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# MIDWIFERY: A HISTORY OF STATUTORY SUPPRESSION

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by Cynthia Watchorn\*

On March 6, 1974, state investigators lured two midwives to a fake birth and arrested them for practicing medicine without a license.<sup>1</sup> Subsequently, a third woman was arrested and the three midwives were charged with “willfully and unlawfully [holding themselves] out as practicing a system or mode of treating the sick or afflicted . . . and treat[ing] . . . a physical condition of a person . . . .”<sup>2</sup> At that time California was one of only three states<sup>3</sup> which prevented midwives, nurse or lay, from practicing.

Since that time there has been an enactment providing means by which people can obtain certificates which can be used for the practice of midwifery.<sup>4</sup> Before, as in the case above, one was running the risk of being arrested for practicing medicine without a license.<sup>5</sup> However, this program is locked into the exist-

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1. *Bowland v. Municipal Court*, 18 Cal. 3d 479, 556 P.2d 1081, 134 Cal. Rptr. 630 (1976). The women were associated with the Santa Cruz Birth Center. See text accompanying notes 27-39, *infra*.

2. *Id.* at 484-85, 556 P.2d at 1082-83, 134 Cal. Rptr. at 631-32.

3. *California vs. Midwives, The Legalities of Attending a Birth*, ROLLING STONE, May 23, 1974, at 12.

4. CAL. BUS. & PROF. CODE § 2746-2746.8 (West Supp. 1979). See text accompanying notes 40-46, *infra*.

5. CAL. BUS. & PROF. CODE § 2141 (West 1974) provides as follows:

Any person, who practices or attempts 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 diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury 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 chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor.

ing medical field, and requires substantial education before actual practice may begin. And traditionally, such programs have an exclusive effect: people who live in urban areas where innovative programs are offered at universities and hospitals can benefit; however, poor and/or rural people without the time or means to obtain these certificates, are at present left without protective law. For these people, there is not an approved certification program. It is in the rural areas of California that a lay midwife could offer a valuable service. It is hoped that recent signs of a change in legislative consciousness regarding health care in outlying geographic areas will begin to remedy this problem.<sup>6</sup> However, at present, a *lay*-midwife is running the risk of being arrested for practicing medicine without a license.

Coincident with the growing women's movement is the strong desire to take women's health care out of the hands of male physicians and put the control and care of women's bodies back where it belongs—with women. Therefore, this decade has seen an increased withdrawal by women from the traditional institutions of medicine, including an increase in the desire for home birth attended by a midwife.<sup>7</sup>

This paper will trace the demise of earlier midwifery statutes in California, and describe recent legislation which broadens the midwife's opportunities to be trained and to practice.

## I. AN HISTORICAL PERSPECTIVE

The nineteenth century saw the rise of an all-male medical field which in order to obtain a complete monopoly, labeled its educational doors "prestigious," charged large admission fees,

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6. In 1970, the Physician's Assistant Act, CAL. BUS. & PROF. CODE § 2510 (West 1974), was enacted and gave the Board of Medical Quality Assurance (formerly Board of Medical Examiners) the authority to set up training programs, standards and requirements for people to become physicians assistants, and also set up a certification program. Although this Act made no specific mention of midwifery per se, and in fact it was repealed in 1975 (West Supp. 1979), it is important for the language which first reflects a legislative consciousness and concern for the lack of adequate health care services in outlying areas. The legislative intent was explicit: "In its concern with the growing shortage and geographic maldistribution of health care services in California, the Legislature intends to establish in this article a framework for development of a new category of health manpower - the physician's assistant." *Id.*

7. S. ARMS, IMMACULATE DECEPTION, A NEW LOOK AT WOMEN AND CHILDBIRTH IN AMERICA 137, 147 (1975).

and excluded women and the poor.<sup>8</sup> As the male medical field gained power, prestige and money, it sought to bar from any medical practice members of society who were not of their class. This included the midwives.<sup>9</sup> The law in this area was a reflection of this power take-over. The Legislature had listened to the physicians' lobbyists and had drafted the laws in accordance with their goals; namely, that (male) physicians would have control over the health field and that midwives, because they usurped this authority in the area of birth, would be increasingly restricted, and eventually prohibited, from practice.

