Overview & Synoptic Commentary of the Legislature History of

Medical Practices Enactments of 1876, 78, 1901, 07, 09, 11, 13, 15,

17, 21, 33, 37, 74, 78, 80 & 89  ~ by Faith Gibson

[**Hyperlink to background & commentary**](#gjdgxs)

             \*\*\* Basic Vocabulary \*\*\*

The legislation commonly called the medical practices act, entitled "An Act to Regulates the Practice of Medicine", is found on pages 792-94 of the 1876 legislative record. It begins with the statement "Every person practicing medicine in any of it's departments shall posses the qualifications required by this Act". This progenitor enactment defines those qualifications as a formal medical education in a state-chartered school, it defines a "physician" as: "Any person shall be regarded as practicing medicine, within the meaning of this Act, who shall  profess publicly to be a physician and to prescribe for the sick of who shall append to his name the letter of "M.D.".

The 1913 enactment to "Regulate the examination of applicants for licensure and the practice of those licensed to treat diseases, injuries, deformities or other mental or physical conditions of human beings" (progenitor of the phrase "or other mental or physical conditions") introduces the legal concept of the "practice of medicine", which is defined as the "prescribing or administering of medicinal preparations, called drugs, and penetration or severing of human tissue". This establishes that medical practice concerns itself with the particular topic of the  treatment of the "sick & afflicted" and this classification contains two subdivisions based on distinct treatment modalities - those who employ medical & surgical treatments and "other"  practitioners who treat by "drugless" methods, such as homeopathy, osteopathy, naturopathy.

The addition of "diagnosis" as an exclusive function of the practice of medicine was created by the 1913 enactment. With this fourth & last piece in place the practice of medicine was functionally stabilized to be:

That which is concerned with the regulation of and the professional wellbeing of physicians who publicly profess to diagnose & treat disease, injury, deformity or other physical conditions by "prescribing or administering of medicinal preparations, called drugs, and penetration or severing of human tissue" and who shall use the word 'doctor' of medicine and append to his name the letters of "M.D."

The definition of the illegal practice of medicine as contained in the 1913 enactment:

"Any person who shall practice or attempt to practice or who advertises or holds himself out as practicing any system or mode of treating the sick or afflicted in this state, or who shall diagnose, treat, operate for or prescribe for any disease, injury, deformity, or other mental or physical condition of any person without having at the time of so doing a valid unrevoked certificate as provided in this act or who shall in any sign or advertisement use the word "doctor", the letters or prefix "Dr", the letters "MD" or any other term or letters indicating or implying that he is a doctor under the terms of this act .. without having a valid unrevoked certificate ... shall be guilty of a misdemeanor..."  Section 13

                       \*\*\* Overview \*\*\*

Reading the legislative record line by line, staring with this original authorizing enactment, gives one not only specific information but a flavor for the nature of this important piece of social legislation meant to be an expression of the "social contract" which holds it to be the duty and obligation of the state to protect its citizens, especially the "sick & afflicted" or those who may be "credulous", uneducated or easily taken advantage of by those in positions of authority such as is customarily accorded medical doctors or those who pose as being medically educated. The intent and content of the 1876 enactment is true to this humane purpose of government and the revisions and amendments have remained faithful to their antecedents.

It is a good piece of legislation that clearly and succinctly (1876 bill was 3 pages) addresses itself to the issues and achieves its goal of defining both a physician & medical practice, and establishing a locally-controlled board of medical examiners consisting of homeopathic, osteopathic, naturopathic and medical doctors elected by their county medical societies. Amendments and revisions between 1878 & 1913 tract the gradual metamorphosis of the regulatory process from its origin as a democratic county board to a state agency governed by a board of political appointees & comprised of only medical doctors.

The medical practices art of 1917 offered the opportunity to be a medically educated, "medically approved" midwife, but not a medical practitioner of midwifery. It was not until the creation of nurse midwifery in contemporary times (1974) that a domain of medically-educated nurse-midwives was legislatively enacted who were authorized to use the tools and techniques of medical practice (administration of drugs and penetration of human tissue). This medicalized version of midwifery is an extension of a hospital-based medical education and requires medical supervision; it is not an extension of the non-theraputic, non-medicinal, and non-interventive nature of traditional midwifery described by the 1917 medical practices act.

