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RECENT CASES

Antitrust—When Plaintiff Participates in a Scheme Initiated by Defendant, In Pari Delicto Is No Bar to Recovery

Plaintiffs[1] brought a treble damage antitrust suit[2] against their franchisor, a distributor of automotive parts,[3] alleging that their franchise agreements[4] with defendant created a restraint of trade in violation of section one of the Sherman Act[5] and section three of the Clayton Act.[6] The franchise agreements gave plaintiffs exclusive territories for the sale of "Midas Mufflers"[7] at fixed prices and required that plaintiffs buy all parts exclusively from defendant. Plaintiffs made substantial profits from their franchises and sought and obtained additional Midas shops.[8] After being denied the opportunity to

1. Plaintiffs were four Midas Muffler dealers, each of whom did business separately from the others in a different part of the country between 1955 and 1960.

2. 15 U.S.C. § 15 (1964) provides that any person who is injured in his business or property by reason of violation of the antitrust laws may sue for treble damages in any district court of the United States.

3. Named as defendants were International Parts Corp., three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants. These ten separate legal persons constituted a single trading entity by which a family-owned business was conducted. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692, 693 (7th Cir. 1967).

4. The terms of the franchise agreement did not provide for a franchise fee, construction expense, purchase of capital equipment from defendants, or lease of real estate or equipment. It could be cancelled on 30 days notice. The franchisee was granted a license to use the trademarks "Midas" and "Midas Muffler Shop" and in return agreed to buy all exhaust system parts from International, to sell at prices fixed by defendants, and to refrain from selling or handling any automotive parts of any other distributor. The dealers were able to purchase directly from the manufacturer, International Parts, at considerable savings, but were prohibited from handling any automotive parts except exhaust system parts. *Id.* at 694.

5. 15 U.S.C. § 1 (1964) declares unlawful combinations or conspiracies in restraint of trade.

6. 15 U.S.C. § 3 (1964) prohibits the making of a contract to fix prices for goods or to prevent purchases from competitors when the effect is to lessen competition or to create a monopoly.

7. The Midas plan was originated in 1955 by International Parts. The plan was to create a network of shops specializing in automotive exhaust system service and maintaining an atmosphere of cleanliness, comfort, and prompt service. The plan also included the Midas guarantee to replace in any Midas shop in the country any Midas muffler that failed to last as long as the customer owned the car. 376 F.2d at 694-95.

8. The franchises were so successful that each of the four plaintiffs actively sought and obtained additional franchises during their participation in the Midas program. One plaintiff made over $200,000 in profits during his years as a franchisee. *Id.* at 696-97.

purchase certain parts at lower prices elsewhere, plaintiffs terminated their agreements with defendant[9] and joined a Midas competitor.[10] The trial court granted defendant's motion for summary judgment, holding that plaintiffs voluntarily and actively participated in the scheme and were barred by the doctrine of *in pari delicto*, and the Seventh Circuit affirmed.[11] On certiorari, the Supreme Court, *held*, reversed. Where an injured party utilizes an illegal scheme formulated and carried out by others, the doctrine of *in pari delicto* will not bar recovery in a private antitrust suit. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

When the Sherman Antitrust Act was enacted by Congress, several alternate bills expressly allowing the defense of *in pari delicto*[12] were rejected, indicating that Congress did not intend the defense to bar recovery.[13] However, an early decision[14] permitted the defense, and subsequent congressional amendments have neither granted nor withheld the defense. Almost all early lower court decisions[15] permitted the defendant to raise *in pari delicto* as a bar to plaintiff's recovery. These decisions rested on the principles recognized in equity and common law that the law should refuse to enforce an illegal bargain and should leave equally guilty parties where it finds them.[16] An exception to this rule was made and recovery allowed when a plaintiff had severed his relationship with the unlawful scheme and

9. Three of the plaintiffs cancelled when they were denied additional franchises. The fourth was cancelled by defendant over a controversy regarding the exclusive dealing provision. *Id.*

10. After their relationship with International was severed, all plaintiffs became members of the Robin Hood franchise program which encompassed items other than exhaust systems and provided no guarantee on its leading muffler. Plaintiffs felt that the requirements of this agreement were less restrictive than those of the International agreement. *Id.*

11. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967). The district court decision was not reported. Plaintiffs also alleged a violation of the Robinson-Patman Act, 15 U.S.C. § 13 (1964), which prohibits price discrimination between different purchasers of commodities of like grade and quality and the granting of discriminatory rebates. The Seventh Circuit reversed the district court's order of summary judgment for defendant on this issue, and it was not considered in the instant case. 376 F.2d at 703-04.

12. *In pari delicto* literally means "in equal guilt." When it is invoked as a defense the law refuses to aid the guilty plaintiff and does not allow him to profit from his own wrongs. At common law the defense is frequently applied when the guilt of plaintiff is considerably less than that of defendant.

13. *See* Bushby, *The Unknown Quantity in Private Antitrust Suits—The Defense of In Pari Delicto*, 42 VA. L. REV. 785, 787 (1956) and documents cited.

14. Bishop v. American Preservers Co., 105 F. 845 (N.D. Ill. 1900).

15. Eastman Kodak Co. v. Blackmore, 277 F. 694 (2d Cir. 1921); Bluefields S.S. Co. v. United Fruit Co., 243 F. 1 (3d Cir. 1917), *dismissed on stipulation*, 248 U.S. 595 (1919); Morny v. Western Union Tel. Co., 40 F. Supp. 193 (S.D.N.Y. 1940).

16. *See* Bales v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964).

claimed damages sustained only after such severance.[17] The Supreme Court, on the other hand, has stressed the public nature of the private treble damage action, and has never expressly recognized the *in pari delicto* defense,[18] regarding plaintiffs as "private attorneys general" for the enforcement of antitrust legislation.[19] Hence, when it has considered *in pari delicto,* the Court has restricted the defense. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,*[20] the Court held the defense inapplicable where a plaintiff's guilt consists of participation in illegal activity other than that sued upon. In *Simpson v. Union Oil Co.,*[21] the Court held that a plaintiff cannot be *in pari delicto* if his participation was the result of economic coercion.[22] In such a situation plaintiff's acquiescence in the violation is the only feasible way he can do business and can hardly be said to be voluntary. Following the *Kiefer-Stewart* and *Simpson* decisions, the application of the *in pari delicto* defense has remained questionable in two situations: when plaintiff voluntarily enters into the illegal activity, and when his guilt is equal to that of defendant. Lower courts have divided on these issues. Reasoning that notions of fairness are offended if a plaintiff recovers treble damages on an agreement under which he has profited,[23] some courts have held that the voluntary participant cannot complain of a wrong arising from his illegal activity.[24] Other courts have allowed recovery when plaintiff's guilt was voluntary but not equal to that of

17. Connecticut Importing Co. v. Frankfort Distilleries, 101 F.2d 79, 81 (2d Cir. 1939); Victor Talking Mach. Co. v. Kemeny, 271 F. 810 (3d Cir. 1921).

18. "[F]ounded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public . . . ." D. R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165, 174 (1915).

19. "It is clear Congress intended to use private self-interest as a means of enforcement. . . ." Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947).

20. 340 U.S. 211 (1951). Kiefer-Stewart was a liquor wholesaler who bought from Seagram and other distillers. In a treble damage action by Kiefer-Stewart based on the distilleries' price fixing agreement, the distilleries interposed as a defense an agreement between Kiefer-Stewart and other wholesalers setting minimum resale prices. The Court held that an illegal agreement other than the one sued on could not be used as a defense and allowed Kiefer-Stewart to recover.

21. 377 U.S. 13 (1964). Simpson was a consignment dealer for Union Oil Co. under an agreement which granted him a commission for gasoline sales at prices set by Union. After plaintiff sold below the prices fixed by Union, both his franchise and lease were cancelled. The Court reasoned that since Congress intended to prohibit agreements such as this and provided for private sanctions to enforce them, a party who has been coerced into participating in an illegal agreement should not be denied recovery by reason of such involuntary participation.

22. This exception was recognized earlier in Ring v. Spina, 148 F.2d 647, 653 (2d Cir. 1945).

23. *See* Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593 (N.D. Ill. 1964).

24. Crest Auto Supplies, Inc. v. Ero Mfg. Co., 360 F.2d 896 (7th Cir. 1966); Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co., 209 F.2d 131 (4th Cir. 1953), *cert. denied,* 347 U.S. 960 (1954).

defendant.[25] Since each case is based on a unique factual situation, no general rule has evolved as to when plaintiff's involvement in an illegal scheme becomes "equal" to that of defendant so as to invoke the defense.

In the instant case, the Court first noted the public purpose of private antitrust litigation and the absence of congressional intention to make *in pari delicto* a defense to treble damage actions. The Court found that such common law defenses would discourage plaintiffs from bringing action and thereby curtail the effectiveness of antitrust laws;[26] therefore, the *in pari delicto* defense should not be broadly applied in antitrust actions.[27] Turning to the facts before it, the Court disagreed with the lower court finding that plaintiffs had voluntarily[28] and actively[29] participated in the illegal scheme. Rather, the parties were found to be in an unequal bargaining position, similar to the situation in *Simpson*, wherein the plaintiff could either acquiesce in the illegal agreement or go out of business. While concluding that *in pari delicto* is inapplicable when such a scheme is formulated by another and merely utilized by plaintiff,[30] the Court expressly refused to decide whether recovery would be barred if plaintiffs had actively formulated and perpetuated the illegal program.[31] Five justices in

25. *E.g.*, Bales v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964); Lyons v. Westinghouse Elec. Corp., 235 F. Supp. 526 (S.D.N.Y. 1964); Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964). These courts indicated that if the plaintiff's conduct were sufficiently immoral, the defense of *in pari delicto* would be allowed.

26. "The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." 392 U.S. at 139.

27. "We therefore hold that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." *Id.* at 140.

28. "Although petitioners may be subject to some criticism for having taken any part in respondent's allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the frauchises enthusiastically but they did not actively seek each and every clause of the agreement." *Id.* at 139.

29. "These statements completely refute respondents' argument that petitioners were active participants and show, to the contrary, that the illegal scheme was thrust upon them by Midas." *Id.* at 141.

30. The opinion suggests that plaintiffs' damages might be reduced by the profits received through restraints beneficial to them. *Id.* at 140. Mr. Justice Marshall, concurring, considered this unworkable because of the extreme difficulty of determining which restraints caused what profits and in what amount. *Id.* at 152.

31. The Court's opinion indicates that if recovery is to be barred in such a situation,

four separate opinions[32] agreed with the Court's decision on the facts before it, but felt the doctrine of *in pari delicto* should not be altogether abolished in private antitrust litigation. In each opinion the view was clearly expressed that a plaintiff who actively formulates and perpetuates an illegal plan and whose guilt is substantially equal to that of defendant will not be allowed to recover.[33]

The problem faced by the Court in this case was two-fold: (1) balancing the public interest in private antitrust suits with the fundamental notion of justice that one shall not profit from his own wrongdoing; and (2) deciding when a plaintiff's own illegal conduct should bar his recovery in a treble damage suit. The Court handled the first problem in a manner consistent with prior decisions by coming down strongly on the side of the public interest. In so doing, however, the Court used ambiguous language which seems to abolish the defense of *in pari delicto*[34] and created a semantic problem which it failed to resolve. However, analysis of the majority and concurring opinions reveals that the concept of *in pari delicto* was not in fact abolished as a defense. What was struck down was the broad scope of the "common law" *in pari delicto* barrier which denies recovery for any guilt whatsoever on the part of plaintiff. Though the *in pari delicto* doctrine is, by that name, given broad application in other contexts, the Court declares such application inappropriate in private antitrust suits created to protect the public interest. The instant holding amounts to a condemnation of the "common law" manifestations of the doctrine, but it does not mean that the concept of "equal guilt" is abolished as a defense in private antitrust suits. Five justices sensed the Court's ambiguity on this point and sought to clarify the view that recovery will be barred whenever guilt is literally or substantially "equal" on the part of both plaintiff and defendant. The Court refused

it should not be labeled an *in pari delicto* defense because of the complexity of the common law notions surrounding that term. *Id.* at 140.

32. Justices White, Fortas and Marshall wrote concurring opinions. Mr. Justice Harlan, joined by Mr. Justice Stewart, in a concurring and dissenting opinion felt that rather than remand for trial, the Court should order the motion for summary judgment reconsidered in the light of a clearer understanding of *in pari delicto.*

33. Mr. Justice White argued that allowing one who formulates an illegal scheme to recover will work at cross purposes with antitrust policy. "[A]ssuring him illegal profits if the agreement . . . succeeds and treble damages if it fails . . . may encourage what the Act was designed to prevent." 392 U.S. at 146. Justices Fortas, Marshall and Harlan stated that if the trial on remand of the instant case shows that plaintiffs actually bargained for and formulated the illegal restraints, recovery would be denied. *Id.* at 148, 150, 156. Mr. Justice Harlan felt that neither the "consent" situation of the instant case, the "economic coercion" situation of *Simpson,* 377 U.S. 13 (1964), nor the "independent illegal activity" situation of *Kieffer-Stewart,* 340 U.S. 211 (1950), are true cases of *in pari delicto,* which should mean guilt that is literally or substantially equal. 392 U.S. at 154-55.

34. *See* note 27 *supra.*

to make such a clarification, leaving open the question of when a plaintiff's involvement is such that his guilt is "equal" to that of defendant. In this case, plaintiffs who made handsome profits from their illegal agreements were treated as having been economically coerced, and therefore allowed to recover. Future courts could have profited from a discussion of the kind of conduct necessary to preclude plaintiff's recovery. The five concurring justices tried to fill this gap, but unfortunately, their opinions do not carry the authority of the Court. Many of these issues may be laid to rest when the Court can make such a decision with a full trial record before it rather than a motion for summary judgment. Because it treated the facts of this case as falling within the category of "economic coercion," the Court made no substantial change in prior law. However, several obscure areas of private antitrust law were elucidated, and may be of help to future litigants. First, plaintiff's voluntariness in making an illegal agreement will not, by itself, bar his recovery; second, the fact a plaintiff has made substantial profits from a scheme does not preclude his bringing suit on the illegal agreement; third, the predominating consideration in such actions is the public interest in encouraging the private antitrust suit, and courts will view the facts of each case in the light most favorable to permitting trial; and fourth, the *in pari delicto* defense, whether by that name or some other, will not be available unless a plaintiff has equal bargaining power with defendant and has actively formulated and perpetuated the illegal scheme.

Civil Rights—Amusement Park Is Covered by Title II of the Civil Rights Act of 1964

Plaintiff, a Negro, filed suit in federal district court seeking to enjoin defendant amusement park, which operates mechanical rides and a skating rink, from denying Negroes the use of its facilities.[1] Plaintiff contended that defendant's exclusion of Negroes from the park violated section 201(b)(3) of the Civil Rights Act of 1964, which prohibits racial discrimination in "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertaiument."[2] Defendant contended that his amusement park was not a "place of exhibition or entertainment" within the meaning of the statute on the ground that it had no exhibits or performances for the entertainment of spectators. The district court entered judgment

1. Defendant also operated concession stands serving refreshments, but it was stipulated by the parties that coverage would not be claimed on this basis.
2. 42 U.S.C. § 2000a(b)(3) (1964).

for the defendant[3] and the Fifth Circuit Court of Appeals affirmed.[4] On rehearing *en banc, held,* reversed. An amusement park which operates mechanical rides and a skating rink is a "place of entertainment" within the meaning of section 201(b)(3) of the Civil Rights Act of 1964. *Miller v. Amusement Enterprises, Inc.,* 394 F.2d 342 (5th Cir. 1968).

The first federal legislation to prohibit racial discrimination in public accommodations was the Civil Rights Act of 1875.[5] That act was quickly declared unconstitutional, however, on the ground that the fourteenth amendment, upon which it was based, applied only to state action, and not to actions by private individuals.[6] The Civil Rights Act of 1964 sought to avoid this problem by basing its public accommodations section[7] on the commerce clause as well as the fourteenth amendment.[8] That section provides that all persons are entitled to equal enjoyment of any "public accommodation" without discrimination because of race, religion, or national origin.[9] It enumerates four types of establishments which are to be considered "public accommodations" within the meaning of the Act if their operations affect commerce or are supported by state action: (1) lodgings for transient guests; (2) eating facilities and gas stations; (3) "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment;"[10] and (4) any establishment which is located within any of the establishments covered above, or within which is located a covered establishment.[11] Following the passage of the Act there was some speculation in legal literature as to whether the third category, places of exhibition or entertainment, would include places of participation sports, such as bowling alleys and swimming pools; most of the writers concluded that such places would not be included.[12] Several district court cases have discussed this question, reaching similar conclusions. In *Kyles v. Paul*[13] a federal

3. Miller v. Amusement Enterprises, Inc., 259 F. Supp. 523 (E.D. La. 1966).
4. 391 F.2d 86 (5th Cir. 1967).
5. Act of March 1, 1875, ch. 114, 18 Stat. 335.
6. Civil Rights Cases, 109 U.S. 3 (1883).
7. Civil Rights Act of 1964, 42 U.S.C. § 2000a (1964).
8. The constitutionality of the act has been upheld by the Supreme Court. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
9. Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (1964).
10. Plaintiff claimed the amusement park came within this subsection as a *place of entertainment.*
11. Civil Rights Act of 1964, 42 U.S.C. § 2000a(b) (1964).
12. BUREAU OF NATIONAL AFFAIRS, THE CIVIL RIGHTS ACT OF 1964 83 (1964); Rasor, *Regulation of Public Accommodations via the Commerce Clause,* 19 SW. L.J. 329, 331 (1965); Sanders, *The Civil Rights Acts of 1964,* 27 TEXAS B.J. 931, 1016 (1964).
13. 263 F. Supp. 412 (E.D. Ark. 1967).

district court held that an outdoor recreational facility for swimming, boating and picnicking was not a "place of exhibition or entertainment" within the meaning of the Act. In reaching this conclusion the court applied the rule of *ejusdem generis*[14] and said that the phrase "other place of exhibition or entertainment" must refer to places similar to those expressly mentioned in the statute (motion picture house, theater, concert hall, sports arena stadinm), and thus must be places in which one is passively entertained and participation is minimal. In *Adams v. Fazzio Real Estate Co.*[15] another district court said that, on the basis of legislative history, bowling alleys were not "places of entertainment" within the meaning of the Act.[16] Several other district court cases have implied, by way of dicta, that "places of entertainment," as used in the Act, includes only establishments where performances are presented,[17] and where entertainment is essentially passive.