#### A. THE EARLIEST STATUTES

Midwifery was first subject to licensing in California in 1917.<sup>10</sup> The definition of midwifery contained in the successor statute is still part of California law, and the wording has been left unchanged.

The certificate to practice midwifery authorizes the holder to attend cases of normal childbirth.

As used in this chapter, the practice of midwifery constitutes the furthering or undertaking by any person to assist a woman in normal childbirth. But it does not include the use of any instrument at any childbirth, except such instrument as is necessary in severing the umbilical cord, nor does it include the assisting of childbirth by any artificial, forcible, or mechanical means, nor the performance of any version, nor removal of adherent placenta, nor the administering, prescribing, advising, or employing, either before or after any childbirth, of any drug, other than a disinfectant or cathartic.

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8. G. COREA, *THE HIDDEN MALPRACTICE, HOW AMERICAN MEDICINE MISTREATS WOMEN* 34 (1978).

9. It then became easier for men to take over midwifery because they barred women from the schools and claimed that doctors alone possessed a scientific knowledge that could make childbirth safe. After the 1870's, physicians gradually replaced midwives among the more affluent in the cities. Midwives were allowed to continue attending the poor.

*Id.* at 252.

10. 1917 Cal. Stats. ch. 81, p.93.

A midwife is not authorized to practice medi- 077  
cine and surgery by provisions of this chapter.<sup>11</sup>

By 1918, a full four years of high school were required, in addition to compliance with professional requirements.<sup>12</sup>

The Business and Professions Code in 1937 entitled the Board of Medical Examiners to issue four types of certificates: "(a) Physicians and surgeons certificate; (b) Drugless practitioner's certificate; (c) Certificate to practice chiropody; and (d) Certificate to practice midwifery."<sup>13</sup>

Therefore, under the first statutes, a person could qualify for the certificate of midwifery issued by the Board of Medical Examiners by satisfying the requisite educational criteria. These criteria did not require a nursing degree, but neither did they permit the practice of midwifery by people whose experience was entirely practical, with no formal academic instruction.

#### B. THE EFFECTIVE PROHIBITION OF MIDWIFERY

In 1949, midwifery was effectively eliminated in California by the removal of the authority of the Board of Medical Examiners to issue a certificate to practice midwifery.<sup>14</sup> Also repealed in the same year were the sections of the Business and Professions Code which prescribed the standards and educational requirements for obtaining a midwifery certificate.<sup>15</sup> Left in the code was the definitional section<sup>16</sup> which defined what a midwife could do with her or his certificate; however, there was absolutely no way to *obtain* a valid certificate.<sup>17</sup>

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11. CAL. BUS. & PROF. CODE § 2350 (West Supp. 1979).

12. 1917 Cal. Stats. ch. 81, p. 99. There were three choices: (a) one year residence course in a hospital and taking of residence courses; or (b) a diploma from a hospital with a course in professional instruction for three months; or (c) residence courses for physicians and surgeons certification. *Id.* The residence courses in professional instruction consisted of 415 hours in obstetrics, anatomy, physiology, hygiene, and sanitation. *Id.* § 10 p. 101.

13. 1937 Cal. Stats. ch. 414, p. 1377.

14. 1949 Cal. Stats. ch. 898, § 1, p. 1670.

15. *Id.*

16. CAL. BUS. & PROF. CODE § 2350 (West Supp. 1979).

17. An alternative way to assist at birth, without obtaining a physician and surgeon's license, was eliminated in 1951. In that year CAL. BUS. & PROF. CODE § 2315 was further amended to eliminate the authority to issue a certificate of drugless practitioner. As with midwifery, the definitional section was left intact, CAL. BUS. & PROF. CODE § 2528 (West Supp. 1979) (former § 2138) (West 1974), while the authority to license was removed. The law is as follows:

The medical field had obtained its objective. It had cut off the available means of lay or semi-professional people practicing the delivery of normal childbirth.

