Fordham Law Review

Volume 36 | Issue 1 Article 6

1967

Case Notes

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Recommended Citation
Case Notes, 36 Fordham L. Rev. 121 (1967).
Available at: https://ir.lawnet.fordham.edu/flr/vol36/iss1/6

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CASE NOTES

Collateral Estoppel—Truck Owner Allowed to Make Offensive Use of His Driver's Prior Judgment.—To further the fundamental interest of the state in reducing unwarranted litigation and to protect the individual citizen from a needless barrage of costly and repetitious suits, the courts have evolved the companion doctrines of res judicata and collateral estoppel.[1] The doctrine of res judicata concludes parties and their privies from suing on the same cause of action;[2] any issue that has been actually or impliedly determined or that might have been litigated in one suit cannot be raised again in subsequent litigation.[3] Collateral estoppel, on the other hand, operates when the causes of action are not identical.[4] When a court of competent jurisdiction has actually or necessarily determined[5] or impliedly decided[6] any issue, the determination is conclusive in all later litigation between the same parties or their privies.[7] New York courts in applying collateral estoppel have generally followed the traditional rubric[8] and demanded that the issues be identical,[9] the parties be the same or in privity[10] and the estoppels, mu-

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1. In re New York State Labor Relations Bd. v. Holland Laundry, Inc., 294 N.Y. 480, 493, 63 N.E.2d 68, 74 (1945); see Coca Cola v. Pepsi-Cola, 36 Del. 124, 128, 172 A. 260, 261 (Super. Ct. 1934); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 118, 134 N.E.2d 97, 98, 151 N.Y.S.2d 1, 3 (1956); Moore & Currier, Mutuality and Conclusiveness of Judgments, 35 Tul. L. Rev. 301, 307 (1961); von Moschzisker, Res Judicata, 38 Yale L.J. 299 (1929).

2. Mintzer v. Carl M. Loeb, Rhoades & Co., 10 App. Div. 2d 27, 29, 197 N.Y.S.2d 54, 58 (1st Dep't 1960).

3. Id. See Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 305-07, 165 N.E. 456, 457 (1929).

4. Mintzer v. Carl M. Loeb, Rhoades & Co., 10 App. Div. 2d 27, 29, 197 N.Y.S.2d 54, 58 (1st Dep't 1960).

5. See House v. Lockwood, 137 N.Y. 259, 33 N.E. 595 (1893); In re Edwards, 196 Misc. 997, 92 N.Y.S.2d 780 (Surr. Ct. 1949); cf. Statter v. Statter, 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957).

6. Pray v. Hegeman, 98 N.Y. 351, 358 (1885); Oldham v. McRoberts, 37 Misc. 2d 979, 237 N.Y.S.2d 937 (Sup. Ct. 1963), modified, 21 App. Div. 2d 231, 249 N.Y.S.2d 780 (4th Dep't 1964), aff'd mem., 15 N.Y.2d 891, 206 N.E.2d 358, 258 N.Y.S.2d 424 (1965).

7. Elder v. New York & Pa. Motor Express, Inc., 284 N.Y. 350, 352, 31 N.E.2d 188, 189 (1940); Friedman v. Park Lane Motors, Inc., 18 App. Div. 2d 262, 265-66, 238 N.Y.S.2d 973, 976-77 (1st Dep't 1963). See generally 5 J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 5011.24 (1966 ed). Many New York courts have failed to distinguish between res judicata and collateral estoppel. See 36 N.Y.U.L. Rev. 1158, 1159-60 & n.10 (1961).

8. The belief that one should be entitled to but "one day in court" on any issue justifies denying a party a second opportunity to litigate an issue. Israel v. Wood Dolson Co., 1 N.Y.2d at 119, 134 N.E.2d at 99, 151 N.Y.S.2d at 4. Conversely, a litigant's right to contest any claim in a court of law must not be abridged, for "[j]udicial finality . . . is a salutary doctrine only when it precludes unnecessary litigation without eliminating a litigant's day in court . . . ." Moore & Currier, supra note 1, at 301-02; accord, Commissioners of State Ins. Fund v. Low, 3 N.Y.2d 590, 595, 148 N.E.2d 136, 138, 170 N.Y.S.2d 795, 798 (1958).

9. See notes 5 & 6 supra. See also Restatement of Judgments § 68 (1942).

10. Privity limits the number of litigants against whom the judgment can be asserted.

tual.[11] The absence of mutuality of estoppel has often been used as the basis for denying a plaintiff the right affirmatively to conclude a defendant with a prior adjudication.[12] In a recent decision, however, the New York Court of Appeals ignored the mutuality rule and permitted a plaintiff affirmatively to estop a defendant with an earlier adjudication to which the plaintiff was neither a party nor privy.

A truck owned by plaintiff DeWitt and operated by one Farnum collided with defendant Hall's jeep. Farnum sued Hall for personal injuries, recovering a $5,000 verdict after a jury trial. Shortly after the termination of that lawsuit, plaintiff DeWitt initiated a second action against Hall, claiming $8,250 property damage to his truck. He moved for summary judgment upon the ground that the prior adjudication was res judicata on the question of Hall's liability for the accident. The defendant submitted no papers in opposition and the court granted the motion. The appellate division reversed,[13] but the court of appeals, in a four-to-three decision, reinstated the order of the trial court, overruled *Haverhill v. International Ry.*,[14] and held that there was "no reason either in policy or precedent to prevent"[15] the offensive use of a prior judgment by the plaintiff DeWitt. *B.R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

Mutuality of estoppel, the doctrine that the *DeWitt* court termed a "dead letter"[16] in New York, provides that a party cannot assert a prior adjudication unless he himself would have been bound by it had the result been different.[17] The inflexibility of the mutuality rule has never received too favorable an audience;[18] "[j]ust why a party who was not bound by a previous action should

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See Haverhill v. International Ry., 217 App. Div. 521, 522, 217 N.Y.S. 522, 523 (4th Dep't 1926), aff'd mem., 244 N.Y. 582, 155 N.E. 905 (1927); Restatement of Judgments § 83 (1942). In addition, due process requirements must be satisfied. Hansberry v. Lee, 311 U.S. 32 (1940); Romeo v. Western Express Co., 45 N.Y.S.2d 297 (Sup. Ct. 1943).

11. Coca Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 128, 172 A. 260, 261 (Super. Ct. 1934); Elder v. New York & Pa. Motor Express, 284 N.Y. 350, 352, 31 N.E.2d 188, 190, (1940); see Haverhill v. International Ry., 217 App. Div. 521, 526-27, 217 N.Y.S. 522, 527 (4th Dep't 1926), aff'd mem., 244 N.Y. 582, 155 N.E. 905 (1927). But see note 31 infra.

12. See note 33 infra.

13. B.R. DeWitt, Inc. v. Hall, 24 App. Div. 2d 831, 264 N.Y.S.2d 68 (4th Dep't 1965) (mem.).

14. 217 App. Div. 521, 217 N.Y.S.2d 522 (4th Dep't 1926), aff'd mem., 244 N.Y. 582, 155 N.E. 905 (1927). The parties and their positions in the suits were similar to the instant case.

15. B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 148, 225 N.E.2d 195, 199, 278 N.Y.S.2d 596, 602 (1967).

16. Id. at 147, 225 N.E.2d at 198, 278 N.Y.S.2d at 601.

17. See note 11 supra.

18 "Hence, the emphasis . . . is increasingly being put on the question whether a party has had his day in court on an issue, rather than on whether he has had his day in court on that issue as against a particular litigant." 65 Harv. L. Rev. 818, 862 & n.340 (1952). The focus of this note on mutuality does not imply that the rules governing privity and identity

be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend."[19] Throughout the jurisdictions there has been a growing tendency to relax the mutuality rule to permit a stranger to take advantage of an earlier adjudication.[20]

Prior to *DeWitt*, New York courts steered a middle-of-the-road course, "neither abrogating the requirement of mutuality completely nor regarding it as sacrosanct."[21] The approach taken was along the lines of an offensive-defensive distinction. One not a party to the original action often successfully asserted a prior adjudication defensively.[22] In *Good Health Dairy Products Corp. v. Emery*,[23] a truck owner and his driver had previously litigated and lost a negligence action against a car driver who was involved in a collision with the truck driver. The court held that the truck owner and driver were precluded from relitigating as plaintiffs the issue of negligence against the car owner. Rarely, though, has a stranger, i.e., one who would not have been bound had the judgment been otherwise, been able to use the judgment offensively.[24]

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of issues no longer plague the court. For a collection of the New York authorities on these points see generally 5 J. Weinstein, H. Korn & A. Miller, supra note 7, at ¶¶ 5011.26-5011.29 & 5011.32-5011.37.

