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## A CASE STUDY IN ADMINISTRATIVE LAW— THE REGULATION OF BARBERS

DAVID FELLMAN†

The problems presented by the regulation of what is generally considered a rather simple trade are not at all simple. Although it is now a truism to say that we live in an age of increasing public regulation of many aspects of our social, occupational and personal lives, and although the power of government to promulgate rules and establish standards in the interests of the general welfare is, generally speaking, well established, any particular field of activity will, upon close examination, suggest many interesting and significant problems. General questions of constitutional right arise, such as are measured by the reasonableness which due process and the equal protection of the law require. And many problems of an administrative character, dealing with the discretionary authority of enforcement agencies and the fairness of their procedural techniques, are brought before the courts for review.

The aim of this paper is to examine these various issues in detail through an exhaustive analysis of a single, garden-variety trade, that of the barber. This is a case study, and it was undertaken in the hope that a vertical approach to the law of licensing will illuminate the many aspects of a body of law which has generally been treated horizontally and in rather general terms. Many of the legal problems of the barber are quite typical of the service trades, although it will appear that some of them are rather peculiar to this particular trade. The illustration of general principles as well as the exploration of special issues must be the objectives of any such case study.

The barbering trade has been closely regulated for many years. Issues arising from its regulation have been raised in the courts many times. The regulation of barbers is the object of a great deal of legislative activity today, and the legislatures are pushing their rules into the borderline regions of constitutionality and policy. A study of this trade, therefore, has a foundation of varied and fruitful experience, and affords the investigator the possibility of noting tendencies and making generalizations.

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An analysis of this trade will also suggest the nature of the fundamental interests which lie at the base of the existing body of licensing regulations. On the one hand, there is the important and compelling interest of conserving the public health and promoting the general welfare. But it will also appear that here, as is so frequently the case today, an important impetus for legislation comes from the organized barbers themselves. They come to the legislatures, local councils, and administrative boards seeking such economic satisfactions as the curtailment of competition through the restriction of opportunities to enter the trade, price-fixing, and similar devices. Equally important is the fact that they also seek the social and psychological satisfactions which they think will come from elevating a humble and honorable trade into a profession, replete with examinations, standards, boards, and a terminology smacking of the scientific. Regulation is not merely a matter of external restraint; it is also a product of the group quest for status and security. The assertion of integrated group interests is a characteristic feature of our times.

#### I. CONSTITUTIONALITY OF REGULATION UNDER THE POLICE POWER

There is a vast amount of legislation on the statute books of forty-six states and the District of Columbia dealing with the licensing and regulation of barbers.<sup>1</sup> Although this body of legis-

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1. D. C. (1938) 52 Stat. 620; Ala. Gen. Acts (1935) No. 316, Acts Extra Sess. 1936, 71; Ariz. Sess. Laws of 1935, c. 51, Laws of 1939, c. 38; Ark. Pope's Dig. Stat. (1937) secs. 12069-12091, Laws of 1939, Act 198; Cal. Deering's Gen. Laws (1937) Act 665, Deering's Codes (1935 Supp.) Act 8780f; Colo. Stat. Ann. (1935) c. 19, Laws of 1937, c. 105; Conn. Supp. Gen. Stat. Ann. (1935) secs. 1193c-1208c; Del. Rev. Code (1935) secs. 1030-1043, Laws of 1937, c. 184; Fla. Gen. Laws (1931) 23, Gen. Laws (1935) 91, c. 16799; Ga. Code (1933) c. 84-4, as amended, Laws of 1937, 564; Idaho Code Ann. (1932) secs. 53-601 to 705, as amended, Laws of 1935, c. 28, Laws of 1939, c. 29; Ill. Laws of 1937, 252, as amended, Laws of 1939, 298, 303; Ind. Burns Stat. Ann. (1933) secs. 63-301 to 327, as amended, Acts of 1937, c. 65, Acts of 1939, c. 108; Iowa Code (1935) secs. 2585-b11 to b19, secs. 5786-g1 to g8; Kan. Gen. Stat. Ann. (1935) secs. 65-1801 to 1807, secs. 74-1801 to 1804; Ky. Acts of 1938, c. 44; La. Dart's Gen. Stat. Ann. (1939) secs. 9367-9389.15; Me. Laws of 1937, c. 190; Md. Flack's Supp. Ann. Code (1935) art. 43, secs. 269-282-O; Mass. Michie Ann. Laws (1933) c. 112, secs. 87F to 87S, c. 13, secs. 39-41, 1938 Cum. Supp., c. 112, secs. 87F-87R, c. 13, secs. 40-41; Mich. Comp. Laws (1929) secs. 8691-8714, as amended, Mason's Code (1933 Supp.) secs. 8700-8711-5, as amended, Pub. Acts of 1937, No. 307; Minn. Mason's Stat. (1938 Supp.) secs. 5846-1 to 26½; Miss. Gen. Laws (1932) c. 118, as amended, Laws of 1938, c. 176; R. S. Mo. (1929) secs. 13522-13534, as amended, Gillespie's Cum. Ann. Supp. (1937) secs. 13522-13529; Mont. Laws of 1939, c. 150; Neb. Comp. Stat. (1929) secs. 71-2001 to 71-2027, as amended, Comp. Stat. (Supp. 1937) secs. 71-2020 to 71-2023; Nev. Hillyer's Comp. Laws (1929)

lation has been built up over a long period of time, most of the general laws have been enacted or over-hauled during the past decade. These laws follow a common pattern, but taken as a whole, they include a bewildering variety of rules, regulations, and systems of administration.

The constitutional power of a state to regulate the barber trade is now well established. The courts agree upon the inherently useful, necessary, and beneficial character of the trade; the barber "has come to be recognized as an artisan, indispensable and respected as the time-honored butcher and baker and candlestick maker."<sup>2</sup> But the police power extends "to all the great public needs,"<sup>3</sup> and the courts now universally admit the validity of licensing laws regulating the barbering trade as serving the interests of the public health.<sup>4</sup> Just how this legislation

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secs. 760-785, as amended, Hillyer's Comp. Laws (1938 Supp.) secs. 760-779, and Stat. (1939) c. 188; N. H. Laws of 1937, c. 163; N. J. Laws of 1938, c. 197; N. M. Laws of 1935, c. 111; N. C. Michie Code Ann. (1931) secs. 5003 (a)-(x), as amended, Pub. Laws of 1937, c. 138, and Pub. Laws of 1939, c. 164; N. D. Laws of 1927, c. 101, as amended, Laws of 1931, cc. 97, 98, 99, Laws of 1933, c. 79; Ohio Page's Gen. Code (1937) secs. 1081-1081-27; Okla. Stats. (1931) secs. 4325-4352, as amended, Laws of 1933, c. 60, Laws of 1936-7, c. 24, arts. 2, 3; Ore. Code Ann. (1930) secs. 68-401 to 425, as amended, Code Ann. (1935 Supp.) secs. 68-401 to 426, and Laws (1939) c. 540; Pa. Purdon's Stat. Ann. (1938) tit. 63, secs. 551-567; R. I. Gen. Laws (1938) c. 262; S. C. Acts of 1937, No. 223; S. D. Code (1939) c. 27.16; Tenn. Williams Code (1932) secs. 7117-7139, Pub. Acts of 1937, c. 236; Tex. Vernon's Ann. Penal Code (1936) art. 728-734a; Utah Rev. Stat. Ann. (1933) secs. 79-4-1 to 79-4-19, secs. 79-1-5 (3); Vt. Laws of 1937, No. 195; Wash. Remington's Rev. Stat. Ann. (1932) secs. 8277-1 to 19, as amended, Laws of 1937, c. 199; W. Va. Acts of 1939, c. 30; Wis. Stats. (1937) c. 158; Wyo. Rev. Stat. Ann. (1931) secs. 11-101 to 123, as amended, Laws of 1935, cc. 7, 8, 9, Laws of 1937, c. 67. There are no general state barber laws in New York and Virginia; here the impetus of regulation comes from the local governments. These citations will not be repeated in the discussion except where there is special need. Instead, reference will be made to the names of the states.

2. *People v. Stiegler* (County Ct. 1936) 160 Misc. 463, 290 N. Y. S. 732, 733.

3. *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 111.

4. *Marx v. Maybury* (D. C. W. D. Wash. 1929) 36 F. (2d) 397; *Eason v. Morrison* (1935) 181 Ga. 322, 182 S. E. 163; *People v. Logan* (1918) 284 Ill. 83, 119 N. E. 913; *Commonwealth v. Ward* (1909) 136 Ky. 146, 123 S. W. 673; *State v. Zeno* (1900) 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88, 79 Am. St. Rep. 422; *Clark v. State* (1934) 169 Miss. 369, 152 So. 820; *Ex parte Lucas* (1901) 160 Mo. 218, 61 S. W. 218; *State v. Lockey* (1930) 198 N. C. 551, 152 S. E. 693; *Peters v. State* (Okla. Crim. App. 1934) 34 P. (2d) 286; *Mundell v. Graph* (1934) 62 S. D. 631, 256 N. W. 121; *State Board of Examiners v. Comer* (Tex. Civ. App. 1937) 109 S. W. (2d) 1012; *State v. Sharpless* (1903) 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; *State v. Walker* (1907) 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257; *McDermott v. State* (Wash. 1938) 84 P. (2d) 372. See Note (1940) 26 Va. L. Rev. 928.

protects and promotes the public health has been elaborated over and over again by the judges. Briefly, the argument is that the barber comes into close physical contact with his customers, often with sharp instruments, and that there is therefore need for special safeguards with respect to skill and sanitation. Such being the case, "it goes without saying that barbering requires a degree of skill, proficiency, and training."<sup>5</sup> Of course, there are other trades which require skill and training, but the particular feature of this one which justifies the amount of regulation now enforced is the element of physical contact with the public. For example, the Arkansas Supreme Court, in upholding the recent state barber act,<sup>6</sup> explained away a previous case holding a similar act for the plumber unconstitutional<sup>7</sup> on the ground that the latter's trade does not involve this element. It is further argued that the emphasis upon cleanliness and sanitation as a public health measure is in accord with the general trend of modern legislation. "Why go back," it is asked, "to the standard of the discredited barber who would use the same old towel on the face of every customer from Monday morning until Saturday night?"<sup>8</sup> The barber must, by the compulsion of law if necessary, keep pace with the times.