More than twenty years later, in 1972, the California State Department of Health requested an opinion from the Attorney General on questions which "arise from the department's concern that in areas in the state where few physicians and surgeons practice that the presence of persons qualified to practice midwifery would be desirable addition to public health."<sup>18</sup> The department asked the Attorney General to answer three questions. The first was whether or not the Board of Medical Examiners may issue certificates to practice midwifery to qualified applicants. The opinion was "no," and explained the state's position:

The logical inference from the Legislature's action, and the board has followed this inference, is that the Legislature wished to prohibit the issuance of further certificates for the practice of midwifery but did not want to terminate the practice of midwifery by those presently holding certificates. According to the board, there are only three individuals, all over the age of seventy years, holding valid midwife certificates issued previous to 1949.<sup>19</sup>

The department then asked whether or not the Board of Medical Examiners could permit persons with training or skills to practice in an experimental program approved by the Department of Health. The Attorney General's opinion was again "no." "In fact," he wrote, "if the board is made aware of such a program where persons without a valid certificate are acting as midwives, the board is under the duty to investigate and perhaps seek prosecution or an injunction against any person who practices midwifery without a valid certificate."<sup>20</sup> He further stated that these persons could be prosecuted under § 2116 and § 2141 of the Busi-

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The drugless practitioners certificate authorizes the holder to treat diseases, injuries, deformities, or other physical or mental conditions without the use of drugs or what are known as medical preparations and without in any manner severing or penetrating any of the tissues of human being except the *severing* of the umbilical cord.

*Id.* (emphasis added).

18. 55 Op. Att'y Gen. 353, 354 (1972).

19. *Id.* at 355.

20. *Id.*

ness and Professions Code for a misdemeanor,<sup>21</sup> and § 2346 of the same code would enable the board to obtain an injunction against such activity.<sup>22</sup>

Third, the department asked, if the answers to the above two questions were “no”, what could be done to permit qualified applicants to receive lawful permission to practice midwifery? The reply was that perhaps the (former) Physicians Assistant Practice Act<sup>23</sup> “might” include duties of a midwife.<sup>24</sup> Also AB 1503, which would authorize the Department of Health to approve experimental pilot projects, “might” include midwifery.<sup>25</sup>

In conclusion, the intent was clear: midwifery was not to be a legal trade in California for people other than physicians. In fact, all others who engaged in the practice could and would be prosecuted. The future would bring a controlled atmosphere for the lawful practice of midwifery.<sup>26</sup>

## II. THE TREND TOWARD A RETURN OF LEGALIZATION

### A. BOWLAND V. MUNICIPAL COURT

The Santa Cruz Birth Center blossomed in 1971. For three years, the (unlicensed) midwives associated with the Center attended hundreds of births in northern California, and could boast that not one mother or child had died during birth.<sup>27</sup> Then, in the arrest discussed above, three midwives were charged with practicing medicine without a license, a misdemeanor.<sup>28</sup> *Bowland v. Municipal Court*<sup>29</sup> brought the issue of whether normal birth is necessarily a medical condition into sharp focus. Is attending a birthing woman in normal childbirth a “mode of treating the sick or afflicted,”<sup>30</sup> and is birth a “physical condition”<sup>31</sup> within the meaning of the law?

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21. *Id.*

22. *Id.*

23. CAL. BUS. & PROF. CODE § 2510 (West 1974), (repealed 1975) (West Supp. 1979).

24. 55 Op. Att’y Gen. at 356.

25. *Id.*

26. Recent liberalizing statutes keep midwifery firmly under the control of organized medicine. See CAL. BUS. & PROF. CODE § 2746-2746.8 (West Supp. 1979).

27. *California vs. Midwives, The Legalities of Attending a Birth*, *supra* note 3, at 13.

