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Case Notes

Constitutional Law—Federal Rules of Criminal Procedure—

Suppression of Evidence—Federal-State Relationships—

Cleary v. Bolger, 83 S. Ct. 385 (1963).

ON SEPTEMBER 12, 1959, respondent Edward Bolger was arrested on suspicion of theft by federal Customs agents. Bolger was a hiring agent licensed by the Waterfront Commission of New York Harbor, a bi-state agency of New York and New Jersey. Following interrogation at the Customs office, the agents searched Bolger's home without a search warrant and seized evidence tending to incriminate him. By this time, the Waterfront Commission, which worked in close cooperation with the Customs Service, had been informed of Bolger's arrest, and petitioner Cleary, a Waterfront Commission investigator, was present at Customs headquarters when interrogation resumed. Petitioner did not participate in the questioning although he could have done so. During this interrogation, Bolger made statements which were self-incriminating.

No federal prosecution was initiated against Bolger. However, the State of New York instituted both a criminal prosecution for petit larcency and an administrative proceeding to revoke Bolger's license as a hiring agent. After the petit larcency charge had been set for trial, Bolger sued the federal agents and state officer Cleary in U.S. District Court to enjoin them from producing in either of the state proceedings any of the evidence seized or testifying as to any of his statements. Bolger alleged that the seized property and incriminating statements were the products of illegal conduct on the part of the federal officers and were inadmissible under Rules 41 (a) and 5 (a), FED. R. CRIM P.

An injunction issued against the federal officers for their violation of Rules 41 (a) and 5 (a) and against Cleary in order to make the injunction against the federal officers effective. 189 F. Supp. 237 (1960). The U. S. Court of Appeals affirmed. 293 F. 2d 368 (1961). On certiorari, the Supreme Court reversed and held that a federal injunction would not issue against a state officer where there was no evidence of a purpose to avoid federal requirements, where he was not a factor in the federal

investigation, and where the information had not been acquired by the state officer in violation of a federal court order. *Cleary v. Bolger,* 83 S.Ct. 385 (1963).

Federal law enforcement officers are bound by the Federal Rules of Criminal Procedure, and Federal courts are bound by the decision of *Weeks v. United States,* 232 U. S. 283 (1914), which barred the use of illegally obtained evidence in federal prosecutions (the federal exclusionary rule). *Mapp v. Ohio,* 367 U. S. 643 (1961), which held that the federal exclusionary rule is applicable to the states, is binding on state courts. With the decision in *Mapp,* the law of admissibility of evidence in state criminal proceedings seemed settled. See Note, 11 CATH. U. L. REV. 53 (1962).

The instant case, however, raises the question—by what are state law enforcement officers bound? To consider this question, however, it would seem that we must ask another; *viz.,* how far should the federal courts go in suppressing evidence obtained in violation of the Federal Rules of Criminal Procedure?

Rea v. United States, 350 U.S. 214 (1956), is precedent for suppressing evidence in a state prosecution obtained by federal officers in violation of the Federal Rules. The accused in *Rea* had been indicted in a federal court and succeeded in obtaining a court order suppressing narcotics illegally obtained by federal officers. Despite this order, however, one federal officer swore out a complaint before a state judge and caused the accused to be rearrested and charged with possession of the same narcotics in violation of a state statute. The accused then moved in federal court to enjoin the federal officer from testifying in the state proceeding. The Court, invoking its "supervisory powers over federal law enforcement agencies," *id.* at 216-217, granted the injunction in order to prevent frustration of the Federal Rules.

