Statutory Regulations of Midwives: A Study of California Law

Julie Harmon

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STATUTORY REGULATION OF MIDWIVES: A STUDY OF CALIFORNIA LAW

When many people hear the word "midwife," another era comes to mind: an era before medical doctors and the many technological advances widely available today. Midwives, as part of holistic and natural women's health care, are as shrouded in mystery and mystique as women themselves.\(^1\) The practice of midwifery is alive today in all countries and communities, not just in those that are underprivileged or rural.\(^2\) Midwives are safe and healthy alternative care providers for women throughout their pregnancy.\(^3\) Midwifery and home births are increasingly accepted in the United States as a valid option for mothers-to-be.\(^4\) In 1999, for example, midwives attended approximately 3,000 of California's 600,000 births.\(^5\)

Midwives are regulated by state statutes that vary from state to state.\(^6\) California regulates both certified nurse-midwives (CNMs) and lay (non-nurse) midwives.\(^7\) This is the minority position in the states.\(^8\) Consistent with most states, California originally regulated only CNMs by statute, leaving lay midwives outside the legal practice of midwifery.\(^9\) In order to practice their trade, lay midwives were forced to break the law.\(^10\) Unfortunately, many states continue to outlaw lay midwifery.\(^11\)

Under the Licensed Midwifery Practice Act of 1993,\(^12\) lay midwives were granted the freedom to legally practice their trade, but they were subject to continued restrictions, including a requirement that they

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5. Gorman, supra note 2, at B1.
11. See Midwives Alliance of N. Am. Legal Status, supra note 8 (noting that lay midwifery is illegal in the District of Columbia, Indiana, Iowa, Kentucky, Maryland, Missouri, North Carolina, Vermont, and Wyoming).

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work under a supervising physician.\textsuperscript{13} This forced both CNMs and lay midwives into a subordinate position in the healthcare structure.\textsuperscript{14} California Governor Gray Davis recently approved an amendment to the Licensed Midwifery Practice Act that specifically states that a woman has a right to choose her childbirth option, stressing the positive aspects of midwife-assisted birth and relieving the requirement that a midwife be "supervised" by a physician.\textsuperscript{15} Instead, midwives are free to make their own arrangements for emergency medical assistance and possible hospital transfers.\textsuperscript{16} This expands the possibility for more home births because the number of physicians willing to act as back-up healthcare providers in the home-birth setting is extremely low.\textsuperscript{17}

The first part of this Note will discuss midwifery in general, including categorizations of midwives set out by the American College of Nurse-Midwives and the Midwives' Alliance of North America. The second part of the Note will explore the history of the California regulations and how those regulations have affected midwives in practice and in the court system. The third section will discuss the modern law of California, which consists of the Licensed Midwifery Practice Act, and how that Act and its amendments will affect the practice of midwifery, especially for lay midwives. The final part of the Note will contrast the midwifery statutory regulations of other states with those of California, suggesting that there ought to be a uniform regulation of midwives throughout America, with the regulations in California leading the way for other states. This would allow midwives the same mobility to move state-to-state as other workers currently enjoy.

\begin{itemize}
\item \textsuperscript{13} \textbf{CAL. BUS.} \& \textbf{PROF. CODE} § 2507 (1980), \textit{amended by CAL. BUS.} \& \textbf{PROF. CODE} §§ 2505-2507 (2000).
\item \textsuperscript{14} Suarez, \textit{supra} note 1, at 323.
\item \textsuperscript{15} Southern California Resources for Childbirth, \textit{News Flash: SB-1479 Was Signed Into Law by Governor Gray Davis on Sept. 1, 2000}, at \url{http://www.socialbirth.org/currents/midwifery_events.htm} (last visited Oct. 29, 2000).
\item \textsuperscript{16} California College of Nurse-Midwives, \textit{Informal Guidelines for Implementation of SB-1479 by Licensed Midwives}, at \url{http://www.goodnewsnet.org/Law/AB1418%20implementsb1479.htm} (last visited Oct. 29, 2000).
\item \textsuperscript{17} See Jennifer Berry Hawes, \textit{Home Delivery: Intimate Event or Tragedy in the Making?}, THE POST AND COURIER (Charleston, SC), Jan. 2, 2000, at E1 (one doctor states that home deliveries are against physicians' training; another maintains that "[h]ome deliveries are for pizzas"); \textit{see also} Wayne J. Guglielmo, \textit{In the Trenches, It's Cooperation That Matters}, 77 MED. ECON. 194 (2000) (noting under former Colorado law, physicians could be held vicariously liable for the actions of a nurse-midwife).
\end{itemize}
Tenets of Midwifery

Obstetrical care practiced by physicians tends to be highly medical, focusing on pregnancy and childbirth as a disease or illness, instead of as a natural part of a woman's life. On the other hand, midwifery focuses on childbirth as a natural process, using methods handed down for generations. Some commentators recommend using the talents of both midwives and doctors.

