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the tax laws when this is necessary to accomplish the sound accounting practice of matching revenues against costs. To the extent that *Hagen* departs from these decisions by denying a realistic deferral of advance payments to the year in which the related costs must be recognized, and to the extent that it requires inconsistent methods of accounting, it is subject to serious criticism.

BRUCE H. JACKSON

REGULATION OF PRESCRIPTION DRUG DISCOUNT ADVERTISING

A New Jersey statute,[1] which prohibits the advertisement of prescription drug prices by pharmacists, recently came under attack in *Supermarkets General Corp. v. Sills*.[2] Such statutes exist in ten other states,[3] and the Board of Pharmacy has adopted similar prohibitions by regulation in at least eight other states.[4] These statutes and regu-

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[1]N.J. STAT. ANN. § 45:14-12 (Supp. 1966):

> [T]he board may refuse an application for examination or may suspend or revoke the certificate of a registered pharmacist or a registered assistant pharmacist upon proof satisfactory to the board that such registered pharmacist or such registered assistant pharmacist is guilty of grossly unprofessional conduct and the following acts are hereby declared to constitute grossly unprofessional conduct for the purpose of this act:
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> c. The promotion, direct or indirect, by any means, in any form and through any media of the prices for prescription drugs and narcotics or fees for services related thereto or any reference to the price of said drugs or prescriptions whether specifically or as a percentile of prevailing prices or by the use of such terms "cut rate", "discount", "bargain" or terms of such connotation. . . .

[2]93 N.J. Super. 326, 225 A.2d 728 (Chan. 1966).

[3]CAL. BUS. & PROF. CODE § 651; CONN. GEN. STAT. ANN. § 19-241(c) (1960); LA. REV. STAT. § 51:522 (1950); MD. ANN. CODE art. 43, § 226 A(IV) (1965); NEB. REV. STAT. § 71-148(15) (reissue 1966); NEV. REV. STAT. § 639.215(4) (1963); N. Y. EDUC. LAW § 6804(1) (d); N.D. CENT. CODE § 43-15-19 (1960); OKLA. STAT. ANN. tit. 59, § 736.1 (1963) (While this statue implies a prohibition of the advertisement of specific prices on specific items, it may be considered a ban on all advertising.); PA. STAT. ANN. tit. 63 § 390-5 (9) (ii) (Supp. 1966).

[4]Colorado, Regulations of . . . State Bd. of Pharmacy, 48-1-2(d). 1(5); Massachusetts, Code of Professional Conduct for Pharmacy, Rule 20 (1961); Mississippi, Rules & Regulations . . . of . . . Bd. of Pharmacy, Art. IV, § 1 (recompiled and effective 1965); South Dakota, Bd. of Pharmacy Regulation No. E 13; Wisconsin, Administrative Code § 1.18. In addition the following states have peculiar deviations from the above regulations: North Carolina does not have such a regulation in its Rules and Regulations, but, nevertheless, the Board of Pharmacy does not permit the practice of advertising the "discount nature of a pharmacy; Virginia has a regula-

lations have been passed or adopted under the police power of the state. As such, they carry a strong presumption of validity[5] and the courts are, therefore, reluctant to intervene.[6] In order to be valid under the federal due process clause, or its equivalent in a state constitution, such statutes must bear a relationship to general health and welfare of the public and be a reasonable attempt to reach the specific goal of the legislature.[7] Yet it is questionable whether these statutory

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tion prohibiting deceitful or fraudulent advertising, Bd. of Pharmacy Rules and Regulations, Rule 11 § 2 (c), and under this rule bans any discount advertising on the theory that there being no set price for drugs, any claim of a discount thereon must be fraudulent (This approach fails to recognize recommended retail prices.) Washington has a regulation similar to the principal one but based on a Virginia-type theory, but permit a pharmacist to advertise his "discounts" if he posts in his store a list of the particular drug's regular price and records the same with the State Board of Pharmacy. Rules and Regulations, Regulation No. 44. The following states failed to respond to this writer's poll: Alabama, Kansas, Minnesota and Tennessee.

[5]Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935); Sproles v. Binford, 286 U.S. 374 (1932).

