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LEGAL CONTROL OF MEDICAL PRACTICE: VALIDITY AND METHODS*

Kenneth C. Sears†

INTRODUCTION

Legislators have deemed it necessary, in order to protect the public interest, to exercise some control over the practice of the healing art by physicians, surgeons, chiropractors, osteopaths, dentists, etc., both as to who may practice and in what manner the practice may be carried on. Legislators have also required, in certain situations, that designated persons submit to medical treatment. Both types of regulation give rise to various legal and constitutional problems and it is the purpose of this paper to discuss some of these problems.

I

LICENSING—DUE PROCESS OF LAW

IN HIS opinion in *Lambert v. Yellowley*¹ Mr. Justice Brandeis uttered the following dictum: "Besides, there is no right to practice medicine which is not subordinate to the police power² of the States. . . ."³

* By publishing this article, and the others in this issue (see *infra*, pp. 715, 773), the REVIEW is participating in an extensive symposium entitled "Scientific Proof and Relations of Law and Medicine" (second series). This present group of articles is a continuation of a series published in various law reviews and medical journals in the Spring of 1943 [see 41 MICH. L. REV. 872 (1943)]. The Editor-in-Chief is Hubert Winston Smith, A.B., M.B.A., LL.B., M.D., Professor of Legal Medicine, University of Illinois; formerly, Research Associate on the faculties of Harvard Law School and Harvard Medical School.

An index containing references to articles in both series may be obtained from Professor Smith, College of Law, University of Illinois, Urbana, Ill. Price 20c.

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¹ 272 U. S. 581, 47 S. Ct. 210 (1926).

² For the benefit of the medical profession it is perhaps desirable to state that the term police power is just one way of expressing the idea that is better expressed by the words, regulatory power. Sometimes this regulatory power can be extended to a prohibition.

³ 272 U. S. 581 at 596, 47 S. Ct. 210 (1926).

One decision cited by Mr. Justice Brandeis to support his dictum was *Dent v. West Virginia*.⁴ That state in 1882 passed a statute which required every medical practitioner to meet one of three standards: (1) a graduate of a reputable medical college; (2) a practitioner in West Virginia continuously for ten years prior to March 8, 1881; or (3) pass an examination prepared by the State Board of Health. Dr. Dent had practiced only since 1876. He had a diploma from the American Medical Eclectic College of Cincinnati, Ohio, but that college had been determined by the Board of Health to be not "reputable." Dr. Dent did not submit himself to the examination of the board. He was convicted for violating the West Virginia statute. The Supreme Court of the United States affirmed the conviction and thus determined that the statute was no violation of due process guaranteed by the Fourteenth Amendment. There are many similar decisions.⁵

II

REVOCATION OF LICENSES

Licenses to practice medicine may be revoked by a state board. The courts generally have refused to hold that statutes conferring this power violate constitutional provisions. The usual claim has been that due process was denied. More particularly, it has been argued that statutes permitting revocation were unconstitutional because the grounds for revocation were stated in general terms, such as gross immorality or unprofessional conduct. Most courts have not been convinced by this argument.⁶ Some of them, however, have held that such grounds are

⁴ 129 U. S. 114, 9 S. Ct. 231 (1889).

⁵ *Reetz v. Michigan*, 188 U. S. 505, 23 S. Ct. 390 (1903); *Watson v. Maryland*, 218 U. S. 173, 30 S. Ct. 644 (1910) (due process and equal protection); *Collins v. Texas*, 223 U. S. 288, 32 S. Ct. 286 (1912) (osteopathy); *Crane v. Johnson*, 242 U. S. 339, 37 S. Ct. 176 (1917) (drugless practitioner); *Douglas v. Noble*, 261 U. S. 165, 43 S. Ct. 303 (1923) (dentists); *Graves v. Minnesota*, 272 U. S. 425, 47 S. Ct. 122 (1926) (dentists; see citation of many state decisions); *Sage-Allen Co., Inc. v. Wheeler*, 119 Conn. 667, 179 A. 195 (1935); 98 A.L.R. 905 (1935) (optometry). Cf. *People v. Griffith*, 280 Ill. 18, 117 N. E. 195 (1917) (act of 1915 to regulate optometry invalid).

⁶ *Meffert v. State Board of Medical Registration and Examination*, 66 Kan. 710, 72 P. 247 (1903); 1 L.R.A. (N.S.) 811 (1906); *Richardson v. Simpson*, 88 Kan. 684, 129 P. 1128 (1913); 43 L.R.A. (N.S.) 911 (1913); (dentist); *Laughney v. Maybury*, 145 Wash. 146, 259 P. 17 (1927); 54 A.L.R. 400 (1928) (advertising); *Yoshizawa v. Hewitt*, (C.C.A. 9th, 1931) 52 F. (2d) 411; 79 A.L.R. 323 (1932); *State Dental Examiners v. Savelle*, 90 Colo. 177, 8 P. (2d) 693 (1932) 82 A.L.R. 1184 (1933); (dentist practising as employee of a corporation); *Bell v. Board of*

so vague as not to give fair notice. Such a defect, according to the minority view, makes a revocation-of-license statute unconstitutional.⁷

III

EQUAL PROTECTION: DISCRIMINATORY REGULATIONS

A. Among the members of the several professions practicing the healing arts

Statutes regulating members of the several professions practising the healing arts do not have to treat each profession precisely the same. The test, when complaint is made that the statutes deny equal protection of the laws (class legislation), is whether the discrimination is plainly unreasonable.⁸ Louisiana discriminated against chiropractors by requiring them to pass satisfactory examinations in the same subjects that were specified for physicians and surgeons, including surgery and materia medica. Other statutes provided for the admission of osteopaths, dentists, chiropodists, and trained nurses without requiring them to take a full course in materia medica or surgery. In other words, the osteopaths were favored and the chiropractors were, it would appear, practically prevented from practising in Louisiana. But this patent discrimination was sustained by the Louisiana Supreme Court.⁹ It stated: "Were it otherwise the Legislature would be greatly hampered in the exercise of its power to protect the general health and the public from imposition and fraud. Every group of men who might get together and evolve some system, designed to restore health, would be entitled to recognition, and all that could be required of them would be evidence of good character and a knowledge of such subjects as their particular school seemed to require, although the Legislature might deem with reason a knowledge of such subjects wholly insufficient to entitle any one to treat the sick."¹⁰ This reasoning by the Louisiana

Regents, (N. Y. 1946) 65 N.E. (2d) 184 (splitting fees with an unlicensed solicitor of patients).

⁷ Green v. Blanchard, 138 Ark. 137, 211 S. W. 375 (1919) 5 A.L.R. 94 (1920) (dentist—divided court).

⁸ Laughney v. Maybury, 145 Wash. 146, 259 P. 17 (1927); McNaughton v. Johnson, 242 U. S. 344, 37 S. Ct. 178 (1917); People v. Witte, 315 Ill. 282, 146 N. E. 178 (1924); 54 A.L.R. 400 (1928); 37 A.L.R. 680 (1925).

