NOTES

EXTENDING COLLATERAL ATTACK: AN INVITATION TO REPETITIOUS LITIGATION*

A POLICY of settling disputes quickly and cleanly would allow the disputants one fair trial, ending in a judgment that is absolutely binding on the loser. But there is always a danger that the loser lost because of harmful errors in the proceeding, rather than because he had the poorer case. To prevent judgments in such cases from freezing into finality, two methods of attack—"direct" and "collateral"—are made available to the loser.[1] Most errors open a judgment only to direct attack,[2] which is usually a continuation of the original action, either as an appeal or through a motion in the rendering court to set aside the judgment.[3] In rarer cases a "direct" attack may also be made by an independent equity suit, brought in a different court, to enjoin enforcement of the judgment.[4] But whatever the form of the direct attack, the aggrieved party must either have prosecuted his claim promptly or have thoroughly justified his delay.[5] In a collateral attack, which may be brought in any court at

* Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949), *cert. denied*, 338 U.S. 816 (1949).

1. See 1 FREEMAN, JUDGMENTS §§ 304, 305 (5th ed. 1925) (cited hereafter as FREEMAN); 1 BLACK, JUDGMENTS § 252 (1891); VAN FLEET, COLLATERAL ATTACK §§ 2, 3 (1892). Classification of attacks as "direct" or "collateral" has been so inconsistent that "[e]xcept in the light of some . . . particular purpose, attempted distinctions are probably futile." ARNOLD & JAMES, CASES ON TRIALS, JUDGMENTS AND APPEALS 137 (1936). For an outline of the definitional confusion, see 1 FREEMAN 606–8. Even the proper categorization of particular proceedings is debatable. *E.g.*, compare 1 FREEMAN § 308 (independent equity suit—"direct" attack) with 1 BLACK, JUDGMENTS § 253 (1891) (same—"collateral" attack). See, generally, 1 FREEMAN §§ 304–16; ARNOLD & JAMES, *supra*, at 136–8.

The most common distinction between the categories of attack is in terms of the purpose of the proceeding in which the assault is made: a "direct" attack is one made in a proceeding brought for the express purpose of upsetting the judgment, while a "collateral" attack is one made in a proceeding brought for some other or "collateral" purpose. Once classified as "collateral" an attack is not only confined to certain particularly grievous errors, see notes 7 and 8 *infra*, but the attacker is often further restricted to proving them solely by reference to the judgment record itself. See 1 FREEMAN 781 and §§ 375–6.

2. See 1 *id.* 645. The traditional lingo is that certain errors make a judgment merely "voidable" (*i.e.*, open only to "direct" attack) while others make a judgment "void" (open also to "collateral" attack). *Id.* § 322; 1 BLACK, JUDGMENTS § 170 (1891). The terms are not helpful.

3. See 1 FREEMAN § 307.

4. Where fraud or accident deprived the losing party of a fair chance to present his case, he may move to vacate the judgment in the rendering court, 1 *id.* §§ 231–51, or he may bring an independent equity suit in any court. 3 *id.* §§ 1179, 1181, 1231–47; 3 MOORE, FEDERAL PRACTICE 3272 *et seq.* (1st ed. 1938). Though usually these attacks are called "direct," there is disagreement as to the proper classification of the equity suit. See note 1 *supra*.

5. See 1 FREEMAN 603, 645, and §§ 266–272; 3 *id.* §§ 1192, 1204.

any time, he need do neither.[6] Therefore, since collateral attacks tend to defeat the policy of prompt settlement of actions, they are usually limited to errors presumed so prejudicial that the rendering court may be said to have lacked jurisdiction[7] or have violated due process.[8] In the recent case of *Bass v. Hoagland*,[9] however, Court of Appeals for the Fifth Circuit relaxed the traditional boundaries and allowed a much wider resort to collateral attack than has heretofore been permitted.

A Kansas citizen brought a personal injury action against a Texas citizen in a Kansas federal court. Plaintiff claimed a jury trial.[10] The defendant, remaining in Texas, retained Kansas counsel who filed an answer denying his client's liability but later withdrew from the case. When no one appeared for defendant at the trial, the court considered him in default and gave judgment for plaintiff. Nearly three years later plaintiff brought suit on the judgment in a Texas federal court.[11] Defendant now attacked the original judgment, claiming that his attorney had abandoned him without notice, and that the judgment was rendered without pre-default judgment notice under Federal

6. 1 *id.* § 322.

7. 1 *id.* § 339 (jurisdiction over the parties); 1 *id.* § 337 (jurisdiction over subject matter of the action). It was formerly said that lack of jurisdiction over the subject matter is always ground for collateral attack because such jurisdiction cannot be conferred by the parties or assumed by the court. 1 *id.* at 676. The trend, however, is toward closing attacks on this kind of jurisdiction. See, *e.g.*, Stoll v. Gottlieb, 305 U.S. 165 (1938) (issue contested); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) (issue could have been contested). This corresponds with the growing tendency to restrict collateral attack in the interest of achieving greater finality in litigation. See Notes, 9 OHIO ST. L.J. 539 (1948); 29 GEO. L.J. 204 (1940).

The victorious party's fraud, rather than the court's lack of jurisdiction, has been the basis for allowing a few collateral attacks. Nardi v. Poinsatte, 46 F.2d 347 (N.D. Ind. 1931); Stephens Fuel Co. v. Bay Parkway Nat'l Bank of Brooklyn, 10 F. Supp. 395 (E.D.N.Y. 1935). Usually, however, such fraud is assailed in an independent equity suit regarded as a direct attack. See, *e.g.*, Arrowsmith v. Gleason, 129 U.S. 86 (1889); Rhino v. Emery, 72 Fed. 382 (6th Cir. 1895). See 1 FREEMAN § 331; 3 *id.* § 1231.

8. The due process notion has two uses in collateral attacks: (1) Errors usually called jurisdictional are cast in due process terms, evidently to frame a constitutional issue in the hope of ultimate review by the United States Supreme Court. *E.g.*, Scott v. McNeal, 154 U.S. 34 (1894) (probate court had no jurisdiction over estate of living person); Pennoyer v. Neff, 95 U.S. 714 (1877) (no jurisdiction over defendant). (2) Errors not easily cast in jurisdictional terms are called a violation of due process which in turn deprived the rendering court of jurisdiction. *E.g.*, Hovey v. Elliott, 167 U.S. 409 (1897) (judgment for contempt rendered without hearing).

9. 172 F.2d 205 (5th Cir. 1949), *cert. denied*, 70 S.Ct. 57 (1949).

