McGeorge Law Review

Volume 15 | Issue 1 Article 5

1-1-1983

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Bowland v. Municipal Court Revisited: A Defense Perspective on Unlicensed Midwife Practice in California

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In 1976, the California Supreme Court in *Bowland v. Municipal Court*[1] addressed the right to privacy of an expectant mother who chooses to use the services of a lay midwife. The issue surfaced in the successful criminal prosecution of a lay midwife[2] for violating section 2141 of the California Business and Professions Code[3], the unlicensed practice of medicine. The *Bowland* court refused to recognize a fundamental right of privacy in the decision of an expectant mother to have a home birth or to be assisted during the home birth by a lay midwife.[4] *Bowland* remains the seminal decision, as the issue has not again resurfaced in California.

Interim developments as well as several overlooked or inadequately considered perspectives render *Bowland* at best suspect, and clearly ripe for re-examination. Since the 1976 *Bowland* decision, the Califor-

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1. 18 Cal. 3d 479, 556 P.2d 1081, 134 Cal. Rptr. 630 (1976).

2. The distinction between a certified midwife and a lay midwife generally may be traced to the nature and extent of the prior educational training lay midwives rely on, knowledge of the physical processes of labor and the impact of a personalized involvement by the labor assistant. In contrast, a certified midwife is minimally an R.N. with additional education and training specifically in midwifery. *See* Comment, *A "Birth Right": Home Births, Midwives, and the Right to Privacy*, 12 PAC. L.J. 97, 99-102 (1980).

3. NOW BUSINESS & PROF. CODE §2052.

4. 18 Cal. 3d at 495, 556 P.2d at 1088-89, 134 Cal. Rptr. at 637-38.

nia Supreme Court in *City of Santa Barbara v. Adamson*[5] and *Committee to Defend Reproductive Rights v. Myers*,[6] has refined the independent state grounds of privacy. *Adamson* held that the guarantee of privacy based on the California Constitution is more protective in areas involving sexual freedom and familial autonomy than the federal counterpart.[7] In *Meyers*, the court recognized the fundamental privacy interest involved in the right to life;[8] in the choice to bear children unfettered by discriminatory governmental regulation;[9] in the right to preserve one's personal health and that of the expectant child;[10] and in the right to retain personal control over one's own body during the birth of children.[11] This paper will discuss the impact of *Adamson* and *Myers* in the context of the lay midwife assisted birth.

Another significant interim development that impacts on the *Bowland* decision is more pragmatic and involves the radical personnel transformation of the court.[12] From the unanimous *Bowland* court only Associate Justices Mosk and Richardson remain. The post-*Bowland* court comprised of Chief Justice Bird and Associate Justices Mosk, Kaus, Richardson, Broussard, Newman and Reynoso has demonstrated in cases such as *Adamson*, *Myers*, *Mandel v. Myers*[13] *People v. Terensinski*,[14] and *In Re Cummings*[15] that the court may be more re-

5. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

6. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981); *accord* Moe v. Secretary of Admin. & Finance, 417 N.E. 2d 387 (Mass. 1981); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).

7. 27 Cal. 3d at 130 n.2, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3; *see* Note, *Committee to Defend Reproductive Rights v. Myers: Procreative Choice Guaranteed for All Women*, 12 GOLDEN GATE L. REV. 691, 710-11 (1982).

8. 29 Cal. 3d at 275, 625 P.2d at 792-93, 172 Cal. Rptr. at 879-80.

9. *Id.* at 275-76, 625 P.2d at 793, 172 Cal. Rptr. at 880.

10. *Id.* at 274, 625 P.2d at 792, 172 Cal. Rptr. at 879.

11. *Id.*

12. Justice Richardson wrote the 1976 *Bowland* court decision. Joining him in concurrence were Justices Tobriner, Mosk, Clark, McComb, Sullivan and Wright. In 1981, the decision of the California Supreme Court in Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 arguably has marked the highest advance yet seen regarding judicial recognition that the right to privacy under the California Constitution extends a fundamental canopy over the expectant mother in the birthing situation. *See infra* notes 51-59 and accompanying text. Justice Tobriner wrote the majority opinion in *Myers* with Chief Justice Bird writing a separate concurring opinion. Justices Mosk and Newman were also in concurrence, with Justices Clark and Richardson dissenting. Chief Justice Tobriner retired from the bench in 1982 and will be missed. Nevertheless, in the post-Myers years, Chief Justice Bird has continued to recognize the viability of the *Myers* decision. Mandel v. Myers, 29 Cal. 3d 531, 629 P.2d 935, 174 Cal. Rptr. 841 (1981). In People v. Teresinski, 30 Cal. 3d 822, 640 P.2d 753, 180 Cal. Rptr. 617 (1982) Justice Broussard acknowledged that, as in *Meyers*, the California high court has on occasion been influenced not to follow parallel federal decisions by the "visor of the dissenging opinion and the incisive academic critism of those decisions." *Id.* at 836, 640 P.2d at 761, 180 Cal. Rptr. at 625. One hopes that Justice Broussard may be equally influenced to question push decisions of the high court of California.