Midwifery is indispensable and an essential part of good obstetrical organization, because midwifery means: protection of health and normality, whereas obstetrics, as part of medicine, belongs to the "department of knowledge and practice, dealing with disease and its treatment." To care for pregnancy and childbirth, you need a midwife and a doctor.

Most state regulations require at least that a midwife make arrangements for emergency care in case something unexpected happens to put the health of the mother or baby at issue. Midwives are careful about their decisions to care for specific women. They will not take high-risk cases, such as women with high blood pressure or a family history of childbirth difficulties. These women are referred to the care of an obstetrician trained to deal with their individual needs. "The midwife screens her clients carefully so that she only takes low-risk cases. She is trained to recognize abnormalities and is fully capable of transferring a woman to a hospital safely during labor if necessary."

Midwifery is practiced without stigma worldwide, with the notable exceptions of the United States and Canada. Indeed, countries with

18. Suarez, supra note 1, at 315.
20. Suarez, supra note 1, at 346.
21. Id. (quoting J.G. Kloosterman, Why Midwifery?, The Practicing Midwife, 10 (Spring 1985)).
23. Id. at 516.
24. Id.
25. Id.; see also Gorman, supra note 2, at B1 (explaining that midwives encourage women with health problems or who have had trouble in previous pregnancies to consider hospital birth).
26. Suarez, supra note 1, at 319.
27. See Rifkin, supra note 22, at 510.
highly effective healthcare programs such as the Netherlands and Sweden utilize obstetricians only for the high-risk cases mentioned earlier. Because midwifery has a non-interventionist philosophy, midwives do not use the costly tests and equipment such as sonograms and fetal monitors that obstetricians cannot do without. This makes midwifery extremely cost-effective, an important consideration in today's world of HMOs. Consequently, the World Health Organization (WHO) has endorsed midwifery as a safe and cost-effective healthcare option. Despite the evidence of the safety and low cost of midwifery shown by the WHO's statistical studies, many industrialized nations, including the United States, prohibit midwifery, furthermore, many insurance plans, including Medicaid, refuse to cover home birth care under a midwife.

The right to make decisions about one's reproductive options should extend beyond Roe v. Wade. The Midwives Alliance of North America (MANA) believes that access to an affordable and safe midwife is the right of every pregnant woman.

The Midwives Alliance of North America holds the position that appropriate, accessible maternity care contributes to the health of mothers and babies and facilitates the birth process. MANA recognizes that each birthing woman has individual needs and further recognizes her right to select the care provider and setting for birth that best fits those needs.

Unfortunately, many restrictive state regulations make it impossible for a woman to obtain affordable, safe birthing options under the care of a midwife.

Many obstetricians argue that home birth is inherently dangerous and that hospital birth is the only way to protect the interests of the

28. Id.
29. See id. at 517 (stating that many complications that accompany hospital births are actually caused by the obstetricians, often in the name of safety but more likely for convenience to the doctor).
30. Id. at 509.
31. Id.
32. Id.
33. Id.
34. Suarez, supra note 1, at 322. However, Medicaid often covers midwife-assisted birth in birthing centers. Stork Brings Questions From Patients, State, ORLANDO SENTINEL TRIB., Apr. 12, 1992, at B1.
37. Id.
38. Rifkin, supra note 22, at 510; Suarez, supra note 1, at 315.
mother and child.\textsuperscript{39} Statistics show, however, that infants born in hospitals have a higher rate of infection, and women giving birth in hospitals are often subjected to unnecessary surgical procedures, such as episiotomies (the surgical cutting of the vagina) and Cesarean sections.\textsuperscript{40} Although physicians and physician groups cite concern for health as the main factor for their opposition to midwives and home births, many commentators agree that economics are the true concern.\textsuperscript{41}

