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THE PROBLEM OF APPARENTLY UNGUIDED ADMINISTRATIVE DISCRETION*

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CHAPTER I

INTRODUCTION

Through the last sixty years there has developed in England and the United States a system of what has since been termed administrative control over persons and property.¹ This administrative system has developed so rapidly that today it controls many of the activities of the American people.² The system can probably be accounted for on the theory that the legislatures and the courts found themselves unable to function adequately under the increased burdens incident to modern developments and realized that administrative agencies are better qualified to perform certain of the functions which they themselves formerly performed, as well as many of the new functions, due to the steady expansion of governmental activity, which they were called upon to perform.

In order to perform the functions^{2a} for which they were created, administrative agencies³ necessarily have been endowed

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¹ Freund, *Administrative Powers Over Persons and Property* (1928).

² Frankfurter and Davison, *Cases on Administrative Law* (1932) Preface; Pound, C. W., *Constitutional Aspects of Administrative Law* (1923) 9 A. B. A. J. 409.

^{2a} *Infra*, 264.

³ The type of administrative agency discussed in this thesis is confined to that type which "while acting in a quasi-legislative or quasi-judicial capacity" "interferes with the conduct of the individual."

with discretionary powers. But "discretionary powers" is a broad term. There are different kinds. Administrative agencies are sometimes given one kind and sometimes another. In order to get an adequate conception of the problem, it is necessary to break up the concept of discretion into its component elements. The following analysis is based upon an analysis advanced by Professor Ernst Freund.⁴

1. One kind of discretion is called "prudential" or "quasi-legislative" discretion. This is the power to act upon the basis of considerations of expediency. It is this type of discretion which the state often delegates to its officials in dealing with the state's own property. An example is the power to say whether road-building machinery, when not in use, shall be stored in one part of the state or in another, or the power to say whether the court house shall be swept once a day or once a week. The legislature always, in theory, exercises a prudential discretion. "The subjection of private action to [such discretion] represents the strongest kind of governmental control."⁵ The use of this type of discretion for controlling private action has so far been a limited one. Examples are statutes requiring a certificate of public convenience and necessity from a public service commission before operating a certain type of public utility, or the Interstate Commerce Act of 1912 authorizing the Interstate Commerce Commission to order the building of physical connections between rail and water carriers when reasonably necessary.

2. A second kind of discretion, called "mediating," is the power to act upon the basis of considerations of fairness.⁶ An example, as it has been conferred by the legislature, is the power to fix reasonable rates for common carriers and public utilities.

3. A third kind of discretion is called "censorial" discretion, which is the power to act upon the basis of considerations of conformity. An example is the power to censor plays and moving pictures if they do not measure up to the conventional standard of right and wrong.

4. A fourth kind of discretion is called "quasi-judicial" or "expert" discretion. It is the power to act upon the basis of considerations of fitness and is found in statutes regulating "safety,

⁴ Freund, *op. cit.*, n. 1, at pp. 71-103.

⁵ *Ibid.*, at p. 74.

⁶ *Ibid.*, at p. 72.

health, traffic, finance, professional competence," or dealing with questions of "serviceability of commodities, equipment, and improvements." It is this type of discretion with which the public is most familiar, for statutes conferring it have been numerous, and they all operate directly upon the individual.

An entirely different classification of discretionary powers is based on the presence or absence of standards for the guidance of the administrative agency—that is, it is based on the quantity rather than on the quality of discretion. This classification necessarily overlaps the other, for no matter whether the discretion be called prudential, expert, censorial, or mediating, the question remains, whether there are standards for the guidance of the administrative authority in exercising its discretion, and whether those standards are expressed in the statute conferring the discretion.

1. First, there is an "unqualified" or "unguided" discretion. A statute conferring this type of discretion makes private action dependent upon official approval, but provides no grounds upon which the official power of approval or disapproval is to be exercised. Complete freedom is given, so that practically no issue as to the correct or incorrect exercise of the discretion can be made successfully.

The existence of an absolutely unqualified power over private interests in a governmental agency is inconceivable in a constitutional, or limited, form of government such as the American. An unqualified power is an arbitrary power; it is an attribute of sovereignty. The theory of the American constitution does not admit of the existence of such a power in any body other than the one which has the power to change the constitution, theory and all. That body is the "people." It is elementary that neither the national nor the state legislatures possess an unqualified power. It is equally clear that the legislatures could confer no such power. Any attempt to do so would be futile.

2. Then there is a "qualified" or "guided" discretion, which is the converse of the type just discussed. Such discretion is qualified in that it must be exercised in accordance with some guide or standard. These guides are of two kinds: (a) those expressly set forth in the statute conferring the discretion, and (b) those which are implied. In either case the basic question or problem

is the same, and that is whether the guide will be considered sufficient to satisfy constitutional requirements, and the requirements of a sound administrative policy. If it is sufficient, it makes no difference whether or not it is expressly stated in the statute. In other words, the problem is not the presence or absence of guides, but the sufficiency of those guides.

This classification explains the title of this article. There is no real problem concerning the validity of an absolutely unguided discretion. The problem arises when the discretion conferred is *apparently* unguided (or insufficiently guided), either because no guide is expressed or because the guide expressed appears to be inadequate. The question is: "When is an apparently unguided (or insufficiently guided) discretion valid?" or in another form, "When is an apparently unguided (or insufficiently guided) discretion in fact unguided (or insufficiently guided)—which means arbitrary and void?"⁷

But what is the purpose of creating a discretionary administrative body? What are the functions of such a body? The first obvious function is to improve the administration of the law. There are at least three reasons why such a discretionary body tends to improve administration. One is that it introduces the element of flexibility into the law.⁸ Abstract principles are no longer applied as they would be to an abstract person.⁹ Administration is individualized and the doctrine of reasonableness is introduced, making it possible to prevent unnecessary hardships which would result from the enforcement of an inflexible rule of law. An example is the power which most ordinances give to zoning boards of appeal—the power to depart from the requirements of the ordinance in case of unnecessary hardships or prac-

⁷ Several reasons have been advanced to account for the absence of express statutory guides in so many instances. One is that the legislature intended to allow the administrative authority to find its own standards or be guided by the circumstances of each case. Another is that the legislature apparently intended there should be some qualification, or standard, or guide, but failed to provide any, either because: (a) of carelessness, or (b) the grounds of discretion were obvious, or (c) in statutes requiring official consent it presumably intended approval to be given as a matter of course in normal cases, and to be withheld only in case there were something abnormal or irregular. Freund, *op. cit.*, n. 1.

⁸ Charles E. Hughes, *Some Aspects of the Development of American Law* (1916) 39 Rep'ts N. Y. State Bar Ass'n. 269; Freund, *op. cit.*, n. 1.

⁹ Roscoe Pound, *The Growth of Administrative Justice* (1924) 2 Wis. L. R. 321.

tical difficulties.¹⁰ A second reason is that it draws to the complexities of administration the comprehensive knowledge and technical skill of highly trained men in all fields of endeavor.¹¹ And the third is that it secures disinterested men of sound judgment to apply broad legislative principles.¹²

A second function of such a body is to evolve workable rules of administration by means of the trial and error method.¹³ An authority with discretionary powers over the details of administration is in a position to try one method and then another until it arrives at a satisfactory one, whereas if the legislature were compelled to fix the details in every statute it would be most difficult to get them changed. After a satisfactory rule has been evolved by the administrative body there would be less objection to embodying it in a statute.

A third function is to serve as a disguised method for setting up a particular standard. There may be a desire to disguise the standard either because it is a higher one than the public has yet reached, or because it is a standard not fit to be set up as the law of the land.¹⁴ The wisdom of disguising any standard is doubtful, but it is utterly indefensible when the disguised standard is an improper one.

The problem of the scope of administrative discretion has two distinct aspects: (a) the scope of administrative discretion as a matter of constitutionality, and (b) the scope of administrative discretion as a matter of policy.¹⁵ It is the purpose of this article to discuss the problem under the following heads:

¹⁰ *Spencer-Sturla Co. v. Memphis* (Tenn. 1927) 290 S. W. 608.

¹¹ Charles E. Hughes, Address to Practitioners Before the Interstate Commerce Commission, U. S. Daily, Nov. 1, 1930.

¹² Charles E. Hughes, *supra*, n. 8.

¹³ Freund, *op. cit.*, n. 1. Such a function of an administrative body is analogous to the theory sometimes advanced to the effect that the various state legislatures serve as experimental laboratories for the national congress, and for each other.

¹⁴ Freund, *op. cit.*, n. 1.

¹⁵ "The whole subject of administrative law is, on the threshold, one of constitutionality, but beyond that it belongs to the field of statesmanship, and not of law as administered by the courts." C. W. Pound, *supra*, n. 2.

The problem of policy has to do with the relative advantages and dangers of discretionary administration. It is a question of reasonableness and flexibility v. indifference of routine; a question of comprehensive knowledge, technical skill, sound judgment, and disinterestedness v. the "arbitrariness of an unintelligent or despotic bureaucracy." Charles E. Hughes, *supra*, n. 11.

1. The rule as ordinarily stated (distinguishing administrative discretion in the regulation of an ordinary lawful business, in the exercise of the police power, in the determination of personal fitness, and in the regulation of a mere privilege). The soundness of such a rule.

2. An analysis of the cases based on the constitutional doctrines involved:

(a) Unguided administrative discretion and the delegation of legislative power.

(b) Unguided administrative discretion and due process of law or equal protection of law.

3. Unguided administrative discretion and judicial review.

CHAPTER II

The Rule in Regard to Unguided Administrative Discretion as Ordinarily Stated

ORDINARY LAWFUL BUSINESS RULE

In *State ex rel. v. City of Billings*¹⁶ appears this statement: "The generally accepted rule [is] that an ordinance [or statute] which vests in public officials a discretion to grant or refuse to grant a license to carry on an ordinarily lawful business, without . . . being guided by specifically enumerated conditions to which all persons similarly situated may knowingly conform, is invalid." That is, the statute (or ordinance) itself must lay down the standards which are to guide the public official in the exercise of his discretion, when that discretion affects the right to engage in an ordinarily lawful business.

It is the opinion of the writer that this so-called "rule" is not a rule of law, which upon its face it purports to be, but is at best nothing more than a rule of construction which the courts announcing it have decided to follow. That is, unless the statute or ordinance lays down such standards, the courts have decided to

"(a) We may view with alarm the tendency to vest in administrative commissions drawn for political motives from an inexperienced public, power over personal and property rights, or (b) we may welcome the substitution of the regulatory power of trained officials for the unprofessional and unwieldy processes of the courts of law. . . ." C. W. Pound, *supra*, n. 2.

¹⁶ (1927) 79 Mont. 25, 225 Pac. 11.

construe it as an attempt to confer unqualified discretion—arbitrary discretion—and therefore void. The origin and development of this “rule” are the basis of such an opinion:

As is the case with so many rules of law, the one under discussion owes its origin to a dictum in an early case. In *Bessonies v. City of Indianapolis*, decided in 1880,¹⁷ the court had under consideration the validity of a city ordinance which made it unlawful to establish a hospital in the city without a license from the common council and board of aldermen. After deciding that under state law the city had no authority to regulate private hospitals, the court made this statement: “The granting or refusal of the license is not governed by any prescribed rules, but rests, in such case, in the *uncontrolled*¹⁸ discretion of the common council and board of aldermen.” Thus, the court did nothing more than construe the ordinance as an attempt to delegate unqualified, arbitrary discretion. The opinion continues: “if the ordinance is valid [and means what it has just been construed to mean], the common council and board of aldermen have it in their power [i. e. they are authorized] to grant one person a license, and refuse another under the same circumstances. No law could be valid, which, by its terms would authorize the passage of such an ordinance.” The rule as first announced was based on this and the following cases:

In *Mayor of Baltimore v. Radecke*¹⁹ the court declared invalid an ordinance giving the mayor power to revoke any license to use steam engines and steam boilers within the city. It did so on the ground that the city had no authority to pass the ordinance. It first construed the ordinance as an attempt to vest arbitrary power in the mayor, and concluded: “We are of the opinion that there may be an ordinance . . . so clearly unreasonable, so arbitrary, oppressive or partial as to raise a presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority.”

In *Barthet v. City of New Orleans*²⁰ the court issued an injunction *pendente lite* to restrain the enforcement against the plaintiff

¹⁷ 71 Ind. 189.

¹⁸ Italics those of the present writer.

¹⁹ (1878) 79 Md. 217, 33 Am. Rep. 239.

²⁰ (D. C. E. D. La. 1885) 24 F. 563.

of an ordinance prohibiting the maintenance of slaughtering houses within prescribed limits without the permission of the city council. The grounds for issuing the injunction were that (a) the city had no power to pass such an ordinance, and (b) the power attempted to be conferred on the council, if exercised as the defendant admitted it intended to exercise it, would cause plaintiff irreparable harm, and would tend to create a monopoly prohibited by the constitution of Louisiana.

In *Frazees' Case*²¹ the court declared invalid an ordinance prohibiting the use of the streets for the purpose of a parade without a permit from the mayor, on the ground that (a) it suppressed what was in general perfectly lawful, and (b) it vested the power to make exceptions in an official with "unregulated" discretion—i. e. the ordinance was construed as an attempt to confer arbitrary discretion.

In 1886 the supreme court of the United States, in *Yick Wo. v. Hopkins*,²² had before it an ordinance making it unlawful for anyone to operate a laundry in other than a brick or stone building without the consent of the board of supervisors. The court discharged the defendant on a writ of *habeas corpus* for violating the ordinance, on the ground that the ordinance *as enforced* had resulted in arbitrary discrimination against the defendant, and all other Chinese engaged in the laundry business, and thereby deprived him of the equal protection of the law. However, the court went farther and construed the ordinance as intended to confer a naked and arbitrary power to withhold consent. So construed the ordinance was invalid. "The very idea that one man may be compelled to hold his life, or the means of living . . . at the mere will [unqualified discretion] of another, seems intolerable in any country where freedom prevails, as being the essence of slavery itself."

*State v. Mahner*²³ merely followed the dictum in *Yick Wo. v. Hopkins*. An ordinance authorizing the city council to grant or refuse a license to conduct a dairy was construed as an attempt to confer arbitrary discretion and was then declared invalid.

An ordinance of the city of Chicago prohibited the use of the

²¹ (1886) 63 Mich. 396, 30 N. W. 72.

²² 118 U. S. 355.

²³ (1891) 43 La. Ann. 496, 9 So. 480.

streets for parades or processions without a permit from the police department. The court in *City of Chicago v. Trotter*²⁴ construed the ordinance as an attempt to confer arbitrary discretion and therefore void, saying: "It is subversive of the liberty of the citizen, and outside the domain of law, that authority so arbitrary should be lodged in one individual."

Upon the basis of these cases the "rule" was announced by the Indiana court in *City of Richmond v. Dudley*.²⁵ The case involved an ordinance prohibiting the storage of inflammable oils in the city without permission from the common council. The court first construed the ordinance as intending to confer arbitrary or unqualified discretion, and then said: "It seems clear from the foregoing authorities to be well established that a municipal ordinance placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and the conditions to be observed in such conduct or business; and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or the opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply." The cases relied on do not support such a broad statement. They merely show that when an ordinance vested discretion in a public officer without laying down standards for its guidance it was construed as an attempt to vest arbitrary power in that officer. This case goes one step further and lays down the proposition that such a construction is necessary.

Two later Indiana cases stated the rule a little more carefully. In *City of Elkhart v. Murray*,²⁶ the court said: "If an ordinance upon its face restricts the right of dominion which the owner [of property] might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own [property] depend upon the will of the city authorities, it is invalid because it fails to furnish a uniform rule of action, and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons." The court merely construed

²⁴ (1891) 136 Ill. 430, 26 N. E. 359.