## II. REGULATION BY MUNICIPALITIES

A great many of the regulations dealing with barbers are found in municipal ordinances, which form part of the health codes of many localities. There is no doubt as to the constitutionality of delegating to municipalities the power to regulate this trade.<sup>9</sup> Furthermore, it has been held that a state barber law which is applicable in a given town only with the approval of the town council is consistent with the rule of delegation of power, the court comparing this procedure to familiar local option liquor laws.<sup>10</sup>

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5. *State v. Lockey* (1930) 198 N. C. 551, 152 S. E. 693, 696.

6. *Beaty v. Humphrey* (Ark. 1938) 115 S. W. (2d) 559.

7. *Replogle v. Little Rock* (1924) 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333.

8. *People v. Stiegler* (County Ct. 1936) 160 Misc. 463, 290 N. Y. S. 732, 735.

9. *Louisville v. Schnell* (1908) 131 Ky. 104, 114 S. W. 742, 40 L. R. A. (N. S.) 637. A municipality may not add to the penalties of substantive provisions of a general state law purporting to embrace the whole subject.

*State v. Paille* (N. H. 1934) 9 A. (2d) 663.

10. *State v. Armeno* (1909) 29 R. I. 431, 72 Atl. 216.

Generally speaking, municipalities have adequate authority to deal with this trade. A charter provision authorizing a city to regulate and license trades, professions, occupations and callings, for the promotion of good order, public health and safety, undoubtedly enables the city to regulate, by licensing and otherwise, the barbering trade.<sup>11</sup> The grant of power to a city board of health to prevent the spreading of contagious diseases is ample to enable the city to promulgate sanitary rules for barbers and to require a license.<sup>12</sup> A charter provision authorizing a city to set up a board of health and to preserve the general health of the people is broad enough for this purpose, and the fact that the state board of health has been given the power to make rules and regulations on the same subject does not oust the city board of jurisdiction if its ordinance is not in conflict with the regulations imposed by the state.<sup>13</sup>

### III. THE MATTER OF QUALIFICATIONS

The various requirements relating to the qualifications of barbers and apprentices, fixed by statute, ordinance and administrative regulation, have been tested in the courts many times. The requirement of good moral character has been held to be a reasonable one.<sup>14</sup> There is no doubt of the reasonableness of requiring a certificate of health, in view of the peculiarities of the trade.<sup>15</sup> And it has been held that it is not necessary to define, in the statute, just which diseases are "infectious, contagious, or communicable," since "almost every man of moderate intelligence" would agree that certain diseases fall within this category, and in doubtful cases the matter can be left to the judge or jury.<sup>16</sup> Furthermore, an administrative rule requiring every applicant for an annual renewal license to submit a laboratory report and a physician's certificate showing freedom from infectious and contagious diseases was held valid as being within the statutory authority of the board to adopt reasonable regulations, even though an annual health examination was not specified in the statute.<sup>17</sup> Although the statute provided that a barber,

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11. *Hanzal v. San Antonio* (Tex. Civ. App. 1920) 221 S. W. 237.

12. *La Porta v. Board of Health* (1904) 71 N. J. L. 88, 58 Atl. 115.

13. *Ransone v. Craft* (1935) 161 Va. 332, 170 S. E. 610; *Trimble v. Topeka* (1938) 147 Kan. 111, 75 P. (2d) 241.

14. *Marx v. Maybury* (D. C. W. D. Wash. 1929) 36 F. (2d) 397.

15. See cases cited supra note 4.

16. *Hanzal v. San Antonio* (Tex. Civ. App. 1920) 221 S. W. 237.

17. *Eason v. Morrison* (1935) 181 Ga. 322, 182 S. E. 163.

once licensed, does not have to requalify, the court indicated that this had reference only to his skill, a matter having no relation to the question of disease. Finally, it may be noted that the inspection of shops during business hours to enforce reasonable regulations does not violate a state constitutional provision as to searches and seizures.<sup>18</sup>

The courts have assumed without much question, once the general power to regulate has been admitted, that it is proper to require the applicant for a barber's license to pass an examination testing his skill in the handling of instruments, and his knowledge of sanitation and other problems connected with his trade. This is in accord with the common law rule that barbers must exercise a reasonable degree of skill and care, and that they are liable for injuries to patrons resulting from negligent, incompetent, unsanitary or careless work.<sup>19</sup> The content of particular examinations, however, has been severely criticized by several courts in recent years as going beyond the necessities of the trade. For example, a barber law enacted by Maryland a few years ago provided that the course of instruction in the barber school or shop must include the "scientific fundamentals for barbering, hygiene, bacteriology, histology of the hair, skin, nails, muscles and nerves, structure of the head, face and neck, elementary chemistry relating to sterilization and antiseptics, disease of the skin, hair, glands and nails, haircutting, shaving and arranging, dressing, coloring, bleaching and tinting of the hair."<sup>20</sup> The highest court of Maryland thought that these requirements were "entirely out of proportion with the character and purposes of this trade and with the safeguards that seem just and fair to the public. They constitute an arbitrary prohibition rather than a reasonable approach to a lawful and chosen work."<sup>21</sup> Furthermore, the court thought that the sweeping powers given to the board by the statute were "so broad that they may be exercised in an arbitrary fashion in this almost unlimited field of

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18. *State ex rel. Melton v. Nolan* (1930) 161 Tenn. 293, 30 S. W. (2d) 601.

19. *Marsteller v. S. Kann Sons & Co.* (App. D. C. 1929) 32 F. (2d) 419; *Reed v. Rosenthal* (1929) 129 Ore. 203, 276 Pac. 684, 63 A. L. R. 1071; *Smith v. York* (La. App. 1934) 152 So. 152; *Barnett v. Roberts* (1922) 243 Mass. 233, 137 N. E. 353; *Hales v. Kerr* [1908] 2 K. B. 601, 15 Ann. Cas. 448.

20. Md. Acts of 1935, c. 371, sec. 282L.

21. *Schneider v. Duer* (Md. 1936) 184 Atl. 914, 917.

requirements."<sup>22</sup> This denunciation of the statute was premised upon the court's conviction that "this trade is neither highly technical nor exceptionally difficult, and its nature is understood by persons generally \* \* \*."<sup>23</sup> A similar "imposing array of subjects" was condemned by a federal district court as being unreasonable and unnecessary, and indefinite as to the amount of knowledge to be acquired.<sup>24</sup>

One court has also ruled invalid a scale of grading devised by an examining board which, in weighing the various items of the examination, counted "haircutting" and "shaving" as 48%, the balance including such items as "cleanliness" and "condition of tools."<sup>25</sup> The court thought this was giving too much weight to items which are "of only minor importance, is so far as health and safety are concerned," since haircutting and shaving relate merely to "style and mechanical skill," and that the system of grading adopted was arbitrary and capricious, leaving it within the power of the board to refuse a license arbitrarily. It has been suggested, however, that if a board's grading plan is unreasonable or arbitrary, it does not follow that the law itself is unconstitutional, the remedy being to review the conduct of the board.<sup>26</sup>

A statutory requirement of a two years' apprenticeship before qualifying as a barber has been upheld, the court expressing the opinion that it did not know judicially how much time should be required to guarantee proficiency, and that if the legislature was wrong, relief must be sought there.<sup>27</sup> Similarly, an apprenticeship period of three years has been approved, on the ground that the trade requires training, experience and study,<sup>28</sup> and another court suggested that while "three years seems a long time to require for learning the trade of a barber," it was not

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22. *Id.* at 918.

23. *Id.* at 917.

24. *Marx v. Maybury* (D. C. W. D. Wash. 1929) 30 F. (2d) 839, comment (1929) 4 Wash. L. Rev. 139. The portions of the Idaho barber law requiring knowledge of massaging and manipulation of muscles of the upper body and knowledge of diseases of nails were held invalid in *Monte Jano v. Rayner* (D. C. Idaho 1939) 33 F. Supp. 435.

25. *Timmons v. Morris* (D. C. W. D. Wash. 1921) 271 Fed. 721.

26. *State v. Wester* (1925) 135 Wash. 32, 236 Pac. 790.

27. *Moler v. Whisman* (1912) 243 Mo. 571, 147 S. W. 985, 40 L. R. A. (N. S.) 629, Ann. Cas. 1913D 392.

