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Characteristics and Constitutionality of Medical Legislation

Author(s): H. B. Hutchins

Source: *Michigan Law Review*, Vol. 7, No. 4 (Feb., 1909), pp. 295-317

Published by: [The Michigan Law Review Association](#)

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# MICHIGAN LAW REVIEW

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VOL. VII

FEBRUARY, 1909

No. 4

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## CHARACTERISTICS AND CONSTITUTIONALITY OF MEDICAL LEGISLATION

**R**IGHT to *practice medicine regulated by statute*.—In the absence of a statute upon the subject, any person is at liberty to practice medicine or surgery or both. This is the common law. And yet in the absence of a statute the physician necessarily assumes certain responsibilities that grow out of his relation to those whom he treats. He is bound to bring to the discharge of his duties the learning, skill and diligence usually possessed and exercised by physicians similarly situated. In other words, while in the absence of statutory regulation, the door of the profession is open to all, the one who enters cannot escape the common law responsibility for his acts.<sup>1</sup>

*Medical legislation in England*.—It was early apparent that the protection to the public afforded by the common law, if protection it could be called, was entirely inadequate. In England as early as 1421 a statute upon the subject was passed by Parliament, giving authority to the Lords of the King's Council to prescribe ordinances governing the practice of physicians and surgeons.<sup>2</sup> Other statutes relating to the subject were enacted subsequently from time to time.<sup>3</sup> Reference to the more important is found in the note, but comment upon them is not necessary other than to suggest that under the earlier legislation in England, practitioners were divided into three classes, known respectively as physicians, surgeons and apothecaries. The status of each class was distinct as were the functions; the classes were governed by different statutes and charters, and the

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<sup>1</sup> See *Logan v. Weltmer*, 180 Mo. 322, 79 S. W. Rep. 655, 103 Am. St. Rep. 573, 64 L. R. A. 969, and *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. Rep. 228, 7 Am. St. Rep. 900, 1 L. R. A. 719.

<sup>2</sup> 9 Henry V, 1421 Rotuli Par. 130.

<sup>3</sup> See 3 Hen. VIII, c. 11; 14 and 15 Hen. VIII, c. 5; 32 Hen. VIII, c. 40.

members of each pursued their callings independently of one another. It is perhaps worthy of note in this connection that the art of surgery was formerly practiced by barbers and that the practice by them was recognized and regulated in England by charter and statute.<sup>4</sup> The different branches of the medical profession in England were brought together under one governing body by the medical act of 1858.<sup>5</sup> This act and its different amendments<sup>6</sup> constitute what are known in England as the Medical Acts. By these acts, admission to the profession and the professional conduct of the practitioner are under the supervision, direction and control of "The General Council of Medical Education and Registration of the United Kingdom." This council, which now consists of thirty members, is made up by the appointment by the Crown of five members, the selection by the universities and medical colleges of twenty members and the election by the registered medical practitioners of five members. The Privy Council has a general power of supervision over this Medical Council. A critical examination of the English medical acts would be beyond the purpose and scope of this article. Suffice it to say that they provide for thorough qualifying examinations to be held by designated medical authorities and for a system of complete registration of those who are entitled to practice. The legislation seems well adapted for keeping out of the recognized profession those who are not qualified for the practice and for regulating the professional conduct of practitioners. But the laws apparently permit a person to practice without registration, although such a practitioner is forbidden to take the title of a licensed physician and cannot recover in the courts for his services; neither can he give valid certificates of death.<sup>7</sup>

*Medical legislation in the United States.*—In the United States at the present time admission to the practice of medicine and surgery, the revocation of licenses, and punishment for practicing without having been regularly licensed so to do, are regulated by statute in every state. The medical legislation of the different states has

<sup>4</sup> The barbers of London obtained a charter of incorporation from Edw. IV in 1461. In 1540 the surgeons and barbers of London were incorporated and were made one company, and their respective duties and privileges were prescribed. 32 Hen. VIII, c. 42. Other legislation touching the subject will be found in 34 and 35 Hen. VIII, c. 8, and in 18 Geo. II, c. 15, the latter being an act making the surgeons and barbers of London two separate and distinct corporations.

<sup>5</sup> 21 and 22 Vict., c. 90.

<sup>6</sup> See 22 Vict., c. 21; 23 and 24 Vict., c. 7 and c. 66; 39 and 40 Vict., c. 40 and c. 41, and 49 and 50 Vict., c. 48.

<sup>7</sup> See generally upon the English Medical Acts, 8 Encyclopaedia of the Laws of England, pp. 346-350; also Abstract of "Laws regulating the Practice of Medicine in the United States and Elsewhere" (12th Ed.), published by the American Medical Association, pp. 108-110.

been by no means uniform, although an improvement in that regard in recent years is noticeable. In a number of the states the medical statutes are now comprehensive and thorough, and through them much undoubtedly has been and will be accomplished in the way of protection to the public from the results of ignorance and fraud and the raising of professional standards. While a critical review of this legislation cannot be attempted in an article of limited extent, a general consideration of its prominent and characteristic features may be of service.

The legislation of the different states at the present time provides for a state board of medical examiners. This board as a rule is appointed by the governor,<sup>8</sup> the statute sometimes providing for a list of names made up by the different medical societies from which the appointees may be selected.<sup>9</sup> But in most of the states this provision is not found, the governor being in no way restricted by suggestions from medical societies. In many, probably in the majority, of the states, different schools of medicine are in some way represented in the body or bodies whose function it is to supervise admission to the practice of medicine.<sup>10</sup> Sometimes the necessary authority is centered in a single board, the members of which must be appointed from certain schools that are named in the statute.<sup>11</sup> Separate and

<sup>8</sup> In New York the members of the board are appointed by the Regents of the University of the State of New York. 2 Birdseye's R. S., Codes and General Laws of New York (3rd Ed.), p. 2837, § 141. And in Connecticut the statute provides for three examining boards, to be appointed by the state board of health from nominations submitted by the regular, homeopathic and eclectic medical societies of the state. See Public Acts of Conn., 1907, pp. 642, 643.

<sup>9</sup> For example, in Michigan it is provided that the appointees of the governor may be chosen from lists submitted to him biennially by each of the four legally incorporated state medical societies, namely, the societies of the regular, homeopathic, eclectic and physio-medical schools. Public Acts, 1899, p. 369. In Pennsylvania the governor appoints three boards of medical examiners, representing the regular, homeopathic and eclectic medical societies of the state, these societies furnishing a list of names from which selection can be made. 3 Purdon's Digest (13th Ed.), p. 3514, §§ 20-22. A similar provision will be found in several of the states.

<sup>10</sup> In the following states there seems to be no provision for the representation of different schools upon the examining board: Alabama, Colorado, Mississippi, Missouri, Montana, New York, North Carolina, Oklahoma, Washington, West Virginia and Wyoming. See "Laws (abstract) regulating the Practice of Medicine in the United States and Elsewhere" (12th Ed.), published by American Medical Association.

