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James A. Cathcart

Gil Graff

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Occupational Licensing: Factoring It Out

JAMES A. CATHCART*
GIL GRAFF**

Occupational licensing, the zenith of state regulation, is rooted in the notion that stringent entry requirements and ongoing scrutiny by government will assure the protection of the consumer public. Such protection is deemed necessary because of the difficulty consumers have in ascertaining the competence of those who hold themselves out as skilled, and because of consumers' inability to recognize when or if substantial injury has been sustained at the hands of the provider.

The standards under which occupations are licensed emphasize educational preparation, an examination, and, in many instances, lengthy experience requirements.¹ It is commonly assumed that the combination of academic education and practical training is essential to the development of a qualified professional. The examination is generally utilized not as a substitute for such training but to validate a minimum standard of knowledge that should have been learned and retained during such training.

Of the aforementioned standards, experience requirements for licensure warrant particularly close scrutiny. The issue of experience requirements is of dual importance. First, such requirements may serve to restrict qualified

* Consultant to the California Senate Committee on Business and Professions.

** California Senate Fellow, 1976-77. J.D., UCLA, Member, California State Bar.

1. See generally, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, STATE LICENSING OF HEALTH OCCUPATIONS 11-16 (1967); COMM'N ON CAL. STATE GOV'T ORGANIZATION AND ECONOMY, AN EXAMINATION OF THE DEP'T OF PROFESSIONAL AND VOCATIONAL STANDARDS 11-13 (1967).

persons from pursuing the vocation of their choice, "a distinguishing feature of our republican institutions."² Concomitantly, experience requirements may, by serving as barriers to entry, curb competition and result in higher prices for the consumer.³ Given these possible deleterious effects, statutes requiring prior experience for licensure should, indeed, meet standards for reasonableness and not be arbitrary and lacking in rational basis.

Given the nature and circumstances surrounding their enactment, however, such statutes may be lacking this requisite rationality. The growth of occupational licensing throughout the country has been described as "a haphazard, uncoordinated, and chaotic process."⁴ The various "Practice Acts" in California,⁵ as elsewhere, were individually enacted (generally at the behest of the new group to be licensed) over a period of many decades and, as a consequence, the licensing system that emerged shows little consistency.

It is no secret that the licensing system that has emerged has generally established standards, including experience requirements, that have the effect of reducing competition and establishing barriers designed to restrict entry to an occupation.⁶ This has been the result largely because occupational licensing has occurred at the behest of the occupational group to be licensed.⁷ The group, itself, commonly drafts the legislative proposals⁸ enacted into law, and as such, has written legislative proposals designed to benefit the occupation economically.⁹ Thus, the whole thrust of occupational licensing has been "toward decreasing competition by restricting access to the occupation; toward a definition of occupational prerogatives that will debar others from sharing in them"¹⁰

The present array of experience requirements among the licensed occupations in California is utterly chaotic and lacks an overriding rationale, mirroring the inconsistency of the licensing system itself. For example, a dispensing optician, who fits and sells eyeglasses only upon prescription of another licensed person, must possess five years of experience prior to

2. Dent v. West Virginia, 129 U.S. 114, 121 (1889).

3. STAFF REPORT TO THE FEDERAL TRADE COMM'N, REGULATION OF THE TELEVISION REPAIR INDUSTRY IN LOUISIANA AND CALIFORNIA: A CASE STUDY 17 (1974); Barron, *Business and Professional Licensing—California, a Representative Example*, 18 STAN. L. REV. 640, 643 (1966).

4. B. SHIMBERG, B. ESSER & D. KRUGER, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES I (1973).

5. A "Practice Act" contains the statutes pertaining to the licensing of an individual occupation; such as, the "Medical Practice Act" contains those statutes pertaining to the licensing and regulation of physicians and surgeons.

6. W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 114 (1956).

7. U.S. DEP'T OF LABOR, OCCUPATIONAL LICENSING AND PUBLIC POLICY, FINAL REPORT TO MANPOWER ADMINISTRATION 7-8 (1972).

8. *Id.* at 11.

9. A classic example of this tendency may be seen in SB 236, 1977-78 Regular Session of the California Legislature.

10. W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 114 (1956).

licensure.¹¹ A hearing aid dispenser, on the other hand, who diagnoses hearing disorders and fits and sells hearing aids to any person he or she pleases, need not possess any experience whatsoever.¹² Clearly, when such irrationality occurs within occupational licensing laws, it is time to examine their validity.

This article will examine the validity of experience requirements in California's occupational licensing statutes by performing four primary tasks. First, the article will examine the legal basis for challenging California statutes or regulations establishing experience requirements as a condition of licensure. Second, the article will establish a model that may be used to perform a comparative analysis of existing occupational experience requirements. Third, the article will survey the experience requirements of 58 occupations¹³ licensed by 28 licensing entities¹⁴ located within the Department of Consumer Affairs¹⁵ and perform a comparative analysis to determine the rationality of such requirements. Last, the article will suggest some alternative actions the California Legislature may take to establish a system in which experience requirements for occupational licensure are rational, fair, and a proper exercise of the state's police power.