The court in the instant case rejected the conclusion of the aforementioned writers[18] and district courts[19] that the Act does not cover places of participant sports. According to this court, the broad legislative purpose of ending racial discrimination in places open to the public overrides the rule of *ejusdem generis*,[20] which would limit the term "other places of entertainment" in the statute to establishments where performances are presented to entertain spectators.[21] The court stated that, even if this section of the Act were limited to places where performances are presented, an amusement park and skating rink would still be within its scope since many of the patrons come to watch the "performance" of the other patrons, particularly their own

14. "[U]nder the maxim, where an enumeration of specific things is followed by a more general word or phrase, such general word or phrase is held to refer to things of the same kind, or things that fall within the classification of the specific terms." Bumpus v. United States, 325 F.2d 264, 267 (10th Cir. 1963).

15. 268 F. Supp. 630, 633 (E.D. La. 1967).

16. However, the particular bowling alley in that case was covered by the Act because it contained a lunch connter. *Id.*

17. In Evans v. Laurel Links, Inc., 261 F. Supp. 474 (E.D. Va. 1966), the court found a golf course to be within the section, hecause it presented tournaments tlnat moved in interstate commerce. The court implied that if no tournaments had been held, the golf course could not have been considered a "place of entertainment" within the meaning of the Act. An alternative ground for the holding was a lunch counter operated by the golf course. *See also* Robertson v. Johnston, 249 F. Supp. 618 (E.D. La. 1966), *rev'd on other grounds*, 367 F.2d 43 (5th Cir. 1967), where the court held that a "cabaret" or "nightclub" is a "place of exhibition or entertaimment," implying in dicta that the term must be limited to places where entertainment is presented.

18. *See* note 12 *supra.*

19. *See* Adams v. Fazzio Real Estate Co., 268 F. Supp. 630 (E.D. La. 1967); Kyles v. Paul, 263 F. Supp. 412 (E.D. Ark. 1967); note 17, *supra.*

20. *See* note 14 *supra.*

21. The statute lists motion picture houses, theaters, concert halls, sports arenas and stadiums.

children, as they participate in the activities. As to the second requirement for coverage under the statute, that the "place of entertainment" must present "films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce,"[22] the court held that since the mechanical rides, although now affixed to the ground, had been manufactured in another state, and many of the participating patrons who were "entertaining" other spectator patrons, came from out-of-state, this requirement was also met.

Although the court has reached what may be a sociologically and philosophically correct result, a close analysis of the wording of the statute and its history indicates that this result is beyond that intended by Congress. Although the legislative history of the statute is generally inconclusive on the question,[23] at least some parts of the history indicate that places of participant sports were not intended to be covered. For example, when the bill was presented to the Senate, Senator Magnuson, floor manager of Title II, stated that dance studios, bowling alleys, and billard parlors would be exempt from coverage as places of entertainment;[24] when the bill was reported out of the House Judiciary Committee, Representative Kastenmeier criticized its narrow coverage, commenting that it would allow discrimination to continue in "bowling alleys and other places of recreation and participation sports, unless such places served food."[25] Despite this criticism no change was made. Other factors also indicate that the Act was meant to cover only establishments where spectators are passively entertained by some type of performance, rather than places of participant sports. First, there is the statutory requirement that a place of entertainment will be held to "affect commerce" (and thus be covered by the Act) only if it customarily *presents* films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce.[26] This clearly implies than an establishment which does not present some type of show or performance is not covered; thus places of participant sports would be excluded. The court's characterization of patrons' participation as a "performance" is strained in itself; it breaks down completely, however, in that such a "performance" is not "presented" by the establishment. Secondly, there is the *ejusdem generis* issue, in which the court seems to ignore the fact that the legislative

22. Civil Rights Act of 1964, 42 U.S.C. § 2000a(c)(3) (1964).

23. An excellent summary of the pertinent legislative history was filed as a memorandum by the United States in the first hearing of this case before the circuit court; it is reported as an appendix to that decision. 391 F.2d 86, 89 (1967) (appendix).

24. 110 CONG. REC. 7407 (1964) (remarks of Senator Magnuson).

25. H. R. REP. No. 914, 88th Cong., 1st Sess. 40-41 (1963).

26. Civil Rights Act of 1964, 42 U.S.C. § 2000a(c)(3) (1964).

purpose was to prohibit racial discrimination only in certain selected types of public establishments.[27] In other words "Congress . . . exclude[d] some establishments from the Act . . . for reasons of policy . . . ."[28] As stated by the Attorney General before the House Judiciary Committee, Title II did not include many establishments within Congress's reach, because it was hoped that either local legislation would take care of them or that enforcement in the establishments covered by the Act would induce voluntary non-discriminatory practices in other establishments, thus making coverage by federal legislation unnecessary.[29] Had Congress intended for participation establishments such as bowling alleys, swimming pools, and amusement parks to be covered, it would seem that at least one such establishment would have been enumerated in the statute. Several factors might explain Congress's intent to exempt participant establishments.[30] In addition to legislative compromise, the Congress may have felt it more likely that violence might result from the forced integration of places where people actively participate and often compete, than in places where the patrons are passively entertained, as in a movie theater. Finally, the question of whether the exhibition or performance moves in commerce provided Congress with an easy and efficient test of coverage.[31] In the case of places of participant sports, this test could not be used since there is no exhibition or performance involved. In summary, the instant court seems to have lost sight of the fact that the public accommodations section of the Civil Rights Act of 1964 was aimed at only selected types of establishments, with certain other types deliberately excluded. While the decision may be justifiable on moral or sociological grounds, it has certainly broadened the intended scope of the Act.

27. That the legislature purposely excluded some types of public establishments that could have been brought within the scope of the Act is recognized by the instant court in its opinion. 394 F.2d 342, 350 (1968).

28. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 273 (1964); Miller v. Amusement Eenterprises, 391 F.2d 86, 91 (5th Cir. 1967) (appendix).

29. *Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess., Part IV, at 2655-56 (1963); Miller v. Amusement Enterprises, 391 F.2d 86, 91 (5th Cir. 1967) (appendix).

30. Many places of participant sports are covered under other sections of the Act; for instance, a bowling alley which serves food would come under 42 U.S.C. § 2000a (1964).

31. 110 CONG. REC. 7405 (1964).

Civil Rights—Desegregation—Freedom-of-Choice Plans Are Not To Be Used When More Effective Means for Desegregation Are Available

Negro children in Virginia brought a class action seeking injunctive relief against respondent New Kent County School Board's continued maintenance of an alleged racially segregated school system.[1] Five months after the suit was brought, the school board adopted a freedom-of-choice plan for the desegregation of the schools.[2] After the plan was filed, the district court denied petitioner's prayer for an injunction, and approved the amended freedom-of-choice plan, which also provided for the employment and assignment of teachers and staff on a racially nondiscriminatory basis.[3] Sitting en banc, the Court of Appeals for the Fourth Circuit affirmed the approval of the freedom-of-choice provisions, but remanded the case for a more specific order regarding the teachers and staff.[4] On certiorari to the United States Supreme Court, *held*, reversed. A freedom-of-choice plan

1. Segregated operation of the school system was continued even after the *Brown v. Board of Education* decisions, apparently on the authority of several statutes enacted by the Virginia legislature in resistance to such decisions. Some of these statutes were held to be unconstitutional. *E.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964); Green v. School Bd., 304 F.2d 118 (4th Cir. 1962); Adkins v. School Bd., 148 F. Supp. 430 (E.D. Va.), *aff'd*, 246 F.2d 325 (4th Cir. 1957); James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959); Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959). The Pupil Placement Act, VA. CODE ANN. § 22-232.1 to -232.17 (1964), which was not repealed until 1966, divested local boards of the authority to assign children to certain schools and gave the authority to the state board. Children were automatically reassigned to the school previously attended unless upon application the state board assigned them elsewhere. As of September 1964, no Negro student had applied for admission to the New Kent school under that statute.

2. The school board did this in order to remain eligible for federal financial aid. Title VI of the Civil Rights Act of 1964 provided that: "No person in the United States shall, on the ground of race, color or natural origin, be excluded in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1964). The Department of Health, Education, and Welfare issued regulations covering racial discrimination in federally-aided school systems, as directed by 42 U.S.C. § 2000d-1 (1964), which allowed school systems in the process of desegregation to remain qualified for federal funds. 45 C.F.R. §§ 80.1-80.13, 181.1-181.76 (1968). Freedom-of-choice plans are among those considered acceptable by HEW, so long as the plan is in fact effective. 45 C.F.R. § 181.54 (1968). If a school system agrees to comply with a final order of a court of the United States for the desegregation of such school system then it is in compliance with the statute. 45 C.F.R. § 80.4(c) (1968).

3. 11 RACE REL. L. REP. 1300 (1966).

4. Green v. County School Bd., 382 F.2d 338 (4th Cir. 1967). The case was decided per curiam on the basis of the opinion in Bowman v. County School Bd., 382 F.2d 326 (4th Cir. 1967) (an unrestricted right to attend the school of one's choice is not a denial of any constitutional right to be free from racial discrimination). Judges Sobeloff and Winter concurred with the remand on the teacher-assignment issue. They otherwise disagreed, saying that the district court should be directed to set up procedures for evaluating the effectiveness of the freedom-of-choice plans. Bowman v. County School Bd., 382 F.2d 326, 330 (4th Cir. 1967).

violates the equal protection clause of the fourteenth amendment when there are reasonable alternatives that promise a speedier and more effective conversion to a unitary, nonracial school system; and courts should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. *Green v. New Kent County School Board,* 391 U.S. 430 (1968).[5]

Fourteen years ago, on May 17, 1954, the Supreme Court, basing its decision on the equal protection clause of the fourteenth amendment, decided for the first time that Negroes were constitutionally entitled to attend public schools on a nonsegregated basis.[6] One year later in *Brown II*,[7] the Court declared that desegregation was to proceed "with all deliberate speed."[8] Interpreting *Brown II*, the Court in *Cooper v. Aaron*[9] maintained that only a prompt start, "diligently and earnestly pursued," would constitute a good faith compliance with that decision. Authorities were "duty bound" to devote their time to bringing about the elimination of racial discrimination in the public school system.[10] A widespread response to this duty was the enactment of pupil placement laws,[11] which conferred varying degrees of discretion upon either state or local authorities to assign pupils individually to various schools. Although the laws were initially quite successful when proffered as desegregation plans,[12] they later met opposition.[13] As a result, "grade-a-year" plans were sometimes adopted in an attempt to comply with the requirements of the second *Brown* decision, but soon it appeared that the door was closing on these

5. In two companion cases decided the same day the Court held a "free transfer" plan inadequate where three years after its adoption segregation had been maintained despite attendance-zone lines capable of producing meaningful desegregation, Monroe v. Board of Comm'rs, 391 U.S. 450 (1968), and a freedom-of-choice plan inadequate where no attendance zones existed and after three years no meaningful desegregation had occurred, Raney v. Board of Educ., 391 U.S. 443 (1968).

6. Brown v. Board of Educ., 347 U.S. 483 (1954).

7. 349 U.S. 294 (1955).

8. District Courts were directed to require "a prompt and reasonable start toward full compliance" with the first *Brown* decision. Additional time to carry out desegregation would only be granted if it was necessary to the public interest and was "consistent with good faith compliance at the earliest practical date." Brown v. Board of Educ., 349 U.S. 294, 300-01 (1958).

9. 358 U.S. 1 (1958).

10. Cooper v. Aaron, 358 U.S. 1, 7 (1958).

11. *E.g.*, ALA. CODE tit. 52, § 61(1)-(12) (1958); ARK. STAT. ANN. §§ 80-1519 to -1525 (Supp. 1957); FLA. STAT. ANN. § 230.232 (1961); MISS. CODE ANN. §§ 6334-01 to -08 (Supp. 1956); S.C. CODE § 21-230, 21-247 to -247.7 (1957).

12. Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956); Shuttlesworth v. Birmingham Board of Educ., 162 F. Supp. 372 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958).

13. Green v. School Bd., 304 F.2d 118 (4th Cir. 1962); Northcross v. Board of Educ., 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962); Manning v. Board of Public Instruction, 277 F.2d 370 (5th Cir. 1960); Gibson v. Board of Public Instruction, 272 F.2d 763 (5th Cir. 1959).

plans and that the courts were becoming impatient with transitional devices.[14] Finally, nine years after *Brown II* the Supreme Court decided that the "deliberate speed" standard of that decision was no longer sufficient.[15] The desire to expedite desegregation resulted in the enactment of Titles IV and VI of the Civil Rights Act of 1964.[16] Title IV authorized the Attorney General to initiate legal proceedings designed to achieve desegregation in public education when he received a meritorious written complaint,[17] or to intervene in existing school desegregation cases of general public importance.[18] Title VI prohibited racial discrimination under any program receiving federal financial assistance.[19] The practical effect of the legislation was to shift some of the burden of school desegregation from the federal courts to the Department of Health, Education and Welfare. In 1965, the Office of Education issued its first set of uniform standards for the implementation of Title VI. These were followed by the 1966 guidelines, designed to set forth the requirements to be met for compliance with Title VI.[20] Failure to comply with regulations set out by the agency, either through an HEW-approved plan or a court-approved plan, would result in the termination of financial assistance,[21] which many states could ill-afford.[22] In order to remain

14. In Maxwell v. County Board of Educ., 301 F.2d 828 (6th Cir. 1962), *rev'd on other grounds*, 373 U.S. 683 (1963), *modified*, 319 F.2d 858 (6th Cir. 1963), Davidson County, Tenn., where Nashville is located, submitted a grade-a-year plan for court approval. While approving the plan, the court required Davidson County to desegregate immediately the first four grades, thus catching up with Nashville, which had already done so. In Goss v. Board of Educ., 301 F.2d 164 (6th Cir. 1962), *rev'd on other grounds*, 373 U.S. 683 (1963), the court said that the school board's former bad faith did not commend itself to the court, in a suit asking approval for a minimum desegregation plan. The board was ordered to move faster than one grade a year.

15. Goss v. Board of Educ., 373 U.S. 683, 689 (1963). *See* Calhoun v. Latimer, 377 U.S. 263 (1964). The governing constitutional principles of *Brown* "no longer bear the imprint of newly enunciated doctrine." Watson v. City of Memphis, 373 U.S. 526, 529 (1963). A plan that at this late date does not provide for prompt and effective disestablishment of racial segregation is intolerable. "The time for mere 'deliberate speed' has run out." Griffin v. County School Bd., 377 U.S. 218, 234 (1964).

16. 42 U.S.C. §§ 2000c, 2000d to 2000d-4 (1964).

17. 42 U.S.C. § 2000c-6 (1964).

18. 42 U.S.C. § 2000h-2 (1964).

19. 42 U.S.C. § 2000d (1964).

20. The 1966 guidelines, 45 C.F.R. § 181 (Supp. 1966), contain more detailed procedures for the abolition of racially segregated school systems, but in principle differ from the 1965 guidelines only in that criteria are set forth by which it may be determined whether a plan is operating fairly or effectively. 45 C.F.R. § 181.54 (Supp. 1966). *See generally* U.S. COMM'N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 10-19 (1967) [hereinafter cited as DESEGREGATION 1966-67].

21. 45 C.F.R. Pt. 80 (1968).

22. Due principally to the Elementary and Secondary Education Act of 1965 (ESEA), a significant portion of most school budgets is made up of federal funds. DESEGREGATION 1966-67, at 1-2. Of particular interest is Title I of ESEA providing

eligible for assistance many states adopted freedom-of-choice plans, one program considered acceptable under the guidelines.[23] However, only token progress toward desegregation of public schools had been made in many areas of the South by the fall of 1966.[24] Despite evidence as to the frequent ineffectiveness of freedom-of-choice plans, some courts have committed themselves to the principle that such plans are not unconstitutional per se, and may actually represent a valid transitional link in the process of public school desegregation.[25] In approving the use of such plans, these courts first conditioned their approval on standards drawn up by the courts themselves.[26] However, in *United States v. Jefferson County Board of Education*,[27] the Fifth Circuit Court of Appeals held that the minimum standard to be applied by the courts in achieving integration was to be the guidelines set out by the Office of Education, and that if freedom-of-choice plans failed to bring about that result, then school authorities were under an affirmative duty to employ other methods which would insure success. Even though freedom-of-choice was thus recognized as but a means to an end,[28] it remained for the Supreme Court to determine when the transitional link had taken too long to achieve its goal.

