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THE NEED FOR ADMINISTRATIVE DISCRETION IN THE REGULATION OF THE PRACTICE OF MEDICINE

HAROLD WRIGHT HOLT*

I. *The Necessity of Regulation*

At the present time it is axiomatic that the progress of science during the last century has made it possible for mankind to live in greater comfort. It is none the less true that the possible use by ignorant and incompetent persons of many of the discoveries of the period has increased the risk of injury and suffering. An unskilled physician with access to radium and x-rays has far greater potentialities for causing disaster to his fellow-men than the doctor of a century ago. The latter's nauseous preparations, whatever their curative powers, were less likely than an improper use of radium or x-rays to thwart nature's efforts to restore the patient to normal health. To borrow a simile from the Supreme Court of North Carolina:

"An uneducated, ignorant and incompetent doctor turned loose on a helpless community is as deadly as a park of artillery."¹

One method of lessening the possibility of disaster from incompetent followers of the healing art, which calls for a specialized learning and technique, is for the state to require all who wish to engage therein to demonstrate their possession of certain mental qualities and of a minimum of special skill. This method raises peculiar problems because of disagreement as to what methods are efficacious in the diagnosis of ailments and their cure. One person may believe in hypnotism as a curative, while another deems the use thereof wholly evil. Each, however, may believe the other to be sensible and intelligent in other matters. The inability of present day science to prove either belief wholly erroneous is likely to intensify each person in his conviction. Before prescribing the qualifications for one who wishes to follow the vocation of healing, therefore, the state should first decide what modes of treatment alleged to cure disease should come within the scope of the regulatory legislation. In other words, it must determine what content is to be given to "practice of medicine" as that term is used in a statute.²

*Professor of Law, University of Illinois College of Law.

¹State v. Siler, 169 N. C. 314, 318, 84 S. E. 1015, 1017 (1915).

²"Practice of medicine" is susceptible of various meanings, but in this article will be used to denote the practice of the art of healing by any method, unless the context indicates a more restricted meaning.

Is the power of a state limited to regulation of such practice as is in accord with the principles of well-established schools of medical thought? Or may it regulate the practice of any and all forms of the healing art? There is also the question whether or not the Federal Constitution imposes limitations on the attempts of a state to discriminate between different schools of medical belief, such as allopathy, eclecticism, homeopathy, osteopathy, etc. With the intrinsic merits of different systems of therapeutics this article will not deal. It will consider what powers a state may exercise under the Federal Constitution in requiring those who wish to practice the healing art to demonstrate their possession of certain intellectual and educational qualifications, and what discriminations it may make among the different schools of medical belief and branches of the healing art. It will stress especially the importance of administrative discretion in the effective administration of a statute regulating the practice of medicine.

II. *The Objectives of Regulatory Legislation*

An analysis of the purposes of statutes regulating the practice of medicine, hereinafter for convenience termed the medical practice acts, may aid in determining the bounds of a state's powers. Its power under the Fourteenth Amendment to require those wishing to serve the public as physicians to demonstrate their possession of a certain degree of skill and learning was settled by the Supreme Court of the United States in *Dent v. West Virginia*.³ Frequent reference is found to the statement therein made by Field, J., that a state may prescribe such rules as will in its judgment tend to secure its people against "the consequences of ignorance and incapacity as well as of deception and fraud."⁴

These statutes are not designed to benefit directly practitioners of medicine or any group that treats the ailments of human beings. Undoubtedly, by imposing educational and moral qualifications as prerequisite to the right to practice, they do decrease the number of those who earn their livelihoods through the healing art. Those satisfying the tests acquire a privilege which those not qualifying cannot obtain. This, however, is not necessarily such discrimination as to violate the Fourteenth Amendment.⁵ If an incidental effect of

³129 U. S. 114, 9 Sup. Ct. 231 (1889).

⁴See for example *Graves v. Minnesota*, 272 U. S. 425, 427, 47 Sup. Ct. 122 (1926); *Hebe Co. v. Calvert*, 246 Fed. 711, 719 (S. D. Ohio 1917); *State v. Randolph*, 23 Ore. 74, 82, 31 Pac. 201, 202 (1892).

⁵*Dent v. West Virginia*, *supra* note 3; *Watson v. Maryland*, 218 U. S. 173, 30 Sup. Ct. 644 (1910).

the legislation is to protect the competent and reputable from the odium of incompetent and disreputable professional brethren, such effect does not in itself invalidate the statute.⁶ The main purpose, however, must not be the creation of a class with a monopoly of the privilege to practice.⁷

The "consequences of ignorance and incapacity as well as of deception and fraud" which the medical practice acts are designed to avoid are not primarily financial. The general omission in these statutes of regulations as to professional fees is some evidence that their basic aim is not the protection of the patients' pocket books. More significant are the dicta that it is within the police power of a state to forbid the practice of certain systems of healing by unlicensed persons regardless of their receipt of compensation.⁸ Statements that it is practice for hire by unlicensed persons which the legislature prohibits, occur in cases arising under statutes expressly forbidding such persons to practice medicine for compensation.⁹ There are dicta, on the other hand, that a state may not prohibit rendition of *all* gratuitous services of a medical nature by unlicensed persons. These, however, occur in decisions construing broad statutory prohibitions of practice by unlicensed persons.¹⁰

⁶State v. Gallagher, 101 Ark. 593, 597, 143 S. W. 98, 100 (1912); Lynch v. Kathman, 180 Iowa 607, 611, 163 N. W. 408, 410 (1917); Kennedy v. Schultz, 25 S. W. 667, 668 (Tex. Civ. App. 1894). But if this effect is other than incidental, the validity of the statute seems doubtful. In holding unconstitutional COLO. REV. STATS. (1908) § 6068, relative to the revocation of a physician's license, the Supreme Court of the state said that the provision had been enacted to "enforce the ethical notions of some members of a profession, rather than for the protection of the public at large." *Chenoweth v. State Board of Medical Examiners*, 57 Colo. 74, 83, 141 Pac. 132, 135 (1913).

⁷Smith v. Texas, 233 U. S. 630, 638, 34 Sup. Ct. 681, 683 (1914). See also *Nelson v. State Board of Health*, 108 Ky. 769, 782, 57 S. W. 501, 504 (1900) and *Lincoln Medical College v. Poynter*, 60 Neb. 228, 231, 82 N. W. 855, 856 (1900).

⁸People v. Vermilion, 30 Cal. App. 417, 418, 158 Pac. 504 (1916). See also *Nelson v. State*, 97 Ala. 79, 80, 12 So. 421, 422 (1893).

⁹See *State v. Johnson*, 84 Kan. 411, 413, 114 Pac. 390, 391 (1911); *Territory v. Newman*, 13 N. M. 98, 103, 79 Pac. 706, 707 (1905); *Board of Medical Examiners v. Blair*, 57 Utah 516, 525, 196 Pac. 221, 225 (1921). In *State v. Pirlot*, 20 R. I. 273, 38 Atl. 656 (1897), the court pointed out that while the statute declared the practice of medicine and surgery without first exhibiting and registering a certificate from the State Board of Health to be an offense, the fine was limited to the practice of medicine or surgery for reward or compensation.

¹⁰In *Locke v. Ionia Circuit Judge*, 184 Mich. 535, 539, 151 N. W. 623, 625 (1915), the court stated that the police power of a state was scarcely adequate to forbid *all* "gratuitous and humane acts of relief and kindness to the suffering common amongst mankind in all ages and places."

One undoubted purpose of this legislation is to protect people from the evils of ignorant reliance upon empirics or those who practice the art of healing by trial and error, without the aid of a body of principles founded upon a knowledge of science.²¹ In part, therefore, the medical practice acts are designed to prevent deception as to the ability and qualifications of those who would practice the healing art. To effect this purpose, they render illegal certain conduct by unlicensed persons because of its tendency to mislead the public. It may be an offence for an unlicensed person even to hold himself out to the public as ready to treat human diseases and ailments.²² It will be immaterial whether he receives compensation for what he does.²³ If an act prohibits the use by an unlicensed person of the title of "doctor" or any other word, or combination of letters, intended to designate the person with whose name the same is used as a practitioner of medicine, the prohibition is reasonably designed to secure the public "from quacks, humbugs, and charlatans masquerading under the venerable and honorable titles of surgeons, physicians, and doctors. . . ."²⁴ This is neither a deprivation of rights in violation of the Fourteenth Amendment nor an unconstitutional interference with free speech.²⁵ These statutes, however, do not seek primarily to

²¹Nelson v. State Board of Health, *supra* note 7.