²⁵ (1891) 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587.

²⁶ (1905) 165 Ind. 304, 75 N. E. 593, 1 L. R. A. (N. S.) 940.

the failure to furnish a uniform rule of action as an attempt to confer unqualified discretion. This is made even more clear by the language of the same court in *Park Hill Development Company v. City of Evansville*:²⁷ "It [the ordinance] is an attempt to confer upon certain city officers the *arbitrary*^{27a} power to approve or disapprove . . . for any reason they might choose, or upon mere whim, without reason, and to take different action with regard to different plats under like circumstances."

However, the broad statement of the *Richmond v. Dudley Case*²⁸ was taken over verbatim by the Kentucky court in *City of Monticello v. Bates*.²⁹ The court applied the "rule" and held that the failure to specify "the rules and conditions to be observed" made the statute invalid, but made no effort to examine the basis of the "rule." This case was then quoted and followed in later Kentucky cases without serious analysis.³⁰ The North Carolina courts did the same thing.³¹

In Missouri the court followed this same line of cases, saying in *Hays v. Poplar Bluff*:³² "It [an ordinance conferring discretion without laying down guides] violates the principle inherent in our constitutional system that when a municipal corporation seeks to restrict for the public good the rights of the individual otherwise incident to the ownership of property, it must do so by a rule applicable to all alike under the same circumstances, and can not make the enjoyment of his own depend upon the *arbitrary*³³ will of the municipal legislature." That necessarily implied that the ordinance was first construed as an attempt to confer arbitrary power. The same construction is given to an Iowa ordinance: "An attempt is made by the ordinance to vest a discretion in the board of health which the law does not permit"—that is, an arbitrary discretion.³⁴

²⁷ (1921) 190 Ind. 432, 130 N. E. 645.

^{27a} Italics those of the present writer.

²⁸ *Supra*, n. 25.

²⁹ (1916) 169 Ky. 258, 183 S. W. 555.

³⁰ *Bloomfield v. Bayne* (1924) 206 Ky. 68, 266 S. W. 885; *Slaughter v. Post* (1926) 214 Ky. 175, 282 S. W. 1091; *Lovell v. Mt. Vernon* (1926) 215 Ky. 143, 284 S. W. 1025.

³¹ *State v. Tenant* (1892) 110 N. C. 609, 14 S. E. 387; *Bizzell v. Goldsboro* (1926) 192 N. C. 348, 135 S. E. 50.

³² (1915) 263 Mo. 516, 173 S. W. 676, L. R. A. 1915D 595.

³³ Italics those of the present writer.

³⁴ *Bear v. Cedar Rapids* (1910) 147 Ia. 341, 126 N. W. 324, 27 L. R. A. (N. S.) 1150.

The dictum of the court in *Yick Wo. v. Hopkins*³⁵ also has been widely quoted and followed. Ordinances which fail to lay down express guides for the exercises of the discretion conferred are construed to be an attempt to confer arbitrary discretionary authority.³⁶

Two Washington cases illustrate the point that it is when the ordinance is construed as authorizing arbitrary power that it is invalid. Such a construction follows when the ordinance lays down no guides. "All those decisions were rested upon the principle that an ordinance which authorizes the issuing or withholding of a license to engage in a lawful business, that is, a business which within itself is ordinarily perfectly lawful, and [commits] to any officer or set of officers the power to decide according to their own notions in each particular case the question of the propriety of issuing or withholding a license therefor . . . is authorizing the exercise of arbitrary power."³⁷ Of course, the question is whether the ordinance does confer such power. That point seems to be assumed, as it was when the same court said: "The business of conducting a pharmacy or drug store in this state is a lawful business, under the laws of this state, and therefore neither the state nor the city, under the guise of regulation, may delegate to any person or set of persons, the right to arbitrarily designate one who may enter the business and in their discretion reject another equally qualified."³⁸

In each case in which this "rule" has been announced as the basis of the decision the ordinance had already been construed as an attempt to confer arbitrary power.³⁹ This point is made very clear in *State v. Coleman*.⁴⁰ The court had before it an ordinance which prohibited the use of the public square for making speeches

³⁵ *Supra*, n. 22.

³⁶ *In re Garrabad* (1893) 84 Wis. 585, 54 N. W. 1104; *Sioux Falls v. Kirby* (1894) 6 S. D. 62, 60 N. W. 156; *Walsh v. Denver* (1898) 11 Colo. App. 523, 53 Pac. 458; *Tulsa v. Thomas* (1923) 89 Okla. 188, 214 Pac. 1070.

³⁷ *State ex rel. Makris v. Superior Court* (1920) 113 Wash. 296, 193 Pac. 845.

³⁸ *Seattle v. Gibson* (1917) 96 Wash. 425, 165 Pac. 109; *Vincent v. Seattle* (1921) 115 Wash. 475, 197 Pac. 618.

³⁹ *City Council of Montgomery v. West* (1907) 149 Ala. 311, 42 So. 1000; *State ex rel. v. Town of Ripley* (1924) 95 W. Va. 521, 121 S. E. 725; *Mayor v. B. & O. R. Co.* (1908) 107 Md. 178, 68 Atl. 490; *Cicero Lumber Co. v. Cicero* (1898) 176 Ill. 9; *Anderson v. City of Wellington* (1888) 40 Kan. 173, 19 Pac. 719, 2 L. R. A. 110.

⁴⁰ (1921) 96 Conn. 190, 113 Atl. 385.

without a permit from the chief of police. The court frankly recognized that the statute could be upheld by reading into it an implied guide of reasonableness, or a presumption that the chief of police would not act arbitrarily (which means that the chief of police could not act arbitrarily and within the limits of the ordinance at the same time). It also recognized that this construction had been sanctioned by the federal courts.⁴¹ However the court refused to adopt such construction, and instead followed that line of state decisions construing the failure to provide express standards as an attempt to confer arbitrary power.

THE POLICE POWER RULE, OR NECESSITY RULE

The ordinary lawful business rule "is subject to the qualification that where it is impractical to lay down a definite or all-comprehensive rule, or when the ordinance relates to the administration of a police regulation and is necessary to protect the general welfare, morals, and safety of the public, it is not essential to the validity of the ordinance that it prescribe all the conditions upon which such license shall be granted or refused."⁴²

The key word in this exception to the rule appears to be the word "necessary." In the exercise of its police power the legislature sometimes finds it impossible or impracticable to specify standards any more definite than the standard which the courts will imply—the standard of reasonableness. Thus in order to exercise its police power at all in regard to such situations it must of necessity confer a discretion which is apparently unguided, or apparently insufficiently guided (if the legislature sees fit to express the standard which would have been implied).

Thus, in *State ex rel. v. Whitman*,⁴³ the court had before it a statute which provided that no rule or regulation of an insurance rating bureau (which was required by law) should be in force before it was filed with the state insurance commissioner, or after he disapproved it. The statute was attacked on the ground that it conferred an arbitrary and unguided discretion upon the insurance commissioner. The court held: (a) that because of the

⁴¹ *State ex rel. Lieberman v. Van DeCarr*, *post*, n. 69.

⁴² *State ex rel. v. City of Billings*, *supra*, n. 16; *Gorieb v. Fox* (1926) 145 Va. 554, 134 S. E. 914.

⁴³ (1928) 196 Wis. 472, 220 N. W. 929.

nature of the subject matter dealt with it would be impossible or impracticable to establish a more definite standard for the guidance of the action of the insurance commissioner than the standard of "reasonable" action, and (b) that the standard of reasonableness need not be expressed in the statute, but would be implied. "The rule of reasonableness inheres in every law, and the action of those charged with its enforcement must in the nature of things be subject to the test of reasonableness. While the statute does not in terms provide that the commissioner of insurance shall exercise a sound and reasonable discretion in the disapproval of proposed rules and regulations, that condition is necessarily implied."

And in considering the validity of a statute which required certain designated classes of buildings to be equipped with fire escapes, but authorized the factory inspector to determine the number and the location, and the construction of the fire escapes, an Illinois court said:⁴⁴ "It is impossible for the legislature to describe in detail how many fire escapes shall be provided, how they shall be constructed, and where they shall be located in order to serve the purpose of protecting the lives of the occupants—in view of the varied location, construction, and surroundings of buildings." It was therefore necessary to leave the matter to the discretion of the inspector.

A Pennsylvania statute required owners of adjoining coal properties to leave along the boundary line pillars of coal of sufficient size to constitute an adequate barrier for the protection of employees of either mine should the other be abandoned and allowed to fill with water, the size of the pillar to be determined in each case by an administrative body. The court upheld the statute on the theory that it would be impossible for the size to be fixed in the statute, saying: "From this it results that it was competent for the legislature to lay down a general rule and then establish an administrative tribunal with authority to fix the precise width or thickness of the pillar that will suit the necessities of the situation and constitute a compliance with the general rule."^{44a}

⁴⁴ *Arms v. Ayer* (1901) 192 Ill. 221, 61 N. E. 851. This case is quoted at great length, and followed in *Chicago v. Washington Home* (1919) 289 Ill. 206, 124 N. E. 416.

^{44a} *Plymouth Coal Co. v. Pa.* (1914) 232 U. S. 531.

This principle of "necessity" is forcefully set forth by the United States Supreme Court in *Gorieb v. Fox*.⁴⁵ The court was considering the validity of a zoning ordinance which fixed a building line, but reserved to the city council power to make exceptions. It said: "In laying down a general rule, such as the one with which we are here concerned, the practical impossibility of anticipating in advance and providing in specific terms for every exceptional case which may arise, is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. . . . We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds." The court was merely affirming the principle it had announced years before when considering the validity of an ordinance of the City of St. Louis prohibiting the establishment of cow stables in the city without permission of the municipal assembly. It had said then: "It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases, and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases."⁴⁶

In *Monongahela Bridge Company v. United States*,⁴⁷ the court upheld an act of Congress⁴⁸ empowering the Secretary of War, when satisfied after a hearing of the parties interested that a bridge over a navigable waterway of the United States was an "unreasonable" obstruction, to order changes, on the theory that "any other method was impractical, in view of the vast and varied interests of the nation requiring legislation from time to time." Congress could not possibly act in each case.

However, there are several cases which apply this exception to the so-called general rule without any reference to the principle of necessity. The court merely construes the discretion as subject to the implied guide of reasonableness, and then holds that

⁴⁵ (1927) 274 U. S. 603.

⁴⁶ *Fischer v. St. Louis* (1904) 194 U. S. 361.

⁴⁷ (1909) 216 U. S. 117.

⁴⁸ Act of Mar. 3, 1899, 3 Stat. at L. 1121.

such discretion is not arbitrary. There is either no discussion of the "necessity" of omitting express standards, or the discussion is obviously a subterfuge. An excellent example is the case of *Wisconsin Telephone Company v. Public Utility Commission*.⁵⁰ A Wisconsin statute imposed on public utility companies the cost of their regulation, but provided that the Public Utility Commission could exempt a company from the requirement upon a finding that the "public interest" required it. The court upheld the statute, and though it makes the statement that "the legislature realizes the impossibility of anticipating and providing for every special situation involved in the question of what the public interest requires," it is difficult to conceive of the possibility that the court intended the sentence to be taken literally. It is the sole function of a legislature to look after the "public interests" of its constituents. Of course it is impossible for the legislature or anyone else to foresee the future requirements of the public. If it were not, there would be no need for future sessions of the legislature. Having determined and provided for all future needs it could adjourn indefinitely. It cannot be that the inability of the legislature to foresee what the public interest will require in the future necessitates the conference of discretionary powers upon an administrative officer, for the conclusion from such a premise is inevitable: the inability of the legislature to determine what the public interest requires in the present must create the same "necessity." There is no "necessity" for unguided discretion.

However the court holds that the commission's discretion is not an arbitrary one. Though the power of the legislature to de-

⁴⁹ For other cases in which this same principle is applied see: *State ex rel. v. Duval County* (1918) 76 Fla. 180, 76 So. 692; *Ex parte Holmes* (1921) 187 Calif. 640, 203 Pac. 398; *Consolidated Coal Co. v. Ill.* (1901), 185 U. S. 203; *Hyma v. Seeger* (1926) 233 Mich. 659, 207 N. W. 834; *Taylor v. Roberts* (1922) 84 Fla. 654, 94 So. 874; *Ashland Transfer Co. v. State Tax Comm.* (1933) 247 Ky. 144, 56 S. W. (2d) 691; *Peo. ex rel. v. Van DeCarr* (1903) 175 N. Y. 440, 67 N. E. 913, affirmed (1905) 199 U. S. 522; *Yee Bow v. Cleveland* (1919) 99 Ohio St. 269, 124 N. E. 132; *U. S. v. Shreveport Grain and Elevator Co.* (1932) 287 U. S. 77; *Black v. City of Chicago* (1909) 239 Ill. 251, 87 N. E. 1011; *Mutual Film Corp. v. Ohio Industrial Commission* (1915) 236 U. S. 230; *Peo. v. Harley* (1925) 230 Mich. 276, 203 N. W. 531; *Buffalo v. Hill* (1903) 79 App. Div. 402, 79 N. Y. S. 449; *Spencer-Sturla Co. v. Memphis* (Tenn. 1927) 290 S. W. 608; *Peo. v. Globe Grain and Milling Co.* (1930) 8 Calif. Dec. 625, 294 Pac. 3.

⁵⁰ (1932) 206 Wis. 589, 240 N. W. 411.

termine what constitutes the public interest is an arbitrary power, the power lodged in the commission falls short of such arbitrariness. The commission is required to exercise a reasonable judgment as to what shall constitute the public interest, and its judgment is subject to the judicial test of reasonableness.

The *Case of Cutsinger v. City of Atlanta*⁵¹ involved the validity of a statute conferring on the municipal council power to grant or refuse a license for a hotel. The court said: "From these cases it will appear that the conferring of discretionary power to grant or refuse a license in occupations subject to police licenses is not *per se* in violation of the Fourteenth Amendment of the Constitution of the United States on the ground that the exact terms on which the discretion is to be exercised are not prescribed . . ." because there is no attempt to confer arbitrary power, "and if the power is sought to be arbitrarily or wrongfully exercised the courts will apply a remedy." There is no discussion of "necessity."

In *Blackman Health Resort v. Atlanta*⁵² the court said: "An act of the legislature, in general terms conferring power to control, regulate, and in its discretion prohibit the erection of buildings of the character mentioned, [hotels] without prescribing the bounds of such discretion, will not *ipso facto* render the grant of power void as being an effort to confer arbitrary power, but will be treated as authorizing the municipal authority to exercise a reasonable discretion." There is no discussion of "necessity."⁵³

What is the effect of the inclusion of the word "necessity" in the exception? "Unguided" discretion must be necessary for what? For the best possible administration or only for a reasonably good administration? The standards used by the legislature vary in degree of definiteness; would the possibility of using a slightly more definite standard invalidate the use of a slightly less definite one? These are the questions which will be considered later.

⁵¹ (1914) 142 Ga. 555, 83 S. E. 263.

⁵² (1921) 151 Ga. 507, 107 S. E. 525.

⁵³ *Tarpey v. McClure* (1923) 190 Calif. 593, 213 Pac. 983; *San Antonio v. Rubin* (C. C. A. 5, 1930) 42 F. (2d) 107; *Union Telegraph Co. v. Richmond* (1911) 224 U. S. 160; *State v. Yopp* (1887) 97 N. C. 477, 2 S. E. 458; *Engel v. O'Malley* (1911) 219 U. S. 128; *Ex parte Weisburg* (Calif. 1932) 12 Pac. (2d) 446; *Redmond and Co. v. Michigan Securities Commission* (1923) 222 Mich. 1, 192 N. W. 688.