Midwifery as a function is not regulated by California statute; what is regulated is the midwife who takes on the status of a state-certified practice, a person "holding themselves out" to be a state-certified midwife must fulfil certain "duties and obligation": primarily that of not practicing medicine as defined by article 24.

I don't believe that this apparent neutrality to domiciliary midwifery was an oversight. It certainly wasn't done because physicians wished to favor midwives but rather because they did not like providing care to those mothers who were most frequently the clients of traditional midwives - the disadvantaged who could not pay professional fees and who had to be attended in their ill-equipped homes because the family couldn't afford hospitalization.

             \*\*\* Legislative Synopsis \*\*\*

The progenitor of all current California legislation relating to medical practice was originally passed by the 21st session of the California legislature and is entitled "Act to regulate the practice of medicine". The history of this 1876 medical practice enactment and it's 14 subsequent revisions & amendments reveals that the legislative intent was (and is) to regulate medicine practices based on the premise of public protection. The scope of the legislative authority defined itself as pertaining to "systems or modes of treating the sick and afflicted"; its stated purpose was to protect residents of California from harm as a result of actions by uneducated or unskilled persons "prescribing or administering medicinal preparations" and/or the "penetration or severing of human tissue".

The use of powerful & potentially harmful medical methods, often referred to as "heroic measures" at the turn of the century, were to be restricted to those who could prove competency and good moral character and thus could be held accountable for the skilled use of what are to the healing arts, an equivalent of power tools. Succinctly stated, the medical practice act is designed to maximize accountability and minimize ignorant, negligent and fraudulent practices detrimental to the public good. It was an authentic function of government in 1876 and is still a valid premise today.

In addition to the duties and obligations of medical practitioners set forth in the medical practice act, legislation was also designed to protect medical practitioners who embarked upon the lengthy (& expensive) course of formalized education from unfair competition of those unschooled in the powerful new techniques of medical practice. Statutory penalties were imposed upon those who falsified diplomas or documents of certification as well as those who 'publicly professed' to treat disease by the use of "medical" methods without a proper medical education. In regard to medically-based care, "to cure without studying" is a crime.

Thus the medical practice act establishes that it is a public offense to "hold one's self out to be a doctor" or to us the initials MD or the title "Dr". However, in regard to midwifery, the legislation never creates the comparable crime of to "holding one's self out to be a midwife", nor does it stipulate criminal penalties for those functioning in the capacity of a midwife, nor criminalize the "uncertified" practice of midwifery.

The 1876 Act established the prime directive of medical regulation to be the protection of the sick or afflicted from dangerous "medical' (ie. drugs & surgery) practices. Secondarily was protection of proprietary rights of those who practitioners who complied with its lengthy educational preparation (entitlements = personal property) by establishing criminal sanctions for those who attempted to practice without complying with educational & competency provisions. And lastly, to establish criminal penalties for those who willfully risked harm to California residents by the unauthorized use of potentially dangerous medical methods, whether or not they misrepresented themselves as medical doctors.

          \*\*\* History of Board of Medical Examiners \*\*\*

The progenitor medical practice legislation contained very good provisions for checks and balances against abuse of government power but those provisions have been eroded away over the last 116 years. Originally members of the Board of Medical Examiners were elected from county medical societies and included drugless practitioners such as homeopaths and naturopaths. This local board was replaced by a state board in 1901 but members were still elected by their respective professional societies. In 1907 board members were no longer elected but candidates for appointment by the governor were to be taken from a list provided to him by the state medical societies and still included drugless practitioners.

In 1913 the eclectic & egalitarian nature of the board was replaced by a 12 member all MD board appointed by the governor and granting the governor the power to remove members of the board. For the next 57 years the power of gubernatorial appointments remained absolute; in 1980 a provision was added that requiring the approval of appointees by the State senate.

