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OPINION	:	No. 81-1209
of	:	MAY 6, 1982
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THE HONORABLE DAVE ELDER, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following rephrased questions:

1. Is the practice of hairbraiding included within the practices of cosmetology?

2. May the cosmetologist licensure requirement be constitutionally applied to a person engaged solely in the practice of hairbraiding for compensation?

CONCLUSION

1. The practice of hairbraiding is included within the practices of cosmetology.

2. The cosmetologist licensure requirement may be constitutionally applied to a person engaged solely in the practice of hairbraiding for compensation.

ANALYSIS

The Cosmetology Act ("Act") is codified at chapter 10 of division 3 of the Business and Professions Code, commencing with section 7300.[1] Section 7320 of the Act states:

> "No person, firm or corporation shall conduct or operate a cosmetological establishment, school of cosmetology, hairdressing shop, beauty parlor or any other place of business in which the *art of cosmetology* or any of its branches is taught or practiced, except the branch of manicuring as practiced in a barbershop, unless licensed under the provisions of this chapter and complying with the provisions of this chapter relating to sanitation. Any violation of this section is a misdemeanor." (Emphasis added.)

(See also §§ 7325, 7326.)

Exceptions to the licensing requirements are found in sections 7322, 7323 and 7324. Section 7322 excepts the unlicensed practice of cosmetology in cases of emergency, domestic unlicensed practice without compensation, and the practice by a licensee outside a licensed school where the recipient is physically incapacitated or ill. Section 7323 excepts the recommendation, demonstration, administration or sale of cosmetics by any person not claiming himself or herself to be a cosmetician. Subdivisions (a) through (d) of section 7324 exempt from the prohibition on the unlicensed practice of cosmetology (a) persons licensed in the State to practice medicine, surgery, dentistry, pharmacy, osteopathy, chiropractic, naturopathy or podiatry, (b) commissioned officers of the medical corps of the armed services, or Public Health Service when engaged in the actual performance of their official duties, and the attendants attached to such services, (c) barbers, in certain circumstances, including arranging, dressing, curling and waving (except permanent waving), cleansing, cutting, or singeing the hair of any person; and (d) persons employed to render cosmetological services in the performing arts industries.

Section 7321 states:

> "The art of cosmetology includes any and all and any combination of the following practices:

[1] Hereafter all section references are to the Business and Professions Code unless otherwise indicated.

"(a) Arranging, dressing, curling, waving, machine less permanent waving, permanent waving, cleansing, cutting, singeing, bleaching, tinting, coloring, straightening, dyeing, brushing, beautifying or otherwise treating by any means the hair of any person.

"(b) Massaging, cleaning or stimulating the scalp, face, neck, arms, bust or upper part of the human body, by means of the hands, devices, apparatus or appliances, with or without the use of cosmetic preparations, antiseptics, tonics, lotions or creams.

"(c) Beautifying the face, neck, arms, bust or upper part of the human body, by use of cosmetic preparations, antiseptics, tonics, lotions or creams.

"(d) Removing superfluous hair from the body of any person by the use of electrolysis or by the use of depilatories or by the use of tweezers, chemicals, preparations or by the use of devices or appliances of any kind or description, except by the use of light waves, commonly known as rays.

"(e) Cutting, trimming, polishing, tinting, coloring, cleansing or manicuring the nails of any person.

"(f) Massaging, cleansing, treating or beautifying the hands of any person."

We are asked whether the practice of hairbraiding is included within the practices of cosmetology. As seen by section 7321(a), the art of cosmetology includes the practice of "[a]rranging . . . beautifying or otherwise treating by any means the hair of any person." According to Webster's Third New International Dictionary (3d ed. 1961) to "braid" is ". . . to do up (the hair) by interweaving three or more strands together into one or more lengths . . . ." (Cf. "plait.") Giving the language of section 7321(a) its usual and ordinary import (cf. *People* v. *Bellici* (1979) 24 Cal.3d 879, 884; *Moyer* v. *Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230), it is our view that the practices of the art of cosmetology encompass the practice of hairbraiding since braiding is a form of "arranging" ("to put into a deliberate order or relation") and may be said to "beautify" a person's hair ("to make beautiful: as adorn in order to mask or transform the plain or unpleasant . . ."). (Webster's Third New Internat. Dict., *supra*.)