Both lower courts in the *Cleary* case cited *Rea* as authority for granting the injunction against state officer Cleary as well as against the federal officers. In distinguishing the two cases, the Court of Appeals said the only difference "is the time at which the federal officials attempt to make their lawbreaking available to the state." 293 F. 2d at 369. Nonetheless, Justice Harlan, writing the opinion of the Court in *Cleary,* accepted *Rea* as authority for issuing an injunction against the federal officers but said it would not support the injunction against Cleary. The Court felt the words of the Court in *Rea* were sufficient to distinguish it from the instant case; *viz.,* "the ... Court is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law.... No injunction is sought against a state official." 350 U.S. at 216-217. On the contrary, however, those words were compelled by the decision in *Wolf v. Colorado,* 338 U. S. 25 (1949), which left it to the States, not the Federal Government, to devise appropriate remedies for state violations of the Fourth Amendment. But *Wolf* was overruled by *Mapp v. Ohio, supra,* and thus the significance of those words in the *Rea* case has been removed.

The Court in the *Cleary* case relied on *Stefanelli v. Minard,* 342 U. S. 117 (1951), to support its decision. There the Court refused to sanction an injunction against state officials to prevent them from using, in a state criminal trial, evidence seized by state police in an alleged violation of the Fourteenth Amendment. The Court reasoned that to do so would "touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the

power of the States." *Id.* at 120. Though disclaimed by the Court here, the *Stefanelli* decision was likewise compelled by the *Wolf* case. Justice Brennan, dissenting in *Cleary,* explained the holding in *Stefanelli* as follows: "To have authorized the Federal District Courts to order the exclusion in the state criminal trials of evidence unlawfully obtained by state officials would have sanctioned accomplishing indirectly what *Wolf* forbade directly. But *Wolf* has been overruled – and the accomodation of *Wolf* which required the decision in *Stefanelli* is no longer a concern." 83 S.Ct. at 395-96.

Bolger, according to the Court, is not subjected to any denial of federal constitutional rights by the withholding of injunctive relief. The Court alluded to *Mapp v. Ohio, supra,* as a basis for Bolger's objection to the admission of the illegal evidence in state court, and should this fail, he could seek review in the Supreme Court. But would *Mapp* compel a decision favorable to Bolger in state court? The reasoning of the Court raises some doubt.

The concurring opinion of Justice Goldberg expressed confidence that New York will exclude all the evidence here in question in the pending criminal proceeding due to "the commendably broad reading which the New York Court of Appeals has given this Court's decision in *Mapp v. Ohio.*" 83 S.Ct. at 390. Three New York cases were cited by Justice Goldberg in support of his statement. But another New York case, *People v. Dinan,* 229 N.Y.S. 2d 406 (1962), has declined to apply *Mapp* in an analogous situation. The New York Court of Appeals held that wiretap evidence was admissible in a state court prosecution notwithstanding the fact that it was obtained in violation of the Federal Communications Act. It reasoned that "a statute may not possess the sanction of a constitutional inhibition. . . ." *Id.* at 409. The interpretation of the *Mapp* case by the State of New Jersey is reflected in *State v. Carbone,* 183 A. 2d 1 (1962). "The federal rule excluding evidence obtained in violation of the federal statute does not apply to the states. . . . In *Mapp,* the Court . . . held the state courts must exclude evidence obtained by an unreasonable search and seizure in violation of the Fourth Amendment. *Mapp,* however, dealt solely with that constitutional provision. The federal rule excluding proof of messages intercepted in violation of section 605 rests upon the supervisory power of the judiciary rather than upon the command of either the statute or of a constitutional provision. We cannot assume that *Mapp* was intended to deny that thesis." *Id.* at 2. Perhaps still another interpretation of *Mapp* will be forthcoming in the future court decisions of other States. Thus it would seem that Justice Brennan summed up the applicability of *Mapp* in the instant case when he said: "Nor is it certain that a State is obliged to exclude evidence which is the product of violations of the Federal Rules—no decision of this Court has yet so held. . . ." 83 S.Ct. at 396.