[6]Berman v. Parker, 348 U.S. 26 (1954). United States Supreme Court said in Ferguson v. Skrupa, 372 U.S. 726, 731 (1963):

> We refuse to sit as a "super-legislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state conditions, because they may be unwise, improvident or out of harmony with a particular school of thought."

See Breard v. City of Alexandria, 341 U.S. 622 (1951); Smith v. Virgin Islands, 329 F.2d. 135, 144 (3d Cir. 1964):

> Whether legislation serves a public purpose "is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify intervention of a court."

Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911): "It may be said in a general way that the police power extends to all the great public needs." See also, Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, 360 U.S. 334 (1959); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Munn v. Illinois, 94 U.S. 113 (1876).

[7]Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962):

> The classic statement of the rule in Lawton v. Steele, 152 U.S. 133, 137 (1894) is still valid today:
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> 'To justify the state in ... interposing its authority in behalf of the public, it must appear, First, that the interests of the public ... require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'

See Louis K. Ligget Co. v. Baldridge, 278 U.S. 105 (1928). (The Ligget case does not represent a broad doctrine. Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949):) Staten Island Loaders, Inc. v. Waterfront Comm'n, 117 F. Supp. 308 (S.D.N.Y. 1953); Southern Pac. Co. v. Railroad Comm'n, 13 Cal. 2d 125, 87 P.2d 1052 (1939); Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3 (1938); Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 178 Md. 38, 12 A.2d 201 (1940); Shirley v. New Hampshire Water Pollution Comm'n, 100 N.H. 294, 124 A.2d 189 (1956); Jones v. Haridor Realty

prohibitions of prescription drug price advertising meet this twofold test.

There is no clear standard for the application of this test.[8] The mere fact that the United State Supreme Court has set forth a federal due process standard seems to have little influence on the state courts. A good example of the divergence between federal and state due process standards may be found in the treatment given non-signor provisions[9] in state Fair Trade Acts. Non-signor provisions have long been held valid under the federal due process clause,[10] but fourteen states have held such provisions in violation of the due process clause of their respective constitutions.[11] This same split in authority may

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Corp., 37 N.J. 384, 181 A.2d 481 (1962); Guill v. Mayor & Council, 21 N.J. 74, 122 A.2d 881 (1956); Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955); Mansfield & Swett, Inc. v. Town of W. Orange, 120 N.J.L. 145, 198 A. 225 (1938); State v. Collins, 61 N.M. 184, 297 P.2d 325 (1956); Kraus v. City of Cleveland, 76 Ohio L. Abs. 214, 121 N.E.2d 311 (App. Ct. 1954); *aff'd*, 163 Ohio St. 559, 127 N.E.2d 609 (1955); *appeal dismissed*, 351 U.S. 935 (1956). A few cases have held that the courts should balance the benefits to be derived from the legislation against the infringement of personal rights. Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957); *aff'd*, 254 F.2d 883 (3d Cir. 1958); Myerson v. Sakrison, 73 Ariz. 308, 240 P.2d 1198 (1952); City of Louisville v. Kuhn, 284 Ky. 684, 145 S.W.2d 851 (1940).

[8]See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950). "Unless the content of state due process is carefully studied to determine which approach the courts of a particular state are prone to follow, predicting the outcome of litigation in the due process field becomes highly precarious." Comment, 18 OHIO ST. L.J. 384, 389 (1957).

[9]A non-signor provision permits a holder of a trademark to impose resale price maintenance on the retailer even without a contract so providing. See, *e.g.*, ARIZ. REV. STAT. ANN. § 44-1422 (1956).

[10]Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Pep Boys, Inc. v. Pyroil Sales Co., 299 U.S. 198 (1936). These cases upheld under the Federal Constitution the non-signor provisions of Illinois and California respectively.