\textit{Categorization and Organization of Midwives}

There are two large national organizations for midwives: the Midwives Alliance of North America (MANA) and the American College of Nurse-Midwives (ACNM). MANA provides national support and a network for midwives,\textsuperscript{42} while the ACNM is more education-based.\textsuperscript{43} The ACNM is the result of a merger between the American College of Nurse-Midwives and the American Association of Nurse-Midwives.\textsuperscript{44} The ACNM prescribes educational standards for nurse-midwives and has formulated a nationwide accreditation program.\textsuperscript{45} "[T]he ACNM values competency as the ultimate goal of training and does not push for or require college degrees.["]\textsuperscript{46}

Midwives can be put into three distinct categories recognized by the Midwives Alliance of North America.\textsuperscript{47} They are "direct-entry" midwives (also called lay or non-nurse midwives), Certified Professional Midwives, and Certified Nurse-Midwives.\textsuperscript{48}"Direct-entry' midwives, who are licensed in some states, are not required to become nurses before training as midwives. . . . [T]hey practice most often

\textsuperscript{39} Suarez, \textit{supra} note 1, at 320.
\textsuperscript{40} See Rifkin, \textit{supra} note 22, at 515-19 (discussing the interventionist techniques that result in fetal distress and injury to the mother and infant that occur with frequency in hospital births).
\textsuperscript{41} See Guglielmo, \textit{supra} note 17, at 194 (stating that the reason for physician resistance to nurse practitioners boils down to a "battle over turf"). See generally Karla Kelly, \textit{Nurse Practitioner Challenges to the Orthodox Structure of Health Care Delivery: Regulation and Restraints on Trade}, 11 AM. J. L. & MED. 195 (1985) (arguing that denial of access to medical facilities, physician back-up services, and licensing restrictions on nurse practitioners, including nurse-midwives, is in part caused by physicians' fear that they will lose business).
\textsuperscript{42} Midwives Alliance of N. Am., History of MANA, at http://www.mana.org/history.html (last modified Feb. 2, 2000).
\textsuperscript{43} Rifkin, \textit{supra} note 22, at 514.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} Suarez, \textit{supra} note 1, at 333.
\textsuperscript{47} Midwives Alliance of N. Am., Categories of Professional Midwives, at http://www.mana.org/category.html (last modified Feb. 2, 2000).
\textsuperscript{48} \textit{Id.}
in birth centers and homes." The term "direct-entry" refers to the lack of training as a nurse; the lay midwife enters the field of midwifery directly from being a lay-person:

Certified Professional Midwives may gain their midwifery education through a variety of routes. They must have their midwifery skills and experience evaluated through the North American Registry of Midwives (NARM) certification process and pass the NARM Written Examination and Skills Assessment. The legal status of these nationally credentialled (sic) direct-entry midwives varies from state to state.

Certified Nurse-Midwives (CNMs) are educated in both nursing and midwifery. After attending an educational program accredited by the American College of Nurse-Midwives Certification Council (ACC), the must pass the ACC examination and can be licensed in the individual states in which they practice most often in hospitals and birth centers.

Certified Nurse-Midwives are expressly permitted to work in all fifty states. They are generally restricted to working in a hospital, limiting the ability of women to obtain a CNM for a home delivery. As noted above, CPMs and lay midwives have legal recognition only in certain states.

**Increased Acceptance of Midwifery**

From 1975 to 1991, the amount of births attended by certified nurse-midwives increased eight-fold. There are several reasons why midwifery has made a resurgence into the consciousness of the American people. The wish for a normal and comfortable birthing process and environment is at the forefront of the midwifery movement.

Some [women] want the comfort of a bedroom, rather than a hospital room, and don't want to worry about their doctor going off duty during the birth. Others want more control over their

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49. Id.
50. Id.
52. Id.
53. Midwives Alliance of N. Am., Categories, supra note 47.
55. Gorman, supra note 2, at B1.
deliveries, and the freedom to have their friends and family participate. Still others say they want a chance to really get to know the person who will help them deliver the baby.\textsuperscript{56}

These are the traditional reasons for preferring home birth over hospital birth, but these concerns are met in most instances by birthing centers as well.\textsuperscript{57} Women who prefer midwives as birth attendants view child-bearing as a natural process requiring medical intervention only for serious complications.\textsuperscript{58}