The Supreme Court in *Elkins v. United States,* 364 U. S. 206 (1960), overruled the "silver platter" doctrine, thus barring the admittance in a federal court of evidence illegally obtained by a state officer. In support of its decision, the Court said: "To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis." *Id.* at 215. As noted by Justice Brennan, the

Cleary case is merely a *converse* situation to that present in *Elkins*. It would seem to follow that the Court's holding here would supplement *Elkins*. On the contrary, however, the decisions are in conflict.

Also to be considered is the argument that the decision in the *Cleary* case will invite federal officers to violate provisions of the Federal Rules. Justice Goldberg said it will not, but the dissenting opinion of Justice Douglas graphically expressed his concern—"Such an injunction should issue lest federal agents accomplish illegal results by boosting Oliver Twists through windows built too narrow by those Rules for their own ingress. It is no answer to say that the state agent was merely a nonparticipating observer, or that Oliver Twist was an innocent child." 83 S.Ct. at 393. Justice Douglas presents a strong point. Allied with it is the fact that the "free and open cooperation between state and federal law enforcement officers," which was a motivating factor in the *Elkins* decision, may well be impaired by the *Cleary* decision resulting in "an unhealthy form of state-federal cooperation." 83 S.Ct. at 394.

Returning to the questions posed at the outset, it seems the answers are not provided in the opinion of the Court. However, recognizing the proper allocation of *responsibility* between the Federal Government and the States may provide the key. Justice Douglas focused on this point when he said: "Here the evidence was obtained by federal agents in violation of the Federal Rules. It therefore involves no entrenchment on principles of federalism to hold that a Federal District Court may enjoin the production of such evidence in a state proceeding, regardless of who seeks to introduce it. The federal courts, rather than the state courts, have the *responsibility* of assuring that federal law-enforcement officers adhere to the procedures prescribed by the Federal Rules." 83 S.Ct. at 394. [Emphasis added.]

In any event, the answers appear to hinge upon which is the more important—the reluctance of federal courts to infringe upon state court proceedings or the assurance that a defendant to a state action is not deprived of his constitutional rights. My choice is the latter.

DONALD B. COFFIN

Constitutional Law—First Amendment Freedom of Association—

Corporate Practice of Law—

NAACP v. Button, 83 S. Ct. 328 (1963).

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Incorporated, (NAACP), is a non-profit corporation licensed to do business in the Commonwealth of Virginia; its purpose is to end racial discrimination in the United States, particularly in the schools. NAACP representatives in Virginia speak to groups of parents of Negro children in still-segregated schools, and urge them to join as petitioners in civil rights class suits handled by NAACP's staff of attorneys. In 1956, the Virginia

legislature amended, by the addition of Chapter 33, the existing statutory regulation of unethical and non-professional conduct by attorneys to include as a "runner" or "capper", in those sections forbidding solicitation, any agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability. NAACP moved to restrain the enforcement of Chapters 33 and 36, which prohibited the inducement of bringing suits; the Virginia Supreme Court of Appeals struck down Chapter 36, but found Chapter 33 applicable and constitutional. On writ of certiorari *held* Chapter 33 is so vague as to possibly prohibit NAACP's and its members' political expression through litigation, an activity protected by the First Amendment through the Fourteenth. *NAACP v. Button,* 83 S.Ct. 328 (1963). The Court found that under the authoritative construction of the Virginia Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys for assistance has committed a crime. The Court held that a state cannot foreclose the exercise of constitutional rights by mere labels, and that abstract discussion is not the only species of communication which the constitution protects against government intrusion.

The attitude of Virginia to NAACP is hostile, and it seeks for weapons against it. The opposition to the militant Negro civil rights movement engendered in the politically dominant white community, its background and effect, are chronicled in *NAACP v. Patty,* 159 F. Supp. 503 (E.D. Va 1958). This note seeks to answer two questions: Does the Court's holding adequately protect NAACP's legal activities in Virginia? If not, are there indications in this case that the Court will protect those activities if directly called on to do so?