DUE PROCESS CLAUSE AS A LEGAL BASIS FOR CHALLENGING LICENSING STATUTES

As regulations enacted for the health, safety and welfare of the public, licensing restrictions have generally been found to be a valid exercise of the state's police power.¹⁶ The fact that the legislature enacts occupational licensing statutes under its police power, however, does not completely shield these statutes from judicial review. Courts in the past have held that

11. CAL. BUS. & PROF. CODE §2552.

12. CAL. BUS. & PROF. CODE §3327.

13. See Tables A & B *infra*.

14. The licensing entities surveyed are the Board of Osteopathic Examiners, Board of Medical Quality Assurance, Board of Behavioral Science Examiners, Board of Chiropractic Examiners, Board of Dental Examiners, Board of Nursing Home Administrators, Board of Pharmacy, Board of Registered Nursing, Board of Examiners in Veterinary Medicine, Board of Optometry, Board of Vocational Nurse and Psychiatric Technician Examiners, Board of Guide Dogs for the Blind, Board of Registration for Professional Engineers, Board of Architectural Examiners, Contractors State License Board, Structural Pest Control Board, Board of Accountancy, Cemetery Board, Board of Registered Construction Inspectors, Board of Funeral Directors and Embalmers, Board of Geologists and Geophysicists, Board of Landscape Architects, Board of Fabric Care, Board of Barber Examiners, Board of Cosmetology, Certified Shorthand Reporters Board, Bureau of Employment Agencies, and the Bureau of Collection and Investigative Services.

15. Approximately 50 additional occupations are licensed by some ten separate licensing entities falling outside of the jurisdiction of the Department of Consumer Affairs.

16. See, e.g., *Watson v. Maryland*, 218 U.S. 173 (1910); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Dent v. West Virginia*, 129 U.S. 114 (1889). There are still isolated decisions, however, that hold that the police power does not extend far enough to regulate the occupation in question. Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1099 n.14 (1973). For some reason, photographers are often the object of such decisions. See, e.g., *Sullivan v. DeCerb*, 156 Fla. 496, 23 So. 2d 571 (1945); *State v. Gleason*, 128 Mont. 485, 277 P.2d 530 (1954); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949). Similar holdings can be found with regard to watchmakers. See *State ex rel. Whetsel v. Wood*, 207 Okla. 193, 248 P.2d 612 (1952).

the scope and method of occupational licensing statutes are reviewable under the due process clause of the fourteenth amendment.¹⁷ In order for the due process clause to limit the state's licensing power, however, freedom of occupational choice must be shown to be a "liberty" or "property" interest. For many years a line of authority, best illustrated by the 1954 United States Supreme Court decision in *Barsky v. Board of Regents*,¹⁸ held that the practice of a particular occupation was a privilege, not a right, and hence unprotected by the fourteenth amendment.¹⁹ A more recent line of cases, however, rejects the right-privilege distinction and brings freedom of occupational choice under the protection of the fourteenth amendment.²⁰ In the 1957 case of *Schware v. Board of Bar Examiners*,²¹ the Court was explicit about the applicability of the fourteenth amendment:

A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.²²

The Court went on to state:

We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace.²³

The Court's clear statement has been reiterated since *Schware* and has virtually laid to rest the right-privilege distinction as applied to occupational choice.²⁴

Freedom of occupational choice may also be protectable as a "liberty" interest.²⁵ In the 1972 case of *Board of Regents v. Roth*,²⁶ the Court stated, "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."²⁷ Quoting from *Meyer v. Nebraska*,²⁸ the majority included freedom "to engage in any of the com-

17. See, e.g. *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Doyle v. Board of Barber Examiners*, 219 Cal. App. 2d 504, 33 Cal. Rptr. 349 (1963); *Whitcomb v. Emerson*, 46 Cal. App. 2d 263, 115 P.2d 892 (1941); Note *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1100 (1973).

18. 347 U.S. 422 (1954).

19. *Id.* at 451.

20. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1960); *Greene v. McElroy*, 369 U.S. 474 (1959); *Speiser v. Randall*, 357 U.S. 513 (1958); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

21. 353 U.S. 232 (1957).

22. *Id.* at 238-39.

23. *Id.* at 239 n.5.

24. See note 20 *supra*.

25. Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1102-03 (1973).

26. 408 U.S. 564 (1972).

27. *Id.* at 572.

28. 626 U.S. 390 (1923).

mon occupations of life”²⁹ within the definition of liberty. Thus, it seems clear that federal courts would use the fourteenth amendment as a standard in determining the validity of requirements in occupational licensing statutes.

