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Recommended Citation

Wayne Rhine, *Barratry - A Comparative Analysis of Recent Barratry Statutes*, 14 DePaul L. Rev. 146 (1964)
Available at: <https://via.library.depaul.edu/law-review/vol14/iss1/11>

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BARRATRY—A COMPARATIVE ANALYSIS OF RECENT BARRATRY STATUTES

As part of the policy of massive resistance to the school desegregation case¹ and other civil rights decisions, seven southern states have amended their laws pertaining to barratry, champerty and maintenance.²

COMMON LAW BARRATRY

At common law barratry was defined as the offense of frequently exciting and stirring up quarrels and suits either at law or otherwise.³ Maintenance was assistance in a suit or action in which the assistant had no interest of his own; champerty was maintenance plus an agreement to share the subject matter of the suit if successful.⁴ Barratry was habitual maintenance with at least three offenses being required.⁵

Some or all of these definitions of barratry, champerty and maintenance have been codified by the various states,⁶ and are quite adequate, since prosecutions under barratry, champerty and maintenance statutes are rare in the United States and England.⁷ The doctrines are now limited to inter-

¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

² Ark. Laws 1958, No. 16, §§ 1-7; FLA. STAT. §§ 877.01-877.02 (1963); Ga. Laws 1957, No. 514; MISS CODE ANN. §§ 2049.01-2049.07 (Supp. 1962); S.C. CODE §§ 16-521-16-523 (1962); TENN. CODE ANN. §§ 39-3405-39-3410 (Supp. 1964); VA. CODE ANN. §§ 18.1-388-18.1-400 (1960).

³ *Churchwell v. State*, 195 Ga. 22, 26, 22 S.E.2d 824, 825 (1942). *State v. Batson*, 220 N.C. 411, 412, 17 S.E.2d 511, 512 (1941).

⁴ PERKINS, CRIMINAL LAW 449 (1957).

⁵ *Churchwell v. State*, *supra* note 3, at 23.

⁶ For example N.Y. PENAL LAW § 320 provides, "Common Barratry is the practice of exciting groundless judicial proceedings."

§ 321, Common Barratry is a misdemeanor.

§ 322, No person can be convicted of common barratry except upon proof that he has excited actions or legal proceedings in at least three instances, and with a corrupt or malicious intent to vex and annoy. ILL. REV. STAT. ch. 13, § 21 (1963) provides that if any person wickedly and wilfully incites and stirs up any suits or quarrels with a view to promote strife he is guilty of barratry. Punishment is set at a \$100 fine and attorneys may be suspended from practice for up to six months. § 22 provides that anyone who officiously intermeddles in any suit that does not concern such person by maintaining or assisting either party with money or otherwise to prosecute or defend the suit with intent to promote the suit is guilty of maintenance. The fine is the same as for barratry.

The statutes are aimed at the same conduct as were the common law offenses. The laws against champerty, maintenance and barratry are primarily to prevent multitudinous and useless suits as enterprises and speculation. *Milk Dealer's Bottle Exchange v. Schaffer*, 224 Ill. App. 411, (1922).

⁷ Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 67 (1935).

ference by a complete stranger to the litigation who is motivated by a wrongful intent such as stirring up groundless litigation.

RECENT STATUTORY REVISIONS

Prior to 1956, the seven southern states followed the common law definitions of barratry, champerty and maintenance. Georgia defined common barratry as the offense of frequently exciting and stirring up suits and quarrels between individuals.⁸

Since 1956 the seven southern states have been utilizing their amended barratry, champerty and maintenance laws as legal weapons to resist the efforts of such organizations as N.A.A.C.P. and C.O.R.E. in initiating civil rights suits.⁹

The recent statutory revisions in the South have taken the form of re-defining and extending the criminal offenses of barratry, champerty and maintenance.¹⁰ The acts are quite similar in effect with some of the statutes serving as the pattern for legislation in other states.¹¹