The power to regulate the practice of law in the United States is inherent in the judiciary; it is part of the constitutional division of powers present in all states. *People v. Goodman,* 366 Ill. 346, 8 N.E. 2d 941 (1937). "From the thirteenth century to this day, in England the profession itself has determined who should enter it. In the United States the courts exercise ultimate control." *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957). Once this was an area of jealous exclusiveness, but today, in most jurisdictions, the rule has broadened so that statutes prescribing reasonable qualifications for practitioners of law will be given effect by the courts, but are not a limitation on the judicial power to prescribe further. *Cf.* Annot., 144 A.L.R. 150 (1943). Such statutes must never frustrate the exercise of judicial power. *Clark v. Austin,* 340 Mo. 467, 101 S.W. 2d 977 (1937). The instant case does not strike down as unconstitutional the regulation of the practice of law by Virginia, but rather a set of statutes whose vagueness and overbreadth threatened to prohibit simple referral to or recommendation of a lawyer, a privileged exercise of First Amendment rights. The traditional power remains in the courts of Virginia, and we now turn to examine the scope of that power, as applicable to our facts.

There is no judicial dissent from the proposition that a corporation cannot practice law. *Merrick v. American Security and Trust Co.,* 71 U.S. App. D.C. 72, 107 F. 2d 271 (1939); *Re Standard Tax and Management Corp.,* 181 Misc. 632, 43 N.Y.S. 2d 479 (1943); *Richmond Ass'n. C. M. v. Bar Ass'n.,* 167 Va. 327, 189 S.E. 153 (1937); *Divine v. Watauga Hospital,* 137 F. Supp. 628 (M.D.N.C. 1956); *Laskowitz v.*

Shellenberger, 107 F. Supp. 397 (S.D. Calif. 1952). Since a corporation cannot practice law directly, it cannot do so indirectly by employing competent lawyers to practice for it, *In Re Co-operative Law Co.,* 198 N.Y. 479, 92 N.E. 15 (1910), and an attorney who aids in this is subject to fine and disbarment. *Re Otterness,* 181 Minn. 254, 232 N.W. 318 (1930). Several of the features which characterize the instant case have been the subject of criticism. The slightest contact by the corporation with the attorney-client relationship has been held to upset that fiduciary balance, and thus not be a proper corporate activity, *Re Maclub of America, Inc.,* 295 Mass. 45, 3 N.E. 2d 272 (1936); in the case at bar, the forms signed by the parents authorizing suit in their names were sometimes blank. NAACP was actively concerned that the outcome of each case was consistent with its aims, and some litigants never had a second contact with the soliciting attorney. That the corporate activity is for the public good, and not for profit, has been offered in defense of the charge of unlawful practice and rejected. *People ex. rel. Courtney v. Ass'n. of Real Estate Taxpayers,* 354 Ill. 102, 187 N.E. 823 (1933); in the case at bar NAACP also argued its activities protected personal rights. A similarity in the interest of a corporation with those in whose names the suits are instituted failed to exempt an international union, which was found in a series of cases to be in a forbidden field, *In re Brotherhood of Railroad Trainmen,* 13 Ill. 2d 391, 150 N.E. 2d 163 (1958); *Hildebrand v. State Bar of California,* 36 Cal. 2d 504, 225 P. 2d 508 (1950); *Atchison, Topeka and Santa Fe Railway Co. v. Jackson,* 235 F. 2d 390 (10th cir. 1956); in our case NAACP urged that it had standing to represent the interests of its members, as well as its own. The majority does not reach the application of this traditional law to NAACP under a properly drawn statute or the exercise by the courts of their inherent powers. With such considerable control over the litigation and the resulting disruption of the attorney-client relation, and with the defense of the public good and interest of members differing apparently only in degree from those rejected, it seems the thrust of traditional law lies against NAACP. In spite of the instant case, NAACP will not be able to continue its legal activities in Virginia when that Commonwealth's courts rule against it unless NAACP can obtain a serious modification of traditional law. We turn now to the arguments for such modification, and their chance of success.