28. CAL. BUS. & PROF. CODE § 2141 (West 1974). See note 5 *supra*, and accompanying text.

29. 18 Cal. 3d 479, 556 P.2d 1081, 134 Cal. Rptr. 630 (1976).

30. And therefore a violation of CAL. BUS. & PROF. CODE § 2141. See note 5 *supra* and accompanying text.

31. *Id.*

After defendants lost a motion for demurrer in municipal court, and a motion for writ of mandate in superior court, the California Supreme Court granted a hearing.

In an unanimous opinion, the all-male court, speaking through Justice Richardson, held that the practice of midwifery as defined by statute,<sup>32</sup> which allows (licensed) midwives to attend normal childbirth, could not be deemed treatment of the “sick or afflicted.”<sup>33</sup> However, the state claimed that the midwives held themselves out as competent to perform acts which included treatment for the *complications* of childbirth—an area reserved for holders of the Physicians and Surgeons license.<sup>34</sup> Unfortunately, the Supreme Court agreed.<sup>35</sup>

As to whether the practice of (unlicensed) midwifery violated the “physical condition” clause of the statute, the court held:

Thus, although normal childbirth is not a “sickness or affliction” within the meaning of [the statute], we conclude, in light of the total statutory scheme governing the practice of the ‘healing arts’, that [the statute’s] prohibition against unlicensed persons treating a ‘physical condition’ was intended to encompass the practice of midwifery.<sup>36</sup>

In other words, the practice of midwifery without a license, (the authority for the issuance of which was withdrawn in 1949),<sup>37</sup> would be considered a treatment of a “physical condition”; and whether or not the birth was normal, would be practicing medicine without a license.

The Supreme Court inferred that since 1949, the Legislature had intended that the practice of midwifery without a certificate would be prohibited as practicing medicine without a license.<sup>38</sup>

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32. CAL. BUS. & PROF. CODE § 2140 (West 1974) (reenacted as § 2350) (West Supp. 1979).

33. 18 Cal. 3d at 487, 556 P.2d at 1084, 134 Cal. Rptr. at 633. The court declined to state unequivocally that the phrase “sick and afflicted” must necessarily exclude normal physiological conditions. Rather, the court based its holding on due process considerations of adequate notice of prohibited behavior. *Id.*

34. CAL. BUS. & PROF. CODE § 2137 (West 1974).

35. 18 Cal. 3d at 488, 556 P.2d at 1085, 134 Cal. Rptr. at 634.

36. *Id.* at 491, 556 P.2d at 1086-87, 134 Cal. Rptr. at 635-36.

37. 1949 Cal. Stats. ch. 898, p. 1670.

38. 18 Cal. 3d at 490, 556 P.2d at 1086, 134 Cal. Rptr. at 635. The court acknowledged that although new certificates were not issued after that date, unrevoked certificates

The court, in effect, recommended that the plaintiffs' arguments be addressed to the Legislature rather than the courts, inasmuch as the Legislature had shown interest in the field.<sup>39</sup>

#### B. NURSE-MIDWIFE LEGISLATION

The legislators were beginning to hear another side of the story. Instead of only physicians' lobbyists, they began to hear the stories of women and mothers. The legislative response was to effect a compromise. Midwife certificates would again be issued, but only to persons within the ranks of established medicine: registered nurses with special training.<sup>40</sup>

In 1974, the Nurse Midwife statute was enacted into California law.<sup>41</sup> The practice of nurse-midwifery was defined in this Act and provided in part:

The certificate to practice nurse-midwifery authorizes the holder, under the supervision of a licensed physician and surgeon, to attend cases of normal childbirth and to provide prenatal, intrapartum, and postpartum care, including family-planning care, for the mother, and immediate care for the newborn . . . .