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for financial assistance to local educational agencies for the education of children of low income families. 20 U.S.C. § 241(a)-(1) (Supp. 1966). *See generally* DESEGREGATION 1966-67, at 80-86.

23. 45 C.F.R. § 181.54 (1968). The U.S. Commission on Civil Rights reported in 1967 that in the 1,787 school districts desegregating in the South, freedom-of-choice plans were overwhelmingly favored. All of the Alabama, Mississippi, and South Carolina districts were using freedom-of-choice, and 83% of such districts in Georgia had adopted the same method. DESEGREGATION 1966-67, at 45-46.

24. DESEGREGATION 1966-67, at 87. Even though the percentage of Negro children attending schools which were not all Negro doubled during the 1966-67 school year in the eleven Southern states, more than 90% of the Negro children in the five deep South states still attend all-Negro schools. The Commission reported that in the Southern and border states Alabama had the smallest percentage of Negro students attending predominantly white schools. In Alabama, only 2.4% of the Negro students went to school where they made up less than 95% of the student body. The comparable figures in other states were: 3.2% in Mississippi, 3.6% in Louisiana, 4.9% in South Carolina, 6.6% in Georgia, 12.8% in North Carolina, 14.7% in Florida, 15.9% in Arkansas, 20.0% in Virginia, 21.9% in Tennessee, 34.6% in Texas; and in the border states, 26.7% in Missouri, 40.5% in Maryland, 40.5% in Oklahoma, 83.4% in West Virginia, 84.8% in Delaware, and 88.5% in Kentucky. *Id.* at 101-106.

25. Jackson v. Marvell School Dist., 389 F.2d 740 (8th Cir. 1968); Kemp v. Beasley, 389 F.2d 178 (8th Cir. 1968); Kelly v. Altheimer, 378 F.2d 483 (8th Cir. 1967).

26. Lockett v. Board of Educ., 342 F.2d 225 (5th Cir. 1965); Gaines v. Dougherty County Board of Educ., 334 F.2d 983 (5th Cir. 1964).

27. 380 F.2d 385 (5th Cir. 1967).

28. " 'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.' " Bowman v. County School Bd., 382 F.2d 326, 333 (4th Cir. 1967) (concurring

In the instant case[29] the Court first noted that although the immediate focus of the second *Brown* decision was to make initial inroads into the traditional pattern of exclusion of Negro children from white schools, the ultimate end to be brought about was and is a unitary, non-racial system of public education.[30] In determining whether the respondent had taken whatever steps might be necessary to convert to such a system, the Court noted that the first step[31] had not occurred until ten years after the second *Brown* decision. Even then, rather than dismantling the dual system,[32] the freedom-of-choice plan had operated simply to burden the children and their parents with the initiative in disestablishing segregation, something the second *Brown* decision had placed squarely on the school board.[33] At this late date, the Court said that it was incumbent upon the school board to establish that its proposed plan promised meaningful and immediate progress toward disestablishing state-imposed segregation.[34] Noting that a plan utilizing freedom-of-choice is not an end in itself, the Court concluded that in situations where other methods are available, which promise speedier and more effective conversion, freedom-of-choice plans will be constitutionally unacceptable.[35] However, the Court was careful to point out that it was not holding freedom-of-choice plans to be unconstitutional per se, or that such plans might not be effective in some instances.[36] The Court concluded that a new plan should be formulated which would promise realistically a prompt conversion to a system without white schools and Negro schools, but just schools.[37]

opinion). *Accord,* Kemp v. Beasley, 389 F.2d 178 (8th Cir. 1968); United States v. Jefferson County Board of Educ., 372 F.2d 836, *aff'd on rehearing,* 380 F.2d 385 (5th Cir. 1967) (per curiam).

29. The reasoning of this case was also used in Raney v. Board of Educ., 391 U.S. 443 (1968), and Monroe v. Board of Comm'rs, 391 U.S. 450 (1968). While the instant case and *Raney* involve freedom-of-choice, the *Monroe* case involves a variant thereof referred to as free transfer. Under free transfer, any child, after he has complied with the requirement of annual registration in his assigned school in his attendance zone, may freely transfer to another school of his choice if space is available.

30. 391 U.S. at 436 (1968).

31. The adoption of the freedom-of-choice plan was the first step taken. *Id.* at 438.

32. In the three years under freedom-of-choice not a single white child had chosen to attend Watkins school, and 85% of all Negro children still attended the all-Negro Watkins school. *Id.* at 441.

33. 391 U.S. at 441 (1968); Raney v. Board of Educ., 391 U.S. 443, 447 (1968); Monroe v. Board of Comm'rs, 391 U.S. 450, 458 (1968).

34. 391 U.S. at 439 (1968).

35. *Id.* at 441; Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968).

36. 391 U.S. at 439 (1968).

37. *Id.* at 441; Raney v. Board of Educ., 391 U.S. 443, 448 (1968); Monroe v. Board of Comm'rs, 391 U.S. 450, 460 (1968). Due to the complexities of desegregation, the Court in *Raney* agreed with the judges of the Eighth Circuit, who in another case held that the district courts "should retain jurisdiction in school desegregation

Until this decision, the United States Supreme Court had not ruled on the adequacy of freedom-of-choice plans in achieving integration.[38] Now that the Court has ruled, it would indeed appear that "[t]he clock has ticked the last tick for tokenism and delay in the name of 'deliberate speed.'"[39] The language of the Court strongly suggests that any plan which places the responsibility of action upon the pupil or the parent will no longer be tolerated. This is a significant step, for no longer will a school board be able to draft a plan which on its face promises desegregation, but because of social factors successfully prevents it. Under freedom-of-choice a number of factors tended to delay, if not to eliminate, any affirmative action on the part of Negro students or parents.[40] Only Negroes of exceptional initiative and fortitude would dare to risk the retaliation, economic reprisal, and harassment that often occurred after the choice to attend a white school had been made.[41] This risk can be eliminated if the school boards adopt plans that will not allow factors of physical and economic suasion to be considered. The Court noted that one such solution would be nonracial geographic zoning.[42] Certainly such a solution would eliminate many of the factors behind the adoption of freedom-of-choice, if the zoning could be impartially accomplished so as not to re-establish segregation.[43] However, in areas where residential segregation already exists, nonracial geographic zoning will accomplish little in terms of meaningful desegregation. Fortuitous segregation, due to the racial composition of neighborhoods, is often found

cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is so operated in a constitutionally permissible fashion that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved." Kelly v. Altheimer, 378 F.2d 483, 489 (8th Cir. 1967).

38. The Fourth Circuit had cited Goss v. Board of Educ., 373 U.S. 683 (1963), as support for such plans. *See also* Bradley v. School Bd., 345 F.2d 310, 318 (4th Cir.), *vacated and remanded on other grounds*, 382 U.S. 103 (1965) (per curiam).

39. United States v. Jefferson County Board of Educ., 372 F.2d 836, 896 (1966), *aff'd on rehearing*, 380 F.2d 385 (5th Cir. 1967) (per curiam).

40. A list of such factors has been formulated by the United States Commission on Civil Rights. The Court neither adopted nor refused to adopt the Commission's views. 391 U.S. 430, 440 n.5 (1968).

41. *See* DESEGREGATION 1966-67, at 47-69.

42. This course of action was urged by Circuit Judge Sobeloff in his concurring opinion in Bowman v. County School Bd., 382 F.2d 326, 332 (4th Cir. 1967). In that case there was no residential segregation. In Moses v. Washington Parish School Bd., 276 F. Supp. 834 (E.D. La. 1967), the court invalidated a freedom-of-choice system and concluded that the schools should operate on the basis of a unitary system of geographical attendance zones. The court said that freedom-of-choice systems had been permitted ouly as an interim measure, and that once desegregation was accomplished the justification for that system was terminated.

43. In Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); the zoning had accomplished meaningful desegregation, but the free-transfer plan had destroyed its effect. The district court had upheld the attendance-zone lines in Monroe v. Board of Comm'rs, 221 F. Supp. 968 (W.D. Tenn. 1963).

in the large metropolitan education complex, and is usually not due to any gerrymandering or other discriminatory practices used by the local school board. The Court in the instant case has expressly avoided any reference to de facto segregation; indeed, the Court speaks only to the removal of state-imposed segregation. But, in order to obtain the Court's goal of "just schools," not white or Negro schools, the language of the instant case suggests that solutions other than zoning should be adopted when zoning does not result in desegregation, possibly including situations where segregation is de facto. Thus, although other courts[44] have held that there is no constitutional duty to bus Negro or white children out of their neighborhoods, or to select new school sites in order to alleviate racial imbalance,[45] the Court's desire to dismantle segregated school systems might very well make such solutions a possibility for the future.

Constitutional Law—Fourteenth Amendment Entitles Defendants Charged with Serious Crimes in State Courts to Trial by Jury

Appellant was convicted of simple battery[1] in a Louisiana state trial court sitting without a jury, fined $150, and sentenced to 60 days in the parish prison. Although subject to a possible maximum penalty of two years imprisonment,[2] appellant's request for trial by jury was denied on the ground that the case did not meet the jury trial requirements established by the Louisiana Constitution.[3] Appellant there-

44. Deal v. Cincinnati Board of Educ., 369 F.2d 55 (6th Cir.), *cert. denied*, 389 U.S. 847 (1966); Goss v. Board of Educ., 270 F. Supp. 903 (E.D. Tenn. 1967).

45. In the instant case the Court noted that one solution the school board could take into consideration was the consolidation of the two schools, one site serving grades 1-7 and the other serving grades 8-12. Although the school district involved was not residentially segregated, the Court's acknowledgement of such a solution would make the problem of new school sites much easier to effectuate. 391 U.S. at 442 n.6 (1968).

1. LA. REV. STAT. § 14:35 (1950): "Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon." The incident leading to the trial occurred when appellant, a Negro, went to the aid of two younger cousins stopped by four white boys on the side of a Louisiana highway. The four testified in court that Duncan had slapped one of them on the arm as he hustled his cousins into his car.

2. LA. REV. STAT. § 14:35 (1950): "Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both."

3. LA. CONST. art. vii, § 41, provides that only defendants subject to capital punishment or imprisonment at hard labor are entitled to jury trials.

after sought review in the Supreme Court of Louisiana claiming that the denial of a jury trial violated his rights as guaranteed by the Constitution of the United States. Finding no error in the trial judge's ruling, the court denied certiorari.[4] On appeal to the United States Supreme Court, *held,* reversed. The right to trial by jury in serious criminal cases is a fundamental right which must be accorded defendants in state courts under the due process clause of the fourteenth amendment. *Duncan v. Louisiana,* 391 U.S. 145 (1968).

The Supreme Court first considered the question of whether trial by jury was required in state courts by the due process clause of the fourteenth amendment almost one hundred years ago in the leading case of *Walker v. Sauvinet.*[5] In that case the issue before the Court was the validity of a state law which allowed the trial judge to decide a civil case when the jury was unable to agree on a verdict. In upholding this procedure the Court said by way of dictum that there was no Constitutional right to jury trial in state courts. The Court reaffirmed this stance by dicta in later cases involving civil trials.[6] In *Hallinger v. Davis*[7] the Court applied the same principle to a state criminal proceeding, but once again the Court's pronouncement was inconclusive since the precise issue was not raised.[8] Criminal cases following *Hallinger* also denied the Constitutional requirement of jury trial but they, too, did not deal directly with the issue presented[9] in the instant case.[10] In *Palko v. Connecticut,*[11] for example, the Court stated: "This Court has ruled that consistently with those amendments [the sixth and seventh] trial by jury may be modified by a state or abolished altogether."[12] The precise issue before the Court in *Palko,* however, was the validity of a Connecticut statute permitting the state to take appeals in criminal cases. Most recently, in *Irvin v. Dowd,*[13] the Court cited *Palko* and *Fay v. New York*[14] in acknowledging the position it had taken on those earlier occasions. However,

4. 250 La. 253, 195 So. 2d 142 (1967).
5. 92 U.S. 90 (1875).
6. Wagner Elec. Mfg. Co. v. Lyndon, 262 U.S. 226 (1923); New York Cent. R.R. v. White, 243 U.S. 188 (1917).
7. 146 U.S. 314 (1892).
8. The case actually dealt with the constitutionality of a state's non-jury trial of a defendant after the defendant had waived his right to jury trial. *Id.*
9. The *Duncan* Court characterized as dicta all of its prior statements regarding the right to trial by jury in state courts. 391 U.S. 145, 155 (1968). *See* cases cited note 10 *infra.*
10. *See* Irvin v. Dowd, 366 U.S. 717 (1961); Fay v. New York, 332 U.S. 261 (1947); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); Maxwell v. Dow, 176 U.S. 581 (1900).
11. 302 U.S. 319 (1937).
12. *Id.* at 324.
13. 366 U.S. 717 (1961).
14. 332 U.S. 261 (1947).

like its predecessors, *Irvin* did not deal with the precise issue raised in *Duncan*.[15] Since every state has provided for trial by jury in serious criminal cases,[16] the issue presented in the instant case could only arise when a conflict occurred between the existing state-guaranteed right and the asserted constitutionally-guaranteed right.

In reaching its decision the Court returned to the basic position that the fourteenth amendment requires the states to accord due process of law to all persons within their jurisdictions and added that the Court has looked increasingly to the Bill of Rights for interpretive guidance in giving content to this constitutionally-imposed obligation. Rejecting its own prior dicta,[17] the Court reasoned that Bill of Rights provisions which are "fundamental to the American scheme of justice"[18] are a part of the definition and content of due process. The Court examined the long and vital role played by the jury in the history of Anglo-American jurisprudence[19] and concluded that the right to a jury in serious criminal cases[20] is so fundamental that due process requires its use in state courts. The Court conceded the existence of a class of petty crimes outside the constitutional mandate,[21] but stated that in differentiating between petty and serious offenses, the penalty authorized for a particular crime,[22] as well as the existing laws and practices of the nation, must be considered as determinative. Judged by these criteria, the Court held that a crime punishable by as much as two years imprisonment[23] is a serious crime rather than a petty offense, and thereby entitles one who is so charged

15. The Court decided in *Irvin* that when a state uses juries it must insure that they are impartial. 366 U.S. 717 (1961).

16. 391 U.S. 145, 153 (1968).

17. *See* cases cited note 10 *supra.*

18. 391 U.S. 145, 149 (1968).

19. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); G. WILLIAMS, THE PROOF OF GUILT 271-79 (1963). *But see* J. FRANK, COURTS ON TRIAL (1949); G. WILLIAMS, *supra* at 236-43 (1963); Broeder, *The Functions of the Jury: Fact or Fiction?* 21 U. CHI. L. REV. 386 (1954); Sunderland, *The Inefficiency of the American Jury,* 13 U. MICH. L. REV. 302 (1915). *See also* SOURCES OF OUR LIBERTIES (R. Perry ed. 1959).

20. Louisiana argued that the Court should look to the penalty imposed rather than that authorized in determining whether or not the crime is a serious one. This argument was made successfully in Cheff v. Schnackenberg, 384 U.S. 373 (1966), where the defendant was jailed for contempt without beuefit of a jury trial. The *Duncan* Court distinguished *Cheff* on the ground that in contempt cases no maximum sentence is authorized by statute and that therefore the penalty actually imposed is the best evidence of the seriousness of the crime. *Accord,* Illinois v. Bloom, 391 U.S. 194 (1968) (decided with the instant case).

21. Other dissents were written by Justices Harlan and Stewart. All dissenters 300 U.S. 617 (1937); Schick v. United States, 195 U.S. 65 (1904); Natal v. Louisiana, 139 U.S. 621 (1891).

22. District of Columbia v. Clawans, 300 U.S. 617 (1937).

23. *See* note 2 *supra.*

to trial by jury as a matter of right. In a concurring opinion[24] Justice Black reiterated his familiar view that the fourteenth amendment incorporates all of the Bill of Rights protections against state action. He approved the majority's tacit selective incorporation approach, since it, like his view, has the virtue of confining judges to the Bill of Rights in deciding what state practices are desirable and what are not.[25]

The Court's decision represents a further development of two of its current trends. Generally, the right to trial by jury in all serious crimes in state courts was added to an expanding list of individual rights protected against state infringement by the fourteenth amendment.[26] More specifically, the Court continued the extension of the right to trial by jury into areas heretofore considered exempt from the constitutional requirement.[27] But in using the phrase "fundamental to the American scheme of justice" the Court apparently reworded its current test for determining the applicability of Bill of Rights guarantees against the states.[28] However, it is doubtful that this change of wording will affect future decisions, since the various phrasings seem to amount to substantially the same requirement.[29] While the wording of the test may not be of particular significance when compared with the other tests the Court has used,[30] it may mark the beginning of a trend toward more facile incorporation through greater emphasis on the asserted right and less emphasis upon the formulation of the test. In any case, the unmistakable di-

24. 391 U.S. at 162. Justice Douglas joined in the opinion.

25. In a dissenting opinion Justice Harlan, joined by Justice Stewart, renewed his debate with Justice Black and the Court majority regarding the validity of selective and total incorporation theories for exteuding the Bill of Rights against the states. 391 U.S. at 171. In a separate concurring opinion, Justice Fortas expressed disagreement with the implication in the majority opinion that all of the Court's decisions with respect to the sixth amendment and federal jury trials might be applicable to the states. *Id.* at 211. *Compare* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949), *with* Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949). *See generally* Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967).

26. *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation of opposing witnesses); Mallory v. Hogan, 378 U.S. 1 (1964) (right to be free from compelled self-incrimination).