<sup>11</sup> For example, in California, the board of medical examiners consists of eleven members who are appointed by the governor, five from a list of ten names furnished by the California State Medical Society (regular), and two each from lists of four names furnished by the state homeopathic, eclectic and osteopathic societies respectively. Statutes and Amendments to the Codes (1907, Extra Session), p. 252. In Indiana the board consists of six members, the statute providing that "no school or system of medicine shall have a majority representation on such board" and further "that each of the four schools or systems of medicine having the largest numerical representation in the state shall have at least one representative on said board." See 2 Horner's Annotated Statutes (Ind. 1901), c. 82 A, § 5352d; Indiana Acts, 1905, c. 115, p. 194. In Michigan the board consists of ten members, five from the regular school, two from

distinct boards, each representing a particular school are not unusual.<sup>12</sup> And in a few states the functions ordinarily exercised by examining boards are imposed upon boards of health.<sup>13</sup>

The statutes usually require that application for a license to practice shall be made to the examining board in writing, and that such application shall be accompanied by the examination fee, or proof of its payment, and by such proof of moral character, general training, and professional study as the statute and the rules of the board require. Sometimes it is provided that the applicant shall file with the board an unmounted photograph of himself, recently taken, on the reverse of which he has written his name in the presence of an official authorized to administer oaths, who has certified by hand and seal that the person whose name appears on the photograph, is known to him to be the person shown in the photograph, and that the signature was written in his presence.<sup>14</sup> It is very generally provided that the examinations of the board shall be written, or both

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the homeopathic, two from the eclectic, and one from the school known as the physio-medical. Public Acts, 1899, p. 369. It may be suggested that in this state provision is made for a separate state board of osteopathic registration and examination. See Public Acts, 1903, p. 209. In New Jersey the board of medical examiners, consisting of nine members, is made up of "five old-school physicians, three homeopaths and one eclectic." *2* General Statutes of New Jersey, p. 2084. Boards constituted like those above described will be found in Arizona, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Nebraska, Nevada, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wisconsin. See "Laws (abstract) regulating the Practice of Medicine in the United States and Elsewhere" (12th Ed.), published by American Medical Association, under provisions given in regard to the named states. In Massachusetts the medical board consists of seven members, not more than three of whom shall at one time be members of any one chartered state medical society. See *1* Rev. Laws of Mass. (1902), p. 683. And in North Dakota the board consists of nine members, two of whom must be homeopathic and one a lawyer. Revised Codes of North Dakota (1905), § 294.

<sup>12</sup> In Pennsylvania, for example, the statute provides for three separate boards of medical examiners, one representing the medical society of the State of Pennsylvania, one, the homeopathic medical society of the state, and the other, the state eclectic medical society. *3* Purdon's Digest (13th Ed.), 3514, § 20. In New Hampshire, also, there are three separate state boards of medical examiners, representing respectively the three schools named above. Laws of New Hampshire, 1897, c. 63, § 2, Public Statutes and Session Laws of New Hampshire (Ed. 1901), pp. 426, 427. Similar provisions will be found in Arkansas, Connecticut, District of Columbia and Georgia; while in Delaware, Florida, Louisiana, South Carolina and Maryland there are two separate state boards of medical examiners, namely, a regular board, so called, and a homeopathic board. See "Laws (abstract) regulating the Practice of Medicine in the United States and Elsewhere" (12th Ed.), published by American Medical Association, pp. 23, 26, 28, 29, 30, 46, 49.

<sup>13</sup> This is the case in Illinois (Hurd's Rev. Stat., 1903, p. 1232, § 6), Iowa (Code, 1897, c. 17, § 2576), Mississippi (Thompson's Ann. Code, c. 104, § 3243), Missouri (Rev. Stat., 1899, vol. 2, c. 128, § 8507), New Mexico (Comp. Laws, 1897, § 3695), Oklahoma (Rev. Stat., 1903, c. 9, § 14), and West Virginia (West Va. Code, 1906, and Supplement, 1907, § 4386).

<sup>14</sup> There is such a rule in Illinois, Indiana, Kentucky and New Jersey. See Laws (abstract) regulating the "Practice of Medicine in the United States and Elsewhere" (12th Edition), published by the American Medical Association, pp. 33, 36, 37, 43, 44, and 66.

written and oral, and that a certain per cent of excellence must be attained by the applicant in order that he may be given his certificate or license. It is usual also for the statute to name the subjects upon which candidates must pass examinations.

The minimum preliminary training that the applicant for admission to the practice of medicine must have at the present time is, in a majority of the states, a high-school course of four years, or its equivalent. But in a few of the states no provision is made by law for preliminary training, and apparently candidates may be admitted to practice without such training, provided they have the requisite medical knowledge. Where such training is required, the applicant must show to the board of medical examiners, either by an examination or by the production of a diploma or certificate that the board can approve, that he possesses the requisite general knowledge.<sup>15</sup>

In most of the states, the statutes now require, as a basis for a license to practice, not only an examination before the state medical board, but, also, as preliminary to such examination, satisfactory evidence of graduation from an approved medical college. This is apparently the rule now in all but five states. What must be the standard of a medical college in order that it may be approved by a medical board, may depend either upon the rules of the board or upon the medical law of the state.<sup>16</sup>

By some statutes it is provided that the license to practice, upon the successful passing of the required examinations, shall be issued by the examining board directly, by others the certificate of the board operates as a license, and by others still, the certificate of the board entitles the holder to a license upon his presenting it to a named officer and paying the license fee. Ordinarily the holder of a license is required to record it in a designated public office, usually that of the county clerk or that of the clerk of the county court, of the county in which he intends to practice, paying for such recording the fee provided by statute. It should be mentioned, also, that the statutes usually require the payment of an examination fee. But in some states there is only one fee for the examination and license.

Reciprocity is provided for by statute in many of the states by which a person duly licensed in one reciprocating state may be admitted to practice in another. But the measure, as a rule, is not

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<sup>15</sup> See table showing the essential features of the state medical laws, p. 124 of "Laws (abstract) regulating the Practice of Medicine in the United States and Elsewhere" (12th Ed.), published by American Medical Association.

<sup>16</sup> See table showing the essential features of the state medical laws, p. 124 of "Laws (abstract) regulating the Practice of Medicine in the United States and Elsewhere" (12th Ed.), published by American Medical Association. The statutes of Alabama, Arkansas, Massachusetts, Mississippi, Rhode Island and Tennessee provide for an examination only.

mandatory, and an examining board may, in its discretion, inquire into the qualifications of an applicant, and, if not satisfied, refuse him a license. Reciprocity may be either upon the basis of an examination, that is to say, the applicant must have received his license after an examination before the board of the state from which he comes, or upon the basis of a diploma, where the applicant has been admitted to practice in the state from which he comes on a diploma from a reputable medical college and without examination. This basis is intended to meet the cases of persons who were registered regularly in another state prior to the date when the state receiving them through reciprocity required an examination.<sup>16a</sup> Reciprocating states require that the applicant for a license upon the basis of having been admitted to practice in another state, should show, in the way designated, either by statute or by the examining board, that he is a person of good moral character. Some of them require, also, a showing of reputable practice for a designated length of time, and some, a membership, usually for at least a year, in a recognized medical society. Admission through reciprocal relations involves the payment of the fee fixed by statute.

The medical acts usually exempt from their operation certain classes of persons. As a rule the act specifies that it shall not apply to those administering domestic or family medicines, to those rendering gratuitous services in cases of emergency, to commissioned surgeons of the United States army, navy or marine hospital service, or to legally qualified consulting physicians or surgeons from other states or territories.<sup>17</sup> Some acts provide that they shall not apply to practitioners of a stated number of years' practice.<sup>18</sup> Others con-

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<sup>16a</sup> For example, in Iowa reciprocal relations have been provided for by statute both on the basis of an examination and on the basis of a license issued without examination to the holder of a diploma from a medical college recognized by the Iowa board as in good standing, the date of said diploma being prior to the legal requirements of the examination test in Iowa. See *Laws of Iowa*, 30 G. A. 1904, p. 106. Similar provisions will be found in other states. And propositions as a basis of reciprocal medical registration, adopted by the American Confederation of Reciprocating Examining and Licensing Medical Boards are along the same lines. See "Laws (abstract) regulating the Practice of Medicine in the United States and Elsewhere" (12th Ed.), published by American Medical Association, pp. 122, 123. In this publication will be found quite a full explanation of reciprocity, together with a table showing between what states reciprocity now exists.