⁹ Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 S. 58 (1926); 54 A.L.R. 600 (1928). While not precisely the same it appears impossible to reconcile satisfactorily with the Louisiana case People v. Love, 298 Ill. 304, 131 N. E. 809 (1921), and People v. Schaeffer, 310 Ill. 574, 142 N. E. 248 (1924); 16 A.L.R. 709 (1922).

¹⁰ 162 La. 681 at 685, 111 S. 58 (1926).

Supreme Court does not appeal to this writer as a perfect example of logic. The states should have the power to deny recognition to schools of medicine that are not valuable to society.¹¹ That fundamental proposition would hardly be denied by any disinterested person. But should a state be permitted to require standards for chiropractors in excess of those for osteopaths? However, even if the answer to this question must be in the negative, it would not necessarily follow that Louisiana could not properly deny admission to chiropractors. Conceivably its board might have reasonably determined that the chiropractors failed to present "a diploma from a college in good standing." Perhaps there was at that time no such college teaching the system known as chiropractic.

Oregon passed a statute that placed severe limitations upon the advertising permitted by dentists. The Supreme Court of the United States held that the statute was valid, saying: (1) "Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each." (2) That defendant was not justified in advertising in the forbidden manner merely because his advertising was truthful. The court also observed: "The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the

¹¹ *People v. Lewis*, 233 Mich. 240, 206 N. W. 553 (1925) (Michigan recognized chiropractors but held that one desiring to practice the system of chiropractic is not deprived of the equal protection of the laws by requiring him, as a condition for securing a license, to pass an examination in anatomy, histology, embryology, physiology, chemistry, bacteriology, pathology, diagnosis, hygiene, and public health, although such objects are not taught in chiropractic schools).

The board of regents of Texas University leased land to the city of Galveston for a municipal hospital, reserving the right to use part of the hospital for clinical instruction of university medical students. The hospital board in charge of the hospital excluded licensed osteopathic physicians from using this hospital. But this was held to be no violation of due process or equal protection. *Hayman v. City of Galveston*, 273 U. S. 414 at 417, 47 S. Ct. 363 (1927), "We cannot say that a regulation excluding from the conduct of a hospital the devotees of some of the numerous systems or methods of treating diseases authorized to practice in Texas, is unreasonable or arbitrary."

See, for a more general discussion of equal protection, *Iowa Eclectic Med. College Assn. v. Schrader*, 87 Iowa 659, 55 N. W. 24 (1893); 20 L.R.A. 355 (1893).

market place And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards."¹²

B. *Between New and Established Members of a Profession*

Probably it is not of much importance now, but in establishing a standard of education as a condition to securing a license, it is no violation of equal protection to make a reasonable exception in favor of established practitioners.¹³ The Minnesota legislature in 1919 revised its statutes concerning the practice of dentistry. Section 4 of this revision authorized the board of dental examiners to suspend or revoke dental licenses for a number of specified reasons. Section 8 had a sweeping provision in this language: "provided that the provisions of this act shall not apply to persons lawfully engaged in the business or practices of dentistry at the present time." It is a fair guess that the legislature intended merely to permit dentists licensed before 1919 to continue to practice without qualifying again for a new license. But the Minnesota Supreme Court held that section 8 plainly excluded these dentists from the disciplinary provisions of section 4. This discrimination was a violation of constitutional provisions for equality and thus made the revision invalid.¹⁴

C. *Among Individual Members of a Profession*

In a Florida case, T. K. Jones stated that he had taken three examinations given by the Florida State Board of Dental Examiners; that he had been thrice notified that he had failed to pass; but that he had made as high a mark as others who were granted certificates to practice by the board. Accordingly, Jones claimed that he had been refused a certificate capriciously and from prejudice. After the board's motion

¹² *Semler v. Oregon State Board of Dental Examiners*, 294 U. S. 608 at 610 and 612, 55 S. Ct. 570 (1935).

¹³ *State ex rel. Walker v. Green*, 112 Ind. 462, 14 N. E. 352 (1887); 136 A. L. R. 219 (1942). See, also, *Fairfield v. Shallenberger*, 135 Iowa 615, 113 N. W. 459 (1907) (special license tax on traveling physicians). Cf. *State v. Doran*, 28 S. D. 486, 134 N. W. 53 (1912) (occupation tax applicable only to nonresident itinerant physicians invalid).

¹⁴ *State v. Luscher*, 157 Minn. 192, 195 N. W. 914 (1923).

to quash the proceedings had been overruled, the board declined to give any further answer to Jones' complaint. Thus the actual facts were not adequately developed. But on the meagre showing it would appear that the Florida court acted correctly in compelling the board either to justify its conduct or to issue a certificate to him. To do otherwise would seem to violate the constitutional guaranty of equal protection; but this provision was not mentioned by the Florida Supreme Court.¹⁵

IV

PREVENTION OF CORPORATE PRACTICE

A. *Validity*

Despite a dissenting minority, it has been generally agreed by the courts that neither a corporation for profit nor any other unlicensed person may practise medicine, surgery, or dentistry through licensed employees. Such a policy by a state does not offend constitutional provisions.¹⁶

B. *What is Corporate Practice*

Apparently in no state have private corporations for profit made more determined efforts to practice medicine and dentistry than in California. They were denied this right when the effort was directly attempted. Then they made an indirect effort as disclosed by the opinions in *People ex rel. State Board of Medical Examiners v. Pacific Health Corporation, Incorporated*.¹⁷ This corporation, for a premium, agreed to pay the policy holder for medical services rendered to him; but to obtain this benefit the holder "must, save as to emergency expenses not exceeding \$50, accept a doctor from the list [of physicians and surgeons approved by the corporation]." This restrictive provision appears to be the main point of difference between this corporation and other insurance companies which issue the long accepted ordinary health and accident policy. The defendant, Pacific Health Corporation,

¹⁵ *York v. State ex rel. Jones*, 144 Fla. 216, 197 S. 766 (1940), noted in 1 *LOYOLA L. REV.* 109 (1941). (It is not clear whether the peremptory writ of mandamus required the board to produce the examination papers of June, 1939 in order to determine whether relator's grade entitled him to a certificate or whether it required the board to issue the certificate forthwith.)

¹⁶ *People by Kerner v. United Medical Service, Inc.*, 362 Ill. 442, 200 N. E. 157 (1936); 103 A.L.R. 1240 (1936). The opposite ruling was made in New York as to a chiropodist: *People v. Dr. Scholl's Foot Comfort Shops, Inc.*, 277 N. Y. 151, 13 N. E. (2d) 750 (1938).