It should not be assumed that by reading into any statute the guide of reasonableness the validity of the statute can be saved. The guide of reasonableness must take its meaning from the policy of the statute. Thus, if the statute does not declare a policy, the guide of reasonableness has no meaning. That was the situation in *Klein v. Barry*.⁵⁴ The Wisconsin blue sky law made the sale of every security issued in violation of the act voidable at the discretion of the commissioner. The implied guide of reasonableness could be of no assistance for there was no policy from which it could take its meaning.⁵⁵

THE PERSONAL FITNESS RULE

As a second exception to the ordinary lawful business rule it is sometimes said that no express statutory guides are necessary when the discretion has to do with the determination of the personal fitness of an applicant for a license.

This is really nothing more than a special application of the police power exception, for the decisions upholding statutes or ordinances conferring this type of discretion do so by implying the guide of reasonableness, thereby preventing a construction of the statute as an attempt to confer arbitrary power.⁵⁶ Some of them also say it is impossible to lay down in the statute express guides for determining personal fitness.⁵⁷ This type of discretion

⁵⁴ (1923) 182 Wis. 255, 196 N. W. 457.

⁵⁵ See also *Peo. v. Klinck Packing Co.* (1915) 214 N. Y. 121, 108 N. E. 278; *Hoyt Bros. v. Grand Rapids* (1932) 260 Mich. 447, 245 N. W. 509.

⁵⁶ *State ex rel. Mackey v. Hyde* (1926) 315 Mo. 681, 286 S. W. 363; *Racine v. District Court* (1916) 39 R. I. 475, 98 Atl. 97; *Douglas v. Noble* (1923) 261 U. S. 165; *Peo. v. Kettles* (1906) 221 Ill. 221, 77 N. E. 472; *Dillard v. State Board of Medical Examiners* (1921) 69 Colo. 575, 196 Pac. 866; *Ex parte McManus* (1907) 151 Calif. 331, 90 Pac. 702; *Lehman v. State Board of Accountancy* (1923) 263 U. S. 394; *State v. De Verges* (1923) 153 La. 349, 95 So. 805; *State ex rel. v. Bond* (1924) 96 W. Va. 193, 122 S. E. 539; *Leach v. Daugherty* (1925) 73 Calif. App. 83, 238 Pac. 160; *Rizzo v. Douglas* (1923) 121 Misc. 446, 201 N. Y. S. 194; *Taylor v. Smith* (1924) 140 Va. 217, 124 S. E. 259; *State v. Cohen* (1906) 73 N. H. 543, 63 Atl. 928; *Gundling v. Chicago* (1899) 177 U. S. 183; *Walker v. Birmingham* (1927) 216 Ala. 206, 112 So. 823; *Sumner v. Ward* (1923) 126 Wash. 75, 217 Pac. 502; *Mincev v. Schoenig* (1898) 72 Minn. 528, 75 N. W. 711; *Mathews v. Murphy* (1901) 23 Ky. 750, 63 S. W. 785; *Czarra v. Board of Medical Supervisors* (1905) 25 App. D. C. 443.

⁵⁷ *Milwaukee v. Rissling* (1924) 184 Wis. 517, 199 N. W. 61; *McBride v. Clark* (1925) 101 N. J. L. 213, 127 Atl. 550; *Peo. v. Flanigan* (1932) 347 Ill. 328, 179 N. E. 823; *Hall v. Geiger-Jones Co.* (1917) 242 U. S. 539, L. R. A. 1917F 514; *Ex parte Whitley* (1904) 144 Calif. 167, 77 Pac. 879; *Contra: Peo. v. Beekman* (1931) 347 Ill. 92, 179 N. E. 435.

is conferred in statutes requiring licenses for teachers, dentists, physicians, electrical contractors, insurance brokers, motor vehicle drivers, public accountants, architects, security brokers, junk dealers, cigarette dealers, milk dealers, peddlers, employment agencies.⁵⁸

THE PRIVILEGE RULE

A rule entirely distinct and separate from the ordinary lawful business rule is that which the writer has chosen to call the privilege rule. It is to the effect that when the discretion conferred has to do with the regulation of a mere privilege, as distinguished from a matter of right, such as the engagement in an ordinary lawful business, it is not necessary that the statute conferring the discretion provide express guides.

The great weight of authority supports this rule,⁵⁹ and the reasons are fairly obvious. Except upon the theory that the statute is an invalid delegation of legislative power (which will be discussed later) there is no way to attack the validity of the statute. It deals with a "privilege," which means that no one has a "right" protected by the Constitution to perform the act regulated. The point can best be illustrated by the following quotations:

"A distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by governmental sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition, and may justify a degree of regulation not admissible in the former."⁶⁰

"It is universally recognized . . . that there is in it [a license to exercise a mere privilege] no element of property right or vested interest of any kind. Being so, it may

⁵⁸ Cases cited in notes 56 and 57.

⁵⁹ *State v. City of Olympia* (1922) 122 Wash. 239, 210 Pac. 371; *Lane v. Whitaker* (D. C. D. Conn. 1921) 275 F. 476; *Port Royal Mining Co. v. Hagoood* (1899) 30 S. C. 519, 9 S. E. 686; *Mehlos v. Milwaukee* (1914) 156 Wis. 591, 146 N. W. 882; *Bank of Italy v. Johnson* (1926) 200 Calif. 1, 251 Pac. 784; *State ex rel. Lane v. Fleming* (1924) 129 Wash. 646, 225 Pac. 647; *State v. Sherow* (1912) 87 Kan. 235, 123 Pac. 866; *State ex rel. Sayles v. Superior Court* (1922) 120 Wash. 183, 206 Pac. 966; *Rowland v. State* (1922) 104 Ohio State 366, 135 N. E. 622; *Dwyer v. Peo.* (1927) 82 Colo. 574, 261 Pac. 858; *Crowley v. Christensen* (1890) 137 U. S. 86.

⁶⁰ *Packard v. Banton* (1924) 264 U. S. 140, approving *Davis v. Mass.* (1896) 167 U. S. 43.

be a necessary consequence that rules of law, protective of vested rights, are without influence in respect of such a privilege. It would seem axiomatic that even one who is, as he conceives, wrongfully denied participation in a matter of mere privilege, or who is discriminated against in his effort or desire to enjoy that privilege with another no better entitled, has no firm basis of complaint."⁶¹

"The question is not whether someone else has been (or will be) favored. The question is whether the petitioner has been illegally oppressed."⁶²

How could anyone be oppressed when no right of his is involved?

It is difficult to quarrel with this rule, for there is no way to subject the regulation to the provisions of the Fourteenth or Fifth Amendments to the United States Constitution.⁶³

SOUNDNESS OF THESE RULES

The quintessence of the foregoing discussion may be expressed in two simple statements: First, when a statute or ordinance confers upon an administrative body discretionary powers in the regulation of a mere privilege, no express standards for the guidance of the discretion are necessary. Second, when a statute or ordinance confers upon an administrative body discretionary powers in the regulation of an ordinary lawful business, express standards must be established by the statute or ordinance itself, unless the statute or ordinance is an exercise of the police power and express standards are not practicable (and when the regulation is made to turn upon the question of personal fitness no standard is practicable).

There is no intention to criticise the first of these propositions, but the second is open to serious objection. In the first place,

⁶¹ State v. Montgomery (1912) 177 Ala. 212, 59 So. 294.

⁶² Matter of Larkin Co. v. Schwab (1926) 242 N. Y. 330, 151 N. E. 637.

⁶³ Some of the cases get the same result by applying the police power rule, implying the guide of reasonableness and holding that sufficient: Eureka City v. Wilson (1897) 15 Utah 53, 48 Pac. 41; State v. Pocohontas County Court (1923) 92 W. Va. 222, 114 S. E. 519; Brunswicke-Balke-Callender Co. v. Menklenburg County (1921) 181 N. C. 386, 107 S. E. 317; Lloyd v. Ramsey (1921) 192 Ia. 103, 183 N. W. 333; Oakley v. Richards (1918) 275 Mo. 266, 204 S. W. 505; Peo. v. Grant (1891) 126 N. Y. 473, 27 N. E. 964.

Other cases ignore the question of privilege and apply the ordinary lawful business rule: Devereaux v. Township Board (1920) 211 Mich. 38, 177 N. W. 967; Village of Little Chute v. VanCamp (1908) 136 Wis. 526, 117 N. W. 1012.

when the cases are classified according to their factual set-ups they cannot be reconciled upon the basis of this rule. For example, some courts, when considering ordinances regulating theatres and motion picture films, applied the necessity rule,⁶⁴ while another applied the privilege rule,⁶⁵ and still another applied the ordinary lawful business rule.⁶⁶ In considering an ordinance regulating the sale of meat one court applied the police power rule⁶⁷ while another applied the ordinary lawful business rule.⁶⁸ In considering an ordinance regulating the sale of milk one court applied the police power rule⁶⁹ while another applied the ordinary lawful business rule.⁷⁰ In considering an ordinance regulating physicians' licenses one court applied the ordinary lawful business rule⁷¹ while another applied the personal fitness rule.⁷² In considering an ordinance regulating laundries one court applied the ordinary lawful business rule⁷³ while another applied the necessity rule.⁷⁴ In considering ordinances regulating filling stations and the storage of oil some courts applied the ordinary lawful business rule⁷⁵ while others applied the police power rule,⁷⁶ and still others applied the privilege rule.⁷⁷ One court applied the necessity rule to an ordinance regulating cow stables⁷⁸ while another applied the ordinary lawful business rule.⁷⁹ In considering an ordinance regulating hospitals one court ap-

⁶⁴ *Mutual Film Corp. v. Ohio Indust. Comm.*, *supra*, n. 49; *Black v. City of Chicago*, *supra*, n. 49.

⁶⁵ *Oakley v. Richards*, *supra*, n. 63.

⁶⁶ *Vincent v. Seattle*, *supra*, n. 38. The ordinance applied to all amusements and was not restricted to theatres.

⁶⁷ *City of Buffalo v. Hill*, *supra*, n. 49.

⁶⁸ *Walsh v. Denver*, *supra*, n. 36.

⁶⁹ *Peo. ex rel. Lieberman v. Van DeCarr* (1903) 175 N. Y. 440, 67 N. E. 913, (1905) 199 U. S. 552.

⁷⁰ *Bear v. Cedar Rapids*, *supra*, n. 34.

⁷¹ *Hewitt v. Board of Medical Examiners* (1906) 148 Calif. 590, 84 Pac. 39.

⁷² *Dillard v. State Board*, *supra*, n. 56; *Mathews v. Murphy*, *supra*, n. 56; *Czarra v. Board*, *supra*, n. 56.

⁷³ *Yick Wo v. Hopkins*, *supra*, n. 22.

⁷⁴ *Yee Bow v. Cleveland*, *supra*, n. 49.

⁷⁵ *Bizzell v. Goldsboro*, *supra*, n. 31; *Slaughter v. Post*, *supra*, n. 30; *City of Richmond v. Dudley*, *supra*, n. 25.

⁷⁶ *Hyma v. Seeger*, *supra*, n. 49; *San Antonio v. Rubin*, *supra*, n. 53.

⁷⁷ *State ex rel. Lane v. Fleming*, *supra*, n. 59; *Matter of Larkin Co. v. Schwab*, *supra*, n. 62.

⁷⁸ *Fischer v. St. Louis*, *supra*, n. 46.

⁷⁹ *State v. Mahner*, *supra*, n. 23; *Mayor v. B. and O. R. Co.* (1908) 107 Md. 178, 68 Atl. 490.

plied the ordinary lawful business rule⁸⁰ while another applied the police power rule.⁸¹ When one comes to ordinances regulating the use of streets he finds the courts at variance on every point. The use of the streets for the purpose of making speeches has been subjected to both the ordinary lawful business rule⁸² and the privilege rule.⁸³ The use of the streets for parades has been subjected to the ordinary lawful business rule⁸⁴ while the ordinary use of the streets for traffic has been subjected to the police power rule.⁸⁵ The use of the streets by busses and transportation companies has been subjected to both the ordinary lawful business rule⁸⁶ and the police power rule.⁸⁷

In the second place, there are many cases in which the court announced the ordinary lawful business rule with approval, and then proceeded to find that the discretion was guided, though it is difficult to see how the statute was any more definite in providing guides than were the statutes in those cases which applied the rule strictly. In *Farmers' and Planters' Company v. Mayor of Salisbury*,⁸⁸ the court considered an ordinance which prohibited the erection of any building without a permit from the mayor, the application for which must be in writing, stating the proposed location, size of building, materials to be used, and the purpose of the building. The court held that the ordinance provided guides because it specified the various matters to be taken into consideration in the exercise of the discretion. Was the mayor's discretion any more guided than it would have been had the contents of the application not been specified? Though the ordinance required him to consider the size of the building, what then? It did not say what he should decide about the size. Would he not necessarily have considered the size had the ordinance remained

⁸⁰ *Bessonies v. Ind.*, *supra*, n. 18.

⁸¹ *Blackman Health Resort v. Atlanta*, *supra*, n. 52.

⁸² *State v. Coleman*, *supra*, n. 40.

⁸³ *Davis v. Mass.*, *supra*, n. 60.

⁸⁴ *Frazee's Case*, *supra*, n. 21; *Chicago v. Trotter*, *supra*, n. 24; *In re Garabad*, *supra*, n. 36; *Anderson v. City of Wellington*, *supra*, n. 39.

⁸⁵ *State v. Yopp*, *supra*, n. 53; *Taylor v. Roberts*, *supra*, n. 49; *Ashland Trans. Co. v. State Tax Comm.* (1933) 247 Ky. 144, 56 S. W. (2d) 691.

⁸⁶ *Tulsa v. Thomas*, *supra*, n. 36.

⁸⁷ *Lane v. Whitaker*, *supra*, n. 59; *Racine v. District Court*, *supra*, n. 56; *Rizzo v. Douglas*, *supra*, n. 56.

⁸⁸ (1920) 136 Md. 617, 111 Atl. 112.

silent upon the subject? It seems that the court merely wished to evade the rule it announced without repudiating the rule.

In *Moy v. Chicago*,⁸⁹ the court considered an ordinance regulating the operation of laundries. One section gave the mayor power to revoke a license to operate a laundry if satisfied that its maintenance was dangerous to the health of the city or of persons employed in the laundry. The court held that the ordinance provided guides for the exercise of this discretion because the section was to be construed as giving the mayor authority to revoke a license only when the laundry was being operated in violation of "specific provisions" of the ordinance designed to protect the health and safety of the employees and the public. The statute expressed no such guide. When the court gave it such a construction did it do any less than it would have done had it merely implied the guide of reasonableness? The court wanted to uphold the ordinance, but did not want to repudiate the "rule," so it proceeded to find that the ordinance expressed guides.⁹⁰

In the third place, the rule as stated, followed by an exception which all but destroys the rule, is ambiguous. Any regulation of an ordinary lawful business must be done by virtue of an exercise of the police power. There is no other way. Why, then, state an "ordinary lawful business rule" when there is an exception which covers all exercises of the police power?

The rule with its exception amounts to nothing more than a statement that the guide fixed in the statute must be as definite as practicable. Such a statement is unsatisfactory. Practicable for what? The definiteness of a standard is merely a matter of degree. If a standard of one degree of definiteness is "practicable" in order to secure a reasonably good administration of the law, is a standard of a slightly lower degree of definiteness not "practicable" even though it tends to secure a superior administration of the law? Would the lack of any standard at all be "impracticable" or "unnecessary" even though it tended to secure the best possible administration, if a more definite standard would tend to secure a fairly good administration? These questions cannot be answered on the basis of the "rule" and its exception.

⁸⁹ (1923) 309 Ill. 242, 140 N. E. 845.

⁹⁰ See also *Slovanian Literature Ass'n v. Portland* (1924) 111 Ore. 335, 224 Pac. 1098; *Hughes v. Detroit* (1922) 217 Mich. 567, 187 N. W. 530; *Lovell v. Mt. Vernon* (1926) 215 Ky. 143, 284 S. W. 1025.