28. *State v. Zeno* (1900) 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88, 79 Am. St. Rep. 422.



in a position to say that it was unreasonably long.<sup>29</sup> However, a statute requiring a two years' apprenticeship under a barber was held to be unreasonable and arbitrary the court maintaining that "what the public is interested to know is that the barber is competent," and that whether he learns the trade as a barber's apprentice or in a barbering school doesn't matter.<sup>30</sup>

The matter of the apprentice barber has been before the courts in connection with other legal questions. A federal district court recently ruled that limiting the number of apprentices to one for each barber shop is an unreasonable and arbitrary interference with the liberty of the citizen.<sup>31</sup> The court argued that the absence of any peril to the public health is seen in the fact that apprenticeship is expressly authorized by the legislature. The bearing of this rule upon the public health, it was asserted, "is so remote we are unable to see it."<sup>32</sup> It has also been decided that a statute prohibiting more than two apprentices to a barber shop does not apply to a barber school, even though students are allowed, after completing their preliminary work, to receive a nominal fee for their work, since shops and schools are mentioned separately in the statute, and since such a limitation on the schools would destroy them.<sup>33</sup> Some years ago the Missouri court held that it was a denial of constitutional right to forbid students of barbering to receive compensation, arguing that apprenticeship is as old as civilization, that the prohibition was without precedent, and that two years of work as an apprentice without compensation did not promote the public health.<sup>34</sup> Just recently the Iowa court held the same way in reference to a law which forbade students of cosmetology from charging the public for services rendered.<sup>35</sup> On the other hand, the Rhode Island court declared constitutional a statute which provided that barber schools could not make any charge for any work done except the tuition charge.<sup>36</sup> The court asserted that "the proprietor of

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29. *People v. Logan* (1918) 284 Ill. 83, 119 N. E. 913.

30. *State v. Walker* (1907) 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257.

31. *Marx v. Maybury* (D. C. W. D. Wash. 1929) 30 F. (2d) 839, 841.

32. *Ibid.*

33. *Ramsey v. Cantrell* (Tenn. 1936) 93 S. W. (2d) 632.

34. *Moler v. Whisman* (1912) 243 Mo. 571, 147 S. W. 985, 40 L. R. A. (N. S.) 629, Ann. Cas. 1913D 392.

35. *State ex rel. Mitchell v. School of Beauty Culture* (Iowa 1939) 285 N. W. 133.

36. *State v. Conragan* (1934) 54 R. I. 256, 171 Atl. 326.

a barber school has no more right to receive compensation for the service performed by a student than has the student," and that the statute was reasonable and necessary "to insure to the public protection from untrained and unauthorized barbers."<sup>37</sup>

Only one court has ruled so far on the constitutionality of a requirement of citizenship for barbers. In 1902, the Michigan court held such a requirement to be unconstitutional as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>38</sup> The court could not see how the morals, health or even the convenience of the public were promoted by making citizenship, as well as knowledge and skill, a prerequisite for a barber's license. The volume of anti-alien legislation, in this and other fields, however, is growing steadily greater, and it is to be noted that the curtailment of the alien's opportunities of making a living has received a great deal of judicial sanction.<sup>39</sup>

A federal circuit court of appeals recently held that a city ordinance requiring a year's residence in the county before one is eligible for a license to operate a barber shop was invalid as a denial of the equal protection of the laws, the court ruling that it did not promote the public health, as in the case of a physical examination, but was merely designed to discriminate unreasonably in favor of local residents.<sup>40</sup> The court also considered the ordinance an abridgment of the privileges and immunities of citizens of the United States, though it is difficult to see how the right to own a barber shop is an incident of federal citizenship.<sup>41</sup>

The age requirement, found in almost all barbering statutes, has been accepted without much protest, largely, one may suppose, because it is not very restrictive, although one court, in condemning various features of a general law, suggested that it was not apparent that it tended to protect public health.<sup>42</sup>

37. *Id.*, 54 R. I. at 259.

38. *Templar v. State Board of Examiners* (1902) 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610.

39. See *Fellman, The Alien's Right to Work* (1938) 22 Minn. L. Rev. 137.

40. *New Brunswick v. Zimmerman* (C. C. A. 3, 1935) 79 F. (2d) 428, *aff'g* (D. C. D. N. J. 1934) 10 F. Supp. 401.

41. If, however, the unusual doctrine of *Colgate v. Harvey* (1935) 296 U. S. 404, is expanded in the future, one cannot predict where the privileges and immunities clause may eventually lead us. The recent overruling of the *Colgate* case (*Madden v. Kentucky* (1940) 309 U. S. 83) is reassuring.

42. *Marx v. Maybury* (D. C. W. D. Wash. 1929) 30 F. (2d) 839, 841. *Rudkin, J.*, dissenting in *State v. Walker* (1907) 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257, argued that he could not see how the statutory provisions as to age and character had anything to do with the public health.

Many statutes require the applicant for a barber's license to submit one or two photographs of himself when applying, and also to post a photograph, along with his license, in his shop. The Washington court recently held that this was a valid regulation, designed to safeguard the public against persons unlawfully holding themselves out to be licensees.<sup>43</sup> Since the tendency of this legislation will be to protect the community against unauthorized persons, who may be physically and morally unqualified, it has a reasonable relationship to the public health. The court could not agree that the use of photographs was unreasonable "because some persons may associate rogues' gallery pictures with all photographs used for the purpose of identification. It is a protection to the licensee himself."<sup>44</sup>

#### IV. PRICE FIXING

One of the most recent and serious problems arising in connection with the limits of the regulatory power of the state is that of price-fixing. A number of states have, in the past few years, enacted statutes providing for some method of fixing minimum prices specifically for barbers,<sup>45</sup> or broader statutes applying to service trades in general, and thereafter enforced with respect to barbers.<sup>46</sup> These attempts to regulate the prices charged by barbers for their services are in accord with a general trend of our times, and have undoubtedly been stimulated, in part at least, by recent decisions of federal courts upholding price regulation and minimum wage legislation.<sup>47</sup>

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43. *McDermott v. State* (Wash. 1938) 84 P. (2d) 372.

44. *Id.* at 375.

45. Ariz. Laws of 1939, c. 38; Ark. Laws of 1939, Act 198; Colo. Laws of 1937, c. 105; Fla. Gen. Laws (1935) c. 16799; Ind. Acts of 1939, c. 108; La. Acts of 1936, No. 48; Mont. Laws of 1939, c. 150, sec. 4; Okla. Laws of 1937, c. 24, art. 2; Tenn. Acts of 1937, c. 236.

46. Ala. Gen. Acts of 1935, No. 316; Deering's Cal. Codes (1935 Supp.) Act 8780f; Iowa Code (1935) sec. 5786-g1-8; Minn. Laws of 1937, c. 235.

47. *Tagg Bros. & Moorhead v. United States* (1930) 280 U. S. 420; *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.* (1931) 282 U. S. 251; *Nebbia v. New York* (1934) 291 U. S. 502; *Townsend v. Yeomans* (1937) 301 U. S. 441; *Edwards v. United States* (C. C. A. 9, 1937) 91 F. (2d) 767; *Wallace v. Hudson-Duncan & Co.* (C. C. A. 9, 1938) 98 F. (2d) 985. See also: *West Coast Hotel Co. v. Parrish* (1937) 300 U. S. 379; the dissenting opinion of Mr. Justice Cardozo in *Carter v. Carter Coal Co.* (1936) 298 U. S. 238, 324-34. These decisions have modified the importance of earlier cases frowning upon price-fixing for certain industries. *Chas. Wolf Packing Co. v. Court of Industrial Relations* (1923) 262 U. S. 522; *Tyson & Bro. v. Banton* (1927) 273 U. S. 418; *Ribnik v. McBride* (1928) 277 U. S. 350; *Williams v. Standard Oil Co.* (1929) 278 U. S. 235.

Since price-fixing laws for the service trades are of very recent vintage, and to date have been adopted in only about thirteen states,<sup>48</sup> the number of judicial decisions on the subject, so far as barbers are concerned, is necessarily rather small. As the decisions now stand, the weight of authority is against the constitutionality of these statutes. The highest appellate courts of Iowa, Florida, Alabama, Indiana and Tennessee, and a District Court of Appeal in California have, since 1936, declared such measures invalid.<sup>49</sup> On the other hand, price-fixing in this calling has been sustained by the supreme courts of Louisiana, Oklahoma, and Minnesota.<sup>50</sup> It is to be noted, however, that these cases bear the marks of serious controversy over an issue still in the area of conflict. In the Iowa case, three judges concurred separately, submitting two different concurring opinions. In the Florida case, one judge wrote a concurring opinion, and two judges dissented. Furthermore, it may be noted that while the Florida court held, in 1936, that price control for barbers was invalid, in 1938 it upheld a price-fixing statute for the cleaning, dyeing, pressing and laundry business,<sup>51</sup> a most inconsistent position in which the barber case was lightly brushed aside without really being distinguished, and in which two judges dissented, and one wrote a special concurring opinion. One judge dissented in the Alabama case. When the Louisiana court first considered the barber's price-fixing law it held it unconstitutional, three judges dissenting, but on re-hearing, the statute was sustained, with two judges dissenting. In the Oklahoma case three judges

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48. Of course, similar measures are being steadily introduced in various state legislatures.