Justice Holmes tells us: '[P]recedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view." HOLMES, THE COMMON LAW 35 (1881). The cases dealing with the unlawful practice of law by a corporation always reach the same rule, but reveal a shift in their grounds. The first outstanding American case on point based its objection upon the impossibility of a corporation becoming an officer of the court and subject to its disciplines. *In Re Co-operative Law Co., supra.* This reasoning stemming from the old jurisprudential conception of corporate nature served as the basis for a large number of cases, *e.g., State ex rel. Lundin v. Merchants Protective Corp.,* 105 Wash. 127, 177 P. 694 (1919); *People v. Title Guarantee and T. Co.,* 227 N.Y. 366, 125 N.E. 666 (1919); *In Re Bensel,* 68 Misc. 70, 124 N.Y.S. 726 (1910). But with the growth of corporate activities, the judiciary's conception has been changing, not just as "a matter of technical legal construction, but a way of looking at corporations." *Neirbo*

Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939). And in modern times the use of this reason has been subjected to heavy criticism: "If a corporation undertakes to render legal service, obviously it will do so through attorneys admitted to practice law and subject to the control of the court in their conduct. The argument that 'a corporation cannot practice law' because it cannot do so in its own person, applies equally well to all other corporate acts." Weihofen, *"Practice of Law" by Non-Pecuniary Corporations: A Social Utility*, 2 U. CHI. L. REV. 119, 129 (1934). The more thoughtful of the modern corporate practice cases base their objection solely on the disruption of the attorney-client relationship caused by the cold touch of the lay intermediary. *NAACP v. Patty, supra; State Bar Ass'n of Conn. v. Connecticut Bank and T. Co.*, 145 Conn. 222, 140 A. 2d 863 (1958). It is no longer considered metaphysically impossible for a corporation to practice law, and it might be argued that the substitution of the protection of the fiduciary relation as the reason for the case rule smacks somewhat of sleight-of-hand. NAACP might well urge that in view of the inapplicability of the original reason upon which the prohibition of corporate practice of law is based, that the rule can be modified or terminated. There are indications in the case that the Court will not consider the new reason as adequate as the old in support of an absolute ban on corporate practice.

The Court, while avoiding an express rejection of the traditional approach to corporate practice, emphasized that there was no showing here of a serious danger of that professionally reprehensible conflict of interest which anti-solicitation rules seek to prevent, nor any danger that the attorney will desert or subvert the paramount interests of his clients. There is no mention that a corporation's nature should be a barrier in this area. When traditional law is applied by a lower court, or when new legislation is drafted which avoids the vagueness of Chapter 33, the Court might well rule that no longer is there an absolute prohibition against corporate practice of law because of the nature of a corporation, or its disruption of the attorney-client relation.

JAMES M. CASSIDY

Labor Law—State versus Federal Jurisdiction—

When a "Temporary Injunction" is a "Final Judgment"—

Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry, 83 S. Ct. 531 (1963).

S. J. CURRY, A NON-UNION FIRM, entered into a contract with the City of Atlanta, Georgia, for the construction of a sewage disposal plant. The contract stipulated that wages would conform to those paid for similar work in the area.

Local 438 asserted that Curry's wages did not in fact conform to other wages paid in the area for similar work. After failing in its attempts to obtain enforcement of the

wage clause by the city, the union placed a single picket at the site, bearing a placard publicizing the alleged violation of the contract. Workers of other contractors subsequently refused to cross the picket line. Construction slowed, Curry laid off thirty-seven of seventy-two men working on the job, and completion of the work within the contract period was threatened.

Thereupon the contractor sought relief by temporary restraining order, temporary injunction, and permanent injunction, ultimately winning a temporary injunction from the Supreme Court of Georgia. The union argued unsuccessfully that the picketing was a form of free speech and was therefore protected by the provisions of the fourteenth amendment. The temporary injunction issued, on the grounds that the real purpose of the picketing was to force Curry to hire only union laborers, which objective was illegal under Georgia's right-to-work law, GA. CODE ANN., §54-804.

