

THE USE AND MISUSE OF THE RIGHT-PRIVILEGE DISTINCTION IN LICENSE REVOCATION: WHAT'S SO HOT ABOUT COSMETOLOGY SCHOOL?

The operator of a cosmetology school in Iowa is entitled to notice and hearing in the event of license revocation proceedings against him,¹ as is the operator of a licensed taxicab service in New York.² The holder of a liquor license in Iowa has no such right;³ nor does the holder of a license to sell and deliver milk in New York.⁴ This difference is based on the classification of occupations into two categories: rights and privileges. Rights are those activities which a state cannot exclude completely; privileges are activities which the state can exclude if it so chooses.⁵ If an occupation is classified as a right, the licensee is constitutionally entitled to notice and hearing since his occupation constitutes property and a denial of notice and hearing would violate due process.⁶ If an

¹ *Gilchrist v. Bierring*, 234 Iowa 899, 14 N.W.2d 724 (1944).

² *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E.2d 421 (1954).

³ *Michael v. Town of Logan*, 247 Iowa 574, 73 N.W.2d 714 (1955); *Walker v. City of Clinton*, 244 Iowa 1099, 59 N.W.2d 785 (1953).

⁴ *People ex rel. Lodes v. Department of Health*, 189 N.Y. 187, 82 N.E. 187 (1907).

⁵ *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). *Gilchrist v. Bierring*, 234 Iowa 899, 14 N.W.2d 724 (1944), recognizes the "distinction between the granting of licenses in certain occupations, as the sale of liquor or cigarettes, which the state has the absolute right to prohibit entirely, and the granting of a license to operate a legitimate business which the state cannot prohibit, but can only regulate." *Id.* at 909-10, 14 N.W.2d at 729-30.

⁶ *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal. App. 2d 776, 194 P.2d 148 (Dist. Ct. 1948); *State v. Moseng*, 254 Minn. 263, 95 N.W.2d 6 (1959); *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E.2d 421 (1954); *Wignall v. Fletcher*, 303 N.Y. 435, 103 N.E.2d 728 (1952); *Perpente v. Moss*, 293 N.Y. 325, 56 N.E.2d 726 (1944); see 1 DAVIS, ADMINISTRATIVE LAW § 7.19, at 505-06 (1958); cf. *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 120-21 (1926). Some cases suggest that even though a hearing is denied by the administrative agency, the requirement is fulfilled by judicial review. See *Koster v. Holz*, 3 N.Y.2d 639, 148 N.E.2d 287 (1958). Davis argues persuasively that such review does not constitute an adequate hearing. 1 DAVIS, *op. cit. supra* § 7.19, at 505-06. Judicial review is inadequate for two reasons. First, because examination of the facts on review is more limited than in an administrative hearing; and second, because although an agency may be reversed on appeal, there may well be a significant loss of money and reputation as a result of a business being closed down during the period of appeal as a result of an administrative order.

Most state laws permit review of administrative decisions where no hearing is allowed only by mandamus, review by certiorari being reserved for administrative decisions in cases where a hearing is required. *Koster v. Holz*, *supra*. Review by mandamus is limited to cases where the refusal to grant or not to revoke a license is arbitrary or contrary to law. This limits the reviewing court to the extremely narrow question of "whether the record discloses circumstances which leave no possible scope for the

occupation is classified as a privilege, a state's permission to engage in it does not constitute property and it can, therefore, be abridged in any manner the state chooses without violating due process.

This use of the classification has often been criticized as illogical. If the differentiation is illogical,⁷ it is argued, a licensee has a right to notice and hearing upon revocation regardless of whether the licensed activity is classified as a "right" or a "privilege." This tactic of attacking the distinction itself has met with little success.⁸ Courts appear unwilling to abandon the distinction. This comment proposes, therefore, to survey the problem as one of communication and rhetoric. The very seductiveness of the right-privilege distinction as a tool of legal argument is a phenomenon worthy of discussion.⁹ Perhaps, once this phenomenon is

reasonable exercise of . . . discretion . . ." *Stracquadanio v. Department of Health*, 285 N.Y. 93, 96, 32 N.E.2d 806, 808 (1941). See also *Adams Theatre Co. v. Keenan*, 12 N.J. 267, 96 A.2d 519 (1953); *Monachino v. State Liquor Authority*, 6 App. Div. 2d 378, 178 N.Y.S.2d 22 (1958). Surely in cases where a hearing is found to be constitutionally required, that requirement is not fulfilled by judicial review alone. That judicial review may allow some examination of the evidence does not explain why it meets due process requirements in the case of some licenses and not in others.