²²See, for example, IND. ANN. STAT. (Burns, 1926) § 12243; KY. STAT. (Carroll, 1930) § 2618; N. M. ANN. STAT. (1929) tit. 110, § 110; ORE. CODE ANN. (1930) tit. 68, § 2117; TEX. REV. CRIM. STAT. (1925) art 741; VT. GEN. LAWS (1917) § 6093. See also State v. Zechman, 157 Iowa 158, 163, 138 N. W. 387, 389 (1912); State v. Lindsay, 86 Vt. 201, 203, 84 Atl. 612, 613 (1912).

²³Singh v. State, 66 Tex. Crim. Rep. 156, 165, 146 S. W. 891, 895 (1912).

²⁴State v. Oredson, 96 Minn. 509, 513, 105 N. W. 188, 189 (1905).

²⁵State v. Crombie, 107 Minn. 171, 119 N. W. 660 (1909); Reeves v. State, 36 Okla. Crim. Rep. 186, 253 Pac. 510 (1927). See also People v. Mash, 235 Ill. App. 314 (1925); State Board of Medical Examiners v. De Young, 6 N. J. Misc. 231, 140 Atl. 676 (1928), *aff'd*, 105 N. J. L. 255, 143 Atl. 813 (1928).

Since these acts seek to save the public from being deceived as to the abilities and qualifications of healers, a reasonable distinction may be made between treatment by prayer and religious faith only, and treatment which not only relies upon the creation of mental states in the person treated, but also involves special skill, experience, and ability to diagnose disease. Such a distinction will not necessarily be invalid as constituting a denial of equal protection of the laws under the Fourteenth Amendment. In *People v. Jordan*, 172 Cal. 391, 400, 156 Pac. 451, 454 (1916), the court said: "Those who believe that Divine power may be invoked by prayer for the healing of the body believe also that God is all-powerful. Patients receiving their ministrations know this, and therefore no fraud or injury may be practiced upon such persons by reason of any lack of skill by the healers in determining the nature of the diseases to be treated. But those who elect to depend upon

restrain the activities of those who would deceive their patients by treating them according to a system of therapeutics different from that which the patients expect. In prosecutions for practice in violation of a statute it is not a defence that the patients treated by the accused knowingly accepted the mode of treatment.¹⁸ It is also immaterial whether the patients are benefited by the treatment, or not.¹⁷

It seems that a medical practice act is not only a statute seeking to protect the individual from deception, as Mr. Justice Field stated,¹⁸ but it is also a general health measure to protect the public.¹⁹ It is only within recent years that this latter aspect has received attention.²⁰ The individual patient, therefore, does not have an "inalienable right" under the Fourteenth Amendment to any mode of medical treatment that he sees fit to select.²¹ The most that he may assert is a right to select any one of several modes of treatment—treatment according to the principles of any one of several schools of medical belief—which, because of the reasonable possibilities of benefit it has for him, will tend to promote the general health. Admittedly, there is sound reason why a state should have power to compel persons afflicted with communicable diseases to submit to treatment by practitioners who have been trained in the teachings of some one of several schools of medical belief.²² The same power exists as to persons suffering from other diseases, but for reasons of convenience or policy the state may not choose to exercise it.²³ The forms of the state's

some other systems of treatment have a right to protection by the state from the ministrations of unskilful, uneducated persons." See also *Crane v. Johnson*, 242 U. S. 339, 37 Sup. Ct. 176 (1917).

¹⁷See *State v. Fenter*, 204 S. W. 733, 734 (Mo. App. 1918).

¹⁸*People v. Saunders*, 61 Cal. App. 341, 215 Pac. 120 (1923); *State v. Miller*, 146 Iowa 521, 124 N. W. 167 (1910); *People v. Eiferssen*, 136 Misc. 32, 239 N. Y. Supp. 111 (Sup. Ct. 1930); *State v. Miller*, 229 N. W. 569 (N. D. 1930); *Swarts v. Siveny*, 35 R. I. 1, 85 Atl. 33 (1912); *Germany v. State*, 62 Tex. Crim. Rep. 276, 137 S. W. 130 (1911).

¹⁹*Dent v. West Virginia*, *supra* note 3.

²⁰*State v. Smith*, 233 Mo. 242, 255, 135 S. W. 465, 472 (1910); *State v. Oredson*, *supra* note 14.

²¹*Williams v. Scudder*, 102 Ohio St. 305, 308, 131 N. E. 481, 482 (1921).

²²See *Piel Bros. v. Day*, 278 Fed. 223, 227 (E. D. N. Y. 1922); *Locke v. Ionia Circuit Judge*, *supra* note 10; *State v. Smith*, *supra* note 19.

²³*Board of Medical Examiners v. Freenor*, 47 Utah 430, 449, 154 Pac. 941, 947 (1916).

²⁴*State v. Marble*, 72 Ohio St. 21, 36, 73 N. E. 1063, 1067 (1905); *State v. Burroughs*, 130 Ore. 480, 280 Pac. 653 (1929). In *D. S. Kresge Co. v. Ottinger*, 29 F. (2d) 762, 764 (S. D. N. Y. 1928), the court said: "The New York Legislature was not obligated, if it legislated at all, to require an examination of the

medical control have, therefore, the two-fold aspect of limitations upon both the healer and the patient.

III. *The Power to Regulate Practice of Healing Carried on by Material or Mechanical Means or Methods*

Legislatures have failed to give proper emphasis to this primary purpose of protecting the general health. Many of these acts have consequently been unskillfully drafted. Judicial reasoning upholding their validity is often not convincing, however desirable one may consider the actual decisions.

This primary purpose of conserving the general health reveals itself in consideration of the problem whether there are modes of treating human ailments so simple, that a state may not, under the Fourteenth Amendment, require of those practicing the same, a certain degree of skill and learning. Apparently there are no modes so simple that regulation may not be imposed. There is no substantial authority denying validity of regulations applicable even to the simplest forms of healing, although the Supreme Court of North Carolina has said that:

"All the law so far has done or can do is to require that those practicing on the sick with *knife and drugs* shall be examined and found competent by those of 'like faith and order.'"²⁴

In the case before the court, however, this statement was unnecessary. The defendant was charged with the unlawful practice of medicine in violation of a statute that defined practice as treating for a fee any case of disease by any method, whether or not involving, the use of drugs, surgical operations or surgical or mechanical appliances. Applicants for licenses who belonged to schools other than the regular schools of medical thought were required to stand examinations only in the subjects taught in their own colleges.

The statute expressly excluded from its provisions those professing to cure by prayer without the use of drugs or material means. Applicants graduating after 1900 were to submit satisfactory proof of their graduation from a medical school in good standing requir-

customer by a licensed optometrist before permitting a sale of eye glasses to him. *Doubtless it could have done this.* But it might adopt a halfway measure, safeguarding him by in effect placing sales in charge of a man of scientific training, and rendering the services of the latter naturally available." (The italics are the writer's.) See also *Commonwealth v. S. S. Kresge Co.*, 166 N. E. 558 (Mass. 1929).

²⁴State v. Biggs, 133 N. C. 729, 741, 46 S. E. 401, 405 (1903). Italics are the writer's.

ing an attendance over a period of not less than three years, and supplying such facilities for clinical instruction as the board of state medical examiners should approve. The defendant, who had advertised as a "non-medical" physician curing diseases by a system of drugless healing and not by faith, had administered massages, baths and physical culture, had manipulated the muscles, bones, spine and solar plexus, had kneaded the muscles, and had advised what to eat. The court held that the defendant was not guilty of a violation of the statute.

The North Carolina statute did not provide for a system of examinations and educational requirements commensurate in the court's mind with the simplicity of the defendant's mode of treatment. If it had, one may doubt whether the court would have made the statement hereinbefore quoted. The case can hardly be cited to sustain the proposition that some methods of treating human ailments are so simple that they may not be constitutionally subjected to regulation.

A statute forbidding an unlicensed person to treat for hire any human disease, injury or deformity, may bar a chiropodist (one who treats only diseases and malformations of the hands and feet) from practicing his limited branch of the healing art without a license, but the prohibition will violate the Fourteenth Amendment if it requires him to secure the education and license of a regular physician or surgeon, an osteopath or chiropractor.²⁸ Under such an act a power to regulate the practice of chiropody so as to protect the people from incompetent and unscrupulous chiropodists would be converted into a power to prohibit the practice of chiropody as a separate calling.