On appeal, the United States Supreme Court reversed, ruling (1) that although the temporary injunction was not a final judgment on the merits, it did constitute a final judgment by the Georgia court as to its jurisdiction over the subject matter, and as such was reviewable under 28 U.S.C. §1257 (1948); and (2) that the dispute involved a practice that was at least an arguable violation of Section 8 (b) of the National Labor Relations Act, and therefore fell within the exclusive jurisdiction of the National Labor Relations Board.

The *Curry* decision represents a clear departure from the Court's old policy against review of temporary labor injunctions, as expressed in *Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc.,* 344 U.S. 178 (1952). In *Ledbetter,* the Court ruled that it had improvidently granted certiorari, since the action of the state court in issuing a temporary injunction did not constitute a final judgment for review.

The Court has for some time shown its willingness to review judgments in other areas before the cases were perfected in the lower courts. See *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541 (1949). However, since 1952 the *Ledbetter* case has allowed the state courts to act free of federal intervention in many labor disputes until the issuance of a "final judgment". The Court in *Curry* expressly refused to continue following the *Ledbetter* doctrine, finding that the original justification for the rule, based on the vagueness of Federal jurisdiction prevailing at the time, has been largely removed by the development of clearer guides as to the extent of the powers of the NLRB.

The point is a vital one for the unions, particularly in the Southern states, where organizational drives are confronted with state right-to-work laws prohibiting compulsory unionism, and making unlawful the use of picketing and other techniques designed to achieve such an objective. Since under Section 14 (b) of the Taft-Hartley Act states are permitted to outlaw the union shop even though the federal act allows it, state right-to-work statutes can seriously crimp labor tactics. It is true that where the labor conduct regulated by the state law is also an unfair labor practice under the federal law, the doctrine of pre-emption excludes state enforcement and assures the NLRB of exclusive jurisdiction. *Electrical Workers, Local 429 v. Farnsworth & Chambers Co.,* 353 U.S. 969 (1957). And even where the practice is only "arguably" an unfair labor practice under federal law, the NLRB has exclusive jurisdiction.

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955). See also, Merrifield, *Federal-State Jurisdiction in Labor Relations Law*, 29 GEO. WASH. L. REV. 318 (1960). But even where the normal guides indicate federal jurisdiction, heretofore the state courts have been relatively free to issue temporary orders and injunctions, on the theory that both the merits and the jurisdiction would be reviewable at the same time under 28 U.S.C. §1257 (1948).

In labor disputes, however, "temporary" court actions have a long history of mischief, as they are all too frequently the final practical determination of rights. Indeed, the dissent of Justices Douglas and Black in the *Ledbetter* case argues against that very evil.

In *Curry*, the union presented uncontested affidavits showing that not a single labor injunction has gone to a hearing on a final injunction in the State of Georgia in the past ten years. Brief for Petitioner, pp. 52-56. The Court, in the *Curry* opinion, expresses a fear that the issuance of a temporary injunction, "as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board." 83 S. Ct. at 536. See also, for a full and fascinating review of the history of the anti-labor injunction and the continuing efforts to curb abuses of this judicial weapon in the labor field, GREGORY, LABOR AND THE LAW, 95 *passim* (2d rev. ed. with 1961 supp.).

At a time when the unions are faced with the migration of industry from the unionized North to the relatively easier labor climate of the South, the *Curry* decision will enhance organized labor's opportunities to eliminate sectional labor advantages. With *Ledbetter* gone, or seriously undermined, the unions will find more effective organizational weapons at their disposal in "right-to-work" states, since the legality of their objectives, and thus their techniques, will now be determinable solely by the National Labor Relations Board not only in theory, but in practice.

JOSEPH T. WILKINS