   \*\*\* Legislative Authority for Midwifery Certificates \*\*\*

The jurisdiction over non-medical midwifery was voluntarily created by the board in the 1917 legislation; the nature of that jurisdiction was to prevent midwives from straying over into what the medical board defined as medical or surgical practice. The text of the legislation neither defined or regulated the character or extent of the normal (non-medical) practices of midwives which it dispatched with the sentence "may attend cases of normal childbirth". Neither did it protect certified midwives from encroachments by either medical doctors or non-certified midwives by decreeing midwifery to be a 'specialty' domain such as physicians enjoy. Midwives were never accorded a position on the governing body of the Board, did not set educational standards for themselves, nor define the character and extent of certified midwifery practice.

Authorization over midwifery was achieved by simply adding a fourth certificate to the list of those already issued by the board. The legislation stipulates that application for certificates is, ipso facto, an agreement to all the provisions of certification and that midwifery certificates can now be revoked for "unprofessional conduct".

Application for certificates of midwifery practice were voluntary; the medical practices act, later to be codified as Chapter five of the Business & Profession Code, contains no provisions for making the absence of such a certificate a crime. However, traditional birth attendants were accorded no special status, no privileges of employment in public or private institutions, no third-party payments. Obviously, a certain number of individual midwives considered state-certification to be an advantage.

A certificate conferred certain privileges in exchange for an oath or a 'profession' by the certified midwife to play by the rules as put forth by the medical board and honor the stipulated obstetrical  practice as the exclusive domain of doctors. Like countries who share a common boarder; folk wisdom holds that good fences, ie. good lines of demarcation, make for good neighbors. A certificate of midwifery practice was seen by the medical board as a good neighbor agreement by midwives not to mettle in what physician considered to be their exclusive domain.

The technical definition of a 'professional' is to 'profess' to an ethical code of behavior developed by a corporate body. For non-medical midwives that corporate body was the medical board's and that 'profession' was not a midwifery oath designed around the intrinsic acts of compassion to childbearing families but rather the board's own medically-derived definition of what actions or inactions would be construed as either an illegal practice of medicine or "unprofessional conduct".

In addition to the generic proscription against drugs & penetration of human tissue in the general text of the enactments, the 1917 legislation contained a list of midwifery specific 'illegal' actions, (Article 24 in 1937 codification). As with the definition of the character & extent of certificated midwifery practice, the provisions for "unprofessional conduct" was not defined by midwives themselves but rather the medical board.

The core concept of the "illegal" practice of midwifery has nothing to do with the absence of a midwifery certificate; there is no crime called "illegal practice of midwifery" - what is illegal is the performance of medical acts under non-emergency circumstances such as the use of medical/surgical techniques.

Forbidden were: The use of artificial means - ie. dangerous drugs such as pitocin to stimulate labor, of mechanical means  - ie. forceps & vacuum extractors, the use of forcible means - ie. insertion of the midwife's hand into the pregnant uterus to extract the baby by the feet (podalic version) &/or the extraction of an adherent placenta

Crimes of omission: FAILURE to call a medical practitioner in the presence of evident disease, deformity or dysfunction ie. bleeding, swelling, excessive vomiting, convulsions, pelvic deformities, unduly prolonged labor, malformations of the newborn, a fever of more that 24 hours duration, and other obvious pathologies of the postpartum or postnatal period.

Additional grounds for disciplinary action by the board is the failure to use proper aseptic technique or to follow the law of other public agencies such as the department of health and the mandatory registration of births attended by the midwife.

   \*\*\* Principles of Language & Medicalized vocabulary  \*\*\*

The common-sense principles of language decree that 'order' precede 'disorder', 'function' precedes 'dysfunction', and that normal childbearing precedes the disorders of childbearing.

In regard to midwifery vs. medical practice, the fundamental issue is one of vocabulary - the vocabulary used in the legislative enactments is a medical vocabulary. For instance, the term "physician" linguistically denotes a "physical-ishan", ie. a person who treats physical disorders with physical treatments or who utilizes physical treatments for non-physical disorders.

Vocabulary reflects the perspective and the specific qualities of a medical education which aims to teach medical students the skills necessary to use the potent tools of the medical pantheon - prescription drugs, surgery, life/death medical prognosis, differential diagnosis between established pathological states, such as the difference between basal-cell malignancy & inflamatory fibrosis. To do these things well, in fact, to do them at all, one needs a professional medical education, supervised experience (internship & residency), successful completion of a competency exam and proof of good moral character, continuing education and hospital privileges.