27. *E.g.*, United States v. Barnett, 376 U.S. 681 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Duncan v. Kahanamoku, 327 U.S. 304 (1946).

28. Since Gideon v. Wainwright, 372 U.S. 335 (1963), the Court had applied this test: whether the asserted right was "a fundamental right, essential to a fair trial." Earlier the Court had worded it: "basic in our system of jurisprudence." *In re* Oliver, 333 U.S. 257, 273 (1948).

29. *Compare* the wordings in note 28 *supra*, *with* the test announced by the Court in *Duncan*.

30. *Id.*

rection of the present Court is toward incorporation rather than exclusion, regardless of what reasoning is used to determine which rights are fundamental. Despite the contemporary and future significance of this trend, the immediate impact of the *Duncan* decision is of little consequence, since only three of the fifty states impose prison sentences of more than six months without granting jury trials.[31] As a result, the major importance of *Duncan* may be that it heralds a gradual reevaluation of the whole class of offenses designated as "petty." Regardless of what sentence may be imposed, many offenses now classified as petty may in the future be upgraded to require jury trial as "serious" crimes. Gradual redefinition of petty crimes would, in itself, bring the right to jury trial to a whole group of offenders not now entitled to this procedure.[32] This method of extension of the jury trial right is suggested by *Duncan*, but the Court did not attempt to provide any specific guidance for differentiating between petty and serious offenses.[33] Rather than develop this distinction on a case-by-case basis, the Court may well eliminate it entirely and hold that defendants subject to any imprisonment are entitled to juries. This approach would be a distinct break with both history and precedent,[34] but it could reflect a changed value judgment that the social stigma attached to incarceration ought not to be imposed by any means other than a jury. Nevertheless, whichever approach the Court adopts when confronted with the issue in the future, its decisions could cause a complete revamping of the administration of the criminal process in the states,[35] as well as considerable congestion and docket backlogs.[36] Ironically, this congestion could result in an indigent defendant spending more time in pre-trial confinement waiting for his jury trial on a minor offense than could have been imposed against him under the maximum sentence for the offense. Waiver of trial by jury is obviously no answer, for such a procedure could in effect obliterate

31. Louisiana, New Jersey and New York. 391 U.S. 145, 161 n.33 (1968).

32. *See* Frankfurter & Corcoran, *Petty Offenses & the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917 (1926); Kaye, *Petty Offenders Have No Peers!* 26 U. CHI. L. REV. 245 (1959).

33. At one point in its opinion the Court stated that the fourteenth amendment guarantees the sixth amendment right to trial by jury in state courts in all cases where that right would exist were they to be tried in federal courts. 391 U.S. 145, 149 (1968). In federal courts petty offenses are defined as those punishable by no more than six months in prison and a $500 fine. 18 U.S.C. § 1 (1964). However, it is unclear what the Court meant by the above statement, since it declined to apply the six month limitation to definitions of state petty crimes. Perhaps the Court was tacitly indicating that its holding is founded upon the familiar selective incorporation theory.

34. *See* cases cited note 21 *supra*.

35. *See* Desmond, *Current Problems of State Court Administration*, 65 COLUM. L. REV. 561 (1965).

36. *See* Tauro, *Congestion in the Courts*, 49 MASS. L.Q. 171 (1964).

the constitutional right to trial by jury where deals are offered with a view to alleviating court congestion. On the other hand, if such a situation should occur, it might be just the impetus needed to produce other reforms, such as in the area of bail bonds for those who cannot now even "buy" their pre-trial freedom.

Constitutional Law–Reapportionment–"One Man, One Vote" Held Applicable to Units of Local Government

Petitioner, a resident and voter of Midland County, Texas, filed suit against respondents, Midland County and its commissioners court,[1] alleging malapportionment of the four electoral districts from which the members of the court were elected. Petitioner contended that the apportionment scheme[2] then in effect violated the Texas Constitution[3] and the equal protection clause of the fourteenth amendment. The trial court found for petitioner,[4] and respondent appealed. The

1. According to one source the court was the general governing body of the county with such enumerated duties as establishing a courthouse and jail, appointing numerous minor officials like the county health officer, letting county contracts, administering welfare services, building roads and bridges, setting tax rates, and issuing bonds. Interpretative Commentary, VERNON'S ANN. TEX. CONST., art. 5, § 18 (1955). The effect of the authority actually exercised by the court had its greatest significance in the rural districts. The Texas Supreme Court determined that the court was only theoretically the governing body of the entire county because the court's major responsibilities were to the non-urban areas of the county. The court viewed themselves as primarily road commissioners for the rural districts and maintained no streets within the city. Furthermore, the city had a mayor and council for its urban affairs. The county elected at-large a tax assessor and collector, county attorney, sheriff, treasurer, county clerk and surveyor. It was reported that of all the elected officials in the county, only 3 resided outside the city limits.

2. In 1963 Midland County had a population of about 70,000. The county was divided into 4 districts with sizes of 67,906; 852; 414; and 828. The city of Midland was the urban center of the county and located almost entirely in the first district which had 97% of the county's population and almost the same percentage of the county's qualified voters. Also in 1963 the commissioners court, which consisted of a county judge, elected at-large, and 4 other members selected from each district, ordered a redistricting of the county. Three of the four resultant districts were rural, and each district had the right to elect one commissioner to the court irrespective of its size; therefore, the rural populace had the greater share of representation on the court. Avery v. Midland County, 390 U.S. 474, 476 (1968).

3. VERNON'S ANN. TEX. CONST. art. 1, §§ 3, 19; art. 5, § 18 (1955). Section 3 of art. 1 was commonly referred to as the equal protection clause.

4. The trial court set aside the order which had apportioned Midland County into the districts on the ground that the order was arbitrary and invidiously discriminatory and ordered a redistricting on the basis of equal population. Midland County v. Avery, 397 S.W.2d 919 (Tex. Civ. App. 1965).

Texas Court of Civil Appeals reversed on the ground that no federal or state law required the districts to be equal in population,[5] and petitioner appealed. The Texas Supreme Court, reversing both lower courts, held that the redistricting order was arbitrary and thus violative of the equal protection clause and the state constitution.[6] However, the court noted that neither the state constitution nor the equal protection clause of the fourteenth amendment required the districts to be apportioned on a strict population basis.[7] On certiorari to the United States Supreme Court, *held,* vacated and remanded. The equal protection clause of the fourteenth amendment requires the application of the "one man, one vote" principle to apportionment plans for local electoral districts charged with electing members to local governmental units exercising general powers over the entire community. *Avery v. Midland County,* 390 U.S. 474 (1968).

In 1962 the Supreme Court decided *Baker v. Carr,*[8] overruling strong precedent,[9] and held that the question of legislative district appointment was not a mere "political" question, but instead presented a justiciable question under the equal protection clause. Building upon that decision, the Court held in *Reynolds v. Sims*[10] that state legislative districts were subject to the mandate, although conceding that rational deviation from a strict population standard could be permitted when other factors warranted it. The principle of *Reynolds* has, through subsequent litigation, been used in attempts to apportion units of local government with varying degrees of success, usually depending upon the type of government unit involved. Although some state courts have applied the "one man, one vote" principle to local units,[11] federal courts have disagreed as to which govern-

5. The state constitution required only a division of the counties "from time to time for the convenience of the people . . . into four commissioners precincts." VERNON'S ANN. TEX. CONST. art. 5, § 18 (1955).

6. Although the court held that no population disparity was sustainable against the arbitrariness reflected in the districts' patent malapportionment plan, it noted that the "convenience of the people" may require a variance from the equal population standard when other relevant factors are considered; *i.e.,* number of qualified voters, land areas, geography, miles of county roads, and taxation values. Avery v. Midland County, 406 S.W.2d 422, 428 (Tex. 1966).

7. The court noted that the legislative functions of the commissioners courts are negligible "and county government is not otherwise comparable to the legislature of a state or . . . Congress where the 'one man, one vote' principle is asserted in its most exacting and compelling sense." 406 S.W.2d at 426. Before this reference to *Reynolds,* the issues did not appear to be based specifically on the "one man, one vote" principle.

8. 369 U.S. 186 (1962).

9. Colegrove v. Green, 328 U.S. 549 (1946).

10. 377 U.S. 533 (1964).

11. *See, e.g.,* Miller v. Board of Supervisors, 63 Cal. 2d 343, 405 P.2d 857, 46 Cal. Rptr. 617 (1965); Montgomery County Council v. Garrott, 243 Md. 634, 222

mental subdivisions were subject. Thus, the principle has been held applicable to municipal governments[12] and inapplicable to local judicial bodies.[13] In certain instances the "one man, one vote" principle has been extended to county government units[14] and special-function units,[15] while in other instances, application was denied.[16] In the recent case of *Sailors v. Board of Education*,[17] the Supreme Court avoided making a determinative statement of the limits of the doctrine, holding only that an essentially administrative body, chosen by a method essentially appointive, was exempt. Thus, because the issue has not been squarely presented, the Court has not held as a matter of law that even purely legislative local bodies must be equally apportioned, although one case assumed in dictum that such was the law.[18]

A.2d 164 (1966); Armentrout v. Sehooler, 409 S.W.2d 138 (Mo. 1966); Seaman v. Fedourich, 16 N.Y.2d 94, 209 N.E.2d 778, N.Y.S.2d 444 (1965).

12. *See, e.g.*, Ellis v. Mayor and City Council, 352 F.2d 123 (4th Cir. 1965).

13. *See* New York State Association of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967); Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964). The basis of these dccisions was that unlike legislatures, judicial bodies are not responsible for achieving representative government.

14. *See, e.g.*, Dyer v. Rich, 259 F. Supp. 741 (N.D. Miss. 1966) (applied to county board of supervisors).

15. *See* Delozier v. Tyrone Area School Bd., 247 F. Supp. 30 (W.D. Pa. 1965) (interim school board where the court noted that a local school district was an arm of the state legislature to administer its educational system and was therefore not immune to constitutional requirements).

16. Moody v. Flowers, 256 F. Supp. 195 (M.D. Ala. 1966), *vacated and remanded on other grounds*, 387 U.S. 97 (1967); Johnson v. Genesee County, 232 F. Supp. 567 (E.D. Mich. 1964) (the court determined that the power of the state and its agencies over municipal corporations within its territories is not restrained by the fourteenth amendmcnt). *Cf.* Detroit Edison Co. v. East China Township School Dist. No. 3, 247 F. Supp. 296 (E.D. Mich. 1965), *aff'd on other grounds*, 378 F.2d 225 (6th Cir. 1967).

17. Sailors v. Board of Educ., 387 U.S. 105 (1967). The statute challenged provided that county board members were to be chosen by delegates who were appointed by locally elected county school boards. The Court did not decide whether a local legislative body could be validly appointed. It did note that the Constitution permitted non-legislative officers to be selected by an appointive process or a combination of election and appointment. But the Court assumed *arguendo* that when a state provides for an elective process to select local officials who perform admiuistrative, legislative, or judicial functions, "one man, one vote" applied. For a more extensive analysis of the case, see 21 VAND. L. REV. 153 (1967).

18. *See* Dusch v. Davis, 387 U.S. 112 (1967), where the Court assumed that the apportionment of local units was governed by *Reynolds* but held that the local apportionment plan challenged did not indicate discrimination, which must be present in order to invoke the *Reynolds* principle. In *Dusch*, a so-called "Seven-Four" plan created seven boroughs which varied substantially in population. The city council consisted of 11 members, each of whom was elected at-large. Four were elected without regard to residence and the 7 other members were required to reside in different boroughs. Bayside borough, with 29,048 residents, thus had the same assured representation as Blackwater borough, with 733 residents. The Court determined that the boroughs were used only as a basis of residence for the candidates and not

The Court in the instant case determined that the fourteenth amendment applied to the exercise of state power however manifested, whether directly or through subordinate agencies. Reasoning that local government units are to be regarded as subordinate agencies of a state, the Court concluded that if the fourteenth amendment required state legislatures to be elected from equally populated districts, it also required members of local governmental units to be selected on the same basis. Addressing the contention that the commissioners court was a non-legislative and specialized unit, the Court noted that no particular classification would adequately define the court's function; the critical factor was that the court exercised "general powers," in that it had authority to make decisions affecting all the citizens of the county which it represented[19] notwithstanding the court's disproportionate rural interest. Therefore, the Court found that each county resident had the constitutional right to have his vote weigh equally with other residents' votes.[20] In his dissenting opinion Mr. Justice Fortas reasoned that a strict application of the "one man, one vote" principle was impractical due to the complexities of local government structure. He stated that the equal protection clause did not demand a strict application of the *Reynolds* principle, because an inflexible application of that principle ignored the fact that many local functions which are limited and specialized have an unequal impact on the constituents. Determining that the commissioners court in the instant case was a special-purpose unit with limited powers and functions which were oriented toward the rural population in Midland County and not toward the urban population which had another governing body to manage its governmental affairs, Justice Fortas concluded that it would debase the substantive equality of the rural person's vote if it were mechanically equalized with that of the urban voter since the rural person had the greater interest in the court.[21]

as a voting base, since each councilman represented not only his borough but the city at-large.

19. The Court referred to the authority as being "general power" and responsibility for local affairs. The Court determined that a decision not to exercise functional power affected all residents as much as an affirmative exercise. It relied heavily on evidence of the court's taxing and bond-issuing power. A dissenting opinion determined that these functions were extremely limited or within the control of the county at-large. *See* VERNON'S ANN. TEX. CONST. art. 8, § 9; *and* 7 VERNON'S ANN. TEX. CIV. STAT. art. 2352 (1964).

20. The Court emphasized that it was not deterring the efficiency or experimental processes of local governmental units by requiring the equal protection standard. *See* Sailors v. Board of Educ., 387 U.S. 111 (1967), where the Court previously had emphasized the flexibility needed by local units to meet changing urban conditions.

21. Other dissents were written by Justices Harlan and Stewart. All dissenters thought the writ of certiorari was improvidently granted because the Texas Supreme Court's decision lacked finality in that the commissioners court could redistrict after

The instant case does not unequivocally resolve the question whether all elective units of local government are governed by the "one man, one vote" standard. However, it does indicate that the Court will look to the extent of the authority granted to and exercised by a local unit and not to functional classifications such as "legislative" and "administrative" in determining whether malapportionment exists. Now the "one man, one vote" standard will be applicable to a local unit if it exercises "general powers" over the area it serves.[22] Two dissenters persuasively pointed out that irrespective of the scope of the authority granted to a local unit, the "general power" standard ignored the reality of the functioning process of special-purpose units[23] which concentrate on the needs of certain constituents more than others. While these dissenters concluded that the court was a special-purpose unit, the majority recognized the existence of special-purpose units,[24] but stated that that concept was not before them[25] because the commissioners court exercised "general powers."[26] It is submitted that if legitimate exceptions to strict populations standard are constitutionally permissible as the *Reynolds* opinion indicated,[27] the facts of the instant case warranted a determination that the court was a special-purpose unit, and therefore, such an exception should have been adopted. The Court, however, found the facts appropriate for espousing the new "general powers" test, which makes the "one

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the decision was rendered and could comply with apportionment requirements without need for the Court's intervention. The dissenting Justices did consider the merits of the case, however, to reply to the majority. Mr. Justice Harlan noted that practical necessity did not justify application of the "one man, one vote" principle as it did in *Baker v. Carr*, because the state legislature or a constitutional amendment could provide adequate redress. Like Mr. Justice Fortas, he determined that the "one man, one vote" ideology was not acceptable for structuring local government units and therefore concluded that an extension of the *Reynolds* standard in any form to local units was inappropriate. He emphasized that local government structuring was the responsibility of the local political processes. Mr. Justice Stewart stated that he would have joined Mr. Justice Fortas' opinion had the latter not endorsed the *Reynolds* principle.

22. *See* note 19 and *supra*, accompanying text.

23. *See*, Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 32-3 (1965). The author notes as criteria for determining whether the unit is special-functioning: (1) how many functions the unit has; (2) whether the unit is reasonably designed to achieve an end appropriate for a special-function unit, *i.e.*, water supply, sewage disposal, or other special services; and (3) how well the representational formula for selecting members of the unit reflects population. Professor Weinstein believes that a rough approximation should be valid for special units. Accepting the "special purpose" aspects of the instant case, perhaps the Court would have been more hesitant to act had the population disparity been less drastic.

24. 390 U.S. at 483-84.

25. Therefore, the Court could not have intended their holding to apply to special-purpose units, since that issue was not before the Court. *Id.* at 484.

26. *But see Id.* at 504 (Fortas, J., dissenting) and note 1 *supra*.

27. 377 U.S. at 579.

man, one vote" principle more broadly applicable at the local government level.[28] Unquestionably the application of the principle would have been more defensible if the Court had waited for a case in which the local unit did, in fact, affect equally the constituents it represented; as Mr. Justice Fortas' dissent points out, however, the commissioners court was not such a unit. Thus, while espousing a "general power" test, it is apparent that, in substance, the instant decision extends the *Reynolds* principle in a mechanical manner to a unit which in reality did not exercise general powers.[29] Consequently, the Court's decision may conceivably have the effect of making equally populated voting districts a requirement for all units of local government. Reverting to *Sailors*, legislative bodies could be made subject under *Reynolds*, while administrative bodies could be made subject under the instant decision, regardless of the method of choosing the office-holders. It remains to be seen whether this possible effect was the real intent of the Court, or whether, in its zeal to bring the majority of local governing units within the scope of the "one man, one vote" principle, the Court merely gave an unduly strained interpretation of its new test in an attempt to fit it to an unsuitable factual situation.

