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NOTES AND COMMENTS

THE MARYLAND BOULEVARD RULE: A TIME FOR CHANGE

Maryland's boulevard rule has survived frequent challenge and the apparent harshness of its results in recent cases. The author examines the development and application of the rule and questions both the historical bases and judicial justifications for the rule's modern viability.

I. INTRODUCTION

Several Maryland decisions in the past few years point once again to the need for a critical re-evaluation of the Maryland boulevard rule.[1] The stream of cases trying unsuccessfully to carve exceptions into the rule continues, and while inequity is no stranger to the application of this curious rule, the recent trend toward absoluteness in its interpretation by the courts is disturbing.

In *Creaser v. Owens*,[2] a school bus driver traveling on Stewartown Road near Gaithersburg, Maryland, stopped at a stop sign at the intersection of Stewartown and Goshen Roads and looked carefully to the left and right. Seeing no other vehicles, she began executing a left turn. A Cadillac traveling at an excessive speed on Goshen Road flew over a hill about two hundred feet from the intersection.[3] Although the bus driver was powerless to prevent the collision that ensued, in her suit against the driver of the automobile she was held negligent as a matter of law under the boulevard rule, which precluded her recovery under contributory negligence principles.[4]

An even harsher application of the rule is found in *Hensel v. Beckward*.[5] On a moonless night, the driver of a car halted at an intersection stop sign. After he and his passenger twice looked both ways and observed no vehicles approaching on the intersecting highway, the driver proceeded into the intersection where his car was struck by a vehicle driven on the intersecting highway at high speed without lights.[6] Permanently paralyzed, he also was held negligent as a matter of law, thus barring his recovery.[7]

1. It has been over a decade since the last comprehensive analysis of the Maryland boulevard rule. Webb, *Bothersome Boulevards*, 26 MD. L. REV. 111 (1966) [hereinafter cited as *Bothersome Boulevards*].
2. 267 Md. 238, 297 A.2d 235 (1972).
3. *Id.* at 241–43, 297 A.2d at 237–38.
4. *Id.* at 245, 297 A.2d at 239.
5. 273 Md. 426, 330 A.2d 196 (1974).
6. *Id.* at 428, 330 A.2d at 198.
7. *Id.* at 432, 330 A.2d at 200.

Perhaps the ultimate boulevard rule case was presented in *Johnson v. Dortch*.[8] Johnson stopped his car at the stop sign posted at a "T" intersection in Baltimore. He looked both ways and, seeing no moving vehicles, began to execute a right turn. An accident ensued with another driver whom the evidence indicated was intoxicated, speeding, driving at night without headlights and operating on the wrong side of the road.[9] Johnson, found to be negligent as a matter of law, was precluded from recovery in his suit against the other driver.[10]

In each of these cases, a driver was held to have failed in an absolute duty to yield the right of way to traffic favored by a stop sign, and a finding of negligence was dictated by the boulevard rule.

II. ORIGIN OF THE RULE

Under Maryland's boulevard rule, a driver who is legally required to yield the right-of-way at an intersection (the unfavored driver) to another (the favored driver) is held negligent as a matter of law in the event of an accident between the two within the intersection, regardless of relative speeds, times and distances.[11] By statute, a driver approaching a through highway[12] must yield the right-of-way to vehicles on the through highway;[13] a driver faced with a stop sign must yield the right-of-way to vehicles on the intersecting road;[14] a driver faced by a yield sign must yield the right-of-way to vehicles on the merging or intersecting road;[15] a driver who approaches a highway from a private drive must yield the right-of-way to vehicles on the highway;[16] and a driver approaching a road from a crossover must yield the right-of-way to vehicles on the road.[17] The judicial construction and application of these statutory requirements is the boulevard rule.[18] By analogy the rule has been

8. 27 Md. App. 605, 342 A.2d 326 (1975).
9. *Id.* at 607–10, 342 A.2d at 328–30.
10. *Id.* at 617, 342 A.2d at 333.
11. *See, e.g.*, Creaser v. Owens, 267 Md. 238, 244, 297 A.2d 235, 238 (1972).
12. Through highway means every highway or portion thereof on which vehicular traffic is given preferential right-of-way, and at the entrances to which vehicular traffic from intersecting highways is required by law to yield right-of-way to vehicles on such through highway in obedience to either a stop sign, a yield sign or a yield-right-of-way sign when such signs are erected as provided in this article.
MD. ANN. CODE art. 66½, § 1–198 (1970).
13. MD. ANN. CODE art. 66½, § 11–403(b) (1970).
14. *Id.* § 11–403(c).
15. *Id.* § 11–403(d).
16. *Id.* § 11–404.
17. *Id.* § 11–404.1.
18. The boulevard rule has been described as the judicial construction of MD. ANN. CODE art. 66½, §§ 11–401 to 404.1 (1970). Tippett v. Quade, 19 Md. App. 49, 58, 309 A.2d 481, 487 (1973). *See also* Schwier v. Gray, 277 Md. 631, 632 n.1, 357 A.2d 100, 101 n.1 (1976). The judicial characterization of sections 11–401 and 11–402 as falling within the ambit of the boulevard rule is misleading, however, because in cases involving these sections, no automatic finding of negligence is imposed by the court. *See, e.g.*, Nardone v. Underwood, 219 Md. 326, 149 A.2d 13 (1959); Meldrum v. Kellam Dist. Co., 211 Md. 504, 128 A.2d 400 (1957).

extended to situations in which drivers enter roads from traffic lights,[19] parking lots[20] or other open areas.[21]

As the Maryland Court of Appeals has stated the rule, when "an unfavored driver is involved in an accident with a favored vehicle under circumstances where the boulevard rule is applicable then in a suit based on that collision the unfavored driver is deemed to be negligent as a matter of law."[22] The court of appeals has rigidly adhered to the rule. As Judge Digges said, writing for the majority in *Hensel,* "[l]ike the Rock of Gibraltar we remain firm and will not allow [the boulevard rule] to be judically either bypassed or otherwise eroded through new waves of attack."[23] A scrutiny of the origin and development of the boulevard rule reveals some disconcerting leaps along the path to the rigid position taken by the Maryland courts today.