But accepting the rule for what it is worth, is it sound? What is it that requires the standard to be as definite as possible? This question requires an examination of the constitutional problems involved in all these cases. It is extremely doubtful whether they support such a rule. The question will be discussed in a later chapter.

In the fourth place, it is assumed that the lack of any definite guide expressed in the statute is a means of conferring the widest possible discretion. That was the theory of the early cases—if the guide was expressed by the statute the discretion was unguided, uncontrolled, arbitrary. But it has already been shown that when the absence of express guides is “necessary” the guide of reasonableness is implied. In a later part of the article an attempt will be made to show that a discretion guided by the implied (or expressed) standard of reasonableness is often less broad in scope than is a discretion guided by more definite standards—that is, that an apparently unguided discretion in some cases tends to become non-discretionary.

Since it is the belief of the writer that the “rule” as ordinarily stated . . . “is an inadequate analysis of the problem of apparently unguided administrative discretion,” it is next proposed to consider the constitutional problems involved, for the purpose of attempting to discover whether such discretion is or is not constitutional, and to consider whether or not its conference conforms to sound legislative practice.

CHAPTER III

Unguided Administrative Discretion and the Delegation of Legislative Power

One of the first attacks upon statutes conferring discretionary powers was on the ground that the statute violated the principle that the legislature can not delegate its powers. Its powers were given to it by the people and are held in trust. It can not delegate those powers to another without violating that trust. *Delegata potestas non potest delegari*.⁹¹ This doctrine is a corollary of that theory of government known as the separation of powers,

⁹¹ Duff & Whiteside: *Delegata Potestas Non Potest Delegari* (1929) 14 Cornell L. Q. 168.

upon the basis of which the Constitutions of the United States and of every state in the United States were framed. All the powers of government are divided between three departments, the legislative, the executive, and the judicial, and the powers conferred upon one department may neither be exercised by either of the other departments nor delegated to any other body, except as expressly authorized in the constitution. This doctrine of separation and non-delegation of the powers of government has become firmly embodied in our legal system—as a matter of theory.

But in the practical operation of government the doctrine has been subjected to severe criticism on all sides. The theory as strictly applied simply has not worked. Rosenberry, J., speaking for the court in *State ex rel. v. Whitman*,⁹² said: “there never was and never can be such a thing in the practical administration of the law as a complete, absolute, scientific separation of the so-called co-ordinate governmental powers. As a matter of fact they are, and always have been overlapping. Courts make rules of procedure which in many instances at least might be prescribed by the legislature. When courts through a receiver reach out and administer a great railway system extending from one ocean to the other, they are not exercising a strictly judicial power; they are exercising an administrative or executive power, which historically has found its way into the judicial department. The constitution reserves to the legislature the power to act as a court in certain cases; when it acts as such it exercises a judicial power. . . . The essential facts upon which courts, legislatures, and executives, as well as students of the law, agree, is that there is an overpowering necessity for a modification of the doctrine of separation and non-delegation of the powers of government.”

This element of necessity has clearly been the main basis for the continued attack upon the doctrine. At the time the constitutions were written the distribution of powers provided for was no doubt adequate. But “as any community passes from simple to complex conditions the only way in which a government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents,

⁹² (1928) 196 Wis. 472, 220 N. W. 929.

subject to the control of general directions prescribed by superior authority.”⁹³ In the face of necessity the inevitable must happen. It did. The legislatures delegated power and the courts upheld their action. In the words of Elihu Root,⁹⁴ “the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight.”

However, the courts were not willing to repudiate the doctrine openly or in its entirety. It had become too integral a part of American political theory. The result was that the “formula” was repeated over and over, but its scope was qualified and cut down until not much remained. The judges and commentators had no hesitancy in announcing the general doctrine that legislative power could not be delegated, but when it came to applying that doctrine the courts had no alternative; they were forced to be guided by the necessities of government. As was said in *State ex rel. v. Whitman*,⁹⁵ “the courts recognized the situation, and under one pretext or another upheld laws in recent years that undeniably would have been held unconstitutional under conditions which existed prior to the Civil War.”⁹⁶

An adequate conception of the change which has been brought about in this doctrine of non-delegation of power may be had by considering the beginning of the process and its present stage.

The first inroads upon the scope of the theory were made by what is known as the contingency doctrine, which is that the legislature may pass a law, but make its operation depend upon the existence of a fact, the determination of which is left to another agency. The first case involving a statute of this kind

⁹³ Elihu Root, A. B. A. Rep'ts. (1916) 368; Leek, Legislative Reference Bureau (1925).

⁹⁴ *Ibid.*

⁹⁵ *Supra*, n. 92.

⁹⁶ The same theory as to the changing concepts of the scope of the application of constitutional doctrines is forcefully enunciated by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.* (1926) 272 U. S. 365 (though the constitutional doctrine under consideration was a different one):

“Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected. Such regulations are sustained [because of] the complex conditions of our day. . . . and in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.”

which reached the courts was the *Brig Aurora*.⁹⁷ An act of Congress provided that the non-intercourse acts should be revived if the President issued a proclamation declaring that either France or Great Britain had not revoked or modified certain edicts so that they ceased to violate neutral trade. The statute was attacked upon the theory that by making the revival of a statute depend upon the proclamation of the President, the President was given legislative power. The statute was upheld on the ground that Congress had enacted a complete law which was to become effective upon the occurrence of a subsequent event—the failure of France to revoke an edict; someone had to determine the existence of that event, and it need not be the legislature. The President did not make the law. His proclamation was merely evidence of a fact upon which the operation of the law depended.

*Marshall Field v. Clark*⁹⁸ involved the same situation. Congress enacted a statute imposing specified duties upon certain imported products, but the duties were not to become effective unless the country from which those products were imported levied reciprocally unequal duties upon United States products of the same nature. Whether or not a country levied such duties was to be determined by the President. The court upheld the statute, saying: "To deny this [the power to delegate the function of determining the existence of facts upon which the operation of the statute was made to depend] would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and must, therefore, be a subject of inquiry and determination outside the halls of legislation." That is often the only way the legislature can act wisely in regard to "a state of affairs not yet developed, or to things future and impossible to fully know."

In *Hampton and Company v. United States*,⁹⁹ the court considered the validity of the flexible clause in the Tariff Act of 1922, which gave the President power to raise or lower the duty on specified articles so as to equalize the cost of producing that article abroad and transporting it to this country and the cost

⁹⁷ (1813) 7 Cranch 382.

⁹⁹ (1928) 276 U. S. 394.

⁹⁸ (1891) 143 U. S. 649.

of producing the article here. The court upheld the statute, and again applied the contingency doctrine. That is, Congress determined what the duty should be: it should be sufficient to equalize the costs of production. What the exact figure should be in any particular case depended merely upon the calculations, and that could be left to another body. The President was not given the power to determine the duty. He was only given power to determine facts, and when he had done so the statute operated to fix the duty.

These three cases all apply the contingency doctrine—a complete statute *in praesenti* to become effective *in futuro* upon the happening of a specified event, the fact of its happening to be determined by some agency other than the legislature. But their effect is vastly different. In the first case the “fact” which determined the operation of the statute was the revocation of a French or British edict. In determining that “fact” the President exercised no discretion. In the second case the “fact” was the levy of a duty by a foreign country that made the duties reciprocally unequal. In determining the existence of that “fact” the President was given some room for judgment of his own. But in the third case the “fact” which the President was to determine was the cost of production of a particular article both abroad and in the United States. The cost of production of a given article is most difficult to determine. There are a great many factors to be considered and the importance of each factor varies with the circumstances. Though the statute specified the factors to be considered it did not, and could not, specify the influence each factor should have upon the final determination. The President is required to make a determination which involves the use of a wide discretion. It is one thing to determine the revocation of an edict and quite another to determine the cost of production of an article. The one involves the exercise of no discretion, and the other involves the exercise of a very great discretion. Yet in both cases the President is merely determining the existence of a “fact” upon which the operation of the statute depends.

In theory the contingency doctrine involves no problem of administrative discretion. The theory works out in practice only so long as the “fact” to be determined is definite, objective, and

subject to absolute determination. But where the "fact" is something concerning which opinions differ the problems of discretion become important. A very simple illustration will serve as an example: suppose an ordinance prohibits the operation of a taxicab by anyone without a driver's license, and requires the mayor to issue a license to everyone whom he finds "as a matter of fact" to be a competent driver. Are there many things more controversial than the competency of an automobile driver?¹⁰⁰ Thus, by means of the contingency doctrine the legislature began to delegate functions once exercised by it. That doctrine was carried far.¹⁰¹

Without attempting to trace the complete history of the doctrine of non-delegation of power, what is its status today? It is not difficult to state: In its very briefest terms it is that the legislative or policy forming power is its only non-delegable power. The legislature has two kinds of power: one is its exclusively legislative power, which can not be delegated; the other is its non-exclusively legislative power, which it may either exercise directly or delegate to subordinate bodies. The only exclusively legislative power is the power to determine basic policies. All other powers may be delegated.

"The power to declare whether or not there shall be a law; to fix limits within which the law shall operate—is a power which is vested by our constitution in the legislature and may not be delegated. When, however, the legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose."¹⁰²

¹⁰⁰ Cf. *Milwaukee v. Rissling* (1924) 134 Wis. 517, 199 N. W. 61: The Court upheld an ordinance requiring electricians to be licensed and allowing the examining board to determine the fitness of the applicant, saying: "The duty devolved on the commission is to ascertain what is reasonably necessary to constitute what may be deemed proper qualifications for a license. In determining such qualifications and conducting the examination the commission acts, not in a legislative capacity, but in an administrative capacity. When it has found the necessary 'facts' and acted favorably or unfavorably, the provisions of the ordinance become operative automatically."

¹⁰¹ For other statements of the doctrine see: *Adams v. Beloit* (1900) 105 Wis. 363, 81 N. W. 869; *Minn., St. P. and Ste. M. R. Co. v. Railroad Comm.* (1908) 136 Wis. 146, 116 N. W. 905; *In re Griner* 16 Wis. 423; *Lathrop v. Stedman* (1875) 13 Blatch 134, Fed. Cas. No. 8519; *State v. N. Haven and Northampton Co.* (1876) 43 Conn. 351; *Haeussler Inv. Co. v. Bates* (1924) 306 Mo. 392, 267 S. W. 632; *Locke's Appeal* (1872) 72 Pa. 491, 13 Am. Rep. 716.

¹⁰² *State ex rel. v. Whitman, supra*, n. 92.

“There is a distinction, however, between delegating power to make a law and conferring authority or discretion as to its execution. If a legislative act is clothed with all the forms of law, and is complete in itself in form and substance, if the officer, board, or commission to whom the authority is alleged to have been delegated is given no power to add to or take away from the law as enacted, if nothing is left to the discretion as to what shall constitute the form and substance of the statute, and if the statute embodies a full and complete expression of the legislative will, matters relating to the administration and execution of the statute do not constitute an unauthorized delegation of legislative authority.”¹⁰³

“The legislative power, while concerning itself with new rules for the future, has as its true and proper subject-matter the broad policy which it declares. All details in the application of the policy may be delegated, though these details may involve the exercise of discretion and a choice between policies subordinate to the broad policy of the legislature. Therefore, if Art. 1, sec. 1 (of the Constitution) stood alone as an expression of the duty of Congress, that body need only indicate the policy to be pursued, and it will have exercised the power conferred upon it.”¹⁰⁴ Congress may go further and lay down rules in detail, but in doing so it is performing an administrative function and should do so only so long as it can act efficiently.

“We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative officer or board to carry out the definitely expressed will of the legislature, although procedural directions and things to be done are specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.”¹⁰⁵

“The power to carry out a legislative policy enacted into law under the police power may be delegated to an administrative board under quite general language, so long as the exact policy is clearly made apparent.”¹⁰⁶

¹⁰³ State *ex rel.* v. Moorer (1929) 152 S. C. 455, 150 S. E. 269.

¹⁰⁴ Cheadle, *The Delegation of Legislative Functions* (1918) 27 Yale L. J. 892.

¹⁰⁵ *Barbour v. State Board of Educ.* (1932) 92 Mont. 321, 13 Pac. (2d) 225.

¹⁰⁶ *Redmond and Co. v. Mich. Securities Comm.* (1923) 222 Mich. 1, 192 N. W. 688. For examples of statutes failing to state a policy, see: *Chicago v. Matthies* (1926) 320 Ill. 352, 151 N. E. 248; *City of Eureka v. Wilson* (1897) 15 Utah 67, 48 Pac. 150; *Town of State Center v. Barnstein* (1885) 66 Ia. 249, 23 N. W. 652; *Ploner v. Standard Oil Co.* (C. C. A. 7, 1922) 284 F. 34; *Comm. v. Maletsky* (1909) 203 Mass. 241, 89 N. E. 245; *Harrigan-Reid Co. v. Burton* (1923) 224 Mich. 564, 195 N. W. 60; *Samuels v. Couzens* (1923) 222 Mich. 604, 193 N. W. 212; and ordinance of Detroit made it unlawful to conduct a jewelry business without a license from the mayor. The Court

Putting the proposition in another way, if the statute declares a definite policy, it has expressed a sufficiently definite standard for the guidance of the agency charged with its administration, as far as the question of delegation of power goes.¹⁰⁷ If this postulate is accepted it is obvious that for the purposes of this doctrine it makes not the slightest difference whether the ordinance or statute regulates an ordinary lawful business or a mere privilege, or whether it is an exercise of the police power and necessary to accomplish the desired result. The same principle must apply in either case.

Two things should be emphasized: (a) whether a statute is void as a delegation of power is subject to the final determination of the political jurisdiction sanctioning it. A state decision upon the validity of a state statute is final, and the state is under no compulsion to follow the lead of the federal courts. That is because the federal Constitution does not prevent a state legislature from delegating its powers. Any prohibition must be found in the state Constitution, and the decisions of the state courts on that question are final. (b) Thus it is entirely possible for a state to adopt any rule it wishes as to the meaning of this doctrine. Though the foregoing analysis of the present status of the doctrine is generally accepted by the several states, should a state court ever wish to retrench, it could easily do so by changing its view on this subject. But as the matter now stands, the doctrine of non-delegation of legislative power offers little difficulty in considering the problem of administrative discretion. And in the words of Elihu Root, "There will be no withdrawal from these experiments. We shall go on."¹⁰⁸

held the ordinance void as a delegation of legislative power, saying: ". . . an ordinance should at least express an idea upon the subject of regulation. This ordinance . . . defines no policy or purpose, does not speak in regulatory terms, conveys no idea of an end desired, avows no object to be accomplished by way of means prescribed . . . and so offends against the elementary principles governing delegated functions."

¹⁰⁷ For cases applying this principle, see: *Butterfield v. Stranahan* (1904) 192 U. S. 470; *N. Y. Central Securities Corp. v. U. S.* (1932) 287 U. S. 12; *Atcheson, T. and S. F. R. Co.* (1911) 234 U. S. 476; *State ex rel. v. Duval County* (1918) 76 Fla. 180, 79 So. 692; *State v. Montgomery* (1912) 177 Ala. 212, 59 So. 294; *Grace Missionary Church v. City of Zion* (1921) 300 Ill. 513, 133 N. E. 268; *Spencer-Sturla Co. v. Memphis* (Tenn. 1927) 290 S. W. 608; *Ex parte Weisberg* (Calif. 1932) 12 Pac. (2d) 446; *State v. Yopp*, *supra*, n. 85; *Ashland Transfer Co. v. State Tax Comm.*, *supra*, n. 85.

¹⁰⁸ *Supra*, n. 93.

