Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by Georgia trust statutes."[50] This seems to indicate that, even if Georgia did encourage and authorize discrimination, there still must be a finding that the private party was influenced by that encouragement. This, of course, is clearly contrary to the holdings in *Peterson* and *Lombard* which indicated that when a state has compelled discrimination, the discriminator's "mental urges" will not be examined.[51] Likewise in *Robinson* and *Reitman* no proof was required that the state encouragement actually influenced the owners.[52] None of those cases, however, presented the specific issue of whether there can be a "shut-down" to avoid a constitutional mandate. It would seem that the *Evans v. Abney* Court placed much emphasis on this distinguishing factor, because it used the same

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methods used to establish local housing laws between "those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." *Id.* at 390.

46 83 U.S. (16 Wall.) 36 (1873).

47 387 U.S. 369, 373 (1967).

48 Parker, *Evans v. Newton and the Racially Restricted Charitable Trust,* 13 How. L.J. 223, 233 n.30 (1967) places this statute in context:

> The chronology of Georgia's Jim Crow legislation is as follows: 1865 (miscegenation prohibited), 1872 (school segregation statute), 1877 (school segregation in constitution), 1885 (segregation in insane asylums), 1891 (segregation in railroad cars; segregation of state convicts), 1895 (school segregation in Code provision), 1898 (statewide Democratic primary), 1899 (Pullman car segregation), 1905 (Negroes excluded from state militia; park trust segregation), 1908 (Negro disfranchisement).

49 382 U.S. at 311.

50 Evans v. Abney, 396 U.S. 435, 445 (1970).

51 *See* text at note 27 *supra.*

52 387 U.S. 369, 380 (1967).

argument when confronted with *Shelley v. Kraemer*. As noted above, the Court ruled:

> Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon . . . .[53]

It seems clear that the essential state action could be found by examining the impact of the Georgia Code, by referring to the public character of the park, and certainly by analogizing the case to *Shelley*. Quite plainly the state courts "enforced" a racially discriminatory clause. The Court's observation that in the instant case Senator Bacon injected the discriminatory intent may be true, but past cases have determined that fact to be irrelevant. Where the requisite state action has been found, the Supreme Court has held that the fourteenth amendment applies even if the racially discriminatory motivation was clearly injected by private parties.[54] If the distinction made by Justice Black has constitutional significance, however, if it is true that eliminating the park was not discriminatory and had an equal effect on both races, then it would seem that the state action problem has been avoided.

Yet the argument that the elimination of the park eliminated all discrimination is wholly untenable. Black was willing to assume that a municipality could not close a park to avoid a desegregation order.[55] This is undoubtedly the rule announced in *Griffin v. School Board*[56] which held, "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional."[57]

A private party, organization, or corporation performing a governmental or public function is subject to the dictates of the fourteenth amendment. It was held in *Marsh v. Alabama*[58] that a state could not consistently with the first and fourteenth amendments impose a criminal penalty on one who distributed literature on the premises of a privately owned town contrary to the regulations of the town's management. Likewise, *Terry v. Adams*[59] determined that the whites-only "Jaybird" primaries violated the fifteenth amendment, which prohibits a state from denying to an individual the right to vote because of race, since the effect was equivalent to the prohibited election.[60]

The instant case involves the closing of a public park—a park which was previously held to be subject to the fourteenth amendment.[61] It is no less discriminatory to close a public facility for racial reasons than it is to operate it on a segregated basis. In either situation the determining factor is race. Eliminating the park doesn't eliminate discrimination; it is itself a discriminatory act. Since

53 Evans v. Abney, 396 U.S. 435, 445 (1970).
54 Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1, 20 (1948).
55 396 U.S. at 445.
56 377 U.S. 218 (1964).
57 *Id.* at 231.
58 326 U.S. 501 (1946).
59 345 U.S. 461 (1953).
60 *Id.* at 469.
61 Evans v. Newton, 382 U.S. 296 (1966).

the park was found to be subject to the fourteenth amendment, closing it for racial reasons clearly violates the Equal Protection Clause of that amendment.

The Court further asserted that the termination of the park was a loss shared equally by all citizens of Macon. Though that assertion is true, no unconstitutional act is saved by the fact that the result applies equally to all races. For instance, in *Loving v. Virginia*[62] the state defended its miscegenation statute on the grounds that both the black and white participants in an interracial marriage were punished equally. To that defense the Supreme Court responded, "[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations . . . ."[63]

The same result was reached in *Anderson v. Martin,*[64] involving a Louisiana statute which required the race of a candidate to be indicated on the election ballot. Mr. Justice Clark, writing for a unanimous court, stated, "[W]e view the alleged equality as superficial. Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid."[65] It might be noted that the closing of public schools in *Griffin* was unconstitutional despite the fact that it was a loss shared equally by the white and black students. It must be concluded that the equal loss factor is of no significance in this case.

Had the Supreme Court reversed the decision and held that the state courts could not declare a reversion, the objection probably would have been raised that Senator Bacon was deprived of his property without just compensation.[66] This argument was raised and rejected in *Shelley.* The state court had determined that a property right had been established in the land of another by use of the restrictive covenant.[67] The Supreme Court responded: "it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."[68] Following this reasoning, although Bacon may have had a property interest in the park, just as in *Shelley,* it was unenforceable.

The process of adjusting individual rights demands a determination of priorities. In this instance the requirement of equality must be held superior to the right of a testator to control the future use of his property. While Bacon's gift may have been acceptable in a *Plessy v. Furguson* society, a discriminatory charitable trust is presently intolerable. Senator Bacon voluntarily left his property to the city of Macon, voluntarily made it a public park and voluntarily involved

62 388 U.S. 1 (1967).
63 *Id.* at 8.
64 375 U.S. 399 (1964).
65 *Id.* at 404.
66 Park and Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied,* 350 U.S. 983 (1956). The court said:

> If negroes use Bonnie Brae Golf Course, to hold that the fee does not revert back to Barringer by virtue of the limitation in the deed would be to deprive him of his property without adequate compensation and due process in violation of the rights guaranteed to him by the 5th Amendment to the U.S. Constitution . . . . 88 S.E.2d at 123.

67 Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947). This was the companion case of Shelley v. Kraemer, 334 U.S. 1 (1948).
68 334 U.S. 1, 22 (1948).

the government in its operation. Baconsfield became subject to the command of the fourteenth amendment for the reason given by Justice Musmanno, dissenting in *In re Girard College Trusteeship*:[69] "Girard College is public because Girard so planted it and because its whole growth has been accomplished in the orchard of governmental care."[70] *Marsh v. Alabama* made clear that the more an owner opens his property to the public, the more his rights become circumscribed by the constitutional rights of the users.[71]

The decision reached by the court in *Evans v. Abney* rests upon previously rejected principles. The holding represents the first time the Court has permitted a public function, admittedly subject to the fourteenth amendment, to end its existence because it must be integrated. The result is undesirable; it is contrary to the trend toward equality which has gained its greatest momentum in the last several decades.

Joseph J. Beisenstein

INSURANCE—UNINSURED MOTORIST COVERAGE—ARBITRATION CLAUSE—INSURANCE COMPANY'S FAILURE TO INTERVENE IN ACTION AGAINST UNINSURED MOTORIST, DENIAL OF LIABILITY, AND SETTLEMENT WITH THE UNINSURED MOTORIST DID NOT CONSTITUTE WAIVER OF ARBITRATION CLAUSE.—At a signal-controlled intersection in Flint, Michigan, on December 12, 1963, George W. Riley and his wife, Goldie, were involved in a three-car collision. While neither George Riley nor either party in the other two vehicles sustained serious injuries, Goldie Riley was hospitalized with two broken legs, lacerations to the face and forehead, and numerous bruises.[1] An investigation of the accident was undertaken shortly afterwards by State Farm Mutual Automobile Insurance Company, the Rileys' insurer. The resultant findings led State Farm to conclude that its insured, George Riley, while running a red light, had struck a pickup truck driven by one Dennis Williams. The impact from this collision had then caused Riley to collide with a second vehicle driven by one Gale Thayer. Consequently, believing that liability lay directly with its insured,[2] State Farm proceeded to settle with both Williams and Thayer under the public liability feature of the Rileys' policy.[3] Neither of the Rileys at this time was notified or had knowledge that settlement was being made with either of the two claimants.[4]

69 391 Pa. 434, 138 A.2d 844 (1958).
70 391 Pa. at 464, 138 A.2d at 857.
71 326 U.S. 501, 506 (1946).

1 State Farm Mutual Automobile Insurance Co. Liability Settlement Report on George W. Riley (January 8, 1964) at 2.

2 *Id.* at 4, § 4, *Liability.* The full text of this section states:

> This seems to be a case where the liability lies directly with our insured driver. He was approximately 350 feet south of the intersection when the light turned red. He failed to slow. Witnesses report that the light was red for our insured and that he ran the red light and struck the claimant Williams broadside, careening off and striking the third vehicle involved. There seems to be no defense in this case. The sole and proximate cause of this accident was our insured running the red light.