The other difficulty with viewing judicial review as a form of hearing is that it prevents a licensee from engaging in his occupation for a period of time. While this argument might be met by an analogy to cases permitting suspension prior to a hearing in cases where a hearing is required (see note 48 *infra*), authority supporting the analogy is ambiguous. There is a distinction between suspension and prohibition during the period of appeal. When a license is suspended, the burden is on the suspending agency to make the suspension permanent. Once a license is revoked, the revocation is final and permanent unless the licensee appeals. Thus, not only is there an evidentiary burden working against a licensee who wishes to appeal, there is also a burden of expense and initiative.

⁷ 1 DAVIS, *op. cit. supra* note 6, § 7.19, at 505-06; GELLHORN, *ADMINISTRATIVE LAW CASES AND COMMENTS* 273-82 (1947). *But see* Byse, *Opportunity to be Heard in License Issuance*, 101 U. PA. L. REV. 57, 58 (1952) which accepts the distinction for the limited purposes of liquor licenses. See also Note, 32 MINN. L. REV. 306 (1948).

⁸ *Richmond County v. Glanton*, 209 Ga. 733, 76 S.E.2d 65 (1953); *Horenstein v. Liquor Control Comm'n*, 412 Ill. 365, 106 N.E.2d 354 (1952); *Michael v. Town of Logan*, 247 Iowa 574, 73 N.W.2d 714 (1955); *Leventhal v. Michaelis*, 29 Misc. 2d 831, 219 N.Y.S.2d 508 (Sup. Ct. 1961); *Green Mountain Post No. 1 v. Liquor Control Bd.*, 117 Vt. 405, 94 A.2d 230 (1953). The use of the distinction can also blur issues when an activity is held to be a right. See *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal. App. 2d 776, 194 P.2d 148 (Dist. Ct. 1948). For recent decisions which have appeared to reject the distinction but employ arguments which are concomitants of the distinction see *State v. Moseng*, 254 Minn. 263, 95 N.W.2d 6 (1959); *Brown v. Murphy*, 34 Misc. 2d 151, 224 N.Y.S.2d 423 (Sup. Ct. 1962).

⁹ The argument always occurs within a statutory framework. The Iowa Beer and Malt Liquor Act, IOWA CODE § 124 (1962), is characteristic of the statutes involved. Section 124.20 makes it unlawful to sell liquor to a minor and makes such a sale "mandatory grounds for revocation of said permit . . ." Section 124.34 confers power upon licensing boards "to revoke any permit issued under their authority for a violation of any of the provisions of this chapter, or for any cause which in the judgment of the governing body, may be inimical to . . . [the] purposes of this chapter." There

understood, courts and lawyers will be better able to deal with the distinction. The discussion will be divided into three parts: (1) a consideration of whether the right-privilege distinction vitiates the rationale for requiring a hearing; (2) an attempt to perceive a significant pattern in the arguments courts use in upholding the distinction; and (3) an attempt to isolate the seductive element or elements in the pattern described in part two.

I

Although occupations which are rights cannot be completely prohibited, the state can regulate them. If an individual practitioner does not conform to that regulation, he may be prohibited by the state from practicing his profession. However, the state's reason for prohibiting such an individual must, constitutionally, bear a rational connection to the individual's fitness to engage in his profession.¹⁰ To prove his fitness an individual is constitutionally entitled to a hearing.¹¹

The purpose of a hearing is to determine the validity of charges which have been made. Principles of truth-finding techniques dictate that the determination of the charge be tested by the evidence and arguments of those unsympathetic to the charge, in most cases the charged party.¹²

The degree to which a charge is at all subject to rational counter-argument affects the necessity for a hearing. Thus when the charge made is one of misconduct, the person against whom it is made might be able to argue either that (1) the acts constituting misconduct did not occur or (2) that the acts charged do not constitute misconduct.¹³

In certain situations an individual or group of individuals may be removed from jobs or barred from occupations because those in authority are permitted to allow personal opinion to enter into a decision to remove or bar.¹⁴ Since such a decision involves individual feelings,

is no provision for notice or hearing before revocation unless a complaint is filed by an individual citizen under § 124.40. In the absence of such a complaint, the cases suggest that there is a mandatory requirement on the licensing boards not to have a hearing. *Michael v. Town of Logan*, *supra* note 8, at 578, 73 N.W.2d at 716; *Walker v. City of Clinton*, 244 Iowa 1099, 1107, 59 N.W.2d 785, 789 (1953). The statements to this effect are ambiguous and clearly dicta.

¹⁰ *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

¹¹ *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

¹² *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring): "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it."