Maryland's first right of way statute for motor vehicles approaching intersections was enacted in 1916.[24] It simply stated: "All vehicles shall have the right of way over other vehicles approaching at the intersecting roads from the left, and shall give right of way to those approaching from the right."[25] At a time when traffic control devices were scarce and the few automobiles on the roads were incapable of high speeds, this law seemingly attempted to prevent accidents and assess blame for those that did occur. In the cases arising under this statute, the circumstances of each accident were considered in determining the negligence *vel non* of both drivers. These circumstances included whether a right-of-way was properly yielded,[26] width of the roads,[27] speeds of the vehicles,[28] whether either driver was on the wrong side of the roadway,[29] and other factors.[30] In short, there was no finding of negligence as a matter of law, but rather, a weighing of the circumstances surrounding each accident served as the basis for determining liability.

When automobiles and traffic control signs became more widely used and congestion became a problem, the legislature acted to allow motorists on certain roads to travel continuously in preference to

19. Eastern Contractors v. State, 225 Md. 112, 169 A.2d 430 (1961), *noted in* 23 MD. L. REV. 172 (1963) (red traffic light creates "boulevard" for driver proceeding on green light); Cornias v. Bradley, 254 Md. 479, 255 A.2d 431 (1969) (flashing red light creates boulevard).
20. Redmiles v. Muller, 29 Md. App. 304, 348 A.2d 291 (1975).
21. Victor A. Pyles Co. v. Rehmann, 21 Md. App. 686, 691, 321 A.2d 175, 179 (1974) ("[T]hose who enter or cross a boulevard from fields or other curbs when no roadway intersects" have been subjected to application of the rule).
22. Creaser v. Owens, 267 Md. 238, 245, 297 A.2d 235, 239 (1972).
23. 273 Md. 426, 427, 330 A.2d 196, 197 (1974).
24. Law of April 18, 1916, ch. 687, § 163, 1916 Md. Laws 1605.
25. *Id.* This statute remains in force today. MD. ANN. CODE art. 66½, § 11–401 (1970).
26. *See, e.g.,* Chiswell v. Nichols, 137 Md. 291, 112 A. 363 (1920).
27. Taxicab Co. v. Ottenritter, 151 Md. 525, 135 A. 587 (1926).
28. *Id.*
29. Friedman v. Hendler Creamery Co., 158 Md. 131, 148 A. 426 (1930).
30. *See, e.g.,* Chiswell v. Nichols, 137 Md. 291, 307, 112 A. 363, 368 (1920).

vehicles traveling on intersecting roads. In 1929, several provisions were added to the 1916 right-of-way statute, one of which authorized the State Roads Commission to designate main or through highways by erecting stop signs at the entrances to those highways from intersecting roads.[31] A driver facing such a stop sign was required to come to a full stop and yield the right-of-way to all drivers traveling on the favored highway.[32] This 1929 legislation included a similar provision allowing motorists on paved highways to proceed in preference to those on unpaved highways.[33] Once again, the unfavored driver was required to come to a full stop and to yield the right-of-way to all drivers approaching on the favored highway.[34] The language of the 1929 legislation was similar to the original 1916 statute in that both required a yielding of the right-of-way to "all vehicles" within a specified class, and neither made any mention of speed, time, distance or other factors. Yet the 1929 provisions served as a judical springboard to the inflexible boulevard rule applied by Maryland courts today. It seems odd that the later provisions have been subjected to an interpretation differing so significantly from that accorded the original statute when the legislature prefaced neither with a statement of purpose or intent. The only apparent difference between the statutes is that in one case a driver must yield the right-of-way to traffic approaching from a single direction and in other cases he must yield the right-of-way to traffic coming from two directions. Indeed, no legislative mandate[35] for a vastly differing interpretation between the statutes is readily apparent.

The loose wording of the early boulevard cases makes them susceptible to several interpretations. Typical of these early cases is *Blinder v. Monaghan,*[36] in which a taxi-cab driver, whose view of the favored road was obstructed by a bus, obeyed a stop sign but did not wait for the bus to move before he entered the intersection. He had noticed a truck approaching behind the bus on the favored road but lost sight of it when the bus stopped. The cab proceeded into the intersection and collided with the truck, which had by that time passed the bus.[37] On these facts, the court found that the cab driver had entered the favored road in disregard of his duty to stop and yield the right-of-way. Although his vision was temporarily blocked and his previous sighting of the truck had given him reason to anticipate its approach, the cab driver proceeded blindly into the intersection rather than waiting to ascertain whether the

31. Law of April 2, 1929, ch. 224, 1929 Md. Laws 616 (now codified in MD. ANN. CODE art. 66½, §§1-198, 11-403(c), and 15-105(a)).
32. *Id.*
33. *Id.* at 615.
34. *Id.*
35. The mandatory finding of negligence on the part of an unfavored driver has been called a "legislative mandate." Hensel v. Beckward, 273 Md. 426, 427, 330 A.2d 196, 197 (1974).
36. 171 Md. 77, 188 A. 31 (1936).
37. *Id.* at 81-83, 188 A. at 33-34.