49. *Mobile v. Rouse* (1937) 233 Ala. 622, 173 So. 266, 111 A. L. R. 349; *Ex parte Kazas* (1937) 22 Cal. App. (2d) 161, 70 P. (2d) 962, followed in *In re Landowitz* (1937) 22 Cal. App. (2d) 733, 71 P. (2d) 334 (barbers); *Ex parte Herrick* (1938) 25 Cal. App. (2d) 751, 77 P. (2d) 262 (cleaning and dyeing trade); *State ex rel. Fulton v. Ives* (1936) 123 Fla. 401, 167 So. 394; *Hollingsworth v. State Board of Barber Examiners* (Ind. 1940) 28 N. E. (2d) 64; *Duncan v. Des Moines* (1936) 222 Iowa 218, 268 N. W. 547; *State v. Greeson* (Tenn. 1939) 124 S. W. (2d) 253.

50. *Board of Examiners v. Parker* (1938) 190 La. 214, 182 So. 485, comments (1938) 1 La. L. Rev. 218 and (1938) 13 Tulane L. Rev. 144; *Herrin v. Arnold* (1938) 183 Okla. 392, 82 P. (2d) 977, 119 A. L. R. 1471, comments (1938) 87 U. Pa. L. Rev. 128, (1938) 27 Geo. L. J. 229, (1938) 13 U. Cinn. L. Rev. 494; *State v. McMasters* (Minn. 1939) 283 N. W. 767. But a barbers' association may not itself fix the prices. *Ex parte Tennyson* (1938) 184 Okla. 50, 84 P. (2d) 637.

51. *Miami Laundry Co. v. Florida Dry Cleaning and Laundry Board* (Fla. 1938) 183 So. 759, upholding Fla. Acts of 1937, c. 17894.

dissented. Furthermore, the majority opinions, and most of the concurring and dissenting opinions, are lengthy and argumentative. All in all, these courts have had a difficult task before them in seeking to reconcile the individualism inherent in some established constitutional principles with the new controls which legislatures are seeking to invoke.

The various price-fixing laws have a more or less common pattern. In most cases, the fixing of rates depends upon some prior petition or agreement of a certain percentage of the members of the trade in a particular locality. The Boards of Barber Examiners of Louisiana and Colorado may act on the petition of 75% of the barbers of each judicial district; in Arizona, Oklahoma and Montana the Board may act on the request of the same percentage of barbers in each city or town and in Arkansas on the request of 70%. The Minnesota law authorizes the governor to act on the request of 65% of the members of any service trade in any subdivision of the state. In Indiana, the board may act on the petition of "any organized and representative group of barbers" of any city or town, with the subsequent approval of 80% of the barbers of the locality. The Iowa law provided that the city council could fix rates on the petition of 65% of the owners or operators of barber shops in towns having less than 2500 inhabitants, and on the petition of 70% in towns over 2500. The California statute authorized the governing body of any city or county to act on the petition of 80% of the trade, while the Alabama statute permitted cities between 60,000 and 250,000 to fix minimum prices by ordinance on petition of 60% of the trade. The Florida statute authorized the board to act on its own initiative or on the complaint of a "representative group." The Tennessee law required the petition of 75% of the barbers of each county.

The expressed legislative purpose, as set forth in the preambles of the various statutes, takes one of two approaches. Two of the statutes which have been sustained, those of Louisiana and Oklahoma, are premised upon considerations of public health. Four of the statutes which have been held unconstitutional were based on the facts of economic emergency, unemployment, trade disorganization and ruinous price-cutting, although the Florida statute included the argument of public health as well. The Tennessee statute was based largely on considerations of public

health, as are the untested statutes of Colorado and Montana. The Minnesota and Indiana laws embrace both types of considerations.

In validating price-fixing, the courts of Louisiana, Oklahoma and Minnesota expressed the belief that there was a reasonable relationship between such laws and the public health. These courts leaned heavily upon the authority of *Nebbia v. New York*<sup>52</sup> and *West Coast Hotel Co. v. Parrish*.<sup>53</sup> The Oklahoma court also ruled that the act did not involve an unlawful delegation of powers, pointing out that there must first be an investigation by the board, and that after the administrative order is made there is always the possibility of a judicial inquiry into its reasonableness.<sup>54</sup> The Minnesota court ruled that the fair trade practice act did not delegate to the governor an unfettered legislative power.<sup>55</sup>

The five courts which have held such price-fixing statutes unconstitutional as a denial of due process of law emphasized the fact that while the police power is very broad, it is not without limitation, and that the right to engage in an inherently lawful occupation and fix the price for personal services is a property right protected by the constitution against governmental encroachment. The mere fact that barbering may be subjected to considerable regulation and licensing does not justify any and every kind of legislation. Further, these courts argued the point that emergency does not create power or authorize the suspension of constitutional guarantees. The *Nebbia* case was distinguished on the ground that the industry there regulated, the milk industry of New York, was of paramount importance in the state, a position which the barbering trade does not occupy. The Alabama court thus distinguished its own previous ruling with reference to the constitutionality of its own milk control act,<sup>56</sup> pointing out that the milk industry is "affected with a public interest."<sup>57</sup> Barbering, the Supreme Court of Florida maintained, is not a "chief industry" of the state; the general welfare and

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52. (1934) 291 U. S. 502.

53. (1937) 300 U. S. 379.

54. *Herrin v. Arnold* (1938) 183 Okla. 392, 82 P. (2d) 977, 982-3.

55. *State v. McMasters* (Minn. 1939) 283 N. W. 767, 769.

56. *Franklin v. State ex rel. Milk Control Board* (1936) 232 Ala. 637, 169 So. 295.

57. *Mobile v. Rouse* (1937) 233 Ala. 622, 173 So. 266, 268, 111 A. L. R. 349.

prosperity of the state do not depend upon it; the assumption of its social importance "is so egregiously erroneous that its illusion may be said to be a matter of common knowledge."<sup>58</sup> The court thought that it would be easy to enumerate at least fifty vocations which are as important to the state. The California District Court of Appeals, in applying a price-fixing law in a single city, indicated also that the barbers constituted a very small group, with their families amounting to only two per cent of the population, and that the statute therefore ignored the other 98%.<sup>59</sup>

In the fullest exposition of this point of view yet written, the Florida court argued the broad principle involved at some length. It asserted:

What this legislation undertakes is not regulation, but management, control, dictation. The Legislature may not by its fiat convert a private business into a public utility.<sup>60</sup>

The court thought that the statute was based upon several untenable assumptions, such as the notions that the standard of living of barbers is a matter so affecting the general welfare of all the people as to warrant making them a favored class, and that the demoralization of the trade is due to the "cut throat" practices of the "stronger members" of the trade. This statute, the court asserted, represents

a species of socialistic leveling of merit or capacity in the practitioner wholly inconsistent with the American ideal of encouragement to the worthy and industrious, by placing a handicap upon the proficient artist in the trade.<sup>61</sup>

Furthermore, the court thought that the statute unconstitutionally delegated legislative power to the board, within the rule of the *Schechter* case.<sup>62</sup>

It is also worthy of note that while the Minnesota court upheld a price-fixing law, it was of the opinion that the law was "crudely conceived and expressed," that there was a great difference between regulating barbers' services and milk prices, that "the general public interest, if any, is indirect and incidental," and that the main objective, "somewhat disguised," was the welfare

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58. State ex rel. Fulton v. Ives (1936) 123 Fla. 401, 167 So. 394, 401.

59. Ex parte Kazas (1937) 22 Cal. App. (2d) 161, 70 P. (2d) 962, 968-9.

60. State ex rel. Fulton v. Ives (1936) 123 Fla. 401, 167 So. 394, 403.

61. Id., 107 So. at 402.

62. Schechter v. United States (1935) 295 U. S. 495. The Indiana decision, Hollingsworth v. Board, supra note 49, turned on the delegation of legislative powers to private persons.

of the trade. The court concluded its opinion with this statement, which perhaps explains why it sustained the law at all:

The wisdom of such group legislation may be doubted. It may be inimical to the best interests of the group it seeks to favor, to say nothing of public good. But that is for the legislature and not the courts.<sup>63</sup>

A similar type of regulation now being sought by barbers' associations in their quest for professional status, and in their desire to curtail price competition, is one which forbids the advertising of prices. A number of state legislatures have obligingly written into their barber laws provisions prohibiting barbers from advertising prices or posting price lists which can be seen from outside the shop.<sup>64</sup> A California court has ruled that this is an unconstitutional encroachment on "the right of property and of contract," and an impairment of freedom of speech and press.<sup>65</sup> Knowledge by a customer of the price he is to pay before entering the shop is not detrimental to the morals or general welfare of the barber, the customer or the general public. Furthermore, the court maintained that by singling out this particular trade the statute made an arbitrary classification. The same conclusion was recently reached by a Delaware court, it being suggested that "there is very little difference between a barber advertising the price for which he sells his services to the public, and a merchant advertising the price for which he sells hats and shoes."<sup>66</sup> Similarly, a statute prohibiting the display of any sign other than "barber school" or "barber college" by places teaching the trade has been held unconstitutional by the Missouri court on the grounds that it was special legislation, was no safeguard for the public health, and that it was improper to prohibit the honest advertising of a legitimate business.<sup>67</sup> However, a requirement that a barber college post a sign show-

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63. *State v. McMasters* (Minn. 1939) 283 N. W. 767, 770.

64. See: Del. Laws of 1937, c. 184; Ky. Acts of 1938, c. 44, sec. 19(f); Mass. Cum. Supp. (1938) sec. 87K; R. I. Laws of 1936-1938, c. 2613, sec. 1; W. Va. Acts of 1939, c. 30, sec. 9.