19. Bernhard v. Bank of America Nat'l Sav. & Trust Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942). Advocates of mutuality justify it on several grounds. They point out that a determination of fact in a trial is only between the actual litigants or their privies, Hornstein v. Kramer Bros. Freight Lines, Inc., 133 F.2d 143, 145 (3d Cir. 1943); that its excluding effect on who may assert a prior adjudication is quite fair, Moore & Currier, supra note 1, at 310-11; and that abandonment of it might result in more, not less litigation. Id. at 309; see Note, 54 Harv. L. Rev. 889, 890 (1941). An extreme position taken by von Moschzisker, supra note 1 at 303, is that a rejection of mutuality "would always require a litigant to establish or defend his position to the utmost; whereas the law takes cognizance of the frailities of human nature and realizes that, even in litigation, one, because of consideration for his opponent or for other reasons personal to himself, may not desire either to establish or defend his position to the utmost, and that, for purposes of the particular case, he may admit facts or fail to meet evidence, which he would combat as against another opponent." See Moore & Currier, supra note 1, at 307 n.14 for a list of the rule's critics and proponents.

20. E.g., Graves v. Associated Transp., Inc. 344 F.2d 894 (4th Cir. 1965); Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

21. 36 N.Y.U.L. Rev. supra note 7, at 1166. This note provides an excellent treatment of the New York law on collateral estoppel.

22. E.g., Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937). See generally Riordan v. Ferguson, 147 F.2d 983, 993 (2d Cir. 1945) (dissenting opinion).

23. 275 N.Y. 14, 9 N.E.2d 758 (1937).

24. E.g., Elder v. New York & Pa. Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (1940); Haverhill v. International Ry., 244 N.Y. 582, 155 N.E. 905 (1927). There are only a handful of reported decisions allowing it to be used offensively. United Mutual Fire Ins. Co. v. Saeli, 297 N.Y. 611, 75 N.E.2d 626 (1947) (mem.); Liberty Mutual Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932); Anderson v. Third Ave. R.R., 9 Daly 487 (N.Y. Ct. C.P. 1881); Kinney v. State, 191 Misc. 128, 75 N.Y.S.2d 784 (Ct. Cl. 1947).

Israel v. Wood Dolson Co. stated in dicta that "although normally it is necessary that

Quatroche v. Consolidated Edison Co.[25] arose out of a collision between a taxicab carrying a passenger, and another automobile. The taxi's owner recovered for property damage to his cab. Thereafter, the passenger sued for personal injuries, pleaded the taxi owner's adjudication and sought summary judgment on the question of the car owner's liability. The court denied his request because he "was not a party to the first action" which "neither preclude[d] the plaintiff nor establishe[d] the defendant's liability in [the second] action."[26] In other words, the passenger could not demonstrate any mutuality of estoppel in respect to the initial suit by the owner of the taxicab.

Under the instant holding, a plaintiff can preclude an adversary who was a party in a previous action from relitigating certain issues, even though the former was not a party to the first suit and cannot show any mutuality.[27] In order for this result to be obtained, certain conditions must be satisfied. First there must be identity of issues;[28] second, the defendant must be unable to offer any valid reason why he should not be estopped; third, the defense in the prior action must be vigorous and with full opportunity to be heard;[29] and finally, the second plaintiff must demonstrate a derivative right to recover from the first plaintiff.[30]

In the instant case the prevailing plaintiff in the second action was the owner of the truck driven by the victorious party of the first suit. The truck owner sued only through the acts of the truck driver; all the legal rights and liabilities of the owner arising out of the accident were clearly derivative.[31] The instant court, holding that the only type of plaintiff who can plead collateral estoppel affirmatively is one who derives his right to recover from the previous plaintiff, would only permit offensive collateral estoppel to a plaintiff who, like the truck owner, sues not in his own right, but vicariously because of the relationship he bears to the first plaintiff.

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mutuality of estoppel exist, an exception is at times made where the party against whom the plea is raised was a party to the prior action and 'had full opportunity to litigate the issues of its responsibility.'" 1 N.Y.2d at 119, 134 N.E.2d at 99, 151 N.Y.S.2d at 4 (citation omitted). Such sweeping language could have marked the demise of mutuality. But later courts have not followed the Israel lead. See 36 N.Y.U.L. Rev., supra note 7 at 1163.

25. 11 App. Div. 2d 665, 201 N.Y.S.2d 520 (1st Dep't 1960) (mem.).

26. Id. at 665, 201 N.Y.S.2d at 521.

27. There is at least a theoretical distinction between, on the one hand, binding a defendant who as plaintiff in the prior action had the initiative and therefore presumably litigated to the utmost and, on the other hand, concluding a party who was a defendant in the first suit, since "a circumscribed defense may be the result, not of the defendant's voluntary choice, but of conditions imposed by plaintiff's use of the initiative." Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281, 303 (1957).

28. See notes 4 & 5 supra.

29. It is submitted that the second and third criteria can be read to constitute a single requirement since generally a defendant would only protest the estoppel if he could demonstrate that his defense in the first suit was inadequate.

30. B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 148, 225 N.E.2d 195, 199, 278 N.Y.S.2d 596, 601-02.

31. See Restatement of Judgments § 96 (1942).

Suppose, however, the truck owner recovered in the first suit, and, in the second, the truck driver tried to conclude the defendant on the issue of liability. The truck driver, since he derived neither rights nor liabilities from the truck owner, would not have succeeded if the principles enunciated in the instant case were applied. And yet such a result is incongruous. That it was the owner and not the driver who first sought recovery is a difference without a distinction and should not dictate a contradictory result.[32] In both situations the owner recovers only on the basis of an accident which the driver has suffered.

The case of the owner taking the initiative is essentially what occurred in *Elder v. New York & Pennsylvania Motor Express, Inc.*[33] That court refused to permit the driver to take advantage of the owner's adjudication against a common defendant because it was felt that to hold otherwise would "overturn fundamental concepts and overrule authorities."[34] *Elder* was decided over twenty years before *DeWitt*, and cases factually the same as *Elder* should be decided differently today.[35]

The requirement of derivative right to recover is troublesome not only in the driver-owner cases. A more fundamental problem is that cases like *Quatroche* and *Elder*, which refused to allow offensive collateral estoppel, have usually been based on the mutuality doctrine.

The *DeWitt* court stated that the doctrine of mutuality "has been so undermined as to be inoperative"[36] and that its "hypertechnical rule[s]"[37] have been replaced by the identity of issues test. This repudiation of the mutuality doctrine, however, was somewhat weakened by the court's insistence on a present derivative right to recover. Thus, the ghost of mutuality is still free to haunt later courts in situations where such derivative right is lacking.

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32. New York has usually permitted the party primarily responsible—the truck driver—to defensively assert a successful judgment in favor of the person secondarily liable—the truck owner. Wolf v. Kenyon, 242 App. Div. 116, 273 N.Y.S. 170 (3d Dep't 1934); Lasher v. McAdam, 125 Misc. 685, 211 N.Y.S. 395 (Sup. Ct. 1925), aff'd sub nom. Lasher v. Bieckelhaupt, 217 App. Div. 718, 215 N.Y.S. 876 (4th Dep't 1926) (mem.); Drier v. Randforce Amusement Corp., 17 Misc. 2d 389, 185 N.Y.S.2d 628 (Sup. Ct. 1959); accord, Spector v. El Ranco, Inc., 263 F.2d 143 (9th Cir. 1959); Giedrewicz v. Donovan, 277 Mass. 563, 179 N.E. 246 (1932); Jones v. Young, 257 App. Div. 563, 14 N.Y.S.2d 84 (3d Dep't 1939); cf. Riordan v. Ferguson, 147 F.2d 983, 988-93 (2d Cir. 1945) (dissenting opinion). But cf. Roberts v. Strauss, 108 N.Y.S.2d 733 (Sup. Ct. 1951). The rationale for this holding is that the same issues are litigated in both suits, though it would seem more consistent to reason the result on the basis of the offensive-defensive distinction. See Restatement of Judgments § 96, comment a at 473 (1942); Note, 23 Oregon L. Rev. 273 (1944).

33. 284 N.Y. 350, 31 N.E.2d 188 (1940).

34. Id. at 353, 31 N.E.2d at 190 (citation omitted).

35. There are situations in New York where a driver's contributory negligence could bar his recovery, even though the owner has been successful in his suit. Cf., e.g., Mills v. Gabriel, 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't), aff'd mem., 284 N.Y. 755, 31 N.E.2d 512 (1940).

36. 19 N.Y.2d at 144, 225 N.E.2d at 196, 278 N.Y.S.2d at 598. See notes 15, 21 & 23 supra and accompanying text.

37. 19 N.Y.2d at 146, 225 N.E.2d at 197, 278 N.Y.S.2d at 600. See note 10 supra.