13. 29 Cal. 3d 531, 629 P.2d 935, 174 Cal. Rptr. 841 (1981).

14. 30 Cal. 3d 822, 640 P.2d 753, 180 Cal. Rptr. 617 (1982).

15. 30 Cal. 3d 870, 640 P.2d 1101, 180 Cal. Rptr. 826 (1982).

ceptive to the recognition of an expectant mother's privacy interest of being assisted during birth by anyone of her choosing.

In addition to these interim developments, this article will examine several issues that the *Bowland* court either failed to consider or inadequately considered and which may prove significant in the inevitable re-examination of the *Bowland* decision. The *Bowland* court initially failed to examine the body of data challenging the assumption that the risks of home births are sufficiently greater than of hospital births. Adherence to this assumption led the court to override the individual privacy rights of the mother in favor of giving the state the compelling interest in the unborn child's welfare. If upon re-examination, the court were to consider the evidence belying this assumption, the cornerstone upon which *Bowland* was built would be eliminated.

A second issue not adequately discussed in *Bowland* is the expectant mother's right to privacy. Indeed, while recognizing the right of an expectant mother to choose to have her baby at home, the prohibition in California against lay midwifery places significant restrictions on persons who may attend the expectant mother. The expectant mother in the proper exercise of her privacy interests is placed in the dilemma of choosing between a hospital birth attended by someone perhaps not of her own choosing, at a location and cost that she may not be able to afford, or being a party to the lay midwife's criminal act of practicing medicine without a license.

Finally, this paper will examine the domestic application remedy provided by section 2058[16] of the California Business and Professions Code. Section 2058 creates an exception to the prohibition of the unlicensed practice of medicine.[17] Pursuant to section 2058, a person may assist a childbirth under "the domestic administration of family remedies." The *Bowland* court, issuing a blanket exclusion of midwifery from this exception, failed to examine the activities of the midwife that should bring them within the exception. Thus, the court failed to provide a basis upon which to distinguish the activities of midwives that constitute "practicing medicine."

FACTS OF *BOWLAND V. MUNICIPAL COURT*

The plaintiffs in *Bowland* originally were defendants in criminal proceedings. They were charged with violating section 2141 of the Business and Professions Code by holding themselves out as practicing

16. BUSINESS & PROF. CODE §2058 provides: "Nothing in this chapter prohibits service in the case of emergency, or the domestic administration of family remedies."

17. *Id.* §2052.

midwifery without a license. In defense of the criminal charges, the lay midwives unsuccessfully postulated that an expectant mother's right to privacy in her own home included the liberty of choosing those whom she wished to assist her in the delivery of her child. Thus, section 2052 impermissibly interfered with the expectant mother's fundamental right to privacy.[18] Rejecting this argument, the California Supreme Court drew parallels to the United States Supreme Court decision of *Roe v. Wade*.[19] In *Roe*, the Court held that a state could proscribe abortion during the third trimester of pregnancy because, at the time the fetus is viable, the state interest in the life of the unborn child supersedes the woman's own privacy right. At that point, abortion may be prohibited, except when necessary to preserve the mother's life or health.[20] The *Bowland* court held that California has a similar state interest in the welfare of the unborn child that overshadows the expectant mother's right to privacy. The California court thus refused to acknowledge a fundamental right of privacy in the expectant mother's choice of an aide during the home birth.

In examining section 2052, the California Supreme Court in *Bowland* observed two separate and distinct prohibitions embodied in the code:

> It may be seen that the . . . section appears to proscribe two types of medically related activities. It is unlawful, first, for an unlicensed person to practice or hold himself out as practicing any 'system or mode of treating the sick or afflicted'; second, the prohibition extends to any actual diagnosis, treatment, surgery or prescription for a 'mental or physical condition' whether or not such activities comprise a system or mode of treating the sick or afflicted.[21]

Thus, the first offense prohibited is the treatment of the "sick or afflicted" by an unlicensed person.[22] The second prohibition forbids the diagnosis, treatment, surgery or prescription for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person. Under this prohibition, the *Bowland* court concluded that the practice of lay midwifery constituted practicing medicine without a license. The court stated:

> Thus, although normal childbirth is not a 'sickness or affliction' within the meaning of section 2141, we conclude, in light of the total statutory scheme governing the practice of the 'healing arts', that section 2141's prohibition against unlicensed persons treating a 'physical

18. 18 Cal. 3d at 494, 556 P.2d at 1088-89, 134 Cal. Rptr. at 637.
19. *See id.* at 495, 556 P.2d at 1089, 134 Cal. Rptr. at 638.
20. Roe v. Wade, 410 U.S. 113, 164-65 (1973).
21. 18 Cal. 3d at 485, 556 P.2d at 1083, 134 Cal. Rptr. at 632.
22. *See id.* at 491, 556 P.2d at 1089, 134 Cal. Rptr. at 638.

condition' was intended to encompass the practice of midwifery.[23]

RIGHT TO PRIVACY

From a defense perspective, at least one commentator has shown that the *Bowland* court committed two errors in rejecting the privacy argument.[24] First, the court failed to recognize the difference between the state interest in regulating third trimester abortions and the state interest in regulating a child's delivery. In childbirth, the interest of the mother as well as the interest of the state are completely compatible since the primary concern of both is the protection of the health of mother and child. In the abortion scenerio however, the primary interest in the overwhelming percentage of cases clearly is not the health of the unborn child but rather the physical and emotional health of the mother. Additionally, abortions in California can only be performed by a state licensed physician, whereas childbirth for a mother need not incur any medical intervention. Clearly, significant policy distinctions distinguish the *Roe v. Wade* abortion analysis from the childbirth analysis.

The second error of the *Bowland* decision was the refusal of the court to consider medical evidence demonstrating the relative safety of lay midwife assisted home births. As set forth in *Roe v. Wade*, the compelling state interest in the proscription of third trimester abortions was based on present medical knowledge.[25] Additionally, *Roe v. Wade* took judicial notice of the fact that maternal mortality for abortions performed during the first trimester may be less than the mortality rate for normal childbirths.[26] In contrast, the *Bowland* court, which purportedly relied in significant part on the logic of *Roe v. Wade*, did not consider the body of medical evidence related to the safety of home births.

MEDICAL EVIDENCE

Midwives do not urge that all births should take place in the home, but rather that hospitalization for all births is ill considered.[27] Certain dangers unique to a hospital are arguably not present in home birth,

23. *See id.* at 491, 556 P.2d at 1086-87, 134 Cal. Rptr. at 635-36; *see also* Comment, *Midwifery: A History of Statutory Suppression*, 9 GOLDEN GATE L. REV. 631, 637 (1978-79).
24. *See* Comment, *supra* note 2, at 110-13; *see also Comment*, *supra* note 23, at 636-38.
25. 410 U.S. 113, 149-50, 163.
26. *Id.*
27. D. STEWART, THE FIVE STANDARDS FOR SAFE CHILDBEARING 201-280 (1981); *see also*, S. ARMS, IMMACULATE DECEPTION 273-74 (1975); Devitt, *The Transition from Home to Hospital Birth in the U.S.*, BIRTH & FAMILY J., 4:47-58 (1977).

including the greater risk of infection.[28] In one study, newborn infection rates were found to be four times higher in the hospital than at home.[29] Furthermore, from 1975 to 1978, the infection rates of surgery in obstetrical wards, including cesarean surgery, increased by 26%.[30] This increase occurred even though the infection rates for all other surgical services in the United States during that same time period decreased by 16%.[31]

A 1973 nationwide study in Holland showed that 53% of all births occurred at home, with the balance occurring in health facilities. Midwives attended 67% of the home births and 37% of all births. The infant mortality rate was 11.5 per 1,000. In contrast, the infant mortality rate in the United States during 1973, with its low rate of home births, was 17.7 per 1,000.[32]

Another study, conducted by the State of North Carolina and the United States Department of Health, Education and Welfare, examined all out-of-hospital births for the years 1974, 1975, and 1976.[33] The newborn mortality rate for planned home births attended by lay midwives was 4 per 1,000.[34] In contrast, the newborn mortality rate in North Carolina hospitals over that same period was 12 per 1,000.[35] The authors of the study concluded:

> . . . if carefully screened low-risk deliveries at home with trained attendants are associated with low neonatal mortality, then there should be no reason for elimination of home delivery as an alternative supported by the medical community. . . . [H]ome delivery and delivery in specialized birth centers by trained personnel, such as nurse-midwives, may have a cost advantage over hospital delivery without unacceptable risk. . . . [T]he training of non-physician attendants needs to be improved and expanded, not phased out.[36]

The largest statistical study comparing data on home births and hospital births was undertaken by physicians of the New York Academy of

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28. *See* T. Chard, & M. Richards, *Benefits & Hazards of the New Obstetrics*, Dev. Med. Pub. section 64, 169 Spas. Intern'l. Med. Publications, Lippincott, Philadelphia, (1977).