As used in this article, 'supervision' shall not be construed to require the physical presence of the supervising physician.<sup>42</sup>

It is important to note that the physical presence of the supervising physician was unnecessary "so long as progress meets criteria accepted as normal."<sup>43</sup>

A nurse midwife could independently work with a prospective mother from conception through birth without having to use a hospital unless complications arose. And then, some nurse-midwives had admitting privileges. More and more nurses are pushing into this field; so much so that nurse-midwifery schools

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issued before 1949 would permit lawful practice. *Id.* But see 55 Op. Att'y Gen. 353, 355 (1972), where the number of holders of pre-1949 certificates was said to be three—all over seventy years of age.

39. 18 Cal. 3d at 495-96, 556 P.2d at 1089, 134 Cal. Rptr. at 638.

40. CAL. BUS. & PROF. CODE §§ 2746 - 2746.8 (West Supp. 1979).

41. *Id.*

42. *Id.* § 2746.5.

43. *Id.*

are very difficult to get into.<sup>44</sup> With the demand ever-growing, and more and more nurse-midwives being trained, it seems a question of time before nurse-midwives achieve widespread independence from male physicians (excluding births where medical intervention is necessary). The disadvantages are that one must first go through a nursing program (up to four years) and then go back to a midwifery school, which at this point may well have a truly limited capacity.<sup>45</sup>

As a further security for nurse-midwives who have private practices, the definitional section on nursing was amended in 1974 to read:

In amending this section at the 1973-74 session, the Legislature recognizes that nursing is a dynamic field, the practice of which is continually evolving to include more sophisticated patient care activities. It is the intent of the Legislature in amending this section to provide clear legal authority for functions and procedures which have common acceptance and usage. It is the legislative intent also to recognize the existence of overlapping functions between physicians and registered nurses and to permit additional sharing of functions within organized health care systems which provide for a collaboration between physicians and registered nurses.<sup>46</sup>

It could be argued that this statute provides a legislative intent that nursing be a more autonomous field, independent and more equal with the physicians. This is a progressive attitude compared to the traditional attitude that nursing is less important than, and subservient to, the role of physicians. It further breaks down the traditional roles and myths of women, the nurse-helpers, behind the scenes.

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44. There are only seven such schools in the nation. It is not only the demand by women for better and more human birthing care which has led to more doors being opened for alternatives to physician delivered birth, but there has been a decline in interest among physicians. "Almost 15% of residency positions for obstetricians - gynecologists have been going unfilled, so that has left room for midwives." G. COREA, *supra* note 8, at 257-58.

45. S. ARMS, *supra* note 7, at 48, 54; G. COREA, *supra* note 8, at 209.

46. CAL. BUS. & PROF. CODE § 2725 (West Supp. 1979).

### III. WHAT WE HAD AND WHAT WE GOT

#### A. WHAT WE HAD: THE MIDWIFERY PRACTICE ACT OF 1978

At present it is clear that the Legislature is still unwilling to provide for the certification of midwives who are not nurses. Between 1977 and 1978 the opportunity was ripe when they were presented with the Midwifery Act of 1978.<sup>47</sup> This bill would have legalized the practice of lay midwifery (after fulfilling certain educational requirements). The purpose of the bill was to:

[e]nhance a woman's freedom of choice in the manner and setting of her child's birth, and to reflect the Legislature's concern with the growing shortage and maldistribution of maternity care services in California, [therefore] the Legislature intends to establish in this chapter a framework for the development and regulation of a traditional category of health personnel - midwives. To this end, the Legislature intends to establish in this chapter a single practitioner of midwifery, including all those persons previously licensed as midwives or nurse-midwives, as an independent health care provider for women in normal child-birth.<sup>48</sup>

The bill would have repealed the Nurse-Midwife Act and provided one category of practitioner: the licensed midwife.

The important terms defining the nature of the relationship between a midwife and a physician had been changed somewhat, allowing more freedom for the midwife.

The practice of midwifery includes the duty by the holder of a certificate issued pursuant to this chapter to practice in consultation with a licensed physician whenever any abnormal signs or symptoms of complications appear either in the mother or the infant . . . .

Consultation shall not be construed to require physical presence of the consulting physician.<sup>49</sup>

Therefore, a midwife would legally have been an indepen-

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47. Cal. A.B. 1896 (unenacted).