IV. *The Power to Regulate Practice of Healing by Means of Faith or Mental Cures*

A state may compel those who hold themselves out as able to cure or relieve disease by mental or faith treatments to procure licenses. *Bennett v. Ware*²⁹ was an action in tort to recover damages for malicious prosecution and false imprisonment based on proceedings that had charged the plaintiff with practicing medicine without a license, in violation of statute. In those proceedings which the defendant had instituted, the plaintiff had been released. The defendant demurred to the declaration in the tort action on the grounds (1) that the plaintiff had really been guilty of the offence charged and (2) that there had been probable cause. The court found that there had

²⁸State v. Armstrong, 38 Idaho 493, 225 Pac. 491 (1923).

²⁹4 Ga. App. 293, 61 S. E. 546 (1908).

been probable cause and upheld the demurrer. It held, however, that the plaintiff had not been "practicing medicine" within the meaning of the statute which

"was not intended to regulate the practice of mental therapeutics or to embrace psychic phenomena. These matters lie within the domain of the supernatural. Practical legislation has nothing to do with them. If they are a part of a man's faith, the right to their enjoyment cannot be abridged or taken away by legislation."²⁷

The Court thought that the statute could be sustained only on the theory that it was necessary to protect the public from quack medical practitioners and imposters whose method in treating disease was to prescribe drugs and medicines.

The plaintiff in the tort action was a "magic healer", who used no drugs, but treated his patients by laying his hands on the parts of their bodies said to be affected. He claimed that his power of healing came directly from God. The statute under which he was prosecuted defined the practice of medicine as prescribing for compensation, for the use of any person, any drug, medicine, appliance, apparatus or other agency, whether material or not, for the cure or relief of any ailment or disease. It required physicians to have certain education qualifications and to submit to examination before one of three boards of examiners. One of these boards was composed of allopaths, another of homeopaths, and the third of eclectics. The court was of the opinion that the scope of the statute was limited to those who desired to practice according to the tenets of one of these three schools. It was the examination requirement that seemingly played a large part in its decision that practice according to the teachings of any other school could not be the "practice of medicine" as the statute used that phrase.

The language of this decision may justify the exemption from a medical registration act of those who profess to cure by faith or mental treatment. Since it dealt merely with the construction of an existing act, the decision does not go so far as to deny legislative power to regulate such systems of treatment. Against any intimation in this case that such regulation is not within a state's police powers, are numerous decisions that within the scope of a state's power to regulate the practice of the healing art are mental healers,²⁸

²⁷Bennett v. Ware, *supra* note 26, at 298, 61 S. E., at 548.

²⁸*Ex parte Smith*, 183 Ala. 116, 63 So. 70 (1913). See also *People v. Treuner*, 144 Ill. App. 275 (1908).

magnetic healers (who seem generally to use massage),²⁹ and various other kinds of drugless healers,—osteopaths,³⁰ chiropractors,³¹ and others.³² The statutes under which these drugless healers were convicted forbade unlicensed persons to treat or to offer to treat human diseases, or to profess publicly to assume the duties of a physician. The inclusion of any of them within the scope of an act was merely a matter of statutory interpretation.

The weakness of the dictum in *Bennett v. Ware* appears upon a consideration of what we may term the Christian Science cases. According to Christian Science, sickness is a subjective state, or a delusion, that a true knowledge of God and Christ dispels. This faith teaches that the only cure for what is really mental error is spiritual treatment.³³ Christian Science healers who render spiritual treatment in accord with the principles just mentioned may, without a violation of the Fourteenth Amendment, be subjected to a medical practice act. The statute may make it unlawful for them to practice according to the tenets of their faith until they have shown a board of examiners that they have a certain degree of skill in, and knowl-

²⁹*People v. Gordon*, 194 Ill. 560, 62 N. E. 858 (1902); *State v. Hughey*, 208 Iowa 842, 226 N. W. 371 (1929).

³⁰*Bragg v. State*, 134 Ala. 165, 32 So. 767 (1901); *Eastman v. People*, 71 Ill. App. 236 (1896); *Little v. State*, 60 Neb. 749, 84 N.W. 248 (1900). *Contra*: *Nelson v. State Board of Health*, *supra* note 7. Cases in which the courts have held that osteopaths were not within the scope of medical practice acts, have arisen generally under acts that forbid unlicensed persons to apply drugs, medicine, or other agencies or applications, for remedial purposes. *Hayden v. State*, 81 Miss. 291, 33 So. 653 (1903); *State v. Herring*, 70 N. J. L. 34, 56 Atl. 670 (1904); *State v. Liffing*, 61 Ohio St. 39, 55 N. E. 168 (1899).

³¹*Cummings v. State*, 214 Ala. 209, 106 So. 852 (1926); *People v. Walker*, 291 Ill. 535, 126 N. E. 120 (1920); *State v. Frutiger*, 167 Iowa 550, 149 N. W. 634 (1914); *State v. Rolph*, 140 Minn. 190, 167 N. W. 533 (1918); *State v. Smith*, *supra* note 19; *Harvey v. State*, 96 Neb. 786, 148 N. W. 924 (1914); *People v. Ellis*, 162 App. Div. 288, 147 N. Y. Supp. 681 (2d. Dept. 1914); *State v. Greiner*, 63 Wash. 46, 114 Pac. 897 (1911). See also *Swarts v. Siveny*, *supra* note 17.

³²*Smith v. State*, 8 Ala. App. 352, 63 So. 28 (1913), *aff'd*, 183 Ala. 116, 63 So. 70 (1913) (vitapathic or scientific healers); *People v. Moser*, 176 Ill. App. 625 (1913) (laying on hands); *Witty v. State*, 173 Ind. 404, 90 N. E. 627 (1910); *People v. Mulford*, 140 App. Div. 716, 125 N. Y. Supp. 680 (4th Dept. 1910), *aff'd*, 202 N. Y. 624, 96 N. E. 1125 (1911); *State v. Pratt*, 80 Wash. 96, 141 Pac. 318 (1914) (suggestive therapists); *State v. Miller*, 229 N. W. 569 (N. D. 1930); *State v. Smith*, 127 Ore. 680, 273 Pac. 343 (1929) (naturopaths); *Commonwealth v. Seibert*, 262 Pa. 345, 105 Atl. 507 (1918) (neuropaths).

³³See MARY B. EDDY, *SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES* (Official ed. 1912) c. 7.

edge of, the same subjects as are required of physicians of the allopathic, homeopathic or eclectic schools.³⁴ Decisions may of course interpret an act as inapplicable to Christian Science healers without denying the power of the state to bring them within the field of the act's operation.³⁵

If Christian Science healers are within the terms of a medical practice act, the question arises whether there has been a violation of those provisions of a state's constitution which guaranteed to its inhabitants freedom to worship according to the dictates of conscience. These statutes allow one in an abnormal condition of health who is not a Christian Scientist, to be treated pursuant to a system in accord, or at least not at odds, with the patient's religious beliefs. In so doing, do these statutes violate the provisions of the Federal and state constitutions which insure freedom of worship and prohibit the grant of special or exclusive rights, privileges and immunities? The difficulty in answering these questions is due to the close connection between religion and the art of healing. They have been closely intertwined in the past and today. While the practice of the healing art is not limited to a priestly class, the line of demarcation between the two is far from distinct.³⁶

In determining the extent to which a state may regulate the practice of the healing art without infringing on constitutional guarantees of freedom of conscience and worship, the significant factor, according to the Supreme Court of Nebraska, is the receipt or non-receipt of compensation by the practitioner.³⁷ That court believes "that the exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship. Neither is it the performance of a religious duty. . ."³⁸

It is not clear whether the court thought that all acts of worship cease to be such if done for compensation. If it did, its statement would seem to be too sweeping.³⁹

In reality there is, so far as the Christian Science healer is concerned, a conflict between his claim to freedom of conscience and of

³⁴State v. Bushnell, 40 Neb. 158, 58 N. W. 728 (1894); State v. Morrison, 98 W. Va. 289, 303, 127 S. E. 75, 80 (1925).

³⁵State v. Lee Chue, 130 Ore. 99, 109, 279 Pac. 285, 288 (1929); State v. Mylod, 20 R. I. 632, 40 Atl. 753 (1898).

³⁶See WORCESTER, RELIGION AND MEDICINE—THE MORAL CONTROL OF NERVOUS DISORDERS (1908) published by Moffat, Yard & Company, New York.

³⁷State v. Bushnell, *supra* note 34.

³⁸State v. Bushnell, *supra* note 34, at 169, 58 N. W., at 732.

