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Case Comments

Robinson-Patman Act: Intermediary
May Assert Functional Discount Defense
To Avoid Section 2(c)'s "Brokerage" Proviso

Respondent, doing business as an intermediary between suppliers and wholesalers of food products, was found by a Federal Trade Commission hearing examiner to have violated section 2(c) of the Robinson-Patman Act by accepting brokerage and discounts in lieu of brokerage on sales for his own account. Respondent purchased goods directly from suppliers and resold them to wholesalers at his own price. These same suppliers also sold to wholesalers through brokers, whose sole function was to procure a wholesale buyer for the suppliers. On sales to respondent for his own account, suppliers gave him discounts equal to the brokers' percentage commissions paid on sales to wholesalers. On appeal the FTC reversed the hearing examiner and held that section 2(c) had not been violated because respondent's discounts were not "discounts in lieu of brokerage" but "functional discounts," which were permissible since respondent did business on a higher level of the chain of distribution than did wholesalers.

1. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.


2. Edward Hruby, 1961–1963 TRADE REG. REP. ¶ 15709 (FTC Jan. 26, 1962). Respondent received payments itemized as brokerage from three of his suppliers. In other transactions, respondent's suppliers invoiced him at the net price without itemizing brokerage. Upon finding that he was not a distributor for the suppliers but was buying on his own account and for his own benefit, the hearing examiner concluded that § 2(c) applied.
Passed during a period of concern for the economic destruction of individual entrepreneurs by large chain-stores, the Robinson-Patman Act was designed to permit independent suppliers, wholesalers, and retailers to compete successfully with the giant corporation. To protect the small independents, the base provision, section 2(a), prohibits price discrimination by sellers between buyers of the same goods that causes injury to competition and that cannot be justified by differences in the seller's costs.

Section 2(c)'s proscription, directed at a particular business practice, is much narrower; it prohibits sellers from granting and buyers from accepting brokerage commissions or discounts in lieu of brokerage. In doing so, Congress sought to eliminate the practice of some large corporations of hiding direct price concessions, then forbidden by section 2 of the Clayton Act, simply by calling them "brokerage." The chain stores, by performing their own


According to one commentator, passage of the act by amendment of the Clayton Act "was a political masterstroke which invested an anti-chain store measure with the venerable trappings of antitrust." Rowe 23. Underlying the basic economic policy of the bill was an attempt to protect the small independents at the price of the consumer. It was thought that although the chains could, at that time, market goods to the consumer more economically, to allow them to destroy independent competition would place them in a monopoly position whereby they would be potentially harmful. See generally Edwards 12–13; Rowe 8–11, 19–23; Fulda, Food Distribution in the United States, the Struggle Between Independents and Chains, 99 U. PA. L. Rev. 1051, 1069–70 (1951).

4. In addition, § 2(b) permits sellers to lower prices to meet competition. 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958). Section 2(f), as a counterpart to § 2(a), prohibits buyers from knowingly accepting goods at discriminatory prices. 49 Stat. 1527 (1936), 15 U.S.C. § 13(f) (1958). Sections 2(c), 2(d), and 2(e) do not depend on the relative prices at which sellers trade; these sections prohibit certain business practices that at the time of passage of the act, were thought to be used by large corporations to conceal coerced price discounts. 49 Stat. 1527 (1936), 15 U.S.C. §§ 13(c)–(e) (1958).

5. 38 Stat. 730 (1914).

6.

Among the prevalent modes of discrimination at which this bill is directed, is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its
wholesaling functions, short-circuited the classical chain of distribution from supplier to wholesaler to retailer. Suppliers, instead of selling to wholesalers through their brokers, sold to chain stores, at a lower price, through the store's representatives. Although part of these price discounts reflected genuine savings in cost to the suppliers, they were, evidently, in part the product of economic coercion. Therefore, in order to abolish the methods by which this unjustified discount was hidden, Congress prohibited any payment of brokerage or of a discount in lieu of brokerage to the other party in a transaction.

Quickly utilized because of the easy application of its per se provisions, section 2(c) was literally construed by the courts. The section was held to be completely independent from section 2(a), so that one could not defend, as he could under 2(a), by showing that a discount in lieu of brokerage was the result of bona fide savings in brokerage costs and not a coerced price concession concealed by the "brokerage label." Nor, because of 2(c)'s inde-

payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made.

S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936), reprinted in RowE 585.

7. For a more complete explanation, see Fulda, supra note 3, at 1053–69. See also Edwards 46–48; Rowe 332–37; Oppenheim, Administration of the Brokerage Provision of the Robinson-Patman Act, 8 Geo. Wash. L. Rev. 511, 516–20 (1940).


9. Rightly or wrongly, Congress clearly believed that payments of brokerage to the other party in a direct sale were the result of coercion.

[H]The positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary unless compelled to do so by coercive influences in compromise of his natural interest.


10. The House version of § 2(c) was directed only at commissions from sellers to buyers' dummies. The Senate added the "allowance or discount in lieu thereof" to cover straight price reduction on direct sales. S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936), reprinted in RowE 584.

11. See Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667, 676–77 (3d Cir. 1940), cert. denied, 308 U.S. 625 (1940); Oliver Bros., Inc. v. FTC, 102 F.2d 763, 766–67 (4th Cir. 1939); Biddle Purchasing Co. v. FTC, 86 F.2d 667, 690–91 (2d Cir.), cert. denied, 305 U.S. 694 (1938); Oppenheim, supra note 7, at 520–23.
pendence, was the absence of price differences between buyers in any given case a barrier to 2(c)'s per se thrust. To further broaden 2(c)'s applicability, the courts emasculated its self-contained exception permitting payments "for services rendered" by interpreting it to apply only to payments by one party to a broker that he had employed. Thus construed, the provision has proved to be a highly effective means of preventing the large corporation from disguising coerced discounts as brokerage. By therefore prohibiting reductions in price that are accompanied by reductions in brokerage, however, section 2(c) has perpetuated the function of the independent broker, for a seller who normally sells through brokers cannot dispense with them and pass on his cost savings to a direct buyer.

12. Payments of brokerage or discounts in lieu thereof were forbidden because of the practice's tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and there is no reason to read into the sections forbidding them the limitations contained in section 2(a) having relation to price discrimination, which is an extremely difficult matter to deal with and is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. Oliver Bros., Inc. v. FTC, 102 F.2d 763, 767 (4th Cir. 1939).

13. The House Judiciary Committee added to the Senate-passed bill the exception that brokerage payments were prohibited "except for services rendered in connection with the sale or purchase of goods, wares, or merchandise." The conference report, however, explained the exception in terms which deprived it of significance:

With the words of the House bill thus retained, this subsection permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936), reprinted in Rowe 618. See Quality Bakers of America v. FTC, 114 F.2d 893, 898-99 (1st Cir. 1940); Webb-Crawford Co. v. FTC, 109 F.2d 268, 270 (5th Cir.), cert. denied, 310 U.S. 636 (1940); cf. Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667, 672-73 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940); Biddle Purchasing Co. v. FTC, 96 F.2d 687, 691-92 (2d Cir.), cert. denied, 295 U.S. 634 (1938). See also Edwards 47-48; Oppenheim, supra note 7, at 518 n.3, 517 n.12.

14. This result was most clearly illustrated, among the early cases, by Southgate Brokerage Co. v. FTC, 190 F.2d 270 (4th Cir. 1951), on facts almost identical to those of the instant case. Southgate acted as a broker for suppliers in their sales to wholesalers; however, in some transactions Southgate bought for its own account, then resold to wholesalers. Upon finding that brokerage or discounts to Southgate were the same in the lat-
The instant case, if followed,15 would significantly change the existing law, opening up new possibilities of distribution: An intermediary like respondent could benefit small suppliers and wholesalers by performing distributive functions impossible for one who operates only as a classical broker.16 Nevertheless, the substitution of a flexible standard for the per se prohibition presents uncertainties and reopens the possibility that the “brokerage” label could again be used to conceal coerced discounts. In the instant case, as the FTC pointed out, Hruby was “clearly not a ‘dummy’ broker controlled by a large buyer to whom he passed on phony brokerage payments”; nor was he “himself a powerful wholesaler or retail chain exacting from his suppliers false brokerage payments.”27 In a case where a favored buyer might have some of the attributes of economic power, however, a definite legal standard will be necessary. Unfortunately, what that legal standard is or ought to be is left unclear by the instant case.

15. In several recent cases the FTC had held respondents in violation of § 2(c) on facts similar to those of the instant case. See Exchange Distrib. Co., 1961–1963 TRADE REG. REP. ¶ 15692, 15975 (FTC July 9, 1962) (intermediary like Hruby who dealt with Hruby’s major supplier); Venus Foods, 1960–1961 TRADE REG. REP. ¶ 29194 (FTC Oct. 28, 1960) (seller dispensed with broker and engaged an exclusive distributor for one area). On a large-scale investigation of the Florida fruit industry, the FTC had found the business practices approved of in the instant case to be in widespread use. The FTC issued cease and desist orders to numerous Florida suppliers, at least one of whom, Keen Fruit Corp., sold to Hruby. Keen Fruit Corp., 1961–1963 TRADE REG. REP. ¶ 15185 (FTC May 19, 1961); cf. Kintner, The Role of Robinson-Patman in the Antitrust Scheme of Things—the Perspective of Enforcement Officials, 17 A.B.A. ANTITRUST SEC. 315, 319 (1960).


17. Instant case at 21051.
Congressional statements, which concentrated on the problem of chain-store coercion, are even less helpful at defining a standard. The most reasonable conclusion that can be drawn from the legislative history is that Congress intended a per se prohibition. Nevertheless, there is no indication that Congress considered the possibility of an economically justified discount on a direct sale in the context of the brokerage provision;\textsuperscript{18} Congress probably intended to prohibit brokerage or discounts in lieu thereof with only false "brokerage" payments in mind.\textsuperscript{19} Therefore, a flexible application of section 2(c) is not inconsistent with congressional intent if that standard permits only justified discounts, unforeseen by Congress, while continuing to prohibit false practices.

The applicable legal standard, then, must differentiate between the justified and the coerced discount. The discounts granted respondent in the instant case are quite easy to justify economically. From the supplier's viewpoint, selling to respondent rather than to wholesalers resulted in cost savings that made possible a discount; from the intermediary's viewpoint, the discount made it possible for him to perform unique distributional functions while still attaining a profit on resale. Theoretically, the discount equalled cost savings to suppliers, which equalled the intermediary's cost of distributional functions assumed. Taking the transaction in the instant case as a prototype, proof of the justifiability of a discount might proceed from the showing of cost savings of the seller or cost disbursements by the buyer.\textsuperscript{20}

A price discrimination based upon "differences in cost of manufacture, sale, or delivery"\textsuperscript{21} is justifiable under section 2(a). Because of the per se prohibition against a "discount in lieu of brokerage" under 2(c), however, it had been held that cost savings from lowered brokerage costs could not be used to justify a lowered price, either under 2(a) or 2(c).\textsuperscript{22} In \textit{Thomasville Chair}


\textsuperscript{19} See the legislative history discussed in note 26 infra.

\textsuperscript{20} Of course, the discount must also be available to all other intermediaries. See FTC v. Morton Salt, 334 U.S. 37, 42 (1948).