¹³ 1 WIGMORE, EVIDENCE § 1 (3d ed. 1940).

¹⁴ *Fell v. State*, 42 Md. 71, 89 (1874): "[T]he legislature has power to prohibit the

the only issue is whether the barring or removing official actually possesses the state of mind he claims to possess—one of incompatibility. There is no argument or evidence which a barred or removed party could make that would refute an assertion of incompatibility. A hearing would serve no purpose in such a case.

Usually, in the absence of statutory requirements, governmental employment can be terminated without a hearing.¹⁵ This phenomenon has often been explained in terms of the unique nature of the relationship between an executive and his subordinates. “[T]he dismissal of an executive official performing executive duties is an executive function.”¹⁶ In this sense “executive” is often distinguished from “public” to emphasize the degree to which the relationship is affected only by the personalities of the individuals involved.¹⁷ In other words, courts tend to recognize incompatibility as a proper ground for termination of some kinds of governmental employment. The “executive” employment cases differ, however, from the occupational license cases in that the personal aspect which is necessary for the success of the employment relationship is not present in occupational licensing.¹⁸

It is generally agreed that a state can constitutionally prohibit certain occupations entirely.¹⁹ When a state does so prohibit an occupation, it is an indication that it has reached a determination of incompatibility with those who practice the occupation.²⁰ When, however, it tolerates

sale of spirituous or fermented liquors in any part of the State; notwithstanding a party to be affected by the law, may have procured a license, under the general license laws of the State, which have not yet expired. Such a license is in no sense a contract made by the State with the party holding the license. It is a mere permit, subject to be modified or annulled at the pleasure of the Legislature, who have the power to change or repeal the law under which the license was granted.” See *State v. Holmes*, 38 N.H. 225, 227 (1859), which states the same principle in terms of “a matter of indulgence.”

¹⁵ *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961) (dictum); *Egan v. Mayor of City of Boston*, 298 Mass. 448, 11 N.E.2d 456 (1937); *Murphy v. Curley*, 220 Mass. 73, 107 N.E. 378 (1914); *Kroop v. Common Council*, 26 Misc. 2d 127, 131, 207 N.Y.S.2d 411, 415-16 (Sup. Ct. 1960); *Ruch v. Wilhelm*, 352 Pa. 586, 43 A.2d 894 (1945).

¹⁶ *Bailey v. Richardson*, 182 F.2d 46, 56 (D.C. Cir. 1950).

¹⁷ *Egan v. Mayor of City of Boston*, 298 Mass. 448, 11 N.E.2d 456 (1937).

¹⁸ *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961): “Moreover, the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment. . . . In that proprietary military capacity, the Federal Government . . . has traditionally exercised unfettered control. . . . This case . . . involves the Federal Government’s dispatch of its own internal affairs.”

¹⁹ See *Metropolitan Bd. of Excise v. Barrie*, 34 N.Y. 657 (1866); *Burgess v. Mayor & Aldermen*, 235 Mass. 95, 126 N.E. 456 (1920).

²⁰ See note 14 *supra* and accompanying text.

an excludable occupation and revokes individual licenses for not meeting the conditions which the state has imposed on the practice of that occupation, individual revocations constitute accusations of fault.²¹ Whether such revocations must be accompanied by notice and hearing is the question this comment seeks to answer.

If the state can exclude certain occupations completely—that is if it is appropriate for the state to reach a determination of incompatibility between itself and the whole group of people who practice that occupation—can it revoke individual licenses within the excludable occupation for no refutable reason while permitting others within the same category to remain in the business? Even if the state makes no charges upon revocation, the individual whose license is revoked is to some extent tainted by comparison with those who have been permitted to remain in business. Since the comparison is always possible, there must be some ground for distinguishing between these categories of licensees.²² An individual, then, might at least be able to prove at a hearing that the application of the reason for revocation to himself is based on inaccurate factual determinations.²³

²¹ The cases discussed in Part II of this comment all involve explicit accusations of fault or breach of condition. See, e.g., *Walker v. City of Clinton*, 244 Iowa 1099, 1108-12, 59 N.W.2d 785, 789-92 (1953).