65. *People v. Osborne* (Cal. App. 1936) 59 P. (2d) 1083, comment (1937) 35 Mich. L. Rev. 488.

66. *State v. Danberg* (Del. 1939) 6 A. (2d) 596, 600. Accord: *State v. Garrubo* (1940) 124 N. J. L. 19, 10 A. (2d) 635; *Jones v. Bontempo* (Ohio App. 1940) 29 N. E. (2d) 428. Cf. *State v. Tarpley* (1940) 64 Ohio App. 27, 27 N. E. (2d) 498.

67. *Moler v. Whisman* (1912) 243 Mo. 571, 147 S. W. 985, 40 L. R. A. (N. S.) 629, Ann. Cas. 1913D 392.



ing plainly that it is a barber college is valid, since the public is entitled to know that fact.<sup>68</sup>

### V. THE ADMINISTRATIVE BODY

The agency of administration in forty-five states is a board of barber examiners having statewide jurisdiction; in Alabama there is a commission in each county, and in Nevada there are district boards in addition to a state board; in Washington, the administrative agency is the Director of Licences, head of one of the ordinary departments of state administration. In the overwhelming majority of states these boards have three members each, although the boards of three states have four each,<sup>69</sup> and four boards have five members each.<sup>70</sup> As a rule, also, the members of these barber boards are given three-year terms, although in several states the term of office varies from two to six years,<sup>71</sup> and in a few states the board members serve at the pleasure of the appointing authority.<sup>72</sup> The appointing authority in the vast majority of states is the governor, although in a few states the appointive power is vested in some administrative department, such as the state health department,<sup>73</sup> and in Alabama in the governing body of the county. The administrative agency in the District of Columbia is a board of three members appointed by the Commissioners of the District for three-year terms.

The statutes also specify certain qualifications for membership on the boards. Almost all of them provide that appointees must have had at least five years' experience in the trade.<sup>74</sup> It has been held that this requirement is not unconstitutional as constituting a political test for an office or public trust.<sup>75</sup> The

68. *Marx v. Maybury* (D. C. W. D. Wash. 1929) 36 F. (2d) 397.

69. Ark., N. J., Okla.

70. Ky., Me., Pa., W. Va.

71. Two years: Ala., Nev. Four years: Cal., Conn., Ky., Md., Miss., Mo., W. Va. Five years: Mich. Six years: Ark., N. C.

72. Idaho, Ill., Pa., Utah.

73. Wis. (state board of health); Idaho (commissioner of department of law enforcement); Ill. (director, department of registration and education); Utah (director, department of registration); Pa. (department of public instruction). In Oklahoma the three barber members of the state board are appointed by the governor, the medical member by the state health commissioner.

74. Idaho requires only one year's experience; West Virginia, eight years', New Jersey, ten years'. In New Hampshire and the District of Columbia at least two of the members must be practicing barbers of five years' experience.

75. *State ex rel. Melton v. Nolan* (1930) 161 Tenn. 293, 30 S. W. (2d) 601.

Delaware statute provides that the board members must be "reputable barbers," the Mississippi statute that they must be of "good moral character," the Minnesota statute that they must have had an eighth grade education or its equivalent and must know the subjects taught in approved barber schools, and the Vermont statute that they have no financial connection with any cosmetic or barber supply house. The West Virginia law requires that at least one member of the board shall be a member of the negro race. The Arizona law requires a nonpartisan appointment, while the statutes of New Mexico and Indiana provide for nonpartisan appointment but, curiously enough, add that no more than two shall be appointed from the same political party. The West Virginia law provides that no more than two of the four barber members of the board shall belong to the same party. Three statutes specify a minimum age for the appointee,<sup>76</sup> and several require federal or state citizenship, or residence within the state for a period of years.<sup>77</sup> Several statutes also specify that the appointees must come from certain areas or parts of the state,<sup>78</sup> and a few require the appointment of both journeymen and master barbers.<sup>79</sup>

Several states now have the very interesting provision that the appointing authority must select the members of the board from a list of names presented by barbers' associations or unions,<sup>80</sup> or that at least he must give "due consideration" to recommendations by members of the trade.<sup>81</sup> The propriety of consulting private associations in making these appointments has been challenged but once on constitutional grounds, and has been sustained, the court suggesting that only the governor is

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76. Ga. (21), Ky. (23), Vt. (25).

77. Ky. (citizen of U. S. and of the state); Wyo. (resident citizen of state); Utah (citizen of U. S., resident of state one year); Nev. (resident of state two years); Mich. (resident of state five years); Ala. (three years in state, one year in county). Citizen of state three years: Conn., Kan., Mo., R. I.

78. Miss. (one from each judicial district); Ore. (one from each congressional district); Ark. (one each from a city of the first and second classes and an incorporated town); Del. (from Wilmington).

79. Ariz., Colo., Conn., Fla., Mich., Minn., Nev., N. J., N. M., Wis. The Kentucky statute provides that the board must include a master barber, a shop owner beautician, a union journeyman barber, an unorganized barber, and a non-shopowner beautician, and there is a similar provision in the West Virginia law.

80. Colo., Conn., Minn., N. J., N. D., Wis., Pa., D. C.

81. Ill., Utah.

in a position to object to the method of appointment, and holding that it does not constitute an unlawful delegation of power.<sup>82</sup> This is consistent with the prevailing view in other fields of administration. In very many states, the appointing authority must consult private associations in selecting members of medical, dental, pharmacy, nursing and other professional boards,<sup>83</sup> and the great weight of judicial authority has been to the effect that such consultation does not violate constitutional principles.<sup>84</sup>

The members of most state barber boards are paid *per diem*, the compensation being generally fixed by statute at \$5 or \$10 a day, plus expenses, or at some figure between these two.<sup>85</sup> Some statutes also provide that one of the board members shall receive a fixed or larger salary for acting as secretary.<sup>86</sup> In a few states, all the members of the board work full time, and are paid regular annual salaries.<sup>87</sup> A majority of the states also provide that all expenses of the barber board must be met from the fees which it collects. It has been held that such an arrangement does not violate a constitutional provision requiring that all money received by the state from any source shall go into the treasury of the state, for the fees of the board are not state revenue, strictly speaking.<sup>88</sup> Furthermore, a general appropriation of 90% of the fees collected by the board is consistent with a constitutional provision that no money shall be paid out except in pursuance of an appropriation by law which shall specify the sum appropriated, the court holding that the legislators set the sum aside in clear and unequivocal terms, fixed the salary of

82. *Ex parte Lucas* (1901) 160 Mo. 218, 61 S. W. 219.

83. See: Lancaster, *Private Associations and Public Administration* (1934) 13 Soc. Forces 285; Lancaster, *The Legal Status of 'Private' Corporations Exercising Governmental Powers* (1935) 15 Southwest. Soc. Sci. Q. 325; Jaffe, *Law Making by Private Groups* (1937) 51 Harv. L. Rev. 201; Note (1932) 32 Col. L. Rev. 80.

84. *In re Bulger* (1873) 45 Cal. 553 (fire commissioners); *Ex parte Gerino* (1904) 143 Cal. 412, 77 Pac. 166 (medical board); *McCurdy v. Jessup* (1915) 126 Md. 318, 95 Atl. 37 (game wardens); *Bradley v. Board of Zoning Adjustment* (1926) 255 Mass. 160, 150 N. E. 892 (zoning board); *Sturgis v. Spofford* (1871) 45 N. Y. 446 (licensing of pilots); *State ex rel. Smith v. Finger* (1891) 48 Ohio St. 505, 28 N. E. 135 (election board); *State Board v. Bellingier* (S. Ct. 1910) 122 N. Y. S. 651 (pharmacy board).

85. But in Vermont the compensation *per diem* is \$4, in Pennsylvania, \$15.

86. E. g., Ore. (\$200 a month); Okla. (\$1800 per year); Ariz. (\$2400 per year); La. (\$2500 per year); Minn. (\$3000 per year); N. H. (\$3000 per year); N. J. (\$3000 per year).

87. E. g., Md., Mass., Cal.

88. *Ex parte Lucas* (1901) 160 Mo. 218, 61 S. W. 219.

each member of the board at a definite amount, and also required full itemized reports.<sup>89</sup> On the other hand, a legislative appropriation out of the general fund was held invalid in Missouri, where the barber law required the board to be self-supporting, the court holding that the appropriation bill did not and could not amend the general law.<sup>90</sup>

## VI. RULE-MAKING AND THE ISSUE OF DELEGATION

A considerable number of state barber laws include a list of sanitary regulations, set out in greater or less detail. In addition, many statutes specifically authorize the barber board to make reasonable rules and regulations in the administration of the law, and to prescribe sanitary requirements in addition to those specified in the law itself.<sup>91</sup> A number of statutes provide, however, that the rules made by the board must have the approval of the state health department, thus establishing an administrative check.<sup>92</sup> In several states the health department itself makes the rules in the first instance.<sup>93</sup>

An objection often made to such regulatory legislation is that an abuse of authority is possible if certain things are done which the legislation theoretically authorizes to be done. It has been held that the court will not consider the question whether the statute delegates an arbitrary power to the board to grant or revoke licenses until the question actually arises.<sup>94</sup> Similarly, it has been held that since the delegation of a rule-making power to administrative officials is not improper, generally speaking,

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89. *Peters v. State* (Okla. Crim. App. 1934) 34 P. (2d) 286.