29. *See* L. Mehl, *Scientific Research on Childbirth Alternatives: What it Tells Us About Hospital Practice*, in D. STEWART, & L. STEWART, COMPULSORY HOSPITALIZATION OR FREEDOM OF CHOICE IN CHILDBIRTH?, 171-208 (1978).

30. *See* Trends in Surgical Wound Infection Rates, U.S. Morbidity & Mortality Weekly Report, Center for Disease Control, U.S. PHS, 29:3:27, (Jan. 25, 1980).

31. *Id.*

32. *See* Department of Consumer Affairs, SB 1829 Information Paper on The Professional Midwifery Practice Act of 1980 3 (March 25, 1980); *see also*, Comment, *supra* note 2, at 98-99.

33. Burnett, Jones, Rooks, Tyler, Miller, *Home Delivery & Neonatal Mortality In N.C.*, J. Am. Med. Assoc., 244:2741 (Dec. 19, 1980). A total of 1,296 births occurred outside hospital during those years. *Id.*

34. *Id.* at 2743. 768 planned home births were attended by midwives. *Id.*

35. *Id.* A total of 242,245 births occurred in North Carolina hospitals during this period. *Id.*

36. *See* D. STEWART, *supra* note 27, at 264.

Medicine in 1933.[37] While admittedly an old study, it is significant because of the large number of births considered. The study encompassed data on the 348,200 births in New York City from 1930 to 1932. Two thousands five hundred and nineteen of the births were attended by midwives at home and 318,701 births were attended by physicians with three-fourths of these births in hospitals. The New York Academy found that the maternal mortality rate of midwife assisted births was significantly lower than physician-assisted births, even though the midwives were more often attending the poor, "a group of women whose childbearing as a group is more hazardous than the average."[38] The study concluded that the relative safety of the home birth should be recognized.[39]

CALIFORNIA MEDICAL EVIDENCE

A recent study conducted by a team from the Department of Gynecology and Obstetrics of the Stanford University School of Medicine evaluated the safety of home delivery by lay midwives.[40] The study conducted in Santa Cruz County found that both the newborn mortality rate and the prematurity rate were significantly lower in the home birth group than in the country as a whole. The success of the home birth group was attributed to a lack of anesthesia, good prenatal care and preparation of the mothers, avoidance of the supine position standard in most hospitals and a general lack of fear and other maternal stresses usually present in a hospital birth.[41]

In a subsequent matched population study conducted by the same author,[42] 1,046 home birth couples were matched to 1,046 hospital birth couples for maternal age, number of previous pregnancies, years of education, socioeconomic status and risk factors including presentation (vertex, brow, breech, etc.), multiparity (twins, etc.), previous cesarean, pre-existing hypertension and symptoms of pre-eclampsia. The results revealed hospital application of forceps was 21.4 times greater than in home births. At the same time, the rate of episiotomies was nine times greater and cesarean births were three times more fre-

37. *See Maternal Mortality in New York City, 1930-32*, New York Academy of Medicine, Commonwealth Fund (1933); *see also*, D. STEWART, *supra* note 27, at 121.

38. *See Maternal Mortality in New York City, 1930-32*, New York Academy of Medicine, Commonwealth Fund (1933); *see also* STEWART, *supra* note 27, at 212.

39. *See Maternal Mortality in New York City, 1930-32*, New York Academy of Medicine, Commonwealth Fund (1933); *see also* STEWART, *supra* note 27, at 212.

40. *See* Mehl, Peterson, Shaw, Creevy, *Compilations of Home Birth An Analysis of a Series From Santa Cruz County, California*, BIRTH & FAMILY J. 2:123-135 (1975).