[11]Union Carbide & Carbon Corp. v. White River Distribs., Inc., 224 Ark. 558, 275 S.W.2d 455 (1955); Olin Mathieson Chem. Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949); Cox v. General Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955); Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co., 334 Mich. 109, 54 N.W.2d 268 (1952); McGraw Elec. Co. v. Lewis & Smith Drug Co., 159 Neb. 703, 68 N.W.2d 608 (1955); Skaggs Drug Center v. General Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957); Zale-Las Vegas, Inc. v. Bulova Watch Co., 80 Nev. 483, 396 P.2d 683 (1964); Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); American Home Prods. Corp. v. Homsey, 361 P.2d 297 (Okla. 1961); Rogers-Kent, Inc. v. General Elec. Co., 231 S.C. 636, 99 S.E.2d 665 (1957); Remington Arms Co. v. Skaggs, 55 Wash. 2d 1, 345 P.2d 1085 (1959) (Non-signor provision in excess of police power under test identical to that of due process.); General Electric Co. v. A. Dandy Appliance Co., 143 W. Va. 491, 103 S.E.2d 310 (1958); Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409 (Wyo. 1962). Fair Trade Acts have been found unconstitutional in their entirety in Alabama, Montana, Utah, and Wyoming. TRADE REG. REP. ¶ 6041 (1967).

be found in other areas.[12] Nevertheless, no general trend appears, and it is safe to say only that insofar as economic legislation of business is concerned, some courts will be more demanding in terms of the due process test than others.[13] The distinction between the federal and state due process standards should be kept in mind, for if a statute is found unconstitutional on the state level, there can be no federal question as to that issue.[14]

Supermarkets upheld the constitutionality of the State's prohibition of price advertising by pharmacists. Plaintiffs operate pharmacies under the name of "Shop-Rite" and utilize the slogan "Why Pay More."[15] The action sought to enjoin the Attorney General of the State of New Jersey from enforcing the advertising prohibition. The plaintiffs argued that the act was unconstitutional for a wide variety of reasons, but it is clear that they relied most heavily on the due process[16] and equal protection[17] clauses of the federal and state constitutions.

The gist of the plaintiff's argument was: (1) the statute does not reasonably promote the public health, morals, or general welfare; (2) while pharmacists may be considered professionals at law, in fact they are mere merchants; (3) the statute regulates the commercial and not the professional aspects of the pharmacy business; and (4) the conduct of pharmacists is so strictly regulated in the dispensing of drugs that the act under consideration in no way alters the duties of

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[12]*E.g.*, legislation prohibiting sale below cost has been upheld under the Federal Constitution, Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, 360 U.S. 334 (1959); United States v. Canfield Lumber Co., 7 F. Supp. 694 (D. Neb. 1934); *appeal dismissed*, 67 F.2d 1003 (8th Cir. 1934). Such legislation has been declared unconstitutional in the following state cases: Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co., 178 Md. 38, 12 A.2d 201 (1940), State v. Packard-Bamburger & Co., 123 N.J.L. 180, 8 A.2d 291 (1939); Serrer v. Cigarette Serv. Co., 148 Ohio St. 519, 76 N.E.2d 91 (1947); Englebrecht v. Day, 208 P.2d 538 (Okla. 1949); Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67 (1940).

[13]*Supra* at note 8. It should be noted that the author of the comment in the Ohio State Law Journal says that states which apply the due process clause most strictly tend to be the most reactionary. A review of the non-signor cases does not bear out this theory. It is also evident that the dual approach to due process is not diminishing.

[14]Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

[15]Save Way Pharmacy, a New Jersey Corporation, intervened on behalf of the plaintiff.

[16]U.S. CONST. amend. V. "[T]he guaranty of due process... demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v. New York, 291 U.S. 502, 525 (1934); *accord*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 381 (1937).

[17]U.S. CONST. amend. XIV.

the pharmacist or his relationship with those he serves and so the act is functionless and arbitrary.[18]

Supermarkets, in rejecting these contentions, pointed out that on rare occasions a pharmacist is called upon to compound his own drugs, and, therefore, performs professional services. On other occasions, the pharmacist may "monitor" a customer's dosage and prevent a possible overdose. By not allowing the public "to shop" for its drug needs there is a greater likelihood that the citizen will patronize the same pharmacist. Thus, the legislation makes the "monitoring" of drugs possible. Also noted in *Supermarkets* was the possibility that the prohibition of advertising would help maintain the high standards of the pharmacy profession. These services and benefits directly relate to the health and welfare of the public and are, therefore, the proper subject of legislative action under the police power. "Such evidence, together with the strong presumption of constitutionality, requires this court to adjudicate chapter 120 as constitutional."[19]