¹⁷ 12 Cal. (2d) 156, 82 P. (2d) 429 (1938); 119 A.L.R. 1290 (1938).

was operating for profit and was seeking to make as many of its contracts as possible. But the Supreme Court of California held that it was illegally engaged in the practice of medicine in excess of its corporate powers. The court refused to heed the argument made by the corporation that the doctors on its approved list were independent contractors as opposed to employees in other cases where corporations were found to be practising medicine. This was rejected as a technical distinction and the court reasoned thus: "The evils of divided loyalty and impaired confidence would seem to be equally present whether the doctor received benefits from the corporation in the form of salary or fees. And freedom of choice is destroyed, and the elements of solicitation of medical business and lay control of the profession are present whenever the corporation seeks such business from the general public and turns it over to a special group of doctors."¹⁸ To answer objections made by the three judges who dissented, that the decision would be a peril to "fraternal, employee, and hospital associations and various medical-hospital services[that] have been rendering such services to their members through doctors employed by them" and also to health insurance and group medicine, the majority of the court was happy to say: "It is perfectly possible to bring adequate medical service to the vast numbers of people who now can ill afford it by some means which will protect both the profession and the public from the evils of corporate control of the practitioner." Then the majority cited, as an example of what it had in mind, *Butterworth v. Boyd* decided the same day. That case is discussed in the next paragraph.

In 1937 the city and county of San Francisco established a health service system for all of its employees who were members of the retirement system, including the teachers and employees of the board of education. The system was to be administered by a board to be elected by the members of the system. Members of religious sects who believed in healing by prayer were exempted from the system at their option. The board had the power to exempt those whose annual salaries exceeded \$4,500, and those who had otherwise provided for adequate medical care. The board had the power to adopt (1) a plan for medical care, (2) for indemnification of the costs of medical care, or (3) for carrying insurance against such costs. To pay the expense of the system the board could determine the monthly sum to be deducted from the compensation of the members. From the fund so obtained all expenses of the system were to be paid. Members, in seeking medical care, were

¹⁸ Id. at 158.

free to select their physicians, nurses, hospitals, etc., subject to these restrictions only: (1) the rules and regulations of the board; (2) the chosen doctor or hospital must render his services pursuant to these rules and regulations; and (3) the services or supplies must be furnished at uniform rates of compensation to be fixed by the board. But the board was expressly prohibited from entering into any exclusive contract for these services. The first board adopted plan number one for the rendition of medical services and rules and regulations to carry it into effect. A monthly deduction of \$2.50 was made, and then came a suit to test the constitutionality of the legislation. The Supreme Court of California, with one judge dissenting, decided that the legislation was valid despite many objections such as delegation of legislative power, due process, equal protection, and religious freedom.¹⁹ It is hardly to be doubted that the court was happy to announce that the municipal employees had voted in favor of the system at the outset by a vote of 7,428 to 939 and that: "Over a thousand physicians, a majority of the licensed practitioners in the city, and nearly all of the city's hospitals, agreed to furnish services under the plan. And petitioners' brief states that among those who have joined the staffs are the president of the State Board of Health, the president of the California State Medical Association and past presidents of that association, the president of the San Francisco County Medical Society and several past presidents of that society, the president of the American College of Physicians, and leading members of the staffs of the medical schools of the University of California and Stanford University."²⁰ The uncertainty in this opinion is contained in the expression, "rules and regulations of the board." Until these rules and regulations are disclosed and discussed in a court opinion one cannot be sure of the scope of the opinion in *Butterworth v. Boyd*. But it would appear that the decision sustains the constitutionality of one type of group (socialized) medicine as distinguished from what may be labelled, inexactly, the corporate practice of medicine.

A similar organization in California was known as California Physicians' Service, a non-profit corporation. The membership consisted of (1) administrative members who exercised administrative control through the election of the board of trustees; (2) professional members, duly licensed physicians and surgeons practicing in the state, who elected the administrative members periodically; and (3) bene-

¹⁹ *Butterworth v. Boyd*, 12 Cal. (2d) 140, 82 P. (2d) 434 (1938).

²⁰ *Id.* at 146.

fiary members, viz., those who upon the payment of monthly dues are entitled to secure from any professional member the necessary medical and surgical services. "Professional membership is open to any physician or surgeon licensed to practice his profession in this state upon his agreeing to abide by the rules of the corporation that all compensation for services rendered a beneficiary member shall be paid upon a pro rata basis out of the monthly funds collected from the beneficiary members." But a professional member could refuse to accept any person as a patient. It was stated by the corporation that approximately five thousand California physicians and surgeons were members and that one hundred thousand persons, increasing at the rate of fifteen hundred per month, had become beneficiary members. Two years after the California Physicians' Service was incorporated, the California legislature passed an act applicable to the service that provided: (1) at least one fourth of all physicians and surgeons had to become members; (2) membership in such a non-profit corporation upon a uniform basis is available to all licensed members of a particular profession; and (3) voting by proxy and cumulative voting are prohibited. The California Physicians' Service was declared by the Court of Appeals, First District, to be validly operating under California laws and not to be engaging in the insurance business or in the corporate practice of medicine.²¹ In the opinion of the court is the following language: "There is no essential difference between the Group Health Association, the San Francisco Health Service, and California Physicians' Service in so far as the scheme of operations is concerned except that in the first two the administrative management is in a board selected by the beneficiary members, whereas in the latter it is in a board selected by the professional members. All are non-profit, semi-charitable organizations conducted for the primary purpose of affording necessary medical care to those of small income."²²

The above expression "Group Health Association" refers to the opinions in *Group Health Association v. Moor* and *Jordan v. Group Health Association*. The first of these two cases decided that the Group Health Association, organized in the District of Columbia, was not practising the healing art or engaged in the business of insurance in violation of law.²³ The second case, in the court of appeals, affirmed

²¹ California Physicians' Service v. Garrison, (Cal. App. 1945) 155 P. (2d) 885.

²² Id. at 894.

²³ Group Health Assn. v. Moor, (D. C. D. C. 1938) 24 F. Supp. 445.

this decision as to the second point only.²⁴ No appeal was taken from the decision on the first point. From the two opinions these facts appear concerning the Group Health Association. It was organized as a non-profit corporation to provide its members and their dependents with medical services, surgery, hospitalization, and medical and surgical supplies. There were specified exceptions and limitations on the services. Membership was limited to civil employees of the executive branch of the United States government service. Members were elected by the boards of trustees, who in turn were elected by the members, except two chosen by the Federal Home Loan Bank Board, all from the membership. Members paid monthly dues and they could be expelled by the trustees who controlled and managed the corporate affairs. The relationship between the corporation and the physicians was not very clear. It had discontinued its former practice of having a staff of full-time salaried physicians in favor of a system whereby the physicians under oral contracts "apparently devote only a portion of their time to the work of Group Health, the remainder being devoted to private practice, although it seems to be contemplated that some physicians will give full time to the work. They receive fixed annual compensation, paid in monthly instalments, not specific fees for each treatment or case." It operated a clinic and provided for home treatment, if necessary. Hospitalization to a limited extent was secured by arrangement with independent established hospitals. But it does not appear that Group Health provided that any licensed practitioner who would abide by the rules and regulations was entitled to be on the panel approved by Group Health for calling by its members. This absent feature seems to be highly important under the California decisions. The court of appeals was apparently not concerned with this fact since its task was to decide whether Group Health was in the insurance business. The decision of the district court that Group Health was not practising the healing art was expressed in a brief opinion that did not consider this possible objection. It was the conclusion of the court of appeals that doctors who made contracts with Group Health were "independent contractors" required to exercise their own judgment entirely independently as to diagnosis and treatment.