³⁹See People v. Vogelgesang, 221 N. Y. 290, 116 N. E. 977 (1917).

practice of religious belief, and the claims of other individuals to security of health. The state has an interest in the free practice of religious belief. It also has an interest in the general health. The balance between these conflicting claims and interests would seem to have been so struck that the healer may, under the constitutional guarantees, enjoy freedom of opinion, but not necessarily freedom of action.⁴⁰

Let us look at the problem from the standpoint of the individual who wishes to have Christian Science treatment. It seems that he is allowed freedom of action so long as the preponderant belief of the people of the state, expressed in its legislation, is that the particular conduct will not harm the general health. The state in order to guard its interest in the general health, may require him to take action at odds with his beliefs when it deems that any other course of conduct will be detrimental to the health of others. Compulsory vaccination legislation is, therefore, valid under the United States Constitution.⁴¹ It has been held that legislation compelling the quarantine of persons afflicted with communicable venereal diseases does not violate due process, even though the patients are not allowed to be quarantined in their own homes, but are compelled to submit to quarantine at state institutions.⁴²

It is hard to see how the state can safeguard its interest in the general health unless it may compel the individual to take action necessary for the preservation or restoration of his own. There may be controversies as to what such action should be, but if any one of several modes of treatment might reasonably lead to the recovery of the individual from an abnormal condition, the state may require that

⁴⁰See *Fealy v. Birmingham*, 15 Ala. App. 367, 73 So. 296 (1916); *State v. Peters*, 87 Kan. 265, 123 Pac. 751 (1912); *State v. Miller*, 229 N. W. 569 (N. D. 1930); *State v. Marble*, *supra* note 23; *cf. Reynolds v. United States*, 98 U. S. 145 (1878).

⁴¹*Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358 (1904).

⁴²*Ex parte McGee*, 105 Kan. 574, 185 Pac. 14 (1919); *Ex parte Caselli*, 62 Mont. 201, 204 Pac. 364 (1922); *Ex parte Company*, 106 Ohio St. 50, 139 N. E. 204 (1922). See also *Brown v. Manning*, 103 Neb. 540, 172 N. W. 522 (1919). By a four to three decision, the Supreme Court of Michigan seems to have held, in an action for damages from confinement in a detention hospital, that it was a question for the jury whether the patient had been unreasonably refused quarantine in her own home. *Rock v. Carney*, 216 Mich. 280, 185 N. W. 798 (1921). In *Wragg v. Griffin*, 185 Iowa 243, 170 N. W. 400 (1919), it was held that a board of health had no power to compel one suspected of having a venereal disease to submit to extraction of blood for use in the Wasserman tests. It has been held, however, that one arrested on a charge of aiding or abetting prostitution may, under statute, be compelled to allow an extraction of his blood for this purpose. *People v. Thomas*, 133 Misc. 145, 231 N. Y. Supp. 271 (Sup. Ct. 1928).

some one at least of these modes be tried. If any of these modes consists of principles and practices in harmony with, or not contrary to, the teachings of certain religious groups, the state is not extending a preference to these groups as religious bodies. *It is giving preference to a mode of practicing the healing art.*

When a person wishes the services of a professional healer, the state may limit his selection to those trained according to the principles of certain schools of medical belief.⁴³ If a state does exercise this power, it may punish as accomplices those members of a patient's family who, with knowledge of the healer's lack of a valid unrevoked license, cooperate with him in an honest attempt to alleviate suffering.⁴⁴

No one will now deny a state this power to compel an individual to pursue a certain line of conduct for the sake of the general health when he is suffering from what the state considers a communicable or contagious disease. There is no need here to justify that power. So far as other than contagious or communicable ailments are concerned, it may be inexpedient or impolitic for a state to force one afflicted with such an ailment to pursue any line of conduct to rid himself thereof. However, there would seem to be good reason why a state might try to do so. The need of a healthy population to defend the state in time of war might itself be sufficient ground. There are other good reasons for the exercise of this power. The condition of an individual's health is a matter of public interest. The health of a population has a direct bearing on its industrial efficiency. The education of a sickly population is more difficult and expensive than the training of a healthy one. Failure of individuals to preserve their bodily well-being may tend to affect the death rate so adversely that insurance rates will be on a higher basis than would obtain if more care were directed to the maintenance of the individual health.⁴⁵

V. *The Power to Require Candidates Trained in One School of Medical Belief to Show a Knowledge of Other Schools*

What significance lies in the recognition of a public interest in the general health strong enough to enable a state to limit an individual in his selection of possible healers? With the realization that a state may restrain the practice of certain systems of healing, the courts should cease to state that in the application of medical practice acts

⁴³At least it may limit his selection to those persons who have been licensed by the state. See *Ex parte Wideman*, 213 Ala. 170, 104 So. 440 (1925).

⁴⁴*People v. Albrexstondare*, 71 Cal. App. 339, 235 Pac. 87 (1925).

⁴⁵*Board of Medical Examiners v. Freenor*, *supra* note 22, at 450, 154 Pac., at 947.

no schools of medical thought are to be preferred over others.⁴⁶ Adherence to the idea that there can be no such discrimination has involved the courts in a problem to which they have given no satisfactory solution. This problem came with the rise of the new methods of healing, such as osteopathy, which were not, perhaps, known at the time of the enactment of the legislation. The question then arose whether one who wished to practice according to the principles of one of these newer methods was deprived of due process under the Fourteenth Amendment if he had to submit to examination, especially in therapeutics, at the hands of examiners composed of members of schools opposed to his own.

Some courts held that a medical practice act with these provisions was not violative of due process. The legislature, they held, was not to prefer one school of medical thought over another, and a board of examiners was not to use its powers for the purpose of building up certain schools of thought at the expense of others; but it was within the legislative discretion to lay down qualifications for practice that should be of general application.⁴⁷ One of these might be the passing of an examination set by a board of examiners; and although the members thereof might belong to schools of thought opposed to those of certain candidates, the board could examine such candidates in subjects which, like *materia medica* or therapeutics, caused the most contention. A legislature might, of course, separate certain branches of the healing art, like dentistry and osteopathy, from the art of healing as a whole. It might then provide that, to secure licenses to practice these limited branches, candidates need show proficiency only in their principles and practices. If those who wished to practice other limited branches of the healing art, like chiropractic, had to pursue the same course of study as was required of those wishing licenses for general medicine and surgery, the discrimination against chiropractors and in favor of dentists and osteo-

⁴⁶State v. Heath, 125 Iowa 585, 589, 101 N. W. 429, 431 (1904); Gee Wo v. State, 36 Neb. 241, 246, 54 N.W. 513, 515 (1893); Dowdell v. McBride, 18 Tex. Civ. App. 645, 648, 45 S. W. 397, 398 (1898). For statutory provisions forbidding discrimination against any school of medical thought, see R. I. GEN. LAWS (1923) c. 159, § 6.

⁴⁷State v. Wilcox, 64 Kan. 789, 68 Pac. 634 (1902); Harvey v. State, *supra* note 31. See also Louisiana State Board of Medical Examiners v. Fife, 162 La. 681, 111 So. 58 (1927); Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 So. 809 (1898); State Board of Medical Examiners v. College of Mecca, 142 Atl. 409 (N. J. 1928); Board of Medical Examiners v. Blair, 57 Utah 516, 196 Pac. 221 (1921).

paths did not contravene the Fourteenth Amendment.⁴⁸ It was for the legislature to decide what schools of medical thought should enjoy licensing requirements based on proficiency in the courses of study advocated by those particular schools. Little attention seems to have been paid to the possibility that some candidates would be unable to find institutions to instruct them in *all* the subjects a knowledge of which was necessary to pass the examinations, as well as in *all* those on which the system of healing they desired to practice was based.⁴⁹ There was seldom any recognition of the almost inevitable prejudice felt by members of an old established school of medical thought for those of a younger one.⁵⁰ There was nothing, so the courts said, to prevent a candidate, once he had met the requirements and obtained his license, from practicing according to any system of therapeutics he was pleased to select.⁵¹ These statements set forth the views of many courts. Let us examine them.

The permission just described is of questionable value to a licensed practitioner. Unless the treatment such a practitioner uses accords with the principles of some school that the state expressly recognizes in its statutes, he will incur the risk of an indictment for manslaughter in the event of the patient's death.⁵² In an action for negligence in treatment brought by a patient, the practitioner's exercise of due care and skill will be measured by the standard of care and skill of the ordinary follower of the system which the practitioner professes to follow.⁵³ In a criminal prosecution for manslaughter, however, the patient's consent will not be a defence because the state will prosecute the practitioner for his failure to perform a duty the law has imposed on him to safeguard the interest of the state in the lives of its people.⁵⁴

⁴⁸Louisiana State Board of Medical Examiners v. Fife, *supra* note 47.