In examining New Jersey's advertising prohibition, it is necessary to apply the law and tests of the due process clause. First, is there an evil related to the public health, safety, morals, or general welfare to be corrected?[20]

In order to determine the existence of a relationship between the public welfare and the statute, there must be an initial consideration of two things: (1) the nature of the statute or regulation, and (2) the nature of the business regulated. In this regard, it may be noted that a judge may take judicial notice of facts surrounding the legislation,[21] "but by their very nature such inquiries, where legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it."[22]

(1) The New Jersey regulation may on its face appear to be a prohibition of the advertising of drug discounts. Its effect, however, is

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[18]225 A.2d at 732.

[19]225 A.2d at 738.

[20]Jones v. Haridor Realty Corp., 37 N.J. 384, 181 A.2d 481 (1962).

[21]United States v. Carolene Prods., 304 U.S. 144 (1938); Boylan v. United States, 310 F.2d. 493, 500 (9th Cir. 1962).

> In determining such questions judicial knowledge may be consulted and relied on, and if from that knowledge, or from any other source, it appears that the grounds upon which the legislature based its action are arbitrary and unfounded in fact it is not only the right but the duty of the courts to say so and declare the consequences.

City of Louisville v. Kuhn, 284 Ky. 684, 145 S.W.2d 851, 854 (1940).

[22]United States v. Carolene Prods., 304 U.S. 144, 154 (1938).

to allow tacit horizontal price maintenance, among retail drug stores, without fear of competition by those more willing to reduce their prices.[23] An attack on a statute on the ground that it is a mere subterfuge for price fixing will not, without something more, be sufficient basis for invalidating the act.[24] Nevertheless, "if the dominant purpose of legislation be to serve private interests under the cloak of the general public good, the resulting legislation is a perversion and abuse of power and therefore unlawful."[25] There is little doubt that the courts are more inclined to strike down economic legislation adopted under the police power than that which is clearly designed to protect the public health:

> [T]he legislature may regulate pharmacists and drug stores in a manner reasonably designed and appropriate to insure competence and diligence on the part of pharmacists, cleanliness of premises, the purity and safety of products sold, the prevention of the unlawful sale of narcotics, and similar health measures.
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> When regulation is attempted beyond such matters, more difficult questions of constitutional validity may arise concerning whether particular statutes, regulations, or policies, or their application in particular circumstances bear a reasonable relation to significant aspects of the public interest.[26]

(2) The question of whether pharmacy is a profession is relevant, for the police power of the state is not as limited by due process when it is used to regulate a profession as when it is used to regulate a business.[27] Laws prohibiting price advertising of professional services by dentists[28] and optometrists[29] have been permitted to stand. However,

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[23]The statute encourages the retail of drugs at the manufacturer's suggested retail price, for the sale of drugs at discount prices necessitates high volume sales to be successful. The prohibition of price advertising increases the chances of low volume sales, for only through advertising of discount prices will the drug retailer be able to attract a sufficiently large number of customers to enable him to reduce his prices.

[24]Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 318 (1940).

[25]Gundaker Cent. Motors, Inc. v. Gassert, 23 N.J. 71, 127 A.2d 566, 567 (1956). See also, Reingold v. Harper, 6 N.J. 182, 78 A.2d 54 (1951). "The public health will not be used as a pretext to aid one group in the community in the competitive race against another to confer a monopoly in the sale of products." Loblaw, Inc. v. New York State Bd. of Pharmacy, 11 N.Y.2d 102, 181 N.E.2d 621, 226 N.Y.S.2d 681, 683 (1962).

[26]Milligan v. Board of Registration in Pharmacy, 348 Mass. 491, 204 N.E.2d 504, 510 (1965).

[27]Laughney v. Maybury, 145 Wash. 146, 259 Pac. 17 (1927).