90. *State ex rel. Davis v. Smith* (1934) 335 Mo. 1069, 75 S. W. (2d) 828.

91. Ariz. Sess. Laws of 1935, 234; Ill. Laws of 1937, 252, sec. 19; Md. Flack's Supp. Ann. Code (1935) art. 43, sec. 273; Miss. Gen. Laws of 1932, c. 118, sec. 4; N. M. Laws of 1935, 250; Ohio Page's Gen. Code (1937) sec. 1081. Mich. Acts of 1937, No. 307, sec. 3, provides that while the Board may prescribe minimum standards, none are to pertain to prices, and that these standards may be established only after notice is given and a public hearing is held.

92. Me. Laws of 1937, c. 190, sec. 11; Minn. Mason's Stat. (1938 Supp.) secs. 5846-23; Neb. Comp. Stat. (1929) sec. 71-2024; N. D. Laws of 1927, c. 101, sec. 22; Ore. Code Ann. (1930) sec. 68-423; R. I. Laws of 1933-34, c. 2110, sec. 3; S. C. Acts of 1937, No. 223, sec. 16; S. D. Laws of 1931, c. 209, sec. 22; Vt. Laws of 1937, No. 195, sec. 2; W. Va. Acts of 1939, c. 30, sec. 3.

93. Okla. Laws of 1933, c. 60, sec. 6; N. J. Laws of 1933, c. 175, sec. 22; Tex. Vernon's Ann. Penal Code (1936) Art. 734a, sec. 28.

94. *Commonwealth v. Ward* (1909) 136 Ky. 146, 123 S. W. 673. Cf. *Baldwyn v. Board of Barber Examiners* (1933) 164 Miss. 744, 145 So. 240.

but is rather "necessary to the vitality" of the law, lack of knowledge as to the classification of diseases by the officials will not be anticipated.<sup>95</sup> The delegation of a rule-making power to the board, it is insisted, is a common and well-recognized procedure.<sup>96</sup> It has been held that while the board may not adopt a regulation making unlawful an act which the legislature did not so define, an administrative regulation as to the proper sterilization of instruments which is exactly the same as a rule set forth in the statute itself cannot be construed as reflecting an unconstitutional delegation of lawmaking power.<sup>97</sup> A few years ago, the Mississippi court held that a statute requiring the applicant for a license to pass "a satisfactory examination" conducted by the board, which should include a practical demonstration and a written and oral test embracing "the subjects usually practised in a duly licensed shop," did not confer an arbitrary discretion upon the board.<sup>98</sup> The legislature, it was stated, may lay down the general rule and permit administrative officials to make reasonable rules and regulations to implement it,<sup>99</sup> and it was pointed out that the conduct of the examination is often left to the judgment of the examining board.<sup>100</sup>

The whole issue of delegation was thoroughly considered by the Oregon court some twenty-five years ago when it sustained one of the early statutes on this subject against the objection that it did not prescribe the standards or degree of knowledge, learning and experience a person had to have to receive a license, such matters having been left to be determined by the board.<sup>101</sup> Arguing that the weight of authority sustained the delegation of a broad rule-making power to administrative bodies, the court said:

The nature and character of the profession, trade, or calling intended to be licensed or regulated often demands technical

95. *Hanzal v. San Antonio* (Tex. Civ. App. 1920) 221 S. W. 237, 239.

96. *State ex rel. Melton v. Nolan* (1930) 161 Tenn. 293, 30 S. W. (2d) 601.

97. *Feeman v. State* (1936) 131 Ohio St. 85, 1 N. E. (2d) 620.

98. *Clark v. State* (1934) 169 Miss. 369, 152 So. 820.

99. Citing: *Field v. Clark* (1892) 143 U. S. 649; *United States v. Grimaud* (1911) 220 U. S. 506; *Abbott v. State* (1913) 106 Miss. 340, 63 So. 667.

100. Citing: *Smith v. Alabama* (1888) 124 U. S. 465 (engineers); *Dent v. West Virginia* (1889) 129 U. S. 114 (doctors); *People ex rel. Nechamcus v. Warden* (1895) 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718 (plumbers).

101. *State v. Briggs* (1904) 45 Ore. 366, 77 Pac. 750, 2 Ann. Cas. 424.

knowledge and learning in order to designate accurately the qualifications which should be possessed by those designing to follow it. In the nature of things, this is a matter outside the ordinary scope of legislative wisdom. The prescribing of the proper qualifications of applicants for licenses by some agent of the state, learned in such profession or calling, is not legislation, but rather the exercise of a mere administrative power. A law, when it comes from the Legislature, must be complete, but there are many matters affecting its execution and relating to methods of procedure, which the Legislature may properly delegate to some ministerial board or officer, and prescribing the qualifications of persons who shall be licensed to follow or engage in the practice of a given trade or profession is one of them.<sup>102</sup>

The board, it was suggested, was authorized to prescribe only fair and reasonable qualifications; arbitrary or unreasonable action by the board would not make the act invalid, as the court could provide a remedy against such action; the constitutionality of an act of legislation, the court said, should be determined by its provisions, and not by the way it is administered.

In a recent decision, however, the Maryland court held that since the statute embraced a wide variety of subjects, including hygiene, bacteriology, histology of the hair, skin, nails, muscles and nerves, elementary chemistry, and the like, the powers of examination given to the board were "so broad that they may be exercised in an arbitrary fashion in this almost unlimited field of requirements."<sup>103</sup> However, this was only one of many reasons which led the court to condemn the statute which was before it, and on this point, the case seems to stand alone among the various precedents.

#### VII. REVOCATION OF LICENSES

One of the important powers in the hands of the administrative boards, and one of their most drastic sanctions, is the power to revoke the barber's license, for it relates to the very possibility of a livelihood itself. So far as the power of revocation is concerned, the statutes generally contain two types of provisions. First of all, they set forth in fairly precise terms the reasons for which licenses may be revoked, and secondly, most of them provide for the procedure to be followed.

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102. *Id.*, 77 Pac. at 752.

103. *Schneider v. Duer* (Md. 1936) 184 Atl. 914, 918.

There are many and varied grounds for revocation in the existing legislation. In twenty-seven states the license may be revoked for the commission of any felony; in five states any "crime" is sufficient; in Iowa and Washington, offenses "involving turpitude" may lead to a revocation. In thirty-three states habitual drunkenness or addiction to drugs is a cause for revocation, while in six other states drunkenness alone is mentioned. In eight states the license may be revoked for "malpractice," and in nineteen states for "gross malpractice." "Incompetence" is a sufficient cause in eight states, while in thirty states there must be "gross incompetence." Forty-one states specifically authorize revocation if the barber acquires some kind of a communicable disease. Twenty-seven statutes permit revocation for false or misleading advertising, and sixteen for the use of a competitor's trade name. Some twenty-five states authorize revocation for the violation of sanitary regulations, though the precise language varies somewhat in various statutes.<sup>104</sup> Seven states also provide that the maintenance of unclean or unsanitary conditions is a sufficient ground for withdrawing a license. Twenty-one states have the rather remarkable provision in their laws that licenses of barbers may be revoked for "immoral or unprofessional conduct." There are similar standards in other states: "immoral or unethical conduct" in Louisiana, "immoral, unprofessional or dishonorable conduct" in Iowa, "unethical or dishonest practice or conduct" in Pennsylvania, and "immoral conduct" in Texas.

Most of the statutes, in addition to enumerating the reasons which may be made a cause of revocation, also have some provisions with respect to the procedure to be followed. The laws of forty states specifically provide for notice and a public hearing before the license can be revoked. Furthermore, most of these laws specify the number of days of notice to which the barber is entitled before the hearing is held: in twenty-one states there must be twenty days' notice; two states provide for fifteen days' notice, five states for ten days' notice, and in ten states five days' notice suffices. Ten statutes stipulate that the barber is entitled to counsel at these hearings, though of course such a provision is unnecessary. The District of Columbia act simply states that the barber is entitled to notice and a full hearing.

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104. For example, the New Jersey law permits revocation only in case of "repeated violation of sanitary rules." The Indiana statute permits revocation for violation of any city ordinance.

A few statutes specify that the barber whose license has been revoked has a right of judicial appeal,<sup>105</sup> and some also specify the particular court to which an appeal may be taken.<sup>106</sup> Eight statutes also indicate that the appeal must be taken within a specified number of days, the number varying from ten to thirty.<sup>107</sup> The statutes of Alabama, Montana and Oregon provide that the question is to be tried in court *de novo*. The Illinois statute indicates that the court may review all questions of law and fact. Ohio provides for judicial review if the administrative finding is "unreasonable or unlawful." In Illinois, the Director of the Department of Registration and Education, and in Idaho the Commissioner of the Department of Law Enforcement, may order a rehearing if satisfied that "substantial justice has not been done." In the District of Columbia an appeal may be taken to the District Court, subject to review by the Court of Appeals. Of course, one may try his luck in court, under general rules of law and practice, whether the statute mentions the right of judicial appeal or not.<sup>108</sup>

In spite of the seriousness of a revocation of license, there have been only a few cases on the subject in the appellate courts of the states. One reason may be the newness of the statutes. Another reason may be the reluctance with which barber boards have exercised this power, for, meagre as the evidence is, since board reports are rarely published, it is clear that they have proceeded most cautiously in revoking licenses.<sup>109</sup> Still another reason may

105. Ind., Ky., Ohio.

106. Ala. (county circuit court), Ariz. (superior court of county), Ark. (circuit court of the district and supreme court), Conn. (superior court for Hartford County), Ill. (circuit and superior courts, supreme court), Md. (circuit courts of the county or common law courts of Baltimore), N. C. (superior court), Ore. (circuit court), R. I. (supreme court), Tex. (district courts of Travis County), Mont. (district courts).