41. *Id.*

42. Mehl, *supra* note 29, at 171-208.

quent in the hospital.[43]

The most illustrative example of the higher risk involved in hospital births occurred in Madera County, California.[44] Prior to 1960, family physicians attended births in Madera County. The mortality and prematurity rates for the newborn were relatively high in those years. For example, in 1959, the neonatal mortality rate for the county was 23.9 per 1,000 births and prematurity rates were 11%. From 1960 to June 1963, nurse-midwives were provided by a special state-funded program to practice in the Madera County Hospital. During their term of stay, the neonatal mortality rate dropped to 10.3 per 1,000 while the prematurity rate decreased to 6.4%. In late 1963, the California Medical Association successfully terminated the program and replaced midwives with obstetrician/gynecologists. Subsequently, from January 1964 to June 1966, neonatal deaths rose to 32.1 per 1,000 while prematurity rates rose to 9.8%.[45]

Even though these studies are clearly inconclusive, they are sufficient at least to challenge the assumption of the *Bowland* court that the risks of home births are sufficiently greater than those of hospital births to give the state an interest in the unborn child's welfare that overrides the individual privacy rights of the mother.[46] Because this assumption is arguably false, the California Supreme Court should not have recognized a compelling interest in prohibiting lay persons from assisting home births without a sufficient consideration of relevant medical evidence.

The *Bowland* court also failed to consider a mother's right to privacy while giving birth to her child. The next section of this article will discuss the emergence of a home birth privacy right that is implicit in the California Constitution.

The Emergence of a Fundamental California Home Birth Privacy Right

In *Bowland*, the court rejected efforts by the defense to characterize the federal right of privacy derived from the first, fourth, fifth, ninth and fourteenth amendments as protecting a woman's choice of the manner and circumstances in which her baby is born.[47] The Bowland court noted that the United States Supreme Court had never addressed

43. *Id.*

44. *NAPSAC News*, THE INTERNATIONAL ASSOCIATION OF PARENTS AND PROFESSIONALS FOR SAFE ALTERNATIVES IN CHILDBIRTH 21 (Spring, 1982).

45. *See* Burnett, *supra* at 34, at 2743.

46. 18 Cal. 3d at 495, 556 P.2d at 1089, 134 Cal. Rptr. at 638.

47. *See generally* Comment, *supra* note 2.

the right so broadly. The federal privacy right, however, seems fundamentally enmeshed in medical decisions that are indispensable to the proper effectuation of the interests protected by the United States Constitution.[48]

The United States Supreme Court is not the exclusive source for the derivation and development of fundamental rights. State courts are increasingly looking to their own constitutions as an alternative and independent basis for developing the right to privacy.[49] Article I, section I of the California Constitution provides for an explicit constitutional right to privacy. The section reads: "all people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."[50]

Subsequent to the 1976 *Bowland* decision, the California Supreme Court in *City of Santa Barbara v. Adamson*[51] and *Committee to Defend Reproductive Rights v. Myers*[52] began to refine the California privacy right. In *Adamson*, the court ruled that the guarantee of privacy based upon the California Constitution is more protective in areas involving sexual freedom and familial autonomy than the federal counterpart.[53] In *Myers*, the California Supreme Court observed that the California Constitution includes privacy as a *fundamental, compelling, and inalienable* right. The court held that this right of privacy "protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose. . . ."[54]

In *Myers*, the court arguably provided the most helpful statement that protects a mother's right to privacy in the childbirth setting. Although the case involved restrictions on Medicaid funding for abortions, the California court based its decision on the express state constitutional guarantee of privacy.[55] Importantly, the court stated that similar constitutional concerns would arise if the issue were the refusal

48. As one commentator has observed, "In the continuum of life's fundamental decisions, childbirth lies at the nexus between procreation and childbearing. Logic and precedent compel the conclusion that childbirth is a fundamental decision protected by the right to privacy." Comment, *supra* note 2, at 108.

49. For an excellent general discussion of California's privacy right, see generally, Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385 (1982).

50. CAL. CONST., art. I, §1 (as amended in 1974).

51. 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

52. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

53. 27 Cal. 3d at 130 n. 3, 610 P.2d at 440 n. 3, 164 Cal. Rptr. at 543 n.3.

54. 29 Cal. 3d at 256, 625 P.2d at 780, 172 Cal. Rptr. at 867. (Meyers involved the right to public funding for abortions).

55. *Id.* at 275, 625 P.2d at 792-93, 172 Cal. Rptr. at 879-80; see Note, *supra* note 7, at 709-10.

to provide medical care for women choosing childbirth rather than abortion.[56] The California Supreme Court went on to state:

> Indeed, although in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar constitutional issues would arise if the Legislature—as a population control measure, for example—funded Medi-Cal abortions but refused to provide comparable medical care for poor women who choose childbirth. Thus, the constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of *either* procreative choice from discriminatory governmental treatment.[57]

In elaborating on the nature of the interest being protected by the right to privacy, the *Myers* court found the following rights involved: (1) the woman's fundamental rights to life and to choose whether to bear children; (2) the woman's fundamental interest in the preservation of her personal health; and (3) the woman's right to retain personal control over her own body.[58] In the context of the expectant mother, each of these interests is represented. Obviously, the expectant mother enjoys the same fundamental rights.