\textsuperscript{22} However, facts tending to show that a discount was the result of cost savings other than brokerage cost savings were admissible. In a sale where the seller enjoyed a reduction in brokerage and other costs, he was permitted to pass on the savings in other costs, but not in brokerage. \textit{Main Fish}, 53 F.T.C. 88 (1956); cf. \textit{Fruitvale Canning Co.}, 52 F.T.C. 1504 (1960).
Co. v. FTC,23 however, the Fifth Circuit read the leading Supreme Court case, FTC v. Henry Brock & Co.,24 as interpreting 2(c) to permit price reductions based on brokerage savings so long as available to all buyers.25 While this reading would seem to repudiate the explicit “in lieu of” language in 2(c), there is some legislative history which indicates Congress intended that true savings on brokerage could be passed on to the buyer.26 The cost justification defense provides an apt legal standard for application of 2(c), since proof of cost savings to the seller precludes the possibility of a discount coerced by the buyer. In practice, however,

23. 306 F.2d 541 (5th Cir. 1962). The FTC had held, in an interlocutory order in Thomasville Chair Co., 55 F.T.C. 2076 (1958) that all facts which would tend to rebut the inference that a discount in lieu of brokerage had been granted were admissible. Since Thomasville was unable to show that all of its savings were from reduction in costs other than brokerage, the Commission held that it had “passed on” a savings in brokerage; i.e., it had granted a discount in lieu of brokerage prohibited by 2(c). Thomasville Chair Co., supra.


25. The Supreme Court, in the Broch case, approved of the factual approach of the Commission as illustrated by the Main Fish case. See note 22 supra. However, the majority opinion left unclear whether the Court thought that a genuine savings in the cost of brokerage could be reflected in the seller’s price. The court in Thomasville thought such a reflection was permissible:

However, as we read it, the Court’s opinion says that a reduction in price, giving effect to reduced commissions paid by the seller, are violations of Section 2(c) only if such reduction in price is “discriminatory.” We read that to mean “without justification based on actual bona fide differences in the costs of sales resulting from the differing methods or quantities in which such commodities are sold or delivered.”

306 F.2d at 545.

26. The Senate Judiciary Committee amended the § 2(a) cost justification proviso to exclude brokerage savings from those savings that might be used to justify a seller’s price variation. S. Rep. No. 1602, 74th Cong., 2d Sess. 5 (1936), reprinted in Rowe 582-83. The amendment was deleted by the Conference Committee “for the reason that brokerage is dealt with in a subsequent subsection of the bill.” H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936), reprinted in Rowe 617. Senator Logan, the Senate floor manager of the bill, stated that “I think perhaps legitimate brokerage ought to be allowed as a part of the costs; and I think when the bill was drafted—I did not write the bill—perhaps ... we had in mind dummy brokerage, sham brokerage.” 80 Cong. Rec. 6285 (1936). The Chairman of the House Conference stated that:

There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which those economies, when demonstrated, may be expressed in price differentials in favor of the
it is questionable whether section 2(c) would be much more permissive than now, because of the arduous process of proof in cost justification cases.27

The Commission, in the instant case, stated that the discounts to respondent were "not granted because on sales to him sellers could dispense with brokerage services regularly required on their sales, thus effecting savings of usual brokerage fees."28 Rejecting the cost justification defense, then, the Commission looked instead to the other side of the transaction, the cost of the distributive functions assumed by respondent.29 While these costs are far easier to prove than cost justification, especially for the buyer, their proof does not present the assurance of economic value that cost justification does. Because savings to the seller need not equal costs assumed by the buyer, proof of the buyer's assumption of costs does not preclude the possibility that at least part of his discount was economically coerced.

The Commission, however, required respondent to prove neither seller's cost savings nor his own disbursements. Instead, the majority opinion relied on the section 2(a) concept of a functional discount to reach its conclusion that section 2(c) had not been violated. Since section 2(a) prohibits price discrimination

particular customers whose distinctive methods of purchase and delivery make them possible.

80 Cong. Rec. 9417 (1936).

The Brock majority minimized the significance of this legislative history, saying that whatever its importance in a § 2(a) case, it was not relevant to the facts at hand, where the seller's broker reduces commissions to make a sale. The dissent took the view that cost justification of brokerage savings was available in a § 2(c) action. 363 U.S. at 185-86. Moreover, the dissent reasoned, as did the court in Thomasville, that the majority's assertion that a reduction in price violates § 2(c) only when discriminatory necessarily permits cost justification of brokerage. 363 U.S. at 188; see Rowe 287-92, 244-45. But see Robinson v. Stanley Home Prods., Inc., 272 F.2d 601 (1st Cir. 1959).

28. Instant case at 21051.
29. In effect, this analysis constitutes a broad construction of the "services rendered" exception of § 2(c), even though the Commission did not base its reasoning on the words of the exception. In the light of the legislative history, it would be difficult to justify such a broad construction of those terms. Whatever was exactly intended by the ambiguous "services rendered" exception, it is fairly clear that it was meant to apply only to classical brokerage services and not to transportation and storage of goods by a buyer for his own account after having taken title to the goods. See note 18 supra; cf. Southgate Brokerage Co. v. FTC, 150 F.2d 607, 610 (4th Cir. 1945).
only where it results in competitive "injury,"\textsuperscript{30} its prohibition does not apply where favored buyers from the same seller do not compete. The majority found a clear 2(a) functional discount in the instant case, because respondent operated between the supplier and wholesalers (disfavored buyers), reselling to wholesalers at substantially the same price offered wholesalers by suppliers.\textsuperscript{31} Applying this 2(a) analysis to the 2(c) case, the majority reasoned that respondent's discounts were justified because they were granted in recognition of the different functional levels of respondent and wholesalers, and not to effect a price concession to one of many buyers on equal levels.

The presence or absence of 2(a) "injury" is of questionable relevance in a 2(c) case, where the sole issue should be whether a discount is justified or coerced. If, the Commission had relied only on proof of the respondent's assumption of distribution functions, however, it would have made possible the avoidance of section 2(c) without resort to justification by proof of seller's cost savings.\textsuperscript{32} By its reliance on the functional discount analysis, the Commission, in effect, denied this opportunity to all but the single-function intermediary.\textsuperscript{33} The instant case, by implication, also denied the availability of a seller's cost justification defense;


\textsuperscript{31} Hruby's discount would be a functional discount under 2(a) only as long as he stayed in this competitive niche. If he should sell to retailers, he would be in competition with wholesalers and his discount would not be deemed functional. See FTC v. Ruberoid Co., 343 U.S. 470 (1951). If Hruby were to "pass on" his discount by undercutting the supplier's prices to wholesalers, the discount would be open to the charge of 2(a) tertiary line discrimination; \textit{i.e.}, anti-competitive effects at the level of customers of the supplier's customer. See Standard Oil Co., 41 F.T.C. 263 (1942), approved, Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949), \textit{rev'd on other grounds}, 340 U.S. 231 (1951). But perhaps there is no vitality in that doctrine because of its inherent tendency to encourage price-fixing by the supplier, contrary to broader antitrust policies. See FTC v. Standard Oil Co., 355 U.S. 96 (1958).

\textsuperscript{32} The Attorney General's Report, in effect, favored this test. It recommended a revitalization of the "services rendered" exception, but it felt that legislative action was necessary for that result. Att'y Gen. Nat'l Comm. Antitrust Rep. 190-95 (1955). See also 45 Minn. L. Rev. 659, 669-69 (1961).

\textsuperscript{33} There was some evidence that respondent at times sold to retailers, from which the dissent argued that a 2(a) functional discount was not present. The majority, however, rejected this evidence on the ground that
but, in light of the *Thomasville* case, this defense would seem to be available still to all respondents.  

Cost justification, however, may be practically impossible for some, including the vertically integrated chain store that buys goods from countless suppliers. Therefore, while the recent developments under §2(c) have relieved the section of a repressive application, they have limited an easy escape from it to the single-function intermediary, almost by definition a small, independent businessman.

If these are to be the standards by which section §2(c) is applied, the section will become a substantive facsimile of section §2(a) instead of the per se prohibition it has been in the past. Pro-

the extent of such sales and their prices were not presented in the record. By doing so, the majority sidestepped a difficult §2(a) controversy in pointed analogy to the problem in the instant case. At present, under §2(a), only a buyer's functional position, dependent on his resale practices, is conclusive in a functional discount case. See note 31 supra. However, many commentators have argued that the functional discount defense ought to apply to favored buyers, regardless of their resale practices, whenever they have assumed distributional functions not performed by disfavored buyers. See Edwards 344-48; Rowe 190-93; Att'y Gen. Nat'l Comm. Antitrust Rep. 209-29 (1955); Adelman, supra note 8, at 233-36; Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 Mich. L. Rev. 1139, 1206-17 (1952). At one time, the Commission showed a disposition to follow this advice. In Doubleday & Co., 52 F.T.C. 169, 207-09 (1955), a §2(a) functional discount case, the Commission permitted Doubleday to present evidence to show that its discount to certain buyers was economically justified because of the unique services that those buyers performed, regardless of their functional positions. But General Foods Corp., 52 F.T.C. 798, 825 (1956) undercut the importance of the Doubleday language and emphasized that the buyer's functional position, dependent on his resale practices, was conclusive in a functional discount case. Mueller Co., 1961-1963 Trade Reg. Rep. ¶ 16886, at 20519-20 (FTC Jan. 12, 1962), clearly rejected Doubleday and approved General Foods. The Commission in the instant case, by limiting its holding to the situation "where the distributor who receives the lower price does not compete at the wholesale level," declined to reopen the functional discount debate under §2(c). Instant case at 21052.

34. It might be argued, however, that although the requirements of § 2(a) might be satisfied by something less than cost justification, § 2(c), which explicitly prohibits a certain kind of unjustified discount, requires exact cost justification in all cases. While such an argument is logically sound, it hardly seems reasonable, if §2(c) is to be made less repressive, to provide only one defense, and that one little better than none at all. The Supreme Court, while passing on the FTC's order to Henry Broch & Co., intimated that a variety of defenses are available under §2(c). FTC v. Henry Broch & Co., 368 U.S. 360, 367 (1962). See also Austin, supra note 16, at 104; 28 U. Chi. L. Rev. 505, 516-20 (1961); cf. *In re Whitney & Co.*, 278 F.2d 211 (9th Cir. 1959).
cedurally, however, it will be easier still to bring a 2(c) action than a 2(a) action. Under section 2(a), the party bringing the action must show a price discrimination between buyers of the same seller and the possibility of injury to competition arising from such discrimination. The 2(f) under section 2(f), which applies 2(a)'s substance to buyers, a prima facie case includes knowledge by the buyer that he was receiving a favorable discrimination unjustifiable under section 2(a). The 2(c) prima facie case, however, includes only the payment of brokerage or a discount in lieu thereof, whether the respondent is a buyer or a seller. This procedural advantage should continue 2(c)'s effectiveness as an enforcement tool, while 2(c)'s substantive changes will make available limited but useful marketing methods.

Criminal Law: Federal Injunction

Against State Official in State Proceeding

Improper Remedy for Illegally Obtained Evidence

Respondent Bolger was arrested by federal Customs officers and held in custody without having been arraigned, in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. During his detention federal officers searched his home without a warrant in violation of Federal Rule 41. Present during the later part of the interrogation was petitioner Cleary, a detective for the bi-state New York-New Jersey Waterfront Commission, which had been informed of the arrest. When New York City police subse-


1. Rule 5. Proceedings before the Commissioner
(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

FED. R. CRIM. P. 5(a).

2. Bolger consented to the search after his request for counsel was refused and after he was told by the officers that his consent was in fact unnecessary. The district court found that the consent was not freely and intelligently given and did not constitute a valid waiver of Bolger's constitutional rights. Bolger v. United States, 189 F. Supp. 237, 253 (S.D.N.Y. 1960).
quently charged respondent with larceny and the Waterfront
Commission suspended his hiring agent and longshoreman's
licenses, he brought suit in a federal district court seeking to
enjoin the federal officers and petitioner Cleary from using or
testifying about the evidence. The district court granted the
requested relief, and on appeal, by Cleary alone, the Court of
Appeals affirmed. On certiorari, the United States Supreme Court
reversed and held that the federal courts will not enjoin testimony
by state officials in state criminal proceedings where there is no
evidence of an attempt to avoid federal requirements and the
information has not been acquired by the state officials in vio-
(1963).