10. This operated as a demand by the defendant, since a jury claim may not be withdrawn without mutual consent. FED. R. CIV. P. 38(d); Thiel v. Southern Pacific Co., 149 F.2d 783 (9th Cir. 1945).

11. There is no longer any need for a party who has won a judgment in one federal district court to sue on it in order to get execution elsewhere: a final judgment may now be registered in any district and executed as if rendered there. 28 U.S.C. § 1963 (1948). While this provision will save judgment creditors the expense of starting a new suit to secure foreign execution, it should not affect a judgment debtor's right to attack collaterally. See MOORE, JUDICAL CODE COMMENTARY 385-6 (1949).

Rule 55, without a jury trial, and without hearing any evidence. He further claimed that the clerk of the court had sent no notice after judgment, as required by Rule 77, and that he was unaware of the result until rudely informed by the new action.[12] It was then too late to appeal.[13]

Assuming the truth of these charges, the Texas district court regarded them as a collateral attack on the judgment. Since no single aspect of the Kansas proceeding had previously been enough to sustain a successful collateral attack in the federal courts,[14] it decided for plaintiff on the pleadings.

On appeal from that decision the Fifth Circuit could have regarded defendant's plight as due (1) to the fact that he was never able to present his case, because of abandonment by his attorney, or (2) to procedural errors in the original action. The court took the latter view. It simply assumed that the defendant was making a collateral attack, and further assumed that the procedural irregularities of which he complained were prejudicial "errors." It then held that these "errors" amounted to a denial of due process[15] that would upset the judgment, and sent the case back for trial on the merits. It is not entirely clear whether its decision rested on the lack of jury trial alone[16] or also on the failure to hear evidence on liability and damages and on the failure

12. The defendant also alleged contributory negligence, challenged the damages as unconscionable, and claimed that plantiff had acted fraudulently in proceeding to judgment while knowing that defendant's counsel had abandoned him without his knowledge. The Texas court considered none of these charges, though the fraud, if established, might have been ground for collateral attack. See note 7 *supra*.

13. FED. R. CIV. P. 73(a) (normal appeal time—30 days).

14. Most of the procedure complained of has been expressly repudiated as a ground for collateral attack: (1) Lack of jury trial: Maxwell v. Stewart, 22 Wall. 77 (U.S. 1874); *cf.* Halligan v. Carlson, 105 Conn. 245, 135 Atl. 39 (1926). *Contra:* Matheny v. Greider, 115 W. Va. 763, 177 S.E. 769 (1934). (2) Failure to hear any evidence: Stephenson v. Kirtley, 269 U.S. 163 (1925); Ritchie v. McMullen, 159 U.S. 235 (1895); Grieshaber v. Knoepfel, 119 Misc. 827, 198 N.Y. Supp. 302 (Sup. Ct. 1922); Globe & Republic Ins. Co. v. Shields, 170 Tenn. 485, 96 S.W.2d 947 (1936). (3) Lack of notice *before* default judgment: Gray v. Hall, 203 Cal. 306, 265 Pac. 246 (1928); *cf.* United States v. Borchers, 163 F.2d 347 (2d Cir. 1947), *cert. denied*, 332 U.S. 811 (1947).

Lack of notice *after* rendition of a federal judgment has never opened the judgment to collateral attack. Nor would such a result be reasonable, since post-judgment notice was designed merely as an accommodation for the loser. Failure to send the notice does not even extend appeal time. See FED. R. CIV. P. 77(d) and Notes of Advisory Committee on Rules, 28 U.S.C. following § 723(c) (1946). The only ground for such an extension is excusable neglect in not learning of the judgment. FED. R. CIV. P. 73(a). This necessity for justifying his own conduct puts the loser virtually in the shoes of one seeking equitable relief.

Abandonment of a party by his counsel has not been held ground for collateral attack, though it does afford the basis for direct relief. See notes 41 and 43 *infra*.

15. 172 F.2d 205, 210 (5th Cir. 1949). The court said that because the judgment was rendered without due process it was rendered without jurisdiction, and thus was attackable collaterally. *Id.* at 209. See note 8 *supra*.

16. This was the view of the dissenting judge: "The majority . . . seems to hold that judgment here without [a] jury rendered the judgment void." 172 F.2d 205, 211 (5th Cir. 1949).

to give pre-judgment notice.[17] But in either event the decision can have unfortunate consequences.

If all four "errors" are necessary to deny due process, the *Bass* case advances the novel proposition that several errors which individually may only be prejudicial enough to open the judgment to direct attack can have the cumulative effect of opening a judgment to collateral attack.[18] Armed with this handy doctrine of "cumulative error," many a loser who failed to appeal will later attack collaterally by arguing that a number of lesser errors lumped together denied him due process. On the other hand, if the *Bass* case rests simply on the lack of jury trial it may open the way to a collateral attack whenever a court erroneously refuses a jury on the ground that the issues were not so triable[19] or that a jury had been waived.[20] Either interpretation of the *Bass* decision will give judgment losers an unwarranted chance to prolong litigation.

The court created this unhappy prospect by assuming, with scant discussion, that the four procedural omissions were "errors." Except for the failure to hear evidence on unliquidated damages,[21] it is highly doubtful that they were even errors subject to direct, let alone collateral, attack. Under the policy of expediting litigation which is embodied in the Federal Rules,[22] a full-dress jury trial is reserved to the litigant who not only presents a case with issues of fact[23] but also asserts his rights diligently.[24] Therefore the court would

17. *Id.* at 210. It is also possible that the court regarded all the "errors" as adding up to an injustice to the defendant.. It did not, however, articulate such a view. See note 18 *infra.*

18. This proposition has been openly advanced only in Hicks v. Hiatt, 64 F. Supp. 238, 249–50 (M.D. Pa. 1946): "Casting up all of the errors committed [they] were so numerous and of such effect as to deprive [petitioner] of the substance of a fair trial." Here, however, the case came up on a petition for habeas corpus, where the policy of assuring a fair trial has been accorded increasing importance at the expense of the finality of judgments. See Note, 61 HARV. L. REV. 657 (1948).

The notion of "cumulative error" may also have prompted courts to upset civil judgments collaterally. But traditional dogma prohibits overt reliance on such a doctrine, since the distinction between errors directly attackable and those collaterally attackable is based on the kind of errors involved rather than their actual effect on the litigant. See 1 FREEMAN §§ 322, 357; Note, 14 CAN. B. REV. 157, 158 (1936).

19. The decision whether an issue is triable of right to a jury requires the judge to make an excursion into the history of "law" and "equity." See CLARK, CODE PLEADING § 16 (1947). If he reads his history wrong (*i.e.*, differently from a higher court) he has committed reversible error. *E.g.*, Ring v. Spina, 166 F.2d 546 (2d Cir. 1948).