⁴⁹But see *People v. Lewis*, 233 Mich. 240, 206 N. W. 553 (1925).

⁵⁰See *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 595, 84 Pac. 39, 41 (1906) and *People v. Schaeffer*, 310 Ill. 574, 583, 142 N. E. 248, 251 (1923). See also *Brown v. People*, 11 Colo. 109, 17 Pac. 104 (1888) and the dissenting opinion of Campbell, J., in *People v. Phippin*, 70 Mich. 6, 31, 37 N. W. 888, 900 (1888).

⁵¹*Carpenter v. State*, 106 Neb. 742, 749, 184 N. W. 941, 944 (1921); *Germany v. State*, *supra* note 17, at 279, 137 S. W., at 132; *Johnson v. State*, 267 S. W. 1057 (Tex. Civ. App. 1925).

⁵²Should the patient, before requesting the services of such a practitioner, know of the principles of the system used, he might be barred from recovering civil damages. See *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376 (1904); *Wilcox v. Carroll*, 127 Wash. 1, 6, 219 Pac. 34, 36 (1923).

⁵³*Spead v. Tomlinson*, *supra* note 52. See also (1924) 158 LAW TIMES 377.

⁵⁴*Spead v. Tomlinson*, *supra* note 52, at 59, 59 Atl., at 380.

Moreover, it is doubtful whether a practitioner, who has been licensed as a follower of one of the schools of medical thought recognized by the act, but has treated a case in good faith according to the therapeutics of some other school not so recognized, will escape civil liability to a patient if the treatment has not succeeded. Perhaps he will not be held liable to a patient to whom in advance of treatment he has explained in detail the principles and practices of the system.⁵⁵ It would often be difficult for a practitioner, however, to establish to the satisfaction of a jury that he gave such an explanation.⁵⁶ The off-hand judicial allowance of the right of a licensed practitioner to use any system of treatment fails to take account of the fact that the individual practitioner within any one of the schools of medical thought who moves apart from his fellows has the cards stacked against him. His attempt must succeed. Otherwise he acts at his peril. On the other hand, if he contents himself with following the recognized methods of his school, he will be held to the use of only due care and will have the professional view-point with him in establishing it.

There are strong possibilities for injury in allowing persons to practice systems of therapeutics in which they have not been examined and found to be skilled.⁵⁷ These dangers the courts overlook when they state that once a candidate has passed the examinations he

⁵⁵See *Higgins v. McCabe*, 126 Mass. 13 (1878); *Spead v. Tomlinson*, *supra* note 52; *Wilcox v. Carroll*, *supra* note 52.

⁵⁶If he is not able to do so, the plaintiff in the action for negligent treatment, would introduce as experts to testify as to the propriety of the treatment given him, other members of the school to which the defendant professes to belong. These witnesses would naturally uphold, as the only proper treatment, that which the principles of their school teach. See *Bowman v. Woods*, 1 Green 441, 443 (Iowa 1848); *Patten v. Wiggin*, 51 Me. 594 (1862). In theory the defendant could introduce the testimony of other competent physicians that the treatment given by him accords with the principles of their school. If the jury then finds that the defendant has satisfied the standard of due care set by that school, the plaintiff might recover only nominal damages, if his action is for breach of contract. If it sounds in tort, he would recover nothing. See *Williams v. Poppleton*, 3 Ore. 139, 146 (1869); *Browning v. Hoffman*, 86 W. Va. 468, 477, 103 S. E. 484, 487 (1920). Actually it will be frequently difficult in the days when a system of healing is fighting for equality of recognition with older schools, for the defendant healer to procure witnesses who can qualify as experts and testify in his behalf. See *Carpenter v. Blake*, 60 Barb. 488, 524 (N. Y. 1871); *Remley v. Plummer*, 79 Pa. Super. Ct. 117, 123 (1922).

⁵⁷Intimations of the undesirable possibilities are found in *State v. Mylod*, *supra* note 35, at 640, 40 Atl., at 756 (1898) and in the dissenting opinion in *State v. Johnson*, *supra* note 9.

may practice any system of therapeutics that he chooses. A statute making a diploma from a legally chartered medical school the prerequisite for a license, so interpreted as to entitle to a license a holder of a diploma from a reputable college which teaches a system of therapeutics arising after the passage of the act, better protects the public.⁵⁹ The theory that a general examination in medical science will satisfactorily test qualifications to practice according to the principles of any of the special schools of medical thought is not a desirable one on which to base a medical practice act. It is a theory that seems plausible, but it will not work satisfactorily.

The alternative solution of the problem raised by the requirement that a medical practice act should not be so read as to prefer one school of medical thought over others, was to construe the act to apply only to the followers of those schools of healing whose courses of study included the subjects in which the statute ordered examinations.⁶⁰ If, for example, an act required all who wished to practice "medicine and surgery", to pass examinations in subjects forming the curriculum of a regular or allopathic college of medicine, and the board of examiners was composed of allopathic physicians, the statute would be construed as not applying to osteopaths.⁶¹ Sometimes resort was had to the principles of statutory construction embodied in the maxim "*noscitur a sociis*". By this reading, a statute that forbade persons, not licensed, to prescribe any "drug or medicine or other agency" for the treatment of a disease was interpreted as forbidding the use by unlicensed persons of *material* agencies, which like drugs and medicines were administered to produce effects by virtue of their own potencies. The statute was held not to apply to persons other than those using these material agencies.⁶² Those not within the scope

⁵⁹See *Driscoll v. Commonwealth*, 93 Ky. 393, 20 S. W. 431 (1892).

⁶⁰See cases cited *infra* note 60.

⁶¹*Hayden v. State*, *supra* note 30. So also under a statute making possession of "a diploma from a reputable and legally chartered medical college", a prerequisite to a certificate to practice, it was held that a college teaching osteopathy was not a "medical college" within the meaning of the statutes. *Nelson v. State Board of Health*, *supra* note 7.

⁶²*State v. Herring*; *State v. Liffing*, both *supra* note 30. Chiropractors were held not to come within the scope of a medical practice act defining the practice of medicine or surgery as investigating or diagnosing, or offering to investigate or diagnose, any physical or mental ailment "with a view of relieving the same as is commonly done by physicians and surgeons", or suggesting, recommending, prescribing or directing for the use of a sick, injured or deformed person any drug, medicine, means or appliance for the intended relief, palliation or cure of the sickness, injury or deformity, with the intent of receiving therefor compensation. *State v. Fite*, 29 Idaho 463, 159 Pac. 1183 (1916).

of the statute needed no license to practice their methods of healing. The unfortunate result of this second alternative was to place the public health in jeopardy by allowing persons who had not been examined to set themselves up as able to treat the ills of their fellows. When the courts were reproached for this, they asserted that the remedy for this evil was with the legislature.⁶² It could amend the medical practice act so as to bring within its terms a branch of the healing art previously excluded therefrom.⁶³

No medical practice act should attempt to prescribe the scope and content of examinations in detail. Medicine is a highly progressive science. It is in a state of constant change incident to discoveries made by those engaged in its pursuit, and to advances in the sciences of biology, chemistry and physics. Even within a comparatively short span of years examinations for practitioners of a certain branch of medicine should vary not merely in severity, but in content. The examinations required of an allopathic medical student in 1900 might well be insufficient in 1930 to test fitness to practice. If the progress that render changes in examinations desirable would occur only at intervals of a generation, legislative amendment of a medical practice act would keep the requirements for a license abreast of the times. The advance of knowledge, however, is gradual. The need is to provide for a system of examinations that will be flexible; and this can best be done by virtue of the rule-making power conferred on the officer in charge of examinations and licensing. The examiners must be able to require the applicants from year to year to prove themselves sufficiently cognizant of the science of their time. The purpose of the act is to secure for the public the services of men of good moral character, possessed of a training that will enable them to use such means as the science of the time puts at their disposal. The possession of such training must be ascertained by experts. Consequently, the legislature should leave it to the officer or administrative body in charge of licensing to prescribe from time to time rules of general application for the examination of candidates.

Such a statute does not deprive any one of due process under the Fourteenth Amendment.⁶⁴ The safeguard is the judicial insistence that the examiners do not have arbitrary power to grant or refuse

⁶²See *Nelson v. State Board of Health*, *supra* note 7.

⁶³After the decision in *State v. Liffing*, *supra* note 30, such an amendment of the Ohio statutes was made. See *State v. Gravett*, 65 Ohio St. 289, 62 N. E. 325 (1901).