Our conclusion that hairbraiding constitutes an act of cosmetology requires that one who desires to perform such act for compensation be licensed to do so (§ 7320) except as otherwise provided in sections 7322, 7323, and 7324. (Compare 59 Ops.Cal.Atty.Gen. 587 (1976).) We now consider whether the cosmetologist licensure

requirement may be constitutionally applied to a person engaged solely in the practice of hairbraiding for compensation.

The various practices included within the art of cosmetology, as defined in section 7321, are divided into four "branches": namely, cosmetology (§§ 7330-7334), electrology (§§ 7339-7349), manicuring (§§ 7350-7351), and facials (§§ 7354-7356). As we stated in 59 Ops.Cal.Atty. Gen., *supra*, at 588-589:

> ". . . Each of these branches includes certain practices of cosmetology mentioned in section 7321. In order to engage in those practices included in a specific branch of cosmetology, an individual is required to obtain a license to do so from the State Board of Cosmetology . . . and an individual may not engage in any practice of cosmetology for which he or she has not been licensed."

With respect to the branch of cosmetology, section 7330 states:

> "A cosmetologist is any person who engages in the practice of cosmetology in a licensed cosmetological establishment except the branch of electrolysis."

Section 7331 reads:

> "A junior operator is any person who is engaged in learning or acquiring knowledge of the occupation of a cosmetologist, in a licensed cosmetological establishment, under a licensed cosmetologist."

The qualifications for a cosmetologist's license are set forth in section 7332 which provides:

> "The board shall admit to examination for a certificate of registration and license as a cosmetologist any person who has made application to the board in proper form, paid the fee required by this chapter, and who is qualified as follows:
>
> "(a) The applicant is not less than 17 years of age.
>
> "(b) The applicant has not committed any acts or crimes constituting grounds for denial of licensure under Section 480.

"(c) The applicant has completed the 10th grade in the public schools of this state or its equivalent.

"(d) The applicant has had any one of the following:

"(1) Training of at least 1,600 hours, in a school of cosmetology approved by the board.

"(2) Practice of the occupation of a cosmetologist, for a period of four years outside of this state. Each three months of such practice shall be deemed the equivalent of 100 hours of training for qualification under paragraph (1) of this subdivision.

"(3) Service for at least two years as a licensed junior operator in a licensed cosmetological establishment in which all of the occupations of a cosmetologist are practiced.

"(4) Practice of the occupation of a licensed barber in this state within the last preceding two years, and has completed a 400-hour approved course in a cosmetology school licensed by the board.

"(5) Completion of a 1,500-hour course in a barbering school licensed by the State Board of Barber Examiners and has completed a 400-hour approved course in a cosmetology school licensed by the California Board of Cosmetology."

The curriculum for the cosmetologist course covering 1,600 hours of technical instruction is set forth in section 916 of title 16 of the California Administrative Code. The course includes wet hair styling, thermal hair styling, permanent waving, chemical straightening, haircutting, haircoloring and bleaching, scalp and hair treatments, facials (manual and electrical), eyebrow arching and hair removal, makeup, manicuring and pedicuring. (16 C.A.C. § 916(a)(5)-(15); cf. § 7310.)

Looking to the other branches of cosmetology we see that: An "electrologist" removes hair from, or destroys hair on, the human body by using only an electric needle. (§ 7340.) A "manicurist" engages in cutting, trimming, polishing, coloring, tinting, cleansing or manicuring the nails of any person or massaging, cleansing, treating, or beautifying the hands of any person. (§ 7350.) And a "cosmetician" gives facials and skin care; applies makeup and eyelashes; removes hair by tweezing, depilatory or waxing; beautifies the face, neck, arms, bust or upper part of the human body by use of cosmetic preparations, antiseptics, tonics, lotions or creams; and massages, cleanses or stimulates

the face, neck, arms, bust or upper part of the human body by means of the hands, devices, apparatus, or appliances, with the use of cosmetic preparations, antiseptics, tonics, lotions or creams. (§ 7354.)