<sup>17</sup> The Michigan exemption, which may be taken as a type, is as follows: "This act shall not apply to the commissioned surgeons of the United States army, navy or marine hospital service, in actual performance of their official duties, nor to regularly licensed physicians or surgeons from out of this state, in actual consultation with physicians of this state, nor to dentists in the legitimate practice of their profession, nor to temporary assistants in cases of emergency, nor to the domestic administration of family medicines," etc., etc. See *Public Acts of Michigan*, 1899, p. 373.

<sup>18</sup> See, for example, *Public Statutes of Vermont* (1906), § 5372. A provision of this kind is not an unusual one.

tain a more liberal exemption clause than any to which reference has been made, including therein physicians residing on the border of a neighboring state and who are authorized to practice therein and persons practicing methods of healing that are not ordinarily recognized as regular.<sup>19</sup> In some of the states practitioners of osteopathy are specially exempted from the operation of the medical act, and where this is the case, we usually find a statute regulating the practice of osteopathy. But in many of the states there is no special provision exempting the osteopathist, and the courts are not in harmony upon the question of whether or not he can be regarded as a practitioner of medicine and so subject to the provisions of the medical act of the state in which he resides and practices. The decision of the question must, of course, depend largely upon the wording of the statute, but an examination of the cases will disclose the fact that practically the same language has been construed differently in different states.<sup>20</sup> The dentist is not subject to the medical legislation, his practice being usually regulated by special acts.

In most of the states the medical statute defines what shall be regarded as the practice of medicine within the meaning of the act. In some of the states the definition is narrow and for that reason the statute does not reach many irregular practitioners.<sup>21</sup> And not infrequently the definition has been made more narrow by the construction put upon it by the courts.<sup>22</sup> But in other states the defini-

<sup>19</sup> The exemption clause of the New Hampshire medical act may serve as an example of the more liberal kind. In addition to the exemptions for which provision is ordinarily made, it states that the law shall not apply to "any one while actually serving on the resident medical staff of any legally incorporated hospital," \* \* \* or to "any physician residing on a border of a neighboring state and duly authorized under the laws thereof to practice medicine therein, whose practice extends into this state, and who does not open an office or appoint a place to meet patients or receive calls within this state" or "to the regular or family physician of persons not residents of this state, when called to attend them during a temporary stay in the state, or to the hotel physician regularly employed by the landlord of the summer hotel in the care of his guests or employes" or "to clairvoyants or to persons practicing hypnotism, magnetic healing, mind cure, massage, Christian Science, so called, or any other method of healing, if no drugs are employed or surgical operations performed, provided such persons do not violate any of the provisions of this act in relation to the use of M. D., or the title of doctor or physician." Public Statutes and Session Laws of New Hampshire (1901), p. 427, § 11.

<sup>20</sup> See 1 MICHIGAN LAW REVIEW, p. 309; 2 MICHIGAN LAW REVIEW, p. 51; 4 MICHIGAN LAW REVIEW, p. 376.

<sup>21</sup> For example, the Georgia statute provides that "any person shall be regarded as practicing medicine or surgery \* \* \* who shall prescribe for the sick or those in need of medicine or surgical aid and shall charge or receive therefor money or other compensation or consideration, directly or indirectly, provided, however, that midwives and nurses shall not be regarded as practicing medicine or surgery." 1 Code of Georgia, § 1490.

<sup>22</sup> For a general treatment of the subject *What is the practice of medicine?* in which the holding of the courts is fully shown, see 5 MICHIGAN LAW REVIEW, p. 181, and 7 MICHIGAN LAW REVIEW, p. 154.

tion is broad and comprehensive in its terms and reaches irregular practitioners generally, whatever may be the system that they follow.<sup>23</sup>

The medical laws of some of the states provide against the employment of solicitors, cappers, or drummers for the purpose of procuring patients, and against the payment of money or the making of gifts to persons for a like purpose, and, also, against the subsidizing of hotels or boarding houses in order thereby to secure the recommendations of proprietors.<sup>24</sup>

It is also very generally provided that the medical board must refuse a certificate or license to a person guilty of grossly unprofessional and dishonest or dishonorable conduct, and that a certificate or license that has been issued, may be revoked by the board, if the person holding it is legally shown to have been guilty of such conduct. In some of the medical acts the words "unprofessional and dishonest (or dishonorable) conduct" are defined as meaning the doing of certain things therein set forth.<sup>25</sup> In others, they are not defined, and the meaning of the words and their application to cases as they arise, are questions, in the first instance, at any rate, for the determination of the board.

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<sup>23</sup> In Delaware, for example, the medical law provides that "the words, practice of medicine or surgery, shall mean to open an office for such purpose, or to announce to the public, or to any individual, in any way, a desire or willingness or readiness to treat the sick or afflicted, \* \* \* \* or to investigate or diagnosticate, or to offer to investigate or diagnosticate any physical or mental ailment, or disease, of any person, or to give surgical assistance to, or to suggest, recommend, prescribe or direct for the use of, any person, any drug, medicine, appliance, or other agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or bodily injury, or deformity, after having received or with the intent of receiving therefor, either directly or indirectly, any money, gift, or other form of compensation." It provides further that it shall also be regarded as practicing medicine, within the meaning of the act "if any one shall use in connection with his or her name the words or letters Dr., Doctor, Professor, M. D., M. B., or Healer, or any other title, word, letter or other designation which may imply, or designate him or her as, a practitioner of medicine or surgery, in any of its branches." *Laws of Delaware, 1907, p. 247.*

<sup>24</sup> See Public Acts of Michigan, 1907, p. 209; Arkansas Digest of Statutes, 1904, c. 109, § 5246.

<sup>25</sup> For example, the medical act of Michigan provides that the words "unprofessional and dishonest conduct," as used in the act, shall mean either criminal practices in connection with abortion, or the giving of the assurance, for a fee, that an incurable disease can be permanently cured, or grossly improper advertising, particularly where specific mention is made of venereal diseases, or having a professional business connection with illegal practice, or the advertising of medicine or means for the regulation or re-establishment of the menses, or the advertising of any matter of an obscene or offensive nature derogatory to good morals, or the employment of solicitors or other irregular means named for the purpose of securing patients, or "being guilty of offenses involving moral turpitude, habitual intemperance, or being habitually addicted to the use of morphine, opium, cocaine or other drugs having a similar effect." This act also makes it a misdemeanor for any persons to be guilty of "unprofessional and dishonest conduct," as defined therein and provides a penalty. See Public Acts of Michigan, 1907, p. 218.

To secure obedience to the medical acts, a penalty is provided for their violation. This is usually in the form of a fine or imprisonment in the county jail, or both, in the discretion of the court. Moreover, in some of the states it is provided in the act that a person practicing without a license shall not be entitled to collect fees for his services.<sup>26</sup>

*The constitutionality of medical acts.*—In nearly every state the validity of its medical legislation has been attacked in the courts. It has been claimed that such laws invade natural rights. The argument advanced is that it is the natural right of every citizen to follow such business or profession as he may select, provided it be lawful, and that any statute that interferes with the free exercise of that right by imposing conditions in regard to qualification that the citizen must satisfy before he can enter upon his chosen calling, is contrary to a fundamental principle of the organic law and cannot stand.<sup>27</sup> It has been claimed further that such laws interfere with vested rights, that they operate to deprive a person of his property without due process of law. It is argued that the right to continue the practice of medicine, which one has already begun, is a vested right and a property right that cannot, under the limitations of the organic law, be invaded by the requirement that the practitioner must submit to special tests provided for by statute before he can lawfully continue his practice.<sup>28</sup> It is sometimes contended that this legislation dis-

<sup>26</sup> Such provisions will be found in Alabama (Political Code of Alabama, 1907, §1644), Georgia (1 Code of Georgia, 1895, § 1497), Kansas (General Statutes of Kansas, 1905, § 7229), Kentucky (Kentucky Statutes, 1903, § 2618), Louisiana (Wolff's Constitution and Revised Laws of Louisiana, 1904, vol. 2, p. 1240, § 16), and several other states. As to whether or not the unlicensed practitioner in the absence of such a statutory provision can collect fees for his services, there is some conflict of authority, although in practically all the states in which the matter has been judicially determined, it has been held that he cannot, because the services out of which the contract arises, are rendered in violation of the medical law. See *Gardner v. Tatum*, 81 Cal. 370, 22 Pac. Rep. 880; *Haworth v. Montgomery*, 91 Tenn. 16, 18 S. W. Rep. 309. But see *Smythe v. Hanson*, 61 Mo. App. 286, in which the contrary doctrine is declared.