3 Brief for Appellant at 7, Riley v. State Farm Mut. Auto. Ins. Co., 420 F.2d 1372 (6th Cir. 1970).

4 The letter of January 17, 1966, from the Rileys' attorney to one of State Farm's agents states that Riley heard nothing further from his insurer until he learned that State Farm

Subsequently, on November 26, 1965, nearly two years after the accident had occurred, the Rileys commenced suit against Williams in a Mecosta County, Michigan, court for personal injury damages arising out of the 1963 collision. Although Williams apparently carried no liability insurance and therefore would have been classified as an uninsured motorist under the Uninsured Automobile Coverage found in the Rileys' automobile insurance policy, State Farm received no notice of the commencement of the suit until January 17, 1966. Then, by letter, the Rileys' attorney informed one of State Farm's local agents that he intended to take a default judgment against Williams unless some responsive pleading was filed. State Farm answered this letter on February 9th, some twenty days after a $156,000 default judgment had already been obtained against Williams. The gist of the insurance company's letter was that the entire matter had, as far as State Farm was concerned, been settled and was closed. Before this letter was received, however, the Rileys' attorney sent a second letter, dated February 4th, to the same local agent, making a claim for the first time under Coverage U of the Rileys' policy.[5]

On February 22nd, State Farm notified the Rileys that because they had prosecuted to judgment an action against a person who might have been legally liable to them without having first received the written consent of State Farm as was required under the terms of the insuring agreement, the Rileys had come within the scope of Exclusion A of the Uninsured Automobile Coverage agreement.[6] State Farm, therefore, refused payment of the Rileys' claim under Coverage U.

This prompted the Rileys' attorney, in a February 24th letter to State Farm, to renounce the exclusionary clause as being contrary to public policy and therefore unenforceable; he furthermore requested that State Farm take some positive action in regard to the Rileys' claim.

Answering this letter on March 2nd, State Farm expressed disagreement with the attorney's belief that the exclusionary provision was contrary to public policy, but asked that the attorney actually determine that Williams was uninsured

had "paid some claims." Appendix on Appeal for Appellant at 9a (Exhibit 2), Riley v. State Farm Mut. Auto. Ins. Co., 420 F.2d 1372 (6th Cir. 1970). This fact was apparently uncontested by the insurer, as nothing was offered by the latter which attempted to show that State Farm had informed the Rileys of the insurance company's plans to settle with the uninsured motorist, Williams.

5 The Rileys' policy, at "Insuring Agreement III — Uninsured Motorist Coverage," provided:

> Coverage U — Damages for Bodily Injury Caused by Uninsured Automobiles. To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration. Brief for Appellant at 5, Riley v. State Farm Mut. Auto. Ins. Co., 420 F.2d 1372 (6th Cir. 1970).

6 Exclusion A states that the uninsured motorist coverage of the policy does not apply:

> to bodily injury to an insured, or care or loss of services recoverable by an insured with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall, without written consent of the company, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefor. Brief for Appellant at 6, Riley v. State Farm Mut. Auto. Ins. Co., 420 F.2d 1372 (6th Cir. 1970).

at the time of the accident before carrying the matter further. Accordingly, the Rileys' attorney made attempts to learn the status of Williams' insurance coverage, but failed to receive any response from Williams. Thereafter, on October 17, 1966, the Rileys instituted suit against State Farm in the United States District Court for the Western District of Michigan, asking for a declaratory judgment under the uninsured motorist coverage of their insurance policy.

Denying State Farm's motion to dismiss on the ground that the policy provided for an exclusive remedy of arbitration, the district court submitted to the jury the singular issue of whether State Farm had waived the right to demand arbitration pursuant to the terms of its insurance contract with the Rileys. The jury returned a verdict for the Rileys and the court set their recovery at $20,000, the limits of liability under Coverage U of the Rileys' policy. State Farm appealed from this judgment, and the Court of Appeals for the Sixth Circuit reversed and *held*: the failure of State Farm to intervene in the lower court action, its failure to move to set aside the default judgment against the uninsured motorist, and its settlement with a party which it had determined to be free from fault, did not constitute waiver of the arbitration clause; furthermore, by prosecuting to judgment an action against the uninsured motorist without having first obtained the written permission of its insurer as required under Exclusion A of Coverage U, the Rileys had triggered the exclusionary provision, thereby relieving State Farm of all liability under the terms of this uninsured motorist coverage. *Riley v. State Farm Mutual Automobile Insurance Co.*, 420 F.2d 1372 (6th Cir. 1970), *cert. denied*, 399 U.S. 928 (1970).

The query facing the *Riley* court did not concern the enforceability of contracts to arbitrate future disputes in Michigan;[7] instead, the question posed concerned those actions taken by the insurer which would or would not constitute a waiver of this otherwise valid and enforceable arbitration clause. In attempting to resolve the problem the particular facts of the case so sidetracked the court from meeting the issue head-on that it never clarified the direction in which it was attempting to go.[8]

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7 420 F.2d at 1375. The state of Michigan has approved of agreements to arbitrate *in futuro* for nearly a century. *See, e.g.*, Alpena Lumber Co. v. Fletcher, 48 Mich. 555, 12 N.W. 849 (1882) and Chicago & M. L. S. R.R. Co. v. Hughes, 28 Mich. 186 (1873). Statutory recognition came in 1915. Presently, see MICH. STAT. ANN. § 27A.5001 (1962).

8 The underlying rationale which served to account for the *Riley* decision should be seen against the vast, complex background of uninsured motorist coverage. The setting began to coagulate some fifty-five years ago when Ford's assembly line first began the mass production of automobiles. Although demand increased in direct relation to the decrease in price, a buyer's financial responsibility often ended abruptly with the purchase of his new vehicle. Correspondingly, as more people drove more cars down more roads, more accidents were taking place between people who were both insolvent and uninsured. Innocent persons who were consequently injured received little if any monetary compensation, and were forced to rely heavily upon public assistance. *See* Donaldson, *Uninsured Motorist Coverage*, 34 INS. COUN. J. 57 (1967).

Some legislatures, misunderstanding the true problem, responded with the passage of financial responsibility laws which performed the service of revoking the insolvent, negligent, uninsured motorist's driver's license until he submitted proof of *future* financial responsibility. These laws, however, failed to provide a means of recovery for the countless innocent injured victims. Compensation, not correction, seemed to be the obvious answer. *See generally* Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700 (1959).

After a number of methods had been put into effect in many of the states with varying degrees of success, the insurance industry hit upon the basic plan from which today's uninsured motorist coverage has been built. The payment of a nominal additional premium by the in-

In its confrontation with the waiver issue, the court recognizably placed great importance upon the fact that both parties to an arbitration agreement are under a duty to make a good faith effort to carry out the provisions of the agreement and to accomplish the real object of the contract, and that breach of this duty should result in waiver of the arbitration right.[9] Generally, such breach on the part of the insurer has been manifested by the latter's

(a) failure to demand arbitration within a reasonable time;[10]
(b) failure to participate in arbitration proceedings after demand for them has been made;[11]
(c) denial of the existence of coverage;[12] or
(d) improper or inconsistent actions.[13]

The next question then had to be: did State Farm, either through its own action or inaction, come within one of the above four classifications and, in so doing, waive its right to assert the arbitration clause and the exclusionary provision as a defense to the action brought against it by the Rileys?

The court endeavored to answer this question by first examining the rightfulness, or lack thereof, of State Farm's inactivity.[14] Specifically, State Farm had made no attempts either to intervene prior to the entry of default judgment against the uninsured motorist or to move to set aside this judgment. Neither did it demand arbitration after learning that the Rileys were about to take the default judgment against Williams. Could the natural import of this passivity be con-

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sured enabled his insurance company to protect him against the perils of being involved in an accident with an uninsured motorist. Should such an accident occur through no fault of the insured, his insurer would compensate him according to the measure of liability of the uninsured motorist. *See, e.g.,* Welbourn v. Fireman's Ins. Co., —— Ore. ——, 453 P.2d 167, 168 (1969). The plan, having satisfied the demands of insured drivers, has been met with increasing popularity among the states, until today all but four states require insurance companies to at least offer uninsured motorist coverage, while eleven of those forty-six states have mandatory uninsured motorist laws. *See* Widiss, *Perspectives on Uninsured Motorist Coverage,* 62 Nw. U.L. Rev. 497 (1967).

In Michigan, this protection was inaugurated in 1965 with the passage of the state's uninsured motorist coverage law. Mich. Stat. Ann. § 24.13010 (Supp. 1970). This legislation provided that the insured must be given uninsured motorist coverage unless he specifically rejects it in writing. Additionally, the Michigan legislature passed "The Motor Vehicle Accident Claims Fund," which created a fund to compensate innocent victims of an automobile accident for property damage and/or personal injuries sustained through the fault of uninsured motorists. Mich. Comp. Laws § 257.1103 (Supp. 1970). *See* Buesser & Buesser, *Pariah to Paragon,* 45 Mich. St. B.J. 16 (May, 1966).