20. The judge who denies a jury trial on the ground that it was demanded too late (see FED. R. CIV. P. 38(d), 5(d)) commits error if the appellate court finds the demand was made in time. *E.g.*, Berslavsky v. Caffrey, 161 F.2d 499 (2d Cir. 1947).

21. See note 30 *infra.*

22. FED. R. CIV. P. 1. See 2 MOORE, FEDERAL PRACTICE 55–7 (2d ed. 1948). And see note 37 *infra.*

23. Failure to present such issues at the outset results in summary judgment. *E.g.*, Piantadosi v. Loew's, Inc., 137 F.2d 534 (9th Cir. 1943); Austin v. United States, 125 F.2d 816 (7th Cir. 1942). See CLARK, CODE PLEADING § 88 (1947); Clark & Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1928). See also note 33 *infra.* Similarly,

have been justified in regarding the defendant's non-appearance at the trial as (1) a default,[25] which would eliminate as error the lack of jury trial and failure to hear evidence on liability; or (2) a waiver of jury trial,[26] which would also eliminate the requirement of pre-judgment notice.

In the traditional default judgment, a litigant's failure to take some required step in the pre-trial stage[27] is deemed an admission of his opponent's claim,[28] eliminating any need for a jury trial[29] except on unliquidated damages.[30] The default provision in Rule 55 authorizes a judgment against any

default judgments proceed on the theory that a litigant who fails to press his case does not have one worthy of trial. See notes 27 and 28 *infra*.

24. See notes 27 and 28, *infra* (default) and CLARK, CODE PLEADING 113-16 (1947) (waiver of jury trial). The fundamental prerequisite to the jury trial right is, of course, that the issues be regarded historically as so triable. See FED. R. CIV. P. 38(a), 39(a); and note 19 *supra*.

25. Both the Kansas district judge and the dissenting judge in *Bass v. Hoagland* took this view. 172 F.2d 205, 207, 212 (5th Cir. 1949).

26. See p. 351 *infra*.

Neither default nor waiver was urged by the *Bass* plaintiff. Instead he chose traditional doctrine: the judgment could not be impeached in an action upon it because the rendering court had jurisdiction. 172 F.2d 205, 207 (5th Cir. 1949). See 1 FREEMAN 606-8. The Fifth Circuit countered that the rendering court lost its jurisdiction when it denied the defendant due process. 172 F.2d 205, 209. In his petition for rehearing, plaintiff invoked a second concept: since the Kansas judgment was regular on its face and rendered by a court of general jurisdiction, it could not be contradicted by defendant's extrinsic evidence. Appellee's Brief in Support of Petition for Rehearing 5. See 1 FREEMAN 606-8. The court in its original opinion had acknowledged the existence of this doctrine but ignored its possible application. 172 F.2d 205, 208 (5th Cir. 1949).

The case affords yet another example of the futility of relying on doctrinal distinctions to solve particular problems in the collateral attack field. See note 1 *supra*.

27. For example, default judgments have long been rendered for failure to appear in the action, to plead, to answer interrogatories, or to file an affidavit of defense as required by statute. See 3 FREEMAN §§ 1266-76.

While default judgments are not usually rendered against a party who has pleaded without first striking his pleading, 3 *id.* § 1270, this custom is not required by FED. R. CIV. P. 55. Indeed the penalties for refusing to permit discovery allow a pleading to be stricken as an alternative to a default judgment, not as a condition precedent to it. FED. R. CIV. P. 37(b)(2)(iii), (d).

28. *E.g.*, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351 (1908). See 3 FREEMAN § 1287.

This "admission of claim" fiction is a handy device for rationalizing a default judgment, but perhaps no more than that. The justification for shortcutting the normal course of proceedings is to prevent one party from stalling off judgment simply by refusing to take a step necessary to move the case toward trial. *See* Coggin v. Barfield, 150 Fla. 551, 554, 8 So. 2d 9, 11 (1942). And the justification for not requiring formal proof of liability would seem to be the saving in time and expense for all concerned. It is this last consideration that should justify a default judgment for failure to appear at the trial. See note 36 *infra*.

29. See 3 FREEMAN §§ 1282, 1287. See note 33 *infra*.

Proof is required, however, before a default judgment can be rendered against the United States. FED. R. CIV. P. 55(e).

30. See 3 FREEMAN 2673-4. It is doubtful, however, whether the constitutional right to jury also applies. While such a right has been affirmed (Thorpe v. Nat'l City Bank

"party who has failed to plead or otherwise defend as provided by these rules." The Fifth Circuit limited the rule to the traditional default situation by interpreting the crucial words "otherwise defend" to mean only motions made in place of pleadings.[31] It regarded an extension to include absence at the trial as a violation of the constitutional right to a jury.[32] But this right is guaranteed only where there is an issue of fact,[33] and there can hardly be an issue of fact when the defendant does not make an appearance to argue one. Since he had notice of the trial date,[34] his failure to appear is as much an admission of plaintiff's claim as is failure to plead within the allotted time,[35] and

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of Tampa, 274 Fed. 200 (6th Cir. 1921)), the contrary seems the better view. For the Constitution only secures the right to a jury where such right existed at common law. Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935). And early English cases indicate that a jury trial on unliquidated damages in default cases was granted only at the court's discretion. *E.g.*, Bruce v. Rawlins, 3 Wils. K. B. 61, 95 Eng. Rep. 934 (1770). In the United States, this developed into a regular practice of trial by the court alone. *E.g.*, Brown v. Van Braam, 3 Dall. 344, 354 (U.S. 1797). One writer concludes that in actions going by default neither party has a right to a jury trial on any issue at all. 3 MOORE, FEDERAL PRACTICE 3167, 3186 (1st ed. 1938).

31. "The words 'otherwise defend' refer to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits." 172 F.2d 205, 210 (5th Cir. 1949).

32. *Id.* at 209–10.

33. "No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined." *Ex parte* Peterson, 253 U.S. 300, 310 (1920). See note 23 *supra*.

34. The opinion and record in *Bass v. Hoagland* do not disclose whether the defendant himself had actual notice of the trial date. But notice is imputable to a client when it is charged to his attorney. Davenport v. Davenport, 69 Mont. 405, 222 Pac. 422 (1924). And here the defendant's attorney could properly be charged with notice of the date, since he did not withdraw until some time after the pleadings were closed. 172 F.2d 205, 207 (5th Cir. 1949).