Because state courts have been more liberal than federal
courts in admitting evidence “tainted” with illegality, defendants
in state criminal trials have occasionally attempted to utilize
federal injunctive procedure to secure the benefits of the federal
exclusionary rules. In Stefanelli v. Minard the Supreme Court
affirmed the denial of a federal injunction against evidence seized
unconstitutionally by state agents on the ground that equity
seldom interferes with a criminal prosecution, a fortiori federal
equitable relief should not intervene in state criminal proceedings.
Disparately, in Rea v. United States the Court enjoined a federal
agent from testifying in a state criminal proceeding as to evidence
previously excluded by a federal court—the injunction was a
proper exercise of the supervisory power of the federal courts
over federal agents. The scope of Rea was narrowed consid-
   § 1979 (1875), 42 U.S.C. § 1983 (1958), which provides that every person
   using a state law to deprive a citizen of constitutional rights shall be liable
to the injured party in an “action at law, suit in equity, or other proper
   proceeding for redress.”
9. The evidence was excluded because the search warrant under which
   the federal agents had operated was found invalid. Exclusion, then, was re-
   quired by the familiar federal exclusionary rules of Weeks v. United States,
   232 U.S. 388 (1914).
10. Justice Douglas for the majority emphatically limited the decision to
    that ground.

No attempt was made to justify the injunction as a protection of the
ably, however, by Wilson v. Schnettler, in which the Court declined to enjoin the admission in a state court of evidence seized by federal agents acting without a search warrant. Rea was distinguished on the ground that in Wilson there was no abuse of federal process since no warrant had been issued and that there had not been a prior determination of inadmissibility by a federal court.

rights given the petitioner by the Federal Rules of Criminal Procedure. The failure to use this argument, which in the instant case was seriously to handicap Bolger, may well have been deliberate; the federal rules, by the terms of 18 U.S.C. § 3771 (1958) (the enabling act), are meant to apply only in the federal courts. The federal exclusionary policies expressed in Weeks v. United States, 232 U.S. 383 (1914) and Mallory v. United States, 354 U.S. 449 (1957) did not then apply to state courts, see Gallegos v. Nebraska, 342 U.S. 55 (1951); Wolf v. Colorado, 338 U.S. 25 (1949), and it was in fact Rea's rights in the state court that were at issue.

Justice Harlan, joined in a vigorous dissent by Justices Reed, Burton, and Minton, protested that the decision was unprecedented in its suggestion that “the federal courts share with the executive branch of the Government responsibility for supervising law enforcement activities as such.” Rea v. United States, 350 U.S. 214, 218 (1956).

Justice Harlan was undoubtedly correct as far as he went. Nevertheless, at the time of the Rea decision, and even more frequently thereafter, courts have protected the rights of accused parties by the indirect means of excluding evidence obtained in violation of those rights. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961); Mallory v. United States, supra; Weeks v. United States, supra; People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955); Paulsen, The Fourteenth Amendment and the Third Degree, 6 STAN. L. REV. 411, 429 (1954). The ultimate aim of the courts in excluding illegally obtained evidence is deterrence of the unlawful conduct of law-enforcement officers that led to the evidence. From this indirect disciplinary power of the exclusionary rules to the more direct disciplinary power asserted by the Court in Rea is only a short step. See the dissent by Justice Douglas in Wilson v. Schnettler, 365 U.S. 381, 396-97 (1961):

When I wrote for the Court in ... [Rea] saying that “[t]he obligation of the federal agent is to obey the Rules,” I thought we meant obedience to the substantive law for which those rules offer a procedural matrix.

11. 365 U.S. 381 (1961)

As an alternative holding the Court denied the injunction because the petitioner, by neglecting to allege that his arrest was made “without probable cause,” had failed to show that the subsequent search of his person was unlawful. Justice Stewart said the Court was basing its decision upon failure to recite a “talismanic phrase.” Id. at 388 (concurring opinion); see The Supreme Court, 1960 Term, 75 HARV. L. REV. 80, 164 (1961).

13. The result of the opinion, Justice Douglas noted in dissent, was to give “federal agents carte blanche to break down doors, ransack homes, search and seize to their heart’s content—so long as they stay away from
In the instant case the district court felt that the Rea case was governing, for all of the evidence had been gathered by federal agents in violation of the federal rules. The only distinction was that an injunction was sought against Cleary, a state officer, as well as against the federal officers. The district court reasoned that the injunction had to run against Cleary also, for unless he was enjoined he would “act as a vehicle to defeat the policy enunciated in the Rea case of protecting the privacy of the citizen against invasion in violation of the federal rules.”

The Supreme Court, however, insisted that the principles outlined in Stefanelli still governed, because of Cleary’s status as a state officer. The Court rejected the analysis that an injunction against Cleary was necessary to make the injunction against the federal officers effective: “Such relief as to him [Cleary] must stand on its own bottom.” Apparently the “bottom” would have had to have been a showing of affirmative misconduct by the state officer or a deliberate evasion of federal requirements by the federal officers.

The distinction drawn by the Court between federal and state agents seems somewhat ingenuous. Justice Douglas in dissent argued that the violation of the federal rules by the federal agents was the crucial issue; the danger in ignoring this issue and making the state agent immune from injunction was suggested by an analogy: Cleary, the state agent, was like Oliver Twist who was small enough to go through openings that his mentor in crime could not negotiate. Thus, “an injunction federal courts . . . .” Wilson v. Schnettler, 365 U.S. 381, 398 (1961). The dissent in Wilson is a very persuasive statement in favor of the policy—and in favor of an expansion of the policy—adopted by the Court in Rea.

The decision in Wilson casts heavy doubt on the correctness of the district court’s injunction against the federal officers in the instant case. The district court opinion (decided before Wilson v. Schnettler, 275 F.2d 932 (7th Cir. 1960) had been affirmed by the Supreme Court) was based in part upon a rejection of the Seventh Circuit’s reasoning. Bolger v. United States, 189 F. Supp. 237, 247 (S.D.N.Y. 1960). There is a distinct undertone of reservation in the majority opinion in the instant case regarding the propriety of the lower court’s ruling on this issue. But cf. instant case at 409 n.1 (dissenting opinion).

15. Instant case at 399.
16. Instant case at 399–400.
17. It was a little lattice window, about five feet and a half above the ground: at the back of the house: which belonged to a scullery, or small brewing-place, at the end of the passage. The aperture was so
should issue lest federal agents accomplish illegal results by boosting Oliver Twist through windows built too narrow by those Rules for their own ingress.” The district court advanced a similar thought when it characterized Cleary as a “human recorder.”

In fact, little attention was paid to the circumstances that brought Cleary to Bolger’s interrogation. Although the Court indicated that Cleary would have been enjoined if there had been any indication that his presence was part of a deliberate scheme to avoid the federal rules, no such scheme could be found. Nevertheless, the illegal search of Bolger’s house and the daylong detention were certainly deliberate, or inexcusably ignorant, violations of the federal rules. Since it is against these that the accused should be protected, the attitude, purpose, or timing of the federal officers in passing information gained from these violations over to the state officers should be irrelevant.

The essential problem dealt with by the Court in the instant case involves the role that the federal courts are to play in protecting accused parties against violation of their rights by law-enforcement officials. The federal system has all too often provided a way for police avoidance of restrictive rules of conduct enforced in one jurisdiction but not in another. On the federal side, the Supreme Court has been forced to react by developing exclusionary rules against evidence illegally obtained by state officials. This was comparatively easy; few could dispute the power of the federal courts to regulate the evidence brought before them. Further, the Court, acting under asserted constitutional mandates as in *Mapp v. Ohio*, has been able to apply some limits to the evidence that state courts may hear.

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18. Instant case at 407.


20. Because the circumstances under which the evidence passes are difficult to ascertain, lower courts will henceforth unnecessarily have to become involved in elaborate fact-finding when faced with similar cases.


There remain, however, a few situations where law-enforcement officials may continue to use evidence obtained in violation of prescribed law-enforcement standards. For example, it is unclear what restraints exist upon testimony by federal officers in state courts in regard to evidence obtained in violation of the federal rules. The Rea case seemed, at least momentarily, to offer a partial solution to problems of this type. Limited to its facts it no doubt remains good law. Wilson v. Schnettler, however, appears to have confined Rea, and the instant case has shown at least one situation where an injunction against federal officers proved ineffective in protecting an accused against violations of the federal rules. Moreover, doubt remains as to the propriety of granting relief by way of injunction.

The Supreme Court has repeatedly affirmed that the federal courts should use their injunctive power against the states when it appears necessary "to prevent irreparable injury which is clear and imminent." But while consistently repeating this phrase, the Court never seems to have defined it. In Stefanelli the Court seemed to imply that irreparable injury was suffered when federal constitutional rights were violated and no appeal was available. If this is so, it tends to indicate that the "ir-

24. Arguably, the cure of police lawlessness is a task for law-enforcement officials themselves and not for the courts. Nevertheless, the recent trend has been for the courts to handle this problem as best they can, because the police have been doing such a poor job of policing themselves. The method adopted is the exclusionary rules. Mapp v. Ohio, 367 U.S. 643, 651-53 (1961); People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955); see Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim. L., C. & P.S. 171, 179-82 (1962); cf. Irvine v. California, 347 U.S. 128 (1954).

25. Justice Harlan, dissenting in Rea, suggested that the net result is a race between the state prosecution and a federal injunction. If the state can introduce illegally obtained evidence before being enjoined, the accused is without a remedy. Rea v. United States, 350 U.S. 214, 220-21 (1956).

26. No one has denied that the federal courts have such power; even the dissenters in Rea conceded on that issue. Rea v. United States, 350 U.S. 214, 219 (1956). The denial of relief in cases such as Stefanelli has been based upon the exercise of equitable discretion.


28. No . . . irreparable injury, clear and imminent, is threatened here. At worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey courts. Such a conviction, we have held, would not deprive them of due process of law. Wolf v. Colorado . . . .

Stefanelli v. Minard, 342 U.S. 117, 122 (1951) (Frankfurter, J.)
reparable injury" exception to the anti-injunction policy in this area is so narrow as to be nearly nonexistent: any petitioner seeking an injunction who alleges that a state conviction will deny him his federal constitutional rights is told that he has an adequate remedy by way of appeal.\footnote{Stefanelli v. Minard, 342 U.S. 117, 122 (1951).} If he alleges mere violations of federal standards or other rights not of constitutional dignity, conviction by means of these violations will not deprive him of due process of law and hence will not cause him "irreparable injury."\footnote{Stefanelli v. Minard, 342 U.S. 117, 122 (1951).}

Although the phrase did not appear in the opinion, the irreparable injury doctrine worked against Bolger. His complaint about the search of his home, though cast in terms of a violation of Rule 41 of the Federal Rules of Criminal Procedure, was essentially an allegation that his rights under the fourth amendment were violated. Under the recent decision in \textit{Mapp v. Ohio}\footnote{867 U.S. 543 (1961).} state courts are required to exclude evidence obtained through such violations, regardless of whether state or federal officers gathered the evidence. Thus Bolger's rights would probably be protected in the state court, and if they were not, he still had his remedy of appeal. Justice Goldberg concurred separately in the denial of the injunction for just this reason,\footnote{Instant case at 402 (concurring opinion).} and the Court's opinion mentioned, but did not rely on it.\footnote{Instant case at 402-03.} The difficulty with this rationale, as Justice Douglas in dissent pointed out, is that much of the evidence against Bolger was gathered in violation of Rule 5(a) of the federal rules; and \textit{Mapp v. Ohio} offers no guarantee of exclusion of this evidence in state courts.\footnote{Instant case at 400-01.} Further...
thermore, it is doubtful, as Justice Goldberg's opinion admitted, whether the exclusionary rules of *Mapp* will apply in the state administrative proceedings.\(^3\)5

The procedural context of the instant case, however, cannot be forgotten; the question that the instant case presented to the Court related to the nature of the remedy and not to the desirability of an exclusionary policy. The federal courts have traditionally shown a great reluctance to use their injunctive power to interfere in any way with state criminal law enforcement.\(^3\)9 As a practical matter the mere availability of possible relief in the federal courts could lead to considerable harassment and delay.\(^3\)8 Furthermore, as a matter of comity, the federal courts must assume that the state courts are competent to protect the rights, both state and federal, of accused parties brought before them.