intersection was clear. The court drew an analogy to a case where a driver ran a red light and collided with another driver who was proceeding through a green light and had no opportunity to avert a collision.[38] It was eminently clear to the court in both of these cases that the proximate cause of the collisions was the unfavored driver's disregard of "explicit and mandatory rules."[39] Under ordinary standards of care and negligence principles, the court in *Blinder* at this point had said enough to dispose of the case. It went on to state, however, that when such a disregard of explicit and mandatory rules is found and a collision has ensued, "the collision can only be attributed to [the unfavored driver's] negligence."[40] Because of that statement, *Blinder* was not to be remembered as just another intersection accident case but rather as an early formulation of the boulevard rule.[41] Thus the court fell into the common legal trap of making a statement that it considered to be a concise determination of the particular case before it, but which lent itself to sweeping future application far beyond the contemplation of its issuers. Resort to such a general statement was unnecessary in *Blinder* because a weighing of the individual circumstances could have pointed to no other conclusion than that the unfavored cab driver was at fault. Indeed, the court said "[n]either argument nor authority are needed to characterize such conduct as negligent."[42]

Upon a reading of *Carlin v. Worthington*,[43] decided a year after *Blinder*, it is apparent that a finding of negligence as a matter of law whenever a favored and unfavored driver collide at an intersection was not contemplated by the court in *Blinder*. Judge Sloan, writing for the court, quoted the general rule stated in *Blinder* and explained it as an accurate statement of the law but not one which should be made to the jury as an instruction.[44] Such an instruction would have been deficient in not submitting to the jury the question of the unfavored driver's violation of his duty to stop and yield the right-of-way as the proximate cause of the collision. The opinion indicated that, depending upon such circumstances as the favored vehicle's speed and distance from the intersection, whether the unfavored driver came to a full stop before entering the intersection, and the degree to which his vision was obstructed by a building, the unfavored driver's alleged violation of duty might not have been a

38. *Id.* at 84, 188 A. at 34 (citing Sun Cab Co. v. Faulkner, 163 Md. 477, 163 A. 194 (1932)).
39. *Id.*
40. *Id.* The unfavored cab driver's negligence barred recovery in his suit against the favored truck driver.
41. *See, e.g.*, Creaser v. Owens, 267 Md. 238, 244, 297 A.2d 235, 238 (1972) (citing Blinder v. Monaghan, 171 Md. 77, 188 A. 31 (1936)).
42. Blinder v. Monaghan, 171 Md. 77, 83, 188 A. 31, 34 (1936).
43. 172 Md. 505, 192 A. 356 (1937). In *Carlin*, a favored truck driver sued the driver of an unfavored vehicle which entered the favored roadway, where a collision occurred.
44. *Id.* at 510, 192 A. at 358.

cause of the accident:[45] "When the unfavored driver has time, if the favored driver is so far from the intersection that he will not arrive there before the crossing is cleared by the other, *if he is not speeding,* it is not negligence of an unfavored driver to enter."[46] The unfavored driver must, however, have his vehicle under control so as to allow him to yield the right-of-way.[47] Fault was properly to be determined by a jury after weighing the attendant circumstances. This writer can only speculate that if some of the more extreme boulevard cases of recent years had come before the *Carlin* court in 1937, the court would have weighed more carefully the predicament of unfavored drivers whose vehicles were under control but who, because of the conduct of the favored drivers or other circumstances, had little or no opportunity to avert a collision.

It was in *Greenfeld v. Hook*[48] in 1939 that the court, while maintaining that it was merely following consistent case law, actually tightened its stance on the duties of unfavored drivers. Some of the court's language has achieved notoriety through its frequent quotation:

> The obvious and essential purpose of such rules is to accelerate the flow of traffic over through highways by permitting travellers thereon to proceed within lawful speed limits without interruption. That purpose would be completely frustrated if such travellers were required to slow down at every intersecting highway. . . . If, however, the relative rights of travellers on the two types of highway are held to depend upon nice calculations of speed, time and distance the rule would encourage recklessness and the privilege of the uninterrupted travel would mean little more than the privilege of having a jury guess in the event of a collision whose guess was wrong.[49]

The context in which the court noted the "obvious and essential purpose" of the statutes requiring unfavored drivers to stop and yield the right-of-way is worth mention. That statement was made in disapproval of a proposed jury instruction to the effect that a favored driver was required to reduce his speed when approaching street crossings.[50] Clearly no such duty existed by statute or judicial decision. When the language is read out of context,[51] it appears that

45. *Id.* at 507, 192 A. at 357.
46. *Id.* at 508, 192 A. at 358 (emphasis added).
47. *Id.*
48. 177 Md. 116, 8 A.2d 888 (1939). In *Greenfeld,* an unfavored driver sued the driver of a favored vehicle for injuries sustained in a collision. On the facts of the case, the unfavored driver was negligent, but the court held that her recovery would not be precluded if the favored driver had a last clear chance to avert a collision.
49. *Id.* at 125–26, 8 A.2d at 892–93.
50. *Id.* at 120, 8 A.2d at 890.
51. These statements are often quoted without reference to their context. *See, e.g.,* Creaser v. Owens, 267 Md. 238, 246, 297 A.2d 235, 239 (1972).

requiring the favored driver to slow down at intersections was, in the court's view, the sole alternative to a required finding of negligence. While that inference is not supported by the text of the opinion, the prohibition against "nice calculations of speed, time and distance" has effectively foreclosed the remaining alternative, a weighing of the circumstances surrounding a boulevard collision.