The reason for the court's reluctance to license the wholesale use of offensive collateral estoppel undoubtedly reflects concern with cases like *Quatroche* that involve a multiple claimant situation in which two or more successive plaintiffs, who bear no relationship to one another, have causes of action against the same defendant on identical facts. The most common example is the automobile accident in which several pedestrians sustain injuries and each acquires a right to sue. If the mutuality rule had no application in this type of situation, then each plaintiff would be free to sue regardless of the outcome of the previous suits;[38] but the defendant, if he lost to any of the injured, would then be concluded against the remaining plaintiffs on the issue of his liability.

A handful of New York cases, in the multiple claimant situation, have permitted a stranger to the previous action to plead that adjudication against the common defendant.[39] This result recently was reached in *Quick v. O'Connell*,[40] which was decided shortly after *DeWitt*. A passenger injured in a two car automobile accident successfully sued the representatives of the deceased owner-operators of the vehicles involved. Subsequently, the administrator of a fellow passenger who was killed in the accident sued the same defendants and moved for summary judgment. The court, while holding that the issue of the decedent's contributory negligence had never been adjudicated, concluded the defendants on the issue of the drivers' liability for the accident and found that the "logic and reasoning in *DeWitt*"[41] were dispositive of the matter. This decision, a memorandum opinion of one of New York's trial courts, rests on shaky ground since it failed to take note of the derivative liability requirement of *DeWitt*, and it probably cannot be regarded as indicative of any post-*DeWitt* trend.

Other courts have applied collateral estoppel in the multiple claimant situation.[42] In *United States v. United Air Lines, Inc.*,[43] a mid-air collision resulted

38. The illustration commonly used by the commentators is the train crash in which fifty passengers are injured and the defendant railroad faces fifty potential suits. Currie, supra note 27. Professor Currie devised this illustration to show the unfairness which would be worked on the railroad if mutuality were abandoned and to emphasize the limitations of the broad dicta in Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), which is cited in B.R. DeWitt, Inc. v. Hall, 19 N.Y.S.2d at 145, 225 N.E.2d at 197, 278 N.Y.S.2d at 599.

39. Quirk v. O'Connell, 281 N.Y.S.2d 120 (Sup. Ct. 1967) (mem.); Kinney v. State, 191 Misc. 128, 75 N.Y.S.2d 784 (Ct. Cl. 1957); see Liberty Mut. Ins. Co. v. Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932).

40. 281 N.Y.S.2d 120 (Sup. Ct. 1967) (mem.). Contra, e.g., Quatroche v. Consolidated Edison Co., 11 App. Div. 2d 665, 201 N.Y.S.2d 520 (1st Dep't 1960) (mem.); Goodman v. Kirshberg, 261 App. Div. 257, 25 N.Y.S.2d 13 (1st Dep't 1941); Fallick v. Saporito, 154 N.Y.S.2d 154 (Sup. Ct. 1955); accord, Nevarov v. Caldwell, 161 Cal. App. 2d 763, 327 P.2d 111 (1958). But cf., Anderson v. Third Ave. R.R., 9 Daly 487 (N.Y. Ct. C.P. 1881).

41. 281 N.Y.S.2d at 121.

42. Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934 (1964); United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962), modified, 335 F.2d 379 (1964); Barbour v. Great Atl. & Pac. Tea Co., 143 F. Supp. 506 (E. D. Ill. 1956).

43. United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962), modified, 335 F.2d 379 (9th Cir. 1964).

in the death of all those aboard the two aircrafts. The representatives of twenty-four of the deceased travellers, in a consolidated action, established the defendant's liability. The representatives of other passengers, in a subsequent suit, were permitted to estop the defendant on the issue of liability. The court, while acknowledging that its holding contradicted the mutuality rule, pointed to the thoroughness and competence of defendant's counsel in the first action, the lengthy duration and completeness of the trial and the failure of the defendants to produce any new evidence.[44] These factors, the court reasoned, would have made it "a travesty . . . to now require these plaintiffs . . . to again re-litigate the issue of liability after it has been so thoroughly and consumately litigated . . . ."[45]

The logic of the *United Air Lines* court is persuasive, and the outcome of the case certainly accords with the expressed design of collateral estoppel.[46] Moreover, if a defendant realizes that a loss to a particular plaintiff will foreclose him from relitigating common issues with other plaintiffs it could be argued that he can defend to the hilt and an unfavorable judgment that subsequent plaintiffs could use against him would not be unfair.

Yet, where many potential plaintiffs are involved there is an element of unfairness in compelling a defendant to litigate with every possible plaintiff[47] but then foreclosing him from relitigating a material issue.[48] One possible solution, of course, is to limit the use of offensive collateral estoppel to instances where there are only two or three potential adversaries. But the difficulties inherent in deciding when and how many plaintiffs should profit from a judgment may demand hair line evaluations that the courts would rather not make. For these reasons the courts must exercise extreme caution in applying offensive collateral estoppel.

Cases involving multiple defendants will also have to be reevaluated in light of *DeWitt*. If a plaintiff has judgment against two co-defendants in a negligence action, should one tortfeasor be precluded from suing the other on the same set of facts? *Minkoff v. Brenner*,[49] a memorandum opinion by the court of appeals, answered this question in the negative. The majority in the instant court distinguished *Minkoff* because co-defendants do not litigate the question of

44. 216 F. Supp. at 729.

45. Id. at 728. In Zdanok v. Glidden, Co., 327 F.2d 944 (2d Cir. 1964), one group of employees successfully sued the defendant employer by utilizing a prior adjudication by other employees followed a similar line of reasoning. But in Ayala v. Airborne Transp., Inc., 282 App. Div. 486, 124 N.Y.S.2d 561 (1st Dep't 1953) (per curiam), representatives of four deceased passengers futilely attempted to estop the defendant with a favorable judgment obtained by the representatives of the remaining traveler.

46. See note 1 supra.

47. See note 9 supra.

48. A further consideration is the possible disparity between the damages sought in the two suits, a factor that may be pertinent in determining the zeal with which the defendant handled the first action. Compare the results and amounts in Fallick v. Saporito, 154 N.Y.S.2d 154 (Sup. Ct. 1955) with Barbour v. Great Atl. & Pac. Tea Co., 143 F. Supp. 506 (E.D. Ill. 1956).

49. 10 N.Y.2d 1030, 180 N.E.2d 434, 225 N.Y.S.2d 47 (1962) (memorandum decision), noted in 30 Fordham L. Rev. 820, 822-23 (1962).

liability *inter se*.[50] But if identity of issues is now the touchstone of collateral estoppel this explanation is subject to criticism.[51]

DeWitt is a decision of the future. Although Judge Breitel in his dissent claims that the "present rules . . . have subsisted for a long time and there is no great amount of . . . duplicated litigation,"[52] it cannot be doubted that if the instant case is the harbinger of a more wide open approach to the subject of collateral estoppel, a reduction in duplicated litigation must be forthcoming.[53]

DeWitt is both salutary and sound. New York, however, should broaden the holding of the case to enable a driver to plead a successful judgment recovered by an owner:[54] this enlargement will not abridge a defendant's day in court. On the other hand, in the multiple claimant area New York must weigh the interests of the parties and proceed with caution.[55]

The *DeWitt* case did not try to rephrase all the existing law dealing with collateral estoppel.[56] As one member of the bench has stated: "In examining the diffused mosaic which runs through the various decisions, one reaches the conclusion that the applicability of the doctrine of collateral estoppel turns largely

50. 19 N.Y.2d at 147, 225 N.E.2d at 198, 278 N.Y.S.2d at 601.

51. In Ordway v. White, 14 App. Div. 2d 498, 217 N.Y.S.2d 334 (4th Dep't 1961) (concurring opinion), Judge Halpern, writing shortly before Minkoff, opted that a defendant should be able to estop his fellow tortfeasor: "I do not believe that the Glaser case [232 App. Div. 119, 249 N.Y.S. 374, aff'd mem., 256 N.Y. 686, 177 N.E. 193 (1931). This decision involved facts and a result similar to Minkoff.] is any longer controlling, in view of the statutory and decisional changes in the law of this State which have occurred since the decision of that case. The theory of the Glaser case was that the codefendants in a passenger's action are adversaries only as to the plaintiff and not as to each other and therefore that, when one of the defendants is subsequently sued by the other, he cannot set up the finding of negligence in the passenger's action as res judicata.

. . . ."

"It is noteworthy that the Glaser case was not referred to in [m]any of the later decisions of the Court of Appeals . . . dealing with res judicata and collateral estoppel generally. The requirement of mutuality of estoppel has been virtually abandoned by these cases, and the right of persons who were not adversaries in the original litigation to use collateral estoppel defensively has been recognized in a variety of situations." Id. at 498, 500, 217 N.Y.S.2d at 335, 337.

Justice Goldman, writing the dissent in DeWitt in the appellate division, predicted that one day collateral estoppel would apply in a Minkoff situation. 24 App. Div. 2d at 833, 264 N.Y.S.2d at 71.