The *Myers* court has provided a vehicle for the recognition of a fundamental privacy right in California. This privacy interest involves the right to life; the choice to bear children unfettered by discriminatory governmental regulation; and the right of the expectant mother to preserve her own health and the health of her child. This privacy interest also includes the right to retain personal control over one's own body during the birth of children.[59]

Since the *Bowland* decision, several significant developments have occurred affecting the practice of midwifing. The next section of this article examines these developments that make reevaluation of the *Bowland* decision imperative.

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56. *Id.* at 256, 625 P.2d at 780, 172 Cal. Rptr. at 867.
57. *Id.* (emphasis added).
58. 29 Cal. 3d at 274, 624 P.2d at 792, 172 Cal. Rptr. at 879.
59. *Id.* at 274-75, 624 P.2d at 792, 172 Cal. Rptr. at 879. It is apparent that no precise High Court ruling is forthcoming. This term, the United States Supreme Court has granted *certiorari* to hear cases regarding whether the government may require hospitalization for abortions, parental consent for abortions on minors, signature on an informed consent form, a 24-hour hiatus between informed consent and the performance of the abortion, and taking of tissue sample to be submitted for pathology report. Simpoulos v. Virginia, 102 S. Ct. 2265, (1982); City of Akron v. Akron Center for Reproductive Health, 102 S. Ct. 2266, (1982); Planned Parenthood Ass'n. of Kansas City, Mo. v. Ashcroft, 102 S. Ct. 2267, (1982). Nevertheless, the United States Supreme Court has held consistently that state constitutions may provide more expansive protection of individual rights than the United States Constitution. *See* Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 81, 2035, 2040-41, (1980).

The *Bowland* court specifically held that former section 2141 of the Business and Professions Code proscribes lay midwife practice.[60] The court held that the statute prohibited the practice of a system or mode of treating the "sick or afflicted by an unlicensed person," recognizing, however, that pregnancy is *not* a "sickness or affliction" under this code provision. Continuing to interpret the statute, the court ruled that section 2141 also prohibits the unlicensed diagnosis and treatment of a "mental and physical condition", including pregnancy assistance.[61] This conclusion was reached "in light of the total statutory scheme governing the practice of the 'healing arts'."[62]

Since the *Bowland* decision, the Committee to Study Alternatives in Maternity Care, established by the California Legislature,[63] specifically found that the California criminal process is an inappropriate means to regulate normal pregnancy operations and recommended that Business and Professions Code section 2141 be amended to delete the phrase "or other physical or mental condition."[64] In 1981, Senate Bill 670 was proposed by California State Senators Bill Greene and Barry Keene, and Assemblyman Tom Bates. This proposed legislation was to provide for a minimally intrusive, short term training program for lay midwife certification. Senate Bill 670 was defeated in Committee in both 1981 and 1982.[65]

Recently, the California Board of Medical Quality Assurance [hereinafter referred to as BMQA] has begun considering a proposal to deregulate the medical profession.[66] Under this proposal, the state would

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60. CAL. BUS. & PROF. CODE §2141 provided in full:
Any person, who practices or attempts to practice, or who advertises or holds himself or herself 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 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.
This is now CAL. BUS. & PROF. CODE §2052.

61. *Bowland*, 18 Cal. 3d at 491, 556 P.2d at 1086-87, 134 Cal. Rptr. at 635-36.

62. *Id.* The court acknowledged that its construction of the statute was difficult in lieu of the defendant's notation of statutes such as Business and Professions Code §551 which imposes the duty of treating a newborn child's eyes not only upon physicians and midwives, but also upon "any person" assisting in the birth. *Id. See also* HEALTH AND SAFETY CODE §305. The defendants argued that such statutes, "extant both during the periods when midwifery certificates were available and when they were not, evidence legislative recognition that unlicensed persons may lawfully attend and assist a childbirth." The court, however, required "further indications of legislative intent". 18 Cal. 3d at 490-91, 556 P.2d at 1086, 134 Cal. Rptr. at 635.

63. *See* COMMITTEE TO STUDY ALTERNATIVES IN MEDICAL CARE. A REPORT TO THE 1978 LEGISLATURE ON ALTERNATIVES IN MEDICAL CARE (December, 1977).

64. *Id.*; *see* Comment, *supra* note 2, at 111 n.135.