If injunction is an undesirable remedy, a new exclusionary rule may be the preferable alternative. Justice Goldberg, in his separate concurrence, suggested that the supremacy clause could be a basis for requiring state courts to exclude evidence of the kind involved in the instant case.\(^3\)8 Perhaps the best justification for this proposed exclusionary rule would be the inherent power of any court to go beyond statutory mandate to prevent abuse of its processes by officers who owe obedience to the court and to its rules.\(^3\)9 This exclusionary solution may seem like a

the evidence against him excluded by the New York courts as being the fruit of an illegal search. See People v. Rodriguez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962), cited by Justice Goldberg, instant case at 402 n.1 (concurring opinion).


38. Instant case at 404. He said it was an argument that “will warrant serious consideration in an appropriate case.” The suggestion appears to be without precedent; the wiretapping cases would seem to be clearly to the contrary. *Schwartz v. Texas*, 344 U.S. 199 (1952) (no federal officers were involved, but the convictions were obtained with evidence gathered and divulged in direct contravention of federal statute). *But see Note, State Remedies for Federally-Created Rights, 47 Minn. L. Rev. 815, 830–33 (1963).*

drastic interference with state processes, but in the long run it should prove less troublesome and easier to use than an injunctive remedy. As long as the state courts remain a ready avenue for avoidance of the federal rules, the Supreme Court will have to find some further means to protect against illegal conduct by federal agents.

Criminal Law: Indigent, Capital Defendant's Right to Counsel on Petition for Certiorari

Petitioner was convicted in New York of first degree murder and sentenced to death. After the New York Court of Appeals affirmed his conviction, petitioner requested that that court appoint counsel to prepare his petition for a writ of certiorari to the United States Supreme Court. When this request and his subsequent petition for certiorari, prepared with the aid of a law school professor, were denied, petitioner instituted a federal habeas corpus proceeding, asserting that his constitutional rights had been violated. The district court dismissed the proceeding on the ground that a state need not assign counsel to an indigent defendant who already enjoys the assistance of counsel. On appeal,

U.S. 393 (1943); Nardone v. United States, 302 U.S. 379 (1937); Weeks v. United States, 224 U.S. 383 (1914); People v. Cahan, 44 Cal. 2d 494, 282 P.2d 905 (1955).


2. During the appellate proceedings in this case, petitioner was receiving the voluntary assistance of Professor Norman Redlich of the New York University Law School. Professor Redlich was instrumental in securing stays of execution and assisting Coleman with his pro se applications for appointment of counsel and, ultimately, the writ of certiorari.


4. Although Professor Redlich's efforts were restricted to the single question of the constitutionality of the absence of any provision for state appointed counsel, the district court believed that such "exemplary representation" made "moot" the question which petitioner sought to raise. United States v. Coleman v. Denno, 205 F. Supp. 510 (S.D.N.Y. 1962).
the Court of Appeals for the Second Circuit, in affirming, broadened the district court's decision and held that the "due process" and "equal protection" clauses of the fourteenth amendment do not require a state to appoint counsel to aid petitioners seeking certiorari. United States ex rel. Coleman v. Denno, 318 F.2d 457 (2d Cir. 1963).

The Supreme Court has moved slowly in determining the scope of the indigent defendant's constitutional right to appointed counsel; although recent decisions have illuminated some aspects of the problem, whether this right extends to a petition for certiorari remains unclear. In 1982, in Powell v. Alabama, the Supreme Court relied on the fourteenth amendment in determining that at least in some capital cases a state's denial of counsel violates "fundamental principles of liberty and justice." Six years later the Court, in Johnson v. Zerbst, held that in a federal court an indigent has an absolute right to counsel in all criminal proceedings; but in 1942, the Court, in Betts v. Brady, restricted the state indigent's right to assigned counsel to those cases where the lack of counsel due to "special circumstances" or "prejudicial error" would render the trial offensive to the common and funda-

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5. The Second Circuit acknowledged the "mooted" nature of petitioner's claim, but the court was not content to rely upon mootness and chose to face the broader issue.
7. Douglas v. California, 372 U.S. 353 (1963) (extended the right to assigned counsel for state defendants to the first appeal); Gideon v. Wainwright, 372 U.S. 335 (1963) (extended the right to assigned counsel at trial to all state criminals); Ellis v. United States, 356 U.S. 674 (1958) (extended the federal criminal's right to assigned counsel to appellate proceedings).
10. Powell v. Alabama, 287 U.S. 45, 67 (1982). The Court's holding can be read as applicable only to those cases where the defendant is incapable of making his own defense due to "ignorance, feeble mindedness, illiteracy, or the like." Id. at 71.
11. 304 U.S. 458 (1938).
12. 310 U.S. 455 (1941).
13. Id. at 478. To a degree, the Betts ruling extended the indigent's right to appointed counsel beyond the "line" drawn by the Powell Court, in that
mental ideas of fairness and justice. After 21 years Betts was overruled by Gideon v. Wainwright, the right to appointed counsel was deemed "fundamental and essential to fair trials" and the sixth amendment was "incorporated" into the fourteenth.

On the same day that it decided Gideon, the Court, in Douglas v. California, held that every indigent convicted of a serious crime who desires to prosecute a first appeal has an absolute right to appointed counsel. The Douglas decision, based as it was on counsel was made available to the accused in noncapital cases where "special circumstances" existed. See Kamisar, Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219, 255 (1962). On the other hand, the Betts decision was quite unresponsive to the rationale in Johnson v. Zebst, in that Betts provided no "mechanical rule" for assignment of counsel, even in capital cases. Under the Betts test, the courts at first limited appointed counsel, for the most part, to capital cases. See Uveges v. Pennsylvania, 385 U.S. 437, 441 (1968); Bute v. Illinois, 383 U.S. 640, 676 (1968). But Hamilton v. Alabama, 368 U.S. 52, 55 (1961), clearly established that defendants in capital cases had an absolute right to appointed counsel.

14. For the proposition that during the 21 years that Betts reigned the Court provided little illumination on the issue of right to appointed counsel or the sixth amendment itself, see Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 MINN. L. Rev. 803, 806–12 (1961).


16. See Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 MINN. L. Rev. 1 (1963); 24 U. PA. L. Rev. 851 (1963). The significance of Gideon may lie not so much in the fact that it raised indigent state defendants to the level achieved by their federal counterparts in Johnson v. Zebst, but that it opens the door to the states so that any constitutionally based extension of the right to appointed counsel that binds the federal courts will be required by "due process" to bind the state courts. Cf. Ker v. California, 374 U.S. 23 (1963).

Griffin v. Illinois\textsuperscript{18} and the concept of "14th amendment equality,"\textsuperscript{19} might signify that the indigent defendant must be furnished legal assistance at every phase of an appeal where the defendant might utilize retained counsel.\textsuperscript{20} To date, however, no court has held that an indigent defendant has an absolute right to assigned counsel at certiorari.

In the instant case, decided before Gideon and Douglas, the court relied on the lack of precedent for petitioner's contentions; the court distinguished cases such as Powell as being inapplicable because they involved the right to counsel at trial. In doing so the court begged the question of whether the Powell requirement—appointment of counsel "at every step in the proceedings against"

\begin{quote}
18. 351 U.S. 12 (1956). Griffin held that a state's failure to provide a bill of exceptions for all indigent defendants to enable them to appeal their conviction was a violation of the equal protection clause of the fourteenth amendment.

19. "Fourteenth amendment equality" is an elusive concept, at best. If it mean "absolute equality," it presents at least two specific problems. First, where does "equal protection" end? Does it mean that an indigent must not only have appointed counsel but the "best" counsel available, too? Second, there is no equivalent clause in the federal courts: As a result, if, as has been suggested, Douglas provided state indigent defendants with rights not yet accorded to their federal counterparts, are the federal courts bound by that decision? See Kamisar & Choper, supra note 16, at 7. On the other hand, "fourteenth amendment equality" may also mean only that equality which is necessary to meet "due process" requirements. For a discussion of these issues, see note 28, infra.

20. The inference that the indigent state defendant has a constitutional right to appointed counsel at certiorari can be drawn by considering Douglas and Griffin together. Before Douglas, Griffin was interpreted as dealing only with the accessibility of the indigent defendant to the appellate courts, not the equality or the lack thereof, that he might encounter in the appellate proceedings themselves. Douglas, however, directs itself to the lack of equality that exists between a defendant with counsel on appeal and a defendant appealing pro se.

Although the application of the Douglas doctrine to post-conviction hearings may require a showing of "special circumstances," cf. Kamisar & Choper, supra note 16, at 10, some application of the doctrine seems a certainty. This would not necessarily be so if the Griffin case had been limited to the indigent defendant's first appeal. But Griffin has been extended to coram nobis hearings, Lane v. Brown, 372 U.S. 477 (1963); state collateral proceedings, Smith v. Bennett, 365 U.S. 708 (1961); and even applies after the state has provided a review on the merits, Burns v. Ohio, 360 U.S. 252 (1959). Thus, Douglas coupled with Griffin may demand not only that the indigent state defendant have access to all post-conviction proceedings, but that he also be accorded an equal opportunity to present the merit in his case with the assistance of counsel. See Kamisar & Choper, supra note 16, at 18.
the capital defendant—had been satisfied. Since the initial proceeding against an accused sets in motion the series of appellate proceedings that might ultimately lead to a petition for certiorari, to conclude that “proceedings against” the defendant terminate at any point prior to the closing of the last avenue of appeal is questionable. In the instant case, for example, a conviction of first degree murder imposed the death sentence. To argue that the “proceedings against” the petitioner terminated after his first appeal appears unduly harsh in view of the fact that the law does provide additional procedures for review. That the need for counsel for capital defendants at certiorari is as “fundamental and essential to fair trials” as the need for trial assistance is at least arguable. The sixth amendment guarantees the accused the right to counsel “for his defense,” and if literally applied to state offenders under the direction of Gideon, petitioner’s “defense” should not terminate before resolution of his case on the final appeal.

In “drawing the line” for the indigent’s right to appointed counsel prior to his petition for certiorari, the court in the instant case balanced the petitioner’s need for counsel against the in-

22. The proceedings against a defendant do not necessarily terminate at the conclusion of his first appeal for he has the ultimate right to have a federal court and federal judges pass on his federal contentions. 28 U.S.C. § 2241(c)(3) (1958). The argument has been made that the sixth amendment right to counsel pertains only to criminal proceedings and that a petition for habeas corpus or certiorari are civil proceedings and, thus, excluded. See, e.g., Anderson v. Heinze, 258 F.2d 479, 481 (9th Cir.), cert. denied, 358 U.S. 889 (1958); De Maris v. United States, 187 F. Supp. 273, 275 (S.D. Ind. 1960). However, in Smith v. Bennett, 365 U.S. 708, 712 (1961), the Supreme Court said:

We shall not quibble as to whether ... it be called a civil or criminal action .... The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels.

See also Daugharty v. Gladden, 257 F.2d 750 (9th Cir. 1958); Ex parte Chin Loy You, 223 Fed. 833, 838 (D. Mass. 1915).