⁶⁴*Douglas v. Noble*, 261 U. S. 165, 43 Sup. Ct. 303 (1923).

licenses.⁶⁵ If, in the case of any one person, the examiners should abuse their authority, a judicial review of their conduct would give him a remedy.⁶⁶ The rule-making authority may prescribe only those regulations that would reasonably tend to accomplish the statutory object,⁶⁷ and its provisions are carefully scrutinized by judicial authority in the interest of reasonable adaptation to that end. It could not, for example, authorize the promulgation of a regulation whereby a candidate would fail to secure a license merely because he failed to pass satisfactorily an examination in a subject familiarity with which would only remotely affect his fitness to serve the public.⁶⁸ Nor may an examining board require a higher degree of skill from a candidate for a license than the standard then prevailing among those already engaged in that branch of the healing art.⁶⁹ Only by a gradual process extended over a period of years would an examining board be able to require candidates to show a higher degree of skill than that prevailing at the passage of the act.

A medical practice act drawn in accordance with these principles brings into harmony the interest of the state in the conservation of the health of its population and the individual interest in freedom of action. It entails no greater uncertainty than inheres in a statute that

⁶⁵People v. McGinley, 329 Ill. 173, 179, 160 N. E. 186, 189 (1925).

⁶⁶The determination of the Board respecting the competency of a candidate for a license would be reviewed by the courts in "a proper proceeding where it appears that the board acted unreasonably, arbitrarily, unfairly, illegally, or under a misconception of the statute and the powers thereby delegated." *Indiana State Board of Dental Examiners v. Davis*, 69 Ind. App. 109, 129, 121 N. E. 142, 148 (1918). See also *In re Thompson*, 36 Wash. 377, 379, 78 Pac. 899, 900 (1904).

The medical practice act should prescribe some mode for a judicial review of the conduct of the examiners to determine whether or not there had been an abuse of authority. See *Ewbank v. Turner*, 134 N. C. 77, 46 S. E. 508 (1903); *Kenney v. State Board of Dentistry*, 26 R. I. 538, 59 Atl. 932 (1904).

⁶⁷People v. Kane, 288 Ill. 235, 239, 123 N. E. 265, 266 (1919).

⁶⁸No case has been found on this point concerning the rights of a candidate for a license to practice medicine, but the principle has been applied in a case concerned with the examination of a candidate for a license to practice barbering. See *Timmons v. Morris*, 271 Fed. 721 (W. D. Wash. 1921).

Md. Laws 1896, c. 378, § 5 states that a candidate for a license to practice dentistry "may be examined...with reference to qualifications" by the board of dental examiners and obtain a certificate upon "passing an examination satisfactory to said board". The Maryland Court of Appeals in construing this section said: "To hold that this language would permit an examination in astronomy, classics, mathematics, or even in the kindred study of medicine, would be to adopt a forced and violent construction of the law, not for the purpose of sustaining, but defeating it." *State v. Knowles*, 90 Md. 646, 656, 45 Atl. 877, 878 (1900).

⁶⁹*Ex parte McManus*, 151 Cal. 331, 339, 90 Pac. 702, 704 (1907).

requires a candidate for a license to practice medicine to submit, as a prerequisite to examination, "a diploma issued by some legally chartered medical school the requirements of which shall have been at the time of granting such diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year. . . ."⁷⁰ That group is a voluntary association of institutions giving medical education. It is not a part of a state government. The requirement, nevertheless, is valid, notwithstanding that it sets a standard which is a scientific variable.⁷¹ Such an act allows gradual changes in the requirements for a license in response to the advance of science, but it, of course, applies a standard common to all applicants at a given time.

With respect to professions other than that of medicine, one finds vague statements as to the limitations of a state's power to specify the subjects in which a candidate for a license must pass examinations. A board of accountancy examiners cannot require candidates for professional certificates to show themselves versed in astronomy or civil engineering.⁷² Nor may a board of examining architects require prospective followers of their profession to pass examinations in theology.⁷³ On the other hand, a candidate for a license to practice medicine may have to show a certain degree of learning and skill in a system of treating ills that is alien to the principles that he professes to follow.⁷⁴ There is no real inconsistency here. However legislatures may classify those who treat the ills of the human race, the practice of the art of healing by any method seems to involve diagnosis.⁷⁵ The better a practitioner is grounded in subjects the mas-

⁷⁰WASH. COMP. STAT. (Remington, 1922) § 10008.

⁷¹State v. Bonham, 93 Wash. 489, 161 Pac. 377 (1916). See also Jones v. Board of Medical Examiners, 111 Kan. 813, 208 Pac. 639 (1922); Williams v. Board of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019 (1894); State v. Morrison, 98 W. Va. 289, 127 S. E. 75 (1925).

⁷²State v. De Verges, 153 La. 349, 355, 95 So. 805, 807 (1923).

⁷³Ex parte McManus, *supra* note 69.

⁷⁴See cases cited *supra* notes 47-51.

⁷⁵Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286 (1912); Smith v. State, *supra* note 32; People v. Willis, 62 Cal. App. 717, 217 Pac. 771 (1923); State v. Heath, *supra* note 46; State v. Smith, *supra* note 19; People v. Allcut, 117 App. Div. 546, 102 N. Y. Supp. 678 (1st Dept. 1907); Swarts v. Siveny, *supra* note 17.

Under a statute making it unlawful for an unlicensed person to treat or profess to treat human ailments, an offense against the statute is committed by mere diagnosis even though the actual treatment is rendered in another state. Bailey v. Niebruegge, 211 Ill. App. 82 (1918). See also State v. Davis, 194 Mo. 485, 92 S. W. 484 (1906).

tery of which trains him in diagnosis, the better is secured the state's interest in the general health. Just what these subjects are, may be a matter of reasonable dispute. The state may limit the practice of the healing art to those methods of healing having a reasonable tendency to restore or preserve the health of a considerable number of the population; it may require a candidate for a license to show himself proficient in any subject knowledge of which any of the schools regards as essential to ability to diagnose. So long as a state cannot select any school of medical belief as the one complete and perfect school, it should demand this general knowledge.

As to subjects dealing with therapeutics, there would seem to be two alternatives for a legislature. One would be to make no requirement that a candidate show proficiency in therapeutics,—to adopt the principle that once a candidate has shown himself thoroughly grounded in subjects that fit him to diagnose, he may be trusted to show good judgment in finding a cure.⁷⁶ The other would be to require a candidate to show proficiency only in the therapeutics of the school to which he belonged.⁷⁷ There is much authority that permits a legislature to go beyond the latter requirement;⁷⁸ but it is submitted that the legislature should be content with merely requiring proficiency in the particular school to which a candidate belongs. It should provide for a system of licenses whereby the licensees have authority to practice only certain methods of healing in which the state has found them qualified.

Recent statutes frequently provide regulations for licensing as a class those who wish to practice the healing art by any means or method, and provide other regulations for those wishing to use drugless methods without surgery.⁷⁹ Some acts subdivide the general group

⁷⁶*Smith v. State*, *supra* note 32; *State v. Corwin*, 151 Iowa 420, 131 N. W. 659 (1911); *State v. Siler*, 169 N. C. 314, 84 S. E. 1015 (1915); *Williams v. Scudder*, *supra* note 20; *State v. Barnes*, 119 S. C. 213, 112 S. E. 62 (1922).

⁷⁷See, for example, IOWA CODE (1927) c. 122, § 2576.

⁷⁸See cases cited *supra* notes 47-51. Ill. Laws 1899, pp. 273-277, required an osteopath to pursue a course of study in subjects belonging to the allopathic curriculum in a medical college of the allopathic or regular school of belief as prerequisite to a license to practice surgery as well as osteopathy. One licensed to practice medicine and surgery could be licensed to practice osteopathy although he had never studied in a college of osteopathy, but only in an allopathic or regular medical college. Surgery was taught and practiced in colleges of osteopathy in the same manner and as thoroughly and completely as in regular or allopathic medical colleges. The statute was held to violate the Fourteenth Amendment in that it unreasonably discriminated against osteopaths. See *People v. Schaeffer*, *supra* note 50.