Virginia now has typical statutes defining barratry, champerty and maintenance. Barratry is the offense of stirring up litigation which is defined as instigating or attempting to instigate a person to institute a suit. In order for the act to constitute instigation, all or part of the expenses of litigation must be paid by the barrator. Such action does not amount to illegal instigation if the instigator is related by blood or marriage to the plaintiff or is entitled by law to share with the plaintiff in the money or property which is the subject of the litigation.¹²

The maintenance statute makes it unlawful for a person not having a direct interest in the litigation to support with money or other assistance any proceeding before a court or administrative agency against Virginia or any of its agencies.¹³

Thus, the Virginia maintenance statute has eliminated the requirement that the offending party be engaged in stirring up litigation, because the

⁸ GA. CODE ANN. § 26-4701 (1953). See also ARK. STAT. ANN. §§ 41-701-41-702 (1947).

⁹ Although the statutes do not mention N.A.A.C.P. or C.O.R.E. by name, it is apparent that the acts are aimed at these organizations. In *Scull v. Virginia ex rel Committee on Law Reform and Racial Activities*, 359 U.S. 344, 346-347 (1959), Chairman Thomson, while testifying in the course of the legislative battle over the barratry laws, stated that "with this set of bills . . . we can bust that organization [N.A.A.C.P.] . . . wide open."

¹⁰ 3 RACE REL. L. REP. 1257, 1263 (1958).

¹¹ E.g., the Tennessee statute. TENN. CODE ANN. §§ 39-3405-39-3410 (Supp. 1964) is almost a verbatim imitation of the Virginia statute. VA. CODE ANN. §§ 18.1-388-18.1-393 (1960).

¹² VA. CODE ANN. §§ 18.1-388-18.1-393 (1960).

¹³ VA. CODE ANN. §§ 18.1-394-18.1-400 (1960).

statute encompasses any arrangement where persons having no direct or pecuniary interest contribute toward expenses of a lawsuit *regardless of whether or not such action stirs up litigation*. In addition it is unlawful in that state to give or receive money, goods or service to induce the institution of a suit against Virginia or advocate such a suit regardless of motive.¹⁴

In addition, the common law requirement of frequently stirring up litigation (a minimum of three such offenses) has been eliminated and one such act would constitute the crime of barratry.¹⁵ The apparent reason for this is that the N.A.A.C.P. may institute just one action concerning civil rights and prevail. This would not constitute barratry at common law since it is not frequent stirring up of litigation.

The definition of "person" within the Virginia barratry statute has been expanded to include person, firm, partnership, corporation, organization or association.¹⁶ The purpose of this expanded concept of "person" is to permit the state to prosecute for barratry such unincorporated organizations as the Virginia Branch of the N.A.A.C.P. Such prosecutions would not be possible under the commonly accepted definition of person as a natural being or a corporation.

Virginia has been the only southern state to amend its statutes concerning running and capping.¹⁷ The offense now includes procurement of legal business for a corporation, partnership or association which compensates attorneys serving in proceedings where the group has no direct interest.¹⁸

¹⁴ VA. CODE ANN. §§ 18.1-394-18.1-400 (1960). In Virginia if the N.A.A.C.P. gave an individual money to institute a suit and that person never commenced the suit, the N.A.A.C.P. would still have violated the statute. To be guilty of maintenance in Illinois, one must assist or give a party money to actually prosecute or defend a suit. ILL. REV. STAT. ch. 13, § 22 (1963).

¹⁵ In New York three offenses are required to constitute barratry. N.Y. PENAL LAWS § 322. There have been no court rulings in Illinois as to whether three offenses are required in order to constitute barratry.

¹⁶ VA. CODE ANN. § 18.1-388 (1960). This definition of "person" has been adopted by three other states. See Ark. Laws 1958, No. 16, § 1; MISS. CODE ANN. § 2049.01; S.C. CODE § 16-523 (Supp. 1962).