The low costs of midwife care are another reason to prefer midwives over obstetricians. The difference in cost is considerable.\textsuperscript{59} Costs for midwife services, including prenatal, intrapartum, and postpartum care provided in patients’ homes or other non-hospital settings\textsuperscript{60} generally range from $1,500 to $3,000.\textsuperscript{61} In contrast, “[d]uring 1993, an average c-section in the United States cost $11,000, and an uncomplicated vaginal birth cost $6,430.”\textsuperscript{62}

Midwives, along with other types of alternative care providers, significantly increase the availability of healthcare in under-served areas, such as the rural South and the inner cities.\textsuperscript{63} Midwives charge far less than physicians because they have lower training costs.\textsuperscript{64} Moreover, midwives are involved in far fewer malpractice cases than obstetricians.\textsuperscript{65} There are several explanations for this occurrence. Midwives only take low-risk cases, so the incidents of death or injury tend to be lower.\textsuperscript{66} Also, midwives generally have a close personal relationship with their clients, something most doctors do not have.\textsuperscript{67} Many clients of midwives do not press for malpractice suits because of the increased communication and resulting quality of service.\textsuperscript{68}

\textsuperscript{56.} Id.
\textsuperscript{57.} Suarez, supra note 1, at 322.
\textsuperscript{58.} Neuberger, supra note 2, at A-8.
\textsuperscript{59.} Suarez, supra note 1, at 322.
\textsuperscript{60.} Rifkin, supra note 22, at 533 (citations omitted).
\textsuperscript{61.} Gorman, supra note 2, at B1.
\textsuperscript{62.} Rifkin, supra note 22, at 533 (citation omitted).
\textsuperscript{63.} Andrews, supra note 54, at 1276.
\textsuperscript{64.} Id. at 1279 (citation omitted).
\textsuperscript{65.} Id. at 1281-82.
\textsuperscript{66.} Id.
\textsuperscript{67.} Suarez, supra note 1, at 345-46 (noting that midwives spend an average of twenty-four minutes per visit with each client, while prenatal visits with doctors ranged from less than five minutes to ten minutes).
\textsuperscript{68.} Id.
Limitations on Midwives

Midwives are limited in their ability to provide care by state laws that prohibit the practice of medicine without a license, hospitals that exclude midwives from hospital admitting privileges, and the inability to obtain malpractice insurance. The regulations in California deal with some of these unfair restraints.

Unfortunately, many midwives who perform home births are not able to procure the required supervisory physician. This is because insurance companies are hesitant to provide coverage to doctors who agree to back-up or supervise midwives for home births. Sue O'Connor, chairwoman of the California Association of Midwives, stated that "midwives are stuck in a 'legal quagmire' created by the California Legislature and insurance companies." Additionally, many obstetricians do not want midwives to undercut their business.

Although physician groups are at the heart of the restrictions of alternative care providers, some take a more optimistic view of the future of midwife and obstetrician collaboration. "Public health experts and researchers are recognizing that midwifery will not disturb the system of obstetrics. Instead, international research indicates that the two professions are compatible, complementary, and necessary to each other for an efficient and cost-effective system of care."

The California Midwifery Regulations

Constitutionality of the California Regulations

The California Supreme Court decision in the 1976 case of Bowland v. Municipal Court examined the constitutionality of the California Business and Professions Code section 2141, which prohibits the unlicensed practice of the healing arts. The healing

69. Kelly, supra note 41, at 196.
70. See, e.g., CAL. BUS. & PROF. CODE § 2507(c) (noting that physician supervision does not require physical presence of physician).
72. Dotinga, supra note 4.
73. Guglielmo, supra note 17, at 194.
74. See Andrews, supra note 54, at 1282-93 (providing a synopsis of antitrust issues between alternative care providers, physicians, and the AMA).
75. Suarez, supra note 1, at 320 (citations omitted).
76. 556 P.2d 1081 (Cal. 1976).
78. Id.
arts are defined as “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.” The midwife plaintiffs argued they did not treat the sick or afflicted and therefore their practice was not part of the healing arts. The court disagreed, noting that pregnancy is not a sickness or affliction, but a physical condition, the treatment of which is considered a healing art. The court went on to say that obstetrics has long been regarded as a branch of medicine and complications that can result during pregnancy and childbirth undoubtedly qualify as sickness or afflictions.