⁷⁹ILL. STAT. ANN. (Callaghan, 1924) c. 91, 5 *et seq.*

of drugless healers according to theories of drugless healing, and provide special requirements for each of these subdivisions.⁸⁰ The holder of a license for the practice of any of the drugless systems may be limited strictly to practice according to the principles of that particular system in which he has been trained. One with a license for the general practice of medicine and surgery will, on the other hand, have authority to use any system of therapeutics.⁸¹ In order that the public may be able to recognize the distinction between the holder of a general license and the holder of a license limited to the practice of one special system, it is a reasonable requirement, and one not in violation of, the Fourteenth Amendment, to limit the use of the title "doctor" to the holder of a general license.⁸²

VI. *The State's Power to Impose Educational Requirements Other than Professional*

A state may exercise wide discretion as to the preliminary education which shall be required of a candidate for a license to practice a system of healing. It can require a high school education. The subjects studied in high school and college may have no direct bearing on medical science, but their discipline prepares the mind the better to comprehend and assimilate medical studies.⁸³ According to the Supreme Court of the United States, a statute regulating the practice of dentistry may exact not only a high school training, but also graduation from a dental college or dental department of an university, as a prerequisite for examination.⁸⁴ There seems to be no reason why a similar requirement may not be made for those wishing to follow many, if not all, branches of the healing art.⁸⁵ The dis-

⁸⁰The constitutionality of such a classification is clear. *People v. Witte*, 315 Ill. 282, 146 N. E. 178 (1925). "Classification of persons in legislative regulations may be on any practical substantial basis that has relation to the subject regulated and that is not purely arbitrary and essentially unjust in its operation upon the rights of persons." *Noble v. State*, 68 Fla. 1, 4, 66 So. 153, 154 (1913).

⁸¹*People v. Witte*, *supra* note 80. See also *People v. Barnett*, 240 Ill. App. 357 (1926); *State Board of Medical Examiners v. De Baun*, 147 Atl. 744 (N. J. 1929). It is not unconstitutionally discriminatory to allow physicians and surgeons to treat diseases of the eyes, but to deny this privilege to osteopaths. See *Ex parte Rust*, 181 Cal. 73, 183 Pac. 548 (1919).

⁸²The question was left open in *People v. Siman*, 278 Ill. 256, 115 N. E. 817 (1917) and *People v. Schaeffer*, *supra* note 50. *But see* the cases cited *supra* notes 14 and 15.

⁸³*People v. Ratledge*, 172 Cal. 401, 406, 156 Pac. 455, 457 (1916).

⁸⁴*Graves v. Minnesota*, *supra* note 4.

⁸⁵*State v. State Board of Medical Examiners*, 209 Ala. 9, 95 So. 295 (1923); *Cutty v. Carson*, 125 Md. 25, 93 Atl. 302 (1915); *Larson v. State*, 285 S. W. 317

inction drawn between medical college graduates and those who are not, whereby, only the former are allowed to take the examinations required of candidates for licenses, is reasonable. A medical college faculty, which has had the applicant under its instruction for a period of years is reasonably considered to be well qualified to determine whether or not he has acquired a sufficient training to warrant his commencing practice, and the examination by the state board of examiners is merely a check on the soundness of the decision of the faculty.⁸⁶ Another reason for the distinction is that instruction spread over a period of years gives a sounder training than the same course crammed into a shorter space of time.⁸⁷ Because of the importance of a sound professional training, a legislature may require a medical college to maintain also such clinical and hospital facilities as meet with the approval of the board of examiners.⁸⁸ The discretionary authority of the examiners to give or to refuse approval of a college must, of course, be exercised reasonably. Their refusal of approval would be subject to judicial review.⁸⁹

As has been pointed out, an act regulating the practice of medicine may not be so framed as to give a monopoly to a favored group.⁹⁰ The requirements set must be such as are attainable by reasonable study and application. They must have some tendency to ensure protection to the public from the dangers of incompetent and ignorant practitioners.⁹¹ Because of a fear of monopolistic tendencies, perhaps, courts are generally hostile towards statutory provisions that require a medical school to limit the number of students or graduates in order to acquire good standing.⁹² The dislike of the

(Tex. Crim. App. 1925). In Illinois a requirement that a candidate for a license to practice a system of treating ailments without the use of drugs, medicine or operative surgery, must be a graduate of a professional school, college or institution teaching the particular system, has been upheld. *People v. McGinley*, 329 Ill. 173, 160 N. E. 186 (1928).

⁸⁶*State v. McIntosh*, 205 Mo. 589, 613, 103 S. W. 1078, 1085 (1907).

⁸⁷*Horton v. Clark*, 316 Mo. 770, 778, 293 S. W. 362, 364 (1927). See also *People v. Walder*, 317 Ill. 524, 527, 148 N. E. 287, 288 (1925).

⁸⁸ALA. CODE ANN. (1923) § 2837.

⁸⁹This would seem to follow from the following decisions: *Iowa Eclectic Medical College Association v. Schrader*, 87 Iowa 659, 55 N. W. 24 (1893); *State v. North*, 316 Mo. 1050, 294 S. W. 1012 (1927); *State v. Chittenden*, 112 Wis. 569, 88 N. W. 587 (1902).

⁹⁰See *supra* note 7.

⁹¹See *supra* notes 3 and 4.

⁹²*Iowa Eclectic Medical College Association v. Schrader*, *supra* note 89. See also *Castellini v. New Jersey State Board of Examiners of Nurses*, 101 N. J. L. 245, 128 Atl. 544 (1925).

Missouri court for a requirement of a full-time faculty is more difficult of explanation.⁸³

Not infrequently statutes prescribe the length of time during which a candidate must have pursued his professional studies. The courts have seldom considered the reasonableness of such a requirement.⁸⁴ In New York a statute required an applicant for a license to practice dentistry to submit (1) satisfactory evidence of a preliminary education equivalent to graduation from a high school, and (2) from a registered dental school or from a registered medical school followed by at least two years' study of dentistry in a registered dental school.⁸⁵ The Court of Appeals held these requirements neither so arbitrary nor so unreasonable as to violate the Fourteenth Amendment.⁸⁶ Discrimination, however, between followers of different schools of the healing art as to the length of time to be spent in professional education may be unreasonable. Suppose, for example, that a statute allows the holder of a diploma from a legally chartered medical college to take the examination required for practice of medicine according to the precepts of the regular or allopathic school, but does not oblige him to spend any stated period in the pursuit of his professional studies. If the same state requires one who wishes a license to practice osteopathy to pursue his course of study, which is less arduous and extensive, over a definitely prescribed length of time—four years, for example—there is a discrimination against the osteopaths that violates the requirements of due process.⁸⁷

Preferences given to graduates from the medical department of the state university, or medical colleges in the state of the examiners, over graduates from other medical colleges are uniformly held not discriminatory.⁸⁸ Actually, there may be no more reason for this discrimination than for that made by many of the early statutes, whereby those who had practiced for a number of years within the state were permitted to continue to practice without further ex-

⁸³State v. Clark, 230 S. W. 609, 611 (Mo. 1921).

⁸⁴See, for example, ILL. STAT. ANN. (Callaghan, 1924) c. 91, § 5; MASS. GEN. LAWS (1921) c. 112, § 2; N. C. CODE (1927) § 6613; WIS. STAT. (1929) c. 147, § 15.

⁸⁵N. Y. Laws 1901, c. 215, § 166. See also MINN. STAT. (Mason, 1927) c. 35, § 5707; Pa. Stat. 1920, § 16786, as amended by laws 1921, c. 100, § 5.

⁸⁶People v. Griswold, 213 N. Y. 92, 97, 106 N. E. 929, 931 (1914.)

⁸⁷People v. Love, 298 Ill. 304, 131 N. E. 809 (1921); State v. Gravett, 65 Ohio St. 289, 62 N. E. 325 (1901).

⁸⁸Czarnowski v. The Succession of Zeyer, 35 La. Ann. 796, 797 (1883); Moore v. Napier, 64 S. C. 564, 42 S. E. 997 (1902); State v. Currens, 111 Wis. 431, 439, 87 N. W. 561, 564 (1901). See also Wright v. Lanckton, 19 Pick. 288 (Mass. 1837).

amination, while those who had practiced for an even longer period outside of the state had to submit to examination.⁹⁹ There seems to be no decision on the question whether preferences may be given by a medical practice act of one state to graduates from medical colleges situated in certain other specified states over graduates from medical colleges in the remaining states of the Union.

VII. Conclusion

We may conclude that a medical practice act should not set the same examinations for all candidates for licenses regardless of the schools of belief to which they adhere. Such an act, to be successful, should be drawn on the premise that from time to time new ideas as to the restoration and preservation of health will arise and gain their followings. It will attempt to preserve the public from the evils of empiricism. It will also allow the lawful development of modes of treatment having reasonable possibilities of benefit to a considerable number in the state's population. It will lessen the constant pressure on the legislature for special legislation to recognize some particular new system of healing as lawful.¹⁰⁰ The problem, therefore, is to devise a scheme whereby the followers of all systems of healing having reasonable possibilities of benefit will secure licenses to practice only after they have demonstrated to an impartial board of examiners their possession of a modicum of ability to diagnose and to administer properly the therapeutics of their respective schools.