²² It is not necessary to argue that a revocation without notice and hearing is unconstitutional, to argue that it is unconstitutional for the state to revoke the license of an individual, engaged in an occupation which is a privilege, for no reason or for an arbitrary reason. The argument that it is unconstitutional for the state to do so would be in part founded on equal protection: that an injury has been done to the individual licensee that was not done to the others, and for no good reason, thus drawing an unreasonable classification. There is language in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), which, although explicitly dicta, would suggest this conclusion. *Yick Wo*, however, involved the regulation of the laundry business, presumably a "right." The Court was more explicit in requiring a reasonable basis for exclusion (and presumably for revocation) as a due process test regardless of whether the activity involved is a "right" or a "privilege" in *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957). The state cases generally find that no grounds or arbitrary grounds are constitutional. See, e.g., *Cooke v. Loper*, 151 Ala. 546, 44 So. 78 (1907). But there are cases which appear to go the other way. See *Sheldon v. Hoyne*, 261 Ill. 222, 103 N.E. 1021 (1913).

²³ The difficult case arises when there appears to be nothing involved but a legislative determination of incompatibility. For example, if a town council decides that there should be only ten taverns in town when there are in fact eleven, it could decide which one to exclude by drawing straws. The tavern keeper whose license is revoked, however, should at least be able to challenge at a hearing some impropriety in the drawing.

A similar problem might arise in a retroactive zoning case. All taverns zoned out of an area near a school might have nothing to dispute other than the legislative determination of their undesirability in that area. However, zoning cases appear to be more like the revocation of occupational licenses as a whole, since, because of their unique location, the tavern operators cannot complain of unequal protection based on unreasonable classification.

Since refutation is always possible to some degree when an individual license is revoked, the rationale of the hearing principle is always applicable in revocation cases. In view of this, the tenacity of the arguments supporting the use of the right-privilege distinction is disturbing.

II

There are two arguments most frequently invoked in support of the distinction: one, that if the state so decided, it could completely prohibit the practice of certain licensed activities, and that therefore the licensee has no constitutionally protected "property";²⁴ and two, that the activities which are termed privileges in some sense pose a greater threat to the welfare of the community than do those occupations termed rights.²⁵ An argument less frequently used is that the practice of a privilege is of less value to the licensee than the practice of a right.²⁶ Whether these justifications²⁷ are of any value depends on two factors: whether they serve to point out significant differences between different occupations for any purpose whatever; and whether they serve to indicate any significant reasons for requiring notice and hearing for the revocation of some licenses and denying them for others.

The first argument, that the state could completely prohibit certain activities if it so decided, is the most common. It is contended that the licensee's right to engage, for example in the operation of a poolroom,²⁸ is based entirely on the statute and limited by the qualifications of the

²⁴ Richmond County v. Glanton, 209 Ga. 733, 76 S.E.2d 65 (1953); Phillips v. Head, 188 Ga. 511, 4 S.E.2d 240 (1939); Hornstein v. Liquor Control Comm'n, 412 Ill. 365, 106 N.E.2d 354 (1952); Cassidy v. Drake, 154 Ky. 25, 156 S.W. 1032 (1913); State v. Cote, 122 Me. 450, 120 Atl. 538 (1923); City of Revere v. Riseman, 280 Mass. 76, 181 N.E. 716 (1932); Burgess v. Mayor & Aldermen, 235 Mass. 95, 126 N.E. 456 (1920); Nulter v. State Road Comm'n, 119 W. Va. 312, 193 S.E. 549 (1937).

²⁵ Commonwealth v. Kinsley, 133 Mass. 578 (1882); Wallace v. Mayor of Reno, 27 Nev. 71, 73 Pac. 528 (1903); People *ex rel.* Lodes v. Department of Health, 189 N.Y. 187, 82 N.E. 187 (1907); Mehlos v. City of Milwaukee, 156 Wis. 591, 146 N.W. 882 (1914). This approach, as a means of distinguishing, is approved by MacCormack, *Notice and Hearing Before Administrative Revocation of Business Licenses in Massachusetts*, 27 B.U.L. REV. 125 (1947). See also Note, 32 MINN. L. REV. 308 (1948).

²⁶ State v. Moseng, 254 Minn. 263, 271, 95 N.W.2d 6, 12 (1959); Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954); Wignall v. Fletcher, 303 N.Y. 435, 103 N.E.2d 723 (1952); Brown v. Murphy, 34 Misc. 2d 151, 156, 224 N.Y.S.2d 423, 427 (Sup. Ct. 1962).

²⁷ A fourth argument sometimes employed is that "rights" are transferable whereas "privileges" are not. Lowell v. Archambault, 189 Mass. 70, 75 N.E. 65 (1905); People *ex rel.* Lodes v. Department of Health, 189 N.Y. 187, 82 N.E. 187 (1907). Since this is neither a formidable nor a frequent argument it will not be discussed in the text. It need only be pointed out that licenses to engage in many occupations, such as law and medicine, which have been held to be "rights," are not usually transferable.