<sup>27</sup> See *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 1372, 24 So. Rep. 809, in which this contention was made by the attorney for the defendant; see, also, *State v. Biggs*, 133 N. C. 729, 731, 14 S. E. Rep. 401, 64 L. R. A. 139.

<sup>28</sup> For example, in *Dent v. West Virginia*, 129 U. S. 114, it appeared that Dent had been a practitioner of medicine in the state, without a diploma that would be recognized by the board of examiners, for five years before the enactment of a law that prescribed certain requirements with which he could not comply without further preparation. Although he had enjoyed a lucrative practice, it had not been continued for such a length of time that he was entitled to exemption from the requirements of the statute. His defense to a prosecution under the statute was that the law, by taking away his right to continue the practice of his profession, had destroyed his "vested rights" and deprived him "of the estate he had acquired in his profession by years of study, practice, diligence and attention"; that it had deprived him "of the value of his invested capital in books, medicines and instruments." To quote further from the brief submitted by his attorney to the Supreme Court: "For the state to enact a law forbidding a man the enjoyment of his own house without the consent of an arbitrary board of examiners is no more unjust than to provide that a man shall not enjoy the benefits of an estab-

criminate among persons engaged in, or who are about to engage in, the same business, and denies them equal protection and privileges under the law; that it is in conflict with the fourteenth amendment to the Constitution of the United States, which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States" and also with the second section of article four of said Constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." To make the contention more specific, it may be suggested that it is usually provided in every medical law that certain persons shall be exempt from its operation, for example, persons who have been in practice in the state for a certain number of years before the law takes effect, and physicians who come within the state for special professional work. It is argued that, as the law does not apply to such persons, there is an unjust and improper discrimination as against those who are obliged to comply with the requirements of the law. It is argued further that a law providing that no person shall practice in the state unless he has met the requirements of the law as to previous study and preparation, or unless he has been in practice in the state for a certain period, ten years, for example, immediately before the law takes effect, is a discriminating law and unconstitutional, first, in that it admits those who have practiced ten years, but excludes those who have practiced for a shorter period, even though the difference in time be slight; second, in that it admits those who have practiced for the requisite period in the state, but excludes those who have practiced for the same period in other states; and third in that such a law makes a distinction between those who have practiced in the state continuously during the stated time, immediately preceding the passage of the act, and those who have practiced just as long or longer in the state, but not continuously during the stated time and immediately before the law went into effect.<sup>29</sup> Medical acts are sometimes attacked also upon the ground that they are *ex post facto* laws and therefore cannot stand.<sup>30</sup>

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lished practice without a like consent. In either case he is deprived of his vested rights and property by a process rather ministerial than judicial and wholly different from that which is meant by due process of law, the judgment of his peers, or the law of the land." A similar claim was made by the relator in *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 50 N. E. Rep. 750, 41 L. R. A. 212.

<sup>29</sup> For cases in which arguments like those suggested in the text were advanced see *Ex parte Spinney*, 10 Nev. 323; *Harding v. People*, 10 Colo. 387; *Williams v. People*, 121 Ill. 84; *People v. Phippin*, 70 Mich. 6; *State ex rel. Walker v. Green*, 112 Ind. 462, 14 N. E. Rep. 352; *State v. Randolph*, 23 Oregon, 74, 31 Pac. Rep. 201, 37 Am. St. Rep. 655, 17 L. R. A. 470.

<sup>30</sup> See *Commonwealth v. Wasson* (York County, Pa., Quarter Sessions), 3 Crim. Law Magazine, 726, in which the medical act in question was held by the court to be *ex post facto*. It should be noted, however, that the court was an inferior one.

But notwithstanding such attacks as the foregoing, the medical legislation of the different states has, with a few exceptions, been sustained as a proper and lawful exercise of the police power.<sup>81</sup> For the non-professional reader it should be explained that the police power of the state is an authority inherent in the state to regulate and control things that are connected with the health, comfort, safety