As a practical matter, however, federal courts have been reluctant to review occupational licensing statutes. The 1955 case of *Williamson v. Lee Optical, Inc.* is illustrative.³⁰ In upholding a state statute that prohibited opticians from duplicating lenses without a prescription from an optometrist or an ophthalmologist, the Supreme Court declared that:

The . . . law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the requirement . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.³¹

Nonetheless, this declaration by the Supreme Court has not prevented the federal courts from reviewing occupational licensing statutes on due process grounds.³² Further, it is clear that state courts are free to examine the validity of state occupational licensing statutes.³³ State courts, in fact, have invalidated state occupational licensing statutes on due process grounds.³⁴

Along these lines, California courts have indicated their willingness to review occupational licensing statutes on due process grounds. In *Whitcomb v. Emerson*,³⁵ a California Appellate Court ruled that the Cosmetology Act

29. 408 U.S. at 572.

30. 348 U.S. 483 (1955).

31. *Id.* at 487-88.

32. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Mercer v. Hemmings*, 194 So. 2d 579 (Fla. 1966), *appeal dismissed*, 389 U.S. 46, *rehearing denied*, 389 U.S. 999 (1967).

33. Fulda, *Controls of Entry into Business and Professions—A Comparative Analysis*, 8 TEX. INT'L L.J. 109, 119 (1973); Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1116 (1973). In 1949, Professor Paul Freund noted:

The Supreme Court's recent reluctance to declare state laws unconstitutional under the due-process clause unless basic civil liberties are involved has important implications for litigation. The result may well be that constitutional litigation over state laws will be concentrated more and more in state courts under state constitutional provisions, and state constitutional law may become of dominant importance.

P. FREUND, ON UNDERSTANDING THE SUPREME COURT 115-16 (1949). Another commentator notes that "state courts are free to develop their own doctrines of state constitutional law independent of [the Supreme Court's] decisions, as long as in doing so they do not contravene federal law." Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 226, 250 (1959).

34. See, e.g., *Whitcomb v. Emerson*, 46 Cal. App. 2d 263, 115 P.2d 892 (1941); *People v. Brown*, 407 Ill. 565, 95 N.E.2d 888 (1950).

35. 46 Cal. App. 2d 263, 115 P.2d 892 (1941).

was unconstitutional insofar as it purported to require a face masseuse to possess experience in and pass an examination in other unrelated branches of cosmetology. The court declared:

[W]hile the several occupations specified in the act are proper subjects of legislative regulation, the relation of those having no reasonable natural association . . . amount to the taking of . . . property without due process of law³⁶

Again in *Doyle v. Board of Barber Examiners*,³⁷ a California Appellate Court specifically stated that:

[T]he right to engage in a legitimate employment or business receives recognition as a portion of the individual freedoms secured by the due process provision of the federal and state Constitutions.³⁸

In this same opinion, however, the court also indicated that great deference would be given to legislative determinations in the licensing area by stating that:

[J]udicial examination of a statute under economic due process attack is completed when any fact or facts appear which the Legislature might rationally have accepted as the basis for a finding of public interest.³⁹

Such judicial deference was adhered to by the California Supreme Court in the 1967 case of *Eye Dog Foundation v. State Board of Guide Dogs for the Blind*.⁴⁰ In this case, the court denied the plaintiff's contention that the statutory provisions of regulating guide dogs for the blind are "unreasonable and arbitrary and violative of due process" ⁴¹ In *Doyle v. Board of Barber Examiners*,⁴² the court stated, "[W]e may invalidate the statute only if these theories are devoid of any rational connection with the public interest objectives as the Legislature may have conceived them."⁴³

While the number of cases that have been reviewed on due process grounds in federal and California courts in the occupational licensing area is small, nonetheless, it seems clear that both the federal courts and California courts will use the due process clause of the fourteenth amendment as a standard by which occupational licensing statutes are to be judged.

It is therefore important to discuss the limitations that the due process clause of the fourteenth amendment places on these statutes. Essentially, there would seem to be three requirements that the due process clause places

36. *Id.* at 277, 115 P.2d at 900.

37. 219 Cal. App. 2d 504, 33 Cal. Rptr. 349 (1963).

38. *Id.* at 509, 33 Cal. Rptr. at 353.

39. *Id.* at 514, 33 Cal. Rptr. at 356.

40. 67 Cal. 2d 536, 432 P.2d 717, 63 Cal. Rptr. 21 (1967).

41. *Id.* at 542, 432 P.2d at 722, 63 Cal. Rptr. at 26.

42. 219 Cal. App. 2d 504, 33 Cal. Rptr. 349 (1963).