²⁴ *Jordan v. Group Health Assn.*, (C. C. D. C. 1939) 107 F. (2d) 239. See, however, *United States v. American Medical Assn.*, (C. C. D. C. 1940) 110 F. (2d) 703, where the circuit court of appeals was unable to say that the Group Health Association, Inc., as described in the indictment before the court, was illegally practising medicine.

This is an appropriate place to ask what is the essential difference between the Group Health Association in the District of Columbia, the California Physicians' Service, and the San Francisco health service system on the one hand and the Pacific Health Corporation and the United Medical Service in Illinois on the other hand? The best answer appears to be the profit motive with its danger of divided loyalty, intellectual dishonesty, and shoddy medical service. This is a sufficient differentiation on paper. Yet it seems fair to observe that a non-profit association cannot be wholly immune to expense, to making ends meet, and administrative success. And these are factors that will hamper and probably prevent the attainment of the high ideal of entirely adequate medical service for those with low incomes. So it is feared that in practice there would not be a great difference between approved non-profit corporations and disapproved profit corporations if the latter had been generally permitted to develop. Some of the latter probably would have developed into institutions with good if not excellent records for service. It can hardly be doubted, however, that many of them would have been of poor quality and even disgraceful. Thus would have arisen a need for public supervision and that, in an approved fashion, is not easy to obtain or cheap. Accordingly, the final conclusion is that the non-profit cooperative way is the superior method. If that method proves to be successful there will be little or no regret that the "practice of medicine" by the profit corporation has been generally forbidden.²⁵

V

PROCEDURAL DUE PROCESS

Not only is a physician entitled to substantive due process as set forth above, but he is entitled to procedural due process before his substantive rights can be adversely affected. Thus, the Ohio Supreme Court held that even though a statute provided that a license could not be revoked except upon notice and hearing, nevertheless it was unconstitutional because it failed to provide "whereby the attendance of witnesses could be required or their testimony procured."²⁶

Missouri apparently was more careful than Ohio and provided by statute that testimony could be taken by deposition and used in the trial of a physician before the state board of health. Officers who take

²⁵ See the opinion in *United States v. American Medical Assn.*, (C.C.D.C. 1940) 110 F. (2d) 703 at 714. Contrast 27 MARQ. L. REV. 135 (1943).

²⁶ *Jewell v. McCann*, 95 Ohio St. 191 at 193, 116 N. E. 42 (1917).

depositions were authorized to compel witnesses to attend and give their testimony. The Supreme Court of the United States held that this was sufficient for procedural due process even though the board had no power to compel witnesses to appear in person before the board and there give their testimony.²⁷

Perhaps the most colossal quack to disgrace the American medical profession was John R. Brinkley, the goat gland surgeon, who barely missed election as governor of Kansas, even though he ran on an independent ticket,—a remarkable feat that was equally remarkable proof of the emotional gullibility of too many Americans. After the State Board of Medical Registration and Examination of Kansas filed a complaint to revoke his license, Dr. Brinkley sought to enjoin the board from holding a hearing because, among other complaints, the board lacked the subpoena power. He failed to obtain an injunction.²⁸ The Kansas Supreme Court said that: "With the exception of a sporadic case to be noted later, no court has ever declared that [an] opportunity to present [a] defense and be heard in its support requires the adjective element of compulsory process." The exceptional case mentioned by the Kansas court was the case decided by the Ohio Supreme Court. The Kansas Supreme Court was caustic in its adverse comment, viz.: "The decision is authority for nothing but the fact that it was rendered, and this court declines to follow it."²⁹

In 1930 the Kansas board revoked Brinkley's license. Then Brinkley sought to enjoin this revocation, claiming that it denied him his rights under the national Constitution. He was unsuccessful but he confronted the federal courts with a difficult decision.³⁰ His best argument was that the members of the Kansas medical board were prejudiced against him before the hearing started and that some of them were active in making the complaint against him. The circuit court of appeals admitted "that some of the board had expressed such prejudice, and doubtless all were in fact prejudiced." This conclusion was explained by the fact that Brinkley's methods of publicity, particularly the use of the radio, made previous knowledge of these facts and opinions concerning their violation of professional standards almost inevitable. Thus the court was confronted by the necessity of making a choice between a decision in favor of Brinkley, because the only body

²⁷ *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 46 S. Ct. 384 (1926).

²⁸ *Brinkley v. Hassig*, 130 Kan. 874, 289 P. 64 (1930).

²⁹ *Id.* at 881.

³⁰ *Brinkley v. Hassig*. (C. C. A. 10th, 1936) 83 F. (2d) 351.

that could try him was disqualified by prejudice, or a decision adverse to Brinkley. In this unhappy dilemma the circuit court of appeals chose not to let Brinkley go "Scot-free" and thus proclaimed that a doctor could not by sensational methods of publicity oust the only body with jurisdiction over him. And yet it is unfortunate for us to admit that a person had to be tried before a board that undoubtedly was prejudiced. Normally, courts could be expected to deny such a conclusion.⁸¹

It is implied in the preceding discussion concerning procedural due process that before adverse action is taken against a medical man, he is entitled to a notice and a hearing. So is the law written;⁸² but it is also true that some courts have had an unfriendly attitude toward administrative tribunals and thus have been unnecessarily strict and legalistic in applying this sensible rule.⁸³

VI

MONOPOLY IN MEDICAL PRACTICE:

APPLICABILITY OF THE SHERMAN ACT

The American Medical Association and others were indicted for a conspiracy to restrain trade in violation of the Sherman Anti-trust Act. The Group Health Association of the District of Columbia was the alleged victim of the conspiracy. The district court sustained demurrers to the indictment, holding that medical practice is not a trade within the meaning of section 3 of the Sherman Act.⁸⁴ However, this decision was reversed and remanded by the circuit court of appeals.⁸⁵ It held that "a restraint imposed upon the lawful practice of medicine—and a fortiori—upon the operation of hospitals and of a lawful organization for the financing of medical services to its members, is just as much in restraint of trade as if it were directed

⁸¹ "Disqualification on the Ground of Bias as Applied to Administrative Tribunals," 23 CAN. BAR REV. 453 (1945); *Re Segal and Smith*, 5 F.C.C. 3 (1937).

⁸² *State v. Schultz*, 11 Mont. 429, 28 P. 643 (1892).

⁸³ *Dyment v. Board of Medical Examiners*, 57 Cal. App. 260, 207 P. 409, 412 (1922); *Bley v. Board of Dental Examiners*, 120 Cal. App. 426, 7 P. (2d) 1053 (1932); *Kalman v. Walsh*, 355 Ill. 341, 189 N. E. 315 (1934); *Abrams v. Jones*, 35 Idaho 532, 207 P. 724 (1922).