Constitutional Law–Search and Seizure–Police May Conduct Limited Search for Weapons in Course of Field Investigation Without Probable Cause for Arrest

Petitioner was convicted of carrying a concealed weapon after a police detective who had observed petitioner and two other men making repeated reconnaissances of a store window approached them, asked their names, and arrested the three after patting down the pe-

28. The Court indicated in Sailors v. Board of Educ., 387 U.S. 111 (1967), that the fourteenth amendment requirement was applicable to all local units whose officials were selected by an elective process. Since almost all local officials are elected, it would appear that the only method available to avoid the "one man, one vote" principle is appointing the officials. However, as the *Sailors* case noted, difficulty may arise in the appointment of a legislative official. It is clear now that emphasis will not be placed on the nature of an official's duty. The Court will consider the nature of the local unit instead of the nature of duties performed by those composing the unit. Thus the duty classifications of the *Sailors* case have been replaced by a unit classification of "general power."

29. If the Court can justifiably conclude that the commissioners court exercised "general powers" when its rural orientation was obvious, it would appear that for any future local unit to qualify as special purpose in character, the proof required will be exacting as to specialized structure, statutory authority, and constituent impact.

titioner's clothing and finding a gun in his overcoat.[1] Petitioner moved before trial to suppress the gun as evidence on the ground that the arrest was illegal. The trial court rejected the prosecution's claim that the gun was seized incident to a lawful arrest, but denied petitioner's motion, holding that the detective had made a permissible stop, rather than an arrest, and an essential self-protective frisk for weapons, rather than a search, upon reasonable cause to believe that the petitioner was armed. The Court of Appeals, Eighth Judicial Circuit, Cuyahoga County, affirmed the conviction, adopting the reasoning of the trial court and adding that the detective, having found the gun by a valid frisk, then had probable cause to make the arrest, which occurred only after he removed petitioner from the street.[2] The Supreme Court of Ohio, finding no substantial constitutional question to be involved, dismissed petitioner's appeal. On certiorari to the United States Supreme Court, *held,* affirmed. The fourth amendment permits a police officer who has a reasonable suspicion, not amounting to probable cause, that an individual is engaging in criminal activity and is armed and presently dangerous, to make a carefully limited search of the suspect's outer clothing for weapons, and any weapons found will be admissible in evidence. *Terry v. Ohio,* 392 U.S. 1 (1968).

Exceptions to the fourth amendment requirement of a warrant for a search or seizure form the basis of the law of arrest.[3] Generally, an

1. The detective, an experienced officer assigned to patrol for shoplifters and pickpockets, watched petitioner and a second man strolling back and forth on the street, repeatedly looking into the same store window, conferring with each other on the corner and with another man who left and rejoined the two in front of the window immediately before the detective approached. He testified that he suspected that they were "casing a job, a stick-up" and feared that they were armed. Feeling it was his duty to investigate, he approached them and patted down petitioner after his questions elicited mumbled responses. The detective took all three men into the store where he removed Terry's overcoat in order to retrieve the pistol from the pocket and where he searched the others. Richard Chilton, Terry's codefendant, was also carrying a gun, but the third man was not. After separate trials, Chilton and Terry made joint state court appeals and petitions for certiorari, but since Chilton died before the granting of the writ, the Court reviewed only Terry's conviction. Terry v. Ohio, 392 U.S. 1, 5 n.2, 6-7 (1968).

2. State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966). Petitioner had argued on appeal that, despite a right of inquiry, the arrest had occurred at the initial questioning, and there being no probable cause at that time, the guns were inadmissible under the exclusionary rule of Mapp. v. Ohio, 367 U.S. 643 (1961). 5 Ohio App. 2d at 127, 214 N.E.2d at 118. It should be noted that, according to the Supreme Court, during the frisk the detective had felt the gun, which was inside Terry's overcoat, but was not able to retrieve it until after removing Terry's coat inside the store. It is not clear from the record that the detective immediately recognized the object through the garment as being a gun and thus "found" it by a frisk. The Ohio court said that the detective removed the gun while on the street before arresting Terry, 5 Ohio App. at 124, 214 N.E.2d at 116, but the Supreme Court reported that the removal was inside the store. 392 U.S. at 7.

3. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

arrest may be made without a warrant when the officer has probable cause to believe that an offense has been or is being committed in his presence,[4] and a reasonable search may be made without a warrant when incident to a lawful arrest,[5] or when delay in obtaining a warrant might cause the loss of evidence.[6] These broad exceptions have been restricted and confined. Though the fourth amendment forbids only unreasonable searches,[7] a search reasonable at its inception may violate the fourth amendment by reason of its unnecessary scope and degree.[8] The Supreme Court has consistently held that, whenever practicable, police must obtain warrants for searches and seizures,[9] and a failure to do so is excused only in extreme circumstances.[10] Moreover, in order to deter unlawful police conduct, evidence obtained by unlawful searches has been declared inadmissible in federal[11] and state[12] courts. Police practices in the field, particularly the so-called "stop and frisk," have engendered a controversy over the

violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

4. *See* Henry v. United States, 361 U.S. 98 (1961). The requirement of probable cause for an arrest without a warrant is one of the most elusive problems in criminal law. It has been defined as facts and circumstances known to the arresting officer warranting a prudent man in believing that an offense has been or was being committed. *Id.* at 102. The Court has also spoken of reasonably trustworthy information and facts sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed. *See* Brinegar v. United States, 338 U.S. 160 (1949).

5. *See, e.g.*, Henry v. United States, 361 U.S. 98 (1961).

6. *See* Carroll v. United States, 267 U.S. 132, 149 (1925). In *Carroll* the Court, reviewing convictions under the National Prohibition Act, Act of Nov. 23, 1921, ch. 134, 42 Stat. 222, eased the restrictions on searches involving contraband in a moving vehicle, holding that probable cause to believe that a vehicle contained contraband subject to seizure made the search and seizure valid even though not incident to a lawful arrest; *cf.* Johnson v. United States, 333 U.S. 10 (1948).

7. *See, e.g.*, Elkins v. United States, 364 U.S. 206 (1960).

8. *See, e.g.*, Kremen v. United States, 353 U.S. 346 (1957) (removal of entire contents of cabin where petitioners were arrested was an illegal search and seizure); *cf.* Warden v. Hayden, 387 U.S. 294, 310 (1967) (scope of search must be strictly justified by the circumstances which rendered its initiation permissible) (Fortas, J., concurring).

9. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Beck v. Ohio, 379 U.S. 89, 96 (1964).

10. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Brinegar v. United States, 338 U.S. 160 (1949) (moving vehicle); *cf.* Trupiano v. United States, 334 U.S. 699 (1948) (seizure of contraband incident to a lawful arrest held illegal where no excuse shown for the failure to obtain a warrant). *But cf.* United States v. Rabinowitz, 339 U.S. 56 (1950), where the Court said that officers having time to secure a search warrant were not bound to do so, the search being otherwise reasonable.

11. Weeks v. United States, 232 U.S. 383 (1914).

12. Mapp v. Ohio, 367 U.S. 643 (1961); *cf.* Ker v. California, 374 U.S. 23 (1963); United States v. Jeffers, 342 U.S. 48 (1951). *See also* People v. Martin, 45 Cal. 2d 755, 759, 290 P.2d 855, 857 (1955), where the California Supreme Court held that since the exclusionary rule is intended to deter unlawful police activities, evidence illegally obtained would be excluded regardless of whether it was obtained in violation of the particular defendant's rights.

extent of the officer's authority to detain and search an individual with less than probable cause to arrest. Proponents of flexible police procedures view the stop and frisk as an essential law enforcement procedure that can be distinguished from arrest and search made upon probable cause;[13] opponents, demanding strict adherence to the fourth amendment, require probable cause sufficient for an arrest at the initial encounter before a search of any kind may be made.[14] The Supreme Court has never expressly distinguished between an investigatory stop and an arrest. The right of a policeman to stop an individual for interrogation upon less than probable cause has been fairly established in state and lower federal courts,[15] however, and the Supreme Court seems to have acknowledged this right as a necessary incident of competent police investigation.[16] Where weapons or contraband found in a search incident to such an encounter have been in issue, the courts have reached various decisions on the legality of the stop and search, depending on the circumstances of each case. In *Rios v. United States*[17] the Supreme Court suggested that evidence taken from a suspect would be admissible only if there were probable cause for an arrest at the time of the initial encounter. Moreover, in *Henry v. United States*[18] the Court, viewing any forcible detention as a constitutionally regulated arrest, seemed to require probable cause for all physical interferences with the person beyond questioning. Several state courts have allowed limited self-protective searches for weapons during investigatory stops upon reasonable suspicion of criminal activity.[19] In permitting such intrusions without probable cause to

13. *See generally* Comment, 65 COLUM. L. REV. 848 (1965).

14. *See generally* 41 So. CAL. L. REV. 161 (1968).

15. *E.g.*, Keiningham v. United States, 307 F.2d 632 (D.C. Cir. 1962), *cert. denied* 371 U.S. 948 (1963) (questioning of suspicious individual warranted without probable cause); United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960) (not every detention of the person is a seizure under the fourth amendment); People v. Jones, 176 Cal. App. 2d 265, 1 Cal. Rptr. 210 (4th Dist. Ct. App. 1959) (police officer has right to make inquiry of persons on public street at night).

16. *See* Rios v. United States, 364 U.S. 253 (1960); *cf.* Brinegar v. United States, 338 U.S. 160, 179 (1949) (Burton, J., concurring).

17. 364 U.S. 253 (1960); *cf.* Husty v. United States, 282 U.S. 694 (1931) (once there is probable cause for an arrest it is immaterial that a search (without a warrant) precedes the arrest).

18. 361 U.S. 98 (1959). The Court seemed to adopt a tort definition of arrest: any interference with liberty, however slight. *See* W. PROSSER, TORTS § 12, at 58 (3d ed. 1964); *cf.* United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959) (defendant arrested when asked to accompany policeman to a call box); United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957) (restraint of full liberty); *cf.* Silverman v. United States, 365 U.S. 505, 511 (1961) (fourth amendment not to be measured in terms of niceties of tort law). *But see* Clark, J., dissenting, in Henry v. United States, 361 U.S. 98, 104 (1959).

19. *E.g.*, People v. Michelson, 59 Cal. 2d 448, 380 P.2d 658, 30 Cal. Rptr. 18 (1963); Commonwealth v. Lehan, 347 Mass. 197, 196 N.E.2d 840 (1964). The right is obvious

support an arrest, some of the cases distinguished between a frisk for weapons and a general search, finding the former to be outside the scope of the fourth amendment.[20] Although a groundless search is unlawful and evidence seized therein inadmissible,[21] the scope of a permitted search for weapons and the admissibility of evidence other than weapons discovered incident to such a search have been unsettled problems. One view is that while the initial stop was without probable cause, if it were justifiable as a proper investigation such evidence as might be found in a subsequent search for weapons might constitute probable cause for an arrest and would be admissible.[22] The opposite view holds that the legality of the search conducted after questioning depends on whether there was probable cause for a technical arrest at the initial encounter, but this view perhaps disregards the idea of a self-protective search as necessary.[23]

In the instant case, the Court found that the narrow question for decision was "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."[24] Noting that the entire variety of police field practices could never be regulated by application of the exclusionary rule,[25] the Court reasoned that the public interest in effective law enforcement justified some authority of a police officer, in appropriate circumstances, to approach an individual and investigate his suspicious conduct without having probable cause for arrest,[26] and in this respect, the detective's conduct in approaching the petitioner and his companions was entirely proper. Noting that criminal violence has caused the deaths of many policemen, the Court found it unreasonable to prohibit an officer who is justified in

when the search is incident to a lawful arrest. Preston v. United States, 376 U.S. 364, 367 (1964).

20. People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965); State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966), *aff'd*, 392 U.S. 1 (1968).

21. *E.g.*, People v. Brown, 45 Cal. 2d 640, 290 P.2d 528 (1955).

22. Smith v. United States, 264 F.2d 469 (1959); People v. Faginkrantz, 21 Ill. 2d 75, 171 N.E.2d 5 (1961); *cf.* Keiningham v. United States, 307 F.2d 632 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 948 (1963).

23. Ellis v. United States, 264 F.2d 372 (D.C. Cir. 1959), *cert. denied*, 359 U.S. 998 (1959).

24. 392 U.S. at 15.

25. The purpose of the exclusionary rule is to enforce constitutional safeguards against police by excluding the fruits of unlawful searches in prosecutions; police conduct not directed at prosecution cannot be deterred by the rule. *Id.* at 12, 13 & n.9.

26. The Court here seems to have accepted the right of the police to approach an individual without probable cause to be grounded in public policy, for no authority is cited. Others have been unwilling to make this categorical statement without authority. See the discussion of the point in State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966).

suspecting that his subject is armed to remove the threat of harm by searching the person. The Court held that this self-protective measure involved a constitutionally governed search and seizure, thus rejecting arguments that sought to take the practice outside the scope of the fourth amendment. The Court argued, however, that since the brief, though serious, intrusion of a search for weapons is not the equivalent of an arrest[27] and serves different interests, the constitutional standard for this conduct is not probable cause, but rather reasonableness,[28] determined by balancing the governmental interest in making the search against the citizen's interest in being free from intrusion. The proper balance between the interest of police in self-protection and the freedom of the individual requires, said the Court, that the police officer be permitted to make a limited search for weapons regardless of whether he has probable cause for an arrest. The officer must have a reasonable belief that the suspect is both engaged in criminal activity and armed. The belief must be based on "the specific reasonable inferences which he is entitled to draw from the facts in light of his experience"[29] and must continue after the initial encounter. Concluding that the specific limitations to be placed upon the search for weapons will be developed case by case, the Court held generally that the search must be reasonably confined to the purpose of protecting the officer and that the instant detective's search of petitioner did not violate this standard.[30]

27. 392 U.S. at 24, 25. Here the Court refers to an arrest as the initiation of a criminal prosecution. Search incident to arrest has always been partly justified by the necessity of protecting the officer from assaults, Preston v. United States, 376 U.S. 364 (1964), but is to be distinguished from the limited search because it may involve a more exhaustive search for contraband or other evidence of crime.

28. The Court characterized this sort of police conduct as "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." 392 U.S. at 20; *cf.* cases cited in note 4, *supra.*

29. 392 U.S. at 27.

30. Mr. Justice Harlan, concurring, found that the right to frisk implies a pre-existing right to make a forcible stop, for which there must be a constitutional basis. Since the State of Ohio has not provided statutory authority for the right to stop and since a citizen may ordinarily refuse to be searched by the officer, the right to stop must arise from the necessity of the situation in which the officer has a reasonable suspicion in light of his experience that the person is about to engage in crime. The right to frisk, he felt, automatically followed the justified forcible stop. Mr. Justice White also concurred, saying that in special circumstances a person may be detained, the frisk being justified by the circumstances of the detention. Even if weapons are not found, he concluded, constitutional rights are not violated if pertinent questions are asked. Mr. Justice Black concurred with the result, but excepted to the parts supported by *Katz v. United States* and the concurring opinion in Warden v. Hayden, 387 U.S. 294 (1967). Mr. Justice Douglas dissented on the ground that the holding, in abandoning the standard of probable cause for an arrest without a warrant, in the last analysis gave the police in the street greater power to intrude lawfully upon the privacy of the individual than a judge could authorize when asked for a warrant. This inroad on

Having devoted many opinions to protecting the integrity of the individual, the Court in *Terry* has struck an expedient compromise between society's interest in effective law enforcement and the innocent citizen's interest in being free of governmental interference. Whereas convictions based on evidence obtained without a warrant previously turned on the existence of probable cause, courts may now also apply a standard of reasonable suspicion that the subject was armed and in the course of criminal activity in order to uphold a search. While the decision recognizes that necessity and the public interest require that the police be allowed to detain and question persons found in suspicious circumstances and require that innocent citizens yield to such necessity even to the point of a humiliating public frisk, it also makes greater demands on the common sense and professionalism of the police officer in the field. The new standard of police conduct will be no more nor less difficult to apply than that of probable cause; however, in light of the complexity of human behavior and the events which confront policemen, it would be difficult to fashion a more useful and positive test. In reality, the decision is unlikely to cause any major changes in police attitudes or behavior. Courts can regulate the practices of stop and frisk only to the extent that abuses become visible through litigation. The requirement of reasonableness will not curb harrassment or aggressive patrols not intended to produce prosecutions any more than would the strict application of the exclusionary rule.[31] It seems likely, however, that possible misconstruction of the rule in *Terry* as affording to police a license to continue abusive field interrogations will have incendiary results in communities where such practices are already a " 'major source of friction between the police and minority groups.' "[32]

In the area of legitimate operations under *Terry*, the Court at present will not allow the limited search to go beyond the requirements of disarming the subject; thus the rule of *Terry* should not come to replace the requirement for a warrant or probable cause in order to search for evidence for a prosecution.[33] The decision does

judicial supervision of the requirement of probable cause, he felt, was a serious step that should be based only upon deliberate amendment of the Constitution.

31. 392 U.S. at 14.

32. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE POLICE (1967), cited in 392 U.S. at 14 n.11.