43. *Id.* at 519, 33 Cal. Rptr. at 357-58.

on occupational licensing schemes.⁴⁴ The licensing schemes must be drawn up with specificity,⁴⁵ rationality⁴⁶ and fairness.⁴⁷ Specificity means that the standards and guidelines that a licensing board uses in granting, denying, suspending, renewing or revoking a license be intelligible.⁴⁸ Rationality means that the standards bear a reasonable relation to effective practice of the regulated occupation.⁴⁹ Fairness pertains to the make-up of the licensing board, the procedures it follows, and the necessity and timing of judicial review.⁵⁰

This article is primarily concerned with the rationality of occupational licensing schemes in California. Before one can tell whether a court would invalidate the California scheme on due process grounds, one must first examine the rationality of the current California scheme. Thus California's licensing scheme will be examined by comparing one occupation to another to determine the rationality of the scheme as a whole.

ANALYSIS OF CALIFORNIA'S CURRENT LICENSING SCHEME

In order to determine the rationality of California's current occupational licensing scheme, the authors surveyed 58 occupations currently licensed by the California Department of Consumer Affairs, all of which require passage of a board approved examination for licensure eligibility. It was found that 29 of these occupations require no experience as a prerequisite to licensure and 29 require some experience. Of the 29 occupations requiring some experience for licensure, the length of required experience ranges from six months to five years beyond any educational requirements. An examination of the current experience requirements suggested three conclusions:

1. There is no apparent "rational basis" for the distinction between occupations in which experience is necessary and occupations for which

44. Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1103 (1973).

45. *Id.* at 1104 n.36. The due process clauses of the fifth amendment (when a federal statute is involved) and the fourteenth amendment (when a state statute is involved) require that a criminal statute be declared void when it is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Conally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Undue vagueness in the statute will result in its being held unconstitutional whether the uncertainty goes to the persons within the scope of the statute, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); the conduct which is forbidden, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Winters v. New York*, 333 U.S. 507 (1948); or the punishment which may be imposed, *United States v. Evans*, 333 U.S. 483 (1948). See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

46. The Supreme Court has long recognized its power to review legislation regulating economic affairs to determine if the means selected "have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934). Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1111, n.68 (1973).

47. *In re Murchison*, 349 U.S. 133 (1955); Note, *Due Process Limitations on Occupational Licensing*, 58 VA. L. REV. 1097, 1118 (1973).

48. Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1103-04 (1973).

49. *Id.* at 1104.

50. *Id.*

experience is not necessary. For example, there appears to be no "rational basis" as to why prospective barbers need apprentice for 15 months,⁵¹ and prospective cosmetologists need not.⁵²

2. There is no apparent "rational basis" upon which the determination of an "appropriate" length of required experience is made for those occupations in which experience is required for licensure. For example, an educational psychologist need possess three years experience for licensure⁵³ while a psychologist, whose practice is more discretionary, need possess only two years experience.⁵⁴

3. The imposition of experience requirements for licensure in any of the occupations might be unwarranted given the fact that completion of an approved standard of academic training and the passage of rigorous board-administered examinations often measures the very same practical skills that applicants are required to demonstrate through years of documented experience prior to becoming eligible for licensure⁵⁵ (and, indeed, 50 percent of the occupations surveyed do not impose any experience requirements whatsoever).⁵⁶

While the necessity of an experience requirement for any occupation raises an important policy concern, the authors do not address this issue in the present article. It is assumed for purposes of this analysis that a well-reasoned approach to the issue of experience requirements for occupational licensing might conclude that experience is, in fact, an essential aspect of preparation for the practice of certain occupations.

Whether or not experience becomes a prerequisite for licensure appears to be more a function of particular political events surrounding the passage of the licensing program rather than any deliberate, rational legislative policy. Thus, as has already been pointed out, experience requirements, as most other licensing law requirements, were developed in a haphazard and uncoordinated manner.⁵⁷ In recent years, the California Legislature has recognized that certain aspects of practice acts were developed in a haphazard manner and have sought to correct many provisions common to practice acts that might be subject to court challenge under due process limitations established by court decisions. For example, citizenship requirements,⁵⁸

51. CAL. BUS. & PROF. CODE §6545(d).

52. CAL. BUS. & PROF. CODE §7332.

53. CAL. BUS. & PROF. CODE §17862(e).

54. CAL. BUS. & PROF. CODE §2914(d).

55. In 1969, the American Institute of Certified Public Accountants adopted a statement of institute policy that stated that all experience requirements mandated by State Accountancy Practice Acts be eliminated by 1975. The basis of this statement was the recommendation made in AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, REPORT OF THE COMMITTEE ON EDUCATION AND EXPERIENCE REQUIREMENTS FOR CPAS 6 (1969). This report elaborated a series of reasons why an experience requirement was not a viable method of determining qualifications for licensure. *Id.* at 12.