CHAPTER IV

Unguided Administrative Discretion and Due Process of Law or Equal Protection of Law

The next question to consider is the validity of apparently unguided administrative discretion when tested in the light of the Fourteenth and Fifth Amendments to the United States Constitution. There are two clauses of the Amendments that are involved: the equal protection of the law clause and the due process of law clause. It is the purpose of the following discussion to demonstrate that the mere grant of an apparently unqualified discretion does not of itself violate either of these two constitutional safeguards. The mere conference of apparently unguided power deprives no one of the equal protection of the law or of property or liberty without due process of law. It is only when the discretion conferred is exercised in an arbitrary manner that the rights of the individual are impaired.

It should be repeated here, that those cases which deal with the conference of discretion in the regulation of a matter of mere privilege present no problem under the Fourteenth Amendment because there are no "rights" involved.

One other class of cases should be disposed of rather summarily when considering the question of the Fourteenth Amendment, and that is the class of case in which the court has before it a municipal ordinance and declares it void because it is unreasonable. There are several cases in which courts have declared an ordinance unreasonable because it conferred an apparently unguided discretion when there was no reason why standards could not have been expressed.¹⁰⁹ Thus, in *Cicero Lumber Company v. Town of Cicero*,¹¹⁰ the court said: "The ordinance, in so far as it vests the board of trustees with the discretion indicated, is unreasonable. It prohibits what is in itself and as a general thing lawful, and leaves the [matter] . . . to an unregulated official discretion when the whole thing should be regulated by perma-

¹⁰⁹ *Chicago v. Trotter* (1891) 136 Ill. 430, 26 N. E. 359; *Frazee's Case* (1886) 63 Mich. 396, 30 N. W. 72; *Anderson v. City of Wellington* (1888), *supra*, n. 39; *State ex rel. v. Town of Ripley* (1924), *supra*, n. 60.

¹¹⁰ (1898) 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696: The ordinance prohibited the operation of traffic vehicles (as distinguished from pleasure vehicles) upon a designated street without "special permission."

ment and local provisions operating generally and impartially." This passage was quoted and followed in *Mayor v. Baltimore and Ohio Railroad Company*.¹¹¹

The theory upon which the courts declare an ordinance void for unreasonableness has nothing to do with the Fourteenth Amendment. The theory is simply that the municipal legislature had no "authority" to pass an unreasonable ordinance. A municipal legislature exercises a delegated legislative power, and "in every power given to a municipal corporation to pass by-laws or ordinances there is an implied restriction that the by-laws or ordinances will be reasonable."¹¹² Or, as stated by the court in *Mayor of Baltimore v. Radecke*,¹¹³ "We are of the opinion that there may be an ordinance . . . so clearly unreasonable, so arbitrary, oppressive, or partial as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority."

However, this rule applies only to ordinances enacted under a general grant or under implied and incidental powers. It does not apply to an ordinance which the legislature has given the municipal corporation express power to pass.

"If passed by virtue of an express power, an ordinance cannot be set aside by a court for mere unreasonableness, since questions as to the wisdom and expediency of a regulation rest alone with the state law-making power," (subject to the restraints of the Fourteenth Amendment).¹¹⁴

"Where the power to enact the particular ordinance is specifically conferred on the municipality, the question whether it is reasonable can no more be raised so as to affect its validity than could the same objection be raised against the statute so as to affect its validity."¹¹⁵

"If an ordinance is passed in virtue of and in exact conformity with an express grant of legislative power . . . a court will not pass upon the validity of such an ordinance. The attack, if any, must be made against the constitutionality of the enabling statute."¹¹⁶

¹¹¹ (1908) 107 Md. 178, 68 Atl. 490: The ordinance made it unlawful to keep domestic animals in certain places without a permit from the mayor.

¹¹² McQuillin, *Municipal Corporations* (2d Ed.) sec. 761.

¹¹³ (1878) 49 Md. 217, 33 Am. Rep. 239.

¹¹⁴ McQuillin, *op. cit.*, n. 112 at sec. 760.

¹¹⁵ *Shea v. Muncie* (1897) 148 Ind. 14, 46 N. E. 138.

¹¹⁶ *Fritz v. Presbrey* (1922) 44 R. I. 207, 116 Atl. 419.

Though the question of the power of a court to declare an ordinance void because unreasonable is an important one when considering the problem of administrative discretion, it is not proposed to discuss it in detail here. It is only necessary to note that the question can always be eliminated, if the legislature wishes to extend the practice of conferring apparently unguided discretion, by providing express statutory authority for the municipal ordinance. Otherwise the doctrine announced will apply. But even so, whether the court will declare an ordinance which fails to specify guides for the discretion conferred unreasonable will depend upon the circumstances. As conditions change so will the opinions of the judges; the ordinance which was declared unreasonable in *Mayor of Baltimore v. Radecke* in 1878 might not be declared unreasonable by the same court today. One can only speculate upon the matter.

When considering the validity of apparently unguided administrative discretion in the light of the Fourteenth Amendment it is necessary to know how the ordinance or statute conferring the discretion has been construed—i. e. whether the ordinance or statute, as finally construed, does in fact confer an unregulated discretion, or confers a guided discretion, guided by the implied standard of reasonableness, to be determined by the subject matter regulated and the policy of the statute in regulating it.

The construction of an ordinance or statute is a matter for the political jurisdiction which sanctions it. The meaning of any state statute is subject to the final determination of the courts of that state. So in considering the problem it will be necessary to assume first one construction and then the other.

VALIDITY OF APPARENTLY UNGUIDED DISCRETION WHICH HAS BEEN CONSTRUED TO BE ARBITRARY DISCRETION

Though a statute conferring a discretionary power which has been construed to be arbitrary would undoubtedly be void as a delegation of legislative power,¹¹⁷ the courts have not always placed their decisions upon that ground. For this reason it is believed that an analysis of the problem from this standpoint is not purely an academic one. When considering this problem the courts rarely distinguish between the equal protection of the

¹¹⁷ *Supra*, c. III.

law clause and the due process of law clause. It is the belief of the writer that the distinction is not necessary, because, for the purpose of this discussion, one includes the other.

There is a long list of state decisions which have construed ordinances failing to lay down express standards for the guidance of the discretionary powers conferred as an attempt to confer arbitrary power. The ordinances so construed were then declared void. Those cases were considered and cited when discussing the ordinary lawful business rule, *supra*, and will be considered again only for the purpose of scrutinizing their reasoning. Needless to say, the courts did not always make their reasons clear. It is not necessary to review the cases in detail. It is sufficient to indicate that most of them said or implied that a statute or ordinance which conferred arbitrary power *ipso facto* deprived the affected persons of the equal protection of the law. In no case was such a statement explained. Is it sound?

The question becomes this: Does the mere existence of an arbitrary power over a person's property deprive him of the equal protection of the law, or is it only the arbitrary exercise of that power which deprives him of the equal protection of the law? It is impossible to answer the question with certainty, in view of the fact that the United States Supreme Court has not spoken definitely.

The mere grant of an arbitrary discretionary power over the property of an individual does not *ipso facto* deprive him of the equal protection of the law. That discretion may never be exercised arbitrarily and unless it is arbitrarily exercised the individual is deprived of nothing. The law is applied to him just as it is to everyone else. He is protected "equally" with everyone else. To illustrate: suppose a statute prohibits the engagement in a particular business of anyone without a license and vests an arbitrary discretionary power in the licensing officer. If an individual applies for a license and gets it, has the law failed to protect him "equally"? Has he been denied the equal protection of the law? The mere requirement that he secure a license does not deny him equal protection, for everyone else is also required to secure one. The fact that some discretion is vested in the licensing officer is unobjectionable for it is now clearly settled that a guided discretion is valid. What difference does it make

whether that discretion is guided or unguided? If a guided discretion is exercised arbitrarily the courts will give relief,¹¹⁸ at least to whatever extent is procedurally possible, which is the problem discussed in the next chapter. The court gives the same relief when an arbitrary discretion is arbitrarily exercised.¹¹⁹ A statute which authorizes an agent to deny an individual equal protection does not *ipso facto* deny him equal protection of the law, but has that effect only when the agent discriminates against the individual.

A dictum in *Gundling v. Chicago*¹²⁰ supports such a thesis. The court said: "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it [a license]. He has made no application for a license, and of course the mayor has not refused it. *Non constat*, that he would have refused it if application had been made by the plaintiff in error. Whether the discretion is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he has made no application for the exercise of the discretion in his favor and was not refused a license." If that is so, the mere existence of an arbitrary power in the mayor is no concern of the plaintiff. It is not until that power is arbitrarily exercised against him that he is injured.

A statement by the United States Supreme Court in *Plymouth Coal Company v. Pennsylvania*¹²¹ also supports such a thesis. The court said: "We may once more repeat, what has so often been said, that one who would strike down a state statute as violative of the Federal Constitution . . . must show that the alleged unconstitutional feature *operates*¹²² so as to deprive him of rights protected by the Federal Constitution." The wording of the statement has significance. It is: if the statute "operates" so as to deprive him of rights, etc. It is the *operation* of the statute that controls. The statute can not operate to deprive him of rights until it is arbitrarily enforced against him.

There is an obvious answer to such reasoning: The statute

¹¹⁸ *Peo. ex rel. Lieberman v. Van DeCarr* (1905), *supra*, n. 69.

¹¹⁹ *Yick Wo v. Hopkins* (1886), *supra*, n. 22.

¹²⁰ (1889) 177 U. S. 183.

¹²¹ (1914) 232 U. S. 531.

¹²² Italics those of the present writer.

conferring arbitrary power *ipso facto* denies each individual the equal protection of the law because the statute does not insure him equal protection. If he gets equal protection it is by virtue of the will of the discretionary agent and not by virtue of any provision of the statute, which gives him no right to equal protection with others. Each individual is entitled as a matter of right to the equal protection of the law. Unless the statute itself gives him that right he does not have it. But law itself must insure him equal protection.

This theory is supported by a much-quoted statement of the court in *Yick Wo v. Hopkins*:¹²³ "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

But there is a rejoinder to this answer. If the individual in fact receives equal protection he can not complain. The state has not denied him equal protection. And the statement quoted from *Yick Wo v. Hopkins* assumes that the exercise of an arbitrary "will" is beyond control. That assumption is not correct, for once the "will" is exercised so as to discriminate against that person he is deprived of equal protection of law and may obtain relief in the federal courts.

What is the essence of the argument? Merely this. A discretion which has been construed to be arbitrary is unobjectionable in the light of the Fourteenth Amendment so long as it is not exercised arbitrarily. Is the discretion really arbitrary then? If the courts will control an unreasonable exercise of the discretion does the administrative agency actually have any more than a "reasonable" discretion? And that leads to a consideration of the next subject:

VALIDITY OF APPARENTLY UNGUIDED DISCRETION WHICH HAS BEEN
CONSTRUED TO BE GUIDED BY THE IMPLIED STANDARD OF
REASONABLENESS

In accord with the steady expansion of the administrative system there has been an increasing tendency on the part of the courts to read into every statute the implied guide of reasonable-

¹²³ *Supra*, n. 22.

ness—i. e., they have refused to construe the statute as an attempt to confer arbitrary power.¹²⁴ Once such a construction has been placed upon a statute is there any question of its validity under the Fourteenth Amendment? Does its validity depend upon whether that degree of discretion is “necessary”? The recent cases are quite clear; the answer appears to be an unequivocal “no.” The theory upon which the courts go is that the administrative agency is given only a reasonable discretion. It can not be presumed that the discretion will be exercised arbitrarily, and if ever it should be, the person discriminated against would have a remedy in the courts. It is not until the discretion has been abused that any rights under the Fourteenth Amendment are involved.

The objection is often made that the power given might be abused, since there are no express guides. As it has been assumed that the statute was not intended to authorize such an abuse it must follow that the objection is nothing more than that the officer might exceed his authority. Such an objection has been emphatically answered. The court in *Ex Parte Holmes*,¹²⁵ when considering an ordinance which gave to certain officers an apparently unqualified discretion to grant or refuse permits to dealers in secondhand goods, said: “Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that the municipal officers will not use their small powers villainously or for purposes of oppression or mischief.” And Justice Holmes, speaking for the court in *Union Telegraph Company v. City of Richmond*,¹²⁶ said: “The objection that other motives may come in is merely that which may be made to all authority—that it may be dishonest—an objection that would make government impossible if it prevailed.” Moreover, if one assumes the dishonesty of the administrator, express guides would do no good. And Justice McKenna expressed the same idea when he wrote the decision of the court in *Lehman v. State Board of Accountancy*:¹²⁷ “We cannot . . . assume that the board will be impelled to action by other than a sense of duty or render judgment except upon convincing evidence. . . .

¹²⁴ *Supra*, 274 *et seq.* See cases cited in n. 53.

¹²⁵ (1921) 187 Calif. 640, 203 Pac. 398.

¹²⁶ (1911) 224 U. S. 160.

¹²⁷ (1923) 263 U. S. 394.

We certainly cannot restrain the board upon the possibility of [arbitrary] action. Official bodies would be of no use as instruments of government, if they could be prevented from action by the supposition of wrongful action." It will be time enough to complain, when, if ever, the power shall be thus abused."¹²⁸

In *Smith v. Cahoon*,¹²⁹ the court expressly passed on the point. The plaintiff had been arrested for operating a motor vehicle on the highways of Florida without a certificate of public convenience and necessity as required by a statute. Before considering the power of the state to pass the statute in question the court made this sweeping statement: "The appellant did not apply for a certificate, and the principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business of following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration."

At the next term of court this principle was affirmed by the court in *Continental Baking Co. v. Woodring*.¹³⁰ The statute involved was the Kansas Motor Vehicle Act which gave the Public Service Commission power to insist that motor vehicles be maintained "in a safe and sanitary condition," to prescribe qualifications of operators as to age and hours of service, and to require the reporting of accidents. In upholding this provision the court, speaking through Chief Justice Hughes, said: "Appellants had no right to resort to equity merely because of an anticipation of improper or invalid action in administration." And when speak-

¹²⁸ *Gorieb v. Fox* (1927) 274 U. S. 603.

"If the enforcement of the law gives rise to situations impairing constitutional rights, they may be considered as they arise." *Wis. Telephone Co. v. Public Serv. Comm.* (1932) 206 Wis. 589, 240 N. W. 411.

"Learned counsel for defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under an Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise." *Monongahela Bridge Co. v. United States* (1909), *supra*, n. 47.

¹²⁹ (1931) 283 U. S. 553.

¹³⁰ (1932) 286 U. S. 352, 81 A. L. R. 1402. See also *Dalton v. Adding Machine Co.* (1915) 236 U. S. 699; *Lehon v. Atlanta* (1916) 242 U. S. 53; *Hall v. Geiger-Jones Co.* (1916) 242 U. S. 539; *Champlin Refining Co. v. Corp. Comm.* (1932) 286 U. S. 210; *Baker v. Glenn* (D. C. E. D. Ky. 1933) 2 F. Supp. 880.

ing of similar provisions the court said: "the objection [that the commission might act arbitrarily] . . . raises no question which can now be considered, as there has been no action or threat of action, so far as appears, by the commission, giving ground for the contention that the constitutional rights of the appellants have been or will be invaded."

A Federal District Court recently had this question squarely before it.¹³¹ A "Texas Livestock Tick Eradication" act provided for the compulsory systematic dipping of cattle infested with ticks. Before there was any effort to enforce the act the plaintiff sought to restrain its enforcement on the ground that the act contained at least three provisions conferring upon an administrative commission arbitrary and unrestrained power. The court refused to issue the injunction, saying: "If the plaintiff can be compelled to a course of systematic dipping, and the act in its general features and purposes is valid, but only some subordinate feature of it is in question, plaintiff can not now obtain an injunction against those features, even if generally invalid, but must wait and apply for relief against such provision when it is first sought to be applied against him. . . . There is neither allegation nor proof that the plaintiff has been discriminated against in favor of other persons, or that the plaintiff has been, or is about to be, proceeded against by injunction . . . or that any of the things complained of as illegally provided by the act have been or will be done in any way to effect injury to the plaintiff, and it is but an academic speculation to consider what ought to be done to relieve plaintiff against a case which has not yet arisen and which may never arise. . . . It will be time enough for the court to determine whether his situation is such as to entitle him to relief when he feels the pressure of the particular provisions of which he complains."