⁸⁴ *United States v. American Medical Assn.*, (D. C. D. C. 1939) 28 F. Supp. 752.

⁸⁵ *United States v. American Medical Assn.*, (C. C. D. C. 1940) 110 F. (2d) 703. See *The Medical Profession and the Sherman Act*, 8 GEO. WASH. L. REV. 1034 (1940).

against any other occupation or employment or business.”³⁶ The opinion condensed the charge against the medical societies in this fashion: that they conspired to prevent the successful operation of Group Health’s plan, and that the steps by which this was to be effectuated were as follows: “(1) to impose restraints on physicians affiliated with Group Health by threat of expulsion or actual expulsion from the societies; (2) to deny them the essential professional contacts with other physicians, and (3) to use the coercive power of the societies to deprive them of hospital facilities for their patients.”³⁷ Upon the trial which followed, the American Medical Association and the Medical Society of the District of Columbia were convicted. They appealed but the convictions were affirmed, first, by the Circuit Court of Appeals for the District of Columbia and then by the Supreme Court.³⁸ The latter court avoided a decision on the “question whether a physician’s practice of his profession constitutes trade under § 3 of the Sherman Act.” But it held that: “Group Health is a membership corporation engaged in business or trade. Its corporate activity is the consummation of the cooperative effort of its members to obtain for themselves and their families medical service and hospitalization on a risk-sharing prepayment basis. The corporation collects its funds from members. With these funds physicians are employed and hospitalization procured on behalf of members and their dependents. The fact that it is cooperative, and procures service and facilities on behalf of its members only, does not remove its activities from the sphere of business.

“If, as we hold, the indictment charges a single conspiracy to restrain and obstruct this business it charges a conspiracy in restraint of trade or commerce within the statute. As the Court of Appeals properly remarked, the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health.”³⁹

At the same time that the American Medical Association was before the courts, a case was decided in Kentucky that may present another problem in restraint of trade. Dr. Hughes was a competent and quali-

³⁶ 110 F. (2d) 703 at 711.

³⁷ *Id.* at 711.

³⁸ *American Medical Assn. v. United States*, (C. C. D. C. 1942) 130 F. (2d) 233, 317 U. S. 519, 63 S. Ct. 326 (1943). See comments in 29 CORN. L. Q. 271 (1943); 29 VA. L. REV. 832 (1943), 18 TENN. L. REV. 393 (1944).

³⁹ 317 U. S. 519 at 528.

fied surgeon with a long and successful experience and with no proof against him of unprofessional conduct. In 1939 the superintendent of the Good Samaritan Hospital wrote to Dr. Hughes that in order for the hospital to continue as an accredited hospital, it would be necessary for him to have the indorsement of the proper board of officers of the American College of Surgeons. Apparently, Dr. Hughes was justified in interpreting this letter as denying him the use of the operating room in the hospital unless he ceased to perform some types of operations, for the letter was based on the fact that Dr. Hughes, "a general practitioner, had invaded the field of the specialist by performing certain operations, which are under rules usually performed in the hospital by surgeons classified as specialists, and such continued practice would take the hospital from the accredited list."⁴⁰ Dr. Hughes sought an injunction to restrain the hospital from interfering with his practice. An injunction was refused, the court saying: "We have before us merely one question—his vested right to operate in the rooms of appellee hospital, when it for no manifested arbitrary or capricious reason, but in the exercise of a reasonable discretion to maintain its institution on an accredited basis, decided otherwise. Appellant has failed to demonstrate that he has such a vested right, either by contract, inherently or as vouchsafed by any constitutional provision, hence we are of the opinion that the chancellor properly dissolved restraining order and denied permanent injunction."⁴¹

There was no discussion of the possibility that the arrangement between the hospital and the American College of Surgeons was an agreement in restraint of trade and a possible violation of the Sherman Act, to say nothing of Kentucky statutes. Was the arrangement one that can be differentiated from the conduct condemned in the Group Health case because it is a reasonable restraint, since the primary, if not the sole, purpose was to maintain proper standards for hospitals? The present writer is not sufficiently versed in the complications of the Sherman Act to venture an answer to this question.

VII

COMPULSORY MEDICAL ATTENTION

Professor Thomas Reed Powell has written about the constitutional aspects of compulsory vaccination and sterilization. But he con-

⁴⁰ 289 Ky. 123 at 125, 158 S.W. (2d) 159 (1942).

⁴¹ Hughes v. Good Samaritan Hospital, 289 Ky. 123 at 129, 158 S. W. (2d) 159 (1942), reviewed in 31 Ky. L. J. 197 (1943).

fined his observations to cases decided by the United States Supreme Court.⁴²

Not all of our state courts have been so favorably inclined toward the validity of compulsory medical treatment. The bulk of the litigation has concerned itself with vaccination against small pox, as a condition of school attendance. So far as the writer is aware no state statute directly requiring such a vaccination has been held to be beyond the power of the state. But Illinois, not usually listed as politically and judicially progressive, has three cases in which a vaccination requirement was held to be invalid as beyond the delegated authority of the public body which attempted to enforce the requirement.⁴³ The mental obtuseness of these decisions is demonstrated to some extent by the opinion in a later Illinois case.⁴⁴ But even there the earlier decisions were distinguished because in the later case there was an *epidemic* of small-pox, viz., about forty cases in a city of approximately twelve thousand population. Presumably there are those who can view with sweet tolerance the attitude of a supreme court that permitted the protection of vaccination only after the disease was a serious problem.⁴⁵ A Wisconsin decision fully supports the earlier Illinois decisions and more definitely condemned the vaccination regulation as unconstitutional.⁴⁶ Fortunately, however, it appears to be agreed that by one method or another most vaccination statutes and regulations have been held to be valid by the state courts, despite constitutional claims of

⁴² "Compulsory Vaccination and Sterilization: Constitutional Aspects," 21 N. C. L. REV. 253 (1943).

⁴³ Potts v. Breen, 167 Ill. 67, 47 N. E. 81 (1897) (A rule of State Board of Health compelling vaccination of school children is unreasonable and beyond the power of the board where smallpox does not exist in the community and there was no reason for apprehension); Lawbaugh v. Board of Education, 177 Ill. 572, 52 N. E. 850 (1899); People ex rel. Jenkins v. Board of Education, 234 Ill. 422, 84 N. E. 1046 (1908).

See also Burroughs v. Mortenson, 312 Ill. 163, 143 N. E. 457 (1924), and People v. Tait, 261 Ill. 197, 103 N. E. 750 (1913).

⁴⁴ Hagler v. Lerner, 284 Ill. 547, 120 N. E. 575 (1918).

⁴⁵ The decision and the attitude of the Supreme Court of Illinois was much better in People ex rel. Barmore v. Robertson, 302 Ill. 422, 134 N. E. 815 (1922). There it was held that a typhoid carrier had been legally placed under a quarantine which required her to remain in her home and forbade her to prepare food for anyone except her husband and forbade anyone to come into her home, as a roomer or otherwise, unless he had been immunized from typhoid fever.