Although the courts have not found it useful to quote this language, *Greenfeld* went on to say that the unfavored driver was *not* negligent as a matter of law in proceeding from the median access road into the favored driver's side of the roadway.[52] Her negligence was in her *admitted* failure to look in the direction from which oncoming traffic would approach after she entered that side of the favored roadway.[53] *Greenfeld*'s use as precedent, however, has been no different than if the court found the unfavored driver to have been negligent as a matter of law simply because an accident occurred. The court denied unfavored drivers the opportunity to vindicate themselves by showing relative speeds, times and distances; the prohibition against these "nice calculations" deprived unfavored drivers of the most effective means of escaping a finding of negligence. Thus *Greenfeld* and its progeny have brought the court to the position it takes today. Whenever the boulevard rule is applicable, however, the required finding that the unfavored driver is negligent as a matter of law is said to be a "legislative mandate."[54]

There is no basis in the right-of-way legislation nor its history for holding the unfavored driver negligent as a matter of law. The rule was judicially created. Yet in *Creaser*, the court stated "[i]f the meaning and application of the 'boulevard rule' is to be changed, it must be done by the Legislature and not by judicial fiat."[55]

III. APPLICATION OF THE RULE

When an unfavored driver has entered the favored roadway and merged into the flow of traffic before a collision occurs between his vehicle and another on the favored road, he has shed his status as an unfavored driver and will escape application of the rule.[56] If a question of merger is presented, the trier of fact decides whether the accident occurred within the intersection or so close to it that the entering unfavored driver has interfered with the favored driver's right-of-way into or through the intersection.[57] The threshold question in each case, then, is whether an entry and merger have

52. 177 Md. at 133, 8 A.2d at 896.
53. *Id.*
54. *See* note 35, *supra.*
55. 267 Md. 238, 249, 297 A.2d 235, 241 (1972).
56. *See, e.g.*, McCann v. Crum, 231 Md. 65, 188 A.2d 537 (1963).
57. *See* Great Coastal Express v. Schruefer, ___ Md. ___, ___, 369 A.2d 118, 127 (1977); Paul v. Lyons, 34 Md. App. 93, 94, 366 A.2d 410, 411-12.

taken place or, as it was so aptly put by Judge Liss writing for the court of special appeals in *Paul v. Lyons,*[58] "Is this a piece of the Rock?"[59]

If the boulevard rule applies, the unfavored driver is negligent as a matter of law.[60] This is so even though the conduct of the favored driver, such as driving without lights at night, prevented the unfavored driver from knowing of his presence in time to comply with the duty to yield the right-of-way[61] and even though the unfavored driver's view may be blocked by topographical or other visual obstructions.[62]

In *Creaser,* the court of appeals subscribed to a concern voiced by Judge Gilbert in his dissent in the lower appellate court.[63] Judge Gilbert believed that if an unfavored driver whose vision of a favored road was obstructed were to be relieved from a mandatory finding of negligence and allowed to recover from a speeding favored driver, favored drivers would be placed in the untenable position of having to know in advance what obstacles would obscure the unfavored driver's vision.[64] Thus, it was feared, the right-of-way statutes would be rendered meaningless.[65] In adopting this reasoning, the court of appeals in *Creaser* reviewed its substantial number of boulevard rule opinions and found none in which there was "any suggestion" that the topography of an area limiting the unfavored driver's view of the boulevard would relieve him of the absolute duty to yield the right-of-way.[66]

When *Creaser* is considered with such cases as *Hensel* and *Johnson,* it becomes clear that neither topography of the area nor any other circumstance beyond the control of an unfavored driver will excuse him from the mandatory finding of negligence made by Maryland courts today.

Greenfeld is often cited as precedent for the boulevard rule,[67] but that case contains certain qualifications. After noting that the purpose of the boulevard statutes was to permit favored drivers to proceed within *lawful* speed limits,[68] the *Greenfeld* court explained, "[t]here are many situations in which the driver of an automobile entering a favored from an unfavored highway may *without negligence* be endangered by traffic over and along the same."[69] The

58. 34 Md. App. 93, 366 A.2d 410 (1976).
59. *Id.* at 94, 366 A.2d at 411.
60. *See* note 11, *supra.*
61. *See* text accompanying notes 5–7, *supra.*
62. *See* text accompanying notes 2–4, *supra.*
63. 267 Md. 238, 249–50, 297 A.2d 235, 241 (1972).
64. Owens v. Creaser, 14 Md. App. 593, 610, 288 A.2d 394, 403 (1972).
65. *Id.* at 610, 288 A.2d at 403, *cited in* Creaser v. Owens, 267 Md. at 249–50, 288 A.2d at 403.
66. 267 Md. at 243, 297 A.2d at 238.
67. *Id.* at 246, 297 A.2d at 239.
68. *See* text accompanying note 49, *supra.*
69. 177 Md. at 130, 8 A.2d at 894 (emphasis added).

court gave examples of such situations: dense fog, children darting out, mechanical failure and curves and grades which prevent a view of approaching traffic.[70] This proviso, however, seems to have been ignored in the intervening years. It was considered and dismissed in *Creaser* on the alternative grounds that it either was intended to apply only to a last clear chance situation or authorized an exception to the boulevard rule which later cases have eliminated.[71] Neither of these explanations, however, fully disposes of the issue. The doctrine of last clear chance is predicated upon negligence of both the plaintiff and the defendant, the consequences of which the defendant had the last clear chance to avoid through the use of ordinary care.[72] With respect to its examples, the *Greenfeld* court stated that the unfavored driver may be "without negligence." It is thus unlikely that the examples were intended to apply only to last clear chance situations. Assuming, on the other hand, that the statement authorized an exception to the boulevard rule, if indeed *Greenfeld* expounded such a rule, to say that the exception has been whittled away by later cases is to say that the rule as it exists is neither a legislative mandate nor an exclusively legislative matter.