The courts did not ignore the possibility of the arbitrary exercise of the discretion conferred. Though they would not presume such action in advance for the purpose of declaring a statute invalid, they clearly indicated that if the case of abuse should arise the aggrieved person would have his remedy in the courts.

In *People ex rel. Lieberman v. Van DeCarr*,¹³² the court in up-

¹³¹ *Armstrong v. Whitten* (D. C. S. D. Tex. 1930) 41 F. (2d) 241.

¹³² (1905), *supra*, n. 69.

holding an ordinance of New York prohibiting the sale of milk without a written permit from the board of health, said: "There is no presumption that the power will be exercised arbitrarily, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal Court [citing *Yick Wo v. Hopkins*]."

In *Plymouth Coal Company v. Pennsylvania*,¹³³ the court said: "It is to be presumed, until the contrary appears, that the administrative body would have acted with reasonable regard to the property rights of the plaintiff in error; and certainly if there had been any arbitrary exercise of its powers, its determination would have been subject to judicial review. . . . Were this not expressed in the act, it would none the less be implied, at least so far as pertains to any violation of rights guaranteed by the Fourteenth Amendment [citing *Yick Wo v. Hopkins*, and *People ex rel. v. Van DeCarr*]."

In *Merrick v. Halsey and Company*,¹³⁴ the court, after indicating that the presumption is that the power conferred would not be abused, added: "If there should be such a disregard of duty, a remedy in the courts is expressly given, and if it were not given it would necessarily be implied."

In *Ex Parte Weisberg*,¹³⁵ appears this statement: "We cannot say that the present act confers unreasonable and arbitrary powers upon a subordinate officer or agent. The various duties and powers bestowed upon the fire marshall by the act may not be arbitrarily discharged, but must be discharged in the exercise of a reasonable discretion with a view to effectuating the purpose of the act. An abuse of these duties and powers may readily be remedied by a resort to the courts."

In *Sumner v. Ward*,¹³⁶ the court said: "The fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature, and the action of the officer may be reviewed in the courts for an arbitrary exercise."

¹³³ (1914) 232 U. S. 531.

¹³⁴ (1917) 242 U. S. 568.

¹³⁵ (Calif. 1932) 12 Pac. (2d) 446.

¹³⁶ (1923) 126 Wash. 75, 217 Pac. 502.

In *Cutsinger v. Atlanta*,¹³⁷ the court, after presuming that the discretion conferred would not be arbitrarily exercised, said: "if the power is sought to be arbitrarily and wrongfully exercised, the courts will apply a remedy."

Thus it is quite clear that whenever an administrative authority exercises its powers in such a way that constitutional rights of the individual are impaired, the courts will provide a remedy. Just what the courts will consider in their review and the procedure by which a review is possible will be considered in the next chapter.

There is still one important question to be considered. As was noted above, the rule as ordinarily stated sanctions a failure to specify definite standards if "necessary," and many of the cases do find, as a matter of fact, that it was necessary because a more definite standard was impracticable under the circumstances. The difficulties presented in interpreting the meaning of the word "necessary" have already been indicated, but aside from that, is there anything in the Fourteenth Amendment which *requires* a standard to be as definite as possible? It is believed that there is not.

The appropriateness of a police power regulation under the due process clause of the Fourteenth Amendment has long been a troublesome question. Appropriateness must depend upon the circumstances, and circumstances are constantly changing. There are really two parts to this question: (a) appropriateness of any regulation of the particular subject matter involved and, (b) appropriateness of a particular kind of regulation. The test as exemplified by the cases is whether, in view of the prevailing public opinion at the time, and in view of all the circumstances, the legislature could be reasonably justified in believing two things; (a) that regulation of the subject matter bears a direct relation to the public health, safety, morals, and general welfare, and (b) that the particular kind of regulation attempted has a reasonable tendency to secure the end desired. In neither case is appropriateness made to depend upon "necessity." The following cases will illustrate the point:

In *Nobel State Bank v. Haskell*,¹³⁸ the court upheld an Okla-

¹³⁷ (1914) 142 Ga. 555, 83 S. E. 263.

¹³⁸ (1911) 219 U. S. 104, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

homa bank deposit guarantee statute on the theory that the legislature was reasonably justified in believing that (a) a regulation of the banking system bore a direct relation to the public welfare, in that the whole commercial system depended on it, and (b) the statute in question had a reasonable tendency to secure a sound banking system. The statute was not held to be necessary to secure a sound banking system. In fact, Justice Holmes personally doubted its tendency to do so.

In *Block v. Hirsh*,¹³⁹ the court upheld a statute of Congress allowing tenants of property in Washington, D. C., to continue in possession thereof notwithstanding the expiration of their leases, subject to regulations of a commission created by the act. The theory of the court was that Congress was reasonably justified in believing, in view of the emergencies growing out of the war, (a) that a regulation of the subject matter bore a direct relationship to the public welfare, and (b) that the particular regulation had a reasonable tendency to accomplish the desired result. The court did not say that the regulation was necessary for that purpose. In fact it negated such an opinion when it said: "assuming that the end in view justified the means adopted by Congress, we have no concern of course with the question of whether those means were the wisest." If the means had been necessary there would have been no question of whether they were the "wisest."

In *Village of Euclid v. Ambler Realty Company*,¹⁴⁰ the court upheld a comprehensive zoning ordinance which restricted the plaintiff's land to a residential use on the theory that the legislature was reasonably justified in believing (a) that a zoning ordinance bore a direct relationship to the public welfare, and (b) that the exclusion of business from a residential district tended to promote the general welfare by protecting children, suppressing disorder, etc. But the court did not say that such exclusion was necessary.

In *Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association*,¹⁴¹ the court upheld a Kentucky statute which allowed the incorporation of growers' co-

¹³⁹ (1921) 256 U. S. 135, 16 A. L. R. 165.

¹⁴⁰ (1926) 272 U. S. 365, 54 A. L. R. 1016.

¹⁴¹ (1928) 276 U. S. 71.

operative marketing associations and made any one who knowingly persuaded a member to break his contract subject to a statutory penalty, on the theory that the legislature was reasonably justified in believing, under the circumstances, (a) that cooperative marketing agreements were to the interest of the public and should be protected, and (b) that the penalty imposed had a reasonable tendency to protect them. The court did not say that the penalty was necessary. It is entirely possible that some other sanction would have accomplished the result.

Though these cases do not involve the problem of discretion, it is believed that they amply support the writer's contention, which is that when the legislature exercises its police power, the means used do not have to be necessary. It is sufficient if they have a reasonable tendency to secure the end desired (provided that end is a proper one). Applying such a principle to licensing cases involving an apparently unregulated discretion, one gets this result: One starts with the proposition that the legislature is reasonably justified in believing that regulation of the subject matter by means of a license bears a direct relationship to the public welfare. The only question then is the validity of the means used. The means of regulation used is an administrative agency with discretionary powers guided only by the implied rule of reasonableness. The use of an apparently unguided administrative agency does not have to be necessary. It is sufficient if the use of such an agency has a reasonable tendency to accomplish the regulation desired.

CHAPTER V

Unguided Administrative Discretion and Judicial Review

It is next proposed to consider whether or not the conference of apparently unguided administrative discretion is sound legislative practice. The problem will be considered primarily from the standpoint of the persons affected. From that approach, the major problem is one of control—the question of safeguards to prevent an arbitrary exercise of the power conferred. By analogy to the theory of preventive medicine, the best safeguard is the one that operates before the evil occurs, i. e. a safeguard that tends to prevent any attempt to exercise a discretionary power arbitrarily. There are two possible “preventive remedies”: (a)

the abolition of unguided discretionary power, and (b) the minimizing of the danger of an arbitrary exercise of unguided discretionary power by a careful selection of administrative personnel. In view of the causes of the rapid development and present magnitude of the administrative system it is not probable that the first remedy will be adopted. The soundness of the theory of the second remedy is not questioned. The only difficulty is a practical one: how is a careful selection of a capable administrative personnel to be secured? The problem of improving the personnel of governmental agencies is as old as government itself, and the prospects for its immediate total solution are not very great. Therefore, the persons affected by the conference of unguided administrative discretion must rely on some other safeguard, at least for the present.

The courts historically have been the tribunals relied upon to protect the rights of individuals, and it is to them that persons instinctively turn to secure relief from arbitrary action. In order to complete the picture of administrative discretion, it is necessary to consider the extent to which arbitrary action may be controlled by judicial review.

The discretionary powers of administrative officers fall into two broad classes: the power to regulate matters of right, and the power to regulate matters of privilege. An abuse of power which falls into the latter class presents no legal problem, for in order to obtain relief from an abuse of discretion it is necessary for the complainant to show an invasion of his "rights." If he has no right involved, and has only a privilege, he has no basis of complaint. The point is illustrated by a case decided by the New York Court of Appeals in 1891.¹⁴² A New York statute prohibited anyone from engaging in the business of an auctioneer without a license, and made the issuance of the license discretionary with the mayor of the city. The plaintiff was refused a license and he began *mandamus* proceedings to compel the issuance of a license to him, on the theory that the mayor's refusal was arbitrary. The court refused to interfere, saying: "To obtain relief by *mandamus* it is necessary that a relator show an invasion of a clear legal right. This he has not done," for there is no

¹⁴² *People ex rel. v. Grant* (1891) 126 N. Y. 473, 27 N. E. 964.

“right” to engage in the business of an auctioneer; it is a mere “privilege.” Such a doctrine clearly places this type of discretion beyond judicial control.¹⁴³ But in regard to the discretionary power to regulate matters of right, an abuse of discretion is subject to judicial control if the abuse results in an invasion of private rights.¹⁴⁴

When a court reviews the action of an administrative body for the purpose of determining whether or not its action was reasonable, it does not substitute its own opinion for that of the administrative body. It merely determines whether or not there are any facts which could reasonably justify the action.¹⁴⁵ If there are, the court will not interfere, even though its own discretion exercised under identical circumstances might have led to an entirely different action. As it has been said,¹⁴⁶ the court “must not forget that the discretion to be exercised is that of the” administrative body, and the court can not substitute its own discretion for that of the administrative body “to whom the Legislature has specifically confided its exercise. If it were otherwise, the city would be governed by the courts, and not by the city officers in whom the law vests the governmental power.”

The question of whether the court will review by means of a trial *de novo*, or will confine its consideration to the record of the administrative proceeding is an important one in some types of cases, but not in the type of proceeding ordinarily involved here. The reason is that in the great majority of cases where a discretionary power guided only by the rule of reasonableness is conferred, there is no formal record of the administrative proceeding. The only possible method of review in such cases is by

¹⁴³ See cases cited *supra*, notes 60, 61 and 62.

Though the privilege doctrine is quite clear, it is most difficult to apply. Just what is a privilege? What is the distinction between a privilege and a right? The courts themselves are not agreed. The operation of a theatre has been called both a right (Vincent v. Seattle, *supra*, n. 66) and a privilege (Oakley v. Richards, *supra*, n. 63). The same is true of the operation of filling stations (cases cited *supra*, n. 75 and n. 77), and of the use of the streets (cases cited *supra*, notes 82 and 83). The distinction is difficult to draw, and often depends upon history (see cases holding the sale of liquor to be a privilege). In view of the confusion on the subject, too much reliance should not be placed on the doctrine.

¹⁴⁴ See cases cited *supra* in notes 132-137, inc.

¹⁴⁵ *In re Hunstiger* (1915) 130 Minn. 474, 153 N. W. 869.

¹⁴⁶ *Bainbridge v. Minneapolis* (1915) 131 Minn. 195, 154 N. W. 964, L. R. A. 1916 C. 224.

means of a trial *de novo*. Consequently, this problem is not an important one under present circumstances.¹⁴⁷

But the problem of the procedure by means of which the courts may review an arbitrary administrative decision has caused the courts much difficulty. There are six methods by means of which the matter may be placed before the court: (a) *mandamus* proceedings, (b) injunction suit, (c) *certiorari*, (d) *habeas corpus*, (e) defense to a prosecution for disregarding the administrative decision, and (f) damage suit against the administrative officer. The availability of each of these remedies should be considered.

MANDAMUS

The writ of *mandamus* is an ancient common-law writ which issued from a common-law court of competent jurisdiction, commanding an officer to perform a duty imposed upon him by law.¹⁴⁸ But during the long development of the writ certain dogmas have grown up. "It is commonly said that by *mandamus* courts will enforce only such official duties as are ministerial"¹⁴⁹ as distinguished from those duties which are discretionary.¹⁵⁰ It was the original function of the writ to compel the performance of non-discretionary duties,¹⁵¹ but when, under modern conditions, officers were given greater and greater discretionary powers, an exception was added to the rule. The courts began to state the

¹⁴⁷ The question of what should be the basis of the court's review was the main issue in *Crowell v. Benson* (1931) 285 U. S. 22. The court was called upon to review an administrative award made under the Federal Longshoremen's and Harbor Workers' Act. One of the questions involved was the fact question of whether the injured man was in the employment of the defendant. The district court refused to consider the record of the Employees' Compensation Commission, and allowed a hearing *de novo*. The Supreme Court sustained the action of the district court, announcing what Professor Dickinson calls the doctrine of "constitutional fact." Such a doctrine is a logical extension of the doctrine of "jurisdictional fact": those facts upon which depend the statutory jurisdiction or the constitutional power of the commission to act are subject to a judicial determination upon independent evidence. For an excellent analysis and criticism of this case see Dickenson, *Crowell v. Benson—Judicial Review of Administrative Determinations of Questions of Constitutional Fact* (1932) 80 U. of Pa. L. R. 1055.

¹⁴⁸ High, *Extraordinary Legal Remedies* (2d Ed. 1884) sec. 1; Freund, *op. cit.*, *supra*, n. 1 at p. 255, 38 C. J. 541.

¹⁴⁹ Freund, *op. cit.*, *supra*, n. 1 at p. 255.

¹⁵⁰ 38 C. J. 592, and cases collected in note 55.

¹⁵¹ *Comm'rs of Poor v. Lynah* (1822) 2 McCord (S. C.) 170; "The power of this court to control all inferior jurisdictions and subordinate magistrates, and to compel them to the performance of those duties imposed upon them by law can not be doubted."

rule and then to qualify it. It was said in *Dunham v. Ardery*:¹⁵² "The law as expressed by this court . . . will not permit the use of the writ of *mandamus* to control an inferior officer in the performance of duties requiring the exercise of discretion . . . except when it is alleged and shown that such officer acts arbitrarily or fraudulently; in such case the writ may issue."¹⁵³ And in *People ex rel. v. Baker*,¹⁵⁴ it was said: "The power to issue licenses [to conduct a concert hall] . . . is discretionary, and not controllable by *mandamus*. This rule is varied only when the action of the board or person vested with the power of issuing a license is arbitrary, or tyrannical, or unreasonable, or is based upon false information." Another court stated the rule to be that "when a discretion is given, the court will not interfere, unless it be clearly shown that this discretion has been abused."