<sup>81</sup>In each of the following cases the statute was upheld as a valid exercise of the police power: *Brooks v. State*, 88 Ala. 122, 6 So. Rep. 902; *Bragg v. State*, 134 Ala. 165, 32 So. Rep. 767; *Richardson v. State*, 47 Ark. 562, 2 S. W. Rep. 187; *Thompson v. Van Lear*, 77 Ark. 506, 92 S. W. Rep. 773, 5 L. R. A. (N. S.) 588; *Ex parte Frazer*, 54 Cal. 94; *Ex parte McNulty*, 77 Cal. 164, 19 Pac. Rep. 237, 11 Am. St. Rep. 257; *Ex parte Gerino*, 143 Cal. 412, 77 Pac. Rep. 166, 66 L. R. A. 249; *Harding v. People*, 10 Col. 387; *Brown v. People*, 11 Col. 109, 17 Pac. Rep. 104; *State v. Wordin*, 56 Conn. 216, 14 Atl. Rep. 801; *Williams v. People*, 121 Ill. 84, 11 N. E. Rep. 881; *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. Rep. 923; *Eastman v. State*, 109 Ind. 278, 10 N. E. Rep. 97, 58 Am. Rep. 400; *Orr v. Meck*, 111 Ind. 40, 11 N. E. Rep. 987; *State v. Webster*, 150 Ind. 607, 50 N. E. Rep. 750, 41 L. R. A. 212; *Parks v. State*, 159 Ind. 211, 64 N. E. Rep. 862, 59 L. R. A. 190; *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. Rep. 228; *State v. Mosher*, 78 Iowa, 321, 43 N. W. Rep. 202; *Iowa Eclectic Medical College v. Schrader*, 87 Iowa, 659, 55 N. W. Rep. 24, 20 L. R. A. 355; *State v. Heath*, 125 Iowa, 585, 101 N. W. Rep. 429; *State v. Edmunds*, 127 Iowa, 333, 101 N. W. Rep. 431; *State v. Wilhite*, 132 Iowa, 226, 109 N. W. Rep. 730; *State v. Kendig*, 133 Iowa, 164, 110 N. W. Rep. 463; *State v. Wilcox*, 64 Kans. 789, 68 Pac. Rep. 634; *Meffert v. Medical Board*, 66 Kans. 710, 72 Pac. Rep. 247, affirmed in 195 U. S. 625; *Driscoll v. Commonwealth*, 93 Ky. 393, 20 S. W. Rep. 431; *Wilson v. Commonwealth*, 119 Ky. 769, 82 S. W. Rep. 427; *Allopathic State Board of Medical Examiners v. Fowler*, 5 La. Ann. 1358, 24 So. Rep. 809; *State v. Bohemier*, 96 Me. 257, 52 Atl. Rep. 643; *Scholle v. State*, 90 Md. 729, 46 Atl. Rep. 326; *Manger v. Board of Examiners*, 90 Md. 659, 45 Atl. Rep. 891; *State v. Knowles*, 90 Md. 646, 45 Atl. Rep. 877, 49 L. R. A. 695; *Hewitt v. Charier*, 16 Pick. 353; *People v. Phippin*, 70 Mich. 6, 37 N. W. Rep. 888; *People v. Reetz*, 127 Mich. 87, 86 N. W. Rep. 396; *State v. State Medical Examining Board*, 32 Minn. 324, 20 N. W. Rep. 238, 50 Am. Rep. 575; *State v. State Board of Medical Examiners*, 34 Minn. 387, 26 N. W. Rep. 125; *State v. Flischer*, 41 Minn. 69, 42 N. W. Rep. 696; *State v. Hathaway*, 115 Mo. 36, 21 S. W. Rep. 1081; *Craig v. Board of Medical Examiners*, 12 Mont. 203, 29 Pac. Rep. 532; *Gee Wo v. State*, 36 Neb. 241, 54 N. W. Rep. 513; *In re Roe Chung*, 9 N. M. 130, 49 Pac. Rep. 952; *Territory v. Newman*, 79 Pac. Rep. 706, 68 L. R. A. 783; *People v. Fulda*, 52 Hun (N. Y.) 65, 67, 4 N. Y. Supp. 945; *Ex parte Spinney*, 10 Nev. 336; *State v. Van Doran*, 109 N. C. 864, 14 S. E. Rep. 32; *State v. Call*, 121 N. C. 643, 28 S. E. Rep. 517; *France v. State*, 57 Ohio St. 1, 47 N. E. Rep. 1041; *State v. Ottman* (Com. Pl.), 6 Ohio Dec. 265; *State v. Morrill*, 7 Ohio Dec. 52; *State v. Gravett*, 65 Ohio St. 289, 62 N. E. Rep. 325, 55 L. R. A. 791; *State v. Marble*, 72 Ohio St. 21, 73 N. E. Rep. 1063; *Barmore v. State Board of Medical Examiners*, 21 Oregon, 301, 308, 28 Pac. Rep. 8; *State v. Randolph*, 23 Oregon, 74, 31 Pac. Rep. 201, 37 Am. St. Rep. 655; *Commonwealth v. Taylor*, 2 Kulp (Pa.) 364; *Commonwealth v. Wilson*, 19 Pa. Co. Ct. Rep. 521, 6 Pa. Dist. Rep. 628; *Commonwealth v. Finn*, 11 Pa. Super. Ct. 620; *Commonwealth v. Densten*, 30 Pa. Super. Ct. 631; *Commonwealth v. Densten*, 217 Pa. St. 423, 66 Atl. Rep. 653; *O'Neil v. State*, 115 Tenn. 427, 90 S. W. Rep. 627; *Logan v. State*, 5 Texas App. 306; *Kenedy v. Schultz*, 6 Texas Civil App. 641, 25 S. W. Rep. 667; *Dowdell v. McBride*, 18 Texas Civil App. 645, 45 S. W. Rep. 397, affirmed 92 Texas, 239, 47 S. W. Rep. 524; *Stone v. State*, (Texas Cr. App.) 86 S. W. Rep. 1029; *People v. Hasbrouck*, 11 Utah 291, 39 Pac. Rep. 918; *Fox v. Territory*, 2 Wash. Ter. 297, 5 Pac. Rep. 603; *State v. Carey*, 4 Wash. 424, 30 Pac. Rep. 729; *State v. Dent*, 25 W. Va. 1; *State v. Currans*, 111 Wis. 431, 87 N. W. Rep. 561, 56 L. R. A. 252; *Dent v. West Virginia*, 129 U. S. 114; *Hawker v. New York*, 170 U. S. 189; *Reetz v. Michigan*, 188 U. S. 505.

and welfare of the public. The regulation and control may have to do with person or with property or with both. And the right of regulation and control includes the right to prohibit, where the public exigency calls for the exercise of such a right. It has been said that the police power is co-extensive with the necessity for public self-protection. The power has been called the "law of overruling necessity."<sup>32</sup>

It need not be suggested that the practice of medicine is intimately connected with the health and well being of the people of the state. Properly regulated, it becomes a source of great and widespread benefit, but without regulation, it may become the source of grave harm and far-reaching danger. And so, in order that the people may be safe-guarded in this respect and be reasonably sure of receiving intelligent medical treatment, the state, by virtue of its inherent power, enacts regulations for the examination and registration of physicians and surgeons and for the practice of the profession. Such legislation, if reasonable in its provisions, violates neither state nor national organic law. It does not unwarrantably interfere with the natural rights of the citizen to follow the calling of his choice, because all callings that are public or quasi-public in their nature, must yield to such reasonable regulations as the public health, safety and welfare demand. So long as the conditions imposed are reasonable and apply to all alike who desire to enter or follow the calling, they do not violate any fundamental right.<sup>33</sup> It undoubtedly would be more nearly correct to speak of the practice of medicine, or any other quasi-public calling, not as a right to which the citizen is entitled, but rather as a privilege, in regard to the exer-

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<sup>32</sup> For definitions of the police power see *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71; *State v. Noyes*, 47 Me. 189; *Thorpe v. Rutland, etc.* R. R. Co., 27 Vt. 140; *Commonwealth v. Alger*, 7 Cush. 53, 84, 85, 86.

<sup>33</sup> "It is undoubtedly the right of every citizen of the United States," says the court in *Dent v. West Virginia*, 129 U. S. 114, 121, "to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud."

cise of which the state may impose such reasonable conditions as the protection and welfare of the public seem to demand.<sup>34</sup>

In answer to the contention that the medical statute that imposes conditions that must be met by those already engaged in practice as well as by those who contemplate practice, interferes with vested rights and operates to deprive persons of their property without due process of law, the courts with remarkable unanimity have held that such legislation does not interfere with vested rights because it does not deprive any person or class of persons of the right to begin, or continue in, the practice of medicine; it simply provides that in order to do so, one must comply with such requirements as the protection of the public demands. And the courts with the same unanimity have held that such legislation does not operate to deprive persons of their property without due process of law, because, even though it be conceded that the right to continue the practice of medicine is a property right, such right must, according to fundamental principles, always be exercised under such regulations and restrictions as the protection of the public demands.<sup>35</sup> In order to make a medical law

<sup>34</sup> See *State v. Edmunds*, 127 Iowa, 333, 339, 101 N. W. Rep. 431; *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358, 1373, 1374, 24 So. Rep. 809. In this case the court says: "Whenever the pursuit of any particular occupation or profession requires for the protection of the lives or health of the general public, skill, integrity, knowledge or other personal attributes or characteristics in the person pursuing it, the general assembly has the power and the authority to have recourse to proper measures to ensure that none but persons possessing these qualifications should pursue the calling. We find this right constantly put in force by the general as well as the state governments. \* \* \* \* \* There is no more natural, absolute right in a person to practice medicine or surgery than there is to practice law. What is claimed to be a natural or absolute right, is nothing more than a privilege or a right upon conditions."