Section 2140 of the Business and Professions Code describes the practice of midwifery as “authoriz[ing] the holder to attend cases of normal childbirth.” It prohibits 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 administering, prescribing . . . of any drug.” The court then examined the history of the statutory regulations of midwives.

Prior to 1949

Certificates were required in California in order to practice medicine in compliance with the original section 2136 of the California Business and Professions Code. The certificates licensed the practice of medicine, surgery, podiatry, and midwifery. Section 2141 followed the certification requirements, making uncertified practice of midwifery a misdemeanor.

79. Bowland, 556 P.2d at 1083.
80. Id. at 1082.
81. Id. at 1083-84.
82. Id. at 1084.
83. Id. at 1085.
84. Id. at 1083 (citing CAL. BUS. & PROF. CODE § 2140).
86. Id. at 1085.
87. Id.
88. Id. at 1085-86.
89. Id. at 1086.
Section 2135 of the California Business and Professions Code was amended in 1949 to prohibit the issuing of midwifery certificates. The legislature's intent was to prohibit the practice of midwifery without a certificate. Although new certificates could not be issued, midwives could still practice "under an unrevoked certificate issued before 1949." This change coincided with new developments in obstetric medicine and a push for births in the "safe" and less painful hospital environment. The medical establishment had discovered drugs that put women to sleep during the birth, and women liked being unable to remember the pain. The natural childbirth methods seemed like a way of the past.

In the Age of Aquarius, many women decided to go back to nature and rediscover their bodies. There was a movement back to midwives, especially among those that "dropped out" of the norm in society and, for example, went to live on co-ops like "The Farm" in Tennessee.

The California legislature responded with the enactment of section 2141 to the Business and Professions Code, which provided for the certification of midwives. The court in Bowland decided that the certification provisions would not be effective unless the practice of midwifery without a valid certificate was considered a violation of section 2141. The decision follows the licensing provisions and "makes it a misdemeanor to engage in various types of acts without the required certificate."
The Final Decision

The court in Bowland ultimately determined that section 2141 of the Business and Professions Code was constitutional. The court recognized the constitutional right to privacy that mandates protection of decisions pertaining to abortion, child-rearing, marriage, and contraception, but determined that it did not extend to "protect a woman’s choice of the manner and circumstances in which her baby is born." The court likened home birth to abortion when it discussed the State’s interest in the life and well-being of an unborn child. "For the same policy reasons for which the Legislature may prohibit the abortion of unborn children who have reached the point of viability, it may require that those who assist in childbirth have valid licenses." The decision in Bowland caused an uproar in circles that promoted midwifery:

This represents the biased thinking promoted by organized medicine for the last 100 years - i.e., that home-based midwifery care kills babies, therefore the Court does not have to make any qualitative distinction between abortion and midwifery. Since the . . . Bowland decision, states all over the US . . . have been reiterating this fallacious interpretation of Roe v. Wade to criminalize direct-entry midwives and prevent mothers from having the lawful choice of a professionally-attended home labor and birth.

Because of the laws and interpretations, most midwives who wished to practice in the home were either barred from it completely, or were forced to practice illegally. A 1982 survey by the American College of Nurse Midwives indicates that ninety-two percent of all nurse-midwives would like to provide services in birth centers or in

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100. Id. at 1088, 1089.
101. Id. at 1089.
102. Id.
104. 556 P.2d 1081 (Cal. 1976).
105. California College of Nurse-Midwives, supra note 16.
106. But see Northrup v. Super. Ct. of Modoc County, 237 Cal. Rptr. 255, 259 (Cal. App. 1987). The court held that two childbirth "helpers" were not subject to prosecution of practicing midwifery without a license because the California Business & Professions Code included an exception for practitioners whose religious beliefs prohibited them from seeking medical assistance. Id.
the home. But by 1987, only fifteen percent of nurse-midwives worked in birth centers, and far fewer provided home birth services.  

THE LICENSED MIDWIFERY PRACTICE ACT OF 1993

Due to the lobbying efforts of midwife organizations, such as the California Association of Midwives, the practice of midwifery was re-evaluated in a 1993 legislation.  

Section 2507(b) of the California Business and Professions Code defines midwifery.  

Sections 2512 and 2512.5 explain the licensing requirements and qualifications.  