¹⁷ At common law; a runner or caper was a person who acted as an agent for an attorney in the solicitation or procurement of business. The Virginia statute expanded this definition by including not only agents who solicit business for attorneys but for any person, partnership, corporation or organization which retains any attorney in connection with any judicial proceeding in which the person, partnership, corporation or organization is not a party and in which it has no pecuniary right or liability. The N.A.A.C.P. retains attorneys on its legal staff. Members of the N.A.A.C.P. legal staff explain the steps necessary to achieve desegregation to a meeting of a local N.A.A.C.P. branch. The attorney then circulates printed forms authorizing N.A.A.C.P. attorneys to represent the signers in legal proceedings. *N.A.A.C.P. v. Button*, 371 U.S. 415, 421 (1963). Thus the members of the N.A.A.C.P. would be guilty of soliciting legal business for an organization.

¹⁸ VA. CODE ANN. §§ 54-78-54-79 (1960).

The South Carolina barratry act is more limited in scope than the Virginia statute as there is a requirement of wilful solicitation or incitement of another to prosecute an action and the barrator must seek employment for himself or another to prosecute or defend the action.¹⁹

While the other states repeal prior inconsistent barratry acts, the South Carolina statute provides that the act shall not be construed as repealing any existing statutes or common law.²⁰ One possible explanation for this unique arrangement is that civil rights advocates will be prosecuted under the more stringent law while other violators will be punished under the common law doctrine of barratry.

Arkansas includes within its definition of a barrator any person who commits or proposes committing an act tending to breach the peace with the intent that such an act will result in a suit. The definition is also extended to any person who seeks out and proposes to another that they sue another person, Arkansas or the United States.²¹ Thus members of N.A.A.C.P. who conduct a sit-in, in order to test the legality of a segregation statute would be guilty of barratry as they are committing an act tending to breach the peace with the intent that the act will result in a test case. In addition, the statute would bar any class action, as the plaintiffs would have to seek out and propose to each other that they bring such an action. These two courses of conduct would never constitute the offense of barratry at common law. The Arkansas statute is truly a powerful weapon that can be used against those seeking to assert their civil rights.

In 1957 Georgia repealed its barratry statute and enacted a new law which included a broadened definition of a barrator.²² However this act was repealed and the present statute provides that any person who frequently incites and stirs up suits and quarrels is guilty of barratry. In addition attorneys or other persons are prohibited from offering money, property or things of value as an inducement to institute any action or proceeding.²³

¹⁹ S.C. CODE § 16-521 (1962). South Carolina directly punished the plaintiffs by providing that any person who wilfully prosecutes an action and who has no direct or substantial interest or who receives anything of value to induce the bringing of the suit is guilty of barratry.

²⁰ S.C. CODE § 16-525.

²¹ Ark. Laws 1958, No. 16, §§ 1-7.

²² Ga. Laws 1957, No. 514. A barrator is defined as any person who frequently engages in inciting and stirring up suits between individuals or between an individual and the state. Any person who commits an act which tends to breach the peace with the intention that such an act will result in litigation is also guilty of barratry. The act of proposing to another that he sue any person or Georgia is also deemed barratry.

²³ GA. CODE ANN. ch. 26-4701 (Supp. 1963).

Mississippi and Florida have also modified their laws pertaining to barratry, champerty and maintenance.²⁴

SANCTIONS

In another deviation from the common law codes in the other states, Arkansas, Georgia, Mississippi and South Carolina now consider barratry, champerty and maintenance as felonious.²⁵ The apparent reason for this is that the legislators of these four states believed that stringent penalties would deter the N.A.A.C.P. from instituting civil rights actions. Arkansas and South Carolina have set the punishment for a conviction at a maximum fine of \$5,000 or a maximum jail sentence of two years, or both. In addition, a guilty corporation or organization is forever barred from doing business in the state. Georgia provides for a jail sentence of from one to three years or a fine not exceeding \$5,000 or both. Mississippi provides for a one-year jail sentence.