<sup>35</sup> "It would not be deemed a matter for serious discussion," says the court in *Dent v. West Virginia*, 129 U. S. 114, 123, "that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications." See, also, *State v. Currens*, 111 Wis. 431, 87 N. W. Rep. 561; *Meffert v. Medical Board*, 66 Kans. 710, 72 Pac. Rep. 247, affirmed in 195 U. S. 625; *State v. Bohemier*, 96 Me. 257, 52 Atl. Rep. 643, in which the constitutionality of the state medical act is sustained and it is also held that the state could not, under the provisions of its statutes, contract, through a legislative act, with a medical society that its regular licensees should be admitted to practice without being subject to additional limitations unless imposed by the society itself, in such a way as to prevent a subsequent legislature from revoking the contract, and that the general medical act, requiring all practitioners to be licensed, which was subsequently passed, although it would operate to revoke such a contract, if there were one, would not impair the obligation of any contract.

effective, then, the legislature may require that one having an established practice and one contemplating practice should conform to the same standard. It is easy to see that if the state, acting through its public legislative assembly, did not possess this power, it would be seriously handicapped in the exercise of its authority as the guardian of the public health and welfare.<sup>86</sup>

In order to perform what may be called the public duties of his profession, the physician is, under the law, not infrequently called upon to sacrifice what is essentially a property interest. For example, a statute or an ordinance may require him, without compensation, to report to the proper authorities such of his patients as are suffering from contagious or infectious diseases, and impose a penalty for each omission so to do. It might be claimed, upon the theory that the time required for the reporting of such cases would constitute a property interest, that such statute or ordinance would be unconstitutional, in that it would deprive the physician of his property without due process of law. But such a claim would not be recognized by the courts, because the state has the inherent authority to compel such reports, in order that the spread of disease may be prevented and the public health conserved. In such cases the right of the physician must be sacrificed for the public good. It has been said that, under such circumstances "the constitutional right to compensation for services stands in abeyance."<sup>87</sup>

The ordinary answer given by the courts to the contention that the exemptions that we find in most medical laws by which certain persons named, physicians for example who have been in practice for a stated number of years, give rise to unjust and improper discriminations and thereby make such laws unconstitutional, is that simply fixing requirements that all persons who purpose practicing medicine must meet, and that all such persons by reasonable efforts may meet, is not discrimination but regulation that the state, by virtue of its inherent power, has the right to make; that the state has the right to say, and may very properly say, that a certain period of actual practice within the state, is the equivalent, so far as preparation for practice is concerned, of a stated period of study followed by an examination or of any other requirement that may be set forth in the statute; that the exemption from the requirements of an act of physicians who have been practicing for a stated length of time, does

<sup>86</sup> See *State v. Gravett*, 65 Ohio St. 289, 62 N. E. Rep. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

<sup>87</sup> See *State v. Wordin*, 56 Conn. 216, 14 Atl. Rep. 801; see, also, *Robinson v. Hamilton*, 60 Iowa, 134, 14 N. W. Rep. 202, 46 Am. Rep. 63, in which a regulation of the state board of health, provided for by statute, requiring physicians to report births and deaths was held to be constitutional, the legislation being clearly within the police power of the state.

not operate as a denial of the privilege or of the right of practicing medicine to any one; that any citizen may qualify himself, in the manner pointed out by the law, and thereafter lawfully engage in the practice of medicine; that an act of this kind "does not grant privileges or immunities to any citizen or class of citizens either within or without the state; it only establishes a rule of evidence by which qualification to practice medicine and surgery is to be determined."<sup>38</sup> An examination of the cases, both state and federal, bearing upon the question, will show that these constitutional limitations in regard to the privileges and immunities of citizens are never construed in such a way as to deprive the states of their power so to control the conduct of individuals as to protect the welfare of the community. There must necessarily be what from some points of view might be regarded as class legislation. If the protection of the community as a whole requires that people following a particular calling should reach and maintain a certain standard of preparation, the state, by virtue of its inherent power, may fix that standard and declare what the legal evidences of that preparation may be. Yet the state by such legislation in a sense imposes burdens, the burdens of preparation, and confers privileges, the privileges that come from the following of the calling, upon a separate class of citizens. "It has been decided with substantial unanimity," says the supreme court of Wisconsin, "that upon those subjects wherein the welfare of the community at large is jeopardized by unrestrained freedom of will and action in every individual, the legislature may impose restraints, and that such restraining laws are within the constitutional requirement of uniformity and equality between individuals, if they affect all individuals alike with reference to the subject under consideration."<sup>39</sup>

The argument occasionally advanced, as hereinbefore suggested, that legislation making the practice of medicine without a license a crime is essentially *ex post facto* in its nature and therefore cannot stand, is unsound for the reason that such legislation has none of the essential qualities of an *ex post facto* act. "An *ex post facto* law," according to Mr. Justice WASHINGTON, in *United States v. Hall*, "is one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which in relation to the offence, or its con-

<sup>38</sup> See *State v. Randolph*, 23 Oregon, 74, 85, 31 Pac. Rep. 201, 17 L. R. A. 470.

<sup>39</sup> See *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 436, 87 N. W. Rep. 561, 56 L. R. A. 252. See, also, *Fox v. Territory*, 2 Wash. Ter. 297, 5 Pac. Rep. 603; *Ex parte Spinney*, 10 Nev. 323; *Harding v. People*, 10 Colo. 387; *Williams v. People*, 121 Ill. 84, 11 N. E. Rep. 881; *State ex rel. Walker v. Green*, 112 Ind. 462, 14 N. E. Rep. 352; *People v. Phippin*, 70 Mich. 6. Many of the cases cited *ante* note 31 bear also upon this phase of the general question.

sequences, alters the situation of a party to his disadvantage."<sup>40</sup> To show that the ordinary medical law does not fall within this definition, it need only be suggested that such law never makes the physician liable for having practiced before the taking effect of the act, but only when he attempts to practice after the act has taken effect, in violation thereof. It is apparent that such a law does not make an act criminal which was not so at the time it was performed; that it does not in any way alter the situation of a physician to his disadvantage in regard to anything that he has done before the law became operative. So far as its criminal quality is concerned, such a law is strictly prospective.

But while all this is very generally conceded in regard to most of the essential parts of the ordinary medical act, it is nevertheless sometimes claimed that certain parts of an act, as practically applied, operate in an *ex post facto* manner. For example, many of the medical acts provide that the board of examiners "may refuse to grant a certificate to any person guilty of felony, or gross immorality or addicted to the liquor or drug habit to such a degree as to render him unfit to practice medicine or surgery, and may, after notice and hearing, revoke the certificate for like cause." In a state where such a provision was in force, the medical board revoked a certificate for gross immorality which was committed before the passage of the law under which the proceeding was taken, and it was claimed by the physician affected that the provision, if made to apply to such immorality, would be *ex post facto*, because punishing him for something which took place before the statute was in force and which was not then an act that, before the law, affected his status as a physician. The following answer to the contention was given by the court: "Conceding that the evidence introduced before the state board of medical examiners related to acts of immorality occurring before the passage of the law creating the board, does it follow that the law is *ex post facto* as applied to plaintiff in error? An *ex post facto* law is one that imposes a punishment for an act that was not punishable at the time it was committed, or imposes an additional punishment to that then prescribed, etc. The revocation of a license to practice medicine for any of the reasons mentioned in the statute was not intended to be, nor does it operate as, a punishment, but as a protection to the citizens of the state. Such requirements go to his qualifications. \* \* \* \* If the revocation were intended as a punishment, there might be force in this argument, but since the only purpose of the law was to require a certain standard of morals

<sup>40</sup> See *United States v. Hall*, 2 Wash. C. C. 366; *Calder v. Bull*, 3 Dall. 386; *Kring v. Missouri*, 107 U. S. 221.