²⁸ Commonwealth v. Kinsley, 133 Mass. 578 (1882).

statute.²⁹ It "vests no property rights in the licensee."³⁰ Thus no condition or limitation imposed by the licensing statute can be considered unconstitutional since a state's permission to engage in the activity, under any conditions, is wholly gratuitous.

Cases employing this reasoning often rely on earlier cases whose holdings do not support the proposition for which they are cited. For example, in *Metropolitan Board of Excise v. Barrie*,³¹ a liquor license had been issued the defendant under the New York excise act of 1857. The license had been issued in 1865 and was to extend well into 1866. In 1866, however, a new excise act was passed which revoked all outstanding licenses and created a new statutory basis on which new licenses had to be obtained. The defendants attacked the revocation as a denial of property without due process. It was in this context that the New York Court of Appeals declared the sale of liquor to be not a property right, but a privilege which could be prohibited entirely by the state legislature if it so decided.

For courts to extend the argument used in *Barrie* to support the proposition that persons licensed to engage in a privilege have no constitutional right to notice and hearing upon revocation requires a large logical leap. A court must reason, first, that since the state can prohibit an occupation entirely, it can revoke all outstanding licenses. On the basis of this proposition a court must then assert that individual licenses may be revoked without notice and hearing. The logic of such a step is not at all clear and the courts which have upheld denials of notice and hearing have never seen fit to clarify it.

Indeed many courts have believed *Barrie* to be so clearly on point that they have felt its mere citation to be sufficient to support a holding that the Constitution does not require notice and hearing for the revocation of licenses to engage in occupations termed privileges.³² For example, in *Martin v. State*,³³ the petitioner argued that the revocation was unconstitutional because there had been no notice or hearing. The Nebraska

²⁹ *Id.* at 579: "A licensee takes his license subject to such conditions as the Legislature sees fit to impose . . ."

³⁰ *Cassidy v. Drake*, 154 Ky. 25, 29, 156 S.W. 1032, 1034 (1913).

³¹ 34 N.Y. 657 (1866).

³² *Yarbrough v. Beardon*, 206 Ark. 553, 177 S.W.2d 38 (1944); *Hevren v. Reed*, 126 Cal. 219, 58 Pac. 536 (1899); *Cassidy v. Drake*, 154 Ky. 25, 156 S.W. 1032 (1913); *State v. Cote*, 122 Me. 450, 12 Atl. 538 (1923); *Wallace v. Mayor of City of Reno*, 27 Nev. 71, 73 Pac. 528 (1903); *Leventhal v. Michaelis*, 29 Misc. 2d 831, 219 N.Y.S.2d 508 (Sup. Ct. 1961); *People ex rel. Beller v. Wright*, 3 Hun. 306 (N.Y. Sup. Ct. 1874); *State ex rel. Zugaru v. O'Brien*, 130 Ohio St. 23, 196 N.E. 664 (1935).

³³ 23 Neb. 371, 36 N.W. 554 (1888).

Supreme Court rejected petitioner's argument citing *Barrie* for the following proposition:

There is no vested right in a license to sell intoxicating liquors, which the state may not take away at pleasure. . . . [S]uch licenses are . . . mere temporary permits to do what otherwise would be unlawful.³⁴

Courts have gone further and argued that since the activity could be entirely prohibited, the sum total of the licensee's rights reside in the statute as do the qualifications and conditions upon those rights. Since no rights can be found outside the statute, the courts argue, a state may impose any qualification it sees fit upon the right to engage in such an activity.³⁵ This position, however, raises some difficulties.

It would seem that the fact that a license may be revoked without notice and hearing is not a condition or qualification in the sense that it is imposed upon the practice of certain occupations within a state. Any argument that a denial of notice is a condition which may be imposed by a state upon the licensing of a privilege is not responsive to the rationale of the conditional privilege theory: that certain occupations are inherently dangerous and therefore must be regulated or prohibited.³⁶ If a state is to be permitted to exclude certain occupations because of their potential danger, the conditions which the state may impose on licensees must go to the regulation and prevention of that potential danger. Denial of notice and hearing cannot serve a desired regulatory purpose. It can affect but a few of those whose activities the condition was designed to regulate. It can serve only as a statement of possibility or at best a warning. It could be argued, however, that with the Damoclean sword of revocation without notice and hearing hanging over their heads, licensees will proceed in the operation of their businesses with more caution. However, this form of insuring greater caution increases the possibility that the sword will fall on the wrong head. Injecting capriciousness into the revocation process promotes fear with-

³⁴ *Id.* at 377, 36 N.W. at 557.