When a favored driver sues an unfavored driver, the plaintiff may be precluded from recovery if he is shown to have been inattentive and thus contributorily negligent.[73] Likewise, the favored driver may incur liability to parties other than the unfavored driver by his contributory negligence.[74] These cases have been rare, however, because of the prohibition against "nice calculations of speed, time and distance" stemming from *Greenfeld*.[75] If, in order to find the favored driver contributorily negligent, the jury must indulge in these nice calculations, it is improper to submit that issue to the jury.[76] *Kopitzki v. Boyd*,[77] however, recently limited this prohibition. In that case, a passenger sued her host driver who was the favored driver in a boulevard collision. Affirming a judgment for the passenger, the court of appeals considered evidence of the host driver's high speed and inattentiveness and concluded that it was sufficient to overcome the prohibition against nice calculations.[78] The question of the favored driver's negligence was thus properly

70. *Id.* at 130, 8 A.2d at 894–95.
71. 267 Md. 238, 248, 297 A.2d 235, 240.
72. *See* W. PROSSER, LAW OF TORTS 427–33 (1971). For a discussion of the doctrine of last clear chance in the context of the boulevard rule, see Trionfo v. Hellman, 250 Md. 12, 241 A.2d 554 (1968).
73. *See, e.g.*, Schwier v. Gray, 277 Md. 631, 357 A.2d 100 (1976). Contributory negligence requires inattentiveness on the part of the favored driver. *See* Kopitzki v. Boyd, 277 Md. 491, 355 A.2d 471 (1976).
74. *See, e.g.*, Kopitzki v. Boyd, 277 Md. 491, 355 A.2d 471 (1976).
75. *See* text accompanying note 49, *supra*.
76. *See, e.g.*, Tippett v. Quade, 19 Md. App. 49, 60–61, 309 A.2d 481, 489 (1973).
77. 277 Md. 491, 355 A.2d 471 (1976).
78. *Id.* at 497, 355 A.2d at 474–75.

submitted to the jury. *Kopitzki* is significant in that it recognized that the prohibition has some limit in Maryland courts.[79]

A month after *Kopitzki*, the court of appeals decided *Schwier v. Gray*.[80] In *Schwier*, a favored motocyclist collided with an unfavored driver entering Annapolis Road, the favored highway. The favored driver sued to recover damages from the unfavored driver. In affirming a judgment for the unfavored driver, the court held that the issue of the motorcyclist's contributory negligence was properly submitted to the jury.[81] The court concluded that evidence of the motorcyclist's negligence, including excessive speed and swerving across lanes, was proper for the jury to consider.[82] While, arguably, the speed and weaving of the favored driver may have been so excessive or so erratic as to deprive the prohibition against nice calculations of application in this case under the *Kopitzki* rationale, it is noteworthy that the court did not even pay lip service to the prohibition. On the contrary, the court based its approval of the submission of the favored driver's contributory negligence to the jury on this evidence simply on the traditional basis that reasonable minds could have differed as to whether his conduct constituted contributory negligence.[83]

The prohibition against nice calculations has long been an impediment to jury consideration of the favored driver's negligence. Read together, *Kopitzki* and *Schwier* indicate that favored drivers may no longer be able to flaunt the rules of the road with virtual impunity. In those boulevard cases in which their negligence contributes to the injury of some party other than the unfavored driver, they risk liability, and when they contribute to their own injury, they may be precluded from recovering from the unfavored driver.

When sued by an unfavored driver, the favored driver may be liable despite the unfavored driver's contributory negligence if the doctrine of last clear chance is applicable.[84] The prohibition against nice calculations also applies in these situations, but even if the prohibition has been relaxed, as recent cases would indicate, a further complication stifles an unfavored driver's opportunity to recover. In the context of a boulevard case, the doctrine of last clear chance contemplates an act of negligence by the unfavored driver which comes to an end, placing him in peril which is realized by the negligence of the favored driver in failing to avoid the collision.[85] An

79. Judge Northrop, on the federal bench, had observed long before *Kopitzki* that when calculations of relative speeds, times and distances in boulevard cases are not close, this prohibition is inapplicable. Goosman v. A. Duie Pyle Co., 206 F. Supp. 120, 127 (D. Md. 1962).
80. 277 Md. 631, 357 A.2d 100 (1976).
81. *Id.* at 636, 357 A.2d at 103.
82. *Id.*
83. *Id.*
84. *See* text accompanying note 72, *supra*.
85. *Id.*

unfavored driver will be continually negligent, however, from the moment he enters the boulevard intersection until the moment of collision.[86] This continuing negligence, which probably only a mechanical failure or some other unique circumstance could eliminate,[87] is incompatible with a theory of recovery predicated upon the favored driver's last clear chance.[88] Thus the doctrine holds only a phantom hope for unfavored drivers.

Perhaps the most perplexing boulevard case of recent years is *Nicholson v. Page*.[89] *Nicholson* seems to have avoided the rule simply because its imposition would have had a very harsh result. That case involved a westbound unfavored driver who stopped at a boulevard intersection and looked to his left. Traffic in the only northbound lane was waiting behind a stopped bus. The unfavored driver-plaintiff was waved on by the bus driver and moved his car forward to cross the intersection, looking to his right to observe southbound traffic on the boulevard. The defendant driver, who had been waiting behind the bus, then swung around the bus on the wrong side of the road to make a left turn at the intersection. The vehicles of the plaintiff and defendant collided at the intersection.[90] The court of appeals affirmed a judgment for the unfavored driver-plaintiff, concluding that a proper application of the boulevard rule did not require a holding that the plaintiff was guilty of negligence as a matter of law.[91] The affirmance was based, in part, on a lack of foreseeability that the favored driver would pass the bus by traveling in the southbound lane.[92] Surely it is no more foreseeable that a favored driver will commit any of the other serious acts of negligence with which boulevard cases have been replete. Perhaps *Nicholson* recognized a relinquishment of the right-of-way by the favored driver, or perhaps the court was simply moved by the predicament in which the unfavored driver, who was a police officer,[93] found himself. Whatever its rationale, *Nicholson* has proved to be a mirage, as the court has refused to extend its reasoning beyond a virtual duplication of the particular facts of that case.[94]