52. 19 N.Y.2d at 149, 225 N.E.2d at 200, 278 N.Y.S.2d at 603.

53. See note 1 supra.

54. See notes 31-34 supra and accompanying text.

55. See note 8 supra.

56. There is authority in New York for the proposition that collateral estoppel effect will be given to default judgments. Barber v. Kendall, 158 N.Y. 401, 53 N.E. 1 (1899); J.J. Miller Constr. Co. v. Berlanti Constr. Co., 197 N.Y.S.2d 818 (Sup. Ct. 1960). This is criticized in 5 J. Weinstein, H. Korn & A. Miller, supra note 7, at ¶ 5011.30. At first glance it seems inequitable to apply collateral estoppel affirmatively here. But if the damages sought in the second action are not substantially disproportionate to those obtained in the first suit and the defendant can furnish no reasonable explanation why he didn't defend initially, it does not seem unfair to bind him.

on the particular fact situation."[57] *DeWitt* does, however, represent a repudiation of the technicalities and unrealities of the common law rule of mutuality in favor of equity and practicality.

Constitutional Law—State Lending of Textbooks to Students in Denominational Schools.—The question of public aid to denominational schools, currently under consideration by the electorate, is one which has recurred throughout the history of this State. Although the focus of the present disagreement in New York centers about the state constitutional provision popularly known as the Blaine Amendment,[1] almost every other state has a similar provision specifically prohibiting public aid to religious schools.[2] Moreover, state aid to religious education presents a substantial federal question involving interpretation of the establishment of religion clause of the first amendment of the United States Constitution. The New York Court of Appeals recently held that a state statute[3] authorizing local school boards to lend textbooks to students of public and private schools, upon individual request, did not violate the state or federal constitutions.

Several local boards of education sought a declaratory judgment that a newly enacted provision of the Education Law,[4] permitting the lending of textbooks by local public school boards to private school students upon individual request, violated both the New York and United States Constitutions. Special term found the statute violative of both state and federal constitutions. The appellate division reversed, holding that plaintiffs had no standing to sue. The court of appeals ruled that the plaintiffs did have standing to sue but held 4-3 that since the statute in controversy provided aid directly to individual students and only collaterally to religious institutions, it did not violate the state constitution. Since the court felt that there was no question of aiding religious institutions, it concluded that no federal question concerning a violation of the establishment clause[5] was presented. *Board of Education v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 790, 281 N.Y.S.2d 799 (1967).

The Blaine Amendment provides:

> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution

57. B.R. DeWitt, Inc. v. Hall, 24 App. Div. 2d at 832, 264 N.Y.S.2d at 70 (4th Dep't 1965) (dissenting opinion). "The applicability of the concept of preclusion [collateral estoppel] should be decided on the basis of its validity and desirability in the situation." Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 56 (1964).

1. N.Y. Const. art. XI, § 4.

2. See 50 Yale L.J. 917 (1941).

3. N.Y. Educ. Law § 701(3) (Supp. 1967).

4. Id.

5. The establishment clause reads in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

The instant court noted that in the case of *Zorach v. Clauson*,[6] the court of appeals had warned against the dangers of complete non-cooperation between church and state[7] and went on to point out that the Blaine Amendment was merely intended to prevent aid to the religious institution itself, without forbidding aid to students who attend such schools.[8] The court noted, moreover, that the statement of legislative intent behind the statute[9] "belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children, regardless of their school affiliations."[10] The majority thus adopts the well known "child benefit" theory. This theory maintains that programs which provide transportation, books and similar services directly to private school students do not violate constitutional prohibitions on aid to religious institutions since the beneficiaries of such aid are the individual pupils and not the schools they attend.

The "child benefit" theory has been accepted by a number of state courts[11] and by the United States Supreme Court in the early case of *Cochran v. Board of Education*.[12] However, the instant court's adoption of the "child benefit" theory represents a change in judicial thinking in New York. This theory had been strongly rejected by the court of appeals in *Judd v. Board of Education*,[13] which has been called "[t]he leading case rejecting" the "child benefit" theory.[14] The *Judd* case involved a statute which provided for the transportation of religious students to and from school. The court held that the statute allowed for indirect aid to a denominational school and was thereby in violation of the Blaine Amendment.[15] In answer to the argument that the program merely provided aid to the pupil and not to the institution, the court stated: "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. It not only ignores the spirit, purpose and intent

6. 303 N.Y. 161, 100 N.E.2d 463 (1951), aff'd, 343 U.S. 306 (1952).

7. Id. at 172, 100 N.E.2d at 467.

8. 20 N.Y.2d at 116, 228 N.E.2d at 794, 281 N.Y.S.2d at 804.

9. N.Y. Sess. Laws 1965, ch. 320, § 1.

10. 20 N.Y.2d at 116, 228 N.E.2d at 794, 281 N.Y.S.2d at 804.

11. E.g., Borden v. Board of Educ., 168 La. 1005, 123 So. 655 (1929); Board of Educ. v. Wheat, 174 Md. 314, 199 A. 628 (1938); Chance v. Textbook Rating & Purchasing Bd. 190 Miss. 453, 200 So. 706 (1941).

12. 281 U.S. 370 (1930). In addition to the "child benefit" theory, the Court also accepted the argument that the aid provided is in the interest of the public welfare as the state is endowed with the public function of encouraging education.

13. 278 N.Y. 200, 211, 15 N.E.2d 576, 582 (1938).

14. Dickman v. School Dist., 232 Ore. 238, 251, 366 P.2d 533, 540 (1960), cert. denied, 371 U.S. 823 (1962).

15. 278 N.Y. at 217, 15 N.E.2d at 585 (1938).

of the constitutional provisions but, as well, their exact wording."[16] *Judd* also relied on the case of *Smith v. Donahue*,[17] which had disapproved the "child benefit" theory by way of dicta.[18] In addition, the "child benefit" theory has not been reaffirmed by the United States Supreme Court since *Cochran*,[19] despite a clear opportunity to do so in *Everson v. Board of Education*.[20] In *Everson*, the Court allowed aid to parochial students for transportation, but solely on the grounds that such aid was in the interest of the public welfare.[21] Mr. Justice Rutledge writing for the dissent in *Everson*, pointed out that the dichotomy between child benefit and school benefit is a false one.[22] Mr. Justice Rutledge's dissent was cited with approval by two recent state court decisions which also rejected the "child benefit" theory.[23]

The court in the present case admits that the statute may provide "collateral aid" to denominational schools but maintains that this is not yet the "indirect aid" proscribed by the state constitution.[24] The statement of the court in *Donahue* that "[i]t seems . . . to be giving a strained and unusual meaning to words if we hold that . . . books . . . when furnished for the use of pupils, is a furnishing to the pupils and not a furnishing in aid or maintenance of a school of learning,"[25] appears more consistent with logic and the constitutional intent than the court's fine distinction between "collateral" and "indirect."

While the court of appeals has created a new category of "collateral" aid to religious institutions, it has failed to indicate the proper criteria for distinguishing between collateral and constitutonal aid and indirect and unconstitutional aid. If the lending of textbooks remains collateral aid, what of the lending of athletic equipment, laboratory material or school facilities? Are these to be "collateral," "indirect," "direct," or solely for the benefit of the pupils? The confusion flowing from discussion of the "child benefit" theory reflects the basic weakness of the theory itself. Obviously, both institution and child are benefited by any form of aid which is given by the state to private education. For both school and pupil are mutually dependent, and a benefit to one inevitably results in a benefit to the other. Thus, by supplying textbooks to students at denominational schools, the state relieves denominational schools of the burden of supplying such books themselves. Even in those cases where it is the responsibility of the individual pupil to purchase his texts, the school will indirectly benefit by being able to raise fees.

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16. Id. at 211, 15 N.E.2d at 582.

17. 202 App. Div. 656, 195 N.Y.S. 715 (3d Dep't 1922).

18. Id. at 664, 195 N.Y.S. at 721-22.

19. In Cochran, the "child benefit" theory was approved in the context of the fourteenth amendment rather than the first amendment. 281 U.S. at 374-75.

20. 330 U.S. 1 (1947).

21. Id. at 17.

22. Id. at 49.

23. Dickman v. School Dist., 232 Ore. 238, 252, 366 P.2d 533, 541 (1961), cert. denied, 371 U.S. 823 (1962); Matthews v. Quinton, 362 P.2d 932 (Alas. 1961), cert. denied, 368 U.S. 517 (1962). See also Visser v. School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949).

24. 20 N.Y.2d at 116, 228 N.E.2d at 794, 281 N.Y.S.2d at 804.

25. 202 App. Div. at 664, 195 N.Y.S. at 722.