It was against this historical development and statutory approval of uninsured motorist coverage that the Sixth Circuit measured its decision in *Riley.*

9 *See, e.g.,* Hall v. Nationwide Mut. Ins. Co., 189 So.2d 224, 225 (Fla. App. 1966); Niazi v. St. Paul Mercury Ins. Co., 265 Minn. 222, 231, 121 N.W.2d 349, 356 (1963).

10 *See, e.g.,* Andeen v. Country Mut. Ins. Co., 70 Ill. App.2d 357, 217 N.E.2d 814 (1966), *cert. denied,* 385 U.S. 1036 (1967); Shapiro v. Patrons Mut. Fire Ins. Co., 219 Mich. 581, 189 N.W. 202 (1922); Blake v. Farmers Mut. Lightning Protected Fire Ins. Co., 194 Mich. 589, 161 N.W. 890 (1917); Poray v. Royal Globe Ins. Co., 90 N.J. Super. 454, 217 A.2d 916 (1966).

11 *See, e.g.,* Hall v. Nationwide Mut. Ins. Co., 189 So.2d 224 (Fla. App. 1966); Bielski v. Wolverine Ins. Co., 379 Mich. 280, 150 N.W.2d 788 (1967).

12 *See, e.g.,* American S. Ins. Co. v. Daniel, 198 So.2d 850 (Fla. App. 1967); Rorick v. State Mut. Rodded Fire Ins. Co., 263 Mich. 169, 248 N.W. 584 (1933); Kelley v. Citizens Mut. Ins. Co., 19 Mich. App. 177, 172 N.W.2d 537 (1969).

13 *See, e.g.,* Ovavez v. Patrons Mut. Fire Ins. Co., 233 Mich. 305, 206 N.W. 503 (1925); Rott v. Westchester Fire Ins. Co., 218 Mich. 576, 188 N.W. 334 (1922); Schramm v. Dotz, 23 Wis.2d 678, 127 N.W.2d 779 (1964).

14 420 F.2d at 1375-77.

strued as being so inconsistent with the enforcement of the insurer's right to demand arbitration as to induce the reasonable belief that such right has been dispensed with?[15] The court answered in the negative since State Farm had no contractual relationship with the uninsured motorist and thus no right or duty to intervene on his behalf.[16] Accordingly, the court held that State Farm had no right or obligation to move to set aside the default judgment against Williams.[17]

Most interestingly, however, the Sixth Circuit expressed doubt as to State Farm's right to intervene *on its own behalf*.[18] This doubt was grounded upon the following reasoning: by prosecuting to judgment a claim against the uninsured motorist without first obtaining the insurer's written consent as was required under the terms of the insuring agreement, the Rileys triggered the exclusionary provision and therefore relieved the defendant insurance company of all liability under Coverage U. Thus relieved, State Farm was, for all intents and purposes, a disinterested party. Not being a party in interest, then, it had no right to intervene on its own behalf.[19]

While it is readily apparent that State Farm could not have intervened on behalf of Williams since it had neither a contractual bond with, nor the consent of, this uninsured motorist, the court, in stating that State Farm was not a real party in interest in the Mecosta County action, has been guilty of prematurely triggering the exclusionary provision. When the Rileys commenced suit against Williams, they had not yet "prosecute[d] to judgment any action."[20] They were *in the process* of obtaining the judgment but had not yet done so. Not until the Rileys obtained the *judgment*[21] would they trigger the exclusionary provision; and not until the exclusionary provision was triggered would State Farm become a disinterested party since not until then would it be relieved of any and all liability under Coverage U.

There is a double tragedy in the court's failure to appreciate this distinction. First, by prematurely pronouncing that State Farm was not a real party in interest, the court forsook the opportunity it had to make a definitive statement on an insurer's right to intervene in an action which had been commenced by its insured

15 *See* Swedish-American Bank v. Koebernick, 136 Wis. 473, 117 N.W. 1020, 1023 (1908) which states:

> A waiver may be shown by a course of conduct signifying a purpose not to stand on a right, one leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. And a person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of the right in his favor as to induce a reasonable belief that such right has been dispensed with will be deemed to have waived it.

Accord, Bielski v. Wolverine Ins. Co., 379 Mich. 280, 286, 150 N.W.2d 788, 790 (1967).

16 420 F.2d at 1375. *Accord,* Kisling v. MFA Mut. Ins. Co., 399 S.W.2d 245, 252 (Mo. App. 1966).

17 420 F.2d at 1377. A leading case on the right of the insured to sue the uninsured motorist in an attempt to recover damages from him directly, without first having to arbitrate with the insurer, is Kirouac v. Healey, 104 N.H. 157, 181 A.2d 634 (1962).

18 420 F.2d at 1377.

19 *Id.*

20 *See* Exclusion A of the insuring agreement at note 6, *supra.*

21 *See* Annot., 25 A.L.R.3d 1275 at 1285 (1969), which states:

> The term "judgment," as used in an uninsured motorist indorsement provision excluding coverage where the insured shall, without the consent of the insurer, prosecute to judgment an action against any person or organization who may be legally liable for his injuries, has been strictly construed by the courts, which have required that there be a final judgment entered in favor of the insured before the provision will be given effect.

against an uninsured motorist in a jurisdiction which recognized the validity and enforceability of both agreements to arbitrate future disputes and exclusionary or "permission to sue"[22] provisions. While there is some case authority which indicates that the insurer does have a direct and immediate interest to protect and does have the right to intervene, such pronouncements have been made by courts in which agreements to arbitrate future disputes and "permission to sue" provisions similar to that found in the case at bar were either unenforceable or simply not relied upon.[23] Judicial decisions aside, the present liberal rules of federal and state procedure lend credence to the belief that the insurer would likely be permitted to intervene.[24]

Secondly, and perhaps more tragic, is the fact that the court seems to have implied that once an insurer is aware that its insured has commenced an action against an uninsured motorist, it no longer has any obligation to either demand arbitration or attempt to intervene since it is no longer a party in interest. Such a holding is, however, contradictory to a party's duty to act in good faith under the terms of an arbitration agreement. The dissent, recognizing this, argues:

> The policy enunciated in *Bielski*, and in other Michigan cases, is that where insurers recognize the existence of arbitrable disputes, they have the duty to go forward with, or expedite, arbitration. Where they fail to do so, they waive their right to arbitrate.[25]

It is, nevertheless, true, that while the majority incorrectly found that State Farm was not a party in interest in the Mecosta County action,[26] there is an unmistakable note of justice in the court's determination that State Farm had not waived the right to demand arbitration by failing to intervene. It is doubtful whether three days' notice prior to obtaining a default judgment is a reasonable amount of time in which the insurer could have appeared and intervened had it desired to do so. One is thus left with the impression that the court was actually not so much concerned with State Farm's *right* to intervene as it was with its *ability* to do so.

Looking at the matter of intervention in this perspective, while at the same time keeping the policy enunciated by *Bielski* and reiterated by the dissent in the foreground, it is apparent that the court was determined to prevent the insurer from having to intervene in an action if it has not first been given reasonable notice of its commencement. In a vaguely discernible style, the court has pointed out that the insured's failure to reasonably notify is no less an abrogation

22 An exclusion such as that found in the Rileys' policy is frequently known as a "permission to sue" provision, since the very wording of the exclusion states that the insured must obtain the written consent (i.e., permission) of his insurer. *See* note 6, *supra*.

23 *See, e.g.*, Matthews v. Allstate Ins. Co., 194 F. Supp. 459 (D.C. Va. 1961); State Farm Mut. Auto. Ins. Co. v. Brown, 114 Ga. App. 650, 152 S.E.2d 641 (1966); Wert v. Burke, 47 Ill. App.2d 453, 197 N.E.2d 717 (1964); State v. Craig, 364 S.W.2d 343 (Mo. App. 1963). *See generally* Annot., 95 A.L.R.2d 1330 (1964).

24 Permissive intervention under both F.R.C.P. 24(b)(2) and MICH. STAT. ANN. Gen. Ct. Rule 209.2(2) is allowed "upon timely application . . . when an applicant's claim or defense and the main action have a question of law or fact in common."

25 420 F.2d at 1378. *Accord*, Andeen v. Country Mut. Ins. Co., 70 Ill. App.2d 357, 363, 217 N.E.2d 814, 817 (1966); Poray v. Royal Globe Ins. Co., 90 N.J. Super. 454, 460, 217 A.2d 916, 919 (1966).