[28]Basford v. Department of Registration & Educ., 390 Ill. 601, 62 N.E.2d 462 (1945); Levine v. State Bd. of Registration & Educ. in Dentistry, 121 N.J. 193, 1 A.2d 876 (1938); Goe v. Gifford, 168 Va. 497, 191 S.E. 783 (1937).

[29]Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963);

some courts have noted a distinction between the optometrist and the optician,[30] holding legislation restricting price advertising as it relates to the former valid but invalid as to the latter.[31] "To forbid price advertising by an optometrist is regulation of his practice. But to forbid price advertising by [opticians] is merely regulation of their merchandising.... Truthful price advertising is a legitimate incident to a lawful merchandising business."[32] Where price advertising by barber and beauty shops[33] and gasoline stations[34] has been prohibited, the legislation has usually been held unconstitutional.

While the practice of pharmacy may generally be considered a profession, it is not so considered in the application of a license tax[35] or exemption from a sales tax.[36]

> [I]t [is not] necessary to discuss the ... contention that the practice of pharmacy constitutes a "profession" rather than a "business." Those words are popular rather than "legal" terms. A minister's sermon, or a brief prepared by a lawyer, or a physical examination of a patient by a physician, is not the subject of a sale, but a bottle of medicine is.[37]

State v. Rones, 223 La. 839, 67 So. 2d 99 (1953); City of Springfield v. Hurst, 144 Ohio St. 49, 56 N.E.2d 185 (1944); Ullom v. Boehm, 392 Pa. 643, 142 A.2d 19 (1958). *Contra,* Ritholz v. City of Salt Lake, 3 Utah 2d 385, 284 P.2d 702 (1955).

[30]The optometrist diagnoses the patient's difficulty and, if it can be cured by mechanical means, writes a prescription for the lenses. The optician must follow the prescription in his sale of the lenses to the patient.

[31]*E.g.,* Booth v. Beck Jewelry Enterprises, 220 Ind. 276, 41 N.E.2d 622 (1942); Ritholz v. City of Detroit, 308 Mich. 258, 13 N.W.2d 283 (1944); State v. Ritholz, 263 Minn. 36, 115 N.W.2d 743 (1962).

[32]Booth v. Beck Jewelry Enterprises, 220 Ind. 276, 41 N.E.2d 622, 625 (1942).

[33]State v. Garrubo, 124 N.J.L. 19, 10 A.2d 635 (1940); Jones v. Bontempo, 137 Ohio St. 634, 32 N.E.2d 17 (1941); Haight v. State Bd. of Hairdressing, 76 R.I. 512, 72 A.2d 674 (1950).

[34]Cases striking down legislation prohibiting large roadside signs: State v. Miller, 126 Conn. 373, 12 A.2d 192 (1940); Town of Miami Springs v. Scoville, 81 So. 2d 188 (Fla. 1955); Levy v. City of Pontiac, 331 Mich. 100, 49 N.W.2d 80 (1951); State v. Guyette, 81 R.I. 281, 102 A.2d 446 (1954). *Contra,* Merit Oil Co. v. Director of Div. of Necessaries of Life, 319 Mass. 301, 65 N.E.2d 529 1946); People v. Arlen Serv. Stations, 284 N.Y. 340, 31 N.E.2d 184 (1940). Compare the following cases which hold requirements as to maximum size invalid: State v. Hobson, 46 Del. 381, 83 A.2d 846 (1951); Sears, Roebuck & Co. v. City of New Orleans, 238 La. 936, 117 So. 2d 64 (1960); State v. Union Oil Co., 151 Me. 438, 120 A.2d 708 (1956); Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954). Also compare both above sets of cases with the following which uphold the validity of a requirement that the lettering on price listings be uniform in size and legible: Serve Yourself Gasoline Stations v. Brock, 39 Cal. 2d 813, 249 P.2d 545 (1952), *appeal dismissed,* 345 U.S. 980 (1953); People v. Arlen Serv. Stations, *supra.* The common thread in all of these cases is the prevention of fraud upon the consumer and the guarantee to the consumer that he will know the price of gasoline before he purchases it.

[35]Lee v. Gaddy, 133 Fla. 749, 183 So. 4 (1938).