Actual notice of the trial date is not essential; where given, it is merely an accommodation within the court's discretion. See FED. R. CIV. P. 40 and the discussion of post-judgment notice in note 14 *supra*. Responsibility for appearing at the trial is placed on the attorney of record. *E.g.*, CALENDAR RULE 17 (S.D.N.Y. 1938); CALENDAR RULE 1(j) (N.D. Ia. 1938). And adequate notice is effected at least from the time the case is listed on the jury calendar. See, *e.g.*, CALENDAR RULE 8 (S.D.N.Y. 1938); CALENDAR RULE 7 (N.D. Ia. 1938); RULE PROC. 12 (S.D. Cal. 1938); RULE 9 (D. Kan. 1940). Since this listing is a normal step after the joinder of issues, see CALENDAR RULE 8 (S.D.N.Y. 1938), the party could properly be charged with notice of the trial date from the time of joinder. *Cf.* Miera v. Simmons, 31 N.M. 599, 248 Pac. 1096 (1926); Hartman v. Byrd, 47 S.W.2d 659 (Tex. Civ. App. 1932).

35. The fact that an answer denying liability remains on file should not prevent a default for failure to appear at the trial. See note 27 *supra*.

In the absence of statutory authority, such a judgment was held improper in Frucci v. Winters, 247 App. Div. 866, 286 N.Y. Supp. 781 (1936); Panhandle & S.F. Ry. v. Lawless, 94 S.W.2d 213 (Tex. Civ. App. 1936). *But see* Pratte & Cabanne v. Corl, 9 Mo. 101 (1845); Gregson v. Superior Court, 46 R.I. 362, 128 Atl. 221 (1925).

Iowa is the only state with an explicit statutory provision for default judgment in event of such non-appearance. IOWA CODE 2169, Rule Civ. P. 230 (1946).

is no less an abandonment of the right to a jury trial and a hearing on the issue of liability.[36]

In addition to the default rationale, the court could have applied a waiver theory under which both lack of jury trial and failure of notice would cease to be errors. Under Rule 38 a jury is automatically waived unless promptly demanded. It is quite consistent with this policy of lightening the jury load[37] also to condition a jury trial on a party's diligence in appearing to take advantage of it.[38] It may be argued that the letter of Rule 39 bars the federal courts from considering such absence as a waiver: once a jury has been demanded the trial "shall be by jury, unless . . . the parties . . . by written stipulation or by oral stipulation made in open court consent to trial by the court [alone]." But the history of Rule 39 indicates that the "shall be" need not preclude a finding of waiver in other conduct inconsistent with an intent to assert the right to a jury.[39] And even if the "shall be" were regarded as

36. The Kansas court in the *Bass* case erred in rendering a default judgment against the defendant, for non-appearance at the trial, without giving notice as required by FED. R. CIV. P. 55(b)(2). But the requirement of notice affords the defendant much less protection at this stage than in the pre-trial stage. In the latter situation the default judgment is a device to keep the defendant from dragging his feet. See note 28 *supra*. When he fails to plead, the plaintiff's move is to apply for a default judgment. Notice then enables the defendant to come into court and, if his excuse is good, have the default set aside and file his pleading so the case may proceed toward normal trial. If the default is made to stand, the defendant loses his jury trial and his right to litigate liability, but may still contest the amount of unliquidated damages. See note 30 *supra*. But where the case has worked its way up the calendar to a scheduled trial date, and the defendant then fails to appear, the plaintiff may well not apply for a default judgment if it could only be granted after notice and further delay. A wiser move would be for plaintiff to waive the defendant's "default" and request trial immediately—putting on his *ex parte* proof before the jury. The defendant's only satisfaction then would be that at least a jury did hear plaintiff's story before deciding in his favor.

37. See James, *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1026 (1936). For an excellent study of the cost and time-consuming aspects of jury trials, see Clark & Shulman, *Jury Trials in Civil Cases—A Study in Judicial Administration*, 43 YALE L.J. 867 (1934).

38. Even in states where express waiver is required by statute, non-appearance at the trial is usually specified as such a waiver. *E.g.*, ARK. STAT. ANN. §27-1743 (1947); MINN. STAT. ANN. §546.26 (West 1947); MO. REV. STAT. ANN. §1101 (1942). See CLARK, CODE PLEADING 115 n.104 (1947). Moreover, as the states turn away from express waiver to waiver by non-demand, see *id.* at 115, absence at the trial is being included as an automatic waiver of jury. Thus Colorado has a rule identical with FED. R. CIV. P. 38, plus a specific provision that such non-appearance is a waiver. COLO. STAT. ANN., Rule Civ. P. 39(a)(3) (1946). And Iowa recently went a step farther to make absence at the trial a default. IOWA CODE 2169, Rule Civ. P. 230 (1946).

The tendency to extend waiver is evident also in criminal cases. Adams v. McCann, 317 U.S. 269 (1942) (waiver of entire jury permitted, for first time, in federal felony trial). See Oppenheim, *Waiver of Jury in Criminal Cases*, 25 MICH. L. REV. 695 (1927); Note, 28 WASH. U.L.Q. 175 (1943).

39. The "shall be" of Rule 39 originated in the Judiciary Act of 1789: "the trial of issues of fact . . . shall . . . be by jury [except in equity and admiralty suits]." 1 STAT. 80 (1789), as amended, 28 U.S.C. §770 (1946). In spite of this mandatory lan-

mandatory, a party's absence at the trial might be deemed an assent to trial by the judge alone which, joined in by his opponent in open court, would provide the oral consent called for by the rule. Under the waiver theory the Kansas court's omission of pre-judgment notice is irrelevant, since this special notice is required, if at all, only before a default judgment.

Thus, assuming that the defendant in the *Bass* case spoke the truth, the injustice of the original judgment lay not in any aspect of the proceeding itself but in the silent withdrawal of his attorney. Even so, it seems only fair to the plaintiff that defendant at least be made to justify his three-year delay before raising the point. If he had been limited to a direct attack, this he would have had to do.[40]

Even after three years, two "direct" procedures were still available. The district court could have treated defendant's answer as a claim for equitable

guage, the federal courts readily held that a jury trial could be waived. Parsons v. Armor, 3 Pet. 413, 425 (U.S. 1830) (express waiver); Bank of Columbia v. Okely, 4 Wheat. 235, 243 (U.S. 1819) (waiver in making note negotiable at bank whose charter authorized collection by summary proceeding). But in waiving a jury, the parties ran into trouble from another quarter. The courts felt they could not review findings of fact unless they were based on a jury verdict or on a stipulation by the parties. Campbell v. Boyreau, 21 How. 223 (U.S. 1858); Guild v. Frontin, 18 How. 135 (U.S. 1855). Hence waiver of jury resulted in waiver of appellate review as well. *Ibid.*

The first statutory attempt to cure this dual effect of waiver came in 1865 when Congress recognized waiver by written stipulation. 13 STAT. 501 (1865). Court trial in such cases was placed on a par with jury trial by an express provision for appellate review of the court's rulings. *Ibid.* But the courts continued to recognize other kinds of waiver where full review was denied. *E.g.*, Edwards v. Dow, 230 Fed. 378 (6th Cir. 1916) (waiver by not objecting to trial by the court alone).