³⁵ *Green Mountain Post No. 1 v. Liquor Control Bd.*, 117 Vt. 405, 94 A.2d 230 (1953); *Burgess v. Mayor & Aldermen*, 235 Mass. 95, 126 N.E. 456 (1920); *Commonwealth v. Kinsley*, 133 Mass. 578 (1882).

³⁶ This argument, as well as the fallacy of arguing from condition to denial of notice and hearing, is made in Mortimer & Dunne, *Grant and Revocation of Licenses*, 1957 U. ILL. L.F. 28: "There are certain occupations which may be prohibited, and the consequences of this fact permit a much more stringent degree of regulation than that which can be applied to ordinary occupations." *Id.* at 41. The authors give the preceding statement as an explanation for denial of notice and hearing upon revocation. Professor Byse makes the same mistake. Byse, *Opportunity to be Heard in License Issuance*, 101 U. PA. L. REV. 57, 58 (1952).

out insuring that more licenses will be properly revoked than otherwise. Presumably, vigorous enforcement of the rules of the licensing agency can insure compliance more effectively than denial of notice and hearing.

Even assuming, however, that denial of notice and hearing is a "condition" consequent to a state's power to exclude, this does not necessarily mean that it can be constitutionally imposed. Historically, the theory that when a state can exclude at will, it can impose whatever conditions it pleases, was developed in the area of state restrictions on foreign corporations.³⁷ Since the corporation was a fiction of the laws of a foreign state, it had no existence beyond those laws other than what the restricting state chose to extend to it.³⁸ However, the cases recognize that whether or not the state can exclude foreign corporations, the conditions which it imposes cannot be unconstitutional.³⁹

For example, a State may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law⁴⁰

Thus by analogy to the foreign corporation cases, the power to exclude may be related to the power to impose restrictive conditions. However, by itself, the existence of the power to exclude is not helpful in indicating what conditions are unconstitutional. Therefore, the power to prohibit the sale of liquor is of no help in determining whether denial of notice and hearing is unconstitutional when a liquor license is revoked.⁴¹

Another form of the "complete prohibition" argument arises in the guise of a theory of implied consent.⁴² Professor Davis argues that a licensee could expressly waive notice and hearing upon revocation regardless of whether the activity engaged in is classified as a right⁴³ or as a privilege. Of course, in a specific case a hearing might be voluntarily waived. However, if the individual wishes to engage in the licensed occu-

³⁷ See *Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530 (1922).

³⁸ *Ibid.* See also FLETCHER, PRIVATE CORPORATIONS § 8386 (rev. ed. 1960), and cases collected therein.

³⁹ *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913).

⁴⁰ *Baltic Mining Co. v. Massachusetts*, *supra* note 39, at 83.

⁴¹ Accepting the analysis that denial of notice and hearing is not a "condition" of the sort that can be imposed by a state as a concomitant of its power to exclude, denial of notice and hearing is not an unconstitutional "condition." The unconstitutional condition argument would be useful only assuming that denial of notice and hearing is the kind of condition which the legislature would impose as a substitute for exclusion.

⁴² *State v. Cote*, 122 Me. 450, 120 Atl. 538 (1923); *City of Revere v. Riseman*, 280 Mass. 76, 181 N.E. 716 (1932).

⁴³ DAVIS, *op. cit. supra* note 6, § 7.19.

pation, to require such a waiver as a prerequisite to receipt of a license is in no sense voluntary. It is generally agreed that licenses to engage in certain occupations, for example, law, medicine and cosmetology education, cannot be constitutionally revoked without notice and hearing.⁴⁴ To coerce a waiver of such a right cannot be distinguished from a denial of the right.

Since the consent theory would appear to be inapplicable in cases involving rights, the concept is useless in distinguishing rights from privileges. It merely says that one licensed to engage in a privilege may be forced to waive a right to notice and hearing. However, even accepting the assumption of the argument, if a licensee, for example a lobster fisherman in Maine,⁴⁵ is engaging in a privilege, his consent is not necessary for a denial of notice and hearing since his license is a mere privilege anyway.

The second argument used to support the "right-privilege" distinction is that certain occupations are inherently more dangerous than others and that licenses to engage in such activities may be revoked without notice or hearing. The difficulty with this position is that it attempts to argue that in some way the inherent danger of certain occupations, for example, the operation of a dance hall,⁴⁶ can be mitigated by denying licensees notice and hearing upon revocation. While speedier administrative action may be desirable in some cases, this characteristic would not seem to distinguish rights from privileges. While the sale of liquor has traditionally been considered a privilege and the practice of medicine a right, there is little factual basis for an argument that an individual engaged in the illicit sale of alcohol poses a greater threat to the community than an abortionist.⁴⁷ It could be pointed out that such an argument begs the question, that to call a doctor an abortionist is conclusionary. On the other hand there is no reason to assume that a liquor dealer is more likely to commit illegal acts than is a doctor. The "inherent danger" argument goes to the need for swift action. Such a need is not diminished merely because an individual is a doctor, if he is also an abortionist.