Section 2513, which lays out educational requirements for non-Nurse Midwives, represents the greatest area of change because it allows clinical experience to substitute for classroom education and thus validates lay midwifery.

Section 2521 makes violation of the code (unlicensed practicing of midwifery) a misdemeanor. If a midwife is not properly licensed under the Act, she will still be subject to penalties for unlawful practice of medicine. In People v. Odam, a California registered nurse was prosecuted for the unlawful practice of medicine after she opened a home-birthing service without obtaining the midwife education requirements. Abigail Odam used Pitocin, a labor-inducing drug, to speed up the labor of two women. The court noted that the Licensed Midwifery Practice Act of 1993 did not overrule the Bowland decision requiring midwives to be certified or licensed to lawfully practice midwifery.

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107. Suarez, supra note 1, at 335 & nn.147 & 148 (citations omitted).
109. CAL. BUS. & PROF. CODE § 2507 (Supp. 2000). A licensed midwife must work under the supervision of a physician and surgeon, and is authorized to attend cases of normal childbirth, including providing prenatal, intrapartum, and postpartum care to the mother and infant. Id. at § 2507(a). The midwife may not assist childbirth by any forcible or mechanical means. Id. at § 2507(b).
110. A midwife must complete a three-year midwifery education program approved and accredited by the board. The midwife must then complete a licensing examination equivalent, but not identical to, the examination given by the American College of Nurse Midwives. Id. at §§ 2512-2512.5(a)(1).
111. Id. at § 2513. To receive credit, the clinical experiences must be verified by a licensed midwife or certified nurse-midwife and a physician. Id. at § 2513(b).
113. 82 Cal. Rptr. 2d 184, 190 (Cal. App. 1999), reh'g granted, 977 P.2d 65 (Cal. 1999).
114. Id. at 190, 199.
115. Id. at 187, 190.
116. Id. at 191.
Results of the 1993 Legislation

Since the passage of the Licensed Midwifery Practice Act in 1993, over 111 midwives have been licensed and authorized to assist in childbirth.\(^\text{117}\) Despite legislation that is decidedly friendlier towards midwives than previous laws, many midwife organizations still were not pleased.\(^\text{118}\) The main source of anger was section 2507(a), requiring physician supervision of midwives.\(^\text{119}\) Midwives viewed this as unnecessary baby-sitting, and just another way the medical establishment belittled their training, experience, and expertise.\(^\text{120}\)

Commentators have acknowledged the medical industry's nod toward midwifery as something that has been a long time coming.\(^\text{121}\) The rising costs of health care have forced the medical establishment to recognize midwifery as a viable alternative to costly maternity stays in the hospital.\(^\text{122}\) "No evidence exists ... that this [medical] system is actually safer than home birth with a competent midwife."\(^\text{123}\) Despite this recognition, many midwives are subjected to harsh penalties should they not comply with the requirements proscribed by statute.\(^\text{124}\)

California Midwife Charged with Felony in Infant's Death

Early in 2000, a former midwife from Orange County, Lori Jensen, was charged with contributing to the death of an infant, a felony under California statute.\(^\text{125}\) She illegally injected the mother with Pitocin, the same labor-inducing drug Abigail Odam used.\(^\text{126}\) The statute governing midwives clearly states a midwife is not permitted to assist the childbirth using artificial or forcible means.\(^\text{127}\) It was the first

\(^{117}\) Judy Silber & Richard Marosi, O.C. Midwife's Actions Contributed to Death of Baby, Officials Say; Prosecutors Charge Her with Breaking the Law by Giving a Drug without a Doctor's Supervision. Her Lawyer Says She Is Not Guilty, L.A. TIMES, Apr. 23, 2000, at B1.


\(^{119}\) CAL. BUS. & PROF. CODE § 2507(a) (Supp. 2000).

\(^{120}\) See Gibson, supra note 118.

\(^{121}\) See generally Kelly, supra note 41.

\(^{122}\) Suarez, supra note 1, at 322; see, e.g., Kathy Subko Saunders, Labor of Love, St. PETERSBURG TIMES, July 5, 1993, at 10.

\(^{123}\) Rifkin, supra note 22, at 515-20 (discussing comparative safety studies).

\(^{124}\) See, e.g., People v. Odam, 82 Cal. Rptr. 2d 184, 190 (Cal. App. 1999), reh'g granted, 977 P.2d 65 (Cal. 1999); Ex-Midwife Pleads Guilty in Baby's Death, L.A. TIMES, May 20, 2000, at B5.