23. By relying on the “proceedings against” language in Powell, the instant court overlooked the possibility that “due process” (under Gideon) might require the appointment of counsel when the convicted indigent, facing execution, petitions for certiorari. See note 37 infra. Moreover, the instant court failed to meet the “equal protection” argument upon which the Court apparently based its holding in Douglas. Although the Douglas Court specifically declined to extend its holding beyond the first appeal, it logically follows that the indigent should have the assistance of counsel at certiorari to satisfy the same “equal protection” requirement of the fourteenth amendment.
increased burden that appointment of counsel would place on the state. In arguing that appointing counsel at certiorari would greatly increase the number of such petitions, the court failed to recognize that the main cause of overcrowded dockets is the excessive number of non-meritorious appeals—the work of pro se petitioners and "jail-house lawyers." Appointment of counsel would help solve this problem by eliminating frivolous appeals while accentuating those that were meritorious. First, such counsel would thoroughly investigate the petitioner’s contentions to determine their validity. If these claims were found to be frivolous, counsel would report his findings to the defendant and the court and thereafter refrain from proceeding with the appeal.

24. Instant case at 460.
25. Mr. Justice Clark, dissenting in Douglas v. California, 372 U.S. 353 (1963), said "we all know that the overwhelming percentage of in forma pauperis appeals are frivolous. Statistics of this Court show that over 90% of the petitions filed here are of this variety." Id. at 358.
26. You mean those pieces of paper written by semi-literate men? Or the papers prepared with the advice of "jailhouse lawyers" who, for a carton of cigarettes, will file anything, anywhere? Are these "lawyers" the appropriate guardians of the Constitution and the Great Writ? Does it come down to this?

28. Douglas, read broadly, may require the indigent's attorney to make the best available argument on appeal in all cases. Since the rich man's lawyer probably would not withdraw from the case when he discovered little or no merit in an appeal because his client's affluence gave him nothing to lose, "fourteenth amendment equality," see note 19 supra, may require the indigent's counsel to perform the strict role of an advocate too. However, Douglas need not be read this broadly; that case can be interpreted as stating that due process requires merely a measure of equality. Cf. Willcox & Bloustein, The Griffin Case—Poverty and the Fourteenth Amendment, 49 Cornell L.Q. 1, 22 (1957). Douglas may be saying that equal protection is met when the indigent is given rights equal to the average defendant who retains his own counsel. As the average defendant, having been informed that his appeal has little or no chance of succeeding, would probably decide not to appeal because of the prohibitive costs involved, it does not seem unjust for the same result to be reached in the case of an indigent, even though appointed counsel makes the decision. If an appeal contains no merit, it should not be permitted to waste the courts' valuable time. An appointed counsel can make this determination and still
In this manner, the number of non-meritorious appeals actually prosecuted would be greatly decreased and the defendant's right to counsel would be satisfied.

Second, appointed counsel would presumably reveal the hidden merit in appeals that often goes unobserved due to the inability of the petitioner or his "jailhouse" lawyer to recognize or legally express it. Since an appellate proceeding, especially the petition for certiorari, requires a legally trained mind even more than the trial proceeding, the need for counsel to assist the petitioner in disclosing the merit is greater at this level.

The inference from the instant court's holding, that acquiescence be an advocate. See Ellis v. United States, 356 U.S. 674 (1958); People v. Brown, 55 Cal. 2d 64, 73-74, 357 P.2d 1072, 1077-79 (1960) (Traynor, J., concurring); Beane, The Right to Counsel: Past, Present, and Future, 49 Va. L. Rev. 1150, 1158 n.35 (1963). This is not to say that the indigent whose appointed counsel has retired from the appeal is automatically denied access to the appellate tribunal. If he insists on making his appeal, he can do so pro se; otherwise, the defendant's right to due process may be violated. See Lane v. Brown, 372 U.S. 477 (1963).

For a graphic example of the need for counsel at certiorari, see Parker v. Ellis, 362 U.S. 574 (1960). The Supreme Court agreed that Parker had been convicted of a felony in disregard of his constitutional right to counsel, but by the time his case was heard in the Supreme Court he had served his sentence and the claim was moot. Parker's first petition to the Supreme Court, years earlier, failed to reveal the prejudice that he encountered at the trial. Id. at 581 n.6.

Arguably, the pro se petition is not as great a handicap to the petitioner at certiorari as it would be on his first appeal, because in the Supreme Court the petition is reviewed by nine Justices and their clerks, assisted by the trial transcript and the lower court briefs, before its merit is determined. Contra, Brown v. Allen, 344 U.S. 443, 521 (1953) (separate opinion). The ordinary petitioner—the defendant who, with legal assistance, is able to prosecute a petition that meets with the Court's requirements and presents the Court with an intelligent record of his case—has a substantially better chance to have his petition granted. During the 1950 Supreme Court Term, while 15.2% of the "ordinary" petitions for certiorari were granted, only 4.2% of the in forma pauperis petitions were granted. Brown v. Allen, 344 U.S. 443, 521 (1953). In the 1961 Term, moreover, only 38 of 1093 in forma pauperis petitions for certiorari were granted (3.4%). Douglas v. California, 372 U.S. 383, 385 n.1 (1963). Thus, the present increase in cases before the Supreme Court coupled with its practice of disposing of many of these petitions on their face, Douglas v. California, supra at 359, suggests that the appointment of counsel at certiorari is a necessity.
ence in the petitioner's claim would result in the augmentation of present court expenses, is unfounded, because costs allocated to provide counsel would be offset by a decrease in the expenditures now made necessary by pro se petitions. The administrative expenses incurred by appellate courts in dealing with petitioners' motions to appeal in forma pauperis, for assignment of counsel, and for free transcripts and trial records, would be eliminated. Furthermore, the time and costs encountered by the prosecution in answering, and by the Court in holding hearings on and making dispositions of, frivolous appeals would be significantly decreased. There would also be a reduction in the substantial costs resulting from the necessity of transporting the prisoner, under guard, to the district where he was convicted in order to prosecute his frivolous appeal. Finally, by providing the indigent with counsel at every phase of his defense, it would become increasingly difficult for him, the higher he goes on appeal, to assert a meritorious claim on which to base the appeal—there would be less chance that reversible error or a valid constitutional claim would go unnoticed in the lower courts. The ultimate result would be a reduction in all post-conviction and collateral proceedings and the attributable expenses.

Finally, there remain the questions of when and by whom counsel should be appointed to prepare the petition for certiorari. The court in the instant case reasoned that since the petition for certiorari was addressed to the Supreme Court, that Court should assign counsel. The instant court, however, ignored the fact that certiorari is included in the concept of state remedies. The state should assume the responsibility of providing the indigent with counsel for certiorari because at this stage of the appeal the state has had all of the substantial contacts with the defendant. Furthermore, the state initiated the action resulting in the conviction and it must assume the responsibility of caring for dependents surviving the defendant and the defendant himself if his sentence is imprisonment.

The singular task of the petition for certiorari, as pointed out by the Douglas Court, is to illuminate the merit of the petitioner's case so that the Supreme Court will grant the writ. To appoint counsel only after the Court has acknowledged the merit is of no

consolation to the convicted indigent whose meritorious pro se petition was denied because of his inability to reveal a substantial claim. A shroud of unfairness will continue to envelop this area of the right to counsel so long as the state, while expending public funds for its prosecution, denies those funds to the indigent defendant, or, at the very least, the execution-bound defendant37 and thereby deprives him of a chance to show the merit in his case.

Labor Law: Non-Struck Employers' Lockout
To Counter Whipsaw Strike
Not Unfair Labor Practice

Respondents, non-struck members of a multi-employer bargaining association, locked out their employees and hired tem-

37. The stakes are infinitely higher where a man's life is hanging in the balance, and it is arguable on a practical basis, although not on a constitutional basis, that the prisoner facing death has a greater "need" for counsel. Mr. Justice Frankfurter, concurring in Griffin v. Illinois, 351 U.S. 12 (1956), said that "since capital offenses are sui generis, a state may take account of the irrevocability of death by allowing appeals in capital cases and not others." Id. at 21. See also Willeox & Bloustein, supra note 23, at 13, in which the authors said that "to prescribe special privileges for a defendant charged with a capital offense is traditional and reasonable, and does not violate equal protection." Moreover, a recent article has indicated that the Court, due to its decisions in two recent capital cases, White v. Maryland, 373 U.S. 59 (1963) and Hamilton v. Alabama, 386 U.S. 52 (1961), may continue to distinguish between capital and noncapital cases where determining the right to assigned counsel at pre-trial proceedings. The authors emphasized that the Court in both White and Hamilton made special note of the fact that the case involved a capital criminal and that the White decision was handed down after Gideon v. Wainwright. Kamisar & Choper, supra note 16, at 58. If such a distinction exists at pre-trial proceedings, it logically might prevail in post-conviction proceedings as well, based, perhaps, on a prerequisite showing of "special circumstances," according to the Powell and Betts doctrine.

1. A "lockout" has been defined as "an employer's action in temporarily shutting down his plant and temporarily laying off his employees during a labor dispute." LRX LAB. REL. REP. 530 (1963). See generally Koretz, Legality of the Lockout, & SYRACUSE L. REV. 251, 252 (1958); Note, 50 COLUM. L. REV. 1128 (1950). At common law a lockout was defined as the "cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms." Iron Moulders Union v. Allis-Chalmers Co., 166 Fed. 45, 52 (7th Cir. 1908). See also GREGORY & KATZ, LABOR LAW 147-48 (1948); MILLIS & MONTGOMERY, ORGANIZED LABOR 554 (1945); WEBSTER'S NEW WORLD DICTIONARY 860 (1937).
temporary replacements to counter a "whipsaw" strike against another member who had already replaced the strikers. Upon a complaint initiated by the locked-out employees' union, the National Labor Relations Board found that the lockout coupled with the hiring of replacements by non-struck employers was an unfair labor practice under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. On petition the Court of Appeals for the Tenth Circuit denied enforcement of the Board's order, holding that absent indicia of an intent to discriminate against locked-out employees, non-struck members of a multi-employer bargaining association may operate with temporary replacements for the duration of a strike. *NLRB v. Brown*, 319 F.2d 7 (10th Cir. 1963).

The National Labor Relations Act was designed to reduce industrial strife that impeded the normal flow of interstate commerce. *NLRB v. Brown*, 319 F.2d 7, 9 n.3 (10th Cir. 1963).

2. "Whipsawing" is the process of initiating successive strikes against members of a multi-employer association. The technique often enables powerful unions to impose unilateral terms on the weakest member of an employer unit and, occasionally, to extend the terms to all the members. *NLRB v. Brown*, 319 F.2d 7, 9 n.3 (10th Cir. 1963).

3. The relevant provisions of § 8 are:

   (a) It shall be an unfair labor practice for an employer —

   (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7 of this act;

   (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Section 7 guarantees that employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.


4. The NLRB had ordered the respondents to cease and desist from discouraging union membership by locking out employees so as to improve their bargaining position while continuing to operate their establishments and from similar interference with employee rights enumerated in § 7 of the NLRA, quoted note 3 supra. The Board had also ordered the respondents to reimburse each locked-out employee for lost wages. *Brown Food Store*, 137 N.L.R.B. 73, 82–83 (1962).

commerce; accordingly, Congress sought to promote free collective bargaining by guaranteeing to employees the right of self-organization. To protect this employee right, section 8(a) of the NLRA proscribes certain employer activity: Specifically, section 8(a)(1) makes it an unfair labor practice for an employer to interfere with employees in the exercise of their guaranteed right to organize and bargain collectively, while section 8(a)(3) supplements section 8(a)(1) by prohibiting discriminatory employment practices aimed at discouraging employee organizational activity.

The language of the unfair practice provisions of section 8(a) is broadly proscriptive, however, not all lockouts are violative. "Retaliatory" lockouts — those intended to frustrate organizational activity — are not in violation of section 8(a). 6

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7. The "Short Title and Declaration of Policy" of the NLRA plainly shows that Congress was concerned with advancing the "normal flow of commerce" by promoting the process of collective bargaining.

The inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized . . . substantially burdens and affects the flow of commerce . . . .