⁴⁶ State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N. W. 347 (1897). See a criticism of the Burdge case in Ex parte Company, 106 Ohio St. 50 at 59, 139 N. E. 204 (1922).

equal protection, due process, non-delegation of legislative power, free public schools, religious and civil liberty, and freedom from unreasonable search and seizure.⁴⁷

There was difficulty in Illinois in securing a statute that compelled under a penalty the dropping into the eyes of a baby within an hour after its birth 1 per cent solution of silver nitrate, or some equally effective prophylactic. Even though the purpose was to save eye-sight by preventing the disease of ophthalmia neonatorum, the Attorney-General of Illinois wrote an opinion declaring the proposed statute to be unconstitutional for interfering with the liberty of parents in rearing their children. The Governor accordingly vetoed the bill.⁴⁸ But this ridiculous position was too much for Illinois. The next legislature passed another bill and it was approved by Governor Horner. As far as is known no court test has been made of such legislation.

In November, 1919, George Buckner was in custody in the Topeka, Kansas, city jail. The city health officer, acting under a state statute, the rules of the state board of health, and a Topeka ordinance, examined Buckner and then certified that he was infected with chronic gonorrhea. Then followed an isolation order whereby Buckner would be sent to the Kansas State Quarantine Camp for men at Lansing for treatment. Buckner sought his release through a writ of habeas corpus. He failed and the Kansas Supreme Court held that the legislation was valid.⁴⁹

New York in 1922 passed an act under which a "neglected" child was one whose parent refuses, when able to do so, to provide necessary medical, surgical, institutional, or hospital care for such child. The Children's Court had the power to order a child to be examined by a physician and whenever such a child appeared to be in need of medical or surgical care, to make an order for such treatment. Helen Vasko

⁴⁷ *Hartman v. May*, 168 Miss. 477, 151 S. 737 (1934); 93 A.L.R. 1413 (1934). See also *Zucht v. King*, 260 U. S. 174, 43 S. Ct. 24 (1922).

⁴⁸ See an editorial in 26 ILL. L. REV. 785 (1932). *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243 (1903), holds that a statute that makes it a misdemeanor to wilfully omit medical attendance for an adopted child did not violate the father's constitutional freedom of religion even though he believed in divine healing and not in physicians. See also *Owens v. State*, 6 Okla. Cr. Rep. 110, 116 P. 345 (1911).

⁴⁹ *Ex Parte McGee*, 105 Kan. 574, 185 P. 14 (1919). See also *People ex rel. Krohn v. Thomas*, 231 N. Y. S. 271, 133 Misc. 145 (1928) (detention for blood test); *In re Caselli*, 62 Mont. 201, 204 P. 364 (1922); *Ex parte Company*, 106 Ohio St. 50, 139 N. E. 204 (1922); *In re Travers*, 48 Cal. App. 764, 192 P. 454 (1920). Contrast *Wragg v. Griffin*, 185 Iowa 243, 170 N. W. 400 (1919), which appears to be a reactionary decision.

was brought before this court upon the petition of the Westchester County Society for the Prevention of Cruelty to Children. Medical examination disclosed that Helen, two years old, had a glioma of the retina of the left eye, which was permanently blind; that the growth was probably of a malignant nature and will increase until it fills the eyeball; that it will then burst through the eyeball and protrude between the lids; and that in all probability, if left to nature, it will follow the optic nerve into the brain, thus causing her death. An operation to remove the left eye was recommended with the advice that statistics show a cure in about 50 per cent of the cases. But Helen's parents refused to permit the operation, the mother saying that she would rather have the child as she is now. "God gave her the baby and God can do what he wants." This attitude of the parents was thought by the New York court to be arbitrary. Accordingly, the statute was held to be constitutional and the order adjudging the child to be neglected was affirmed. As a necessary inference from the opinion, the trial court's order included a direction that the operation be performed and this was also approved.⁵⁰

Patricia Hudson presented a sad case. She had a congenital deformity consisting of an abnormal growth of her entire left arm which made that arm much longer and much larger than the right arm and rendered it absolutely useless. The minority of the court from an examination of a photograph concluded that the left arm was ten times the size of the other arm and nearly as large as her body. The medical testimony was that Patricia appeared to be frail; that she will remain in a rather weakened condition, an easy prey for infection; that her heart is burdened by reason of having to pump blood through the large left arm; and that her chest and spine are becoming deformed from carrying the enormous weight. Both physicians concluded that there was no remedy except amputation which they recommended, even though "there is a fair degree of risk of life involved in the operation." Patricia came before a juvenile court on the complaint of an adult sister that Patricia was not receiving needed medical care.

⁵⁰ In *re Vasko*, 263 N. Y. S. 552, 238 App. Div. 128 (1933). This decision was the subject of comment in 12 TENN. L. REV. 59 (1933); 14 BOSTON UNIV. L. REV. 196 (1934); 28 ILL. L. REV. 556 (1933).

In *re Rotkowitz*, 25 N. Y. S. (2d) 624, 175 Misc. 948 (1941), is a similar decision upon an order for an operation to correct and prevent extension of a leg deformity induced by poliomyelitis. The mother of the child petitioned for the order and the court found that the child was neglected by the father who would not consent to the operation. He gave no reason for his opposition.

Patricia was then eleven years old. Her brothers and sisters testified that Patricia's deformed arm made her shy and sensitive and deprived her of a normal life. She did not attend school because other children jeered at her. Patricia apparently did not testify but she frequently cried and stated that she wished to have her left arm removed. Three of her sisters testified that they favored the amputation even though they realized that Patricia might not survive the operation. Her father was an invalid and a weak character. He testified that he would not object to the amputation and also stated: "I am leaving it in the Judge's hands." Her mother strongly opposed the operation, not because of religious scruples, even though she had had a divine healer for Patricia, but because of the danger of causing Patricia's death.

The trial judge ordered the amputation but the Washington Supreme Court by a vote of six to three reversed the order.⁵¹ The majority opinion stated that the legal problem presented was whether Patricia's mother could be deprived of the control of Patricia for a sufficient period of time to subject Patricia to the operation which, in the judgment of the juvenile court, Patricia's welfare demanded.

The answer to this question was in the negative. Was it correct? One cannot give a negative answer to this last question without admitting that the Washington statute was in no sense as satisfactory and direct as the New York statute previously considered. Indeed it seems necessary to admit that the Washington juvenile court act was not drafted with any such problem specifically in mind. It has no express language providing for medical or surgical care. But it defined a dependent child as one who is destitute, or whose home, by reason of the neglect of a parent, is an unfit place for such child, or one whose parent does not properly provide for such child, etc. The minority opinion argued that this language was sufficient and came to these conclusions: (1) "Medical services are necessary and a child, who is not furnished such services is destitute"; and (2) since Patricia was in need of surgical attendance she was destitute and the juvenile court possessed the power to order the amputation.