[36]Appeal of Biser, 317 Pa. 190, 176 A. 200 (1935).

[37]*Ibid.*

Supermarkets relied heavily on the fact that the business of pharmacy was a profession.[38] The decision stresses the analogy between the business of pharmacy and the practice of optometry.[39] Yet, the analogy is of doubtful value. An optometrist is called upon to make a value judgment with every prescription he fills.[40] But it was admitted in *Supermarkets* that the pharmacist in more than 90 per cent of the prescriptions he fills is called upon to find the pill prescribed and transfer the specified number of pills from one container to another.[41] The pharmacist is trained to obey the orders of the physician and, by law, is prohibited from deviating in any manner from a prescription presented to him.[42] *Supermarkets* places great emphasis on a pharmacist's education as indicative of his professional status.[43] While many cases differentiate a profession from a business on the basis of education,[44] it should be noted that in many states certain non-professional occupations require specialized education.[45]

Therefore, the New Jersey court may have erred in its finding that pharmacy is a profession. Yet this finding, or indeed a contrary finding, goes only to the question of how strictly the due process clause will be applied.[46] At some point the justification of a statute must return the basic question of whether it is for the general health and welfare of the public. In this regard the court relied upon the pharmacists' "monitoring" of a customer's purchase of drugs.[47] It is mani-

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[38]225 A.2d at 735.

[39]225 A.2d at 734.

[40]The optometrist diagnoses the infirmity of his patient and then fills out a prescription for the corrective measures necessary and, finally, may fill the prescription himself. The nature of his work, however, is more mechanical than medical. Even the optician who is in the business of selling frames and lenses on prescription, must make a value judgment with every customer he fits, for he must be sure the fit is proper.

[41]225 A.2d at 735.

[42]N.J. STAT. ANN. § 45:14-16 (1962).

[43]225 A.2d at 734.

[44]Dvorine v. Castelberg Jewelry Corp., 170 Md. 661, 185 A. 562 (1936); Teague v. Graves, 261 App. Div. 652, 27 N.Y.S.2d 762 (1941); Board of Supervisors v. Boaz, 176 Va. 126, 10 S.E.2d 498 (1940).

[45]For example, barbers, ARIZ. REV. STAT. ANN. § 32-324 (1956); ME. REV. STAT. ANN. tit. 32, § 402 (1965); MD. ANN. CODE art. 43, § 318 (1965); MASS. ANN. LAWS ch. 112, § 87H (1965); N.D. CENT. CODE § 43-04-23 (1960); and undertakers, CAL. BUS. & PROF. CODE § 7643; DEL. CODE ANN. tit. 24, § 3108 (Supp. 1966); IOWA CODE ANN. § 156.3 (Supp. 1966); N.J. STAT. ANN. § 45:7-49(2) (1963).

[46]See *supra* note 27.

[47]225 A.2d at 737. It is difficult to comprehend the logical connection between monitoring and the statute, but the court thought that advertising would increase "shopping" for drugs and since people would go from one store to another, the effect of monitoring would be lost.

fest from the court's discussion of this service that it amounts to far more of a hope for the future than an existing practice.[48]

The other connection *Supermarkets* found between the statute and public health and safety was its effect in reducing the chance of drug adulteration.[49] Absent competition from discount drug advertisers, the small retailer, not feeling the need to purchase large stocks at their more attractive prices, would not permit drugs to sit on the shelves and with time, to break down chemically. The court overlooks the fact that the sale of adulterated drugs is already regulated by law.[50] It appears evident from the above that a law prohibiting the advertisement of discount prices bears no substantial relation to the health, safety, morals, or general welfare of the public.

Stadnik v. Shell's City, Inc.,[51] a case very close on point, held such a prohibition unconstitutional. The regulation in *Stadnik* was promulgated by an administrative agency, although the agency may not have the authority to so regulate.[52] Nevertheless, it is clear that the court addressed itself to the merits of the regulation[53] when it said:

> [T]he rule has more resemblance to an economic regulation prohibiting price competition in the prescription drug business than it does to a regulation guarding the public health.... The effect if the rule is that the druggist cannot advertise the price of a prescription drug even though he is prohibited by law from selling the drug except upon the prescription of a physician. There is simply no reasonable justification for such an... intrusion on private rights when the regulation is so completely lacking in public benefit.[54]

Even if a relationship between the New Jersey statute and the

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[48]225 A.2d at 737.