48. *Id.*

49. *Id.*

dent health care provider, so long as she met the educational requirements.<sup>50</sup>

This bill would have filled a gap which has been existent since 1949 when the procedure for certification of lay midwives was repealed. Lay midwives would have been educated in eighteen months of formal training and could have returned to rural areas or their communities to apprentice with other midwives and begin to practice.

## B. WHAT WE GOT

After two years of successful lobbying by the California Medical Association (CMA) the bill as signed by the Governor in 1978 did not even mention the word "midwife", much less provide for legal certification.<sup>51</sup> At present the Department of Consumer Affairs, who backed the original bill is looking for a legislator to sponsor the Midwifery Act. To date, these efforts have been fruitless.

The version of the bill which passed through the Legislature in late 1978 simply amended an Act in existence since 1972,<sup>52</sup> which provides for experimental pilot projects in the health field. The original Act specifically names midwifery as one of the areas of health care which would qualify as an "approved project." This program could provide a limited means of training lay midwives. It would provide a basis of study of the area of midwifery, which the Legislature seems to be requiring before legalization of lay-midwifery is allowed. In this sense, the amended Health and Safety Code sections are the only legislation which provide for legal practice of lay midwifery.

The original enactment of the Health and Safety Code sections in 1972 carried over the initial legislative intent of the (former) Physicians Assistant Practice Act of 1970<sup>53</sup> which was con-

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50. The educational experience in specific courses could not be completed in less than 12 months if the applicant was a registered nurse and not less than 18 months if the person was not a registered nurse. *Id.* This was to be completed at a committee approved midwifery school. *Id.* After her schooling, the midwife candidate could not take the certificate examination without first completing an apprenticeship program: 12 months for a registered nurse and 24 months for an applicant who was not a registered nurse. *Id.* A person in the apprenticeship program could be under the supervision of a midwife or a physician. *Id.*

51. CAL. HEALTH & SAFETY CODE §§ 429.70 - 429.90 (West Supp. 1979).

52. *Id.*

gruent with the purposes of the available federal funding for experimental pilot projects in the health professions.

The projects set up by the statute are to be innovative and include "occupations in the allied health professions."<sup>54</sup> They must meet certain objectives, such as that the graduates or trained personnel will serve the community, and provide opportunities for upward mobility in occupational categories, and the "training of persons with little or no formal education but with a willingness and aptitude to acquire health care skills."

The new amendment to this Health Manpower Pilot Project Act basically applauds the original Act as being successful, and seeks to "extend eligibility for participation in the program to appropriate federal, state, and local government agencies."<sup>55</sup> Prior to this extension the bill covered projects sponsored by non-profit educational institutions or non-profit community hospitals or clinics.

#### IV. CONCLUSION

It is a major set-back that the Midwifery Act of 1978 was amended into oblivion. What is left for lay midwives to practice legally is an enabling act for a pilot project which may or may not lead to the necessary legalization and certification. At present there are no pilot project applications for midwives. Therefore, even though the basic framework is available it is not at present functioning for midwives. This is due partly to lack of money from Proposition 13 cutbacks, lack of grassroots organization on the part of rural lay midwives, and lack of interest on the part of state government to seek alternatives to the hospital birth now predominantly offered by physicians, or to challenge the California Medical Association.

There is hope, though, if a sponsor is found for the Midwifery Act and it survives the lobbying pressures of the CMA. The Department of Consumer Affairs is prepared to push for immediate legalization and does not need a pilot program to prove the effectiveness and necessity of midwifery services.

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53. See note 6 *supra*, and accompanying text.

54. CAL. HEALTH & SAFETY CODE § 429.90 (West Supp. 1979).

55. 1978 Cal. Stats. ch. 1038.

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Immediate legalization is needed to meet the demand not only of the geographic maldistribution of adequate maternity services, but also of the increasing numbers of women who are looking for alternatives to the sometimes violent and impersonal "operation" physicians call birth.