None of these latter branches covers the practice of hairbraiding. Only the licensure requirement of the branch of cosmetology would apply to a person desiring to practice hairbraiding for compensation.[2] The cosmetologist licensure requirement, as previously noted, includes instruction not only in matters pertaining to the hair but facials, manicuring and pedicuring as well. (§§ 7321, 7330, 7332; 16 C.A.C. § 916(a).) In this regard section 7372 states:

> "Examinations for certificates of registration and license as cosmetologists *shall include* practical demonstrations in shampooing the hair, haircutting, hairdressing, permanent waving, wet hairdressing, water waving, hair coloring, *manicuring and facial and scalp massage* with the hands. The practical examination shall also include the standard methods for dressing all textures of hair, including thermal hair pressing and curling and chemical straightening. They shall also include either written or oral tests, or both, in antisepsis, sterilization, sanitation, the use of mechanical apparatus and electricity as applicable to the practice of the occupation of a cosmetologist, and the use of chemical hair straighteners. They may include such other demonstrations and tests as the board, in its discretion, may require.
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> "The scope of examinations in any other branch of cosmetology shall be such as the board, by regulation, in its discretion, may require." (Emphases added.)

A passing grade of 75 percent, based on a grading of 75 points for the practical examination and 25 points for the written examination, is required. (16 C.A.C. § 961.)

With respect to whether the foregoing requirements may be constitutionally applied to a person who engages solely in the practice of hairbraiding for compensation, our attention has been directed to the case of *Whitcomb* v. *Emerson* (1941) 46 Cal.App.2d 263.

In *Whitcomb* the plaintiff engaged in a practice "consisting only of massaging, stimulating and beautifying the face, neck and upper part of the human body

[2] A junior operator's license (§ 7331) is of temporary duration to be used only for purposes of training. (See 21 Ops.Cal.Atty.Gen. 203, 204-205 (1953).)

by means of the hands and use of an oil lotion. . . ." (*Id.*, at p. 266.) This was said to constitute an act of cosmetology. (*Id.*, at p. 270.) The court found that plaintiff's occupation was independent and unrelated to the occupations of waving, coloring and shampooing the hair, manicuring or electrolysis which also constituted the practice (now "art") of cosmetology. (*Id.*, at p. 27.) After stating that the state could control a person's right to engage in a lawful occupation by means of reasonable regulation, the court concluded ". . . that while the several occupations specified in the [cosmetology] act are proper subjects of legislative regulation, the relation of those having no reasonable natural association insofar as they apply to the instant case and an attempted enforcement thereof against the plaintiff, amounts to the taking of her property without due process of law and a denial to her of the equal protection of our laws." (*Id.*, at pp. 273-276, 277.)

While *Whitcomb* was concerned with a person engaged solely in the practice of facials, the court's decision therein that there is no reasonable natural association between such practice and matters pertaining to hair care, thereby rendering unconstitutional the requirement that such person be proficient in hair care as well as facials, would support the conclusion that one engaged solely in a practice relating to hair care cannot be constitutionally required to be proficient in giving facials in order to engage in the practice of hair care. In fact the court in *Baker* v. *Daly* (D.C. Oregon 1926) 15 F.2d 881, cited in *Whitcomb* (46 Cal.App.2d at 277), came to that conclusion. (15 F.2d at 881-882.) The *Whitcomb* case therefore casts doubt on the constitutional validity of the cosmetologist licensure requirement set forth in section 7372 and California Administrative Code, title 16, section 961, that one who desires to engage solely in the practice of hairbraiding must also have knowledge of and be proficient in the giving of facials and manicures.

Whitcomb has not been expressly overruled but its holding is of doubtful validity today. The appellate court in *Doyle* v. *Board of Medical Examiners* (1963) 219 Cal.App.2d 504, 510 cited *Whitcomb* for the proposition that "[i]n the field of occupational licensing the requirement must have a 'rational connection' with fitness to practice the particular vocation or profession; otherwise it is discriminatory and arbitrary." The *Doyle* court went on to state at pages 511-512:

> "In this area of adjudication judges must take care to pursue objective legal standards rather than personal economic and social predilections . . . Decisions of the federal supreme court and of the California Supreme Court demonstrate that legislative motivation plays no role in constitutional judgments . . . Nor are political slogans revolving around the free enterprise concept appropriate to the judgment. Unless that judgment is to have the arbitrariness claimed for the statute under attack, we must seek out and apply such objective, judicially established standards as are available.