The instant court's creation of the new category of "collateral" aid to denominational schools seems little more than a device for circumventing the Blaine Amendment's broad prohibition of indirect aid. Exceptions to Blaine's sweeping prohibition of indirect aid should be permitted only in accord with intent of the framers of the constitution. The amending of Blaine to allow a specific exception for programs of transportation clearly implies that other forms of indirect aid have been disallowed. To permit other forms of indirect aid, amendment of Blaine would be the proper method, not the judicial creation of a spurious category of collateral aid.

The instant court's dismissal of the Federal Constitutional question, apparently on the assumption that Blaine is more restrictive than the establishment clause, is open to question. The first Supreme Court case to consider the question of aid to religious schools in connection with the establishment clause was *Everson v. Board of Education*.[26] In *Everson*, the Court sustained a program of reimbursement to parents of denominational students to offset the costs of transportation to school, noting that the program approached the "verge" of the constitutional prohibition.[27] The Court reasoned, however, that the statute was sufficiently distinct from the educational process so as to come under the heading of allowable public welfare legislation.[28] Mr. Justice Black's language is critical to a full consideration of this problem. After comparing the providing of transportation with the public welfare protection given to religious students by the police department, the fire department and other public welfare bodies, he states: "Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment."[29] The Court urged that to deny this program to denominational school students would convert the state's position from neutrality to hostility.[30]

If the providing of transportation approached the "verge" of the constitutional prohibition, the question remained—what aid would be sufficient to cross the line? The answer was found when the Board of Education in Champaign County, Illinois, cooperated with the local Religious Council in a "released time" program. Under the plan, public school facilities were turned over for 45 minutes each week to the Council which provided the private religious instruction. Nonparticipating students were required to move to another part of the building to continue their studies. The Supreme Court in *McCollum v. Board of Education*[31] held that these facts "show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education."[32]

26. 330 U.S. 1 (1947).
27. Id. at 16.
28. Id. at 17-18.
29. Id. at 18.
30. Id. at 16, 18.
31. 333 U.S. 203 (1948).
32. Id. at 209.

The line separating permissible from proscribed aid lies, therefore, between the fact patterns in *Everson* and *McCollum*. The Court in *Everson* found the transportation program to be constitutional because it could so easily be identified with the police and public welfare function of the state and was sufficiently disconnected from the educational process so as not to constitute an establishment of religion.[33] The Court concluded that the "legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[34] In *McCollum*, on the other hand, the released time plan was such as to throw both the financial support and influence of the state behind a program of religious education.[35]

While a program which involves the lending of textbooks may not place the influence of the government behind religious education to the same extent as the released time program in *McCollum*, it certainly is far more involved in the educational process than is a program of transportation. It is inconceivable that a school may function today without books. In addition to the teacher, textbooks represent the critical factor in education. As was noted above, the new textbook lending law will provide, at the minimum, indirect financial aid to religious schools. In addition to financial aid which the state program will provide to religious institutions, there is a clear possibility that the textbook program may involve the state in the process of religious education. For it would be only fair to assume that in the choosing of textbooks, the advice of all local educational institutions, public and private, would be both sought and actively offered once the students attending these institutions are scheduled to receive the books in question. Moreover, the involvement of personal relationships, political considerations and community pressures in the choosing of texts seems an unavoidable prospect.

The lending of textbooks is far from the exercise of the police and public welfare powers of the state which were used to justify the transportation program in *Everson*.[36] Such was the opinion of the Oregon Supreme Court in *Dickman v. School District*[37] in a similar case involving the lending of textbooks, and of the Supreme Court of Vermont in *Swart v. School District*,[38] which struck down a program of tuition subsidy to parochial school students.

In his concurring opinion in *McCollum*, Mr. Justice Frankfurter stated: "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not a fine line easily overstepped."[39] The state's lending of textbooks to students in denominational schools, with the resulting financial aid to religious

33. 330 U.S. at 18.

34. Id.

35. 333 U.S. at 209, 212. In Zorach v. Clauson, Justice Douglas wrote: "[G]overnment may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education . . . ." 343 U.S. 306, 314 (1952).

36. 330 U.S. at 17-18.

37. 232 Ore. 238, 252, 366 P.2d 533, 540-41, cert. denied, 371 U.S. 823 (1962).

38. 122 Vt. 177, 188, 167 A.2d 514, 520-21, cert. denied, 366 U.S. 925 (1961).

39. 333 U.S. 203, 231 (1948).

institutions and the possibility of state involvement in religious education, reduces this wall of separation to a fine line, easily overstepped.

Constitutional Law—Student's Right to Counsel at Disciplinary Hearing. —Though constitutional rights may not be curtailed at an administrative hearing,[1] the courts have held that the requirements of due process at an administrative hearing are less stringent than at a formal trial.[2] Thus, right to counsel has not generally been considered necessary to fulfill due process requirements at an administrative hearing.[3] However, a recent decision by the New York Supreme Court has held that the Department of Education may not deprive a student of regents privileges[4] without an authorized hearing at which the student enjoys the assistance of counsel.

Marsha Goldwyn, a sixteen year old high school senior, was accused of smuggling notes into a regents examination. After she had finished the examination, Marsha was taken to the Acting Principal's office. The Acting Principal questioned her about the notes, and she wrote a statement which said that she had written the notes during the first half hour of the examination. The Acting Principal then asked her to rewrite the notes in order to determine if it could be done in a half hour. Marsha had not completed rewriting one quarter of the notes in twenty minutes. The notes were then given to a stenographer, and even though she had familiarized herself with them, she was unable to type them within thirty minutes. There was also a negative correlation between the notes and the questions asked on the examination.[5] Marsha then signed a statement admitting she brought the notes into the examination, but she retracted the statement the next day. Throughout the investigation "Marsha was in a highly excited, emotional state and in tears."[6] The Acting Principal wrote to the Department of Education, and on the basis of this letter, Marsha's regents privileges were suspended. Marsha's parents obtained counsel who wrote to the President of the

1. See Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954); Greenbaum v. Bingham, 201 N.Y. 343, 94 N.E. 853 (1911).

2. See generally Annot., 58 A.L.R.2d 903 (1958).

3. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert denied, 368 U.S. 930 (1961); Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y. 1967). But see Cosme v. Board of Educ., 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), aff'd mem., 27 App. Div. 2d 905, 281 N.Y.S.2d 970 (1st Dep't 1967). In addition the right of an infant to counsel in juvenile proceedings has recently been guaranteed even though the proceedings are not criminal. Kent v. United States, 383 U.S. 541 (1966); In re Gregory W., 19 N.Y.2d 55, 224 N.E.2d 102, 277 N.Y.S.2d 675 (1966).

4. Regents privileges enable a student to take examinations in order to obtain a regents diploma.

5. Brief for Respondent at 3.

6. 54 Misc. 2d at 95, 281 N.Y.S.2d at 901.

Board of Education of the City of New York complaining that the investigation constituted a denial of due process. The Assistant Superintendent of Schools answered the letter offering to hold a conference which counsel could attend but as an observer only. Under these circumstances, on the advice of counsel, Marsha and her parents refused to attend the hearing. The hearing was held without them in New York City on March 10, 1967, and the decision to suspend Marsha's regents privileges was upheld. An action under Article 78 of the N.Y. C.P.L.R. to reinstate Marsha's privileges was then commenced, and the court granted her petition. In so doing, the court held that Marsha had been denied due process since she was not allowed a hearing where she could defend herself with the assistance of counsel. *Goldwyn v. Allen*, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967).

The decision focused on two basic rights: the right to a hearing, and the right to counsel at that hearing. Since the hearing which Marsha's parents were offered could have brought about neither a reversal nor an affirmance of the decision of the Acting Principal (because the Assistant Superintendent was not empowered by the regulations of the Board of Regents to call such a hearing),[7] the decision as to the right to a hearing was clearly correct.[8]

The court's ruling on the right to counsel, however, is questionable. While it was agreed by both parties that due process may not be denied at an administrative hearing,[9] the respondents argued that since petitioner had already finished her compulsory education and would be awarded a general diploma, she had not been deprived of a property right and did not have the right to counsel.[10] Petitioner argued that a regents diploma is so important that what amounts to a property right was involved, and therefore she should have been allowed counsel.[11]

Far from being inflexible, "the requirements of due process frequently vary with the type of proceeding . . . ."[12] The nature of the particular rights being

7. Id. at 98, 281 N.Y.S.2d at 904.

8. The hearing was quasi-judicial, as the petitioner argued. Brief for Petitioner at 10. It was not simply administrative as the respondent argued. Brief for Respondent at 12. An administrative act is quasi-judicial if "[i]t depends upon the ascertainment of the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined." Hecht v. Monaghan, 307 N.Y. at 469, 121 N.E.2d at 425. See also Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908). It is well settled that during a quasi-judicial administrative action there is the right to notice and to a hearing. See note 1 supra. Since the hearing would have been ineffective, there was neither notice nor a hearing granted to petitioner.