65. SENATE WEEKLY HISTORY 286 (1981-82 Reg. Sess.).

66. *NAPSAC News*, *supra* note 44, at 21.

continue to license physicians and allied health care practitioners, but would no longer enforce laws against the unauthorized practice of medicine.[67] The Public Affairs Research Group, commenting on the BMQA within the medical profession proposal, stated that the existing system gives some groups more power and authority than they merit,[68] wastes the talents and skills of others, stifles upward mobility, and makes turf conflict inevitable. The proposal under consideration by the BMQA would give consumers the freedom to consult licensed or unlicensed practitioners of their choosing. Anyone could become involved in health care so long as the person did not engage in public deception as to his credentials.[69]

Since the *Bowland* decision, the practice of midwifery has been reevaluated by the California Legislative and public interest groups. In light of continuing social and legislative activity concerning midwifery practice, therefore, the high court of California should reconsider whether the expectant mother, under the California Constitution and state law, possesses the private choice of assistance by a midwife during the birth of her child.

SUPPLY AND DEMAND

California does not directly prohibit an expectant mother from choosing to have her child in the privacy of her own home, but the stringent statutory regulation limiting who may attend the home birth has seriously restricted access to midwives by expectant mothers.[70] Approximately 90% of all mothers can have normal, spontaneous births producing healthy babies without the need for medical intervention.[71] Because of this success rate and related factors, an increasing number of expectant mothers are desiring home births attended by midwives, rather than birth in traditional medical institutions.[72] Out of hospital births in the United States more than doubled from 1973 to 1977, climbing from 22,500 to 49,000. This trend is expected to continue.[73] The number of people able to aid the increasing number of out of hospital births remains small. The total number of nurse-midwives in Cal-

67. *Id.*
68. *Id.*
69. *Id.*
70. *See* Comment, *supra* note 2, at 194-206.
71. ARMS, IMMACULATE DECEPTION, A NEW LOOK AT WOMEN AND CHILDBIRTH IN AMERICA 194-206 (1975).
72. *Id.* at 137, 147.
73. From a memorandum dated March 19, 1981 by the Office of Information of the National Academy of Sciences, as reported in *NAPSAC News*, THE INTERNATIONAL ASSOCIATION OF PARENTS & PROFESSIONALS FOR SAFE ALTERNATIVES IN CHILDBIRTH, (Summer 1981).

ifornia had risen to only approximately 170.[74] In contrast, an estimated that 500 lay midwives in California are delivering nearly 5,000 babies annually.[75]

Clearly, the demand for midwife services will increase in the future. A recent report to the California Senate Committee on Health and Welfare categorized the following reasons for expanding the professional category of certified midwives:[76] (1) a shortage, as well as a geographic dislocation of physicians providing obstetrical services exists, resulting in a substantial reduction of prenatal care; (2) the skills necessary to safely assist a woman in normal childbirth can be learned by midwives; (3) the costs of maternity care are so high that many women are forced to seek lower cost alternatives such as midwives; and (4) alternatives to traditional hospital births are being demanded by women and their families but are discouraged under the standard obstetrical hospital delivery system.

This continuing demand for the assistance of midwives has forced a growing number of expectant mothers to face the unduly burdensome dilemma of either having a hospital birth attended by a person not of her own choosing and at a location and cost that the mother cannot afford, or being a party to the lay midwife's criminal act of 'practicing without a certificate'.[77] This dilemma should not be ignored by the courts of this state in the continuing absence of legislative solutions.

DOMESTIC APPLICATION EXCEPTION

Two exceptions to the unlicensed practice of medicine are embodied in section 2058 of the California Business and Professions Code: a person may assist a childbirth (1) under emergency circumstances and (2) under "the domestic administration of family remedies."[78] The emergency exemption has been limited by subsequent decisions and is not currently applicable to the planned home birth attendant situation.[79] The latter provision, however, concerning the "domestic administration of family remedies" remains an enigma—both as to the nature

74. DEPARTMENT OF CONSUMER AFFAIRS, *supra* note 32, at 3.

75. SENATE COMMITTEE ON HEALTH AND WELFARE, STAFF ANALYSIS OF SENATE BILL 670 at 1-2 (as amended April 28, 1981). The report goes on to state that "to date the nurse midwife program has not been widely utilized . . . this is due to: failure of medical community to embrace the program; malpractice insurance premiums are substantial; lack of availability of approved courses; and difficulty in obtaining admitting privileges to hospitals." *Id.*

76. *Id.* at 2.

77. Statutes such as Business and Professions Code section 2052 as applied to lay midwives "can be understood only as an attempt to achieve with carrots what the government is forbidden to achieve with sticks." L. TRIBE, AMERICAN, CONSTITUTIONAL LAW 933 n.77 (1978).