56. See Tables A & B *infra*.

57. See text accompanying note 4 *supra*.

58. AB 1986, CAL. STATS. 1972, c. 1285, at 2556.

good moral character and similar requirements,⁵⁹ and age requirements above the age of majority,⁶⁰ have all been eliminated by legislative action. In all three instances, arguments were made before the legislative committees that such requirements were probably unconstitutional in that due process of individuals seeking licensure was violated.⁶¹ Specifically, it was argued that the aforementioned requirements bore no reasonable relationship to the licensed activity and hence served as an unreasonable interference with a person's right to pursue the occupation of his or her choice.⁶² Legislation has also recently been enacted to eliminate any additional requirements that may be placed upon applicants for licensure in the event that such applicants failed a license examination.⁶³ In this instance, it was successfully argued before legislative committees that there existed no rational basis for requiring an applicant to wait a period of time or to obtain additional education or experience in order to be eligible for relicensure (and as such could be subject to court attack under due process).⁶⁴

The elimination of age, citizenship, time and moral qualifications as a prerequisite to licensure are, hopefully, only the first steps in what will be an ongoing trend towards rationalizing the now chaotic scheme of occupational licensing. The legislature needs to act to further rationalize existing licensing laws not only because of its moral obligation to establish reasonable and fair licensing standards, but because its previous actions may be subject to attack under the due process clause of the fourteenth amendment.⁶⁵

Even though experience requirements may be challengeable under the due process or equal protection clause of the fourteenth amendment as not being enacted on a rational basis, such a challenge is problematic at best. Nonetheless, the constitutional issues surrounding occupational licensing requirements remain and must be considered by both the courts and the legislature to ensure that legislatively enacted requirements are not an unreasonable interference with a person's right to engage in the occupation of his or her choice.

This article proposes that the legislature develop a means of rationalizing the critical issues of occupational licensing before an attack on due process grounds is made. In analyzing California's current occupational licensing scheme, the apparently random imposition of experience requirements is of fundamental concern. It is the authors' hope that the analytical framework

59. SB 1767, CAL. STATS. 1974, c. 1321, at 2874.

60. AB 686, CAL. STATS. 1972, c.579, §§1-8, at 989.

61. Personal observations by James Cathcart who was present at legislative hearings where oral arguments were presented by proponents of the legislation, in Sacramento, Calif. (July 13, 1972, Feb. 8, 1972, and July 20, 1972, respectively).

62. See text accompanying note 49 *supra*.

63. SB 1675, CAL. STATS. 1974, c. 743, §2, at 1642.

64. Argument presented by James Cathcart before the California Senate Committee on Business and Professions, in Sacramento, Calif. (June 12, 1974).

65. See text accompanying notes 16-43 *supra*.

proposed herein will assist legislators and other policymakers in approaching the area of experience requirements by providing a rational structure within which to examine this important issue.

THE MODEL

The first step in analyzing the relative need for prior experience as a requirement for licensure among the various occupations is to isolate those factors that might warrant a modicum of experience as a prerequisite to licensure. The experience requirement of each licensed occupation surveyed was evaluated and rated in terms of three factors: seriousness of impact upon the consumer, discretion of the occupational licensee, and practical training received in educational prerequisites by the applicant for licensure. The definition of each of these factors and the evaluation of each factor will be discussed in the following sections.

1. Seriousness of Impact

Seriousness of impact reflects the very foundation upon which occupational licensing rests: the protection of the health and welfare of the public. Factors which would indicate seriousness of impact are: (a) potential degree of bodily, emotional, fiscal, or visual and environmental harm; (b) probability of harm; (c) lasting or continuing nature of effect; (d) degree to which effect may be remedied; (e) discoverability of error. This factor is assessed as it relates to the general consumer public, that is, those who are not in a special position to ascertain professional competence. Thus, generally, consideration of seriousness of impact was limited to its effect on an individual, and not its effect on a large business or governmental entity. For example, a landscape architect may design faulty irrigation designs for both a homeowner and school district. The seriousness of impact is considered on the basis of impact to the homeowner and not to the school district. When these criteria are utilized, it is readily observable, for example, that a physician would have very serious impact on the public as compared to say a barber. A barber's malfeasance, contrary to a physician's, is generally discoverable, remediable, not of lasting effect, and has a low probability of harmful action of a serious nature. Thus, a physician may be expected to score higher with respect to the seriousness of his or her malfeasance while a barber may be expected to score lower.⁶⁶

2. Discretion

The need for the licensee to develop the ability to intelligently exercise discretion is a factor frequently invoked to justify the requirement of a

66. See Tables A & B *infra*.

prolonged period of experience. To the extent that an occupation calls for a significant degree of independent judgment, some "field experience" might well be warranted. Factors that might indicate the amount of discretion that is called for in a particular occupation are: (a) degree of independence in selection and application of treatment modalities; (b) degree of complexity of treatment modalities; (c) expansiveness of scope of practice; (d) degree to which a person works under another licensed individual (exclusive of experience requirement); (e) whether employing institution is qualified to judge qualifications of employees. Utilizing the aforementioned criteria, it is clear that a veterinarian has a significantly larger amount of and higher quality of discretion in the performance of his or her duties than say a dispensing optician or a pharmacist. The latter occupations are precise and exacting. The practitioners, however, have little independence and must conform their duties to those prescribed by optometrists and physicians, respectively.