Experience has proven that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife . . . .


Lockouts were condoned at common law as a legitimate employer activity. See Goldman v. Cohen, 222 App. Div. 631, 227 N.Y. Supp. 311 (1st Dept. 1928); Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292
tional efforts\textsuperscript{10} or prevent employee participation in lawful union activities\textsuperscript{11} — have been prohibited by both the Board and the courts; and yet, “economic” lockouts — those instituted solely for business reasons — have generally been upheld,\textsuperscript{12} being viewed primarily as a legitimate employer effort to mitigate the impact of a strike on his business.\textsuperscript{13} In contrast, single-employer “bargaining” lockouts, which are designed to enhance an employer’s bargaining position, have been commonly condemned.

The common-law lockout was essentially a corollary of the employees' right to strike, see Iron Moulders Union v. Allis-Chalmers Co., 106 Fed. 45, 50 (7th Cir. 1908), but whether these rights are corollary under the NLRA is unsettled, see NLRB v. Truck Drivers Union, 863 U.S. 87 (1957) (reserved decision); NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962) (refused to consider the question in absolute terms). Compare Morand Bros. Beverage Co. v. NLRB, 204 F.2d 529 (7th Cir.), cert. denied, 346 U.S. 909 (1953) (corollary), with Utah Plumbing & Heating Contractors Ass'n v. NLRB, 294 F.2d 105 (10th Cir. 1961), and Quaker State Oil Ref. Corp. v. NLRB, 270 F.2d 40 (9th Cir.), cert. denied, 301 U.S. 917 (1959).

10. See, \textit{e.g.}, NLRB v. Norma Mining Corp., 206 F.2d 38 (4th Cir. 1953); NLRB v. Somerset Classics, 193 F.2d 613 (2d Cir. 1952); NLRB v. Cowell Portland Cement Co., 148 F.2d 237 (9th Cir. 1946).


12. See, \textit{e.g.}, American Brake Shoe Co. v. NLRB, 244 F.2d 489 (7th Cir. 1957) (loss on work in process and imminent probability of permanent loss of business justified lockout); International Shoe Co., 98 N.L.R.B. 207 (1951) (cessation of operations upheld where sporadic strikes interfered with efficient operation of integrated departments); Duluth Bottling Ass'n, 48 N.L.R.B. 1335 (1949) (lockout to prevent spoilage of materials upheld); Brown-McClaren Mfg. Co., 34 N.L.R.B. 984 (1941) (lockout upheld where utilized to take advantage of more profitable business site).

Economic conditions unrelated to negotiations may also justify a shutdown of operations or a specific portion of operations. NLRB v. Houston Chronicle Pub. Co., 211 F.2d 948 (5th Cir. 1954); NLRB v. Goodyear Footwear Corp., 186 F.2d 913 (7th Cir. 1951).

by the NLRB. Single-employer lockouts, however, are distinguishable from defensive lockouts utilized by members of a multi-employer bargaining association: The former represent an action


The Supreme Court has not squarely ruled on the validity of "bargaining" lockouts. See NLRB v. Truck Drivers Union, 353 U.S. 87 (1957), 57 Colum. L. Rev. 1172, in which the Court expressly reserved the question of the legality of the bargaining lockout utilized by a single employer. But cf. NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962), 47 Minn. L. Rev. 915 (1963), in which a single-employer lockout during negotiations was upheld in the absence of a showing of economic necessity as neither discrimination nor a violation of a specific provision of the NLRA was shown.

15. While the single-employer unit represents bargaining by a single plant or by more than one plant under a common management, the multi-employer bargaining unit is commonly characterized by either form type contracts, which are identical agreements signed by different employers, or by contracts in which employers jointly participate in contract negotiations without being members of any formal association. By far the most prevalent of all the types of multi-employer bargaining is association bargaining, which is carried on by groups of employers combining for the purpose of negotiating contracts with labor unions. The association may range from an organization which meets only during contract negotiations to an elaborate organization with a constitution, by-laws, and a regular staff of officers. One analysis of collective bargaining agreements shows that approximately as many as five million workers are involved in multi-employer bargaining. U.S. Bureau of Labor Statistics, Dept of Labor, (Rep. No. 1) (1953).

Multi-employer bargaining associations long antedated the NLRA in industries characterized by numerous employers of small work forces and a rapid turnover of employees. Usually the smaller employers feel the need of concerted action to match the power of a strong union. However, pressures exerted on large corporations may lead them to consider the possibility of combining in a bargaining association. Multi-employer bargaining has had its greatest expansion since the enactment of the NLRB because employers have sought to match increased union strength by group bargaining. Chamberlain, Collective Bargaining 178-79, 180-82 (1951).

The NLRB sanctioned multi-employer bargaining units as early as 1938, 4 NLRB Ann. Rep. 92-93 (1939), and the legislative history of the NLRA indicates that proposals made to limit or outlaw multi-employer bargaining were met with the protest that their adoption would weaken the collective bargaining process and conflict with the policy of promoting industrial peace through effective collective bargaining. Hearings on S. 5 Before Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 421-28, 1012-17, 1092-97, 1095-97, 1169-65, 2018-19, 2910-11 (1947); Hearings on H.R. 3 Before House Committee on Education and Labor, 80th Cong., 1st Sess. 552-53, 1552-54, 3024-26 (1947); 93 Cong. Rec. 1834-85 (remarks of Senator Morse), 4030-31 (remarks of Senator Murray), 4442-44 (remarks of
initiated by the employer in an attempt to break a bargaining impasse, while the latter typically constitute a concerted employer response to a whipsaw strike.18 "Defensive" lockouts have been upheld by the NLRB,17 and in NLRB v. Truck Drivers Union18 the Supreme Court firmly established their validity.

In the instant case, the NLRB acceded that a bare lockout might have been validly "defensive" but determined that the hiring of fill-in workers rendered the instant lockout "retaliatory." The Board recognized that a "whipsaw" strike results in a competitive edge for the non-struck over the struck employers, which tends to disintegrate the multi-employer bargaining unit unless non-struck employers are permitted to lock out their regular workers. By operating with fill-ins, however, the Board reasoned that the respondents had enhanced their bargaining position, thereby


17. NLRB v. Continental Baking Co., 221 F.2d 427 (8th Cir. 1955); NLRB v. Spaulding Avery Lumber Co., 220 F.2d 673 (8th Cir. 1955).

The various distinctions between different kinds of lockouts have been criticized by writers in the field of labor law as arbitrary and artificial. See, e.g., Koretz, supra note 1. Professor Koretz argues that the anti-union or retaliatory lockout and the economic lockout should not be distinguished because anti-unionism is usually based on economic considerations; instead, the legality of a particular lockout should be decided by balancing the conflicting legal rights of the parties. See also Meltzer, Lockouts Under the LMRA, 28 U. CHI. L. REV. 621 (1961). There is some tendency on the part of the courts to use the terms interchangeably. Thus, in NLRB v. Truck Drivers Union, 353 U.S. 87 (1957), the Court seems to equate defensive and economic lockouts in the multi-employer situation. The Court stated that a strike by employees against one member of a multi-employer unit constituted a threat of strike action against all of the employers and that such a threat constitutes the type of economic or operative problem which legally justifies their resort to a temporary lockout of employees.

18. 353 U.S. 87 (1957). The Court upheld the multi-employer lockout as a valid exercise of the employers' right to protect their common interest in bargaining as a unit.
unfairly discriminating against their employees.\textsuperscript{19} \textit{NLRB v. Truck Drivers Union} was factually distinguished, since the \textit{Truck Drivers Union} struck employer chose not to operate with interim workers,\textsuperscript{20} which necessitated a lockout by non-striked employers to preserve the bargaining unit. Where the struck employer has replaced the strikers, however, the non-striked employer can operate with his regular employees and a lockout inferrably is intended solely to inhibit a lawful strike, a violation of sections 8(a)(1) and (3).

In refusing to grant enforcement, the Court of Appeals for the Tenth Circuit interpreted \textit{Truck Drivers Union}, basically, as permitting employer self-help to preserve the bargaining equality of multi-employers.\textsuperscript{21} On this basis the instant court sustained both the lockout and the hiring of fill-ins,\textsuperscript{22} reasoning that, clearly, if

\begin{itemize}
\item[\textsuperscript{19}]
The Board's decision was not premised on a finding of the respondents' unlawful motivation. See Olin Mathieson Chem. Corp. v. NLRB, 352 U.S. 1029 (1957) (change in employer policy giving preference to nonstrikers and to employees who had returned to work during the strike held discriminatory in violation of §§ 8(a)(1), (3)). Rather, the Board based its finding of discrimination on respondents' course of conduct in hiring replacements. \textit{NLRB v. Erie Resistor Corp.}, 132 N.L.R.B. 621 (1961), enforcement denied sub nom. International Union of Elec. Workers v. NLRB, 303 F.2d 359 (3d Cir. 1962) (discriminatory intent on the part of an employer may be shown by specific intent or by conduct carrying an indicia of unlawful intent).
\item[\textsuperscript{20}]
A struck employer may replace strikers in order to preserve his business. \textit{NLRB v. Mackay Radio & Tel. Co.}, 304 U.S. 333 (1938).
\item[\textsuperscript{21}]
There is on one hand the right of employees to strike, threaten to strike, or support a strike of their fellow union members by legal means, \textit{NLRB v. Peter Cailler Kohler Co.}, 130 F.2d 503, 505-06 (2d Cir. 1942); and on the other hand, there is the right of the employer to preserve or maintain his business operations in the face of employee pressures, \textit{NLRB v. Babcock & Wilcox Co.}, 351 U.S. 105, 112 (1956); \textit{NLRB v. Mackay Radio & Tel. Co.}, 304 U.S. 333 (1938).
\item[\textsuperscript{22}]
In a dissenting opinion in the instant case, Mr. Justice Murrah argued that the balancing of interests of employers and employees had been entrusted to the NLRB by Congress and under previous decisions it was not within the judicial prerogative of the court of appeals to set aside the Board's decision. Instant case at 12. The basic judicial review provisions in the amended NLRA are found in §§ 10(e), (f). 61 Stat. 147 (1947), 29 U.S.C. §§ 160(e), (f) (1958). It seems clear that the courts do have the power to set aside Board decisions, \textit{NLRB v. Insurance Agents' Int'l Union}, 361 U.S. 477 (1960); S. Rep. No. 105, 80th Cong., 1st Sess. 20-27 (1947); see \textit{Universal Camera Co. v. NLRB}, 340 U.S. 474 (1951); Koretz, \textit{The Lockout Revisited}, 7 \textit{Syracuse L. Rev.} 203 (1956), and in practice, the courts have frequently had occasion to do so, see, \textit{e.g.}, \textit{NLRB v. Truck Drivers Union}, 353 U.S. 87 (1957); \textit{NLRB v. Continental Baking Co.}, 221 F.2d 427 (8th Cir. 1955).
\end{itemize}
the struck employer shuts down, the other employers could lock out their employees and, thus, if the struck employer then replaced the strikers, the non-stripped employers who had locked out their employees could likewise hire fill-ins.\textsuperscript{23} Therefore, the NLRB had denied the multi-employers an effective defensive lockout by requiring them to retain their own employees in order to remain operative.\textsuperscript{24} This approach might suggest an underlying hypothesis that a multi-employer association must operate as a single employer to be effective;\textsuperscript{25} the instant court impliedly rejects this, however, stating that the locked-out employees did not acquire the status of actual strikers. Such language would also seem to indicate that if the replacements had been permanent rather than temporary,\textsuperscript{26} the lockout would not have been upheld.\textsuperscript{27} A permanent severance of employment, then, evidently exceeds the necessities of the multi-employers “defensive” lockout, whereas a temporary severance caused by a lockout and rehiring is presumably commensurate with the union-initiated whipsaw strike.