\(^{125}\) Silber & Marosi, supra note 117, at B1.

\(^{126}\) Id.

\(^{127}\) CAL. BUS. & PROF. CODE § 2507(b) (Supp. 2000).
prosecution against a midwife since the licensing began.\(^{128}\) When Jensen plead guilty to contributing to the death of an infant,\(^{129}\) it marked the first successful criminal prosecution of a licensed midwife in California.\(^{130}\)

Several midwife organizations were fearful the prosecution would derail their push for greater authority during childbirth.\(^{131}\) The requirement that they work under the supervision of a doctor forced many midwives “into becoming reluctant lawbreakers.”\(^{132}\) The insurance companies, although many pay for maternity care by a midwife,\(^{133}\) refuse to insure doctors who offer their services as supervising physicians for midwives.\(^{134}\)

Criminally charging and prosecuting medical practitioners, including physicians is increasing.\(^{135}\) The Jensen case brought midwives into this new and contentious arena. Most lawsuits against midwives are brought under the charge of practicing medicine without a license.\(^{136}\) These suits are most often brought not by patients but by competitors of the midwives, including physicians and medical organizations.\(^{137}\) Those patients who do pursue legal action are dissatisfied with simply settling for a civil case; they now want the mistakes of the medical practitioner to result in jail time.\(^{138}\)

\(^{128}\) Silber & Marosi, supra note 117, at B1.
\(^{131}\) Silber & Marosi, supra note 117, at B1.
\(^{132}\) Id.
\(^{133}\) The potential savings offered by midwife care have led companies such as Mutual of Omaha, Prudential, and Blue Cross Blue Shield to reimburse for midwifery care. See Andrews, supra note 54, at 1279.
\(^{134}\) Silber & Marosi, supra note 117, at B1.
\(^{137}\) Andrews, supra note 54, at 1302.
\(^{138}\) McCarthy, supra note 135, at 601-02 (suggesting that criminal prosecution of allegedly incompetent healthcare providers “is on the rise”).
SB 1479 - Amendment to the Licensed Midwifery Practice Act of 1993

SB-1479
(b) Every woman has a right to choose her birth setting from the full range of safe options available in her community....
(c) The midwifery model of care is an important option within comprehensive health care for women and their families and should be a choice made available to all women who are appropriate for and interested in home birth.\(^{139}\)

Despite fears of the backlash of the Jensen case, the Amendment to the Act was signed into law on September 1, 2000.\(^{140}\) The amendment emphasizes the safety, healthfulness, and cost-effectiveness of midwifery care.\(^{141}\) It acknowledges that a woman's right to choose includes not only her right to terminate a pregnancy, but her right to choose the setting and manner of the birth.\(^{142}\) This reverses the stark reality noted in the Bowland decision — that the legislature had never recognized the right of a woman to have control over the time and circumstances of childbirth.\(^{143}\) The amendment brings new constitutional significance to the woman's right to choose.\(^{144}\) It is no longer limited to the right to prevent or terminate a pregnancy; at least in California, the right to choose now encompasses a woman's right to choose how and where she gives birth and who her attendant will be.\(^{145}\)

The amendments also bring greater freedom to the midwives who have difficulty working under the watchful eye of a traditional obstetrician. The midwife is no longer required to inform the client that a specific physician is available for care should hospitalization be required.\(^{146}\) SB-1479 simply requires that midwives make arrange-

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140. Id.
141. Id.
142. See id.
143. California College of Nurse-Midwives, supra note 16.
144. See Andrews, supra note 54, at 1313 (noting that the United States Supreme Court has never ruled on the expansion of the right to privacy to include the right to choose a healthcare practitioner, although at least one other state has protected that right).
145. There is an argument that once a woman has exercised her right not to abort, the state has a compelling interest in the protection of the fetus. The state may try to prevent the woman from endangering the fetus by prohibiting her from using drugs, drinking, or choosing an inadequate health practitioner. See generally Robertson, supra note 129 (calling for recognition of a woman’s right to choose to extend beyond abortion and contraception).
146. Id.
ments for emergency care and hospital transfer should anything unexpected happen during childbirth. "As midwives are qualified care providers in their own right, they sought to change the 'supervisory' language of the law to reflect the true relationship between midwives and physicians to one of 'collaboration and consultation.' 