In reaching these conclusions the minority relied on that part of the act which declared: "After acquiring jurisdiction over any child, the court shall have power to make . . . any order, which in the judg-

⁵¹ In *re Hudson*, 13 Wash. (2d) 673, 126 P. (2d) 765 (1942). The comment on this decision in 28 IOWA L. REV. 372 (1943) is mildly critical: "Even in the absence of statute, the state's right of guardianship is superior to that of the parent if the assertion of the right is necessary for the welfare of the child. This authority should extend to an order for surgical care in a proper case." *Id.* at 374.

ment of the court, *would promote the child's health and welfare. . .*"⁵² The majority of the court appeared not to attach much value to this provision. Instead, it argued that under the same section, if the juvenile court found a child to be dependent, it was necessary to place the child under the legal control of somebody. "But the court may not, over objection of the natural guardian, or legal guardian or adoptive parents to whom custody and control of the child are awarded by the court, subject the child to a surgical operation."⁵³

Thus it is possible that the decision is primarily procedural in its significance. Instead of directly ordering the amputation, the juvenile court should have proceeded thus: (1) made a finding that Patricia was a neglected child under the statute; (2) made an order depriving her mother and father of her control and custody, taking care to have them transferred to a person, such as one of the adult sisters, who favored the amputation; (3) entertained a petition from this guardian asking for an amputation order, and; (4) made an amputation order in granting this petition. Whether this procedure would have been approved by the Supreme Court of Washington is doubtful. Despite the command of the legislature to give the juvenile court act a liberal construction, the majority of the court apparently failed to do so, or to heed the legal philosophy expressed by the New York court in the *Rotkowitz* case, even though it quoted this passage: "The law is a growth. It could not serve the purposes of man and his needs were it static, inflexible and rigid. Like life, the law constantly undergoes change—change which is imposed by life upon law."⁵⁴ In the course of an unnecessarily long opinion there is one paragraph in the Washington opinion that probably explains, beyond any merely logical setting forth of its reasons, the basic philosophy or perhaps the religious prejudice of the majority of the Washington court. It is worth quoting:

"As we read the evidence it is admitted by all concerned that there is a grave possibility that the child may not survive the ordeal of amputation; nevertheless, every one except the child's mother is willing, desirous, that the child be required to undergo the operation. Implicit in their position is their opinion that it would be preferable that the child die instead of going through life handicapped by the enlarged,

⁵² The court quoted at 728. Italics the court's. Wash. Rev. Stat (Remington, 1932) § 1978.10.

⁵³ 13 Wash. (2d) 673 at 712.

⁵⁴ 25 N. Y. S. (2d) 624 at 625, 175 Misc. 948 (1941).

deformed left arm. That may be to some today the humane, and in the future it may be the generally accepted view. However, we have not advanced or retrograded to the stage where, in the name of mercy, we may lawfully decide that one shall be deprived of life rather than continue to exist crippled or burdened with some abnormality. That right of decision is a prerogative of the Creator." This language, particularly the last sentence, reminds one of the excuse given by the mother of Helen Vasko in one of the New York cases. It was an excuse that the New York court thought was arbitrary. It is also odd that the majority of the Washington court criticized Patricia's mother, "who loves her child devotedly" for seeking "to shift responsibility of decision to the child at some future time, a present responsibility of the mother, a sacred duty the mother shirks." In any event it appears clear that despite a few vague references to constitutional rights, the Washington court did not decide Patricia's case on the theory that some principle of constitutional law would prevent the Washington legislature from amending its juvenile court act to conform to the New York acts. But it is regrettable that the majority of the Washington Supreme Court decided in favor of a static rather than a progressive view.

VIII

METHODS OF ENFORCEMENT

A. *Criminal Sanction*

The normal method of compulsion if a person practices medicine or surgery without securing a license or after his license has been revoked or suspended is through a criminal proceeding with a jury trial. This method has not always been adequate. The statutory penalty may be so mild that it fails to deter some hardy individuals. More often, it seems, some quacks have a popular appeal and it is difficult if not impossible to convict them before a jury with sufficient frequency.

B. *Injunction*

Iowa passed a statute that provided that a person who violated a law requiring a license for the practice of his profession could be restrained by a permanent injunction. This was in addition to a statute that made a medical practitioner subject to a fine and imprisonment for practising without a license. G. E. Fray became the defendant in an action to enjoin him from practising without a license. He complained that the first Iowa statute was unconstitutional because it de-

prived him of a jury trial as guaranteed by the Iowa constitution. But the Supreme Court ruled against him. The importance of this decision lies in the fact that an equity rather than a law court issues an injunction and that an equity court is not compelled to call a jury to determine the facts and very rarely does so. The assumption is that an equity judge has a higher I.Q. than the average jury, knows better from his experience how to evaluate evidence, and is less subject to prejudices and emotions. It is believed that quacks have less chance of avoiding the license law if the case is decided without a jury. In case the injunction issues, a claimed violation of the injunction decree will again be decided by the equity judge without the necessary use of a jury, unless a statute so requires. This method of enforcement of professional standards is also likely to be more speedy than a criminal proceeding. The Iowa Supreme Court admitted that this method could not be used in the ordinary prosecution of crimes. But for a long time equity courts have asserted jurisdiction over nuisances and certain harms to property. Here the Iowa court made use of these analogies in favor of the public health and refused to hold the Iowa statute unconstitutional.⁵⁵ Other states have reached the same result and some of them have done so without the aid of a statute like the Iowa statute.⁵⁶ Still other states have refused to grant injunction decrees, holding that the criminal process would have to suffice.⁵⁷ In the last group of states three of the four cases concerned chiropractors. In the Illinois case it was asserted by the attorney general that some of the fifty-two individual defendants had been tried, convicted, and sentenced; that after paying their fines or serving their terms of imprisonment they returned and continued their practice, and that the Universal Chiropractors' Association collected dues from its members and paid all fines, costs, and attorneys' fees, thus creating disrespect for the law making it unlawful to treat human ailments without a license.

⁵⁵ *State v. Fray*, 214 Iowa 53, 241 N. W. 663 (1932). See Heilman, "Legal Control of Medical Charlatanism," 22 N. C. L. REV. 23 (1943), discussing and comparing the use of criminal prosecution, quo warranto, and injunction, and 81 A.L.R. 292 (1932).

⁵⁶ *State ex rel. La Prade v. Smith*, 43 Ariz. 131, 29 P. (2d) 718 (1934); 92 A. L. R. 173 (1934).

⁵⁷ *Dean v. State*, 151 Ga. 371, 106 S. E. 792 (1921); *Redmond v. State ex rel. Attorney General*, 152 Miss. 54, 118 S. 360 (1928) (recommendation that state proceed by information to abate nuisance with a jury trial); *State v. Maltby*, 108 Neb. 578, 188 N. W. 175 (1922); *People ex rel. Shepardson v. The Universal Chiropractors' Assn.*, 302 Ill. 228, 134 N. E. 4 (1922).