78. CAL. BUS. & PROF. CODE §2058.

79. *See Bowland*, 18 Cal. 3d at 491, 556 P.2d at 1086, 134 Cal. Rptr. at 635.

and the extent of the protection provided.[80]

In *Bowland*, the court held that the family remedy encompassed "informal recommendations among friends as to the efficacy of nonprescription vitamin compounds or ocean cruises" as well as "the presence during childbirth of a husband, friend or relative who merely offers verbal reassurance, soothing massage, or assistance in breathing exercises."[81] Nevertheless, the court refused to recognize the lay midwife as within the meaning of the statute since the California Legislature had characterized midwifery as a "healing art".[82]

The logic of the *Bowland* court in excluding midwifery from this exception is subject to question. The nature of an exception presumes the conclusive effect of other sections of the statutory code on the exempted activity.[83] Otherwise, a specific statutory exemption would not be necessary. To hold that midwifery should not be included under the umbrella of the section due to its prior categorization as a 'healing art' is to avoid the task of defining the precise activities of the midwife that bring the practice of midwifery within the family remedy exception. The high court has provided a poor basis upon which to distinguish which activities of midwives are of the healing art variety. This author does not suggest that none of the activities of a midwife may be regulated by the license requirement. Rather, the court in light of the family remedy language, could accomplish its intent to harmonize *all* sections of the statutory code relating to midwives by turning to a precise analysis of midwife activity.

The acceptance by the *Bowland* court of a relative or friend's presence under the protective canopy of section 2058—provided the assistance is limited to 'verbal reassurance, soothing massage, or assistance in breathing exercises'—is at least an acknowledgment that certain activities performed by a person other than a licensed practitioner come within the exception for domestic administration of family remedies. An examination remains for the California Supreme Court to determine the precise acts of the lay midwife that fall within section 2058.

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80. There is no extensive case law discussion of the legislative intent behind the so-called Good Samaritan legislation contained in section 2144. However, such legislation commences in the *second* paragraph of that section. *See, e.g.*, Colby v. Schwartz, 78 Cal. App. 3d 885, 890-91, 144 Cal. Rptr. 624, 627-28 (1978).

81. 18 Cal. 3d at 492, 556 P.2d at 1087, 154 Cal. Rptr. at 636. The root of the language "domestic administration of family remedies" may be traced to the original 1913 Cal. Stat., 354, §22. No legislative history or subsequent case law interpretation (except *Bowland*) is apparent to this author.

82. 18 Cal. 3d at 491, 556 P.2d at 1086, 134 Cal. Rptr. at 635.

83. For example, see the court's discussion of statutory 'exceptions' in Newhouse v. Board of Osteopathic Examiners, 159 Cal. App. 2d 728, 735-36, 324 P.2d 687, 692 (1958).

In the absence of this analysis, the public is without guidance as to what conduct of the lay midwife is prohibited from engaging in.

Conclusion

When the privacy concerns of an expectant mother who chooses assistance during homebirth by a lay midwife resurface before the California Supreme Court, the court will be hard pressed to ignore the issues raised in this article. The author has shown that in analyzing the privacy parameters set forth in *Roe v. Wade*, the California Supreme Court must acknowledge the significant policy differences that distinguish *Roe v. Wade* from *Bowland*. In *Bowland*, the court failed to discern the difference between the state interest in regulating third trimester abortions and the state interest in regulating a child's delivery. The failure to distinguish these interests caused the court to improperly find a compelling state interest in regulating childbirth. As a result, significant privacy concerns of the expectant mother were ignored. This error of the court was due in part to the failure to consider significant medical evidence related to the safety of midwife assisted home births.

The interim refinement of the California right of privacy makes the position of the court in *Bowland* much less tenable. The California Supreme Court in *City of Santa Barbara v. Adamson* and *Committee to Defend Reproductive Rights v. Myers* has significantly expanded the California privacy right. It appears evident that the court, through *Adamson* and *Myers*, must now modify its approach and recognize the legitimate privacy concerns of the birthing mother. Additionally, the court must deal more precisely with the "family remedy" exception of California Business and Professions Code section 2058. *Bowland* does little to provide guidance on the specific activities of the lay midwife that are prohibited. An analysis of specific activities must be undertaken to determine which activities of the lay midwife come within the exception. Using this analysis, the court could conclude that in light of the total statutory scheme governing the practice of the healing art, the statutory prohibition against unlicensed persons treating a physical condition was not intended to encompass the practice of midwifery.