It is for this reason that suspension before hearing may be permissible regardless of the nature of the licensed occupation.⁴⁸ Suspension is gen-

⁴⁴ See cases collected note 6 *supra*; *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

⁴⁵ *State v. Cote*, 122 Me. 450, 120 Atl. 538 (1928).

⁴⁶ *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N.W. 882 (1914).

⁴⁷ This argument is made by GELLHORN, *op. cit. supra* note 7, at 277.

⁴⁸ *In re Kindschi*, 52 Wash. 2d 8, 319 P.2d 824. *But cf.*, 245 Elmwood Ave., Inc. v. Liquor Authority, 14 App. Div. 2d 393, 222 N.Y.S.2d 117 (1961).

erally justified on grounds of the need for swift action before a hearing can be held. However, this justification emphasizes the alleged misconduct of specific individuals as opposed to the potential danger of entire professions. For this reason, no distinction is made, in cases involving suspension, between occupations traditionally classified as rights and those traditionally classified as privileges.⁴⁹

These first two arguments, that the state can impose any condition it chooses on certain occupations (the "consent" theory is a part of this argument) and that certain occupations are inherently more dangerous than others, suffer from a form of presbyopia. They both suffer from the fallacy of extending valid insights into problems of dealing with occupations as a whole to problems of dealing with licensed individuals. This explains why *Barrie* has been inappositely cited with regularity. This fallacy is also illustrated by *Phillips v. Head*.⁵⁰ In that case, the Georgia court held that the operation of a beer and dance hall was a privilege and therefore subject to revocation without notice and hearing. In so finding the court emphasized both the fact that the activity as a whole could be prohibited by the state and that the activity as a whole was potentially dangerous to the community. The court's failure to view the activity in any way other than as a whole is highlighted by its characterization of the scheme of regulation under which the county licensed the entire malt beverage business as a "grant of special privilege from the state."⁵¹ Nowhere in the opinion is there a consideration of the purposes of notice and hearing and why, based on these purposes, the revocation of a beer and dance hall license might differ from the revocation of a license to engage in a right.

The third argument which is raised in support of the distinction is that those occupations termed rights are more valuable to their practitioners than occupations termed privileges. Although the proponents of such position might prefer to be doctors or lawyers than bar owners or jitney operators, such an argument must appear not only disparaging⁵² but also incorrect to bar owners and jitney operators. It might be suggested that there is more value to an occupation for which there is a requirement of notice and hearing before license revocation. Other

⁴⁹ *In re Kindschi*, *supra* note 48.

⁵⁰ 188 Ga. 511, 4 S.E.2d 240 (1939).

⁵¹ *Id.* at 515, 4 S.E.2d at 242, quoting *Plumb v. Christie*, 103 Ga. 686, 30 S.E. 759 (1898).

⁵² In the face of such disparagement, the approach of the court in *Grossman v. Baumgartner*, 40 Misc. 2d 221, 228, 242 N.Y.S.2d 910, 917 (1963) (not a revocation case) is refreshing: "If there be some who find judicial concern to vindicate the right of a tattoo artist misplaced, it is only necessary to remind them that the rights of all of us are only as secure as those of the most humble and lowly among us."

than that, however, there is little to support the contention that some occupations are of more value to their practitioners than are others.⁵³

The argument that certain occupations are of more value to their practitioners than others is used only when the court finds a requirement of notice and hearing. This argument, like the first two, fails to offer any logical formulation of the distinction between rights and privileges. Nevertheless, it does seem significant that whenever the argument of "value to the individual" licensee is used, inevitably to require notice and hearing, courts examine the potential injury involved in revocation and the importance of notice and hearing to the individual licensee in that it constitutes "a condition precedent to his continuance in . . . (his) occupation."⁵⁴ It is as if at certain moments the courts, influenced by unknowing insight, recognize the fallacy of the first two arguments and, in an attempt to do justice, replace them with a third argument, equally fallacious.

III

Logically, the right-privilege distinction is of little or no relevance to a determination of whether there is a constitutional requirement of notice and hearing in license revocation cases.⁵⁵ In general, however, courts have not responded to the distinction with logical reasoning either in support or in refutation. The cases give the impression that courts, although often regretting denials of notice and hearing, consider themselves powerless to interfere with legislative omnipotence in the area of privileges.