The decision in the instant case seems to effectuate the NLRA policy of aiding efficacious collective bargaining by preserving multi-employer associations. A struck employer always may replace strikers\textsuperscript{28} or make unilateral changes in employment conditions;\textsuperscript{29} however, because of numerous practical difficulties, these remedies alone do not effectively protect the multi-employer association. For example, the union may use the financial resources of the membership of the multi-employer association to support a strike against a single employer, possibly culminating in the

\begin{enumerate}
\item[23.\textsuperscript{23}] The court believed that to deny the struck employer the right to replace that was guaranteed by Mackay, see note 19 supra, would allow the union to obtain a privileged position by virtue of its whipsaw tactics.
\item[24.\textsuperscript{24}] The court’s reference to lockouts as a privilege rather than a right may indicate that it is following the rationale of the court in NLRB v. Dalton Brick & Tile Corp., 301 F.2d 886 (5th Cir. 1962), 47 Minn. L. Rev. 915 (1963). In \textit{Dalton} the court stated that the right to lockout is conditional and that each case must be considered in its own setting.
\item[25.\textsuperscript{25}] 16 NLRB Ann. Rep. 176 (1951). A number of writers in the field of labor law have adopted this view. See, \textit{e.g.}, Jones, \textit{The NLRB and the Multiemployer Unit}, 5 Lab. L.J. 34 (1954).
\item[26.\textsuperscript{26}] Morand Bros. Beverage Co., 99 N.L.R.B. 1448, 1460 (1952), enforced, 204 F.2d 599 (7th Cir.), cert. denied, 346 U.S. 909 (1953).
\item[27.\textsuperscript{27}] For a thorough discussion of the discharge-lockout and permanent-temporary severance distinctions, see Petro, \textit{The NLRB on Lockouts II}, 3 Lab. L.J. 739 (1952).
\item[28.\textsuperscript{28}] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 838, 845 (1938).
\item[29.\textsuperscript{29}] Davis Furniture Co. v. NLRB, 100 N.L.R.B. 1016 (1952) (dictum).
\end{enumerate}
withdrawal of the struck member from the multi-employer unit. Similarly, the individual employer may encounter difficulties in attempting to institute unilateral changes in employment following an impasse. The employer has no assurance that such action will avert a strike timed in accordance with union tactics, and individual concessions by an employer without securing his demands or the withdrawal of union demands may interfere with the process of future negotiations between the union and the multi-employer association. Finally, unilateral concessions may suggest to the union that more will be forthcoming following a strike. Thus, the individual employer's limited control over employment terms seems an ineffectual substitute for a concerted employer response in the form of a lockout and rehiring.

Furthermore, the whipsaw strike allows unions to exert nearly as much pressure against non-struck employers as against those employers actually struck. If the union is protected against a lockout and replacement of employees by non-struck employers, it may initiate such strikes with few of the deterrent risks of ordinary strike action. To deny employers the right to lockout and replace employees not only deprives employers of the benefit of concerted action when they most need it, but also permits the union to derive the advantages of bargaining with a larger unit while retaining the option to abandon such bargaining by the use of selective strikes. This ability to temporarily fragment the larger unit seems to involve a denial of the premise behind the recognition of the propriety of multi-employer bargaining — the existence of a community of interest among employers.

By neutralizing the effectiveness of whipsaw strikes while balancing the legitimate interests of the parties, the instant case represents an attempt to advance the collective bargaining process. Since the members of an employer bargaining association are considered as a unit for purposes of collective bargaining, it seems only proper that the economic weapons available to one member of the group should be available to the group as a unit. Moreover, the union presumably anticipated bargaining with the association as a whole. A unified response in the form of a joint lockout and employee replacement, therefore, is consistent with the reasonable expectations of unions and employers consenting to operate within the framework of multi-employer bargaining.

33. Meltzer, *supra* note 11. It has been argued that allowing non-struck
Zoning Law: "Futile" Pursuit of Local Remedies Unnecessary To Challenge Validity of Use Restriction

The city of Chicago ordered plaintiff to discontinue multiple family occupancy of property zoned for single family use. When plaintiff failed to observe this order, the city commanded her to appear before a compliance board and threatened to bring suit if she disobeyed the earlier directives. Without previously seeking local relief, plaintiff brought an action for a declaratory judgment that the ordinance classifying her property for single family members of a multi-employer group to lock out and rehire workers would turn every "single" employer strike into a multi-employer effort and increase the time lost to strikes. However, a field study has shown that where such defensive lockouts were allowed, there were fewer large strikes and the time lost remained the same or declined. Kerr & Fisher, supra note 30, at 53. In any case, the "time lost on strikes is only one of the dimensions of the strike problem; the extent to which the time lost is concentrated at a particular time in a particular industry is the principal other dimension." Lewis, The Labor-Monopoly Problem: A Positive Program, LIX J. Pol. Econ. 277, 279 (1951). Furthermore, the concentration of lost time is accepted as a cost of the existing pattern of industrial relations when produced by simultaneous strikes.

1. The property was restricted to single family occupancy by the Chicago Zoning Ordinance of April 5, 1923. The 1923 Ordinance was superseded, in turn, by the zoning ordinances of December 3, 1942 and of May 29, 1957. The 1942 and 1957 ordinances continued the restriction of the subject property to single family occupancy. Chicago, Ill., Municipal Code ch. 194A; Brief for Appellant, pp. 11, 56, Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1962). Multiple family use of the property was commenced by one of plaintiff's predecessors in title in 1948.

The subject property was also located within the Hyde Park-Kenwood Urban Renewal District, established by the Chicago City Council under the authority of federal and state legislation in November, 1958. A "conservation board," created under this urban renewal plan, was empowered to recommend to the city council the zoning or rezoning that it thought was required for the district. At the time the instant case was decided, the board had recommended continued restriction of the subject property to single family occupancy. Id., p. 11.

2. Amendment of the zoning ordinance was the only form of local relief available to plaintiff, because the Chicago Zoning Ordinance prohibited the granting of "use" variations. Zoning Ordinance of 1957, Chicago, Ill., Municipal Code ch. 194A, art. 11.7-4. See Babcock, The New Chicago Zoning Ordinance, 52 Nw. U.L. Rev. 174, 195 (1957); Lawton, Procedural Implications of Recent Zoning Decisions, 40 Chi. B. Rec. 15, 17 (1958). The same section of the City and Village Zoning Enabling Act that deprives the councils of cities with populations in excess of 500,000 (the City of Chicago presently is the only municipality in this category) of the power to grant
occupancy was void as to that property. The trial court gave judgment for plaintiff, permitting her to continue to use the property for multiple family occupancy although subject to the restrictions imposed by the zoning ordinance on that classification. The Illinois Supreme Court affirmed and held that plaintiff was not required to exhaust her local remedies before initiating legal action because it was "apparent" that the pursuit of local relief would be futile and that the zoning ordinance as applied to plaintiff's property was "unreasonable and confiscatory" and hence void. *Westfield v. City of Chicago*, 26 Ill. 2d 526, 187 N.E.2d 208 (1962).

With respect to the exhaustion of local remedies problem, the instant case is among the progeny of *Bright v. City of Evanston*. In *Bright* the Illinois Supreme Court established that a property owner may not judicially challenge the validity of a zoning ordinance, as applied to his property, without first exhausting his administrative remedies. Judicially developed procedures such as that of the *Bright* case have been generally supported. Zoning is fundamentally a legislative function, and therefore, to allow zoning authorities the opportunity for discretionary and flexible development of zoning regulations in advance of judicial determinations of their validity is desirable. By adhering to the *Bright* rule, courts are partially able to avoid the difficult task of applying both "use" and "bulk" variations and vests that power in zoning boards of appeals also expressly recognizes that local zoning ordinances may forbid the granting of "use" variations by the boards of appeals. Ill. Rev. Stat. ch. 24, § 11-13--4 (1961).

3. For a discussion of the implications of the court's reclassification of the subject property, see note 9 infra and accompanying text.

4. 10 Ill. 2d 178, 139 N.E.2d 270 (1956).

5. *Id.* at 186, 139 N.E.2d at 274. The court distinguished those cases where the ordinance as a whole is alleged unconstitutionally to impair the value of property or destroy its marketability and stated that in the latter situation direct judicial relief may be afforded without prior resort to remedies under the ordinance. *Id.* at 184-85, 139 N.E.2d at 274. The propriety of using this distinction as a criterion for requiring the exhaustion of local remedies prior to seeking judicial relief was recognized by the United States Supreme Court in its landmark decision upholding the constitutionality of land-use zoning. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). Nonetheless, its significance in the context of modern zoning litigation has recently been questioned. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. Cmr. L. Rev. 509, 523-24 (1959).

a constitutional standard to a multiplicity of local fact questions; in fact, it has been said that the Illinois Supreme Court’s primary goal in following the Bright rule is “to cut down the number of zoning cases it must decide.” Also, by requiring property owners to exhaust their local remedies before initiating legal action, the courts will be able to avoid in many cases the problem of substituting new classifications where existing classifications would be found invalid. Unless a court is willing and able to substitute a new classification for the old, it will be limited to either upholding the classification or declaring it invalid as to that property, thereby leaving the use of the property unrestricted. This problem can be avoided if property owners are required to apply first for local relief since conditions of future use would then be subject to control by the local zoning authorities.

Since the Bright decision, the Illinois court has determined that the rule therein established is inapplicable where the pursuit of local remedies would apparently be futile; but the standard of “futility” has been somewhat unsettled. In the instant case, the court found that any efforts by plaintiff to obtain local relief would have been futile because the zoning restriction had been incorporated into an exhaustively planned and studied urban

8. Babcock, supra note 5, at 532.
10. The question was not presented to the court by counsel in the instant case, although the trial court had not limited itself to invalidating the existing restriction, but had gone on to substitute for it plaintiff’s proposed alternative classification. Instant case at 533, 187 N.E.2d at 212. To the extent that this reflects acceptance of Sinclair, it indicates that Bright may not be justified in Illinois on the ground that it is needed to minimize the occasions when judicial action invalidates a zoning restriction without substituting a more reasonable one, but only on the grounds of administrative and judicial convenience and orderliness.
renewal project, the city had demanded plaintiff's compliance with
the restriction, and the city had threatened to bring suit against
plaintiff if she continued to violate the restriction.

The determination of futility in the instant case — and the
reliance on it as the basis for exempting plaintiff from the Bright
rule — seems incorrect. Futility was inferred from acts of the
zoning administrator rather than from acts of the municipal coun-
cil or the board of zoning appeals. The views of the zoning ad-
ministrator, however, need not necessarily accord with those of
the council or board on the granting of local relief. Thus, the fact
that the administrator threatens, or even brings, suit is no assur-
ance that the council or board will fail to grant relief.

Basically, the Bright procedure appears to be a desirable ad-
vance in zoning administration. The rule assumes, however, that
local zoning bodies are qualified and that they have established
uniform procedural standards. The tendency of the Illinois court,
evined in the instant case, to distinguish cases applying Bright
because the futility of seeking local remedies in the given case is
“apparent” may reflect judicial suspicion that the assumed quali-
fications and procedural standards are absent. Nevertheless, strict
application of the Bright rule might constitute an effective stimu-
lus to reform the rules and procedures of zoning administration.

A valid zoning restriction, as an exercise of the state's police

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12. As an original matter one might also argue that the Bright rule is in-
applicable to the instant case on the ground that the rule requires the exhaus-
tion only of local administrative remedies, while an amendment (the only local
relief available to plaintiff in the instant case) constitutes legislative action.
The Illinois court strongly intimated the validity of such a distinction in
Eckhardt v. City of Des Plaines, 13 Ill. 2d 562, 150 N.E.2d 621 (1958). How-
ever, in Reilly v. City of Chicago, 24 Ill. 2d 348, 181 N.E.2d 175 (1962),
decided eight months before the instant case, the court held that the term
“administrative remedy,” as used in Bright, encompassed appropriate and
available local relief generally, whether legislative or administrative. It said
that the requirement of seeking local relief is justified on grounds of adminis-
trative and judicial convenience, whether the relief in question is granted by a
board of appeals or by a legislative body and whether denominated an amend-
ment or a variation. The Eckhardt case was not cited.