9. Brief for Respondent at 17; Brief for Petitioner at 10.

10. Brief for Respondent at 14-15 (by implication).

11. Brief for Petitioner at 4, 7.

12. Hannah v. Larche, 363 U.S. 420, 440 (1960). "In general, due process of law stands for protection against the arbitrary exercise of the powers of government, assures adherence to the fundamental principles of justice and fair play, and in proceedings of a judicial nature looking to a deprivation of life, liberty, or property entitles the person proceeded against to notice and an opportunity to be heard as a matter of right." 1 N.Y. Jur. Administrative Law § 123 (1958) (footnotes omitted).

adjudicated, or the power being exerted by the administrative board should determine whether right to counsel is a requirement of due process in a particular proceeding.[13] That the requirements of due process become more strict as the question being adjudicated becomes more serious can be seen from the recent decision of the Supreme Court in *Miranda v. Arizona*.[14] Since one's liberty is the most serious question that can be determined by a court, it seems correct to grant right to counsel where that liberty is in jeopardy. Whether the opportunity to earn a regents diploma merits similar safeguards is to be considered.[15]

The leading case dealing with the requirements of due process at a school hearing is *Dixon v. Alabama State Board of Education*.[16] In that case a student faced expulsion from a tax-supported university. The court did not hold that right to counsel must be granted,[17] but rather that a weighing process should be used to determine what will fulfill the requirements of due process: "The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and interests of the parties involved."[18] This balancing test is well illustrated by two cases, *Madera v. Board of Education*,[19] and *Cosme v. Board of Education*.[20] In *Cosme*, a suspended student, already attending another school, was denied right to counsel. In *Madera*, however, a student facing a possible transfer to reform school and denial of his liberty was allowed counsel. By holding that due process necessitates right to counsel, the instant court equated, in terms of the due process protection required, the possible loss of a regents diploma with the possible loss of liberty, and made stricter than ever before the constitutional protections afforded a student at a disciplinary hearing.

The case under discussion hinges on the importance of a regents diploma. Clearly, a regents diploma is of less value than one's liberty. However, if the diploma is sufficiently important that it may be truly said that a student has a property right in it, then a student facing loss of his regents diploma for disciplinary reasons may be entitled to counsel.[21] If it is merely a privilege to

13. Palko v. Connecticut, 302 U.S. 319, 327 (1937) (by implication); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

14. 384 U.S. 436 (1966).

15. The court pointed out, however, that Miranda does not apply to the instant situation. 54 Misc. 2d at 99, 281 N.Y.S.2d at 906.

16. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); see Morrison v. City of Lawrance, 186 Mass. 456, 72 N.E. 91 (1904); People ex rel. Bluett v. Board of Trustees of the Univ. of Ill., 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956), 58 A.L.R.2d 899 (1958); State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942); Smith v. Board of Educ., 182 Ill. App. 342 (1913). See generally Annot., 58 A.L.R.2d 903 (1958).

17. 294 F.2d at 159.

18. Id. at 155.

19. 267 F. Supp. 356 (S.D.N.Y. 1967). The same decision as in the Madera case was reached in Geiger v. Milford School Dist., 51 Pa. D. & C. 647 (C. P. Pike County 1944).

20. 50 Misc. 2d 344, 270 N.Y.S.2d 231 (Sup. Ct. 1966), aff'd mem., 27 App. Div. 2d 905, (1st Dep't 1967).

21. But see Suess v. Pugh, 245 F. Supp. 661 (N.D. W.Va. 1965). "[T]he right to legal counsel must be found in the Constitution of the United States under the Fifth or Sixth Amendment or by some Act of Congress or some rule or regulation of an agency or

receive a regents diploma, then due process would be complied with by a decision that was not arbitrary or capricious,[22] and counsel would be unnecessary. The court reasoned that a regents diploma is so valuable as a prerequisite to higher education and to future employment, that a student has a property right in it: "Any future employer of infant petitioner, who may require a high school education, and any institution of higher learning to which she may seek admission will not accept her affirmation of her educational attainments without a high school diploma as evidence thereof."[23] This property right, the court held, cannot be taken away without allowing a student the active assistance of counsel.[24] While it is undisputed that a regents diploma does have value, neither the value of the regents diploma as a prerequisite to college, nor its value as an employment credential, requires the holding that a student has a property right in it. It has, for example, been consistently held in support proceedings that an infant has no right to a college education.[25] "Unlike the furnishing of a common school education to an infant, the furnishing of a classical or professional education by a parent to a child is not a 'necessary,' within the meaning of that term in law."[26] If the courts refuse to force parents to furnish college education for their children, even when parents are financially able to do so, it would seem that not only does a child have no right to a college education, vis-à-vis the parents, but no right, vis-à-vis society as a whole.

Moreover, while one has a right to earn a living, it is a privilege to be able to exercise that right with the aid of a regents diploma. The court argues that "[i]f, by reason of the socio-economic factors of our times an individual may not be deprived of an equal opportunity to obtain whatever education may be provided by a State . . . then a fortiori one may not be arbitrarily deprived of whatever certificate, diploma or other evidence of that education may be provided."[27] Although it is true that a state which provides for education must

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administrative tribunal under which the individual functions. The Court is unable to perceive that there is any Constitutional right of counsel in a civil case or in a civil matter pending before an administrative agency. The right to counsel under the Sixth Amendment clearly applies to criminal cases only." Id. at 665.

22. In Weiman v. Updegraff, 344 U.S. 183 (1952), the court stated that even though there may not be an abstract right to public employment, "[i]t is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Id. at 192; see N.Y. C.P.L.R. § 7803.

23. 54 Misc. 2d at 99, 281 N.Y.S.2d at 905.

24. Id.

25. See generally Wrightsel, College Education as a Legal Necessary, 18 Vand. L. Rev. 1400 (1965).

26. Halsted v. Halsted, 228 App. Div. 298, 299, 239 N.Y.S. 422, 424 (2d Dep't 1930); see Wagner v. Wagner, 51 Misc. 2d 574, 273 N.Y.S.2d 572 (Sup. Ct. 1966) (a father could not be compelled to pay for college education). Contra, Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960); Cohen v. Cohen, 193 Misc. 106, 82 N.Y.S.2d 513 (Sup. Ct. 1948) (a father was compelled to pay for college education even though it was not a necessary). But see "Samson" v. "Schoen", 204 Misc. 603, 121 N.Y.S.2d 489 (Dom. Rel. Ct. 1953) where the court in discussing Cohen v. Cohen, supra, said, "[h]owever, such decisions are exceptional . . . ." Id. at 609, 121 N.Y.S.2d at 494.

27. 54 Misc. 2d at 99, 281 N.Y.S.2d at 905 (citation omitted).

provide equally for all, there is no specific level of education that all states must provide. In fact, the courts have clearly implied that states need not provide for education at all, as long as they do not provide education for some to the exclusion of others equally qualified.[28] It would seem that what a state need not provide, is a privilege when provided. Thus, since New York State has the power to eliminate the regents program,[29] it is offered merely as a privilege. Since it is a privilege and not a right which is at stake, it does not logically follow, as the court asserts, that right to counsel is necessary in order to assure that a hearing will be neither arbitrary nor capricious.

Since the Board does not have counsel at a hearing of this type, and petitioner would not be subject to questioning by opposing counsel, it does not seem necessary to allow petitioner to have counsel at the hearing. In addition, petitioner does have the right to appeal a decision by the Board under Article 78 of the N.Y. C.P.L.R., and at this appeal, counsel is permitted.[30]

Although the court expressly restricts its holding to the "context of the regents examinations and the rules and regulations governing those examinations,"[31] it would seem that if the reasoning followed by the instant court is valid, then it should be equally applied in analogous educational disciplinary proceedings. Surely a general high school diploma or a private school certificate also has considerable value. To hold that the possible loss of a regents diploma is sufficiently important to require right to counsel but that potential loss of a general high school diploma or private school certificate is not, would be inconsistent.[32]

If counsel is granted where a student is accused of cheating on a regents examination, why then would counsel not be granted a student faced with eventual loss of his regents privileges for violation of other regulations? Should the student who wears metal heel plates in violation of a school regulation be allowed a lawyer?[33] Surely the student who wears face powder,[34] or a Viet Nam

28. In the case of James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959), there was an attempt to close part of the schools in order to avoid the Supreme Court's desegregation order. The court held that if some of the schools were closed, they would all have to be closed. Brown v. Board of Educ., 347 U.S. 483 (1954), stated while discussing the opportunity for education that "where the state has undertaken to provide it, [education] is a right which must be made available to all on equal terms." Id. at 493. Similarly, the Supreme Court in Griffin v. County School Bd., 377 U.S. 218 (1964) stated, "[w]hatever non-racial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one . . . ." Id. at 231.