Congress again attempted to ameliorate the effects of this practice by providing for full review where the waiver was by oral stipulation as well as when in writing. 46 STAT. 486 (1930). And shortly thereafter the courts removed the need for further amendments by ignoring their strict rule limiting review, even though waiver was neither written nor oral. Globe & Rutgers Ins. Co. v. Rose, 91 F.2d 635 (8th Cir. 1937) (waiver by not objecting to trial by court alone).

In 1938 the two provisions for specific methods of waiver were brought together in the Federal Rules. FED. R. CIV. P. 38, 39; see Notes of Advisory Committee on Rules, 28 U.S.C. following § 723(c) (1946). In so doing, the Advisory Committee expressly disavowed any intention of modifying the right to a jury trial as contained in the old Judiciary Act. *Ibid.* Thus it seems reasonable to assume that the "shall be" in Rule 39 does not prevent the courts from continuing to recognize waiver by methods other than those specified. And the fear of a limited review should be no objection to considering absence at the trial as a waiver, since the review provisions of the Federal Rules clearly apply. See FED. R. CIV. P. 46, 52, 73, 75, and Notes of Advisory Committee on Rules, 28 U.S.C. following § 723(c) (1946).

Such a non-exclusive interpretation of specific waiver provisions has been sanctioned by the New York courts. In the New York Civil Practice Act, section 425 states that "an issue of fact must be tried by a jury unless a jury is waived." And, although section 426 specifies methods for waiving a jury, these methods are not held to be exclusive. MacKellar v. Rogers, 109 N.Y. 468, 17 N.E. 350 (1888); Dostko v. Szymaniak, 133 Misc. 657, 233 N.Y. Supp. 167 (1929).

40. See pp. 345–6 *supra* and notes 41 and 43 *infra*.

relief, analogous to the independent equity suit to enjoin enforcement of the judgment.[41] Or it could have stayed the current action[42] pending a decision in the Kansas federal court under Rule 60(b), which authorizes a court to set aside its own judgment for "justifiable" reasons within a "reasonable" time after entry.[43]

By raising defendant's case to the status of a "collateral" attack, however, the Fifth Circuit saved the defendant the trouble of justifying his three-year failure to keep track of his attorney and his case. But more important, the court has inferentially declared an open season on a whole class of judgments, which lackadaisical losers may now pursue at their leisure. This result is neither necessary nor appropriate to justice for all parties to a dispute. It is an ill-founded breach of the general policy favoring a timely end to legal wrangling.

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41. See FED. R. CIV. P. 2 (joinder of law and equity). See also Notes of Advisory Committee on Rules, 28 U.S.C. following § 723(c) (1946); CLARK, CODE PLEADING § 93 (1947).

Abandonment by counsel is a recognized ground for such equitable relief. Seward v. Churn Ranch Co., 136 Neb. 804, 287 N.W. 610 (1939); Stanley v. Spann, 21 S.W.2d 305 (Tex. Civ. App. 1929). To qualify for this relief the complainant must show that he had a meritorious case which he was kept from presenting through no fault of his own, see 3 FREEMAN §§ 1189, 1213, and that he has not been dilatory in pressing his claim for relief. Village of Celina v. Eastport Savings Bank, 68 Fed. 401 (6th Cir. 1895) (relief denied loser who waited a year to bring his suit); 3 FREEMAN § 1192. Although the claimant was personally free from fault, he may be met by the notion that his attorney's negligence is imputable to him. See note 43 *infra*. And the general equity requirement that the complainant have no adequate remedy at law, 3 FREEMAN §§ 1194–5, has been held to bar a loser who could still attack the judgment by motion before the rendering court. Kieffer v. Kinney-Coastal Oil Co., 9 F.2d 260 (1925); Travelers' Protective Ass'n of America v. Gilbert, 111 Fed. 269 (8th Cir. 1901). See 3 FREEMAN § 1197.

42. *Cf.* Landis v. North American Co., 299 U.S. 248 (1936); Mottolese v. Kaufman, 13 F.R.S. 30b.31, Case 1 (2d Cir. 1949).

43. FED. R. CIV. P. 60(b); Klapprott v. United States, 335 U.S. 601 (1949) (four years a "reasonable" time when petitioner was in jail for most of it). In addition to establishing his diligence, the *Bass* defendant would have had to establish abandonment by his attorney as a "justifiable" reason for relief. Such abandonment is a recognized ground for relief under a motion to vacate. People's Finance & Thrift Co. v. Phoenix Assurance Co., 104 Cal. App. 334, 285 Pac. 857 (1930); Lewis v. Van Hooser, 206 Mo. App. 618, 227 S.W. 618 (1921). And the motion to set aside under Rule 60(b) is an equivalent mode of relief. Assmann v. Fleming, 159 F.2d 332 (8th Cir. 1947). See, generally, Notes of Advisory Committee on Rules, 28 U.S.C. following § 723(c) (1946); 3 MOORE, FEDERAL PRACTICE 3254–84 (1st ed. 1938); *id.* at 287–99 (Supp. 1948); Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623 (1946). Moreover, the court would probably require the defendant to prove that his original defense was a meritorious one. Assmann v. Fleming, *supra*. And if the defendant did not stumble over this requirement, he still faced the possibility that his attorney's negligence would be imputed to him. *See* Ledwith v. Storkan, 2 F.R.D. 539 (D. Neb. 1942); 3 FREEMAN § 1253.

DISCRIMINATORY LAW ENFORCEMENT AND EQUAL PROTECTION *FROM* THE LAW*

STATE discrimination against individuals or groups is prohibited by the equal protection clause of the Fourteenth Amendment.[1] While courts have readily used this clause to strike down discriminatory laws,[2] they have never been fully converted to the proposition that discriminatory enforcement of a nondiscriminatory law is also within the constitutional prohibition.[3] The inequality tolerated by this judicial hands-off policy is particularly acute where a law has ceased to reflect contemporary public opinion: it is then that enforcement is sporadic and most likely to be discriminatory.[4]

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* Society of Good Neighbors v. Van Antwerp, 36 N.W.2d 308 (Mich. 1949).

1. U. S. CONST. AMEND. XIV, § 1.

2. *E.g.*, Truax v. Raich, 239 U.S. 33 (1915); *cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886). See Tussman and tenBroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). And see note 18 *infra*.