107. Ten days: Conn., Mont. Twenty days: Ill., Tex. Thirty days: Ala., Ariz., Ore., R. I.

108. It has been held that it is not necessary for a city commission to indicate in an ordinance that the individual has a right of appeal to the courts, nor is it necessary to instruct him how to proceed in case he wants to go to court, since he already has adequate recourse to the courts. *Hanzal v. San Antonio* (Tex. Civ. App. 1920) 221 S. W. 237.

109. E. g., since January 1928, the Nebraska Board has revoked only twelve licenses: one for disease, five for unprofessional conduct, and six for making false statements in the application. During the year ending June 30, 1938, the Connecticut Board revoked sixteen licenses. (April 1939) 35 *The Journeyman Barber* 22. Pennsylvania reported forty-five revocations during 1937. (Feb. 1938) 34 *The Journeyman Barber* 24. There are about 25,000 barbers in Pennsylvania.



lie in the fact that notwithstanding the persistent protestations of the barbers' associations, this is a rather simple and mechanical trade the standards of which are not too difficult to maintain.

The court decisions on this subject suggest rather typical propositions of law. It has been ruled that the barber board is not a judicial tribunal, its duties being administrative and ministerial, and that therefore, a writ of prohibition will not lie against the board in performing its duty of revoking licenses for unsanitary practices and gross incompetence.<sup>110</sup> Nor will a court enjoin the making of an inquiry by the board to determine the question of revocation.<sup>111</sup> Where a statute gives the barber a right of appeal to the courts, there is no denial of due process of law.<sup>112</sup> Furthermore, the revocation is not a criminal proceeding, and on a statutory appeal from the order of an administrative board the appellant is not entitled to a trial *de novo*, the burden of proof resting upon the person attacking the order, which, "if not void on its face," is presumptively valid.<sup>113</sup> Similarly, a statute authorizing the board to revoke a license, subject to judicial review, does not violate a constitutional provision requiring a jury trial in all criminal prosecutions, since this is not a criminal prosecution, there being no penalty or punishment except the revocation of the license.<sup>114</sup> A provision authorizing a member of the board to enter and make a reasonable examination of any barber shop to ascertain its sanitary condition is not an unreasonable search or seizure, since nothing is taken or broken; it is merely an examination to help the board determine the question of revocation.<sup>115</sup>

A license may be revoked for doing unsanitary and filthy work,<sup>116</sup> and this applies to barbers who were practicing the trade before the act went into effect and were therefore given licenses without examination, since the distinction made between those who had to take examinations and those who were exempt did not contemplate exempting the latter from the provisions of

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110. *State ex rel. Allen v. Davis* (Mo. App. 1938) 119 S. W. (2d) 844.

111. *State Board v. Comer* (Tex. Civ. App. 1937) 109 S. W. (2d) 1012.

112. *Turner v. Bennett* (Tex. Civ. App. 1937) 108 S. W. (2d) 967.

113. *Lackey v. Board* (Tex. Civ. App. 1938) 113 S. W. (2d) 968.

114. *State v. Armeno* (1909) 29 R. I. 431, 72 Atl. 216.

115. *Ibid.*

116. *State Board v. Comer* (Tex. Civ. App. 1937) 109 S. W. (2d) 1012, followed in *State Board v. Miller* (Tex. Civ. App. 1937) 109 S. W. (2d) 1013.

the law with respect to revocation.<sup>117</sup> A statute which authorizes a revocation for "gross malpractice" is not void for uncertainty, and to apply the term to certain unsanitary practices, such as failure to sterilize instruments, is not unreasonable or arbitrary, especially in view of the fact that another section of the law makes such practices misdemeanors.<sup>118</sup> A statute which, according to its title, is designed "to ensure the proper sanitary conditions in barber shops, and prevent the spreading of disease," and which requires a doctor's certificate from every applicant for a license, is broad enough to permit the board, within its general rule-making power, to revoke a license because of disease.<sup>119</sup> Furthermore, the cancellation of a barber school's permit because of the use of towels a second time was held valid, where the statute required schools to teach the "scientific fundamentals of barbering," specifically provided that no barber should use the same towel on two customers, and authorized the cancellation of licenses for violations of "any requirements of the law."<sup>120</sup>

In a very few instances, the courts have taken an adverse view of the revocation provisions of barber laws. In 1936, the Maryland court, in an exhaustive review of the state law, held that the grant of the power of revocation to the board for the commission of any crime was "entirely too general and too broad."<sup>121</sup> The court asserted:

It has very little, if any, relation to the health feature, and, in addition to the penalty that the criminal law imposes, that of depriving one of his trade or calling, however insignificant the crime may be, reposes unreasonable powers in the board that may be arbitrarily exercised and should not be tolerated. A man who has endured his punishment should not thereafter be deprived of his livelihood and thrown back upon society as a possible derelict and charge, unable to obtain employment because of an unreasonable intervention of the state.<sup>122</sup>

The court also held that the provision authorizing revocation for having any communicable disease falls under the same constitutional inhibition, arguing that the statute ignores the question

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117. *State v. Chaney* (1904) 36 Wash. 350, 78 Pac. 915.

118. *Turner v. Bennett* (Tex. Civ. App. 1937) 108 S. W. (2d) 967.

119. *Eason v. Morrison* (1935) 181 Ga. 322, 182 S. E. 163.

120. *Dendy v. Dartez* (Tex. Civ. App. 1937) 108 S. W. (2d) 264.

121. *Schneider v. Duer* (Md. 1936) 184 Atl. 914.

122. *Id.* at 920.

of the severity of the contagion, for even a common cold could thus be made the reason for depriving a man of his livelihood.<sup>123</sup> Similarly, a statutory provision authorizing the administrative body to revoke the license of a barber school whenever, in its judgment, the school is not financially able to carry out its contracts of instruction, "uncontrolled by any standard or rule or provision for review," has been held to be in violation of the Fourteenth Amendment and an improper delegation of power.<sup>124</sup> Finally, it is to be noted that a barber board may revoke a license only for the reasons set forth in the statute, and where a board revoked a license because of alleged unsanitary practices, when the real reason was the refusal of the barber in question to raise his prices, the court allowed actual and exemplary damages in a suit for conspiracy.<sup>125</sup> The court held that the fact that the board is a creature of statute charged with making and enforcing rules and regulations, does not mean that it has the power to force a barber into line as to prices, and to "adopt measures which, although performed under the forms of law, are conceived in iniquity, and be relieved from the consequences flowing from their unlawful acts."<sup>126</sup>

#### CONCLUSION

The Supreme Court of Maryland recently suggested a general method of approach in dealing with the sort of legislation which has been the subject of investigation in this study:

Acts creating boards or commissions, with numerous officials and paid employees, complicated legal machinery, and elaborate plans for the supposed purpose of regulating simple trades and callings, well known and understood by the public, the expenses of which come out of the pockets or earnings of those engaged in the trade, should be viewed with care and examined with diligence to ascertain whether such acts and regulatory measures are designed to safeguard the public welfare, or for other purposes not sanctioned by law.<sup>127</sup>

This is a sound observation, and if one views with care and examines with diligence, it is clear that there is much in current

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123. *Id.* at 920.

124. *Marx v. Maybury* (D. C. W. D. Wash. 1929) 36 F. (2d) 397.

125. *Stoner v. Wilson* (1934) 140 Kan. 383, 36 P. (2d) 999.

126. *Id.*, 36 P. (2d) at 1006.

127. *Schneider v. Duer* (Md. 1936) 184 Atl. 914, 917.

barbering legislation that has little to do with the *public* welfare. It is apparent that the driving force behind the new and growing body of legislation is found in the organized barbers' associations, and that such legislation, often poorly drafted,<sup>128</sup> is an expression of a variety of purposes.

Perhaps the all-embracing purpose of this legislation may be said to be the attainment of a professional status.<sup>129</sup> Barbers are at the present time listed by the Census Bureau under the heading of "Domestic and Personal Service,"<sup>130</sup> and it is a commentary upon the legislative aims of the barber associations that one of their major preoccupations, judging from the content of their current literature, is to attain the heights of a professional classification. One state association leader says:

We are not laboring people. Our work requires a certain learned knowledge, and is requiring more all the time. We must be skillful in certain movements and manipulations of the hands and fingers. It requires a certain skillful technique in the use of delicate tools, instruments and appliances. It requires adaptation and co-ordination of eye and brain, nerve and muscle. We are not laboring people, we are building a profession.<sup>131</sup>

And so we are assured by the editor of a barber magazine that "humanity entrusts its outer appearance, from the neck up, to the ministrations of the barber and beautician."<sup>132</sup> The barber shop has become streamlined, we are told, and barbering has

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128. Compare the remarks of Campbell, J., in *Curran v. Bowell* (1928) 53 S. D. 92, 95, 220 N. W. 455, 457: "The statute is crudely and inartistically drawn, and is so full of inconsistencies and self-contradictions that to go to any particular phrase or clause or section and seek thereby to discern definitely and specifically that more or less chimerical thing commonly denominated as 'legislative intent' seems utterly hopeless. The act, we are told, originated with the Barbers' Association of the state, and in view of the numerous inconsistencies appearing therein about the only thing that can legitimately be said as to the 'legislative intent' seems to be this, that the various members of the Legislature were apparently quite willing to give the barbers whatever regulation of barbers and barbering they may have supposed the barbers themselves thought they would get by virtue of the terms of the act."