STATUTORY REGULATION IN FLORIDA AND VIRGINIA

Florida

The Florida legislation is remarkably similar to that of California. Lay midwives are permitted to practice, and all midwives must complete a three-year training program. Florida Statutes Annotated section 467.009 provides that, "A midwifery program shall include a course of study and clinical training for 3 years. If the applicant is a registered nurse or a licensed practical nurse or has previous nursing education or practical midwifery experience, the required period of training may be reduced to the extent of the applicant's qualifications." California has a comparable section that allows credit for clinical experience. Both states then require a certification test.

Florida was one of the first states to permit the practice of lay midwifery. It helped set precedent for other state legislatures considering the same subject. Florida's legislation, passed in 1992, was based on World Health Organization standards and successful European lay midwife programs. Florida has been licensing midwives since 1931.

Lay midwives often find themselves forced to move to states that do not outlaw practice in order to make a living. An Illinois midwife moved to Florida after receiving a cease-and-desist order from the

147. Id.
152. Florida Midwives Need Your Help!, supra note 151.
155. Id.
156. Burnett, supra note 103, at F3.
Illinois Department of Professional Regulation. Just as California has followed in Florida's footsteps concerning the legality of lay midwives, so should other states. This would allow mobility in the midwife labor market that is not currently present.

**Virginia**

Virginia is one of only nine states that prohibit Certified Professional Midwives from practicing and one of eleven that prohibits lay midwifery. Only Certified Nurse-Midwives are licensed to practice in Virginia. There is a movement in Virginia, however, to introduce legislation that would make it lawful for a non-nurse to become a licensed midwife.

The proposed Midwifery Bill is more conservative than the laws in states like Florida and California. It does not propose to license lay midwives, but would require midwives to obtain the Certified Professional Midwife credential offered by the North American Registry of Midwives. The proposed bill would also create an Advisory Council on Midwifery, designed to help formulate midwife regulations.

Two lay midwives in Virginia recently were charged with involuntary manslaughter, practicing medicine without a license, and practicing midwifery without a license. The charges stemmed from the death of a mother under the care of the midwives. The manslaughter charges against both women were dropped, but Cynthia Caillagh pled guilty to practicing medicine without a license, practicing midwifery without a license, and neglect of an incapacitated adult.

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157. Id.
160. VA. CODE ANN. § 32.1-147. "All subsequent licensure for midwifery shall be limited to registered nurses who are trained as nurse midwives...." Id. The state of Illinois requires midwives to obtain a master's degree in nurse-midwifery. Burnett, supra note 103, at F3.
163. Id.
164. Id.
all misdemeanors.\textsuperscript{166} Her assistant, Beth Haw, pled guilty to practicing midwifery without a license.\textsuperscript{167}

Despite the illegality of lay midwife-assisted birth, a small number of women in Virginia seek out the twenty-five to thirty lay midwives who are willing to break the law to practice their trade.\textsuperscript{168} Lay midwives attended an estimated 200 out of 90,160 births in Virginia in 1996.\textsuperscript{169}

Virginia is representative of the most conservative states when it comes to regulation of midwives.\textsuperscript{170} Although progress is likely to be slow, if achieved at all, there is hope looming on the horizon for Virginia's non-nurse midwives.

CONCLUSION

The recently revised California Licensed Midwifery Practice Act provides a good example of effective legislation for the rest of the states. Uniform state legislation would permit midwives to obtain employment in any state. Midwives should not be subjected to unnecessary restrictions that prevent them from effectively practicing their trade. As interest in home birth and midwife-assisted birth increases, the availability of such methods should increase as well.

As the legislatures become more tolerant of midwife-assisted births, the stigma that home births are unsafe, unclean, and not to be trusted, should wear away. As midwifery and home births are decriminalized, it is likely that many more women will choose home birth and midwife assistance for what they are: safe, healthy, and inexpensive alternatives to obstetricians and hospitals.

JULIE HARMON

\textsuperscript{166} Neuberger, supra note 2, at A-8; Midwifery in Virginia, supra note 165.
\textsuperscript{167} Midwifery in Virginia, supra note 165.
\textsuperscript{168} Neuberger, supra note 2, at A-8.
\textsuperscript{169} Id.
\textsuperscript{170} Midwives Alliance of N. Am. Legal Status, supra note 8.