Florida, Tennessee and Virginia still consider the offenses of barratry, champerty and maintenance as misdemeanors. However, Virginia and Tennessee revoke the charters of guilty corporations.²⁶

CONSTITUTIONALITY OF THE STATUTES

As a result of the decision in *N.A.A.C.P. v. Button*,²⁷ the constitutionality of the Southern barratry laws is doubtful. The gravamen of the decision is that the N.A.A.C.P. and its legal staff are modes of expression and association which Virginia may not prohibit as improper solicitation of legal business, despite its power to regulate the legal profession.²⁸

²⁴ FLA. STAT. §§ 877.01-877.02 (1963). The statute provides that whoever gives, promises, offers or conspires to do so, to any person, any valuable thing with the intent to stir up litigation or with the intent of assisting or influencing the accused, sick, injured or uninformed to sue or seek legal advice or service is guilty of barratry. Florida, like the other six southern states, exempts contingent fee contracts, banks, trust companies, and legal aid groups from the operation of barratry statutes.

MISS. CODE ANN. §§ 2044.01-2049.01 (Supp. 1962). The statute makes it unlawful for any person to promise, give, offer, or conspire to do so or to solicit, request or donate anything of value to any person to commence or further prosecute any proceeding. Upon a motion by one party, the opposing party must file an affidavit that he has not received or conspired to receive any valuable consideration or assistance as inducement to commence or further the suit.

²⁵ Ark. LAWS 1958, No. 16, § 2; GA. CODE ANN. ch. 26-4701 (1963); MISS. CODE ANN. § 2049.02 (Supp. 1962); S.C. CODE § 16-524 (1962).

²⁶ FLA. STAT. § 877.01 (1963); TENN. CODE ANN. § 39.3407 (Supp. 1964); VA. CODE ANN. § 18.1-390. Illinois provides for a \$100 fine and a suspension from practice for up to six months for attorneys found guilty of barratry. ILL. REV. STAT. ch. 13, § 21 (1963).

²⁷ 371 U.S. 415 (1963).

²⁸ This opinion coincides with the Opinion 148 of the American Bar Association, Opinions of the Committee of Professional Ethics and Grievances. The National

The Arkansas barratry statute was declared unconstitutional in the recent decision of *Bennet v. N.A.A.C.P.*²⁹ The Arkansas Supreme Court observed that the language of the statute was so indefinite but so inclusive as to acts that it impaired freedom of thought and action in relation to access to the judiciary; the court recognized that our form of government guarantees uninhibited access to the judiciary.³⁰

In the only court test to date of the Mississippi statute, the plaintiff sought a declaratory judgment that the barratry statute was unconstitutional. The court held that there was no evidence of any threat to enforce the act against the plaintiff.³¹ There is no record of any attempt to enforce the statute in Mississippi.

CONCLUSION

There is a pragmatic reason for striking down these recent barratry laws; if these laws are upheld, southern officials might well utilize them in preventing N.A.A.C.P. and C.O.R.E. from instituting civil rights suits. If this occurs the entire line of desegregation decisions will become mere academic opinions.

It is therefore submitted that the recently enacted barratry statutes will eventually be declared unconstitutional. It is apparent that these statutes have been enacted for the sole purpose of eliminating or impeding a deluge of civil rights litigation. No other jurisdiction has discovered any compelling reason to expand their definitions of barratry, champerty and maintenance.

The Illinois statute is apparently adequate since the present statute is identical to the first Illinois barratry statute enacted in 1827.³² This is true despite the tremendous amount of litigation in Illinois.³³ Yet, the seven southern states have radically changed their statutes. The inescapable conclusion is that these states are attempting to punish those groups and individuals who seek to obtain equal rights for all men.

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Lawyer's Committee of the American Liberty League was actively soliciting legal business in order to test the constitutionality of New Deal Legislation. The A.B.A. held that the question presented involved problems of political, social and economic character that have long since assumed the proportion of national issues which transcend the range of professional ethics.

²⁹ 370 S.W.2d 79 (Ark. 1963).

³⁰ *Id.*, at 82.

³¹ *Darby v. Daniel*, 168 F. Supp. 170 (1958).

³² REV. CODE OF LAWS OF ILL. § 104 (1827).

³³ As of July, 1964, there were 108,536 cases pending in the Circuit Court of Cook County. Supreme Court of Illinois Statistical Bulletin Sept. 28, 1964, p. 1.