26 420 F.2d at 1377.

of the duty to act in good faith than is the insurer's failure to take positive action once an arbitrable dispute is apparent.[27]

Having found that the defendant insurance company had not waived the arbitration clause by failing to intervene in the Rileys' action against Williams, the court moved on to consider State Farm's failure to demand arbitration after receiving notice of the commencement of this action.[28] Here the court stated that the issue of whether State Farm had waived the arbitration provision (inasmuch as it had not requested arbitration) should not have been submitted to the jury since there was not sufficient evidence to prove any waiver. In an apparent attempt to explain this conclusion, the court stated: "There was no evidence that Riley ever made a request or demand for arbitration."[29]

This statement seems to imply that, simply because the insuring agreement was written so as to allow arbitration to begin "upon the written demand of either,"[30] the insurer may refrain from demanding arbitration even if it has received sufficient notice that an arbitrable dispute exists. If this was the implication which the court meant to be drawn, its deduction can be much criticized on the basis mentioned above — namely, that both the insured and the insurer, being parties to an arbitration agreement, are under the duty to act in good faith and to make a fair effort to carry out the provisions of the contract.[31] Such duty should necessarily carry with it the obligation to demand arbitration when either one of the parties becomes aware of an arbitrable dispute. As subtly as possible, however, the majority tips its hand in a brief footnote discussing the responsibility for demanding arbitration, and indicates that it was not so much affected by the fact that either Riley *or* State Farm could have demanded arbitration as it was with the unalterable and pervading fact that State Farm simply had not been put on sufficient notice that "a dispute which would be the proper subject of arbitration" existed.[32] It was just a matter of short extension for the court to determine that, since the insurer had not been given reasonable notice of the need for arbitration, it cannot be cited for failing to stand on its rights under the arbitration clause.[33]

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27 *Id.* at 1376 n.3.
28 *Id.* at 1376-77.
29 *Id.* at 1376.
30 *Id.* at 1376 n.3.
31 *See* cases, cited at note 9, *supra.*
32 420 F.2d at 1376 n.3.
33 The Court was reluctant to discuss what result an insurer's failure to demand arbitration after having received ample notice that its insured was bypassing arbitration would bring about, but it is likely that such inactivity would constitute a waiver by the insurer of its right to demand arbitration. The Supreme Court of Nevada made this point unquestionably clear in Allstate Ins. Co. v. Pietrosh, —— Nev. ——, 454 P.2d 106, 110 (1969), when it stated:

> An insurance policy is not an ordinary contract. It is a complex instrument unilaterally prepared and seldom understood by the insured. The parties are not similarly situated. The company and its representatives are expert in the field; the insured is not. . . . For this reason we do not hesitate to place the burden of affirmative action upon the insurance company. When notified of a claim it should investigate with reasonable dispatch; demand arbitration if that is its desire and settlement can't be reached; consent to suit against the uninsured motorist when notified of its pendency; or seek leave to intervene and present its contentions. Multiple litigation is not desirable. *In short, the insurance company may not ignore its insured and then seek refuge in the fine print of its policy.* (Emphasis added.)

Accord, Andeen v. Country Mut. Ins. Co., 70 Ill. App.2d 357, 217 N.E.2d 814 (1966); Poray v. Royal Globe Ins. Co., 90 N.J. Super. 454, 217 A.2d 916 (1966).

What the Sixth Circuit unquestionably leads one to believe is that State Farm's inactivity could not have been justly construed as a waiver of the arbitration clause. This is so, because the Rileys had failed to act in good faith by not giving the defendant insurance company reasonable notice of the commencement of their action against the uninsured motorist.[34] To hold otherwise would be tantamount to requiring an insurer to intervene in an action or to demand arbitration on a dispute which it scarcely has notice of. Clearly, such a decision would pave the way for much deception and bad faith.

Having determined that there could be shown no waiver of arbitration from State Farm's inactivity, the court next considered the character of the insurer's *activity*.[35] In the forefront to be examined were the defendant's letters to the Rileys indicating emphatically the insurer's firm conviction that liability for the accident did not lie with the uninsured motorist, Williams.[36] The question revolved around whether or not denial of liability for the accident — as distinguished from denial of liability on the basis of no existing applicable coverage[37] — is consistent with the demand for arbitration under the provisions of the policy. The court held that such denial of liability was not identical with a repudiation of contractual liability, and thus did not constitute a waiver of the arbitration clause.[38] While the opinion is devoid of further explanation, it is cognizable that the court recognized the crucial distinction between a denial of liability on the basis of *no fault* and a denial of liability on the basis of *no coverage*. The latter should necessarily operate as a waiver of the arbitration clause since the very purpose of this proviso is to settle disputes which originate under the uninsured motorist coverage and not to settle disagreements regarding the existence or non-existence of the coverage.[39] If the insurer denies that the coverage exists, and if the arbitration agreement is meant to settle liability and damage disputes but not coverage questions, a demand for arbitration would be senseless. On the other hand, a denial of liability because no fault is thought to exist is entirely consistent with the arbitration provision since the very reason

34 420 F.2d at 1377 n.5.
35 *Id.* at 1377-78.
36 *Id.* at 1377.
37 Holding that denial of coverage constitutes a waiver of arbitration, see note 12, *supra.*
38 420 F.2d at 1377-78.
39 The Rileys' policy, at "Conditions — Insuring Agreement III," provided:

> 15. *Arbitration.* If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount payable hereunder, then each party shall, upon written demand of either, select a competent and disinterested arbitrator . . . . Brief for Appellant at 6-7. Riley v. State Farm Mut. Auto. Ins. Co., 420 F.2d 1372 (6th Cir. 1970).

A majority of the reported cases on this issue have held that arbitration should be limited to those specific issues agreed to be arbitrated — in the case at bar, those issues being liability and damages — and that questions of coverage and interpretation of the policy are for the courts. *See, e.g.,* Carr v. Kalamazoo Vegetable Parchment Co., 354 Mich. 327, 92 N.W.2d 295 (1958); Western Cas. & Sur. Co. v. Strange, 3 Mich. App. 733, 143 N.W.2d 572 (1966); Murtaugh v. American States Ins. Co., 25 Ohio Op.2d 106, 187 N.E.2d 518 (1963). A minority of the decisions have allowed the arbitrators to determine whether the insured had forfeited his UM coverage. *See, e.g.,* Employers' Fire Ins. Co. v. Garney, 348 Mass. 627, 205 N.E.2d 8 (1965); Harleysville Mut. Ins. Co. v. Medycki, 431 Pa. 67, 244 A.2d 655 (1968). One is hard put to discover a single case which has held that the arbitrators are empowered to determine the very existence or non-existence of uninsured motorist coverage in the insurance policy.

one arbitrates is to settle disputes regarding the liability of one party or the other.

On this point the dissent criticizes the majority for failing to recognize that State Farm's letters show that it was aware of the fact that an arbitrable dispute existed and, despite this awareness, failed to take any steps toward the resolution of the disagreement. Undoubtedly, the dissent failed to appreciate the element of time which the majority considered to be most important.[40] Despite the fact that the Rileys' attorney notified one of State Farm's agents three days before the plaintiffs obtained the default judgment against the uninsured motorist, the defendant was most likely in no position to make a demand for arbitration until *after* the judgment had already been rendered. Since communication channels are seldom instantaneous, it was reasonably perceivable that personnel with sufficient authority in the defendant insurance company to demand arbitration would not learn of the arbitrable dispute until some time after January 20th, the date that the Rileys were to obtain the default judgment. This being so, the court failed to see why more adequate notification had not been given.

Parenthetically, since State Farm for all purposes learned of the existence of the arbitrable dispute and the default judgment at the same time, it is indeed questionable whether a demand for arbitration — assuming for the moment that State Farm wanted to make one — would have been the wisest course of action. Such a demand on the part of the insurer after its insured had obviously come within the confines of the policy's exclusionary provision might be interpreted as an indication that the insurer doubted the validity and enforceability of its own exclusionary proviso. The defendant was, therefore, hardly in a position to demand arbitration at the only time when it could have possibly done so.

The majority's appreciation of the fact that State Farm's denial of liability was consistent with the arbitration provision of the insurance policy is inextricably tied up with the overriding fact of insufficient notice. *Riley* should not be seen as implying that insurers have the right to deny liability and wait for its insured to trigger the exclusionary provision, thereby relieving the insurer from any liability under the uninsured motorist coverage. Instead, *Riley* has implicitly stated that denial of liability, while not in itself constituting a waiver of the arbitration clause, does indicate the existence of an arbitrable dispute. It requires, in honoring the obligation to act in good faith, a demand for arbitration to be forthcoming as soon as reasonably possible, *providing* such a demand can and should still be made under the terms of the insuring agreement.

Yet, did not State Farm, by reaching a settlement with the uninsured motorist without first notifying the Rileys, make such a demand both unnecessary and pointless? Does such a settlement evidence that the insurer has made up its corporate mind just where the fault lies, and therefore place it in no position to demand arbitration?[41] Furthermore, by realizing that insurance companies

40 420 F.2d at 1376 n.3 and at 1377 n.5.

41 In an analogous situation (dealing with a defendant insurer's ability to use as a defense the plaintiff insured's failure to obtain the written consent of the company before prosecuting to judgment a claim against an uninsured motorist), the Supreme Court of South Carolina in Childs v. Allstate Ins. Co., 237 S.C. 455, 117 S.E.2d 867, 871 (1961) stated:

> Having determined independently and for itself without arbitral or other apparent aid, that respondent (insured) was at fault and legally responsible for the collision

aren't prone to pay twice for the same accident, would the fact that the insurer has already paid once lead to the reasonable inference that it would not be willing to arbitrate the possibility of having to pay a second time? The Sixth Circuit again supplies us with the answer,[42] but typically leaves us to ponder why.