This exception to the rule has been affirmatively applied. A Missouri school board had a discretionary power to fix the time, place, and manner of holding elections for the selection of members of the school board. This board selected, for purely partisan ends, an election committee composed of members of one political party. There was strong objection and *mandamus* proceedings were brought to compel the board to rescind the appointments it had made and appoint a new committee composed of members of different political parties.¹⁵⁵ The theory of the proceeding was that the board had grossly abused its discretion. The court found that there had been an abuse of discretion and granted the writ of *mandamus*, saying: "While it is generally true that *mandamus* will not lie to control the discretion of an inferior tribunal in whom a discretion is vested in the performance or non-performance of certain duties devolved upon it by law, it is well settled that if the discretionary power is exercised with manifest injustice the courts are not precluded from commanding its due exercise. Such an abuse of discretion is controllable

¹⁵² (1914) 43 Okla. 619, 143 Pac. 331.

¹⁵³ The court relies upon the following cases, and they all support the statement: *Board of County Comm'rs v. State ex rel.* (1912) 31 Okla. 196, 120 Pac. 913; *Norris v. Cross* (1909) 25 Okla. 287, 105 Pac. 1000; *Montgomery v. State Electric Board* (1910) 27 Okla. 324, 111 Pac. 447; *McKee v. Adair Electric Board* (1912) 36 Okla. 258, 128 Pac. 294; *Roberts v. Marshall* (1912) 33 Okla. 719, 127 Pac. 703.

¹⁵⁴ (1909) 136 App. Div. 7, 12 N. W. S. 161.

¹⁵⁵ *State ex rel. v. Public School Board* (1896) 134 Mo. 296, 35 S. W. 617.

by *mandamus*.”¹⁵⁶ The court concluded “that in the action taken the school board so abused the discretion confided in it that it was a virtual refusal to perform the duty of holding an impartial election,¹⁵⁷ and that in contemplation of law it has refused to act at all, and it is our [the court’s] duty to disregard its unjust action and require it by our [the court’s] mandate to proceed in a lawful way.”

It is important that the theory of the court be emphasized. The school board abused its discretion. By doing so it refused to act in a lawful way. The court therefore disregarded its action and proceeded to compel it to exercise its discretion again, and to exercise a “lawful” discretion. In theory the court did not tell the board *how* to exercise its discretion, but merely said that a particular exercise of discretion was unlawful and beyond its power. The board was left free to pick the individual members of the committee, so long as they were not all from the same political party.

This theory has been accepted as a *bona fide* method of preventing an abuse of discretion in granting or refusing to grant licenses. An Illinois statute gave the State Board of Dental Examiners powers to determine which dental colleges were “reputable” for the purpose of granting licenses to their graduates without requiring them to pass an examination. The case of *Illinois State Board of Dental Examiners v. Cooper*¹⁵⁸ involved a *mandamus* proceeding brought for the purpose of compelling the board to issue a license to the relator without an examination, on the ground that the board had abused its discretion in refusing to recognize the relator’s *alma mater* as “reputable.” The court said: “If a discretionary power is exercised with manifest in-

¹⁵⁶ The court quotes and relies upon the following cases: *Village of Glen-coe v. People ex rel.* (1875) 78 Ill. 382: “The discretion vested in the council cannot be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment and not by passion or prejudice. When a discretion is abused, and made to work injustice, it is admissible that it shall be controlled by *mandamus*.”

State ex rel. v. State Board of Health (1890) 103 Mo. 22, 15 S. W. 322: “If the board of health should exercise its powers with manifest injustice, then the courts may, and will, control the abuse of authority by the writ of *mandamus*.”

¹⁵⁷ A duty imposed by the rule of reasonableness.

¹⁵⁸ (1887) 123 Ill. 227, 13 N. E. 201.

justice, the courts are not precluded from commanding its due exercise. They will interfere, where it is clearly shown that the discretion is abused. Such abuse of discretion will be controlled by *mandamus*. A public officer or inferior tribunal may be guilty of so gross an abuse of discretion, or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law. In such case *mandamus* will afford a remedy."

In *Pavilion Ice Rink v. Bryant*,¹⁵⁹ it was alleged that the defendant "arbitrarily and capriciously and unreasonably" refused to renew the plaintiff's permit to conduct a dance pavilion. Upon demurrer the court granted a writ of *mandamus*, saying: "From the allegations of the petition, it appears that, without any legal cause, but arbitrarily, oppressively and capriciously, the board suddenly terminated plaintiff's right¹⁶⁰ to conduct a lawful and profitable business upon premises which were leased for that purpose upon the faith of the permit theretofore granted. . . . It is not necessary to cite authority to the point that a lawful business, properly conducted . . . can not be confiscated by the arbitrary and capricious dictation of any official body."

In *People ex rel. v. State Racing Commission*,¹⁶¹ the court found that the commission had arbitrarily and capriciously refused to issue the relator a license to operate a race track, and granted a writ of *mandamus* ordering the issuance of a license. "While the rule is that *mandamus* will not lie to compel the performance of a power the exercise of which lies in the discretion of the officer against whom the writ is sought, to that rule there is a well known exception that the action of the officer must not be capricious or arbitrary, and, if such be the character of the reasons for refusing to act, the writ will lie."

When an administrative officer with discretionary power acts arbitrarily and abuses his discretion there is no *bona fide* exercise of discretion. There is nothing but a wilful violation of his duty, and it is the proper function of the writ of *mandamus* to compel him to perform his duty. Upon this theory *mandamus* issued

¹⁵⁹ (Calif. App. 1922) 209 Pac. 76.

¹⁶⁰ The court does not consider the point whether the business of conducting a dance pavilion is a "right" or mere "privilege."

¹⁶¹ (1907) 190 N. Y. 31, 82 N. E. 723.

to compel the granting of a license to exercise the vocation of booking emigrant passengers, when the license was arbitrarily refused,¹⁶² and to compel a medical college to give the relator an examination and confer a degree upon him if he passed, when the right was claimed arbitrarily to refuse,¹⁶³ and to compel the granting of permission to change the location of an employment agency when the permission was arbitrarily refused.¹⁶⁴ And, *mandamus* would have issued to compel a department of health to rescind its action revoking a permit to sell milk if the revocation had been unreasonable,¹⁶⁵ or to compel the reinstatement of a public school teacher if dismissal had been without reasonable cause,¹⁶⁶ or to compel the issuance of a license to practice dentistry if the refusal had been arbitrary,¹⁶⁷ or to compel a civil service commission to reclassify an office as competitive or non-competitive if the classification had been unreasonable.¹⁶⁸

However, such a conception of the remedy of *mandamus* is not always accepted. Some courts say that the writ of *mandamus* lies to compel a discretionary body to act, but it can go no further. If the administrative body has acted and exercised its discretion *mandamus* will not lie. Thus in *Ewbank v. Turner*,¹⁶⁹ the court refused to issue the writ to compel a board of dental examiners to issue the relator a license to practice dentistry even though the refusal were "wrongful, unlawful, unjust, arbitrary, and without cause or reason." The theory of the court was that the statute required the applicant for a license to be found competent *by the board*, and unless he were in fact found to be competent *by the board* no license could issue. Whether or not the board acted arbitrarily made no difference so far as this particular remedy was concerned. It is what they actually decided that determined the applicant's right to a license. If the court

¹⁶² *Peo. ex rel. v. Perry* (1852) 13 Barb. (N. Y.) 206.

¹⁶³ *Peo. ex rel. v. Belleville Hospital Medical College* (1891) 60 Hun. (N. Y.) 107, 14 N. Y. S. 490.

¹⁶⁴ *Peo. ex rel. v. Robinson* (1910) 141 App. Div. 656, 126 N. Y. S. 546.

¹⁶⁵ *Peo. ex rel. v. Department of Health* (1907) 189 N. Y. 187, 82 N. E. 187, 13 L. R. A. (N. S.) 894.

¹⁶⁶ *Peo. ex rel. v. Board of Education* (1914) 212 N. Y. 463, 106 N. E. 307.

¹⁶⁷ *State ex rel. v. State Board of Dental Examiners* (1894) 93 Tenn. 619, 27 S. W. 1019; *State Board of Dental Examiners v. Friedman* (1924) 150 Tenn. 152, 263 S. W. 75.

¹⁶⁸ *Peo. ex rel. v. Williams* (1906) 185 N. Y. 92, 77 N. E. 785.

¹⁶⁹ (1903) 134 N. C. 77, 46 S. E. 508.

were to compel the board to issue the license it would be the court rather than the board which decided the question of competence.¹⁷⁰

In *State ex rel. v. State Medical Examining Board*,¹⁷¹ the court refused to issue a writ of *mandamus* to compel the issuance of a license to practice medicine, saying: "The action of the board is not merely ministerial, but partakes of a judicial character. It is to inquire concerning and to determine as to the existence of certain facts, and whether it should grant a certificate of qualification to an applicant must depend upon that determination. The board has not refused or neglected to act upon the matter submitted to it. It has decided upon the application, and the correctness of that decision, involving the exercise of the judgment of the members of the board, cannot be brought into review by this proceeding."¹⁷²

Here are two lines of authority, diametrically opposed to each other in both theory and result. One absolutely refuses to grant a writ of *mandamus* for the purpose of compelling the issuance of a license when its issuance is discretionary, while the other grants the writ when the license is arbitrarily refused. It would seem that both lines of authority fail to make a necessary distinction. Discretion is a matter of degree.¹⁷³ In the administration of the law there can be neither a complete absence of discretion nor an absolute unrestricted discretion (under the American system of government today). If an administrator has no discretion at all he is no more than an automaton. That is not so. The law is not self-enforcing, and so long as it is administered by human beings the element of judgment, no matter how slight, will be present. Though discretion in administering

¹⁷⁰ The remedies suggested by the court are interesting: (a) the legislature could change the provisions of the statute, (b) the plaintiff could take the examination again, as applicants for admission to the Bar do when they are refused admittance, or (c) if the members of the board acted arbitrarily the plaintiff could sue them for damages.

See also: *State ex rel. v. Gregory* (1884) 83 Mo. 123, 53 Am. Rep. 565; *Hart v. Folsom* (1900) 70 N. H. 213, 47 Atl. 603.

¹⁷¹ (1884) 32 Minn. 324, 20 N. W. 238.

¹⁷² See *Howland v. Eldridge* (1871) 43 N. Y. 392; *Matter of Dorsey* (1838) 7 Port (Ala.) 392; *Peo. v. Judge* (1843) 1 Mich. 359; *Hoole v. Kinkead* (1881) 16 Nev. 217.

¹⁷³ *Patterson, Ministerial and Discretionary Official Acts* (1922) 20 Mich. L. R. 848.

the law may approach the vanishing point it does not reach it. From this extreme, the increase in discretion is a matter of degree. At some intermediate point the judges, commentators and students of the law draw a line and say that on one side the administrative powers are non-discretionary or ministerial, and on the other they are discretionary. But such a line is indefinite, variable, and the terminology means nothing.

It is upon the supposed distinction between discretionary and non-discretionary powers that one line of authority makes the issuance of the writ of *mandamus* depend. It would seem that such a basis is not sound. It is clear that *mandamus* will lie to compel the performance of a so-called non-discretionary act. The theory is that the court will compel an officer to perform an official duty; if that duty requires the performance of one particular act and no other, then the court will compel that particular action. When discretionary action is involved, the theory is that the court will only compel the officer to exercise his discretion, and will not tell him how to exercise it. However, under the circumstances of a particular case it might well be that an officer, though possessing a discretionary power, could not possibly be deemed to act reasonably if he acts otherwise than in one particular way. If the court finds that to be the case, why should it not compel the officer to act in that way? It is conceded that if the officer abuses his discretion and thereby exceeds his authority *mandamus* will lie to compel him to exercise his discretion again, and in a reasonable manner.¹⁷⁴ If there could possibly be but one reasonable manner why should the court not compel the particular action? The process of ordering the officer to exercise his discretion again might go on indefinitely. On the other hand, those courts which freely use the writ of *mandamus* to compel the issuance of a license often ignore the possibility that though the administrative officer may have acted arbitrarily in refusing for a particular reason (such as the reason that he did not like the color of the applicant's eyes), there may be other valid grounds for refusing. The court should insist that the applicant prove his case by negating any such possibility.

Whether or not the use of the writ of *mandamus* for the purpose of controlling an arbitrary exercise of discretion can be

¹⁷⁴ State *ex rel.* v. Public School Board, *supra*, n. 159.

justified theoretically, it seems fair to say that many courts were forced to use it for that purpose because of the absence of any other available remedy. If they were wrong the subject calls for legislative treatment.

The writ of *mandamus* is not an available remedy in the federal courts for the purpose of compelling an administrative official to perform an official duty, either discretionary or non-discretionary. This was decided quite early in the history of the national courts, and probably accounts for the wide scope of the injunction in those courts. In *McIntire v. Wood*,¹⁷⁵ the court refused to compel, by writ of *mandamus*, the Register of the Land Office to issue to the plaintiff a final certificate of purchase, saying: "Although the judicial power of the United States extends to cases arising under the law of the United States, the legislature have not thought proper to delegate the exercise of that power [power to issue writ of *mandamus*] to its circuit courts, except in certain specified cases." And in *Bath County v. Amy*,¹⁷⁶ the court in refusing to issue the writ said: "It must be regarded as settled that the circuit courts of the United States are not authorized to issue writs of *mandamus*, unless they are necessary to the exercise of their respective jurisdictions. These courts are creatures of statute," and that is all the power the statutes have given them.

INJUNCTION

The injunction is an important instrument for preventing an abuse of discretion, and it is widely used for that purpose. When the administrative action is affirmative in character, and amounts to an abuse of discretion there is practically no problem concerning the use of the injunction, for historically its primary function is to restrain positive action which invades or threatens to invade the rights of individuals. Both the national and the state courts use the injunction for this purpose. An Oklahoma statute regulating the production of petroleum authorizes a commission to make "proration orders" in order to limit production. The United States Supreme Court, when considering the validity of a "proration order," makes it very clear that if any order were proved to be "unjust and arbitrary, and to operate to plaintiff's

¹⁷⁵ (1813) 7 Cranch 504.

¹⁷⁶ (1871) 13 Wall. 244.

prejudice" an injunction would issue to restrain the enforcement of the order.¹⁷⁷ Perhaps the best known example of the use of the injunction in this type of case is the use of an injunction to restrain the enforcement of an unreasonable or confiscatory rate fixed by an administrative body. In *Allen v. Omaha Live Stock Commission Company*,¹⁷⁸ the court enjoined the enforcement of a schedule of rates established by the Secretary of Agriculture acting under authority of the "Lever Act,"¹⁷⁹ saying: "There can be no doubt at this day that an order of a board, commission, or executive officer prescribing maximum rates for services performed, if no provision for a review by the courts is made, entitles one who claims the rates to be confiscatory to a review by a court of equity."

The doctrine is clearly stated by the court in *McCullough v. Scott*.¹⁸⁰ A North Carolina statute authorized the State Board of Accountancy to hold examinations at such places as they deemed proper. The Board prepared to hold an examination beyond the borders of the state and an injunction suit was brought to restrain the proposed action. The court issued the injunction, saying: "The authorities . . . establish the principle that when such officers exceed their jurisdiction or abuse their discretion, it is subject to review by the courts; in fact, so fundamental is this principle that in most cases the courts do not discuss it, but address themselves to determining whether or not the act complained of was in excess of jurisdiction or in abuse of discretion, and if they decide these questions in the affirmative, then it is held as a matter of course that the act should be enjoined or enforced, as the case may be." There are numerous cases in which injunctions were issued to restrain affirmative action amounting to an abuse of discretion.¹⁸¹

¹⁷⁷ *Champlin Refining Company v. Corporation Commission* (1932) 286 U. S. 210.

¹⁷⁸ (C. C. A. 8, 1921) 275 F. 1.

¹⁷⁹ 40 Stat. 276.

¹⁸⁰ (1921) 182 N. C. 865, 109 S. E. 789.

