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Administrative Law—Delegation and the Court's Power to Review

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The terms "moral" and "immoral" were held to refer to the moral standards of the community, the "norm or standard of behavior which struggles to make itself articulate in law."[10] So limited by common usage, they are not too broad. Persons of ordinary intelligence know their meaning, kindred, as they are, to "obscene" and "indecent."[11]

The suggestion that the court make an independent judgment as to the picture in controversy was rejected. The Regents, an experienced administrative body, were deemed better qualified to judge the effect of a given motion picture. Judge Dye took issue with the familiar doctrine limiting the function of the reviewing court whenever there is a reasonable basis in law and support by the record.[12] He claimed it was inconsistent with Constitutional guarantees to leave a debatable issue of morals to an administrative agency. The court, however, maintained that if the Regents exercise their powers in a close case, and do so fairly and honestly, then due process has been observed,[13] and if they err in law, the court sits to correct them.

Delegation and the Court's Power to Review

Reliance on the good sense and judgment of the Board of Regents was once again given by the court in *Barsky v. Board of Regents*.[14] There the medical licenses of two physicians were suspended for certain periods, and a third physician was reprimanded and censured, all under the authority of the Election Law § 6514 (2) b, which authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without this state, of a crime."

All three were members of the executive board of the Joint Anti-Fascist Refugee Committee.[15] They were convicted of the misdemeanor of contempt of Congress[16] in that each of them failed to obey a subpoena directing him to produce before a Congressional Committee certain records of the Joint Anti-Fascist Refugee Committee. The judgments of conviction were affirmed on appeal.[17]

10. CARDOZO, PARADOXES OF LEGAL SCIENCE 17, 41-42 (1928).
11. *People v. Muller*, 96 N. Y. 408 (1884).
12. *Mounting & Finishing Co. v. McGoldrick*, 294 N. Y. 104, 60 N. E. 2d 825 (1945).
13. *Nash v. United States*, 229 U. S. 373 (1912).
14. 305 N. Y. 89, 111 N. E. 2d 222 (1953).
15. See the statement of its history and aims in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 130 (1950).
16. 2 U. S. C. A. § 192.
17. *Barsky v. United States*, 167 F. 2d 241 (D. C. Cir. 1948), *cert. denied*, 334 U. S. 843 (1948).

In proceedings brought under Art. 78 of the Civil Practice Act[18] to review the determination of the Board of Regents in the disciplinary proceedings, petitioners contend for a construction of the statute in question[19] which would exclude from its operation offenses not crimes under New York law. This proposed construction was rejected, and the court, making a sheer literal reading of the statute, upheld (6-1) the Board's determination.

The court distinguishes away a line or cases holding that penalties for offenses committed outside this State are authorized only if those offenses, if committed in this state, would be made criminal by our laws.[20] These cases all involved felonies, whereas the statute speaks of "crimes," which, traditionally as well as by statute,[21] includes misdemeanors as well as felonies. The point of distinction seems of slight value. The policy these cases express persists.

In *People* ex rel. *Marks v. Brophy*,[22] the court said: "It is fundamental in the public policy of this state that we do not, if we can avoid it, decree forfeitures in our courts because of violations of the criminal laws of another jurisdiction." To this the court in the instant case replied that public policy is made by the Legislature. This answer begs the very question involved: what is the meaning of the statute? Furthermore, the answer is misleading as only partially correct. "[W]hen we speak of the public policy of the State, we mean the law of the State as found in the Constitution, the statutes, or judicial records."[23] Evidently, then, the *Marks* case, and the cases on which it relies, are as much part of the public policy of this State as the statute involved, and should weigh in the process of determining what that statute means.

It is conceded by the court that the statute, as they construe it, could destroy a physician professionally, solely on a showing that in another state or country he committed an act which New York considers non-criminal or even harmless.

In Kansas it is a crime to drink alcoholic liquor in a public place.[24] In many states a Negro who refuses to sit in a segregated

18. §§ 1283-1306.
19. EDUCATION LAW § 6514, subd. 2, para. b.
20. *Matter of Donegan*, 282 N. Y. 285, 26 N. E. 2d 260 (1940); *People* ex rel. *Marks v. Brophy*, 293 N. Y. 285, 26 N. E. 2d 260 (1944); *Matter of Tonis v. Board of Regents*, 295 N. Y. 286, 67 N. E. 2d 245 (1946); *Matter of Garson v. Wallin*, 304 N. Y. 702, 107 N. E. 2d 604 (1952).
21. PENAL LAW § 2.
22. See note 20 *supra*.
23. *Matter of Rhinelander's Estate*, 290 N. Y. 31, 36, 47 N. E. 2d 681, 683 (1943).
24. KANSAS GEN. STAT., 1949, §§ 41-719, 41-803.

section of a bus commits a crime.[25] Incredible as it does seem, a physician's license to practice medicine in this State could be suspended on such bases.

The court leaves these questions to the good sense and judgment of the Board of Regents. However, what considerations should influence the Regents in their determination of the mode of punishment, and how severe it shall be, is not for the court to consider. In fact, the court is wholly without jurisdiction to review such questions.[26]

The construction of this statute, to include a crime, anywhere committed, as a basis for suspension of a physician's license, coupled with the grant of uncontrolled discretion to the Board of Regents as to what matters to consider in making a determination, and what discipline to mete out, raises fundamental and substantial questions as to the constitutionality of the delegation. This question the court did not consider at all.

Without some guides governing the exercise of discretion in this area, "there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative official."[27] A statute's validity is to be judged not by what has been done under it, but by what might be done under it.[28]

Workmen's Compensation

a. *Course of Employment:* Injuries are compensable under the Workmen's Compensation Law only if they arise "out of and in the course of employment."[29] Common law concepts of scope of employment are not to confine the determination of that question.[30]

Decided in the 1952-1953 term were two cases involving the question whether the risks of travel were also the risks of employment. In *Lewis v. Knappen Tippetts Abbett Engineering Corp.*,[31]

25. ALA. CODE, 1940, tit. 48, § 301 (31A); LA. REV. STAT., 1950, tit. 45, § 195; N. C. GEN. STAT., 1950, §§ 62-121.71, 62. 121.72.

26. *Sagos v. O'Connell*, 301 N. Y. 212, 93 N. E. 2d 644 (1950). There the court said, at 214, 93 N. E. 2d at 645:

> "Under § 1296 of Art. 78 of the Civil Practice Act we find no provision for the judicial review of the measure of punishment imposed as an incident to disciplinary action ordered by an administrative board . . . where . . . the Appellate Division has upheld a finding of a statutory violation which is made the sole basis for such punishment."

27. *Small v. Moss*, 279 N. Y. 288, 299, 18 N. E. 2d 281, 285 (1938).

28. *Packer Collegiate Inst. v. Univ. of State of N. Y.*, 298 N. Y. 184, 81 N. E. 2d 80 (1948).

29. WORKMEN'S COMPENSATION LAW § 10.

30. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U. S. 469 (1946); *Matter of Waters v. Taylor Co.*, 218 N. Y. 248, 112 N. E. 727 (1916).

31. 304 N. Y. 461, 108 N. E. 2d 609 (1952).