29. N.Y. Const. art. XI, § 2 gives the legislature power to diminish the regents program.

30. "[M]ere postponment of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931).

31. 54 Misc. 2d at 100, 281 N.Y.S.2d at 906.

32. See generally Comment, 10 St. Louis U.L.J. 542 (1965-66), which concludes with the statement that private schools "must be very careful to conform to the procedures that courts have demanded of public colleges and universities in expulsion cases." Id. at 547. See also Comment, 10 Stan. L. Rev. 746 (1957-58).

33. Stromberg v. French, 60 N.D. 750, 236 N.W. 477 (1931).

34. Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).

arm band,[35] in violation of school regulations could lose his regents privileges. In one case it was held that a student could not return to school until he cut his hair.[36] Although the student was granted a hearing before the school committee, he was not represented by counsel.[37] If the logic of the instant case is followed, however, every student will be able to call his lawyer instead of his barber. The instant court does note that *Cosme* is distinguishable from the case at bar because the hearing in that case was before school officials and was not punitive in nature. However, it would seem that the reasoning of the instant court would apply to any of the above situations where the action was or could be of a punitive nature. The fact that a hearing might be before school officials rather than the Department of Education does not alone place the hearing in a position similar to that in *Cosme* if the punishment could result in an eventual loss of regents privileges. In fact, the court does not suggest who should hold the hearing, and its decision opens the path for the student to have representation before the principal or even the teacher, thereby making more difficult the job of today's educators.

The petitioner argued that since the rule of the State Education Department did not provide for notice, hearing and the right to counsel prior to suspension of Marsha's regents privileges, it was unconstitutional.[38] Although the court did not explicitly decide this issue, by granting a hearing where due process protections are required, it effectively declared the rule unconstitutional. It is well settled law in New York State that the validity of a statute is measured not by what has been done, but by what could have been done under the statute,[39] and under the rule involved, the right to counsel could be, and indeed had, in the instant case, been denied. If the rule concerned with regents examinations is unconstitutional, then statutes concerned with suspension or revocation of licenses should, if similar reasoning be employed, also be unconstitutional to the extent that they do not provide for the right to counsel but only for notice and a hearing.

In order to earn a living as a pawnbroker, one must obtain a license, but the license can be revoked by the mayor of the city, and there is no provision for the right to counsel.[40] Similarly, an individual may not engage in the practice of selling tickets (for passage) unless he procures a license, and such license may be revoked after notice and an opportunity to be heard, but there is no provision for the right to counsel.[41] Nor can one sell theatre tickets without a license, and such license may be revoked without the right to counsel.[42]

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35. Tinker v. Des Moines Independent Community School Dist., 258 F. Supp. 971 (S.D. Iowa 1966).

36. Leonard v. School Comm., 349 Mass. 704, 212 N.E.2d 468 (1965).

37. Id.

38. Brief for Petitioner at 2.

39. Stuart v. Palmer, 74 N.Y. 183 (1878).

40. N.Y. Gen Bus. Law § 41.

41. N.Y. Gen. Bus. Law § 152.

42. N.Y. Gen. Bus. Law § 169-a.

An employment agency,[43] furniture store,[44] milk plant,[45] farm produce dealership,[46] liquor store,[47] private trade school,[48] or insurance agency,[49] may not be operated without the required license, and these licenses may each be revoked or suspended simply by giving notice and an opportunity to be heard, but there is no right to be represented by counsel.

It would seem that if counsel is to be granted for a hearing where a regents diploma is involved, then counsel should also be granted during proceedings before the local draft board to determine one's classification. However, it has been held in *United States v. Sturgis*,[50] that during these proceedings before the local board, counsel may not even be present.

In summary, if receiving a regents diploma is considered a privilege, as it should be, then according to the test put forth in *Dixon*, a fair hearing and notice should fulfill the requirement of due process, and there should be no need for granting the right to counsel.[51] However, if receiving a regents diploma is considered a right, then the court's reasoning should be applied to, and right to counsel extended to analogous educational disciplinary proceedings, and many licensing statutes should be declared unconstitutional for failing to provide for right to counsel.

The application of legal procedures to disciplinary actions in educational institutions might indeed prove disruptive of traditional educational processes. For, as a New York Times editorial has pointed out: "A student should have assurance of a fair hearing within the school system and recourse to appeals to higher education authorities, if necessary to the State Education Commissioner. But to reduce issues of grades to a matter of winning cases invites educational chaos."[52]

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43. N.Y. Gen. Bus. Law § 189.
44. N.Y. Gen. Bus. Law § 388.
45. N.Y. Agric. & Mkts. Law § 258(c).
46. N.Y. Agric. & Mkts. Law § 251(e).
47. N.Y. Alco. Bev. Control Law § 119.
48. N.Y. Educ. Law § 5001.
49. N.Y. Ins. Law § 40(6).
50. 342 F.2d 328 (3d Cir.), cert. denied, 382 U.S. 879 (1965).
51. 294 F.2d at 155. The court required that notice and a hearing would suffice but stated, "[t]his is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out . . . . In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf . . . . If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled." Id. at 159. See also 75 Harv. L. Rev. 1429 (1962).
52. N.Y. Times, July 12, 1967, at 42, col. 2 (Editorial).

Criminal Law—Two Approaches to Defining Custody under *Miranda*. —In *Miranda v. Arizona*,[1] the Supreme Court held that statements made by a defendant at a "custodial interrogation" are inadmissible, at least as direct evidence, unless the defendant had been fully informed beforehand of his constitutional rights.[2] *Miranda* raised several practical problems.[3] Of these, one of the most fundamental is the meaning of "custodial interrogation."[4] The Court's guideline definition is at best ambigious: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[5] The Court's notes are of little more practical help.[6] Since the Court apparently rejects formal arrest as the only criterion for marking the commencement of custody,[7] there exists an area of confusion wherein an unarrested and unwarned defendant's statements may or may not be admissible depending on whether or not he made the statements while in "custody or otherwise deprived of his freedom of action in any significant way."

In the instant case, the defendant allegedly fled the scene of an accident in violation of N.Y. Vehicle & Traffic Law section 600.[8] Witnesses to the accident gave the investigating police officer the car's license number and description and reported that a woman was driving. Two and a half hours after the accident, having traced the car to the defendant, the officer arrived at her home and questioned her outside the house. At no time did he give the

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1. 384 U.S. 436 (1966).

2. Id. at 444-45. The warnings concern the interrogee's rights to remain silent, to know anything he says can be used against him, to have counsel present (free counsel if needed), and to waive the above rights only by deliberate, intelligent and revocable choice.

3. See White, Recent Developments in Criminal Law, Part Two, 158 N.Y.L.J. No. 29, at 4 (1967).

4. The starting point for nearly all cases determining admissibility under Miranda is a determination as to whether the defendant was in "custody" when questioned. This is true even when the warnings have been given and only the intelligence of an alleged waiver is questioned. Evans v. United States, 377 F.2d 535 (5th Cir. 1967). Tax cases since Miranda, however, have been divided as to whether the warnings must be given at some time before there is any question of physical custody. Cases are generally discussed in United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967).

5. 384 U.S. at 444.

6. Id. at 444 n.4, 478 n.46.

7. See, e.g., People v. Arnold, —— Cal. 2d ——, 426 P.2d 515, 58 Cal. Rptr. 115 (1967); People v. Allen, 50 Misc. 2d 897, 272 N.Y.S.2d 249 (Sup. Ct. 1966), rev'd mem., 28 App. Div. 2d 724, 281 N.Y.S.2d 602 (2d Dep't 1967); Commonwealth v. Jefferson, 423 Pa. 541, 226 A.2d 765 (1967).

8. The section specifies that its violation is a misdemeanor. N.Y. Veh. & Traf. Law § 602 authorizes a police officer to arrest a violator of § 600 without a warrant. Defendant's alleged commission of a misdemeanor as opposed to a traffic violation or infraction distinguishes her case from others which have held the Miranda warnings inapplicable to vehicular incidents. State v. Zucconi, 93 N.J. Super. 380, 226 A.2d 16 (App. Div. 1967); People v. Bliss, 53 Misc. 2d 472, 278 N.Y.S.2d 732 (Allegany County Ct. 1967).

warnings prescribed in *Miranda*. He issued a summons and left. At a preliminary hearing brought to ascertain the admissibility of the defendant's admissions to the officer, the court refused to suppress the statements on the ground that since the defendant was "free to go" during the interrogation and was not in any "police dominated environment 'unfamiliar' and 'menacing' to [her]," she was not in custody and hence not entitled to the *Miranda* warnings. *People v. Schwartz*, 53 Misc. 2d 635, 279 N.Y.S.2d 477 (Suffolk County Dist. Ct. 1967).