of the physician, the argument is without force."<sup>41</sup> A similar conclusion has been reached by the Supreme Court of the United States in another case, although by a divided court. A New York statute provided that practicing medicine, or attempting to practice, after conviction of a felony, should be a misdemeanor, punishable by fine or imprisonment or both. In a prosecution under the act, it was claimed that, as the conviction of defendant took place before the passage of the statute, to apply the statute to the case would be to make it in effect *ex post facto*. The argument was this: that the defendant has suffered the punishment imposed at the time of his conviction: that the right to practice medicine being a valuable property right, to deprive one of it would be in the nature of a punishment; therefore, if the statute in question should be held to apply to defendant's case, its effect would be to punish him again for an offense for which he had once fully atoned, and that so applied, it would be *ex post facto*. This view appealed to three of the justices, who, through the dissenting opinion of Mr. Justice HARLAN, urged, also, the additional objection to the statute that it fails to take into account in any manner whatsoever the character of the person affected, at the time of the passage of the statute. "The offender," says the opinion, "may have become, after conviction, a new man in point of character, and so conducted himself as to win the respect of his fellow-men, and be recognized as one capable, by his skill as a physician, of doing great good. But these considerations have no weight against the legislative decree embodied in a statute which, without hearing, and without any investigation as to the character or capacity of the person involved, takes away from him absolutely a right which was being lawfully exercised when that decree was passed." A majority of the court, however, held that the state, by virtue of the police power, has authority to prescribe, as prerequisites for the practice of medicine, both qualifications of learning and of good character and to enact that the record of a conviction of a felony should be conclusive evidence of the absence of the requisite good character. "It is no answer," says the court, "to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist."<sup>42</sup>

<sup>41</sup> Meffert v. Medical Board, 66 Kans. 710, 722, 72 Pac. Rep. 247, affirmed without opinion in 195 U. S. 625.

<sup>42</sup> See Hawker v. New York, 170 U. S. 189.

In addition to the objections to medical statutes hereinbefore noted and considered, it may be suggested that it is sometimes claimed that a medical law, if enforced according to its terms, would operate to create a monopoly in favor of the medical profession, and would thereby deprive the people of the opportunity of procuring cheap and simple remedies from persons who are not regular practitioners, such remedies being usually harmless and the only ones within the reach of many, all of which would be contrary to the fundamental principles of our institutions.<sup>43</sup> The answer to this contention is that in all legislation the object of which is to protect the public by requiring evidence of fitness before one is allowed to follow a particular calling, a class, learned and prepared in the calling, is necessarily created, the members of which will do the work in the desig-

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<sup>43</sup> Such a claim as the above is not without the sanction of judicial precedent. See *State v. Biggs*, 133 N. C. 729, 46 S. E. Rep. 401, 64 L. R. A. 139. In this case the provision of the statute that was assailed defined what should be regarded as the practice of medicine for the purposes of the act in the following words: "The expression 'practice of medicine and surgery' shall be construed to mean the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever," with certain provisos as to midwives, nurses, osteopaths, etc., etc. Defendant was prosecuted under the statute for practicing a system of drugless healing. The court held that if this provision were made to apply to any excepting those who treat diseases by medical or surgical means, it would violate the provisions of the state constitution as to "monopolies" and "exclusive privileges and emoluments," in that it would make the practice of healing for compensation irregular excepting by the ordinary methods of drugs and surgery. In other words, the court held that if this section of the statute were to be enforced as it reads, everyone in the business of healing would be obliged to meet the professional requirements imposed by the statute, although such requirements are only necessary for those who administer drugs or perform surgical operations, and that this would result in a monopoly. "The practice of medicine and surgery," says the court, "in the usual and ordinary meaning of that term, is of the highest antiquity and dignity. \* \* \* \* \* The public have a right to know that those holding themselves out as members of that ancient and honorable profession are competent and duly licensed as such. The legislature can exert its police power to that end, because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have a right to use such methods if they wish, and the attempt to require an examination \* \* \* \* \* for the application of such treatment is not warranted by any legitimate exercise of the police power. The effect would be to prohibit to those who wish it those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title of M. D., or prohibiting the use of such remedies altogether, neither of which results the legislature could have contemplated, and both of which are forbidden by the provisions of the constitution above cited." It should be suggested that the same court had theretofore held that the state medical law, without the provision hereinbefore quoted, which law required an examination and certificate as to competency of all persons entering upon the practice of medicine, was valid, as a proper exercise of the police power. See *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32; *State v. Call*, 121 N. C. 643, 28 S. E. Rep. 517. In this last case the court said of the examination and certificate: "To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privileges. The door stands open to all who possess the requisite age and good character and can pass the examination which is exacted of all applicants alike."

nated field, but a monopoly in the proper sense of that term is not thereby created, because the legislature has in view not the benefit of those following the calling, but the safe-guarding of the public. The medical legislation that is now so generally found upon our statute books, undoubtedly tends to protect regular practitioners from competition in business, but it should be remembered that the purpose of the legislation is the protection of the public from poorly prepared physicians, quacks and pretenders and not the benefit of the profession in a pecuniary way. Any benefit of this kind that may come to the regular practitioners from the legislation, is incidental.<sup>44</sup>

As hereinbefore shown, the medical laws of some of the states provide against the employment by physicians of solicitors or agents for the purpose of procuring patients.<sup>45</sup> This practice is probably more common at the various health resorts of the country than elsewhere, but it is by no means confined to them. It is a practice that reputable members of the profession condemn, and it has been very largely through their efforts that legislation against it has been secured. But the validity of this legislation has been attacked upon the ground that, as the practice of medicine is a lawful occupation, to make it a crime to solicit practice is an unwarranted interference with the constitutional rights of the physician. It is argued that the rights of the physician to push his business, which is perfectly legitimate, through agents and solicitors, should not be taken away by legislation, when entire freedom in that regard is accorded to those who are following other lines of activity—to the merchant or manufacturer, for example; that to do this is to create an unjust discrimination between citizens, which is contrary to the organic law. While it is generally conceded by those so contending that the state has the power to regulate the practice of medicine and surgery, yet they claim that “no general powers to make needful regulations can include special rights to interfere with lawful business.” The obvious answer to this argument is that the practice of medicine is very different from the business of merchandising or manufacturing and from any business, indeed, that has to do with property simply and is essentially private in its nature. The practice of medicine has to do immediately with the health of the people, and, for this reason, it is a quasi-public occupation. By virtue of the police power it may be regulated to such an extent as is necessary for the protection of the public; and that the public may need protection from the solicitations of agents sent out by unscrupulous practitioners must be quite apparent when we call to mind the probable results of such

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<sup>44</sup> See *Lincoln Medical College v. Poynter*, 60 Nebr. 228, 82 N. W. Rep. 855.

<sup>45</sup> See *ante*, p. 302.

practices. It is not likely that a physician would hire an agent to secure patients and then treat those patients in exactly the same way that he would treat patients coming to him voluntarily. If one of the latter did not need medical treatment, the physician would tell him so at once and send him about his business. But would he do so in the case of a patient sent to him by a paid agent? Is it to be expected that he would pay for securing the patient and then send him away without treatment even though an examination should prove that he did not need treatment? These questions must certainly be answered in the negative. And if the person who is not really in need of a physician may be imposed upon by such practices and thereby suffer injury, it is quite apparent that the danger to the sick from this source must be even greater. Such a method of securing patients must inevitably result not only in fraud but in grave danger to the health and well being of many people, and legislation to prevent it certainly has a substantial basis in reason.<sup>46</sup>

While the courts have very generally sustained the medical legislation of the different states, as is apparent from the foregoing, they have in a few instances refused to sanction certain features of this legislation. For example, a New Hampshire statute provided that the requirements thereof for a license to practice should "not apply to persons who have resided and practiced their profession in the town or city of their present residence during all the time since January 1, 1875." The statute took effect January 1, 1879. It is apparent, then, that all physicians except those who had practiced all the time between the dates named, in one place in the state, would be subjected to the requirements of the statute. It is apparent, also, that this legislation imposed a burden upon one class of physicians that was not imposed upon all, not because those upon