The court states that "Settlement alone is not sufficient basis from which to infer a waiver"[43] because "To hold that . . . would be to set at loggerheads two policies [viz. arbitration and settlement of claims] of the state of Michigan . . . . Therefore, unless the insured resists attempts to settle, the insurer is duty bound to settle a claim which its investigation shows is meritorious."[44]

The court has overlooked the fact that the Rileys could not have resisted attempts to settle — and by so doing indicate to State Farm that an arbitrable dispute existed — unless and until they had received notice from their insurer that a settlement was to be made. But the Rileys received word of settlement only *after* it had been made.[45] Thus, we are left with the question whether the plaintiffs should have reasonably been expected to demand arbitration, knowing full well that its insurer had paid once already.

The answer is not an easy one, and as stated above, the court gives little rationale for its conclusion. Perhaps the majority felt that settlement was no more than one "short step" after denial of liability and, as such, was indicative of nothing more than the insurer's complete confidence in the validity of its denial. Thus, if denial of liability was not inconsistent with the arbitration clause, neither should be settlement with the uninsured motorist. The court's concern, on the other hand, may have been with the so-called "long run." That is, if settlement were found to constitute a waiver of arbitration, an insured having the fortuity to negligently collide with an uninsured motorist could sit back and let his insurer settle, and then, without notifying the insurance company, file suit against the uninsured motorist. If the uninsured party then failed to defend (as in the case at bar), the negligent but insured driver would take a default judgment. He could then follow up by going against the insurer in an action to recover under his uninsured motorist coverage, claiming that under the terms of this coverage the insurer contracted "To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile . . . ."[46] The

with the uninsured driver (whose property damage claim it paid) and having on that account denied liability to respondent under the uninsured motorist provision of the policy, appellant (insurer) is simply not in position to invoke this provision of the policy.

While on the surface this case seems to be in direct opposition to the instant case, a closer examination reveals that South Carolina follows the common law rule that agreements to arbitrate future disputes are invalid and unenforceable. Thus, with the fall of the arbitration clause, necessarily fall all those conditions dependent upon it. Obviously, the exclusionary provision is such a condition. *See* Chippewa Lumber Co. v. Phoenix Ins. Co., 80 Mich. 116, 122, 44 N.W. 1055, 1056 (1890).

42 420 F.2d at 1377.

43 *Id.*

44 *Id.* at 1377 n.6.

45 *See* note 4, *supra.*

46 *See* Coverage U of the insuring agreement at note 5, *supra. But see* Comment, *Enforcement of Arbitration Provisions in Uninsured Motorist Insurance,* 15 STAN. L. REV. 113, 119 n.32 (1962), which takes the position that the insurer contracted only to pay that which the insured was legally entitled as determined by arbitration, and not by an action at law. The

insurer would thus be in an unenviable position. It could not demand arbitration, since its settlement with the uninsured motorist waived this right. It could force the insured to sue in court, but might not fare so well here since relitigation of liability and damages is not always permitted.[47] Realizing this, the insurer, although having rightfully settled with the uninsured motorist, might find it less expensive to endeavor to reach a compromise settlement with the insured, even though no such settlement is justified, rather than go through the costly and time-consuming process of litigation, where its chances of having to pay the entire limits of the policy's coverage would be much greater.

Although the court has left us to conjecture what rationale — be it the "short step," the "long run," of some other less discernible reasoning — convinced it that settlement "alone"[48] should not constitute waiver of the arbitration provision, it is far worse that it has left unsaid that which seems most important for the future handling of uninsured motorist claims, i.e., granting that an insurer has not waived its arbitration rights by settling with the uninsured motorist when it has no reason to suspect that an arbitrable dispute exists, is this also true when the insurer settles *after* receiving notice of the existence of such a dispute? While the "short step" rationale can still be employed to argue that such settlement should not waive the arbitration clause, it is not nearly as convincing as it once was. This is true because, as emphasized above, the duty to act in good faith under the terms of the arbitration agreement[49] necessarily implies that, once an arbitrable dispute is manifested, all actions should be focused upon its resolution. A settlement after liability has been put in question may very well indicate not so much the insurer's confidence in the findings of its investigation as it does its unwillingness to arbitrate. An insured might therefore be justified in concluding that the insurer has waived its right to arbitrate.

The question undoubtedly is an open one, but by the court's failure to appreciate the urgency and scope of the problem, the door remains wide open for future litigation over this very same issue of settlement and its effect upon the arbitration clause. It is imperative that some measures be taken both for the sake of the insurer and of the insured. A suggested solution is that if the insurance company was made to notify its insured prior to instituting settlement talks with the uninsured motorist, a great deal of litigation could be obviated.

By notifying the insured before settling with the uninsured motorist (assuming of course that the insurer has honestly determined that liability lay with its insured), the insurance company would have the opportunity of disclosing to its insured the findings of its investigation, while at the same time giving the latter ample time in which to voice any criticism he may have regarding these findings. Should such criticism be forthcoming, it would serve to alert the insurer of the possibility of an arbitrable dispute, and thus give it the opportunity either

point, though well taken, is inapplicable here, for if settlement would constitute waiver of the arbitration clause, the insurer who had already settled would have waived its right to demand that what the insured is "legally entitled to recover" be determined by arbitration.

47 Readiness to hold an insurer bound by the prior findings as to liability and damages will diminish if the insurer has not been given sufficient notice and opportunity to participate on either side of the litigation between its insured and the uninsured motorist. *See, e.g.*, Boughton v. Farmers Ins. Exch., 354 P.2d 1085 (Okla. 1960).

48 420 F.2d at 1377.

49 *See* cases cited at note 9, *supra.*

to resolve the difference of opinion through open discussion or to demand arbitration. This, in turn, would save the insurer the dread of having to defend itself against the charge of having waived the arbitration clause by its settlement with the uninsured motorist or of having to arbitrate the issue of liability and amount of damages after having already settled with the uninsured party. The insurer, in short, would spare itself the pain either of having to pay twice — once in settlement with the uninsured motorist and once at the arbitration table with the insured — or of having to litigate in court the issue as to whether its settlement with the uninsured motorist waived its right to demand arbitration. Furthermore, such notification to the insured would not hamper the settlement of claims since the insurer could respond with a demand for arbitration if the insured unreasonably refuses to allow the insurer to settle with the uninsured motorist. This would awaken the insured to the stark possibility of his having to pay a portion of the arbitration costs — a debt which he would be reluctant to incur unless his refusal to consent to settlement was motivated more on the firm conviction that he was not at fault in the accident than on stubborn unwillingness to admit liability.

Unfortunately, the court did not look beyond the immediate facts of the case. It failed to appreciate the questions which its determination might raise and it failed to take advantage of the crystalline opportunity it had to help stunt the future growth of uninsured motorist litigation. Instead, the court was patently anxious to consider the Rileys' conduct against the same good faith standards used to measure State Farm's course of action. Specifically, since neither the defendant's inactivity nor its activity constituted a waiver of the arbitration clause, the sole remaining issue requiring the court's consideration was whether the Rileys' failure to obtain State Farm's written consent prior to obtaining the default judgment against Williams should free the insurer of all liability under Coverage U.[50] Clearly, the answer need be predicated upon whether the exclusionary provision be found valid and enforceable.

In finding this provision binding,[51] the court evidently relied upon the recently decided case of *Naparstek v. Citizens Mutual Insurance Company*.[52] In *Naparstek*, the Michigan Court of Appeals held that an exclusionary provision, for all purposes identical to that found in the Rileys' policy, was a valid defense to the plaintiff-insured's action to recover under the uninsured motorist coverage of his insurance policy.[53] While *Naparstek* may have given the *Riley* court no appreciable problem as far as the validity of the provision was concerned, the rationale upon which the Sixth Circuit based its determination that the pro-

50 It is interesting to note that the idea of the preclusive effect which Exclusion A should have on the Rileys' ability to recover against State Farm seems to have germinated in the Court of Appeals. At the District Court level, State Farm was reluctant to argue that the exclusionary provision had been triggered by the Rileys' having obtained a judgment against the uninsured motorist without first receiving the written consent of their insurer. Instead, State Farm openly expressed its willingness to arbitrate the issues of liability and amount of damages, as is evidenced by its attorney's statement to the jury:

> State Farm did not in this case and has not in any case refused to arbitrate in good faith where there is a dispute. In short, the contract between Mr. Riley . . . and State Farm requires arbitration. State Farm at all times stood *and stands ready* to arbitrate . . . . (Emphasis added.) Appendix on Appeal for Appellant at 37a-38a, Riley v. State Farm Mut. Auto. Ins. Co., 420 F.2d 1372 (6th Cir. 1970).