"These standards, caught up in the flux of social development and shifting judicial attitudes, have undergone considerable change. The tide of judicial supervision over regulatory legislation ran high during the first three decades of the century. Courts indulged in independent investigations of reasonableness and nullified statutes regarded as arbitrary. Judicial veto of economic legislation deemed to be unreasonable or arbitrary occurred in many notable decisions . . . During the thirties a turn of the tide was marked . . . The tide has continued in ebb stage. A representative expression of current doctrine is *Williamson* v. *Lee Optical of Okla.*, *supra* [1955], 348 U.S. 483, at pp. 487-488 [75 S.Ct. 461, 99 L.Ed. 563, 571-572]: 'The Oklahoma 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 new requirement . . . But the 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 . . . "For protection against abuses by legislatures the people must resort to the polls, not to the courts."'

"The two cases on which petitioner relies . . . are prime examples of the court's former tendency to veto state economic regulations on constitutional grounds . . . both cases cite a dictum in *Mugler* v. *Kansas*, 123 U.S. 623, 661 [8 S.Ct. 273, 31 L.Ed. 205, 210], which expresses the now-discredited notion that the courts will invalidate economic legislation found, after judicial inquiry, to be unreasonable." (Citations and fns. omitted.)

The *Doyle* court then stated (*id.*, at pp. 514-515):

". . . As we understand current doctrine, judicial 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 . . .

"In determining validity of police power exercises, California decisions of the past voiced the notion that regulatory restrictions on private liberty will be balanced against the benefit to the public . . . Again, it has been said that the extent of regulation of private business must be

> commensurate with the evils to be remedied . . . The qualitative role implied by such pronouncements has been renounced *sub silentio* in the more recent decisions. If the judicial arm stops swinging upon postulation of any rationally acceptable hypothesis for the statute, without regard to the real facts which motivated its enactment, there is little elbow room for balancing private burdens against public benefits. The process stops as soon as any public benefit is hypothesized."

The more liberal attitude toward use of the state's police power for licensing purposes, as expressed in *Doyle*, continues today. (See *Rees* v. *Department of Real Estate* (1977) 76 Cal.App.3d 286, 299; *Naismith Dental Corp.* v. *Board of Dental Examiners* (1977) 68 Cal.App.3d 253, 259; cf. *Anderson* v. *Department of Real Estate* (1979) 93 Cal.App.3d 696, 701; Barron, *Business and Professional Licensing-California, A Representative Example* (1966) 18 Stan. L.Rev. 640, 657.) In the case of *Varanelli* v. *Structural Pest Control Board* (1969) 1 Cal.App.3d 217, 222 (pet. for hg. den. Dec. 17, 1969), the appellate court (2nd dist., div. 2) stated:

> "Cases cited by appellant, *Whitcomb* v. *Emerson* . . . were decided in an era less receptive to economic legislation. In *Whitcomb*, the court found that it was unreasonable and arbitrary for a person working only as a masseuse to be required to pass an examination in the other aspects of cosmetology. The court in *Whitcomb* held that the case before it involved the regulation of the occupation of a masseuse. The court said in effect, that the Legislature should have established a special license for 'facial massage.' . . ."

The *Varanelli* court then cited *Doyle* for the current doctrine of judicial review "that judicial examination of a statute under economic due process attack is completed when any fact or facts appear, or may be hypothesized, which the Legislature might rationally have accepted as the basis for a finding of public interest." (*Ibid.*) Utilizing this standard of review, the court determined there were many rationally acceptable hypotheses for requiring a door to door solicitor for a structural pest control operator to be licensed as a structural pest control operator or as a field representative. (*Id.*, at pp. 223-224.)

In *Rees* v. *Department of Real Estate*, *supra*, 76 Cal.App.3d at page 298, the appellate court (lst dist., div. 1) stated:

> "Finally, chiefly in reliance on the early holding of *Whitcomb* v. *Emerson* . . . appellant contends that the licensing statutes as applied to his activities are overbroad and violate the Fifth and Fourteenth Amendments to the federal Constitution. While conceding the validity of the licensing statutes, he argues there is no reasonable relationship between the skills

> required in the conduct of his business [soliciting general public as prospective tenants in anticipation of a compensation, *i.e.*, an advance fee rental agent] and those subject to regulation under the real estate licensing laws. Focusing upon certain statutory qualifications for a real estate license, he argues that to impose such irrelevant requirements upon him is arbitrary and unduly burdensome and tantamount to an unlawful taking of his property without due process and a denial of equal protection of law. For reasons we explain, this claim is unsound.
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> "*Whitcomb* (decided over three decades ago), in somewhat colorful prose found constitutional infirmity in a statute requiring a face masseuse to obtain a license in cosmetology. That holding was appropriately characterized in *Varanelli* v. *Structural Pest Control Board* . . . as a product of an 'era less receptive to economic legislation.' . . ." (Fns. omitted.)