33. Sibron v. New York and Peters v. New York, 392 U.S. 40 (1968), two cases consolidated and decided with *Terry*, illustrate how the Court is likely to apply the rule in *Terry*. In *Sibron*, defendant was arrested after a policeman had observed his conversations with known narcotics dealers, asked him to leave a restaurant, put his hand in defendant's pocket, and found a quantity of heroin. In *Peters*, defendant was arrested by a policeman who had startled him moving furtively in the hallway outside his apartment. A search produced a packet of burglary tools. The conviction in *Sibron* was reversed because the officer had neither probable cause to arrest nor reasonable

create some uncertainty about the permissible scope of the search, however. Reasonable suspicion that the suspect is armed must continue after the initial encounter in order to justify the search. Since protection of the officer is the only justification for the search, it should be limited to a patting down of the suspect's outer clothes. If no weapons are felt in the clothes, no further search would be justified unless an arrest is made. Since the Court uses the term "search" rather than the familiar word "frisk," which connotes a patting down, it is not clear whether an officer may actually enter a suspect's pockets when he feels something in them that arouses his suspicion. This issue will arise when an officer, meeting all the requirements of reasonableness under *Terry*, reaches into the suspect's pocket and finds, not a weapon, but rather contraband or other evidence of crime. Since the admissibility of the object will turn on the reasonableness of the search, the courts should not view as reasonable an intrusion beyond a patting down unless the evidence is very strong that the officer continued to believe that the object he felt was a weapon. The Court, in failing to delineate clearly the steps of a reasonable self-protective search, has left the initial determination to trial courts where pressure for convictions may encourage relaxation of the requirement of reasonable suspicion.[34] The legislatures in some states, particularly New York, have already determined prior to the instant case that any object, the possession of which is unlawful, found in a limited search may be the ground for an arrest, without setting any standards of reasonableness for the search.[35] Even though a limited search for weapons is now deemed a reasonable intrusion, it

suspicion that the defendant was armed under *Terry*. In *Peters*, the conviction was affirmed because the policeman had ample probable cause to believe that the defendant had committed or was about to commit a crime.

34. *See* Worthy v. United States, 3 CRIM. L. REP. 2448 (D.C. Cir. August 8, 1968), where a conviction for possession of heroin was affirmed and a search of a vagrant was upheld as being incident to arrest for vagrancy, although the crime of vagrancy has no fruit or instrumentality. "Since the search was for a weapon, the seizure of the narcoties, though not a weapon, was lawful and this contraband accordingly was useable [sic] as evidence." In a dissent, Wright, J., adopted the language of Mr. Justice Harlan in Sibron v. New York, 392 U.S. 40 (1968), in stating: "[E]ven if the police had reasonable grounds to suspect a narcotics offense, even a limited search for weapons might be unconstitutional because the 'nature of the suspected offense creates no reasonable apprehension for the officer's safety.'"

35. N.Y. CODE CRIM. P. § 180-a (McKinney Supp. 1967) provides: "1. A police officer may stop any person abroad in a public place whom he reasonably suspects is commiting, has committed, or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

"2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until

should not be permitted to be substituted through such legislation for a constitutional search upon probable cause when circumstances require the latter.

A concomitant area of uncertainty in the decision concerns the permitted scope of forcible detainer without probable cause for purposes other than a self-protective search. Although the Court disclaims any decision of the issue,[36] it is arguable that the holding of *Terry* impliedly permits police to seize a person for temporary detention and/or questioning under the standard of reasonableness.[37] It should be made clear that the forcible seizure allowed in *Terry* is for the protection of the officer in specific circumstances only, and, like the search for weapons, must not become a general substitute for traditional constitutional procedures in the field practices of police. Hopefully, the Court will make this view clear at the first opportunity.

Landlord-Tenant—Violation of Housing Regulations Renders Lease Agreement Unenforceable in Action for Possession and Nonpayment of Rent

Appellee, a landlord, brought an action for possession against the appellant tenant for non-payment of rent.[1] The tenant contended that the landlord had let the dwelling knowing that its condition violated the District of Columbia Housing Regulation,[2] and that the lease agreement was, therefore, unenforceable as an illegal contract. The General Sessions Court gave judgment for the landlord. On appeal to

the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

36. 392 U.S. at 19 n.16.

37. *Cf.* Harlan, J., concurring, *Id.* at 31-34.

1. The tenant had already vacated the premises, but brought this appeal because the trial court's judgment against her would be res judicata in a future action for unpaid rent. Brown v. Southall Realty Co., 237 A.2d 834, 835 (D.C. Ct. App. 1968).

2. Commissioner's Order No. 55-1503, dated August 11, 1955, sets forth Standards of Habitability. Section 2304 of the Housing Regulations provides: "No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin." Section 2501 states: "Every premises acommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."

the District of Columbia Court of Appeals, *held*, reversed. Where violations of housing regulations exist prior to an agreement to lease, the letting of such premises constitutes an illegal and unenforceable contract which defeats a landlord's action for possession and nonpayment of rent. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968).

At common law, the lessee was regarded as the purchaser of an estate in land, and as such, responsible for certain minor repairs, due to his obligation to return the premises to his grantor at the end of the term in the same condition as it was when let to him. Major repairs, however, and care of certain facilities were within the purview of the landlord. For example, the tenant was exempted from repair of heating and plumbing utilities, which, in addition to their complicated nature, come not only under the tenant's physical control, but also under that of the landlord.[3] However, should the landlord fail to make needed repairs, the tenant was still responsible for the rent, as he had purchased an estate in land, while the condition of the structure upon the land was of tangential concern at common law. Indeed, traditionally, to be freed from liability for rent, the tenant had to be evicted. More recently, however, courts have found a constructive eviction where the premises are made uninhabitable by virtue of the landlord's neglect.[4] The doctrine of constructive eviction, as it originally evolved, required that the tenant abandon the dwelling,[5] for otherwise the premises could not logically be considered uninhabitable. Population increase and urban in-migration have relaxed the strict requirement of abandonment. The New York courts were among the first to take judicial notice of the critical housing shortage after World War II, and in several instances found a constructive eviction without abandonment, realizing that for those whose income dictated residence in dwellings unlikely to be in repair when rented or to be repaired thereafter, moving elsewhere was an unreasonable burden.[6] Decisions of this nature went far in alleviating the tenant's plight, but he was still subject to an action for eviction by the landlord unable to extract rent.

In the instant case, the court relied not upon constructive eviction, but rather upon a comparison of the premises with the requirements of the housing regulations. When the lease agreement was made, the

3. For a discussion of control of permanent fixtures and appliances, see *Legal Remedies of Slum Tenants*, 13 (unpublished paper of Washington University School of law).

4. *See* Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1965).

5. *E.g.*, Goldsmith v. Gisler, 150 A.2d 462 (D.C. Mun. Ct. 1959).

6. *E.g.*, Johnson v. Pemberton, 197 Misc. 739, 97 N.Y.S.2d 153 (N.Y. Mun. Ct. 1950); Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (N.Y. Mun. Ct. 1946).

dwelling was not "in a clean, safe and sanitary condition, in repair, and free from rodents and vermin,"[7] nor were repairs subsequently made to meet such a standard. The court reasoned that the housing regulations were based on strong public policy sentiment, so much so that violation of them carried a possible jail sentence and a fine.[8] From this the court concluded that the lease contract was made in furtherance of illegal conduct, and as such was unenforceable, affording the landlord neither a right to reclaim possession nor to demand payment of rent due.

The instant decision is a refreshing example of judicial forthrightness. It is based not on the legal sophistry of constructive eviction, but rather on the simple principle that certain conduct is intolerable in a civilized society, and contracts made to further such conduct will not be given the approval of a court of law. For low-income residents of the District of Columbia, the instant decision is a long-sought defense against the landlord's ability to extort rent for a dwelling, the only virtue of which is all too often a mere roof and four walls. However, the decision, and the regulations which support it, cannot solve the problems of the urban poor who must rent shelter. Nor do they offer protection to the landlord who may well not know of the condition of his building (although ownership itself should impart constructive notice). Neither is a decision of this nature able to compel repairs, or to assure that repairs will be of standard quality if made, for it may often be less expensive for the owner to pay a fine for violation, or merely to allow the building to decay until finally purchased by urban renewal.

Attempts to equalize the bargaining power of the low-income tenant and the landlord began with building codes and regulations, and the sheer pragmatic difficulty of their enforcement in urban areas must be considered. In order to enforce a code, dwellings must be visually compared with the standard set by law; thus most codes require yearly inspection of all dwellings. In the District of Columbia the number of buildings dictates merely an exterior survey.[9] Reinspection of buildings previously found guilty of violations is more frequent, but inspection in general is costly and brings little relief to the tenants. For example, in one year the District of Columbia's Department of Licenses and Inspections, with eighty-four inspectors, had an annual budget of $774,837, or a per capita expenditure of $1.01, the latter figure exceeding that for the cities of New York, Chicago, and

7. District of Columbia Housing Regulations § 2501 (1955).

8. District of Columbia Housing Regulations § 2104 (1955).

9. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 807 (1966).

Philadelphia.[10] The 1960 Census reported that in Washington there were 3,870 "dilapidated" units, 23,143 "deteriorating" units, and 16,909 units lacking some or all plumbing.[11] It is hardly realistic to suppose that the problem has been alleviated in the last eight years, considering population increase and in-migration. Once a violation is reported and inspected, the city enforcement agency must locate and serve process on the landlord, a formidable problem if the dwelling is owned by a dummy corporation or a non-resident. The complexity of the situation is further heightened by the enormous number of complaints confronting the agency. In Chicago, one court is reported to have handled 120 to 300 cases per day, at a rate of one per minute.[12] With a problem of this magnitude, justice can be done to neither landlord nor tenant, and codes can only begin to cope with it.

In order to alleviate the effect of abuses of the disparity in bargaining power, a number of sanctions have been proposed or actually made available against landlords, some public, some combining public and private initiative, and others more nearly private, in the nature of the instant case. The most obvious public remedy is the imposition of a fine, possibly a "cumulative civil penalty" to be imposed upon landlords whose dwellings are in violation of the code.[13] A small sum could be set for each violation and cumulated until repairs are made. For example, if the penalty were set, as has been suggested, at $3 and there were five violations, the owner would become liable for $15 per day, or $105 for each week that the violations went uncorrected. If the landlord is inaccessible, the fee could be taken from the rent due him. Furthermore, in a civil proceeding such as this, the authors of the proposal suggest that an in rem action might be taken against the building itself if the landlord cannot be located. The authors would include as part of their program a civil housing court which would serve all facets of the landlord-tenant relationship,[14] including educating both parties as to their rights and the facilities (for example, federal and state aid for rehabilitating buildings) available to them. This proposal has many merits, among them the stiffness of the

10. *Id.* at 804 n.19.

11. U.S. Censuses of Population and Housing: 1960, Census Tracts, Parts 164-80 (Washington, D.C.-Maryland-Virginia) 151 (1960).

12. Chicago Daily News, May 22, 1963, at 1, col. 1.

13. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies,* 66 COLUM. L. REV. 1254, 1281 (1966).

14. Outside the judicial field, other remedies are suggested, particularly a recent case in Boston in which the Rabbinical Court of the Associated Synagogues of Massachusetts, relying on the landlord-tenant code in the *Talmud,* took jurisdiction over certain Jewish landlords, forcing an arbitration and eventually execution of a housing agreement between the landlords and their dissident slum tenants. Wall Street Journal, Sept. 9, 1968, at 1, col. 6.

penalty against the landlord; $15 per day adds up to over $5000 per year, and is thus a strong incentive to compliance. Unlike the District of Columbia scheme, the owner cannot pay a mere $300 and leave the violations uncorrected. A second possible public remedy, used in several cities, including Washington, D.C., is the requirement of securing a license before renting; to merit the license the building must meet code specifications. The license fees can be used to defray the costs of inspection and repairs, although it seems unlikely that the fees could equal the cost of repairs. One need only glance at the figures cited for Washington, D.C., on the number of dilapidated and deteriorated units to measure the worth of the license system.[15]

A somewhat more satisfactory remedy lies in the appointment of a receiver to enforce the building code. Under this quasi-public scheme, if the owner, after notice, fails to make the repairs, the city would be empowered to appoint a receiver, make the repairs, and retain a lien on the landlord's future rents until the cost of repairs is paid. The great advantage to a receivership is that it ensures that the repairs will in fact be made, and made in accordance with statutory standards. However, the plan is not entirely problem-free. Would-be mortgagees may well be unwilling to lend money to owners if they know their lien will be junior to that of the city. The most inhibiting factor is that there is no guarantee that the city will ever recoup its expenses after having made the repairs; in New York City, of $820,000 spent in one year for repairs, only $30,000 was recovered.[16] Another quasi-public remedy, in force in New York and Illinois, authorizes withholding of rent by the welfare department. In Illinois,[17] upon receipt of a complaint, the agency inspects the tenement, and if a violation is discovered, gives the landlord ten days in which to correct it; otherwise the rent is withheld by the welfare agency. The tenant has the defense of code violation should the landlord elect to evict him for non-payment of rent. Once the repairs are made, the rent is restored to the owner. The New York statute[18] provides for total rent abatement during the violation's continuation with no restoration of withheld rent. These statutes, however, are not free from inadequacies. First, there is no way to protect the tenant from retaliation such as eviction or refusal to provide critical facilities.[19] Furthermore, the landlord may refuse thereafter to rent to welfare recipients. And

15. *See* note 11 *supra* and accompanying text.

16. Gribetz & Grad, *supra* note 13, at 1275 n.94.

17. ILL. REV. STAT. ch. 23, § 11-23 (1967).

18. N.Y. Soc. WELF. LAW § 143-b (McKinney 1966).

19. In Chicago, landlords turned off the heat in welfare tenants' buildings following a complaint. Comment, *Rent Withholding: Public and Private*, 2 HARV. CIV. LIB.-CIV. RIGHTS L. REV. 179, 181 (1967), citing the Chicago Daily News, Jan. 18, 1966.

finally, the statute does not protect those who do not receive welfare payments.

More directly private remedial schemes are also possible. In New York City[20] if an agency has already recorded violations against a certain landlord, the tenant may withhold rent if there is a judicially determined constructive eviction. However, few tenants would be willing to take it upon themselves to decide that there was a constructive eviction, risking subsequent disagreement by the courts. In Massachusetts the tenant may withhold rent if the violation "endangers or materially impairs" the health and safety of the occupants.[21] For non-welfare tenants, New York state requires that each separate violation, not the violations taken cumulatively, pose such a danger.[22] Rent withholding is thus, at best, a tricky business for the tenant, for it places the initiative on him, not upon the wrongdoer; and, in the absence of a statute providing legal aid, it adds the burden of defending this initiative in a court of law. Furthermore, the standard for withholding is generally high, and the tenant is unlikely to know whether or not his grievance meets the test. Another ingenious proposal suggests that slumlordism be treated as a tort, somewhat akin to the tort of intentional infliction of emotional distress.[23] The authors of this proposal feel that the basis for this tort—outrageous conduct and an individual's reaction to it—should be altered to emphasize not the individual's reaction, but the conduct of the offender. The landlord, for his own economic gain, provides a dwelling which is "inconsistent with those standards which represent minimal social goals as to decent treatment and in a manner that is violative of the law, under circumstances where the victim had no meaningful alternative but to deal with him . . ."[24] The authors cogently argue by analogy that the law would not allow a doctor to capitalize on a pre-existing physical illness by giving shoddy medical treatment merely because he can make money doing it and a large number of people need his services; therefore, the law should not allow landlords to capitalize on similarly pre-existing social ills.

None of the suggested or presently used methods of eradicating substandard housing guarantees the attainment of their goal, decent housing. Economic whips such as the cumulative penalty or tort action may provide some relief, but they may merely encourage the owner to abandon the building, thus adding to urban overcrowding. Also, the backlog of cases and plethora of red tape produce delay.

20. N.Y. REAL PROP. ACTIONS AND PROCEEDINGS LAW § 755 (1963).
21. MASS. GEN. LAWS ch. 239, § 8a (Supp. 1967).
22. N.Y. MULTIPLE DWELLING LAW § 302-a(2)a (McKinney Supp. 1967).
23. Sax & Heistrand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967).
24. *Id.* at 890.

Other factors inhibit attainment of decent housing: the tenant's ignorance of his rights, inertia in the face of overcrowding, low wages or no wages, inaccessibility to industry because of poor public transportation systems, first and second-hand knowledge of just causes lost in administrative apathy, lack of child-care to allow access to an agency, and inability (due to poor education) to explain problems articulately to someone who might help. Economic pressures are on the landlord too, forcing him in some cases to succumb to slumlordism. The President's Commission on Civil Disorders points out that as a neighborhood becomes a ghetto, the need for services increases; police, fire and health departments are in greater demand than they were in the formerly stable neighborhood.[25] Consequently, property taxes must be increased to meet this need. An owner seeing his tax rise to double that of his suburban counterpart may well be unable to afford to provide decent housing. He knows that the only immediate way to lower the tax assessment is to lower the value of his property—to allow it to deteriorate. The incentive to maintain his building is removed and the neighborhood crumbles further. Rent subsidy proposals would seem to solve many problems. Presumably where there is the ability to pay for better housing, that housing will arise. Were this to occur, other problems are posed: the length of time required; disposition of the poor in the interim; whether repairs will be made in present buildings; where new housing, if built, will be located in densely populated areas. And perhaps the greatest nagging doubt about rent subsidies is that they will merely inflate rents and result in no improvement, except to the landlord's pocketbook. Perhaps the only real solution to this problem, made enormous by the numbers of people involved and grotesque by its brutal effects on the individual, lies in some form of income redistribution, preferably in general, and at the very least, in particular as related to housing. Such a complete economic and social overhaul is far in the future, however, if not wishful thinking altogether. In the meantime, the instant court has demonstrated that ingenious and sympathetic use of existing public remedies may result in effective private remedies, thus shifting somewhat the burdens of sustaining the controversy away from the tenant and the city, and on to the landlord. Such implication of private remedies from the policies underlying statutes providing public remedies is not an altogether novel judicial strategem, but one particularly to be commended in such an area as housing, where the disparity in bargaining power is often so immense. A defense to a private action, operating in the nature of self help on the part of the tenant, not only adds to the strength and dignity of

25. REPORT OF THE U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 31 (1968).

the tenant and thus tends to alleviate long term inequality, but effectively provides a supplemetary means of enforcing more immediate, though demonstrably less effective, public remedies, such as building and housing codes.