IV. A COMPARATIVE ANALYSIS

A significant majority of the states allow a finding that an unfavored driver has yielded the right-of-way to favored traffic after complying with a traffic control sign, even though an accident occurs within the intersection between himself and a favored

86. *See, e.g.*, Trionfo v. Hellman, 250 Md. 12, 241 A.2d 554 (1968).
87. *See Bothersome Boulevards, supra* note 1, at 121.
88. *Id.*
89. 255 Md. 659, 259 A.2d 319 (1969).
90. *Id.* at 660–61, 259 A.2d at 321.
91. *Id.* at 665, 259 A.2d at 323.
92. *Id.* at 667, 259 A.2d at 324.
93. *Id.* at 660, 259 A.2d at 321.
94. *E.g.*, Creaser v. Owens, 267 Md. 238, 247, 297 A.2d 235, 240 (1972).

driver.[95] In these states, a case which, if brought in the Maryland courts, would be subject to the boulevard rule is approached in the same manner as non-boulevard rule automobile accident cases in Maryland, that is, the negligence *vel non* of both drivers is determined upon a consideration of all of the circumstances surrounding the accident.[96] Of course, the unfavored driver may be found negligent in such situations, but he is not held negligent as a matter of law. For example, a case duplicating the facts of *Creaser* has come before an Illinois district court[97] and a case duplicating the facts of *Hensel* before the Supreme Court of Pennsylvania.[98] In both, a jury verdict was affirmed for the plaintiff-unfavored driver who was not found to be negligent himself.

The wording of many state right-of-way statutes, however, is similar to that of the Uniform Vehicle Code, requiring that the right-of-way be yielded to vehicles which are already in the intersection or are so close to the intersection as to constitute an "immediate hazard."[99] Under these statutes, the class of drivers to whom the right-of-way must be yielded is limited by the words of the statute, and courts are thus spared the decision of whether or not to supply a limitation on the basis of presumed legislative intent. Maryland's intersection right-of-way statutes contain no such express limitation and the courts have refused to supply one of their own accord.

Although the absence in other states of a mandatory finding of negligence when a driver on the favored road was speeding might be attributed to the "immediate hazard" language of the Uniform Code provision, that provision does not explain the absence of mandatory findings in other circumstances, such as in the case of unlit vehicles or topographical obstructions to the unfavored driver's vision. A favored vehicle may not be detectable by the unfavored driver even

95. *See generally* Annot., 3 A.L.R.3d 315, 315-25 (1965).
96. *See, e.g.,* Safirstein v. Nunes, 241 Cal. App. 2d 416, 50 Cal. Rptr. 642 (1966).
97. Edmond v. Wertheimer Cattle Co., 19 Ill. App. 2d 389, 153 N.E.2d 870 (1958). An unfavored entering driver sued a speeding favored driver who was hidden by a hill and a curve before collision. A jury verdict for the unfavored driver was affirmed.
98. Enfield v. Stout, 400 Pa. 6, 161 A.2d 22 (1960). Evidence that a favored driver did not have his car under proper control and was driving without lights was held to support a jury verdict in favor of the driver and occupants of the unfavored vehicle.
99. UNIFORM VEHICLE CODE ANN. § 11-403(b)(Supp. 1970) (emphasis added):
> Except when directed to proceed by a police officer or traffic signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop . . . at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After . . . having stopped, the driver shall yield the right of way to any vehicle which has entered the intersection from another highway or which is *approaching so closely on said highway as to constitute an immediate hazard* during the time when such driver is moving across or within the intersection.

See also: id. (Historical Notes and Statutory Annotations are contained therein).

when it is very close to the intersection. The difference in wording of the right-of-way statutes, then, does not solely account for the differences between the interpretations accorded them by Maryland courts and those accorded them by the courts of other states.

The actions of the Maryland legislature with respect to the relationship between motor vehicle law and the boulevard rule have not been consistent. Had the legislature done nothing, that inaction might have been read as a tacit approval of the rule as formulated by the courts.[100] If, on the other hand, the legislature was inclined to change the rule, it could have done several things. If it had added the "immediate hazard" language of the Uniform Code,[101] limiting the class of drivers to whom the unfavored driver was obligated to yield the right-of-way, mandatory findings might have been eliminated, at least when the favored driver was traveling significantly in excess of the speed limit. If it redefined the term "right-of-way" to conform to the Uniform Vehicle Code definition that only those drivers who are proceeding *lawfully* are granted a preference to proceed before other traffic,[102] mandatory findings might have been eliminated when the favored driver was guilty of a significant violation of law. There are, of course, many other ways in which the legislature could have modified the boulevard rule, but it is reasonably certain that these two steps would have sent a clear message to the courts that the legislature wanted the boulevard rule changed.

What the legislature did in 1970 was to adopt substantially the Uniform Vehicle Code's definition of "right-of-way"[103] while, by the same legislation, recodifying the right-of-way statutes which have provided the judicial basis for the boulevard rule.[104] Although the new definition of "right-of-way" seems incompatible with the boulevard rule as it exists today, the legislature gave no indication of an intent to modify or eliminate the rule. The legislative will with respect to the boulevard rule could certainly bear clarification.