Perhaps the key to the seductiveness of the use of the distinction lies in the difficulty a defendant has in marshalling the equities of the case in his favor. By definition, and usually in fact, he is an individual engaged in a profession which is somehow undesirable or seedy. A court

⁵³ The converse of the "value of the licensee" argument is the "value to society" argument. *Brown v. Murphy*, 34 Misc. 2d 151, 224 N.Y.S.2d 423 (Sup. Ct. 1962). While it may be true that some occupations serve the welfare of the community more than others, such a factor would not seem related to any reason why notice and hearing should be denied for the less "valuable" occupations. Consider the liquor dealer who gives half his income to charity as opposed to the doctor whose fees are high and who spends all his money on himself.

⁵⁴ *Hecht v. Monaghan*, 307 N.Y. 461, 468, 121 N.E.2d 421, 424 (1954).

⁵⁵ In *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), the Supreme Court suggested in a footnote that the "right-privilege distinction" had no significance for the disposition of federal due process questions in occupational licensing cases. *Id.* at 239 n.5. *Schware* has had some impact on the state cases. See *Board of Medical Examiners v. Weiner*, 68 N.J. Super. 468, 172 A.2d 661 (App. Div. 1961); *Brown v. Murphy*, 34 Misc. 2d 151, 224 N.Y.S.2d 423 (Sup. Ct. 1962); *In re Flynn*, 52 Wash. 2d 589, 328 P.2d 150 (1958).

is, by this fact alone, likely to view the individual licensee's extinction as inuring to society's benefit.

Thus, the route of argument most likely to be successful for an advocate is to present his client's occupation as a right. If he does, he will be able to argue the value of the occupation to his client as well as the value of the occupation to society. The difficulty with such an approach is that, regardless of whether the advocate wins, the precedential effect of the court's decision adds more support to the bulwarks of the distinction.

If the advocate cannot argue that the occupation involved is a right, as is usually the case with, for example, the sale of liquor, he then must attack the use of the distinction. The difficulty for the advocate is that an attack on the distinction is a tacit admission that the activity involved is a "privilege." To so admit, the advocate must, in effect, forego the opportunity to present the equities of the case. For he can no longer effectively take the position that the occupation is valuable to the licensee since that is a characteristic of a right, not a privilege. Furthermore, the advocate is forced to admit that the occupation is in some sense harmful to society since harmfulness is the foundation for the legislature's power to exclude it completely.

A court faced with such admissions cannot but feel that to deny a licensee an opportunity to be heard expedites the elimination of a fraction of something which in its entirety constitutes undesirable activity. In addition, an advocate usually must convince a court that it should overrule, or at least go against, a considerable body of precedent. This fact, combined with the difficulty of making a court see the situational equities, places an advocate in an unenviable rhetorical position.

Perhaps the difficulty of the advocate's position can be altered by reformulating the distinction in a manner which will permit the individual equities of the licensee to be presented. In defining a privilege courts and commentators always emphasize what the legislature could have done: the occupation could have been excluded completely because of its uselessness and undesirability. Once the question is posed in these terms, it becomes seductively easy for courts to conclude that a licensee cannot complain of harm in revocation without a hearing since he could have no such complaint if the legislature, at its whimsy, decided to revoke all such licenses.

In so formulating the issue courts fail to observe that the legislature has in fact decided to permit the occupation to exist. This indicates, perhaps, greater affirmative approval of such an occupation than of occupations over which the legislature does not possess such power.

Thus courts, under the guise of submission to legislative power, ignore a significant expression of legislative intent. An advocate attacking the

use of the distinction must start with a more accurate definition of a privilege: an occupation which the state, if it chose, could exclude but one which the legislature has decided to permit, presumably because it is of value to the community.

The courts' analytical presbyopia is explainable as a function of an inaccurate view of the occupation as a whole. This inaccurate view makes it impossible to consider the harmful aspects of revocation. To view a privilege, however, as existing because of an affirmative legislative decision emphasizes the value of the occupation and brings to light the harm caused by its termination.

The courts appear to derive a kind of fatalistic pleasure from submission to a conceptualization of power that necessarily implies its exercise. For an advocate the rhetorical difficulty resides in communicating the significance of power, unused. The advocate arguing against the right-privilege distinction must be prepared to ruffle these familiar patterns of thought. In so doing, he ought, at least, to be able to apply the soothing balm of the individual equities so that the seductive element of the problem can be removed.