The *Rees* court then cited the *Varanelli* court's characterization of the current doctrine of judicial review, and determined there was a rational basis for requiring advance fee agents to possess a real estate license. (*Id.*, at p. 299; cf. *Anderson* v. *Department of Real Estate*, *supra*, 93 Cal.App.3d at p. 701.)

On the basis of *Doyle* and the other recent cases, it is our view that given the opportunity to do so, today's courts would overrule the holding of the *Whitcomb* case that the practice of facials has no reasonable natural association with the other practices of cosmetology thereby rendering unconstitutional the requirement that a person desiring to engage solely in the practice of facials be proficient in such other practices. In fact the tenor of the recent cases suggests an overruling of *Whitcomb sub silentio*.

Therefore, in assessing the constitutionality of the cosmetologist licensure requirement, we look not to *Whitcomb* but the current doctrine of judicial review, "that judicial examination of a statute under economic due process attack is completed when any fact or facts appear, or may be hypothesized, which the Legislature might rationally have accepted as the basis for a finding of public interest." (*Varanelli*, *supra*, 1 Cal.App.3d at 222.) As a basis for the statutory scheme relating to cosmetologists, section 7326 states:

> "The Legislature in establishing the various classifications of licenses to engage in the practice of cosmetology, and in establishing the qualifications which must be fulfilled as a prerequisite for the issuance thereof, finds that such classifications and qualifications are vital and necessary to protect the public health, safety, and welfare of the people of this State, and any person who engages in the practice of any branch of cosmetology for compensation received or expected without holding a valid

> unexpired license therefor pursuant to the provisions of this chapter is guilty of a misdemeanor."

From this declaration of purpose, it may be hypothesized that the Legislature, in the interest of the public health, safety and welfare, intended standardization of the minimum skills required for a person to work as a cosmetologist. (Compare *Doyle*, *supra*, 219 Cal.App.2d at 508, 515-517.) The foregoing hypothesis, along with the fact that all of the acts or practices covered by the branch of cosmetology relate to bettering the physical appearance of the human body (see § 7321), thereby providing a "rational connection" between the requirement of knowledge of such acts with fitness to practice as a cosmetologist (cf. *Doyle*, *supra*, 219 Cal.App.2d at 510), is all that is required under current standards to withstand an economic due process attack.

As to the argument that the cosmetology licensure requirement results in a denial of equal protection to a person who engages solely in the practice of hairbraiding, we find the following quote from the case of *Ex Parte Whitley* (1904) 144 Cal. 167, 178 most appropriate:

> "The law, no doubt, is discriminatory, *but not in any constitutional sense*. It does not discriminate between classes. The discrimination goes to the degree of learning and skill which all applicants for examination must possess. It discriminates between those who have the necessary degree of learning and skill, and those who have not; between those who are able and those who are unable to acquire it. It is not an unreasonable or capricious discrimination applying to classes as such, or members of a class, but is based solely upon professional qualifications. It is a discrimination which, in the interest of the public welfare, it is the duty of the legislature to make, and the necessity for which, and its nature and extent . . . depend primarily upon the judgment of the legislature, which, when reasonably exercised, the courts cannot control." (Emphasis added.)

And as stated in *Varanelli* v. *Structural Pest Control Board*, *supra*, 1 Cal.App.3d at page 224:

> ". . . Equal protection of the law is not denied because a regulatory statute includes some persons, or classes of persons, who might rationally have been excluded. Basically, the establishment of proper classifications reside in the legislative domain, and the judiciary will not intrude unless the classes created for separate treatment represent invidious discrimination, that is, treatment which has no rational basis in relation to the specific objective of the regulatory legislation."

Since we believe the legislative objective is to standardize the skills of cosmetology practitioners, we find the cosmetology licensure requirement to have a rational basis. Such licensure requirement, when applied to a practitioner who only engages in the practice of hairbraiding, does not deny such practitioner equal protection of the law.

We conclude that the cosmetologist licensure requirement may be constitutionally applied to a person engaged solely in the practice of hairbraiding for compensation.

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