51 420 F.2d at 1375.

52 19 Mich. App. 53, 172 N.W.2d 205 (1969).

53 *Id.* at 65, 172 N.W.2d at 211.

vision was enforceable is indeed questionable. To illustrate, the court concluded that without such a provision, an insured could "obtain a default judgment against a person whom the insurer had no right to defend, and claim the judgment as binding on the insurance company on the ground of res judicata."[54] One may very well ask how the insurer, not having been a party or a privy to a party in the action commenced by its insured against the uninsured motorist, could be bound by any judgment rendered in that action.[55] To allow the insured to use his victory against the uninsured motorist as a sword against the insurer would deny a party which has not had its day in court of due process of law.[56]

It seems more probable that if the insured is allowed to recover against his insurer, rationale for permitting such recovery would be based upon the terms of the policy which provide that the insurer agrees to "pay all sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile . . . ."[57]

Thus, while the court's recognition of the enforceability of the exclusionary provision rests upon solid judicial ground, the same cannot, unfortunately, be said of its reasoning regarding the purpose of the provision,[58] and one is left with the impression that the majority was not so much concerned with the "why" as it was with the "therefore," *i.e.*, the purpose of the exclusionary clause was of seemingly secondary importance to the court; of primary concern was the very fact that the provision was valid and enforceable, and therefore acted to preclude the Rileys from recovering against State Farm under Coverage U. The application of this provision by the court, when it would have been just as easy to send the issue of liability to the arbitration table, indicates the court's desire to soundly affirm the importance of the good faith requirement supporting the arbitration agreement. In so affirming, the court apparently felt it necessary — perhaps in an attempt to stifle the recurrence of bad faith as indicated by insufficient notice — to chastise the plaintiffs for their failure to live up to this obligation, and such chastisement was readily manifested through the enforcement of the exclusionary provision.

An overview of the court's handling of the issues which the case at bar presented shows that no evaluation of the conduct of either State Farm or the Rileys was made apart from the underlying, unalterable fact of insufficient notice. One should be cautioned against believing that the court in *Riley* held that an insurer may refrain from intervening or from demanding arbitration. One should also guard against concluding that an insurer can deny liability and

54 420 F.2d at 1376.

55 *See, e.g.*, RESTATEMENT OF JUDGMENTS § 93 (1942), which indicates that the insurer could not be bound by the prior judgment on the basis of res judicata.

56 *See, e.g.*, Embassy Realty Assoc., Inc. v. Southwest Products Co., 126 Cal. App.2d 725, 729, 272 P.2d 899, 902 (1954).

57 *See* Coverage U of the insuring agreement at note 5, *supra*. *But see* note 46, *supra*.

58 Exclusionary provisions such as that found in the case at bar were intended by insurance companies to serve a twofold purpose: first, to protect the insurer's subrogation rights under the Trust Agreement, and second, to assure that no judgment or settlement will be obtained in which the rights of the insurer are inadequately protected. *See, e.g.*, Mills v. Farmers Ins. Exch., 231 Cal. App.2d 124, 41 Cal. Rptr. 650, 653 (1964); Allstate Ins. Co. v. Charneski, 16 Wis.2d 325, 114 N.W.2d 489, 493 (1962). *See generally* Annot., 25 A.L.R.3d 1275 (1969).

settle even though an arbitrable dispute exists and is apparent. Thus, *Riley* can be seen to do no more than affirm that which is the cornerstone of all agreements between two parties — the duty to act in good faith under the terms of the agreement. Seen in this light, *Riley* has said nothing more than that an insurer which has not been given sufficient notice of the existence of an arbitrable dispute cannot be held to have waived either the arbitration or exclusionary provisions by its failure to intervene or to demand arbitration, or by its settlement with the uninsured motorist and subsequent denial of liability to its insured on the basis of no fault.

Mario L. Beltramo, Jr.

SECURITIES REGULATION — SECURITIES ACT OF 1933 — SECURITIES EXCHANGE ACT OF 1934 — A PRESS RELEASE PRIOR TO FILING WHICH INCLUDES A STATED VALUE OF THE SECURITIES OFFERED IN A PROPOSED EXCHANGE IS NOT WITHIN RULE 135 AND THEREFORE VIOLATES SECTION 5(C) OF THE SECURITIES ACT OF 1933; ANY NON-EXEMPTED PURCHASE OF THE TARGET COMPANY'S SECURITIES OUTSIDE THE EXCHANGE OFFER WHILE THE OFFER IS OUTSTANDING IS A VIOLATION OF SECTION 10B-6 OF THE SECURITIES EXCHANGE ACT OF 1934.—Chris-Craft Industries, Inc., in an attempt to gain the controlling interest in the Piper Aircraft Corporation, publicly announced on January 23, 1969, a proposed tender offer for Piper shares. The Piper management notified Chris-Craft and the Piper shareholders of their opposition to the take-over. Nevertheless, Chris-Craft continued with its take-over plans, announcing a second proposed tender offer on May 8, 1969.

In an attempt to thwart Chris-Craft, Piper entered into negotiations with the Bangor Punta Corporation in January, 1969, concerning a Bangor Punta take-over of Piper. These talks culminated in an agreement on May 8, 1969. Pursuant to this agreement, Bangor Punta acquired 500,000 shares from the Piper family, which constituted 30% of the Piper shares outstanding, in exchange for a specified package of Bangor Punta securities. This information was made public through two press releases issued on May 8, 1969, by Bangor Punta and Piper.[1] The release stated that Bangor Punta would file with the SEC a statement covering a proposed exchange offer to be made for any and all of the remaining outstanding shares of Piper for a package of Bangor Punta securities to be valued at not less than $80 per Piper share.

According to Chris-Craft, Bangor Punta's press release itself gave rise to one violation of the Securities Acts, and the press release coupled with subsequent purchases of Piper stock by Bangor Punta constituted a second violation. In the opinion of Chris-Craft and the SEC, the press release, which included the value of

1 The relevant portion of the press release is as follows:
> Bangor Punta has agreed to file a registration statement with the SEC covering a proposed exchange offer for any and all of the remaining outstanding shares of Piper Aircraft for a package of Bangor Punta securities to be valued in the judgment of the First Boston Corporation at not less than $80 per Piper share.

Chris-Craft Industries, Inc. v. Bangor Punta Corp., 426 F.2d 569, 571 (2d Cir. 1970).

the stock to be offered, violated section 5(c) of the 1933 Securities Act.[2] Accordingly, on May 26, 1969, the SEC instituted an action against Bangor Punta and Piper in the Uniterd States District Court for the Southern District of New York. On that same day, Bangor Punta and Piper consented to an entry of judgment and the issuance of an injunction prohibiting similar releases prior to filing with the SEC.

The second violation of which Chris-Craft complained resulted from a series of cash purchases of Piper securities by Bangor Punta between the dates of May 16th and May 23rd, 1969. Chris-Craft alleged that the purchases were made outside the Bangor Punta exchange offer while that offer was outstanding and, therefore, violated rule 10b-6[3] of the 1934 Securities Exchange Act. Chris-Craft based this charge on its contention that the May 8th press release was in effect an offer to sell the Bangor Punta stock, and, as a result of this, the exchange offer was outstanding from the date of the press release. Chris-Craft reasoned that the Piper stock was convertible into Bangor Punta stock and, as such, was a "right to purchase" Bangor stock. Thus, they contended that Bangor Punta's purchase of the Piper securities was a purchase of rights in Bangor Punta stock in violation of rule 10b-6.

Chris-Craft instituted an action for a preliminary injunction on July 23, 1969. The proposed effect of this injunction, until the allegations could be litigated, was to direct Bangor Punta: (1) to offer the right to rescind to all persons who had tendered Piper shares pursuant to the exchange offer; (2) to refrain from acquiring further Piper shares; (3) to refrain from effecting a merger of Bangor Punta and Piper; and (4) to refrain from voting the Piper shares acquired between May 16th and May 23rd, 1969.

The District Court for the Southern District of New York refused to issue an injunction, finding that there was no violation of either act.[4] On appeal, the United States Court of Appeals for the Second Circuit affirmed as to the denial of the injunction but reversed the District Court concerning the violations of the Securities Acts. Upon a petition for rehearing the Court of Appeals siting *en banc* affirmed and *held*: a press release prior to filing, which includes a stated value of the securities offered in a proposed exchange offer, is not within rule 135 and is an offer to sell violating section 5(c) of the Securities Act of 1933; any non-exempted purchase of the target company's securities outside the exchange offer while the offer is outstanding is a violation of section 10b-6 of the Securities Exchange Act of 1934. *Chris-Craft Industries, Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970).