Procedure—Federal Rules of Civil Procedure—Amended Rule 23 Requires Liberal Construction

Plaintiff, on behalf of himself and all other purchasers and sellers of odd-lots[1] on the New York Stock Exchange during the years 1960-1966 (numbering approximately 3,758,000 persons), sought damages and injunctive relief against the New York Stock Exchange for violation of the Securities Exchange Act of 1934,[2] and against two brokerage firms[3] for violation of the Sherman Act.[4] A federal district court sustained defendant's contention that the action was not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure on the grounds that the plaintiff could not fairly and properly represent the other members of his class; that questions common to the class did not predominate over questions affecting individual members; and that there were potentially great difficulties involved in giving adequate notice to the other members of the class.[5] On appeal to the United States Court of Appeals for the Second Circuit, *held*, reversed and remanded. Whenever there is inadequate information to determine if the requisites of Rule 23 of the Federal Rules of Civil Procedure and due process are present, a federal district court must conduct evidentiary hearings before deciding if a class action is main-

1. An odd-lot is a transaction involving less than 100 shares (10 for a few issues) of a security. They are handled by special dealers who trade from their own account and charge a small differential above or below the priee of the auction market. An individual buying in odd-lot quantities must first contact a regular brokerage house, which in turn orders from an odd-lot dealer. The customer's cost includes the broker's fee plus an "odd-lot differential" which goes to the odd-lot dealer. This differential has been subjeet to severe criticism. *See, e.g.*, SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. No. 95, pt. 2, 88th Cong., 1st Sess. 171 (1963).

2. The plaintiff alleged that the New York Stock Exchange had failed to proteet odd-lot investors as required by the Securities and Exchange Act. 15 U.S.C. §§ 78f(b), 78f(d), 78s(a) (1964).

3. These firms were Carlisle & Jacquelin and DeCoppet & Doremus, who collectively handled 99% of the volume of odd-lot transactions during 1960-1966. SEC, REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, H.R. DOC. No. 95, pt. 2, 88th Cong., 1st Sess. 172 (1963).

4. Plaintiff alleged a conspiracy to monopolize odd-lot trading and the fixing of excessive odd-lot differentials. 15 U.S.C. §§ 1 & 2 (1964).

5. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966).

tainable. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968).

It has long been recognized in equity that the essence of a class action lies in the fact that a few members of the class may bring action through which they would litigate the common problems of the entire class.[6] This prevents multiple suits and permits all claimants to obtain redress even though their claims may be too small to warrant individual litigation. Rule 23 of the Federal Rules of Civil Procedure, adopted in 1937, reflected this heritage[7] by providing three types of class actions: true, hybrid, and spurious. True class actions resulted in a judgment binding all class members,[8] while hybrid class actions concluded claims regarding property.[9] Spurious class actions, where class members united by a common question of law or fact sought common relief for various claims, were binding only on the actual parties to the litigation.[10] In effect, this spurious class action was really a permissive joinder device.[11] Since the great majority of class actions were spurious, the objective of making a binding determination of all questions in a single suit which would be conclusive for the whole class was often frustrated.[12] Consequently, to eliminate this and other problems, Rule 23 was amended in 1966 to provide for a single class action in which judgments are binding on all members of the class not specifically opting out.[13] Under the new Rule

6. Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853) (6 preachers and members of the Methodist Church on behalf of 1500 traveling preachers); *See generally* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (524 complainants on behalf of over 70,000 fellow members of a fraternal organization); 3A J. MOORE, FEDERAL PRACTICE, ¶ 23.02, at 3409 (2d ed. 1967).

7. *Compare* 226 U.S. 659 (1912) (Rule 38 of the Rules of Practice in Equity promulgated by the United States Supreme Court), *with* Notes of Advisory Committee on former Rule 23, cited in 28 U.S.C.A. at 147 (1958).

8. A true class action is marked by joint or derivative rights such that if there were no class action, all members of the class would have to be joined anyway. *See* 3A J. MOORE, FEDERAL PRACTICE, ¶ 23.08 at 3435 (2d ed. 1967); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-71 (1937); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629 (1966).

9. In a hybrid class action, the class members have interests that are several rather than joint or common, but are united by a right to a common fund or common property. *See* Pennsylvania Co. for Ins. v. Deckert, 123 F.2d 979, 983 (3rd Cir. 1941); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 562.2 at 272 (1961); 3A J. MOORE, FEDERAL PRACTICE, ¶ 23.09 at 3439 (2d ed. 1967).

10. *See* 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 562.3 (1961); 3A J. MOORE, FEDERAL PRACTICE, ¶ 23.10 at 3442 (2d ed. 1967).

11. *See, e.g.*, Carroll v. American Fed. of Musicians, 372 F.2d 155 (1967), *rev'd*, 391 U.S. 99 (1968) (antitrust violation by musicians' union); 3A J. MOORE, FEDERAL PRACTICE, ¶ 23.10 at 3442 (2d ed. 1967).

12. Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

13. "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to

23(a), to be maintainable as a class action, four requisites must be met: (1) the class must be so numerous that joinder of all its members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must be able to protect fairly and adequately the interests of the class.[14] In addition, the prospective class action must possess one of the three alternative requisites of Rule 23(b). One such requisite is that questions of law or fact common to the class must predominate over questions affecting only individual members.[15] It has been held that in some situations the interests of individuals may differ to such a degree that common questions cannot be considered predominant, and consequently class adjudication would raise insuperable problems of management.[16] However, courts have held that the rule does not require that all members of the class be identically situated in all particulars, but simply that there be substantial questions, either of law or fact, common to all.[17] Furthermore, the fact that members of a class may seek differing amounts of damages has never been a sufficient bar to class action.[18] Since all members of the class may be bound by a class action, the courts are careful to require that the litigant adequately represent the rest of his class.[19] It has also been held that courts must consider the number of plaintiffs bringing suit in rela-

the class, shall include . . . those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class." FED. R. CIV. P. 23(c)(3).

14. FED. R. CIV. P. 23(a).

15. FED. R. CIV. P. 23(b)(3). The other alternatives include the risk of inconsistent class determinative adjudications if separate actions were brought or if the other party's action was based on grounds generally applicable to the class, FED. R. CIV. P. 23(b)(1), and the inapplicability of the class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class, FED. R. CIV. P. 23(b)(2).

16. *See, e.g.*, School Dist. of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967) (conspiracy by jobbers and wholesalers to fix prices of children's books), where it was held that common questions were not predominant in view of the commercially unique product involved and the different requirements and methods of purchasing of the various class members.

17. City of Philadelphia v. Morton Salt Co., 248 F. Supp. 506, 514 (E.D. Pa. 1965) (class actions by various governmental agencies alleging conspiracy to fix salt prices). *See also* Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967) (antitrust class action by 5 of 650 franchisees).

18. *See, e.g.*, Weeks v. Bareco Oil Co., 125 F.2d 84, 91 (7th Cir. 1941) (class action by 2 jobbers of gasoline on behalf of 900 class members for alleged price fixing of gasoline); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966) (class action by 3 shareholders on behalf of all shareholders for rescission of security purchases because of fraudulent inducement).

19. "One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4).

tion to the size of the class as an indication of the adequacy of representation.[20] Some courts have determined that a small number of claimants cannot represent a large class,[21] while others have allowed very small percentages to maintain a class action on the ground that once the action has begun, others may wish to enter.[22] It is also important to note that the res judicata effect of court decisions in class actions makes applicable the constitutional requirement of due process which demands the giving of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[23] Some cases have held that actual notice to all class members is necessary,[24] while other courts have approved notice by publication.[25]

In the instant case, the court carefully noted that the "letter and spirit" of the new Rule 23 require a liberal interpretation of its provisions. Consequently, the court was unwilling to dismiss the instant class action without additional evidence clearly showing that the requisites of Rule 23 and due process could not be met by the plaintiff. The court found that the plaintiff might have satisfied the four requirements of Rule 23(a), reasoning that 3,758,000 persons were obviously too numerous to join as separate parties, that there were questions of fact and law common to the class, and that all members had the same complaint as the instant plaintiff. Surmising that the plaintiff might adequately represent his class despite its size, the court noted that the disparate size of the class in relation to the single plantiff, a factor so heavily relied on by the lower court in its refusal to find a maintainable class action, is only one factor to be considered in determining whether representation will be adequate, particularly since the primary function of the class action is to permit a small part of the class to assert the rights of the entire class. Consequently, the court held that in determining the adequacy of representation,

20. *See, e.g.*, Pelelas v. Caterpillar Tractor Co., 113 F.2d 629, 632 (7th Cir.), *cert. denied*, 311 U.S. 700 (1940) (court dismissed class action by one former employee on behalf of "thousands" of defendant's employees for distribution of surpluses from group insurance policy).

21. *See, e.g.*, Pacific Fire Ins. Co. v. Reiner, 45 F. Supp. 703 (E.D. La. 1942) (dismissal of class action by insuror against one pledge debtor as representative of 5,000 other pledge debtors to clarify liability under fire insurance contract).

22. *E.g.*, Siegel v. Chicken Delight Inc., 271 F. Supp. 722 (N.D. Cal. 1967) (5 of 650 franchisees may bring class action for antitrust violation).

23. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (petition by bank for settlement of accounts of persons with interest in common trust fund); *see* FED. R. CIV. P. 23(c)(2).

24. *E.g.*, Richland v. Cheatham, 272 F. Supp. 148 (S.D.N.Y. 1967).

25. *E.g.*, Booth v. General Dynamics Corp., 264 F. Supp. 465 (N.D. Ill. 1967) (one taxpayer, representing class of "several hundred thousand," sought equitable relief for defendant's fraudulent leasing of city property).

the district court should have given greater consideration to such factors as the competency of the litigant's attorney, the possibility of collusion, and the similarity of the interests of the litigant and the other class members.[26] In addition, the court found that the requirements of 23(b)(3) were met, since the antitrust violations practiced against the entire class presented common questions of sufficient weight to predominate over questions affecting only individual members. The court thus remanded the case, ordering the district court to hold hearings to determine whether or not plaintiff could adequately represent the class and whether or not there were feasible methods of administering an action and judgment for this numerous class, particularly as regarded the problem of notifying the class members of the pending action. Although noting that "some sort of ritualistic notice in small print on the back of a newspaper would in no event suffice,"[27] the court found that the absence of facts as to the identity of the class members made it impossible to determine whether notice by publication or individual notice would satisfy due process. If, after evidentiary hearings, the lower court found that individual notice was required, the present court indicated that it would permit dismissal of the case if the plaintiff was not willing to finance this costly notification.

As the first appellate court interpretation of the new Rule 23, this case could provide an important precedent. The instant court clearly rejected the more restrictive view of the class action[28] and found that a liberal approach[29] was more within "the letter and spirit" of the new rule.[30] Consequently, in rejecting the district court's quantitative determination of adequate representation, the court left open the possibility of an increased use of the class action by an insignificant member of a very large class. In the area of civil rights, particularly, the instant holding could be crucial, as one member of a minority group could conceivably assert the rights of the entire group through the vehicle of a class action. In *Flast v. Cohen*,[31] although not a class action, the United States Supreme Court permitted a single taxpayer to challenge the constitutionality of the use of federal taxing and spending power in using federal funds for parochial schools. In accord

26. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562-63 (2d Cir. 1968). The court cited no authority delineating these three requirements.

27. *Id.* at 569.

28. *See, e.g.*, School Dist. of Philadelphia v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967) (class action not maintainable because there were no common questions of law or fact despite allegation of national conspiracy affecting all buyers of children's books).

29. *See, e.g.*, Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D. Cal. 1967).

30. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968).

31. 392 U.S. 83.

with the instant cases, the threat of opening a floodgate of suits did not frighten the Court into dismissing the suit. While the limits of the instant holding are unknown, it is doubtful that a class action would be extended to a class as large as 100,000,000 (all eligible voters). If, however, *Flast* and *Eisen* indicate a trend, then a person with a very small interest relative to the interests of the whole class will be able to assert his rights and the rights of the class in a court of law. Yet, it is submitted that the instant holding presents several problems which may defeat its liberal approach. The court expressly says that the class members must be notified either personally or by publication, but does nothing more than remand to the district court to decide which means is required and how this is to be accomplished. It is highly possible that the mere requirement of notice will make the action far too expensive for the plantiff with a small interest at stake ($70 here). Similarly, the administration of this action may prove too complex because the class is so large and diverse. The district court's determination of these matters on remand should be of crucial importance to the future use of the class action. Regardless, the liberal, permissive tenor of the instant holding itself may influence the future of Rule 23.

Trade Regulation–Section 2(d) of the Robinson-Patman Act Requires Promotional Allowances to Direct Buyers To Be Made Available to All Retailers Purchasing Through Wholesalers

The Federal Trade Commission charged respondents, Fred Meyer, Inc., a supermarket chain,[1] and its officers, with violating section 5 of the Federal Trade Commission Act[2] by inducing certain suppliers to engage in discriminatory sales promotional activities prohibited by section 2(d) of the Robinson-Patman Act.[3] The chain had solicited

1. Fred Meyer, Inc., operated a chain of thirteen supermarkets in the Portland, Oregon area which sold retail groceries, drugs, variety items, and a limited line of clothing. According to its 1960 prospectus, Meyer made one-fourth of the retail food sales in the Portland area and was the second largest seller of all goods in that area.

2. 15 U.S.C. § 45 (1964). This section declares unlawful any unfair methods of competition and any unfair or deceptive acts or practices, and authorizes the Commission to prevent such unfair methods and practices by instituting proceedings against suspected violators.

3. 15 U.S.C. § 13(d) (1964). "It shall be unlawful for any person engaged in

promotional allowance payments from two of its direct suppliers of canned goods, in return for including their respective products in the 1957 Meyer promotional campaign.[4] The two suppliers also sold to wholesalers who resold to Meyer's retail competitors, but did not make promotional allowances comparable to those received by Meyer available to either the wholesalers or the retail competitors. The Commission found that the two suppliers had violated section 2(d) of the Robinson-Patman Act[5] and ordered respondents to cease soliciting promotional allowance payments unless such allowances were made available, on a proportionately equal basis, to wholesalers who purchased from the same suppliers for resale to Meyer's retail competitors.[6] The Court of Appeals for the Ninth Circuit, reversing in part,[7] agreed with respondents that section 2(d) did not apply to the suppliers because Meyer, a retailer, was not "competing" with the wholesalers, and because the retailers competing with Meyer were not "customers" of the suppliers.[8] On certiorari[9] to the United States

commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such persons, unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities."

4. Since 1936, Meyer had promoted its products by distributing coupon books featuring products sold at reduced prices. Meyer financed the promotion by charging consumers a nominal ten cents for the coupon books and by charging the supplier of each featured product a fee of at least $350 for each coupon page advertising his product; the total revenues received exceeded the costs of conducting the advertising campaign. Some participating suppliers further underwrote the promotion by giving Meyer price reductions on its purchases of featured items, by replacing at no cost a percentage of the goods sold by Meyer during the campaign, or by redeeming coupons in cash at an agreed rate.

5. The participation of one supplier, Tri-Valley, in the promotion was challenged by the FTC in a separate action, and the Commission's finding that it violated § 2(d) was reversed by the Ninth Circuit. Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694 (9th Cir. 1964).

6. Fred Meyer, Inc., [1961-1963 Transfer Binder] CCH TRADE REG. REP. ¶ 16,368 (FTC 1963). Commissioner Elman dissented in part on the ground that the order should have required the promotional allowances to be made available to the retailers competing with Meyer rather than to wholesalers who resold to the retailers. *Id.* at 21,231.

7. Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966).

8. The court upheld the Commission's finding that respondents violated § 2(f) of the Clayton Act by inducing suppliers to violate § 2(a) prohibiting price discrimination, and that Meyer knew or had reason to know of the unlawfulness of the payments it induced. The court also rejected respondents' arguments that inducement of disproportionate promotion payments is not cognizable under § 5 of the Federal Trade Commission Act, and that the Commission's order was too broad and improperly directed against the corporate officers as individuals.

9. The Supreme Court granted certiorari on the limited question of "[w]hether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to the wholesaler who resells to retailers competing with the

Supreme Court, *held*, reversed. A supplier's payment of promotional allowances to a direct-buying retailer without making them available on comparable terms to other retailers who buy the supplier's products through wholesalers and sell in competition with the direct-buyer is a violation of section 2(d) of the Robinson-Patman Act. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

When Congress amended section 2 of the Clayton Act[10] by enacting the Robinson-Patman Act in 1936, one of its primary purposes was to restore "equality of opportunity" in business by eliminating both direct and indirect forms of price discrimination which threatened the competitive position of the small independent merchant.[11] Section 2(d) of the Robinson-Patman Act was designed to prevent the practice of disguising lower prices as promotional or advertising allowances[12] and required manufacturers and suppliers to make all advertising and sales promotional allowances available on proportionately equal terms to "customers competing in the distribution" of their products. In interpreting section 2(d),[13] both the courts and the Federal Trade Commission have held that buyers who compete[14]

direct-buying retailer violates Section 2(d) of the Robinson-Patman Act." 386 U.S. 907 (1967). The Court denied respondents' petition for review of the adverse holdings of the Court of Appeals. 386 U.S. 908 (1967).