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<sup>46</sup> The argument by which this legislation is sustained is well stated by the Supreme Court of Arkansas in the case of *Thompson v. Van Lear*, 77 Ark. 506, 515, 92 S. W. Rep. 773, 5 L. R. A. (N. S.) 588. The court says, "The business of the physician directly affects the public health, and it does not follow because the merchant, the manufacturer and others may solicit trade through hired agents that a physician may do the same thing. The legislature has forbidden the physician to do so, and there are, in our opinion, sound reasons upon which to base the distinction. The law thus undertakes to protect the physician from the temptation and the patients from the danger to which they would be exposed by such a practice. When we consider how easy it would be in many cases for the professional drummer to impose upon sick people, and even upon those who are well, and induce them to submit to treatment they do not need; when we consider that a physician who had paid for a patient would be under a strong temptation to make a profit out of his investment, and to give, and charge for, treatment whether the patient needed it or not; when we consider the fraud and imposition that would be encouraged by such a method of securing patients—we easily reach the conclusion that the law wisely prohibits a physician from seeking patronage by means of paid agents." See, also, *State v. McCreary* (Ark. 1906), 92 S. W. Rep. 775. So far as the writer has observed, the question as to the validity of this legislation has only been raised in Arkansas.

whom the burden was not imposed were exempt because of previous practice which the legislature had declared to be evidence of acquirements equal to those exacted of others who had not practiced, which would have been a valid exercise of power, but because of the fact of unchanged residence. This was very properly held to be an arbitrary, unjust and unconstitutional discrimination among persons sustaining the same relation toward the public. "The present objection, says the court, "is not to the rule of evidence by which the statute requires qualification to practice to be determined. It is not that residence and practice during the specified time in one place is made sufficient evidence of fitness—equivalent to a diploma—rendering an examination unnecessary. It is, that of those physicians who are declared by the statute, or under its provisions are found, qualified to practice, some are and others are not subjected to the burden of obtaining a license. Exemption from the burden is made to depend, not upon integrity, education and medical skill, but upon a continuous dwelling in one place for a certain time. The test is not merit but unchanged residence. It is an arbitrary discrimination permitting some and forbidding others to carry on their business, without regard to their competency, or to any material difference in their situation. \* \* \* \* This is not the equality of the constitution."<sup>47</sup> It has been well said that "the constitutionality of a statute cannot be sustained which selects particular individuals from a class or locality, and subjects them to particular rules, or imposes upon them special obligations or burdens from which others in the same locality or class are exempt."<sup>48</sup>

A fundamental limitation upon legislative authority to prescribe conditions that must be met by those who purpose entering upon, or continuing the practice of medicine, is that the conditions must be reasonable. Whether or not they are reasonable, is a question for the courts. And in deciding the question the courts hold that conditions are reasonable that are fit and appropriate to the end sought, namely, the protection of the public, and are not in any way arbitrary or capricious. But if conditions are imposed apparently for the purpose of discriminating against, or in favor of, a certain class, like a school of medicine, for example, they will not be allowed to stand.<sup>49</sup> An act discriminating against osteopaths by requiring them

<sup>47</sup> *State v. Pennoyer*, 65 N. H. 113, 18 Atl. 878, 5 L. R. A. 709.

<sup>48</sup> *State v. Hinman*, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22. In this case a discrimination in regard to dentists similar to the one discussed above in regard to physicians, was held to be unconstitutional.

<sup>49</sup> See *State v. Vandersluis*, 42 Minn. 129, 43 N. W. Rep. 789, 6 L. R. A. 119. In this case the court states the controlling principle as follows: "If a condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and especially, if it appeared that it must have been adopted for some

to hold diplomas from colleges having a longer period of study than that required of those contemplating the regular practice of medicine, has, by virtue of the limitation upon the legislative authority above suggested, been held to be void as to such discrimination.<sup>50</sup> Furthermore, a statute should not be so broad in its terms as to go beyond a reasonable regulation. A provision, for example, making a license from a state board of dental examiners a prerequisite to the owning, running, or managing of a dental office would be unconstitutional. It would not be a proper exercise of the police power, since, for the protection and well being of the public, technical knowledge, for the conducting of the business side of such an office is not necessary.<sup>51</sup>

The advertising of remedies by physicians, or of what they can accomplish in the way of cures, indeed, any advertising that is commercial in its tone and spirit, is condemned by the ethics of the medical profession, and may subject the person who indulges in it to the discipline of the medical society or societies with which he may be connected. But if the statute declares that a certificate regularly issued may be revoked for "unprofessional conduct," the medical board would have no authority to revoke it simply because the holder has advertised himself as a specialist in certain diseases, provided such advertising be not of a grossly improper kind, such a kind as would be likely to produce a deleterious effect upon the people among whom it might circulate, even though it might be such as would be condemned by medical societies. Even though such advertising would be regarded by the profession as "unprofessional conduct," it cannot properly be so held by a medical board and so made a reason for the revocation of a license, in the absence of anything in the advertisement that makes it objectionable from the moral point of view. It has been suggested in one case, though perhaps the suggestion was not necessary to the decision of the case, that the legislature has not, by virtue of the police power, the authority to enact a law punishing a physician who has been regularly admitted to practice, for advertising himself as a specialist in certain diseases.<sup>52</sup> But

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other purpose—such, for instance as to favor or benefit some persons or class of persons—it certainly would not be reasonable, and would be beyond the power of the legislature to impose."

<sup>50</sup> *State v. Gravett*, 65 Ohio St. 289, 62 N. E. Rep. 325, 87 Am. St. Rep. 605, 55 L. R. A. 791.

<sup>51</sup> *State v. Brown*, 37 Wash. 97, 79 Pac. Rep. 635, 68 L. R. A. 889, 107 Am. St. Rep. 798, 3 MICHIGAN LAW REVIEW, 465.

<sup>52</sup> See *Ex parte McNulty*, 77 Cal. 164, 19 Pac. Rep. 237. In his concurring opinion in this case THORNTON, J., says that the police power will not justify legislation that will enable a medical board to revoke a regularly obtained license because the holder thereof has violated a professional rule as to advertising. The defendant had advertised himself as a specialist in certain enumerated diseases. "As well," says the judge, "might

undoubtedly the words "unprofessional conduct" may properly be declared by statute to include a certain kind of medical advertising that is inherently objectionable, such, for example, as that in which grossly improbable statements are made or that in which specific mention is made of venereal diseases. At all events, such a statutory provision has not as yet, so far as the writer has observed, been judicially declared to be objectionable.

In conclusion it may be said that if statute regulations in regard to admission to the practice of medicine, or the continuance in practice, are adopted in good faith, are reasonable and operate equally upon all alike who desire to practice, may be met by reasonable study and application, and are such as will probably accomplish the object in view, namely, the protection of the public, then they will be declared valid by the courts, even though the conditions imposed may be rigorous and, in the opinion of the court, inexpedient and not such as the court would impose if called on to prescribe conditions.<sup>53</sup>

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the board declare that wearing any other hat than one of a white color, by a physician, should be unprofessional conduct, and cause it to be punished as a misdemeanor. The advertisement of the character mentioned does no harm to anyone. It may be of benefit to the public by giving to the subjects of the diseases mentioned, information of the existence and residence of a person who has peculiar skill in curing them. \* \* \* \* Professional etiquette prescribed by a class of men so eminent in standing as the medical practitioners of our state is a matter to be regarded, and respected, but it has its limits, and I cannot conceive that a violation of it by a competent physician can ever be by the state made a penal offense. The rules in regard to such etiquette between the members of the medical as between those of the legal profession must find their enforcement from a source other than the state."

<sup>53</sup> *Dent v. West Virginia*, 129 U. S. 114; *State v. Vanderluis*, 42 Minn. 129, 43 N. W. Rep. 789, 6 L. R. A. 119; *State v. Currens*, 111 Wis. 431, 87 N. W. Rep. 561, 56 L. R. A. 252.