13. Even if it were assumed in the instant case that the orders and threats
of the City Building Department reflected the views of the city council with
respect to amending the ordinance, the instant case appears to conflict with


15. For an imaginative proposal for administrative reform through the
creation of a state-wide zoning commission with the powers to establish uni-
form rules and procedures for local zoning bodies and to hear appeals from the
final rulings of those bodies, see Babcock, supra note 5, at 538–41.
power, must have some substantial relationship to the health, safety, morals, order, and general welfare of the community; and the power of the community to zone must be exercised reasonably and not arbitrarily. Involved in applying the constitutional test is a balancing of public and private interests: May the harm to the public that is avoided by the restriction be reasonably conceived to outweigh the hardship thereby imposed on the individual property owner.

In the instant case, the Illinois Supreme Court considered the validity of the zoning ordinance, as applied to the subject property, in light of the above test. The court found that enforcement

16. It has long been established that the general classification and regulation of land use upon a broader basis than nuisance is constitutional. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1926).

17. Wallace, Legal Considerations Incident to Zoning, in ZONING ADMINISTRATION AND ENFORCEMENT 2, 3 (Campbell ed. 1954).


The test is stated in terms of the avoidance of harm rather than the conferral of benefit. The purpose of this distinction is to separate those cases where the purpose and effect of governmental restriction may be realized through regulation under the police power and those where the exercise of eminent domain and payment of compensation are required. Applying the distinction to land-use zoning,

the benefit resulting from elimination of a harm does not result from any particular land use; the benefit results from non-use in a particular way rather than from any of the permissible uses. On the other hand the benefit resulting from a restriction designed to obtain a benefit most often can result only from the one or more permitted uses.

Dunham, A Legal and Economic Basis for City Planning (Making Room for Robert Moses, William Zeckendorf, and a City Planner in the Same Community), 58 COLUM. L. REV. 650, 664-65 (1958). See also FREUND, THE POLICE POWER § 511 (1904); Dunham, City Planning: An Analysis of the Content of the Master Plan, 1 J.L. & Econ. 170, 179-82 (1958). The distinction seems implicitly to have been applied in two Illinois cases. See Galt v. County of Cook, 405 Ill. 396, 91 N.E.2d 395 (1950); 2700 Irving Park Bldg. Corp. v. City of Chicago, 395 Ill. 138, 69 N.E.2d 827 (1946). It seems clear in the instant case that the city, in restricting the subject property to single family occupancy, was attempting to avoid a public harm rather than confer a public benefit. Municipal policy would have been just as satisfactorily achieved whether, as a result of the zoning restriction, the subject property consisted of a vacant lot or a single family residence. Thus, assuming the validity of the distinction between conferral of benefit and avoidance of harm, the restriction in the instant case involves the latter. Therefore, it is not invalid per se as a taking of private property for public use without just compensation. Its validity depends rather on a weighing of public harm against private burden.
of the zoning ordinance would work a “real and substantial” economic hardship on the plaintiff, in the form of a capital loss if she sold the property and an income loss if she retained it. With the exception of a vague phrase elsewhere in the opinion, however, the court devoted but one short paragraph to an examination of the public interest. The sole question examined was whether multiple family occupancy of the subject property had resulted in any diminution in neighboring property values. The court found no proof of such an effect. Weighing the private hardship against the apparent absence of public benefit, the court concluded that the ordinance was unreasonable and confiscatory and therefore void as applied to plaintiff’s property.

Whether, in dealing so summarily with the public interest, the court intended to deny recognition to measurements of public interest other than diminution of neighboring property values is not clear from the opinion. The court did recognize that the comprehensive study and planning involved in the creation of an urban renewal district should be a factor in determining the validity of zoning regulations. Yet it failed to indicate in what manner this factor should be considered and specifically denied the city’s contention that judicial review of zoning based upon the recommendation of a conservation board is substantially more limited than the review of zoning that is unrelated to an urban renewal district.

Single family dwelling districts should be established under com-

\[19. \text{See text accompanying note 21 infra.}
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\[20. \text{Instant case at 532, 187 N.E.2d at 212.}
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\[21. \text{Id. at 530, 187 N.E.2d at 211.}
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\[22. \text{Ibid. At the time the instant case was decided, the Hyde Park-Kenwood Conservation Board’s “proposed” zoning maps had not yet been adopted by the city council; the maps did, however, propose continued restriction of the subject property to single family occupancy. Brief for Appellant, p. 35. The city contended that to overcome the presumption of validity of the proposed zoning classification under the urban renewal plan, plaintiff would have to show that the plan, as distinguished from the proposed zoning restriction, “was fraudulent or capricious, clearly evasive or contrary to constitutional prohibitions.” Id., p. 44. The court noted that the city had evidently confused the validity of the plan and of its provision for the exercise of eminent domain with that of the zoning restriction. Instant case at 530, 187 N.E.2d at 211. This confusion apparently resulted from the city’s feeling that the trial court, in holding invalid the zoning restriction proposed by the conservation board, had “indirectly” held the urban renewal plan itself invalid. See Brief for Appellant, p. 41.}

\[\text{It is difficult to comprehend why the existence of an urban renewal district should affect the adjudication of zoning controversies other than possibly to make available to the court greater factual material concerning the area in}\]
prehensive zoning ordinances, since the public policies sought to be achieved through such districts are many and varied. The establishment of such districts, however, is not properly justified by a desire to protect surrounding "property values" or the "character of the neighborhood"; these two factors are "derivative" in the sense that they merely reflect the presence of one or more primary factors that may or may not provide a valid basis for zoning restrictions. In considering such districts, the courts recognize that the drawing of zoning district boundary lines must always be more or less arbitrary, because the properties on either side of a line cannot differ substantially. In the instant case the city es-

which the subject property is located. Conceivably the city might show that, although plaintiff's violating use had not heretofore harmed the public, continued violation would have a deleterious effect upon new uses to be introduced under the conservation plan. Yet this situation would be essentially that present in any newly developing area. It has been held that municipalities may employ the zoning power to protect anticipated future uses in new areas as well as current uses in established areas. See People v. Johnson, 129 Cal. App. 2d 1, 277 P.2d 45 (1954); Napierkowski v. Township of Gloucester, 29 N.J. 481, 150 A.2d 481 (1959); Gignoux v. Village of Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280 (Sup. Ct. 1950). Certainly the fact that a purpose of urban renewal may be to expand the availability of single family residences is not itself sufficient justification to zone property in the district for that use. Such a restriction would clearly violate any rule based upon a distinction between conferral of benefit and avoidance of harm. See note 18 supra.


24. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926); Johnson v. City of Huntsville, 249 Ala. 36, 29 So. 2d 342 (1947); Sullivan v. Anglo-American Inv. Trust, Inc., 89 N.H. 112, 193 Atl. 225 (1937); 8 McQuillin, MUNICIPAL CORPORATIONS § 25.101 (3d ed. 1957). An exhaustive list and analysis of the principal aims of residential land-use control (including zoning ordinances) appears in Williams, Planning Law and Democratic Living, 20 LAW & CONTEMP. PROBS. 317, 331-34 (1955). Of the factors listed, those which bear upon the instant case are (1) protection against heavy traffic; (2) protection against noise and congestion arising from the presence and movement of large numbers of people; and (3) protection against aesthetically displeasing sights.

25. Williams, supra note 24, at 333-34. In the instant case the court found no evidence that invalidation of the restriction upon plaintiff's property would adversely affect surrounding property values and did not consider any possible effect upon the character of the neighborhood. The court seemed tacitly to assume that lack of effect upon the derivative indicates lack of effect upon the primary. Hence it did not go beneath the derivatives to consider whether any of the primary factors justified the restriction in question.

26. See, e.g., In re Dawson, 136 Okla. 113, 115-16, 277 Pac. 226, 228 (1929). The Illinois court had recognized before the instant case that the
sentially argued that the gain to the public interest from restricting the subject property to single family occupancy was the promotion of safety and the security of home life, by preventing the deterioration of the properties and community in plaintiff's area.\(^7\)

While there had admittedly been no proof that neighboring property values had depreciated as a result of the multiple family use of plaintiff's property, the city emphasized that the use of single family structures for multiple family purposes would initiate the deterioration of the entire community, not just the property within the same block. It asserted that the monetary depreciation would be "immeasurable" when the interests of the entire community were affected, as in the instant case.\(^8\)

The difficulty with the city's position was that it had not shown that any of the evils cited had in fact occurred or were likely to occur in the instant case.\(^9\) It was clearly unable to prove that such evils had been reflected in a diminution of property values in the surrounding area:\(^10\) there were adequate parking facilities on the subject property; the city admitted that the condition of the house, both inside and out, was good; and it could hardly argue that light and air in the neighborhood was adversely affected by the multiple family use of the property. The city's strongest argu-

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\(^{27}\) Brief for Appellant, pp. 60-63.

\(^{28}\) Petition for Rehearing, p. 7.


\(^{30}\) It should be noted that the conclusion of the court with respect to diminution of neighboring property values apparently does not exclude the possibility that, but for plaintiff's violation of the ordinance, neighboring property values would have risen since 1948. Neither the briefs nor the opinion contain any information on this point. It would seem, however, that preventing such a rise would be a public harm in the same sense as causing a decline. Either effect should satisfy the test discussed in note 18 supra.

Of course, even had the city been able to prove in this fashion that the purpose and effect of the restriction as applied to plaintiff's property was to avoid (or, in this case, to rectify) a public harm which was within the municipal power to prevent, rather than confer a public benefit, it would still have had to show that the public harm avoided (or rectified) outweighed any resultant burden upon plaintiff. See note 18 supra.
ment was that if multiple family occupancy of plaintiff's property were permitted, there would be no reason to deny such use of other property in the single family district. The result, it was argued, might eventually be the elimination of the single family district. Plaintiff attempted to answer this argument by demonstrating that while it might be applicable elsewhere, it was not applicable in the instant case. She contended essentially that since her property was surrounded on three sides by educational, religious, and charitable institutions, the burden of the ordinance on the property owner was greater, and its benefit to the public was less, in her case than would be the case in other parts of the single family district.

Assuming that surrounding property values have been neither diminished nor prevented from rising by the multiple family use of plaintiff's property in the past and that they will not be so affected by plaintiff's continued multiple family use in the future, it would appear that neighboring owners of properties zoned for single family use could not rely on plaintiff's multiple family use as a ground for rezoning their own properties. They would be required to show that multiple family use of their own properties would not depreciate surrounding property values more than it would contribute to their own. In the likely event that their properties were not surrounded on three sides by non-single family uses, they might well encounter more difficulty in demonstrating a lack of public interest in enforcing the single family classification against their properties than did plaintiff in the instant case.

32. Two authorities on zoning law, relying upon their personal knowledge of Chicago, have argued that the adverse impact of poorly maintained multiple family dwellings in the blocks south of the subject property upon the latter's value as a single family dwelling was an important element in the decision of the instant case. See Babcock & Bosselman, Suburban Zoning and the Apartment Boom, 111 U. Pa. L. Rev. 1040, 1066 n.183 (1963). The difficulty with their argument is that if the effect of this factor were felt so distantly, it is hard to see why the owners of the single family dwellings lying immediately north of the subject property might not rely upon the same factor to have the zoning ordinance declared invalid as to their properties.
33. See note 30 supra.
34. The failure of their property values to be adversely affected by plaintiff's non-conforming use may well indicate that none of the primary factors that might justify restriction of plaintiff's property to single family occupancy was present. See notes 24 & 25 supra.