V. A DIVIDED JUDICIARY

A division among the ranks of the Maryland judiciary with respect to the boulevard rule is made apparent by the way in which the appellate courts have communicated with each other concerning the rule. Both *Creaser* and *Hensel* went to the court of special appeals first, and the unfavored drivers were allowed recovery.[105]

100. Since Shriner v. Mullhousen, 210 Md. 104, 114–15, 122 A.2d 570, 575 (1956), the Maryland courts have so read asserted legislative inaction.
101. *See* note 99, *supra.*
102. UNIFORM VEHICLE CODE ANN. § 1–156 (1968).
103. MD. ANN. CODE art. 66½, § 1–175 (1970).
104. MD. ANN. CODE art. 66½, §§ 11–401.1 to 11–403.
105. Beckward v. Hensel, 20 Md. App. 544, 316 A.2d 309 (1974); Owens v. Creaser, 14 Md. App. 593, 288 A.2d 394 (1972). The court of special appeals held that these cases presented exceptions to the boulevard rule.

These decisions were then reversed by the court of appeals, which indicated that it would allow no exceptions to the boulevard rule.[106] Twice rebuffed, it is not surprising that the court of special appeals applied the boulevard rule to preclude the unfavored driver from recovering in *Johnson,*[107] where the favored driver was chargeable with an incredible array of simultaneous acts of negligence. The court of appeals denied certiorari.[108]

It was undoubtedly with tongue well in cheek that Judge Liss, speaking for the lower appellate court in *Paul v. Lyons,*[109] said, "[w]e believe that our decision in this case does not disturb the pristine beauty of the Rock and that the 'boulevard rule' remains the beacon which our superiors intended it to be."[110]

It may be of at least some encouragement to those who would modify the boulevard rule that in *Hensel,* the court of appeals applied the rule by only a four to two margin.[111] In a dissenting opinion concurred in by Judge Levine, Judge Smith argued that when a favored driver conceals his presence on the highway from an unfavored driver, an exception to the boulevard rule should be recognized because a driver should not be held to a duty which cannot be met.[112] The judicial climate appears to be ripening for a modification of this tenacious doctrine.

VI. CONCLUSION

The term "right-of-way" was redefined in 1970 as part of a massive revision of the Maryland Motor Vehicle Code,[113] the announced purpose of which was to parallel the format of the Uniform Vehicle Code.[114] Formerly, "right-of-way" was defined in Maryland as "the privilege of the immediate use of the highway."[115] This was the statutory definition of the term in force throughout the years during which the court formulated and fortified the boulevard rule. In 1970, however, "right-of-way" was redefined as "the right of one vehicle or pedestrian to proceed in a *lawful* manner in preference to another vehicle or pedestrian."[116]

While there is no evidence that the legislature intended to change the boulevard rule with this new language, the arguable import of the new definition is that by proceeding in an *unlawful*

106. Hensel v. Beckward, 273 Md. 426, 330 A.2d 196 (1974); Creaser v. Owens, 267 Md. 238, 297 A.2d 235 (1972).
107. 27 Md. App. 605, 342 A.2d 326 (1975).
108. *Id.* at 606, 342 A.2d at 326.
109. 34 Md. App. 93, 366 A.2d 410 (1976).
110. *Id.* at 98, 366 A.2d at 414.
111. 273 Md. 426, 330 A.2d 196 (1974).
112. *Id.* at 432–33, 330 A.2d at 200–01.
113. *Forward* to MARYLAND DEPARTMENT OF MOTOR VEHICLES, PROPOSED MARYLAND MOTOR VEHICLE LAWS REVISION (1969).
114. *Id. Compare* UNIFORM VEHICLE CODE ANN. § 1–156 (1968) *with* MD. ANN. CODE art. 66½, § 1–175 (1970).
115. MD. ANN. CODE art 66½, § 2(45) (1957).
116. MD. ANN. CODE art. 66½, § 1–175 (emphasis added).

manner, one might forfeit the right to proceed "in preference to another vehicle or pedestrian." Without question, there are minor violations of law that ought not deprive a favored driver of his right-of-way, such as driving with a cracked window or broken turn signal. But in the many boulevard cases in which a favored driver has been guilty of significant violations of law such as intoxication, reckless speeding, failing to use lights at night, driving on the wrong side of the road or a combination of the above, he should be denied an absolute preference over other drivers by the very definition of the term "right-of-way." To date neither Maryland appellate court has taken cognizance of this definitional change as it relates to the boulevard rule. Objectively, though, the court of appeals is unlikely to change the boulevard rule on the basis of this redefinition alone. The court has so locked itself in by its decisions in the seven years since this redefinition was enacted that to grasp it now as a legislative change of the rule would place the court in the awkward position of having to explain why it did not take cognizance of the change earlier.

If the legislature were to add to the intersectional right-of-way statutes the express qualification of the Uniform Vehicle Code that the class of vehicles on the favored road to which the right-of-way must be yielded are those already in the intersection or close enough thereto to constitute an immediate hazard, the court might then feel free at least to limit application of the rule.[117]

In view of the legislature's inaction, however, if the Maryland boulevard rule is to be abrogated, the onus must ultimately lie on the court of appeals, which created the rule. Neither the previously existing right-of-way statutes nor the legislative history of the statutes through which the rule is applied lend any support to it. The process by which the court has come to assume its current stance is best characterized as "bootstrapping." The court has gradually created a rule of law, ascribed it to the legislature without warrant and then finding support for it in the legislature's failure to act. This straw foundation is meager support for so staunch a rule of law.

In non-boulevard automobile accident cases, the jury is permitted to weigh the relevant facts and circumstances in determining any negligence of the parties. If the jury is competent to

117. During the 1976 session of the Maryland legislature, three bills were proposed which would have altered the boulevard rule, but all failed: H. 1853, "Motor Vehicles-Boulevard Rule," February 26, 1976 (this was a curious proposal, simply requiring the favored driver to operate his vehicle in a "prudent and careful manner"); S. 703, "Motor Vehicles-Boulevard Rule," February 17, 1976 (this proposal would have adopted "immediate hazard" language qualifying the boulevard rule statutes); H. 932, "Vehicle Laws-'Boulevard Rule'," January 21, 1976 (this proposal would have prohibited construing the boulevard statutes against an unfavored driver when the favored driver's conduct concealed his presence).