The philosophy of the Securities Act of 1933 was to replace the ancient rule of *caveat emptor* with the idea of full disclosure. This action was taken to insure an equality of knowledge for all of the investing public.[5] Section 5(c), as amended in 1954, prohibits issuers from offering to buy or sell prior to the filing of a registration statement with the SEC.[6] The section attempts to eliminate

2 Securities Act of 1933 § 5(c), 15 U.S.C. § 77e(c) (1964).
3 17 C.F.R. § 240.10b-6 (1970).
4 Chris-Craft Industries, Inc. v. Piper Aircraft Corporation, [1969-70 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,465 (S.D.N.Y. 1969).
5 H.R. REP. No. 1542, 83d Cong., 2d Sess. (1954).
6 15 U.S.C. § 77e(c) (1964); Roe v. United States, 316 F.2d 617, 620 (5th Cir. 1963).

"beating the gun" by shaping a market so as to be receptive to the new issue.[7] Section 2(c) states that an offer to sell includes every attempt to dispose of the securities, including solicitation of offers to buy.[8] The SEC has set forth rule 135 indicating certain exceptions to the section 2(c) definitions. This rule allows issuers to make certain disclosures without violating the Securities Act.[9] In the case of an exchange offer, issuers are permitted to disclose their names, the title of the securities to be offered and "the basis upon which the exchange is proposed to be made and the period during which the exchange may be made. . . ."[10]

The 1934 Securities Exchange Act which, *inter alia,* deals with trading in securities, complements the 1933 Securities Act, which focuses on the initial distribution of securities to the public, in an effort to eliminate fraud in the securities market. Rule 10b-5 of the act makes it illegal for any person to make materially false or deceptive statements in connection with a stock purchase or sale.[11] The high-water mark in this area is *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*,[12] which indicates that insiders must disclose any material non-public information before it is used for personal gain. The recognized test of materiality in this respect is whether "its [the information's] existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question."[13] The underlying principles of *Texas Gulf* concerning disclosure are applicable to corporations; a corporation cannot make use of non-public information for its own gain.[14] Rules 10b-6 and 10b-13 are used to prevent manipulation during an exchange offer. They are designed to prohibit any person making a tender or exchange offer from going outside that offer to purchase either securities of the target company or other securities which are immediately convertible into or exchangeable for the securities of the target company as long as the offer remains in effect.[15]

In the instant case, the court focused its attention on Bangor Punta's May 8 press release. Bangor Punta contended that immediate disclosure of market value prior to filing was required by *Texas Gulf* and the New York Stock Exchange rules.[16] The court, however, agreed with Chris-Craft and with the SEC's *amicus curiae* brief that the press release was, in effect, an offer to sell.[17] Judge Waterman stated that the only disclosure required within the meaning of *Texas Gulf* was Bangor Punta's *commitment* to offer its stock for Piper shares[18] and that the rules of the Exchange were not binding on the court.[19] Any further disclosures (of the value of the stock) thwart the other policies of the securities laws.[20]

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7 Securities and Exchange Comm'n v. N. Am. Research and Dev. Corp., 280 F. Supp. 106, 121 (S.D.N.Y. 1968).
8 15 U.S.C. § 77b(3) (1964).
9 17 C.F.R. § 230.135 (1970).
10 17 C.F.R. § 230.135(c)(4) (1970).
11 17 C.F.R. § 240.10b-5 (1970).
12 401 F.2d 833 (2d Cir. 1968).
13 NW Paper Corp. v. Thompson, 421 F.2d 137, 138 (9th Cir. 1969).
14 Kohler v. Kohler Co., 319 F.2d 634, 638 (7th Cir. 1963).
15 Lowenfels, *Rule 10b-13, Rule 10b-6 and Purchases of Target Company Securities During an Exchange Offer,* 69 COLUM. L. REV. 1392, 1393 (1969).
16 426 F.2d at 575.
17 *Id.* at 574.
18 *Id.* at 575.
19 *Id.* at 576, citing Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963).
20 *Id.* at 575.

The majority opinion, considering the rationale of the 1958 decision in *Securities and Exchange Commission v. Arvida Corporation*,[21] concluded that the press release, which attractively described a proposed exchange offer and announced the value of the securities, was not unlike a prospectus.[22] The majority acknowledged that the line between an announcement which is an offer and an announcement which is not an offer is at best arbitrary. Therefore, a decision based on a check list as to what does not constitute an offer is preferable to one grounded on the rule of reason. The majority decision was based on such a check list as provided in rule 135.

Rule 135 permits an issuer to make certain statements in an announcement of a proposed exchange offer which would not violate section 5(c). The exception especially relevant to this case is contained in section (c)(4) of the rule—"the basis upon which the exchange is proposed to be made."[23] In interpreting this, the court stated that the assignment of a value to the shares offered would not come within the limits of section (c)(4) since it would be an offer to sell.[24] The majority reasoned that, by giving permission to include the value of the stock in the announcement, the purpose of the registration requirement would be defeated.[25] When a registration statement is filed, the SEC then has the opportunity to verify the statements contained therein and the investing public has the chance to receive detailed information from a prospectus which is allowed subsequent to filing. Without a filing statement, appraisals can be made on the basis of speculation and cannot be checked. This was the situation in *Arvida*. To avoid the potential fraud and to protect the investing public, the Securities Act of 1933, pursuant to section 5(c), requires that a registration statement must be filed before the issuer can make use of interstate facilities or the mails to offer his stock.[26]

The court deemed it better to give a small number of sophisticated investors, i.e., corporate insiders, an unfair advantage than to permit the press release in question to mislead a large number of unsophisticated investors.[27] This advantage could be obtained by a careful perusal of the registration statement which is filed with the SEC in accordance with section 13d-1 of the 1934 Securities Exchange Act. These statements are then placed in the public files of the Commission. The court suggested that, in order to avoid establishing a dangerous precedent, a strict interpretation of rule 135 must prevail.[28]

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21 169 F. Supp. 211 (S.D.N.Y. 1958).
22 426 F.2d at 574.
23 17 C.F.R. § 230.135(c)(4) (1970).
24 "The term 'offer to sell' . . . shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. § 77b(3) (1964).
25 426 F.2d at 575.
26 *See* 59 COLUM. L. REV. 517 (1959):
> During a "waiting period" after filing, in which the Commission reviews the registration statement for accuracy and completeness, oral solicitation is permitted freely but written offers are prohibited unless made in the form of a "red herring" or preliminary prospectus, a summary prospectus, or a "tombstone ad," all of whose contents are prescribed by statute or Commission rule. *Id.* at 518.

27 426 F.2d at 576.
28 Other issuers could design exchange offers similar to the Piper-Bangor Punta agreement and circumvent the 1933 and 1934 securities laws, citing *Chris-Craft* as authority. 426 F.2d at 576.

As a result of the finding that the May 8th press release was an offer to sell, the court concluded that Bangor's purchase of Piper stock was a violation of rule 10b-6 of the Securities Exchange Act.[29] The majority reasoned that the press release of May 8th established the exchange offer and at the time of the purchases (May 16th to May 23rd), this offer was still outstanding.[30] As the court stated in *Securities Exchange Commission v. Scott Taylor & Co.:*

> Manipulation was often accomplished by those about to sell securities or already engaged in selling securities bidding on the market for the same securities, thereby creating an unjustifiable impression of market activity which would facilitate the sale at artificially high prices. This was one of the practices which the Securities Exchange Act was designed to eradicate, and it is the practice which is covered by Rule X-10B-6. (Footnote omitted.)[31]

Bangor Punta argued that its purchase of Piper stock would drive up the price of Piper stock, making the exchange offer less attractive. This would create the opposite effect from that which the act is designed to prevent. The court, however, found that there was market manipulation. The majority reasoned that if the price of the target company did increase because of Bangor Punta's purchases, many stockholders were likely to assume that this was from the "bullish effect" of the exchange offer.[32] The small investor is likely to assume that larger, more informed investors are taking advantage of the offer. This could definitely be a subtle form of persuasion to induce the investor to exchange his stock for Bangor Punta shares. Bangor Punta would thus achieve a benefit from these purchases. Because of this manufactured interest, it would be easier for Bangor Punta to gain the necessary shares required for the control of Piper.

Chief Judge Lumbard disagreed with the majority and said that there was no violation of either section 5(c) or 10b-6.[33] He found that the directive of *Texas Gulf* and the New York Stock Exchange rules were applicable in this situation. He noted the desirability of striking a balance between the need for equal access to information concerning the exchange offer and the prevention of premature and incomplete disclosures. To achieve this compromise, Judge Lumbard read rule 135(c)(4) in light of *Texas Gulf,* noting that this interpretation would authorize the announcement in question. He maintained that, in view of the large number of people involved in the agreement and those others who could learn of the terms of the offer, the need for disclosure was paramount.[34]

Rule 10b-6 is labeled by Chief Judge Lumbard as being highly technical and covering only a limited number of undesirable practices. Judge Lumbard argued that since rule 10b-13 was not applicable — it went into effect after Bangor's alleged violation — the use of rule 10b-6 was only a stopgap measure.[35]

29 This would be correct considering the ruling on the press release if Bangor-Punta could not prove its purchases fall within the exemption provided by rule 10b-6. 426 F.2d at 577.
30 *Id.* at 572.
31 183 F. Supp. 904, 907 (S.D.N.Y. 1959).
32 426 F.2d at 577.
33 *Id.* at 579.
34 *Id.* at 581.
35 *Id.* at 583.