3. *Lack of Practical Training*

While practical training is widely recognized as an important element in developing occupational skills, there are often extensive programs of practical training included within the educational background required for licensure in the various occupations. In such cases, an additional experience requirement may be superfluous and devoid of any "rational connection" with fitness to engage in the particular occupation. Educational programs for various occupations thus need to be evaluated in terms of: (a) degree to which practical, clinical (or "hands on") training is absent from educational requirements; (b) degree to which education is not directly related to licensed function. Occupations such as vocational nursing and cosmetology would score low in this factor in that both occupations' training requirements are geared almost exclusively for the preparation of their occupation. In the case of cosmetology, the actual practice of shampooing, cutting, giving facials, and manicures on consumers constitutes the bulk of their school requirements. In contrast, many occupations, such as contractors, dispensing opticians, and security guards, have no formal educational requirements at all (that is, beyond high school graduation or its equivalent), and thus would score high.

In an effort to determine the rationality of California's current occupational licensing scheme, the authors evaluated each of the 58 occupations in terms of the three factors that were previously discussed. Numerical values were assigned to each of the three factors to indicate whether the occupation being evaluated required a substantial amount (3), moderate amount (2), slight amount (1), or none of the factors in question.

Since the ultimate rationale for occupational licensing is the protection of the public, Factor 1 (seriousness of impact) is of greater significance than Factors 2 and 3 (discretion and lack of practical training). Therefore, in computing the total numerical value for an occupation, a multiplier of 1.5 was applied to Factor 1, to accord it greater weight.

The highest numerical score that an occupation might reach is 10.5. At this level an occupation would (1) have a serious impact on consumers, (2) involve the exercise of considerable discretion, and (3) require almost no practical training, within the educational qualifications for licensure. Thus, if experience requirements are a valid and rational means to determine competency, some amount of required experience might be justified for those occupations scoring at the high end of the rating continuum. While assignment of scores to the various occupations on this basis may be somewhat discretionary (hinging upon the rater's analysis of the factors as applied to the particular occupations),⁶⁷ application of this model at least evaluates experience requirements in terms of a uniform set of criteria and allows for a rational determination of the appropriateness of such requirements.

ANALYSIS OF CALIFORNIA'S CURRENT LICENSING SCHEME IN TERMS OF THE MODEL

For purposes of analysis, the 58 occupations surveyed were divided into two groupings: health occupations (consisting of 30 occupations) and nonhealth occupations (consisting of 28 occupations). Each of the occupations was evaluated in terms of the model that was set forth in the previous section. The data demonstrate that among occupations with substantially similar impact, discretion and practical training profiles (such as veterinarians, dispensing opticians, geophysicists, and funeral directors) there are widely differing experience requirements (such as from no experience required to seven years required). Further, certain occupations with very low factor ratings (such as barbers and embalmers) have considerable experience requirements. Thus, based on this model, it appears that the present scheme of experience requirements among the licensed occupations surveyed is sorely lacking an overriding rationale. Additionally, the general scheme illumines the utterly random spread of experience requirements among the licensed occupations. By examining the data, it is possible not only to develop some perspective as to the existing chaos in the area of experience requirements, but also to draw some conclusions as to the determination of rational distinctions between the various occupations in terms of the relative need for experience as a prerequisite for licensure.

67. The rating was performed by the authors of this article. The rating is based only on personal knowledge of the occupations and as such has not been validated.

TABLE A
HEALTH PROFESSIONS (Care/Treatment)