3. Where courts have squarely met the issue in criminal prosecutions, they have generally held that failure to enforce the law impartially is no defense to an act which is substantively illegal. *E.g.*, Patterson v. State, 18 Ala. App. 55, 88 So. 360 (1921) (sale of prohibited liquor); People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943) (perjury in voter's affidavit of registration); Creash v. State, 131 Fla. 111, 179 So. 149 (1938) (lottery: bingo); Strand Amusement Co. v. Commonwealth, 241 Ky. 48, 43 S.W.2d 321 (1931) (Sunday law). Similarly, in suits to enjoin discriminatory police interference courts have held that such activity does not "rise to the dignity of unconstitutional discrimination. . . ." Buxbom v. City of Riverside, 29 F. Supp. 3, 8 (S.D. Cal. 1939) (discriminatory enforcement of ordinance regulating the distribution of advertising leaflets); Jackie Cab Co. v. Chicago Park Dist., 366 Ill. 474, 9 N.E.2d 213 (1937) (discrimination against Negro taxi drivers in enforcement of ordinance prohibiting cab-sharing).

A few courts have, however, recognized the clause's applicability to discrimination in law enforcement. Wade v. San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947) (order dismissing complaint for injunction overruled: allegedly discriminatory enforcement of ordinance prohibiting sale of magazine subscriptions on the street); City of Covington v. Gausepohl, 250 Ky. 323, 62 S.W.2d 1040 (1933) (injunction granted: ordinance prohibiting sidewalk displays of merchandise enforced against merchants but not against farmers). *See* Boynton v. Fox, 60 F.2d 851, 854 (10th Cir. 1932); People v. Oreck, 74 Cal. App. 2d 215, 221–2, 168 P.2d 186, 190–1 (1946).

4. Sporadic enforcement can hardly be explained by a desire to effectuate the law's purpose, since the law, vitiated to the extent of its nonenforcement, has ceased to exert any significant influence on the pattern of community behavior. See Moore & Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1, 83–5 (1943); Polier, *Law, Conscience and Society*, 6 LAW. GUILD REV. 490, 491 (1946). The court may have been aware of this proposition in Wade v. San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947). An allegation of discriminatory enforcement of a wartime ordinance prohibiting the sale of magazine subscriptions on the street was held to state a cause of action after the war emergency had become less acute and the law unnecessary. *Ibid.* And *see* People v. Montgomery, 47 Cal. App. 2d 1, 14, 117 P.2d 437, 446 (1941) (prosecution for pandering) ("[T]he only possible application of the doctrine of the Yick Wo case to a criminal prosecution would appear to be in an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime."); Strand Amusement Co. v. Commonwealth, 241 Ky.

Typical of such abusive enforcement is the application of Michigan's lottery law[5] to a charitable institution[6] in *Society of Good Neighbors v. Van*

48, 51–2, 43 S.W.2d 321, 322–3 (1931) (elaborate justification for upholding discriminatory enforcement of a Sunday law by stressing the supposed public necessity for such laws).

5. MICH. STAT. ANN. § 28.604 (Henderson 1938).

6. Nonenforcement of lottery laws as applied to charitable institutions is not confined to Michigan. While all American jurisdictions prohibit lotteries, see, *e.g.*, ARK. CONST. Art. 19, § 14; COLO. CONST. Art. XVIII, § 2; KY. REV. STAT. ANN. § 436.360 (1948); N. J. STAT. ANN. § 2:57–8 (1939), in none of them do most people feel that lottery laws should be enforced against charitable institutions. A nationwide poll asking the question, "Do you think that lotteries similar to the Irish Hospitals' Sweepstakes and conducted only for charity . . . should be allowed in this country?" received the following response: Yes, 55.3%; No, 32.5%; Don't know, 12.3%.

The geographical results were as follows:

	N.E.	S.E.	S.W.	W.	Pacific Coast
Yes	57.5%	48.3%	40.8%	44.3%	78.7%
No	31.5	32.1	44.6	41.5	17.2
Don't know	11.0	19.6	14.6	14.2	4.1

Fortune, October, 1935, pp. 168, 170.

Moreover, charitable lotteries appear to flourish unmolested in most jurisdictions. See *What Church (If Any) Runs Lotteries?* 49 CHRISTIAN CENTURY 1045 (1932); Literary Digest, Jan. 1, 1938, pp. 32–4; Legis., 34 IOWA L. REV. 647, 651–2 (1949); *see* Creash v. State, 131 Fla. 111, 122–6, 179 So. 149, 153–5 (1938). For example, clear indications may be found in New Haven, Connecticut, of the nonenforcement of the Connecticut lottery law, CONN. GEN. STAT. §§ 8667–71 (1949), against charitable institutions. Although charitable bingo games are permitted in Connecticut, CONN. GEN. STAT. § 703 (1949), other charitable lotteries or games of chance are not. CONN. GEN. STAT. §§ 8667–71 (1949). Of 12 Catholic churches investigated in June, 1949, 3 conducted annual bazaars or carnivals, 5 conducted raffles, 3 conducted bingo games, and 3 had no gambling at all. At one church a bazaar was in progress from June 17 to June 25, 1949, at which there were 9 roulette wheels and one dice game. Two automobiles were also being raffled off at the time. The police requested only that noise be kept to a minimum and that a large sign advertising the raffle be replaced by a smaller one. On April 27, 1949, the New Haven police raided 23 gambling establishments and made 41 arrests in an effort to wipe out all "illegal" gambling in the city. New Haven Evening Register, April 28, 1949, p. 1, col. 3. On the same day, however, the Register was offering an automobile as the prize in a public raffle which it was conducting for the benefit of the New Haven Boys' Club Summer Camp. *Id.* at p. 7, col. 4.

For a running account of the public's opposition to the late Mayor La Guardia's unsuccessful attempt at enforcing the state lottery law, N. Y. PENAL LAW §§ 1370, 1372, 1376, 1383, against New York City churches, see N. Y. Times, Nov. 26, 1942, p. 29, col. 6; Nov. 30, 1942, p. 1, col. 2; Dec. 1, 1942, p. 27, col. 5; Dec. 2, 1942, p. 27, col. 8; Dec. 3, 1942, p. 27, col. 1; Dec. 4, 1942, p. 1, col. 2; Dec. 5, 1942, p. 17, col. 6; Dec. 9, 1942, p. 29, col. 6; Dec. 24, 1942, p. 1, col. 2. And see N. Y. Herald Tribune, Oct. 17, 1949, p. 1, col. 1, for the New Jersey gubernatorial candidates' attempt to secure support of Catholic groups by advocating legalization of charitable bingo games.