"To treat" is an active verbs that refer to medical 'treatments' done to the patient for his or her "own good", even though actions may be painful initially - IVs, enemas, x-ray studies, tube feedings, plaster casts - the list contains thousands of possibilities. The actual "doing" of the treatments is often the job of another medically-educated person who is other than a doctor - nurses carry out more than 90% of all ordered treatments as well as x-ray techs, lab tech, the whole pantheon of other persons licensed to dispense of potent drugs or to use medical tools such as urinary catheters, nasal-gastric tubes and the like.

Treatment regimen are complicated and sophisticated professional activities in which a specific treatment is chosen only after consideration of several different biological perimeters - the results of the CAT scans, x-rays, lab reports, past history, current physical status, opinions of other professionals, recent findings in professional literature, possible consequences of different t (incomplete sentence)

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**Background Commentary**

Medical Board of California that traditional, non-medical midwifery was an illegal practice of medicine. Extensive research of relative legislation established that midwifery was statutory neutral (i.e., not illegal) according to "black letter law". Medical practice legislation does not, in either intent nor content, criminalized the uncertified practice of midwifery.

The criminalization of midwifery in California hinged entirely on a case law interpertation (*Bowland Stare Decisis)* by the California Supreme Court. On close inspection, the *Bowland Decision* proves to be a factually inaccurate interpretation of the Medical Practice Act. In the  *Bowland Decision*, the California Supreme Court utilized the fetal viability argument which made a false & repugnant connection between childbirth and abortion. This perverse interpretation of *Roe v. Wade* made no functional distinction between the elective medical procedure of aborting a viable healthy fetus with surgical instruments and that of  healthy woman who chooses to carry her pregnancy to term, seeks out pregnancy-related care and plans (in the absence of any evident medical problems) to have a spontaneous normal birth with no drugs, no instrumentation and no use of artificial force. The Court concurred with a pregnant woman's "inalienable" right of privacy to terminate a pregnancy up to the stage of viability but decreed that when a woman chose NOT to abort the pregnancy (or was unsuccessful in procuring a first trimester abortion) her right to chose the "manner and circumstances" of the subsequent childbirth, including the choice of caregivers to assist her during normal childbearing, terminated at the age of fetal liability. The state's interest (i.e.. its duty to protect the viable fetus), was interpreted to subsume the mother's rights in regard to childbirth with an uncredentialed midwife while affirming her right to have an unassisted or lay assisted normal birth.

However, nothing in the the 126 year history of medical practice legislation actually identifies childbirth as pathological condition n or does it identify the uncredentialed practice of midwifery to be illegal or otherwise prohibited as an unauthorized practice of medicine. In fact, neither the 1917 Article 24 which originally providing for state credentialed non-medical midwifery practice or the Licensed Midwifery Practice Act  of  1993 creates a public offense (crime) of "unlicensed practice of midwifery".  To do so would require physicians providing normal maternity care to healthy women (the technical definition and scope of practice of non-nurse midwifery) to either be licensed themselves in midwifery or to incorporate midwifery training into medical education so that midwifery practice was included under medical licensure. Nether of these things were ever done.

Eventually the information brought to light by this research convinced the district attorney to drop the case against the lay midwife, acknowledging that since it was lawful for any layperson to assist a women during normal birth, it made no sense to criminally prosecute midwives for providing assistance to childbearing women. He communicated his intention to drop this case via this comment:  "I told those guys at the Medical Board that that if they wanted me to keep on arresting midwives they were going to have to get some new legislation passed. This "bad news" triggered representatives of organized medicine (California Medical Association and American College of Obstetricians and Gynecologists) to take over pending midwifery legislation and replace it with a licensing law that includes a poison pill (mandatory physician supervision). It is impossible for midwives licensed under the LMPA to comply with their licensing law, which is technically considered unprofessional conduct (license maybe revoked) and it is a misdemeanor crime.

[**Link History of Midwifery Legislation**](http://docs.google.com/legal_legislative01/hxcalmfrylaw00a.htm)