[49]225 A.2d at 737.

[50]N.J. STAT. ANN. § 45:14-27 (1962).

[51]140 So. 2d 871 (Fla. 1962).

[52]*Id.* at 74. Of course, where a legislature has not delegated broad powers to a Board of Pharmacy, such board may not restrict or prohibit advertising by pharmacists. Oregon Newspaper Publishers Ass'n v. Peterson, 415 P.2d 21 (Ore. 1966); Pike v. Porter, 126 Mont. 482, 253 P.2d 1055 (1952). *Oregon Newspaper* and *Pike* also differ from *Supermarkets* in that the regulations in question were prohibitions of all advertising by pharmacists.

[53]Rule 2, Fla. Bd. of Pharmacy, Aug. 27, 1958:

> From and after September 15, 1958, no person licensed as a pharmacist under authority of Chapter 465, Florida Statutes [F.S.A.] and no person who owns a retail drug establishment, as defined in Section 465.031, Florida Statutes [F.S.A.] shall advertise the name or price of tranquilizing drugs or antibiotics or other drugs which can be purchased and dispensed only by means of a prescription from a physician.

[54]140 So. 2d at 875. The subject regulation was adopted by an administrative agency which may have been acting beyond its powers, therefore the Florida Supreme Court may distinguish *Stadnik* from a case where the same regulation was statutory.

public health and general welfare does exist, the prohibition of prescription price advertising is not a reasonable act as required by the second test of the due process clause. The greatest fault with the legislation is that it is a derogation of the best interest of the general public, for it allows a continuation of the extremely high price of drugs. A few years ago, Californians were paying the highest price in the nation for drugs.[55] One of the principal reasons was the existence of a law[56] very similar to the one under consideration as well as a fair trade act. Either one of these laws will destroy price competition between drug retailers. This effect under fair trade legislation is obvious. Under laws or regulations not allowing advertising, the discount drug retailer is prohibited from publicizing his one advantage, lower prices, while it allows the regular retail drug store to boast its advantages such as delivery service and charge accounts. The consumer should be allowed to know that he can get exactly the same drug from one pharmacist for considerably less than from another.[57] Because of its price fixing nature, the statute is not a reasonable attempt to promote the general welfare and, therefore, should not be permitted to stand merely because a state has broad police powers.[58]

STAFFORD W. KEEGIN

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[55]Comment, 49 CALIF. L. REV. 340 (1961).

[56]CAL. BUS. & PROF. CODE, § 651.

[57]For example, this writer's research revealed that a drug, Celestone, manufactured by Shering, has a wholesale price of $13.86 per hundred. Prices to the consumer on this item vary in Lexington, Virginia, between $15.86 per hundred and $20.20 per hundred. This price differentiation should be brought to the attention of the consumer, for he is often not in a position to go without the drug.

> The majority [of the Senate Antitrust and Monopoly Subcommittee] found several . . . aspects of prescription (or ethical) drug manufacture which distinguished it from its companion industries . . . . [One] was the rigid limitation or even negation of consumer choice, whereby the purchaser is wholly dependent upon the brand name prescription of his physician . . . . [Further] the subcommittee found that the consumer demand for drugs was inelastic, that is, demand remained consistent in the face of price change.

Note, 18 RUTGERS L. REV. 101, 102 (1963).

[58]Reingold v. Harper, 6 N.J. 182, 78 A.2d 54, 58 (1951):

> If the dominant purpose be the advancement of private interests under the guise of general welfare, there is a perversion of power. Police regulation denotes such restraints upon property, trade, or business as may be fairly imposed for the good of all. The power may not be exerted to serve private interests in contravention of common rights . . . . The statute under review is not sustainable if it is designed merely to outlaw trade practices, procedures and devices that would lower the price of [goods] to the consuming public, for that would constitute restraint of trade in derogation of the general interest,