The only boulevard rule bill in the 1977 session was a virtual re-write of S. 703 of the 1976 session. S. 367, "Motor Vehicles-Boulevard Rule," January 25, 1977, also failed.

do so in these cases, it is also competent to do so in boulevard cases. There is nothing inherent in the nature of a boulevard case which requires that a jury's determination be preempted by a mandatory finding of negligence imposed by the court. On the contrary, there is strong reason why a mandatory finding of negligence on the part of an unfavored driver should not be made. Favored drivers should be encouraged to obey traffic laws, and a rule which, in effect, relieves them of liability when they have not done so removes a powerful incentive for complying with these laws. Abolishing the rule would also avoid the harsh results which obtain when a driver is held to a duty which he cannot meet, such as when the favored driver's conduct or some physical circumstance has prevented an entering driver from knowing of a favored vehicle's presence on the roadway.

The courts should treat boulevard cases like other automobile accident cases, entrusting to the triers of fact the determination of negligence *vel non* based on a consideration of the relevant circumstances including relative speeds, times and distances. This may be done with the knowledge that Maryland's right-of-way statutes will not thus be rendered meaningless, as was feared in *Creaser,* [118] unless right-of-way statutes in force in the majority of states in this country are also meaningless.

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ADDENDUM

Since the initial printing of this article, the Maryland Court of Appeals has filed its opinions in *Dean v. Redmiles,* No. 24 (Ct. App., April 19, 1977) and *Covington v. Gernert,* No. 69 (Ct. App., May 31, 1977). Both cases will be of major consequence in the application of the boulevard rule.

In the context of a suit against the estate of a favored driver brought on behalf of his passenger, it was held in *Dean* that in a suit by a passenger of the favored or unfavored driver against the favored driver, a jury question as to the negligence *vel non* of the favored driver is presented by evidence of his excessive speed if it was a proximate cause of the accident. Apparently, this is so without regard to the dependence of such evidence upon nice calculations of speed, time and distance. In *Dean,* the speed of the favored driver was variously estimated between five and twenty miles per hour in excess of the posted fifty mile per hour speed limit. In its discussion, the court seemed to imply that the prohibition against nice calculations is nothing more than a supportive statement for the principle that contributory negligence as a matter of law bars the unfavored driver's recovery in a suit against the favored driver.

118. *See* text accompanying notes 63–65, *supra.*

Thus, the court of appeals reversed the decision of the court of special appeals in *Redmiles v. Muller,* 29 Md. App. 304, 348 A.2d 291 (1975).

Chief Judge Murphy dissented vigorously from the *Dean* majority opinion, viewing it as a major departure from prior cases which had made inattention of the favored driver a requisite to his liability. "Inattention" had always required a showing of more than mere excessive speed. *See, e.g., Harper v. Higgs,* 255 Md. 24, 169 A.2d 661 (1961). Judge Murphy foresaw the abandonment of the "eminently sensible" prohibition against nice calculations of speed, time and distance in all boulevard cases and the "unfortunate" downfall of the favored driver from his exalted position in that liability may now be predicated merely upon evidence of his excessive speed.

It is *Covington,* however, which has the potential to severly restrict application of the boulevard rule. The defendant was driving the wrong way on a one-way favored street. The plaintiff, approaching an intersection with the through street, obeyed a stop sign, looked in the direction from which traffic would have been expected, and proceeded into the intersection where a collision occurred. A judgment for the plaintiff obtained in the district court was reversed on appeal by the Baltimore City Court, which held the boulevard rule applicable and, thus, the plaintiff guilty of contributory negligence as a matter of law. In vacating and remanding, the court of appeals grasped the legislative redefinition of the term "right-of-way" (see notes 113-16, *supra,* and accompanying text) seven years after its enactment to hold that since the defendant was not proceeding "in a lawful manner," the boulevard rule did not apply and the plaintiff was not contributorily negligent as a matter of law.

Although the general import of its decision is clear — that a driver on a favored road may forfeit his absolute right-of-way and the protection of the boulevard rule by proceeding unlawfully — the question which the court must now face is what conduct, other than driving the wrong way on a one-way street, will constitute proceeding unlawfully? An argument can doubtless be made in many boulevard cases that the favored driver was violating some statute or other and was, therefore, proceeding unlawfully. The courts may no longer stand firm "like the Rock of Gibraltar," but must now involve themselves in the complexities of determining upon all the facts of a given case whether the favored driver has lost his preference to proceed and, thus, whether the boulevard rule applies at all. Guidelines must be formulated, and it is difficult to perceive how this might be done other than on a case by case basis.

As a general rule, violation of a statute is not evidence of negligence unless the violation was a proximate cause of the injury complained of. *Dean v. Redmiles, supra.* Perhaps it will be argued by

analogy that the violation of a statute should not constitute proceeding unlawfully unless the violation was a proximate cause of the collision. The problem with that approach is that it gives rise to the implication that where the favored driver's conduct is not the proximate cause of a collision, he must have been proceeding lawfully no matter how he operated his vehicle. On the other hand, the court might adopt the approach that any significant violation of law by the favored driver will render the boulevard rule inapplicable.

In short, no single, easy solution to the dilemma presents itself. Although the language of the "new" right-of-way statute is taken from the Uniform Vehicle Code, note 102 *supra,* the decisions of other states are not likely to be helpful to Maryland's courts because other states do not have a boulevard rule.

If *Dean* and *Covington* are indicative of a trend, a judicial abrogation of the boulevard rule may be in the offing. For the present, however, the boulevard rule has not been renounced; its scope of application has been limited to an extent which must await determination.