129. "There is an apparent design, although indefensible and unreasonable, to give to this simple and useful trade the characteristics and standards of a highly technical profession, surrounded with requirements, grades, and divisions such as one might expect to find in those professions where life, liberty, and property are of everyday concernment." *Schneider v. Duer* (Md. 1936) 184 Atl. 914, 918.

130. *Index of Occupations* (1937) 30.

131. (April 1939) 19 *Master Barber Mag.* 7.

132. (Jan. 1939) 18 *Master Barber Mag.* 4.

become one of the professional callings.<sup>133</sup> Over and over again, writers in the barber journals return to this theme.<sup>134</sup> There also seems to be some nostalgic pointing with pride to ancient days when barbers were also surgeons, or surgeon barbers, and appeal is therefore made to history.<sup>135</sup> Barbering is, of course, an ancient trade,<sup>136</sup> but this is not a conclusive fact, for age alone cannot impress upon a common calling the characteristic features of a profession. After all, many trades to which no one would ascribe a professional status are quite as old. Nor can a common trade be converted into a profession by legal fiat, even though it is clothed by law with the outward manifestations of one, for the skill, learning, occupational and ethical standards that stamp a particular calling a profession are indigenous qualities which have an objective reality, independently of the law, and indeed are in fact antecedent to legislation. One should not be misled by the imposing array of scientific subjects concerning which applicants for barbers' licenses are examined, for the body of knowledge required of them is really most elementary.<sup>137</sup>

A legitimate purpose of barber legislation is the protection of the public health and safety. This has long been recognized as a proper objective of police power legislation, and the licensing device has long been used as a sanction in very many different

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133. See: Holtzman and Stechel, *Science is Streamlining Tony the Barber* (Feb. 1939) 27 *Nation's Business* 24; Fishbein, *The Cult of Beauty* (1926) 7 *American Mercury* 161; *The Male Face* (May 1937) 15 *Fortune* 125; Sullivan, *Figaro Storms Athens* (1929) 18 *American Mercury* 441.

134. See Greene, *Why Barbers Merit Professional Classification* (Oct. 1937) 17 *Master Barber Mag.* 14. See also: *Journeyman Barber* for Nov. 1939, 26; Dec. 1938, 32; Jan. 1939, 28; *Master Barber Mag.* for Aug. 1938, 7; Jan. 1939, 6; Feb. 1939, 13.

135. See (April 1939) 19 *Master Barber Mag.* 18; (April 1939) 35 *Journeyman Barber* 28.

136. "Anciently the craft of barbering was dignified as a profession and conjoined with the art of surgery \* \* \*. It was practiced in oriental countries \* \* \*. During the reign of Edward IV of England, the barbers were incorporated by law; and by 32 Henry VIII (C) 42, were united with the surgeons, but their activities were limited to minor operations of blood letting and extracting teeth and hair clipping and shaving. In 1745 the barbers and surgeons were each separated into a distinct corporation by 18 George II, c. 15. The barber's pole with the spiral red is said to symbolize the winding of a ribbon around the arm previous to letting blood. The craft of barbering has been dignified for many centuries by public notice and legislative enactment granting and limiting power." Marx v. Maybury (D. C. W. D. Wash. 1929) 36 F. (2d) 397, 398.

137. All the facts concerning both the theoretical and practical aspects of barbering are found within the compass of a short elementary book of 300 pages, the Associated Master Barbers of America, *Standardized Text-book of Barbering* (Rev. ed. 1936).

fields of endeavor.<sup>138</sup> But this does not mean that any and every calling may be subjected to a licensing system of control,<sup>139</sup> nor that a calling susceptible to such control may thereafter be put under any restraints the legislature may see fit or be driven to impose. Indeed, it has been asserted that the modern general barber law represents "perhaps the farthest point reached by the tide of regulation of labor and industry."<sup>140</sup>

Thus, one may question the legitimacy of those features of the existing barber laws which are designed to restrict unduly the opportunities of entering the trade, and to control price and service competition within it. The tendency of various small businesses to seek monopolistic privileges from the legislature is widespread today,<sup>141</sup> and it should be strenuously resisted if we propose to maintain a competitive economic system and to avoid the creation of new rigidities in it.<sup>142</sup> The impetus for price-

138. See: Freund, *Administrative Powers over Persons and Property* (1928) 7; White, *Introduction to the Study of Public Administration* (Rev. ed. 1939) c. 32; Crecraft, *Government and Business* (1928) c. 30; Powell, *Administrative Exercise of the Police Power (1910-1911)* 24 Harv. L. Rev. 268, 333, 441; Freund, *Licensing* (1933) 9 Encyc. Soc. Sci. 447; Ludwig, *Administration of Regulatory Licenses* (1938) 20 Pub. Man. 227; Koons, *Growth of Federal Licensing* (1936) 24 Geo. Law J. 293; Johnson and Kessler, *The Liquor License System (1937-1938)* 15 N. Y. U. L. Q. Rev. 210, 380; Hanft and Hamrick, *Haphazard Regimentation under Licensing Statutes* (1938) 17 N. C. L. Rev. 1; Note (1926) 26 Col. L. Rev. 472; Note (1938) 25 Va. L. Rev. 219.

139. For example, licensing laws have been held invalid for land surveyors, *Doe v. Jones* (1927) 327 Ill. 387, 158 N. E. 703; paper-hangers, *Dasch v. Jackson* (1936) 170 Md. 251, 183 Atl. 534; bricklayers, *Wilson v. District of Columbia* (1905) 26 App. D. C. 110; horseshoers, *Bessette v. People* (1901) 193 Ill. 334, 62 N. E. 215, *In re Aubrey* (1904) 36 Wash. 308, 78 Pac. 900; photographers, *Wright v. Wiles* (Tenn. 1938) 117 S. W. (2d) 736, *Territory v. Kraft* (1935) 33 Hawaii 397; cement contractors, *State ex rel. Sampson v. Sheridan* (1918) 25 Wyo. 347, 170 Pac. 1; and heating contractors, *Harrigan & Reid Co. v. Burton* (1923) 224 Mich. 564, 195 N. W. 60.

140. *Dasch v. Jackson* (1936) 170 Md. 251, 266, 183 Atl. 534, 540.

141. See Note, *Legislative Monopolies Achieved by Small Business* (1939) 48 Yale L. J. 847. Cf. Grether, *Solidarity in the Distributive Trades in Relation to the Control of Price Competition* (1937) 4 Law and Contemp. Prob. 375.

142. See the remarks of Barnhill, J., dissenting in *State v. Lawrence* (1938) 213 N. C. 674, 197 S. E. 586, 593: "Almost every trade and calling is tinged with some element of social interest or public service, for if the work has no social utility it rarely survives. However, few trades or callings are so essentially vested with a social interest as to justify their establishment, by legislative grant, as close-knit, self-governing, trade monopolies having the power to exclude those seeking to compete with veterans of the craft. The life of our society is not yet so thoroughly regimented that the right to work and earn an honest living in the trade of one's choice is dependent upon the approval of some bureau, commission, or examining

fixing legislation obviously comes from the barbers' associations, whose journals constantly urge its necessity and justice and hail with delight each new victory.<sup>143</sup> In fact, a great deal of price control is accomplished by barbers' associations through measures of self-help without resort to the sanctions of the law. The general president of the Journeymen Barbers' International Union recently asserted that his association has for fifty years, through its local unions, "assumed the responsibility of fixing and continuing stable prices."<sup>144</sup> This is accomplished through fines, suspension from the locals, or annulment of membership cards. And thus self-government in business rears its ugly head.

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board, itself interested perhaps in excluding new workers from its own crowded vineyard." Cf. the remarks of Brown, J., in *Moler v. Whisman* (1912) 243 Mo. 571, 147 S. W. 985, 989: "Possibly some barbers like some lawyers and other persons who have attained successful and remunerative positions in professional and commercial life become anxious to shut out competition by 'burning the bridges behind them', so to speak, but such a scheme is entirely un-American because it is the policy of a free commonwealth to encourage thrift and industry among its citizens and to keep the door of opportunity ajar so that every qualified and deserving person who so desires may enter thereat." See also the interesting veto message of Gov. R. L. Cochran of Nebraska, Legislative Journal, 53d Sess. (1939) 1185-1187.

143. See: *Master Barber Mag.* for Sept. 1938, 8; Nov. 1938, 5, 17, 32; Dec. 1938, 10, 19; Feb. 1939, 8, 10, 32; March 1939, 5, 19; April 1939, 5, 19; 35 *Journeyman Barber* 4; July 1938, 11; Sept. 1938, 30; Oct. 1938, 16; Dec. 1938, 11. See (Jan. 1939) 34 *Journeyman Barber* 22, for a proposed model bill on price-fixing.

144. (May, 1938) 34 *Journeyman Barber* 11. For an analysis of economic conditions of the trade, see *Working Conditions and Wages in Union Barber Shops, 1938* (1939) 48 *Monthly Lab. Rev.* 1287.