Profession	Total Points	Experience Re-requirement (beyond education requirements)	Impact (1.5 Multiplier)	Discretion	Lack of Practical Training
Osteopaths	8.5	1 year	(3) 4.5	3	1
Physicians	8.5	1 year	(3) 4.5	3	1
Marriage, Family & Child Counselors	8	2 years	(2) 3	3	2
Psychologists	8	2 years professional experience, at least 1 year after obtaining Ph.D.	(2) 3	3	2
Clinical Social Workers	7	2 years	(2) 3	2	2
Educational Psychologists	7	3 years full-time experience as credentialed school psychologist. 1 year's credit for approved internship	(2) 3	2	2
Chiropractors	6	0	(2) 3	2	1
Dentists	6	0	(2) 3	2	1
Nursing Home Administrators	6	0	(2) 3	2	1
Pharmacists	6	1500 hours practical experience	(2) 3	1	2
Podiatrists	6	0	(2) 3	2	1
Registered Nurses	6	0	(2) 3	2	1
Registered Social Workers	6	0	(2) 3	2	1
Speech Pathologists & Audiologists	6	9 months full-time, or 18 months part-time	(2) 3	2	1
Hearing Aid Dispensers	5.5	0	(1) 1.5	1	3
Registered Dispensing Opticians	5.5	5 years	(1) 1.5	1	3
Veterinarians	5.5	0	(1) 1.5	3	1
Optometrists	5	0	(2) 3	1	1
Acupuncturists	4.5	0	(1) 1.5	2	1
Psychology Assistants	4.5	0	(1) 1.5	1	2
Physical Therapists	4	0	(2) 3	0	1
Physician's Assistants	3.5	0	(1) 1.5	1	1
Psychiatric Technicians	3.5	0	(1) 1.5	1	1
Registered Dental Assistants	3.5	0	(1) 1.5	1	1
Registered Dental Hygienists	3.5	0	(1) 1.5	1	1
Trainer, Guide Dogs for the Blind	2.5	0 (if training received in school)	(1) 1.5	1	0
Licensed Vocational Nurses	2.5	0	(1) 1.5	0	1
Nurses—Midwives	2.5	0	(1) 1.5	0	1
Animal Health Technicians	2.5	0	(1) 1.5	0	1
Physical Therapy Assistants	2.5	0	(1) 1.5	0	1

TABLE B
NONHEALTH PROFESSIONS

Profession	Total Points	Experience Re-requirement (beyond education requirements)	Impact (1.5 Multiplier)	Discretion	Lack of Practical Training
Engineers	10.5	6 years (4 year college degree counts as 4 years)	(3) 4.5	3	3
Architects	9.5	8 years (5 year approved architect degree satisfies 5 years)	(3) 4.5	3	2
Contractors	8	4 years	(2) 3	2	3
Employment Agencies	8	1 year	(2) 3	2	3
Private Investigators	8	2 years	(2) 3	2	3
Pest Control Operators	6.5	2-4 years (depending on branches)	(1) 1.5	2	3
Accountants	6	2-4 years (depending on educational background)	(2) 3	2	1
Cemetery Brokers	5.5	2 years	(1) 1.5	1	3
Cemetery Salesmen	5.5	0	(1) 1.5	1	3
Collection Agency Operators	5.5	1 year	(1) 1.5	1	3
Construction Inspectors	5.5	4-5 years	(1) 1.5	1	3
Field Representatives (Pest Control)	5.5	6 months	(1) 1.5	1	3
Funeral Directors	5.5	0	(1) 1.5	1	3
Geologists	5.5	7 years (B.S. in the field counts as 2 yrs. Up to 2 years for graduate work)	(1) 1.5	1	3
Geophysicists	5.5	7 years (B.S. in the field counts as 2 yrs. Up to 2 years for graduate work)	(1) 1.5	1	3
Insurance Adjusters	5.5	2 years	(1) 1.5	1	3
Landscape Architects	5.5	6 years (4 year degree from board-approved program = 4 years)	(1) 1.5	2	2
Nurses Registries	5.5	2 years (experience in personnel)	(1) 1.5	1	3
Private Patrol Operators	5.5	1 year	(1) 1.5	1	3
Repossessors	5.5	1 year	(1) 1.5	1	3
Fabric Care	4.5	0	(1) 1.5	0	3
Embalmers	3.5	2 years (disposition of 100 human bodies)	(1) 1.5	0	2
Barbers	2.5	12-15 months	(1) 1.5	1	0
Cosmetologists	2.5	0	(1) 1.5	1	0
Electrologists	2.5	0	(1) 1.5	1	0
Certified Shorthand Reporters	1.5	0	(1) 1.5	0	0
Cosmeticians	1.5	0	(1) 1.5	0	0
Manicurists	1.5	0	(1) 1.5	0	0

Table A, Health Occupations, lists 30 health occupations and their experience requirements, and charts their factor ratings. The occupations are listed in descending order on total number of points. Occupations having an identical total number of points are listed in random order. As Table A indicates, the point-range among the nine health occupations requiring experience is 5.5 to 8.5. Among the 21 health occupations not requiring experience, the point range is 2.5 to 6.0; eight of these occupations rate 5.5 to 6.0, which is identical to the rating of the health occupations that do require experience. Thus, if dentists, registered nurses, veterinarians, chiropractors, hearing aid dispensers, nursing home administrators, podiatrists, and registered social workers (all 5.5 to 6.0) need no experience for licensure, it would seem that pharmacists, speech pathologists, audiologists, and dispensing opticians (5.5 to 6.0) should be similarly treated.