10. 38 Stat. 730 (1914) as amended 49 Stat. 1526 (1936), 15 U.S.C. §§ 13 *et seq.* (1964).

11. An investigation of chain store buying practices undertaken by the FTC at the request of Congress had indicated that § 2 of the Clayton Act was an inadequate deterrent against outright price discrimination, and also revealed certain discriminatory practices wholly beyond the reach of § 2, by which large buyers induced concessions which their smaller competitors could not obtain. *See* FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); H.R. REP. No. 2287, 74th Cong., 2d Sess. 3 (1936); S. REP. No. 1502, 74th Cong., 2d Sess. 3 (1936). For a discussion of the legislative history of the Robinson-Patman Act, see C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (2d rev. ed. 1959); C. EDWARDS, THE PRICE DISCRIMINATION LAW (1959); G. FELDMAN & B. ZORN, ROBINSON-PATMAN ACT: ADVERTISING AND PROMOTIONAL ALLOWANCES (1948); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962, Supp. 1964).

12. In recommending the enactment of § 2(d), the Senate Judiciary Committee noted that such allowances become unjust whether the promotional service is rendered or not, if the payment is grossly in excess of its value, or if the customer derives an equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost which his smaller competitor, unable to command such allowances, cannot do. S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).

13. The term "customer" as used in § 2(d) has been given the same meaning as "purchaser" in both § 2(a), dealing with price discrimination, and § 2(e), dealing with furnishing of services to a buyer, in order to harmonize what are regarded as parallel sections of a unified statute. *See, e.g.*, American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); Elizaheth Arden Sales Corp. v. Guss Blass Co., 150 F.2d 988, 992-93 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 189 (1955).

14. The term "competitors" is defined to include sellers of produets of like grade

on the same functional level[15] are entitled to equal promotional allowance treatment if they buy directly from the same supplier.[16] The Third Circuit has sought to limit this interpretation of the Robinson-Patman Act by holding that direct-buying competitors were the only business category entitled to equal treatment.[17] However, most courts have recognized the "indirect customer" doctrine which extends the interpretation of the Robinson-Patman Act to include retailers who purchase indirectly through wholesalers and compete with a direct buyer, provided that the supplier deals directly with the retailer in promoting the sale of his products and exercises control over the terms upon which the retailer buys.[18] In cases where the "indirect customer" doctrine was inapplicable,[19] the decisions have been inconsis-

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and quality (incorporated into § 2(d) from express language in § 2(a)) trading in the same geographic area at the same approximate time. *E.g.*, Simplicity Pattern Co. v. FTC, 258 F.2d 673 (D.C. Cir. 1958), *rev'd in part on other grounds*, 360 U.S. 55 (1959) (geographic area); Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958) (geographic area, like grade and quality); Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954) (same approximate time).

15. The courts and the Commission focused on the actuality of competition regardless of variations in marketing technique or functional labels. *See, e.g.*, FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959) (department store and fabric shop in competition for customers of dress patterns); FTC v. Ruberoid Co., 343 U.S. 470 (1952) (wholesalers, retailers, and applicators all in competition); Liggett & Meyers Tobacco Co., 56 F.T.C. 221 (1959) (retail sales by vending machines and over-the-counter in competition for cigarette consumers); General Foods Corp., 52 F.T.C. 798 (1956) (grocery wholesalers and institutional distributors in competition). For cases finding absence of functional competition, see notes 18-22 *infra* and accompanying text.

16. Liggett & Meyers Tobacco Co., 56 F.T.C. 221 (1959) (wholesalers); Elizabeth Arden, Inc., 39 F.T.C. 288 (1944), *aff'd*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947) (retailers).

17. *See* Klein v. Lionel Corp., 138 F. Supp. 560 (D. Del.), *aff'd*, 237 F.2d 13 (3d Cir. 1956) (private treble damages action under 15 U.S.C. § 15 (1964) for alleged violations of § 2(a)).

18. The doctrine was first announced by the Commission in Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). *Accord*, K.S. Corp. v. Chemstrand Corp., 198 F. Supp. 310 (S.D.N.Y. 1961); American News Co., 58 F.T.C. 10 (1961), *aff'd*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); *cf.* Joseph A. Kaplan & Sons, Inc., [1963-1965 Transfer Binder] CCH TRADE REG. REP. ¶ 16,666 (FTC 1965) (wholesaler a wholly owned subsidiary of supplier); Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954) (supplier negotiated sales and credits); Luxor, Ltd., 31 F.T.C. 658 (1940) (price controlled by supplier).

19. To support the doctrine, certain minimum contacts must exist between the supplier and the retailer. *Compare* Liggett & Meyers Tobacco Co., 56 F.T.C. 221 (1959) (mere "missionary" activity and sporadic inventory refilling by supplier did not make retailers his customers), *with* FTC Advisory Opinion No. 143, 3 CCH TRADE REG. REP. ¶ 18,060 (FTC 1967) (supplier who makes advertising allowances to a reseller adopts retailer as his customer), *and* Sunbeam Corp., [1963-1965 Transfer Binder] CCH TRADE REG. REP. ¶ 17,178 (FTC 1965) (supplier who grants advertising allowances to retailer makes him his customer).

Apparently, prior to the instant case, no court had considered the possibility of according promotional allowances to retailers who purchased from a wholesaler in the absence of adequate "indirect" contacts. *Cf.* Elizabeth Arden, Inc. v. FTC, 156 F.2d 132, 135 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947), where the court refused

tent as to whether customers operating at different functional levels of distribution are entitled to proportional equality under section 2(d). A New Jersey District Court held that promotional allowances given to a direct-buying retailer must be made available to wholesalers whose customers compete with the retailer receiving the allowance, even though the wholesaler is not impaired in his ability to compete on his own distributive level.[20] On the other hand, the Commission has ruled that promotional allowance payments to a retail grocery chain did not require comparable treatment of wholesalers who resold to retailers, since the wholesalers were not "in competition" with the retail chain.[21] In *Guides* adopted in 1960, the Commission left the issue open, declaring that "all types of competing customers" must be allowed to participate in the supplier's promotional programs, and defined "customer" to mean "someone who buys directly from the seller or his agent or broker."[22] Although the Supreme Court had not directly construed section 2(d), it had indicated that resellers on different functional levels would not be considered competitors under the Robinson-Patman Act unless the intent of Congress to employ a broader definition was clearly proved.[23]

In the instant case the Court reasoned that the broad goals of the Robinson-Patman Act to improve the competitive position of small businessmen against the large chain stores[24] required a finding that a "customer" within the meaning of section 2(d) included retailers who purchased through wholesalers and resold in competition with a direct buyer. The Court noted that to hold otherwise would frustrate the purpose of section 2(d) and lead to the anomalous result that direct-buying retailers, large enough to undertake their own wholesaling function, would be protected by the provisions of section 2(d), while the smaller retailers whose only access to suppliers is through independent wholesalers would not be entitled to this same protection. The Court found that the requirements of the "indirect customer"

to consider whether retailers buying from intermediate purchasers are customers of the supplier within the meaning of the Robinson-Patmau Act.

20. Krug v. International Tel. & Tel. Co., 142 F. Supp. 230 (D. N.J. 1956).

21. Atalanta Trading Corp., 53 F.T.C. 565 (1956), *rev'd on other grounds*, 258 F.2d 365 (2d Cir. 1958); *cf.* Klein v. Lionel Corp., 138 F. Supp. 560 (D. Del. 1956) (§ 2(a) price discrimination prohibitions not applicable as between retailers and wholesaler); Curtiss Candy Co., 44 F.T.C. 237 (1947) (equation of retailers and jobbers with respect to § 2(a) but not with respect to § 2(d)). *But cf.* Liggett & Meyers Tobacco Co., 56 F.T.C. 221, 252 (1959), where the Commission declined to decide "whether a seller need make its promotional allowanees available only to those of its customers who are operating at the same functional level."

22. FTC Gnides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. §§ 240.9, 240.3 (1968).

23. FTC v. Sun Oil Co., 371 U.S. 505 (1963). *See* note 25 *infra.*

24. 390 U.S. at 349, citing FTG v. Henry Broch & Co., 363 U.S. 160, 168 (1960).

doctrine rest on too narrow a reading of the Robinson-Patman Act, holding that retailers who buy through wholesalers are "customers" within the meaning of section 2(d), whether or not there are "direct dealings" between the two. The Court further found that section 2(d) does not require proportional equality between Meyer and the two wholesalers, since Meyer's retail competitors, rather than the wholesalers, are "competing customers" under the statute.[25] The Court concluded that a supplier who gives allowances to a direct-buying retailer must also make them available in comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales.[26] Mr. Justice Harlan, dissenting,[27] disagreed that the "broad goals" of the Robinson-Patman Act required that disfavored retailers be treated as "customers" under section 2(d). Noting that the Commission refused to accept the interpretation adopted by the majority of the Court, and further noting that Congress had not explicitly defined the term "competing customer," Justice Harlan preferred to read the statute as narrowly as possible.[28]

The Court's decision to enforce section 2(d) by requiring proportionately equal treatment of all competing retailers correctly reflects the purpose of the Robinson-Patman Act to protect small retailers from promotional allowance discrimination. Although the interpretations of both the Commission and the Ninth Circuit could also be supported by the ambiguous definition of "competing customer" in section 2(d), neither of those alternatives produces a more desirable result. The

25. The Court noted that Congress had used unmistakable terms to expand the meaning of "competition" to include more than resellers operating on the same functional level when in § 2(a) it prohibited price discrimination which would "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a) (1964). Citing FTC v. Sun Oil Co., 371 U.S. 505 (1963), the Court concluded that the absence of such broad language in § 2(d) left the "reasonable inference" that Congress meant to restrict the meaning of competition to customers competing on the same functional level in the resale of the supplier's products.

26. The Court rejected the argument that its decision was impractical because suppliers will not be able to bypass their wholesalers and grant allowances directly to the retailer, thus suggesting that the supplier could always utilize the wholesalers to distribute or administer a promotional program, provided the supplier takes ultimate responsibility. 390 U.S. at 358. Mr. Justice Fortas, concurring, believed that the intent of Congress could best be served by regarding the wholesaler and his retail customer as a unit for the purposes of § 2(d), and emphasized the possibility of dealing either directly with the retailer or indirectly by arrangement with the wholesaler in order to provide equal treatment to all retailers. *Id.* at 358.

27. Mr. Justice Stewart, also dissenting, would have affirmed the judgment of the court of appeals. He believed the case should be remanded to give the respondent an opportunity to defend against the novel construction of § 2(d) announced by the Court, which was based on a theory not argued by either party. *Id.* at 364.

28. *Id.* at 360. Mr. Justice Harlan also believed that suppliers would find implementing the Court's decision both impractical and a violation of the Sherman Act. *See* notes 29 & 38 *infra* and accompanying text.

Commission's alternative does not explain the wholesaler's obligation to pass on any promotional benefits received from a supplier to his retail customers; and it does not specify the corresponding duty of the supplier to insure that such retailers actually receive their promotional benefits. Without controls on the wholesaler, nothing can prevent him from absorbing the allowances as profit, thus leaving the retailer in the same position he would be in without protection of the Robinson-Patman Act. Yet, a supplier's attempt to guarantee that promotional allowances be passed on to a wholesaler's retail customers is, on its face, an attempt to control the wholesaler's resale price, and would be a per se violation of section 1 of the Sherman Act.[29] Further, the Commission's alternative does not define the supplier's obligations in the event he prefers to by-pass the wholesaler and give promotional benefits directly to the competing retailers themselves. In such event, the Commission's alternative would require simultaneous promotional payments both to wholesalers and to their retail customers who could qualify as "indirect customers."[30] The decision of the Ninth Circuit, with which Mr. Justice Harlan and Mr. Justice Stewart agree, is based on a literal interpretation of the meaning of "competing customer." Such interpretation leaves the small businessman who, by his nature, must purchase through a wholesaler, wholly without protection of the provisions of section 2(d), in direct contravention of the clearly stated intent of Congress in enacting the Robinson-Patman Act. Mr. Justice Harlan's suggestion that the Robinson-Patman Act be this narrowly construed misconceives the judicial function of statutory interpretation. Despite the serious criticism which the Robinson-Patman Act has received,[31] the Court should not refuse to implement the statute's clearly stated purpose in order to persuade Congress to revise the Act.

In order to implement the Court's decision, the Federal Trade Commission is revising its *Guides for Advertising Allowances and Other Merchandising Payments and Services.*[32] These amended *Guides* provide a useful and comprehensive tool for assessing the impact of the legal requirements of the Court's decision. One of

29. *See* Elman, *The Robinson-Patman Act & Antitrust Policy: A Time for Reappraisal,* 42 WASH. L. REV. 1, 26-27 (1966); Millstein, *Sections 2(d) & (e) Robinson-Patman Act—Compulsory Universal Reciprocity?,* 37 ANTITRUST L.J. 77, 89 (1968); *cf.* Albrecht v. Herald Co., 390 U.S. 145 (1968).

30. *See* Hickey, *The Fred Meyer Case—The Implications Under Section 2(d) of the Robinson-Patman Act,* 9 ANTITRUST BULL. 255, 283 (1964); Comment, *Recent Problems Under Section 2(d) of the Robinson-Patman Act,* 29 U. CHI. L. REV. 160, 178 (1961).

31. *See* 390 U.S. at 359-60 nn. 1-3.

32. Proposed Amended Guides for Advertising Allowances and Other Merchandising Payments and Services, 33 FED. REG. 10616 (1968) [hereinafter cited as Proposed Guides].

the key problems connected with furnishing promotional allowances is the supplier's duty to inform all competing customers of the availability of his promotional plan. The revised *Guides* suggest several alternatives: the supplier may use the wholesalers to reach those retailers who buy through the wholesaler, either by having the wholesaler notify the retailers, or by using the wholesaler's customer list for direct notification; if the wholesalers do not cooperate, the supplier might use third party mailing devices, or adopt other means of notifying the retailer directly.[33] In any event, the supplier must insure that the notification plan he adopts gives actual notice to all competing retailers.[34] Second, a supplier's promotional plan must permit all types of competing customers to participate, or offer sufficient alternatives to the plan as will permit proportionately equal treatment to all competing customers.[35] Again, if the supplier's supervision of his program indicates that one class of customers (such as retailers buying directly from the supplier) participates in the plan to a substantially lesser degree than other classes of customers (such as direct-buying retailers), the supplier is on notice that his plan is not suitable for the underparticipating class of customers.[36] Third, the supplier must distribute his payments to the retailers and insure that the services he pays for are actually furnished. The supplier may arrange with the wholesalers to distribute and administer the promotional payments to their retail customers. Many retailers actually prefer to pool their allowances and permit the wholesaler or other intermediary to collect and use the payments on the retailers' behalf.[37] However, where the wholesaler refuses to cooperate, the supplier can make payment directly to those customers who furnish appropriate

33. Proposed Guides § 240.8. Some methods of direct notification include (1) printing the promotional offer on the shipping container or on the product package; (2) including brochures announcing the offer in the shipping container; (3) advising customers from accurate and complete mailing lists; and (4) publishing complete details of the plan in trade publications guaranteed to be received by all competing retailers.

34. *Id.*

35. Most criticisms of the instant case are hypothetical arguments suggesting that the Court's decision forces a manufacturer to allocate his advertising resources irrationally and uneconomically to small retailers who cannot effectively promote the supplier's product. *See generally* Elman, note 29 *supra*; Hickey, note 30 *supra*; Millstein, note 30 *supra*. Such charges are best directed against the Robinson-Patman Act itself, rather than against the decision in the instant case, since the very nature of the Robinson-Patman Act presupposes certain economic restraints upon large business for the purposes of protecting smaller merchants and promoting competition.

36. Proposed Guides § 240.9.

37. The future of independent merchants appears to be in affiliation with "voluntary" and "cooperative" groups which have shown a significant market potential. In the grocery retail business, for example, independent retail groups share between 31% and 47% of the total market. In comparison, the chain store share of the total market in 1960 was about the same as in 1929—less than 25%. *See* ROWE, note 11 *supra* at 553.

proof of performance, and avoid conflict with section 1 of the Sherman Act.[38] Fourth, any customer who knows or should know that he is receiving payments or services which are not available in proportionately equal terms to all competitors engaged in the resale of the supplier's products, may be proceeded against under section 5 of the Federal Trade Commission Act prohibiting unfair methods of competition. The customer must, therefore, take such affirmative action as would satisfy a reasonably prudent businessman, in the light of the previous discussion, that a supplier's promotional plan satisfies the requirements of section 2(d) of the Robinson-Patman Act.[39]

38. Proposed Guides § 240.11. Mr. Justice Harlan's argument that arrangements between supplier and retailer would also violate the Sherman Act as a restraint of the wholesalers is clearly unsound. Since the supplier is required to make such allowances under § 2(d) of the Robinson-Patman Act, and the wholesaler is not entitled to receive any part of the payments, it is unreasonable to suggest that the Sherman Act was meant to prevent the implementation of the purposes of a companion antitrust statute.

39. Proposed Guides § 240.16.