He recognized that it may be desirable to prohibit the acquiring company from purchasing target company shares, but that this should be accomplished with a new rule (10b-13) rather than by pushing an old rule beyond its limits.

In analyzing the majority opinion in light of dissent, it appears the decision in the instant case is the result of a restrictive interpretation of rule 135 confirming the philosophy behind section 5(c).[36] This type of reasoning is neither a constructive nor a beneficial use of judicial powers in light of the securities laws, recent decisions and the rules of the New York Stock Exchange. Although the majority opinion attempted to protect the investing public, it created certain difficulties for the securities market.

In concluding that the May 8th press release was an offer to sell within the meaning of section 2(c), the court construed rule 135 much too narrowly. A corporation, like an individual insider, is not allowed to use undisclosed material information for its own gain.[37] Bangor Punta and Piper had agreed that Bangor Punta's best efforts would be used in an attempt to gain the controlling interest in Piper. Within this agreement, Bangor Punta was to offer an exchange of its securities or cash or a combination of both, having a value of $80, for Piper securities. This information, the $80 value of the exchange offer, is the result of the business dealings between Piper and Bangor Punta. Since the exchange offer was directly attributable to the formal agreement between the two corporations,[38] it is logical to conclude that the information obtained from such an agreement was insider information.[39] Clearly, Bangor Punta could use this knowledge to its advantage since, before the proposed effective date of the exchange, Piper stock was selling at $72.50 and purchases slightly above this price would work to conserve Bangor Punta's financial resources. The number of shares required during the exchange offer would vary conversely with the amount of Piper stock already in Bangor Punta's possession. Obviously it was better to purchase at $73 than at the terms of the exchange offer.[40] Therefore, Bangor Punta was in a situation where the information of the exchange offer and its value had to be disclosed; otherwise its purchases would be based on nonpublic insider information.[41]

This situation should be distinguished from an exchange offer where the decision to go ahead with it is made by the acquiring company alone. In this type of exchange offer, the undisclosed information may be the same as in the Bangor Punta case, but it is not acquired as the result of insider status.[42] The plans of the acquiring corporation are its own plans, those of a detached out-

36 The philosophy behind § 5(c) is to prevent the distribution of financial information before this information is filed with the SEC.

37 *See* note 14 *supra*. "Mergers, and *similar transactions*, seem to be regarded as material facts when there is a 'reasonable probability' of their occurrence." Fleischer and Mundheim, *Corporate Acquisition by Tender Offer*, 115 U. PA. L. REV. 317, 334 n.72 (1967).

38 Information obtained during business dealings may give insider status to the recipient. Hughes and Treat, 22 S.E.C. 623 (1946).

39 Fleischer and Mundheim, *supra* note 37, at 332. Comment, *The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5*, 33 U. CHI. L. REV. 359, 374 (1966).

40 If all of the needed shares are obtained before the exchange offer expires, withdrawal of the offer can be effected only through Commission approval. *See* 17 C.F.R. § 230.477 (1970).

41 401 F.2d 833 (1968).

42 Fleischer and Mundheim, *supra* note 37, at 330-31.

sider.[43] In such a case, the acquiring company is unaware whether the offer will be resisted by the target company's management; furthermore, it does not know the financial position of the target company. Without this information, the acquiring company subjects itself to potential embarrassment if the target company publicly resists its plans or if the company is financially unsound. In such a situation, the acquiring company could purchase the target company securities before the exchange offer without disclosure of its plans.

Bangor Punta's situation was aggravated further by the New York Stock Exchange rules. They require immediate disclosure of any news or information which could be expected to alter materially the market if such information cannot be kept within the upper level of management. Violation or disregard of these rules would subject Bangor Punta to the Exchange's punitive actions.[44]

In view of the circumstances presented, it could be argued that it would have been wiser for the majority to have adopted the reasoning of the dissent. Judge Lumbard made the best of a bad situation. Noting the need for investor protection while not losing sight of Bangor Punta's obligations, he found the press release to be within the rule 135 exceptions.[45] He struck a workable compromise allowing the interests of the public, as well as the interest of the corporation, to be maintained. This reasoning is in line with SEC policy on press releases:

> The policy of the Commission has been to decide the question whether a prefiling communication constitutes an "offer to sell" on a case by case basis, taking into account the nature, timing, content, and purpose of the communication, to whom and by whom it is communicated, and its over-all effect viewed in the light of distribution practices in the securities industry.[46]

The logical application of this policy leads to the conclusion that the press release involved does, in fact, come within the rule 135 exception. It is not an offer to sell.

The majority cites *Arvida* and the possibility of creating a dangerous precedent as further support for its decision. In *Arvida* the pre-filing press release contained an estimated value of the stock to be offered, but there the value was based on speculation. Bangor Punta's statement of value was the result of a written opinion of a reputable financial house. This is clearly a distinguishing

43 "Although knowledge of one's own intentions does not constitute inside information in the usual case, there are situations in which such intentions must be disclosed." Fleischer and Mundheim, *supra* note 37, at 333, *citing* Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951).

44 Brief for Appellees at 23, Chris-Craft Industries, Inc. v. Bangor Punta Corp., 426 F.2d 569 (2d Cir. 1970).

45 426 F.2d at 580. Judge Lumbard has, as further support for his findings, the directives set forth in SEC Release No. 33-4697, 29 Fed. Reg. 7317 (June 5, 1964), which specifically provides that announcements with respect to important business and financial developments:

> are required in the listing agreements used by stock exchanges, and the Commission is sensitive to the importance of encouraging this type of communication. In recognition of this requirement of certain stock exchanges, the Commission adopted Rule 135, which permits a brief announcement of proposed rights offerings, proposed exchange offerings, and proposed offerings to employees as not constituting an offer of a security for the purposes of Section 5 of the Act.

46 59 COLUM. L. REV. 517, 518, 519 n.21 (1959) *citing* Carl M. Loeb, Rhoades & Co., SEC Securities Exchange Act Release No. 5870, at 14 n.20 (Feb. 9, 1959); Address by Chairman Gadsby of the SEC, Investment Bankers Association of America Annual Convention, Dec. 3, 1958, in THE COMMERCIAL AND FINANCIAL CHRONICLE, Dec. 18, 1958, p. 21. cols. 4-5; *see* First Maine Corp., SEC Securities Exchange Act Release No. 5898 (Mar. 2, 1959); Van Alstyne, Noel & Co., 222 S.E.C. 176 (1946).

factor. The *Arvida* release was designed to, and did, create public reaction while the Bangor Punta release was informative in nature.[47] The May 8th press release was based on facts, not speculation. Its purpose was to meet the corporation's disclosure requirement.

The majority's argument that a dangerous precedent would be established fails in its logic since the Commission's policy is to view each pre-filing communication in which there may be an offer to sell on a case-by-case basis, taking into consideration *all* of the facts and circumstances.

In view of the majority holding that the press release was an offer to sell, it is correct to conclude that the purchases of Piper stock by Bangor Punta were made outside of the exchange offer. The announcement made what was supposed to be a *proposed* exchange offer an actual offer. The attempt to stop this practice was meritorious, but the method used was not.

As noted in the dissent, the use of rule 10b-6 is a stopgap measure. The majority has stretched this rule beyond its normal limits to cover this case. A careful analysis of the rule reveals that Bangor Punta securities, not Piper securities, are the subject of the distribution. The theory that Piper securities are a "right to purchase" Bangor Punta securities fails in its reasoning since the right to exchange Piper securities for Bangor Punta securities is a characteristic of Bangor Punta stock. As Lowenfels observed:

> Any attempts to rest the [court's] position upon the words of paragraph (b) of Rule 10b-6 meet similar obstacles. The only securities being distributed are [Bangor] securities and these are not "exchangeable for or convertible into" [Piper] securities; nor do they entitle the holder immediately to acquire [Piper] securities. Rather the converse is true. [Piper] securities are "exchangeable for" and "entitle the holder immediately to acquire" [Bangor] securities; but [Piper] securities are not being distributed.[48]

The court tried to fit Bangor Punta's purchase within the spirit of the rule, but this rule was not meant to cover exchange offer situations as evidenced by the Commission's action in adopting rule 10b-13 to handle exchange offers.

This decision puts the securities bar in a serious dilemma. If this situation should arise again, the company in question could be the subject of suits on the part of private investors, it might receive New York Stock Exchange punitive action for not disclosing the value of the stock, or it could be subject to suit by a competing company or the SEC for disclosing prior to filing.

The result in *Chris-Craft* is at best undesirable. As Judge Cardozo stated: "If dual interests are to be served, the disclosure to be effective must lay bare the truth, without ambiguity or reservation, in all its stark significance."[49]

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47 Brief for Appellees at 22.
48 L. Lowenfels, *supra* note 15, at 1399.
49 Wendt v. Fischer, 243 N.Y. 439, 443 (1926).