IX

LIMITATIONS ON MEDICAL PRACTICE

B. *Use of Spirituous Liquor*

Dr. Samuel W. Lambert, "a distinguished physician" in 1922 in New York sought to enjoin a federal prohibition director from interfering with his practice of prescribing vinous or spirituous liquors to his patients for medical purposes. The director was acting under congressional statutes which strictly limited the amount of liquor which physicians could prescribe. Dr. Lambert claimed that his constitutional right as a physician had been infringed even though, according to the majority of the court, he belonged to the minority group of physicians who believed that liquor had value as a therapeutic agent. A bare majority of the Supreme Court of the United States decided that the statutes were not arbitrary. Accordingly Dr. Lambert was denied judicial relief.⁵⁸ The minority of the Court challenged the assertion by the majority of the Court that the views of the medical profession concerning vinous and spirituous, as distinguished from malt liquors were opposed to their use as medicine. The minority of the Court, accordingly, proceeded on the premise that vinous and spirituous liquors are of medical value.

B. *Use of Narcotics*

*Linder v. United States*⁵⁹ should be contrasted with the *Lambert* case. Dr. Linder sold to a known female addict one morphine tablet and three cocaine tablets. His expectation was that the addict would administer them to herself in divided doses over a period of time. Nevertheless, he was convicted of violating the Harrison Narcotic Law. This conviction was affirmed by the circuit court of appeals but was reversed and remanded by the Supreme Court. It is difficult to interpret the decision and opinion of the latter court. The opinion hardly seems justified in assuming "the doctor's good faith" and the wisdom of his action according to medical standards. It would appear that the decision resulted from the following factors: (1) it was a trivial case; (2) the Supreme Court has been closely divided as to the constitutionality of the Harrison Narcotic Law; and (3) it was announced that the law, a taxing act with penal provisions, must be

⁵⁸ *Lambert v. Yellowley*, 272 U. S. 581, 47 S. Ct. 210 (1926).

Caldwell, "Early Legislation Regulating The Practice of Medicine," 18 ILL. L. REV. 225 (1923), is of general interest.

⁵⁹ 268 U. S. 5, 45 S. Ct. 446 (1925).

strictly construed. The court also announced that "direct control of medical practice in the states is beyond the power of the federal government." On the whole it is believed that the *Linder* case is of no particular importance as a precedent.

C. *Use of Contraceptives*

There appears to be no doubt that the dispensing of contraceptives may be prohibited generally. To what extent, however, may physicians be compelled to accept such a prohibition? On the basis of the decided cases no final answer to this question will be ventured.⁶⁰ But it seems fair to observe that at least two recent decisions are unfavorable to the asserted constitutional right of physicians to prescribe the use of contraceptives even though they honestly believe that the use of contraceptives is desirable or necessary to protect the patient's health or life. Under this sort of a decision it would seem to follow that the patient has no constitutional right to have a physician advise him as to the necessity of using a contraceptive.

The first of these two decisions is *Commonwealth v. Gardner* which affirmed the conviction of a physician, a nurse, and two trained social workers. All worked for the North Shore Mothers' Health Office, a charitable organization. Two of them worked without pay and the contraceptive devices and medicine were sold and given in the office in accordance with the physician's instructions. No question was made concerning the physician's good faith. That seemed to be assumed. Despite that, the ruling of the trial court that these facts constituted no defense was approved. It was also held that the Massachusetts statute, prohibiting the dispensation of contraceptives, must be interpreted without qualification as applicable to physicians, and that, so interpreted, it was constitutional.⁶¹ The Supreme Court of the United States blasted the appeal in this case by a dismissal "for the want of a substantial federal question." Nothing more was said and that would seem to be the equivalent of saying that the Supreme Court agreed with the Massachusetts court that the state statute as applied did not violate the national Constitution, including the due process clause.⁶²

⁶⁰ See *McConnell v. Knoxville*, 172 Tenn. 190, 110 S. W. (2d) 478 (1937); 113 A.L.R. 970 (1938).

⁶¹ *Commonwealth v. Gardner*, 300 Mass. 372 15 N. E. (2d) 222 (1938). 6 UNIV. CHI. L. REV. 260 (1939), is critical of this decision. See also 50 YALE L. J. 682 (1941); 37 MICH. L. REV. 317 (1938); 7 GEO. WASH. L. REV. 255 (1938); 16 N. Y. UNIV. L. Q. 149 (1938).

⁶² *Gardner v. Commonwealth of Massachusetts*, 305 U. S. 559, 59 S. Ct. 90 (1938).

Connecticut had a similar statute. Wilder Tileston, a licensed physician, sought a declaratory judgment to determine whether he was entitled to prescribe contraceptives for married women living with their husbands in the following cases: (1) patient is suffering from high blood pressure; if pregnancy occurred there would be imminent danger of toxemia of pregnancy which would have a 25 per cent chance of killing her; (2) patient is suffering from an arrested case of tuberculosis of the lungs of an acute and treacherous type so that if she should become pregnant such condition would be likely to light up the disease and set back her recovery for several years, and might result in her death; (3) patient is in good health except in so far as she has been weakened by having had three pregnancies in about twenty-seven months and a new pregnancy would probably have a serious effect upon her general health and might result in permanent disability. Despite the appealing nature of these cases the Supreme Court of Connecticut decided that the statutes forbade Dr. Tileston from prescribing contraceptives for these patients even though that was his professional judgment. It also decided that the statutes, as interpreted, were constitutional.⁶³ Why? Because a physician in such cases need not prescribe contraceptives. All he needs to do is to advise his patients to refrain from sexual intercourse for the duration. Observe this language of the court: "The claim of the state on this point comes down, then, to a consideration of whether abstinence from intercourse is a reasonable and practicable method of preventing the unfortunate consequences. Certainly it is a sure remedy. Do the frailties of human nature and the uncertainties of human passions render it impracticable? That is a question for the legislature, and we cannot say it could not believe that the husband and wife would and should refrain when they both knew that intercourse would very likely result in a pregnancy which might bring about the death of the wife." Would and should! The will and the morality! This writer does not believe that either the will or obedience to the moral precept will exist in many instances. And he is inclined to believe that this significant restriction on freedom of belief and action, based upon a lack of realism as to sexual relations, would be better condemned as unconstitutional.

The Connecticut decision was appealed to the United States Supreme Court. Its decision was narrowly confined to a point of pro-

⁶³ *Tileston v. Ullman*, 129 Conn. 84, 26 A. (2d) 582 (1942). Two of the five judges dissented on the interpretation of the statute; but they said nothing about its constitutionality.

See 20 BOSTON UNIV. L. REV. 551 (1940); 3 UNIV. DET. L. J. 216 (1939).

cedure. Curiously, the attorneys for Dr. Tileston had raised in the Connecticut court only the question whether the statutes deprived "any person of life without due process of law." The Supreme Court of the United States held that "the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's [Tileston's] but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. . . . No question is raised in the record with respect to the deprivation of appellants' liberty or property in contravention of the Fourteenth Amendment."⁶⁴

⁶⁴ *Tileston v. Ullman*, 318 U. S. 44 at 46, 63 S. Ct. 493 (1943).