¹⁸¹ *Reagan v. Farmers' Loan and Trust Co.* (1893) 154 U. S. 362, 390 (restraining enforcement of unreasonable railroad rate order); *Bulger v. Benson* (C. C. A. 9, 1920) 262 F. 929 (restraining the suspension of a pilot's license for an improper cause); *Kuenster v. Meredith* (D. C. N. D. Ill. 1920) 264 F. 243 (restraining revocation of a livestock commission agent's license); *State ex rel. v. Mowry* (1925) 119 Kan. 74, 237 Pac. 1032 (restraining a change in boundary of a school district); *Town of Afton v. Gill* (1916) 57

A more difficult problem is presented when the administrative officer abuses his discretion by refusing to act, as is the case when he arbitrarily refuses to issue a license. Is injunctive relief available in such a case? In some jurisdictions a mandatory injunction will issue. A Texas court issued a mandatory injunction to compel the issuance of a building permit which was arbitrarily withheld,¹⁸² saying: "The facts in this case conclusively show that the acts committed by appellants [licensing body] are without any justification whatever. . . . This being so, we believe that under the authorities and practice of this state the court" properly issued the mandatory injunction. However, the courts often hesitate to use an injunction for such purposes,¹⁸³ and they do so only in those jurisdictions in which the distinctions between law and equity are not pronounced. "Authorities recognize the granting of preliminary mandatory injunctions to be more freely practiced in jurisdictions in which distinctions between law and equity do not exist than in those which adhere to the common law. High, in discussing interlocutory mandatory injunctions, declares that in those states where distinctions between law and equity have been abolished a mandatory injunction is not to be distinguished from a *mandamus*. 1 High on Injunctions 6."¹⁸⁴ Since the national courts will not issue a writ of *mandamus* for this purpose, they purport to refuse to use an injunction as a substitute.¹⁸⁵ Yet in *Wilson v. Bowers*,¹⁸⁵ a United States District court restrained the Collector of Internal Revenue from refusing

Okla. 36, 156 Pac. 658 (restraining issuance of bonds); *Cruse v. Police Jury* (1922) 151 La. 1056, 92 So. 679 (restraining a change in the course of a road).

See also the following cases in which the power to enjoin is recognized, but in which no abuse of discretion was proved: *Mutual Benefit Life Ins. Co. of Newark v. Welsh* (1918) 71 Okla. 59, 175 Pac. 45; *Message Photo-Play Co. v. Bell* (1917) 179 App. Div. 13, 166 N. Y. S. 338; *Wetherly v. City of Jackson* (1933) 264 Mich. 146, 249 N. W. 484; *Fritchman v. Athey* (1922) 36 Idaho 560, 211 Pac. 1080; *Grayson County v. Harrell* (Tex. Civ. App. 1918) 202 S. W. 160; *Currie v. Glasscock County* (Tex. Civ. App. 1915) 179 S. W. 1095; *Holt v. Smith* (1919) 149 Ga. 48, 99 S. E. 119; *Gainesville v. Dunlap* (1917) 147 Ga. 344, 94 S. E. 247; *Brennan v. Sewerage & Water Board* (1902) 108 La. 569, 32 So. 563; *Chiro v. Fourth Jefferson Drainage District* (1925) 159 La. 471, 105 So. 556; *Parker v. Mayor* (1911) 128 La. 951, 55 So. 587.

¹⁸² *Dallas v. McElroy* (Tex. Civ. App. 1923) 254 S. W. 599.

¹⁸³ *State Board of Medical Examiners v. Friedman* (1924) 150 Tenn. 152, 263 S. W. 75.

¹⁸⁴ *Ibid.*

¹⁸⁵ (D. C. S. D. N. Y. 1924) 14 F. (2d) 976.

to honor the plaintiff's application for the withdrawal of specially denatured alcohol for which he had a basic permit.

However, a mandatory injunction is not the only equitable relief possible. If a license is arbitrarily refused some courts will issue an injunction restraining any interference with the conduct of the business. In *Chicago v. Fox Film Corporation*,¹⁸⁶ a national court considered this case: the plaintiff was arbitrarily refused a permit to show a certain motion picture. The court enjoined any interference with the showing of the picture, saying: "In a case where the refusal of the permit amounts in law to an abuse of discretion of the officer with whom discretion is vested, and whereby property rights are or will be injuriously affected" a court of equity has jurisdiction to issue a preliminary injunction. And a Georgia court issued an injunction to restrain interference with the installation of a certain kind of plumbing when approval was arbitrarily refused.¹⁸⁷ A California court issued an injunction restraining interference with the business of conducting a dance hall when a renewal permit was arbitrarily refused.¹⁸⁸ At first glance it would seem that the cases were wrongly decided, inasmuch as a valid statute required a permit before doing a particular act and the plaintiffs did not have a permit. Yet upon closer examination the theory of the cases appears to be sound. Though a statute may require a permit from an administrative officer, and though the statute may not be subject to challenge as it leaves the legislature's hands, yet it may be administered unreasonably—which means unlawfully—to the injury of another, in which case the statute as administered becomes void. It is only logical that the courts should restrain the enforcement of the ordinance under such circumstances; "the courts will enjoin the unreasonable and arbitrary administration of a reasonable and valid ordinance." Such a theory is particularly applicable in a jurisdiction which refuses to issue the writ of *mandamus* to compel the granting of a license arbitrarily refused.¹⁸⁹

¹⁸⁶ (D. C. N. D. Ill. 1917) 247 F. 231, affirmed (C. C. A. 7, 1918) 251 F. 883.

¹⁸⁷ *Augusta v. Loftis* (1923) 156 Ga. 77, 118 S. E. 666.

¹⁸⁸ *Supra*, n. 159.

¹⁸⁹ A *contra* view has been taken in Minn. in an analogous case where an applicant, who was refused a license, operated a lumber yard without the license. He was prosecuted and the court refused to consider his defense that

The use of the injunction is restricted by the general rules of equity jurisprudence and "the courts are unwilling to entertain a bill unless rights of property are affected or threatened immediately by the administrative action, resulting in injury for which there is no adequate remedy at law."¹⁹⁰ Where there is an adequate remedy at law the injunction will not issue.¹⁹¹

OTHER REMEDIES

The remedy of *certiorari* is probably one of the most common forms of judicial control today,¹⁹² yet it presents no great procedural difficulties because for the most part its use is controlled by statute. The only problem, for the purpose of this article, deals with the availability of the common law writ to review administrative action. Whether or not it is available depends upon whether the administrative action be called "judicial," for it is settled that the common law writ of *certiorari* lies only to review a judicial determination.¹⁹³ However, there is an equally fundamental obstacle to the use of *certiorari* for the purpose of controlling an apparently unguided administrative discretion. The remedy of *certiorari* is available only when there is a record to review, and in most cases of unguided discretionary power there

the refusal of the license was arbitrary. However, the basis of the decision was that the applicant had an adequate remedy by *mandamus*. *State v. Rosenstein* (1921) 148 Minn. 127, 181 N. W. 107.

¹⁹⁰ Note, *Judicial Control of Administrative Agencies in New York* (1933) 33 *Columbia L. R.* 105, 121.

¹⁹¹ *Grace Missionary Church v. City of Zion* (1921) 300 Ill. 513, 133 N. E. 268; *Genesee Recreation Co. v. Edgerton* (1916) 172 App. Div. 464, 158 N. Y. S. 421; *Southern Leasing Co. v. Ludwig* (1916) 217 N. Y. 100, 111 N. E. 470; *Lazarevick v. Stoeckel* (1933) 117 Conn. 260, 167 Atl. 823; *Araneo-White Construction Co. v. Joint Municipal Sewer Comm.* (1931) 9 N. J. Misc. 243, 154 Atl. 313.

¹⁹² Freund, *op. cit.*, *supra*, n. 1, at sec. 134.

¹⁹³ *Degge v. Hitchcock* (1912) 229 U. S. 162: "The writ issues only to review a judgment. . . . Not being a judgment, it was not subject to appeal, writ of error, or *certiorari*. . . . To hold that the writ could issue either before or after an administrative [as distinguished from judicial] ruling would make the dispatch of business in the Departments wait on the decisions of the courts," and that would "lead to consequences of the most manifest inconvenience."

See Note, *Judicial Control of Administrative Agencies in New York* (1933) 33 *Columbia L. R.* 105, 113.

Also *Peo. ex rel. v. McWilliams* (1906) 185 N. Y. 92, 77 N. E. 785: "It is a well settled principle that the common law writ of *certiorari* issues to review only decisions of inferior judicial or quasi judicial tribunals."

is no record. Particularly is this true in regard to licensing regulations. It seems fair to say that in the absence of statutory provision *certiorari* is not an adequate method of reviewing unguided discretionary action.

The remedy of *habeas corpus*, though available, is not important because very few administrative bodies have the power of retention. Of course, in those jurisdictions which use an injunction to restrain the enforcement of a valid ordinance when administered unreasonably,¹⁹⁴ a person who is arrested for violating the ordinance, as unreasonably administered, can invoke the writ of *habeas corpus*.¹⁹⁵ If he can enjoin interference under an ordinance unreasonably administered he can disregard the ordinance and either secure a writ of *habeas corpus* if arrested or successfully defend an action at law if prosecuted. However, if any other remedy is available, it would be wise to use it. It is always safer to seek affirmative relief, than to disregard a statute thought to be invalid, either in general or as applied to particular facts. Moreover, there are some jurisdictions which will not allow such a defense. "Clearly he [an applicant for a license] may not defy the law by doing the prohibited act, and then be heard in defense on the ground of the alleged arbitrary action of the council in refusing him a license."¹⁹⁶

The remedy of suing the administrative officer for damages resulting from his abuse of discretion is not very effective, under most circumstances. Suppose an officer refuses to issue a license for a reason which does not authorize him, under the statute, to refuse. He clearly abuses his discretion by so acting, yet the courts differ as to his liability. Some hold that if he acted in good faith he is not liable, because "whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment."¹⁹⁷ Others hold that if he exceeds his jurisdictions by

¹⁹⁴ *Augusta v. Loftis*, *supra*, n. 189.

¹⁹⁵ *Yick Wo v. Hopkins* (1886) 118 U. S. 355. Defendant was arrested for operating a laundry without a license. The court held that the ordinance requiring a license had resulted in arbitrary discrimination against the defendant, and discharged him on a writ of *habeas corpus*.

¹⁹⁶ *State v. Rosenstein*, *supra*, n. 191.

¹⁹⁷ *Downer v. Lent* (1856) 6 Calif. 94: Plaintiff sued the Board of Pilot

abusing his authority, he is liable regardless of his good faith.¹⁹⁸ This line of cases extends the theory that a non-discretionary officer who exceeds his authority is liable for resulting damages. The extension is logical, but there is an important question of public policy involved. But conceding that the officer would be liable, there are two very practical difficulties which limit the effectiveness of this remedy. One is the problem of proving damages. If one were refused a license to practice a profession it would be most difficult to estimate damages. The other is the problem of collecting damages. If they are very large it is probable that a judgment against the ordinary public officer could not be liquidated.

In considering whether or not the conference of apparently unguided administrative discretion conforms to sound legislative practice, two other angles of the problem should be mentioned. First, what is the effect of such practice upon the courts? By making reasonableness the administrative standard, the burden upon the courts is obviously increased if the question of reasonableness is litigated, for the legislature has "passed the buck." Instead of saying that a license shall be issued if the applicant conforms to specified requirements it has said that the license shall be issued if compatible with the policy of the statute. That means that the administrative officer must exercise a reasonable discretion, sound judgment in deciding, and if the applicant is dissatisfied with the decision and enlists the aid of the courts, the courts must consider the case on its merits in order to determine whether the administrator's action was reasonable. Of course this effect is contingent upon litigation by the applicant, and there are two reasons why there may not be much litigation: (a) administration may be so efficient that there seldom will be occa-

Commissioners for revoking his license. There was no allegation of bad faith. *Held*, no liability.

Valentine v. Englewood (1908) 76 N. J. L. 509, 71 Atl. 344: The members of a board of health, acting in the performance of a public duty under a statute to prevent the spread of an infectious disease, are not personally liable in a civil action for damages arising out of their acts in establishing a quarantine, even where the disease does not actually exist, provided they act in good faith.

¹⁹⁸ *McCord v. High* (1868) 24 Ia. 336; *Lowe v. Conroy* (Wis. 1904) 97 N. W. 942; *Miller v. Horton* (1891) 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116; *Grider v. Tally* (1884) 77 Ala. 422.

sion to invoke the aid of the courts, and (b) the individual may find it too difficult to litigate the question.

Second, what is the effect upon the operation of the statute of making reasonableness the administrative standard? The answer to this question must depend largely upon the reason why a more definite standard was not fixed. If the reason is to be found in the difficulty of fixing a more definite standard, the statute may be given great flexibility in operation. As was said by the court in *Wisconsin Telephone Company v. Public Service Commission*:¹⁹⁹ "instead of attempting the impossible the legislature gives flexibility and efficiency to the law by providing that the commission shall first exercise its reasonable judgment . . . and then [by] making its judgment subject to the judicial test of reasonableness." An example is found in the power of the Interstate Commerce Commission to fix reasonable railroad rates. The statute is very flexible. Indeed, it is often deplored on the ground that reasonableness depends upon so many factors that practically any rate which the Commission sees fit to establish can be supported by some evidence of reasonableness.

But if a more definite standard was not fixed because of carelessness or because the statute or ordinance regulated comparatively minor affairs (which includes the bulk of the cases discussed above), there is great likelihood that administration will become standardized and the discretion shade into non-discretionary ministerial action, the consent of the administrator becoming mandatory in the absence of a reasonable objection.²⁰⁰ That is what happened in *State ex rel. City of Charleston*.²⁰¹ The ordinance before the court reserved to the city council power arbitrarily to refuse a restaurant license, even though the applicant had complied with all requirements. The plaintiff brought an action of *mandamus* to compel the issuance of a license to him and the court said: "In all instances in which the ordinances do not prescribe the conditions upon which licenses of the kind involved here are to be had, so that all may know what those conditions are and may stand upon an equal footing as to the right to obtain such licenses, the applications therefor must

¹⁹⁹ (1932) *supra*, n. 50.

²⁰⁰ Freund, *op. cit. supra*, n. 1.

²⁰¹ (1922) 92 W. Va. 57, 114 S. E. 378.

be granted." The writ of *mandamus* issued. Thus the administrative agent with apparently unguided discretion became a mere ministerial officer with the power to refuse a license only for cause.

Another example is the case of *White v. Holman*.²⁰² The statute before the court gave the board of commissioners for licensing sailors' boarding houses power to reject any application for a license "as they deemed advisable." The plaintiff was refused a license, and began *mandamus* proceedings to compel the issuance of a license, alleging that the board's refusal was for a reason for which it had no power to refuse. The court granted an order of *mandamus* because the board did not show sufficient reason for refusing. Did not such a decision tend to make the power of the board non-discretionary, for even ministerial action can be denied for cause?

Another case in point is that of *Moy v. Chicago*.²⁰³ An ordinance regulating the operation of laundries enumerated several requirements a laundry must meet. The mayor was given power to revoke a license to operate a laundry if satisfied that the maintenance of that laundry would be dangerous to the health of the city or the employees of the laundry. The court construed the ordinance as giving the mayor power to revoke a license only if the laundry was being operated in violation of specific provisions of the ordinance designed to protect the health and safety of the employees and the public. Did not the decision tend to make the mayor's discretion purely ministerial?

If this is the effect the use of reasonableness as a guide has on the operation of the statute, it is apparent that the purpose of conferring any discretion at all is defeated. The administration might just as well have been made ministerial in the first place. Thus, it is entirely possible that what was thought (and perhaps intended) to be a very wide discretion may prove to be no discretion at all.

²⁰² (1904) 44 Ore. 180, 74 Pac. 933.

²⁰³ (1923) 309 Ill. 242, 14 N. E. 845.