In spite of this public and official approval of charitable lotteries, charities may legally conduct bingo or beano (another form of bingo) in only a few states. *E.g.*, CONN. GEN. STAT. § 703 (1949); ME. REV. STAT. c. 126, §§ 21–7 (1944); MD. ANN. CODE GEN. LAWS Art. 27, § 302 (1939); R. I. GEN. LAWS c. 612, § 56 (1938). A similar beano law in Massachusetts was construed strictly while it was in force, Commonwealth v. O'Connell,

Antwerp.[7] Plaintiff, a relief organization in the city of Detroit, had been conducting bingo games for several years when the local police developed a prejudicial attitude toward it.[8] Intimidation of the Society and its patrons was followed by instigation of a grand jury investigation into its operations for the purpose of prosecuting it under the state lottery law. The Society sued to enjoin the police from engaging in further detrimental action.[9] It alleged that while many other charitable organizations were operating lotteries in the city of Detroit, it alone had been singled out as the object of interference.

The Society relied on *Yick Wo v. Hopkins*[10] to convert these fact allegations into a cause for equitable relief within the equal protection clause. But the Michigan Supreme Court, while accepting the facts as true, rejected the application of *Yick Wo*.[11] The distinguishing feature which it found was the discretionary nature of the official action involved: in *Yick Wo* the administrator had abused a "discretionary" duty to determine what activity was substantively unlawful, whereas here the police were performing a "non-discretionary" duty of punishing a crime substantively defined by the legislature.[12]

293 Mass. 459, 200 N.E. 269 (1936) (game for which players were selected by chance held not to be beano), and has since been amended to legalize only charitable whist or bridge parties. MASS. ANN. LAWS c. 271, § 22A (Supp. 1948).

7. 36 N.W.2d 308 (Mich. 1949).

8. This attitude appeared to be the result of personal animosity on the part of the assistant police superintendent and political differences with other city officials. Brief for Appellant, p. 3; Transcript of Record, pp. 5, 8–9.

9. After suit was begun, the police committed their first act of physical interference by raiding one of plaintiff's bingo games and confiscating a good deal of its equipment. Brief for Appellant, p. 5; Transcript of Record, pp. 18–19.

10. 118 U.S. 356 (1886). A San Francisco ordinance required a license to operate laundries located in buildings constructed neither of brick nor stone. A large number of such licenses had been issued to Caucasians, but had been withheld in every instance from Chinese operating under similar conditions. In releasing on habeas corpus a Chinese imprisoned for operating a laundry without a license, the Supreme Court said: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373–4.

11. Society of Good Neighbors v. Van Antwerp, 36 N.W. 2d 308, 310 (Mich. 1949).

12. As a secondary ground for decision, the supreme court ruled that plaintiff, as a law violator, could have no remedy in equity. *Ibid.* Invocation of this "clean hands" doctrine in the context of discriminatory law enforcement seems singularly inappropriate. For while "clean hands" may have some utility as an expression of judicial reluctance to aid illegal transactions, see Chafee, *Coming Into Equity With Clean Hands*, 47 MICH. L. REV. 877, 889 (1949), the doctrine makes little sense where employed to give judicial blessing to discriminatory government action. And the court's interjection of ethical considerations is even more paradoxical, since the court by granting the injunction would not have condoned the plaintiff's infractions: future enforcement on a non-discriminatory basis would still have been permissible. See note 21 *infra*.

The court incorrectly assumed that plaintiff had an adequate remedy at law. Society of Good Neighbors v. Van Antwerp, 36 N.W.2d 308, 309 (Mich. 1949). While plaintiff

The assertion that the police can exercise no discretion not only ignores the realities of law enforcement,[13] but belies the court's professed acceptance of plaintiff's fact allegations.[14] Indeed, if police discretion is to be thus ruled out of future cases, litigants will be precluded from ever showing police discrimination. And such preclusion is not justified by the frequent necessity for limiting the number of prosecutions. This necessity stems from shortages of money, men, or equipment, or from the physical impossibility of apprehending all offenders. Selectivity in prosecution resulting from these factors usually pursues a rational pattern designed to secure effective enforcement.[15] On the other hand, the sole purpose of discriminatory enforcement is to discriminate. The abolition of such discrimination need not impair the admitted utility of selective enforcement: the existence of a rational plan of enforcement would make it impossible for one claiming discrimination to meet the heavy burden of proof required in such actions.[16]

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could have interposed the Fourteenth Amendment as a defense if prosecuted, the police apparently intended to end the bingo games by extra-legal coercion such as continued investigation and threats of prosecution. Transcript of Record, p. 20. And an action for damages against the police would have had little chance of success. In Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938), a prosecutor was immune from tort liability even though he acted maliciously; and see Keefe, *Personal Tort Liability of Administrative Officials*, 12 FORD. L. REV. 130, 144-5 (1943). Plaintiff might also have sued the police to recover the confiscated equipment. See note 9 *supra*. Success in such a suit would not, however, have provided plaintiff with an "adequate" remedy. Moreover, if the Court felt that plaintiff had stated a cause of action at law, it should not have dismissed the complaint. Transfer of the suit to the law side of the court would have been the appropriate procedure. MICH. STAT. ANN. § 27.652 (Henderson 1938).

13. State *ex inf.* Mc Kittrick v. Wallach, 353 Mo. 312, 322-3, 182 S.W.2d 313, 319 (1944). Clearly, it is up to the enforcing officials to decide whether the purpose of a law has been sufficiently undermined to warrant arrest and prosecution. See Cohen, *"Real" and "Ideal" Force in Civil Law*, Int'l Journal of Ethics, Apr., 1916, p. 347, 357: "We cannot eliminate the judgment from the law [*i.e.*, statute], because those who have to enforce the law must be guided by this judgment in order to determine the actual contents of the law." As a result of this exercise of discretion, many laws remain unenforced generally, or against certain groups or individuals. *See* Everhart v. People, 54 Colo. 272, 284, 130 Pac. 1076, 1081 (1913). For specific examples see the unenforcement of lottery laws as applied to charitable institutions, *supra* note 6, the selective enforcement policy followed by OPA, *infra* note 15, and the laxity in enforcement of traffic and parking ordinances in New York City. N.Y. World-Telegram, July 15, 1949, p. 3, col. 1.

14. "Well pleaded allegations in a bill of complaint, and inferences drawn therefrom, must be taken as true and construed in a light favorable to the plaintiff." 36 N.W. 2d 308, 310 (Mich. 1949).