Table B, Nonhealth Occupations, lists 28 occupations, 20 of which require experience as a prerequisite to licensure. Here, the point range among occupations requiring experience is 2.5 to 10.5 (only five of the 20 nonhealth occupations requiring experience rate above seven). Table B indicates that construction inspectors, funeral directors, insurance adjusters, pest control field representatives and geologists all rated 5.5 using the factor approach, indicating that all should have similar experience requirements. In reality, however, the required experience for these fields ranges from zero to seven years. No conceivable rationale can account for this random table of requirements.

SUGGESTED APPROACH TO RATIONALIZING THE EXPERIENCE REQUIREMENTS

Table B, with 20 nonhealth occupations requiring experience shows only five occupations in the range 8.0 to 10.5. There is a clear gap between these five and the other 15 nonhealth occupations requiring experience, as evidenced by the fact that the 15 others range from 2.5 to 6.5. Table A shows nine health occupations requiring some form of experience. Of the nine, six have factors of over 7, two have factors of 6, and one has a factor of 5.5.

Thus, there are 11 (of 58) health and nonhealth currently licensed occupations surveyed which can, perhaps, be distinguished as to the necessity for an experience requirement (such as those that possess factors of seven or more). Two of these 11 occupations, physicians and osteopaths, have an impact and discretion that may be so great as to warrant an experience requirement despite extensive practical training. Each of the remaining of these 11 occupations involves at least moderate impact and discretion and lacks some practical training (a 3, 2, 2 profile) so that an experience requirement would appear to be reasonable. Those occupations meeting this standard are: psychologists; marriage, family and child counselors; educa-

tional psychologists; clinical social workers; engineers; architects; contractors; employment agency operators; and private investigators. Among the 18 occupations currently requiring experience, which such a standard would eliminate from the list, are barbers (2.5) and embalmers (3.5). Additionally, a case could be made for a substantial reduction of experience requirements for a host of occupations including accountants, geologists, dispensing opticians, landscape architects, etc.

Once it has been established that some sort of experience will be required for an occupation, a scale of length of experience requirements reflecting the point spread from base (7) to apex (10.5) should be devised. Logically, an occupation scoring seven should have a relatively short experience requirement, while an occupation scoring 10.5 should have a more lengthy experience requirement. A continuum of experience (perhaps nine months to two years), paralleling the range of total points would rationalize a now chaotic situation that finds contractors (8) requiring four years for licensure, employment agency owners (8) requiring one year for licensure, and educational psychologists (7) requiring three years for licensure.

RECOMMENDATIONS

Given the lack of rationality in the current scheme, the legislature should act to establish a mechanism to rationally review existing statutes to determine the kind and extent of experience, if any, that may be necessary and proper for the health and safety of the public. Whereas it may be difficult for the legislature in any given instance to act rationally with regard to experience requirements, the legislature could establish a mechanism to determine whether individual experience requirements were a valid and reasonable basis by which to assess an individual's competence to practice an occupation. The legislature, for example, could establish a licensing commission, one of whose duties would be to recommend to the legislature the appropriate level, if any, of experience required for licensure for existing occupational practice acts and new occupational practice acts through the utilization of a model similar to the model proposed in this article.

An alternative mechanism the legislature might utilize is to establish statutory language mandating that it examine any new or existing experience requirements according to a set of statutory guidelines similar to those suggested in the model developed for this article.

CONCLUSIONS

This article has examined 58 licensed occupations with respect to any experience standard that must be met by an applicant prior to becoming eligible for licensure. It has been found, generally, that whether or not an experience standard is required, and to what length, if required, has not been

rationally determined by the legislature. Such requirements in many, if not most instances, appear random and without any rational basis.

Any particular experience requirement could be subject to judicial review if such requirement could be proved to the satisfaction of the court that it was without any rational basis. While it is unlikely that court review will take place, it is possible particularly if it can be proved that an individual was denied due process in exercising his or her right to work by the imposition of an unreasonable, arbitrary or irrational experience standard. Regardless of whether the judiciary acts, however, and given the importance of occupational freedom, experience requirements remain of primal importance for legislative determination.

The legislature currently has no method to determine whether or not an existing or new experience requirement unreasonably burdens a prospective individual in obtaining an occupational license. Until the legislature establishes a policy to rationally determine the appropriateness of such requirements, licensing laws cannot adequately serve the twin interests of freedom to practice one's chosen occupation and protection of the consumer public.

Although the efficacy of prior experience for any of the occupations is a question that needs further study, the present article sets forth useful guidelines for analyzing the need for experience requirements, as new licensing measures are proposed and as existing standards are reviewed by the legislature. In the absence of such a systematic approach to determining the need for experience requirements, the exercise of the state's police power to regulate occupational entry may be without any rational basis and violative of due process.