The success of such an act will depend on the provisions determining who shall decide whether or not candidates possess the required qualifications. The determination should be made by specially trained men. A legislature may, after hearings at which members of different branches of the medical profession and others interested have been heard, enact legislation prescribing certain qualifications satisfactory in broad outlines to the members of the profession as well as to the public. It can hardly lay down in advance a rule-of-thumb test wherewith to measure the qualifications of candidates for licenses. Even though a statute were to do no more than to require that any person wishing to practice dentistry should submit evi-

⁹⁹*Williams v. People*, 121 Ill. 84, 11 N. E. 881 (1887); *State v. Bair*, 112 Iowa 466, 84 N. W. 532 (1900); *Craig v. Board of Medical Examiners*, 12 Mont. 203, 29 Pac. 532 (1892); *Ex parte Spinney*, 10 Nev. 323 (1875); *People v. Hasbrouck*, 11 Utah 291, 39 Pac. 918 (1895). For an adverse criticism of the exceptions, see *State v. Carey*, 4 Wash. 424, 429, 30 Pac. 729, 730 (1892).

¹⁰⁰*People v. Witte*, *supra* note 80; *Newman v. State*, 58 Tex. Crim. Rep. 223, 124 S. W. 956 (1910).

dence that he had studied dentistry for one year in a dental school, and were to attempt to define "dental school" and "practice of dentistry", it is hard to see how the statute could be administered without some person or group to decide what institutions met the statutory definition and what conduct came within the scope of the act.

Conceivably, it might be left to the courts, on litigation instituted by one to whom a license has been refused by the licensing officer, to determine directly whether or not an institution is a "dental school" and whether or not certain conduct constitutes "practice of dentistry" within the meaning of the statute. This, however, would require the courts to pass on questions which they are no more fitted to answer than the ordinary legislature. It would require men not equipped with the requisite knowledge and training to determine matters peculiarly within the cognizance of the profession, and would, therefore, thwart the legislative purpose.¹⁰¹ The possession of the requirements set forth in the act will best be determined by a body composed of individuals who themselves have had the training required, or who by their own experience have some knowledge as to what such training comprehends. States have frequently availed themselves of the services of such bodies.

The statutes have shown considerable variation as to the manner of appointing persons to memberships on these boards. Some of the earlier acts provided that appointments to examining boards should be made by associations or societies in the state composed of members of the particular profession.¹⁰² In some instances these societies were regarded as governmental corporations.¹⁰³ Such a method of appointment does not violate constitutional provisions forbidding the granting of special privileges and immunities to particular persons.¹⁰⁴ A state may create a corporation to assist it in enforcing a statute by requiring the corporation to assume and discharge an obligation

¹⁰¹Raaf v. State Board of Medical Examiners, 11 Idaho 707, 715, 84 Pac. 33, 35 (1906); Indiana State Board of Dental Examiners v. Davis, *supra* note 66.

¹⁰²See Cal. Stat. 1875, c. 518, § 2; Ind. Laws 1887, c. 32, § 2; Md. Code of Pub. Gen. Laws 1888, art. 43, § 40, as amended by Md. Laws 1892, c. 296; N. H. Gen. Laws 1878, c. 132, §§ 2 and 4; N. J. Laws 1898, c. 74, § 2; N. C. Code 1883, §§ 3126, 3149.

¹⁰³N. C. Code 1883, § 3121; Wis. Stat. 1898, §§ 1422-1434. See Parke v. Bradley, 204 Ala. 455, 459, 86 So. 28, 31 (1920); Wilson v. Thompson, 83 N. J. L. 47, 60, 83 Atl. 502, 504 (1912).

¹⁰⁴Ferner v. State, 151 Ind. 247, 51 N. E. 360 (1898). Provisions of the type mentioned may be found in IND. CONST. (1851) Art. I, § 23; ILL. CONST. (1870) Art. IV, § 22; PA. CONST. (1873) Art. III, § 7.

that the state imposes on it.¹⁰⁵ Even though the professional society charged with the duty is not incorporated, it does not follow that the legislature may not invest it with this power of appointment. Precedent for allowing associations or guilds of professional workers to control admission to their calling is found at least as early as Henry VIII. Legislation in his reign directed the College of Physicians and Surgeons in London to appoint from their members examiners of applicants for licenses to "exercise or practice in physick through England."¹⁰⁶ Other provisions as to the appointment of examiners are collected in a footnote.¹⁰⁷ Under all these statutes, the appointment of examiners of candidates for licenses to practice medicine or branches thereof lay directly or indirectly with a limited number of definitely recognized groups adhering to certain schools of medical belief.

An effective method of easing the way for letting new blood and new ideas into the medical profession will take the management of examinations out of the control of established schools of medical thought. This some states have done.¹⁰⁸ By some statutes an officer of the state government, not necessarily a professional man, supervises the whole matter of examination and registration or licensing of candidates to practice any branch of medicine. He has power to summon to his aid in the preparation and grading of papers in subjects peculiar to any school of medicine persons who profess to fol-

¹⁰⁵The Slaughter House Cases, 16 Wall. 36, 64 (U. S. 1872).

¹⁰⁶14 & 15 HENRY VIII, c. 5 (1523).

¹⁰⁷For statutes directing appointment from names recommended by professional associations, see LA. REV. STAT. ANN. (Marr, 1926) § 4482; Tex. Gen. Laws 1901, c. 12, § 3; VT. GEN. LAWS (1917) §§ 6082-6084; Wis. Stat. 1898, § 1435. A statute requiring that the state board of medical examiners be physicians of known ability who were graduates of some medical college recognized by the American Medical Association, has been held valid. *Dowdell v. McBride*, 92 Tex. 239, 47 S. W. 524 (1898).

Indiana at one time had a statute that forbade more than three of the board of medical examiners to be of one political party and prohibited any school or system of medical thought from having a majority of members on the board. All the examiners were to be practicing physicians and graduates of colleges of medicine in good repute, but no one was to be a professor or teacher in a college or university having a medical department and each of the four largest systems of medicine in the state was to have one representative on the board. Ind. Laws 1897, c. 169, § 4.

¹⁰⁸ILL. STAT. ANN. (Callaghan, 1924) c. 24a, § 61; MASS. GEN. LAWS (1920) c. 112; NEB. COMP. STAT. (1929) c. 71, art 3; N. Y. CONS. LAWS c. 140 (Education Law) §§ 1250 *et seq.*

low the same.¹⁰⁹ This officer would have a reasonable discretion as to what schools of medical belief he would so recognize. His refusal, however, to call to his assistance a committee of followers of a particular school might well be held unreasonable if a considerable portion of the inhabitants of the state believed that system to be beneficial. In such a case the court might by mandamus direct him to select persons from such school to aid him in the preparation and grading of examinations.¹¹⁰

A medical practice act that puts a non-professional official in charge of examination and registration, and invests him with power to frame with the assistance of experts rules regulating the content of examinations, may give power legislative in its character to the executive branch of the state government. It may submit individual right to regulation at administrative discretion. Nevertheless, it is submitted that it is only under such a statute that the claim of the individual citizen to freedom of action—whether freedom to pursue a branch of the healing art as a vocation, or freedom to decide who shall treat his ailments—may reasonably expect to receive unbiased consideration.

¹⁰⁹ILL. STAT. ANN. (Callaghan, 1924) c. 24a, § 61. See also OHIO GEN. CODE (Page, 1926) c. 20, §§ 1274-1, 2, 3.

¹¹⁰There seems to be no direct authority as yet in support of this statement. *But see* State ex rel. Medical College v. Coleman, 64 Ohio St. 377, 388, 60 N. E. 568, 572 (1901). In that case an action of mandamus was brought to compel the State Board of Medical Registration and Examinations to recognize the relator as a "legally chartered medical institution in good standing". The court said: "The statute imports, at least, that the institution shall be one which has established a favorable reputation among members of the medical profession, and the board should not be required to recognize one, that, from the brief period of its existence, or the novelty of its system of treatment has not yet acquired such reputation, but might, in the judgment of the board be considered as still in an experimental state." It is suggested that similar principles should govern the recognition of a school of medical thought. See also *People v. McGinley*, *supra* note 85.