15. See OPA MANUAL, c. 9, § 1702.02: ". . . OPA must develop techniques and criteria for choosing a relatively small number of key cases to prosecute criminally. OPA cannot in this way punish all violators who deserve criminal penalties. No prosecution should be recommended unless the case has clear significance for enforcement beyond the administering of deserved punishment." This is one of many instances where discretion plays an important part in law enforcement. See note 13 *supra*.

16. For examples of failure to prove discrimination in the face of a rational plan of enforcement, see Mackay v. Little Rock, 250 U.S. 94, 100 (1919) (prosecution deemed test case to determine scope of ordinance; discrimination against defendant not shown,

Moreover, the court's distinction between "discretionary" and "non-discretionary" government activity[17] is at best a tenuous one in terms of the oft-repeated purpose of the equal protection clause—to protect persons from discrimination by all public officials.[18] That purpose is but partly realized if persons suffering discrimination at the hands of regulating officials are protected, while those suffering discrimination at the hands of enforcing officials are not.

The discriminatory nature of the police activity seems, nonetheless, to have been outweighed by the court's fear that an injunction for plaintiff would entitle other operators of charitable bingo games to the same relief, and thus partially nullify a valid penal law.[19] But to assume that there are other charitable institutions facing prosecution is to assume away the plaintiff's chief claim for relief, namely that the Michigan lottery law is never so enforced.[20] Moreover, the court seemed to overlook the possibility that the law might be resurrected and enforced on a non-discriminatory basis.[21]

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although no others similarly situated were prosecuted); Broad-Grace v. Bright, 48 F. 2d 348 (E.D. Va. 1931), *aff'd*, 284 U.S. 588 (1931) (officials had from time to time brought criminal charges to test applicability of Sunday law; enforcement here held non-discriminatory). See note 22 *infra*.

17. The verbal nature of this distinction becomes obvious in cases where courts attempt to distinguish between the adoption of regulations pursuant to a law and enforcement of a similar law. *Compare* the facts in Pierce v. Schram, 116 Neb. 263, 216 N.W. 809 (1927) (regulations unconstitutional; discrimination found) *with* the similar facts in Chapman v. City of Lincoln, 84 Neb. 534, 121 N.W. 596 (1909) (enforcement of an ordinance constitutional; discrimination ruled out).

18. *See* Chicago, B., & Q. R.R. v. Chicago, 166 U.S. 226, 233–4 (1897): "[T]he prohibitions of the [fourteenth] amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment . . . , 'violates the constitutional inhibition; and . . . his act is that of the State.'"

The equal protection clause has, in fact, been applied to all government activity. *E.g.*, Dobbins v. Los Angeles, 195 U.S. 223 (1904) (municipal ordinance); Home Tel. and Tel. Co. v. Los Angeles, 227 U.S. 278 (1913) (administrative regulation); Hill v. Texas, 316 U.S. 400 (1942) (judicial procedure); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of private restrictive covenant). However, the applicability of the clause is occasionally limited by a restricted view of what is sufficient to state a cause of action under it. *E.g.*, Snowden v. Hughes, 321 U.S. 1 (1934). See also note 3 *supra*.

19. "Should the relief which plaintiff seeks be granted, other operators of charitable bingo games would be entitled to the same relief and the ultimate effect would be the nullification of a valid statute." 36 N.W. 2d 308, 310 (Mich. 1949).

20. At least forty-three bingo parties are operated in the city of Detroit without being molested by the police. Brief of Appellant, p. 12. Among the unmolested organizations are the Detroit Fire Department, the Veterans of Foreign Wars, the American Legion, and the State of Michigan itself. Transcript of Record, pp. 13–14. This conforms with the widespread unenforcement of lottery laws against charitable institutions. See note 6 *supra*.

21. In Wade v. San Francisco, 82 Cal. App. 2d 337, 186 P.2d 181 (1947), the court, in reversing dismissal of a complaint for injunctive relief against discriminatory law enforcement, said: "[I]f the proof satisfies the [trial] court that the ordinance is being

Perhaps the court realized that an injunction here could not possibly have hindered enforcement of a law already dead as to charitable organizations, but feared complete nullification of "necessary" laws, *i.e.*, laws which at least to some extent are fulfilling their expressed purpose. Yet this fear too seems virtually groundless, whatever the situation may be.

In one kind of situation, the statute by its terms requires general enforcement, the legislature fully intends it, and administrative officials are enforcing the law universally or in a rationally selective manner. This presents no problem for the courts, since those alleging discrimination cannot meet their burden of proof.[22]

A second situation arises when again the statute requires and the legislature intends general enforcement, but enforcement officials are directing their attention to one class of violators only. In this case, court injunction against the discriminatory enforcement would tend to bolster the "necessary" law by compelling enforcement officials either to generalize their operations or face inquiry and discipline at the hands of an exasperated legislature.

The final situation is that typified by the Michigan lottery statute: the law presumes general enforcement; the legislature apparently no longer intends enforcement against a particular favored class—charitable institutions; enforcement officials apply the law to commercial lotteries, but also apply it sporadically to certain charities for illegitimate reasons. Here again injunctions against discrimination would do good rather than harm. Such court action would either cause enforcement officials to cease their activities against members of the favored class, or stimulate general enforcement. In either case, legislators would be compelled eventually to make the law mean what they now intend it to mean. If enforcement were confined to disfavored groups, they could validly charge discrimination, and the legislature would have to restrict the law to them to remove the basis for this charge. And if enforcement became general, the legislature could restore protection to favored groups only by a similar restriction. A law distinguishing between commercial and charitable lotteries undoubtedly rests on a "reasonable classification," and the requirements of the equal protection clause would be fully met.

Equal protection requires non-discriminatory law enforcement, even at the risk of nullifying "necessary" statutes.[23] In the *Van Antwerp* case, where

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enforced . . . with intentional discrimination, any injunction issued . . . should be so framed as to permit the future enforcement of the ordinance against all violators without discrimination if the defendants see fit . . . so to enforce it." *Id.* at 339–40, 186 P.2d at 183.

22. For examples of unsuccessful attempts to prove discrimination in the rational enforcement of "necessary" laws see Ah Sin v. Wittman, 198 U.S. 500 (1905) (discrimination against Chinese not sufficiently shown in enforcement of ordinance prohibiting the exhibition of gambling implements in a barricaded house); People v. Zammora, 66 Cal. App. 2d 166, 236–7, 152 P.2d 180, 216 (1944) (prosecution for murder); State v. Smith, 93 Atl. 353 (R.I. 1915) (same). See also notes 15 and 16 *supra*.

23. Most courts, however, have not extended the equal protection clause to cases of discriminatory enforcement. See cases cited note 3 *supra*. For cases arguing for a broader interpretation of the clause, see Covington v. Gausepohl, 250 Ky. 323, 62 S.W.2d 1040