The grounds mentioned by the instant court for finding non-custody suggest both of the two approaches taken by courts ruling on the admissibility of interrogations of unwarned and unarrested defendants during trials commenced after June 13, 1966.[9] One test decides the issue of custody objectively by looking for restraint upon the defendant's freedom of movement. The second test determines the existence of custody by looking to the defendant's reasonable apprehension of custodial status.

Most courts have taken an objective approach, probably in response to the pessimism with which law enforcers greeted *Miranda*. Such courts have evolved somewhat technical and conflicting rules to determine when an unwarned and unarrested defendant is actually in custody so as to make his answers inadmissible. In using the objective test, courts look to limitation of movement, police intent to detain and the existence of probable cause to arrest. Obviously, a formal arrest or actual physical restriction of a suspect's freedom of movement would preclude the necessity of determining whether the intent of the police to detain or the existence of probable cause rendered the interrogation custodial. In the absence of formal arrest or actual physical restraint, however, intent to detain or probable cause might circumstantially establish custody.[10] Police intent is most often determined inferentially from evidence of probable cause. Thus in one case, where police officers stopped and questioned three unwarned persons in circumstances which made them suspected burglars, all their admis-

9. The date Miranda was decided. Johnson v. New Jersey, 384 U.S. 719 (1966), held that the Miranda rules need not apply in trials commenced before the date of the Miranda decision. Most courts have declared the Miranda rules not retroactive. E.g., People v. McQueen, 18 N.Y.2d 337, 221 N.E.2d 550, 274 N.Y.S.2d 886 (1966).

10. Use of police intent and probable cause as components is illustrated in People v. Glover, 52 Misc. 2d 520, 276 N.Y.S.2d 461 (Sup. Ct. 1966). "This pronouncement [the Court's definion of custodial interrogation in Miranda] seems to say that the fact of custody alone is sufficient to invoke the mandated warnings. The difficulty with this conclusion, however, is that in the absence of avowed intention (more often than not), a finding of 'custody' depends on the subjective intention of the police officers. This in turn depends at times on how much knowledge the police possess (not always reflected on the record) and, at others, on whether the course of police interrogation appears to be routine investigation or questioning aimed at eliciting a confession or admission." Id. at 523, 276 N.Y.S.2d at 465 (emphasis omitted). People v. Allen, 50 Misc. 2d 897, 272 N.Y.S.2d 249 (Sup. Ct. 1966), rev'd mem., 28 App. Div. 2d 724, 281 N.Y.S.2d 602 (2d Dep't 1967) held, however, that the defendant was not entitled to Miranda warnings where the policeman admitted subjective intent to detain but where the court found no physical detention. See, N. Sobel, The New Confession Standards, "Miranda v. Arizona" 58-63 (1966).

sions were suppressed since police intent to detain was inferred from the existence of probable cause to detain at the beginning of the questioning.[11] But other courts, even where the police had probable cause to arrest the unwarned defendant at the outset of the interrogation, have refused to suppress the statements of subsequently arrested defendants.[12] The ground cited to justify such decisions is usually a finding of insufficient limitation of defendant's freedom of movement. In the instant case, for example, the investigating officer had established probable cause to arrest the defendant before he arrived at her home and had appropriate authority to arrest her, but the court found that she was "free to go" during the interrogation.[13]

Additional problems occur in the application of these objective tests to "general on-the-scene interrogation" and "routine questioning." Some courts have held that a single incriminating statement to police is the cut-off time before which statements are admissible and after which statements are inadmissible.[14] Others have ruled admissible one or more statements by an unwarned defendant who had already tended to incriminate himself by prior statements[15] or who was already suspected on the basis of prior police knowledge coupled with statements which were incriminating in light of the police knowledge.[16]

The instant case suggests a modification of the objective test. When the court stated as one ground for its holding the fact that the defendant was not questioned in any "police dominated environment 'unfamiliar' and 'menacing' to [her]," it implied that a defendant's subjective apprehension of custodial status might determine the existence of "custody" during the interrogation of an unwarned and unarrested defendant. So far, the subjective approach has been given only limited employment by the courts. In holding *Miranda* applicable to juvenile procedures, one court implied that there are circumstances in which a child might be in "custody" while a normal adult would not.[17] Another court found "custodial interrogation" in part because the interrogated defendant had a background of psychiatric treatment.[18] Two decisions have found defen-

11. People v. Reason, 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966).

12. People v. Kulis, 18 N.Y.2d 318, 221 N.E.2d 541, 274 N.Y.S.2d 873 (1966) (admissions before arrest which tended to connect defendant with the crime); People v. Williams, —— App. Div. 2d ——, —— N.Y.2d —— (1st Dep't 1967) (1 Crim. L. Rep. 2082, May 24, 1967) (defendant upon identification admitted throwing lye); People v. Kenny, 53 Misc. 2d 527, 279 N.Y.S.2d 198 (Sup. Ct. 1966) (defendant admitted control of car containing stolen items); People v. Johnson, 50 Misc. 2d 1009, 271 N.Y.S.2d 814 (Nassau County Ct. 1966) (defendant admitted leasing taxi used in robbery).

13. See text accompanying note 8 supra. See also State v. Boscia, 93 N.J. Super. 586, 226 A.2d 643 (App. Div. 1967).

14. People v. Terrell, 53 Misc. 2d 32, 277 N.Y.S.2d 926 (Sup. Ct. 1967); People v. Glover, 52 Misc. 2d 520, 276 N.Y.S.2d 461 (Sup. Ct. 1966); Commonwealth v. Jefferson, 423 Pa. 541, 226 A.2d 765 (1967).

15. People v. Beasley, —— Cal. App. 2d ——, 58 Cal. Rptr. 485 (1967); People v. Allison, —— Cal. App. 2d ——, 57 Cal. Rptr. 635 (1967).

16. People v. Johnson, 50 Misc. 2d 1009, 271 N.Y.S.2d 814 (Nassau County Ct. 1966).

17. In re Rust, 53 Misc. 2d 51, 278 N.Y.S.2d 333 (N.Y.C. Family Ct. 1967).

18. People v. Golwitzer, 52 Misc. 2d 925, 277 N.Y.S.2d 209 (Sup. Ct. 1966).

dants' statements prior to arrest admissible because, despite possession by police of probable cause to arrest them before their answers, there was in one case no browbeating atmosphere,[19] and in the other no "police dominated atmosphere cut off from the outside world."[20] Another case[21] admitted incriminating statements made by the unwarned defendant at her home to a local policeman, who was an old friend, after she initiated the interrogation by admitting connection with a homicide that the officer was investigating. After her voluntary admission of involvement, in what no one then knew to be more than an accidental death, the policeman's questions elicited a confession of murder, though he gave her none of the *Miranda* warnings. The court held all her statements to that policeman admissible and threw out only her later statements before two unfamiliar policemen and before a justice of the peace, none of whom gave the proper warnings.

The instant case suggests a combination of the subjective and objective approaches. Use of such a dual approach was not only suggested but was clearly stated in *People v. Arnold*.[22] The defendant in *Arnold* allegedly committed a felonious manslaughter by knowingly failing to obtain medical aid for her seriously ill minor daughter. Conviction required proof that the defendant knew the seriousness of her daughter's illness. To obtain it, a deputy district attorney called the defendant to his office where, without giving any of the *Miranda* warnings, he questioned her for nearly two hours. "She testified at trial, 'I didn't know I didn't have to come down and talk to you, or I wouldn't have. . . .' "[23] In reversing her conviction, which was based on her admissions to the deputy district attorney, the court stated: "We hold that custody occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived."[24]

Defining "custody" for the purposes of determining the admissibility of interrogations under *Miranda* should be approached both objectively and subjectively. Thus the courts must examine the actual restraint imposed and the restraint reasonably felt by the interogee. Admission of only those interrogations which pass both examinations will narrow the area of confusion which often results when courts decide whether an unwarned and unarrested defendant was in "custody" solely by a finding of actual physical restraint at a particular time during an interrogation. The evolution of a workable definition of "custody" under *Miranda* requires attention to both approaches.

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19. Gaudio v. State, 1 Crim. L. Rep. 2215, July 26, 1967 (Maryland Ct. of Special Appeals, June 27, 1967).

20. People v. Kenny, 53 Misc. 2d 527, 279 N.Y.S.2d 198 (Sup. Ct. 1966).

21. Commonwealth v. Eperjesi, 423 Pa. 455, 224 A.2d 216 (1966).

22. —— Cal. 2d ——, 426 P.2d 515, 58 Cal. Rptr. 115 (1967); see People v. Hazel, —— Cal. App. 2d ——, 60 Cal. Rptr. 437 (1967). See generally Graham, What is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona, 14 U.C.L.A.L. Rev. 59, 78-92 (1966).

23. —— Cal. 2d at ——, 426 P.2d at 518, 58 Cal. Rptr. at 118.

24. Id. at ——, 426 P.2d at 521, 58 Cal. Rptr. at 121.