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# Horseshoers, Doctors and Judges and the Law on Medical Competence†

B. ABBOTT GOLDBERG\*

*“Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason.”*

Fortescue, C.J.<sup>1</sup>

Despite the eccentric title and what seems to be an unwittingly humorous quotation from Chief Justice Fortescue, this article is a serious effort to illustrate to lawyers and doctors the development of legal requirements for medical competence. The quotation illustrates two points or caveats. The first is that the joke is not that of Fortescue but of Sir William Searle Holdsworth, whom I shall identify later. Holdsworth contrived it from a rather sententious banality by omitting Fortescue’s further words, “but with study and labor we can find it. . . .”<sup>2</sup> It thus illustrates the dangers,

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† The article itself is an elaboration and, I hope, a correction of a talk originally given to a branch of the Los Angeles County Medical Association and repeated in Marin and San Luis Obispo. My excuse for offering it is that a number of the listeners suggested that the talk should be published. This is not a display of my medical knowledge, for, to borrow a phrase, I am a “lawyer who couldn’t tell a pancreas from a rutabaga a la mode . . . .” E. Kane, *Jawbones and Sawbones* in W. PROSSER, *THE JUDICIAL HUMORIST* 34 (1952).

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1. Y.B. 36 Henry 6, f. 25-26, pl. 21 (1458); translated 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 626 (5th ed. 1942) [hereinafter cited as W. HOLDSWORTH]. See also 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 524 n.6 (4th ed. 1936) in Law French. The repetition of the ellipsis in two tongues suggests that it was deliberate rather than the result of postprandial overindulgence in port wine. See note 25 *infra*.

2. Y.B. 36 Henry 6, f. 26, pl. 21 (1458).

unavoidable here, of a historical account based on secondary authorities. The second is that no one, except perhaps a Chief Justice who completely dominates his brethren on the bench, can say what the law is. The most any less august and commanding mortal can say is what the law was when the courts of last resort last spoke. Each of the three substantive parts of this article concludes with the law in a state of uncertainty. And this is not bad. To paraphrase Justice Holmes, this uncertainty is one of the burdens of living in an organized society, which consciously and conscientiously is attacking “[o]ne of the most difficult and one of the most permanent problems which a legal system must face . . . a combination of a due regard for the claims of substantial justice with a procedure rigid enough to be workable.”<sup>3</sup>

This article has as its genesis a request from the Los Angeles County Medical Association that I speak on “malpractice and its relationship to quality medical assurance.” This subject, of course, assumes that there is a relationship. But this assumption is not permissible. I have not been able to find any statistical study that demonstrates that a relationship exists, or, if it does, what it is. Instead I found references to the lack of reliable data and the lack of sampling “which would produce credible numbers.”<sup>4</sup> And I found a variety of conflicting statements. For example, R. Crawford Morris, a prominent defense counsel, advised a Senate Committee in 1969: “I feel that malpractice litigation does more harm than good to the quality of patient care.”<sup>5</sup> A few years later he referred to “a man from California” as saying in effect: “A California survey showed that medical malpractice suits were the single largest factor in raising the standards of medicine in California.”<sup>6</sup> But I have not been able to find any such survey and, after inquiry to the California Medical Association and other sources, am convinced it was not made. A more recent study suggests that improving the quality of care actually increases malpractice litigation, because “modern medicine has increased the physician’s chance of doing harm,”<sup>7</sup> but concludes: “In summary, there is little information available to answer the question of the effect of the current or future malpractice system on the quality of medical care.”<sup>8</sup>

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3. *Compania General De Tabacos v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927); 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 251 (4th ed. 1936).

4. U.S. DEP’T OF HEALTH, EDUCATION & WELFARE, *REPORT OF THE SECRETARY’S COMMISSION ON MEDICAL MALPRACTICE*, at 24 (1973) [hereinafter cited as *COMMISSION REPORT*].

5. SENATE COMM. ON GOVERNMENT OPERATIONS, 91ST CONG. 1ST SESS., *MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN* 464 (Comm. Print 1959) [hereinafter cited as *RIBICOFF REPORT*].

6. Morris, *Commentary on New Developments in Malpractice Law*, in 1975 NAT’L MEDICOLEGAL SYMP. PROC. 45, 51.

7. Brook, Brutoco & Williams, *The Relationship Between Medical Malpractice and Quality of Care*, 1975 DUKE L.J. 1197, 1209.

8. *Id.* at 1221.

Confronted with these conflicting generalities, I abandoned the subject and undertook instead to explore a bit of the history of the law relating to the quality of care. As Mr. Justice Holmes said of understanding the law: “[A] page of history is worth a volume of logic.”<sup>9</sup> He was capsulizing what he had written forty years before:

However much we may codify the law into a series of self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is.<sup>10</sup>

A historical study may be instructive to lawyers and may help doctors understand the nature of the legal world in which they live, if not reconcile them to it. For example, the Secretary’s Commission on Medical Malpractice:

RECOMMENDS that legal doctrines relating to the liability of health professionals should be applied in the same manner as they are applied to all classes of defendants, whether they be favorable or unfavorable to health professional defendants.<sup>11</sup>

History will show that this recommendation is only a recapitulation of a process that has been going on for at least 600 years. Whatever one may think of its merits, no one can accuse it of novelty.

The history of American law does not begin with the settlement of Jamestown in 1607, or of Plymouth in 1620, or with the American Revolution in 1776. “It begins when English law begins,” and its sources are the Year Books, which start to show the evolution of the ideas by which medieval Englishmen regulated their legal relationships.<sup>12</sup> In Lord Coke’s famous phrase: “[W]e must peruse our ancient authors, for out of the old fields cometh the new corn.”<sup>13</sup> In some respects, “American lawyers are more frequently and more importantly concerned with legal history than are their English brethren.”<sup>14</sup> For example, Coke’s opinion in *Dr. Bonham’s Case*,<sup>15</sup> discussed hereafter, ceased to have any medical-legal significance centuries ago, but it still survives as a source of American constitutional theory and contains a dogma applied as late as 1977.<sup>16</sup>

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9. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

10. O. HOLMES, JR., *THE COMMON LAW* 37 (1881) [hereinafter cited as O. HOLMES].

11. COMMISSION REPORT, *supra* note 4, at 31; *see id.* at xix, xx.

12. Thorne, *Sir Edward Coke 1552-1952*, in SELDEN SOCIETY LECTURES 3 (1952).

13. Carr, *The Mission of the Selden Society*, in SELDEN SOCIETY LECTURES 3, 17 (1961).

14. Weiner, *Uses and Abuses of Legal History: A Practitioner’s View*, in SELDEN SOCIETY LECTURES 3, 6 (1962).

15. 77 Eng. Rep. 638 (C.P. 1609).

16. *See Connally v. Georgia*, 429 U.S. 245 (1977). Search warrant issued by magistrate who is paid for issuance but not for denial violates fourth and fourteenth amendments. *Id.* at 251.

No writer on the relation between law and medicine can ignore the antipathy between the two professions. The Secretary's Commission on Medical Malpractice stated: "As significant to the malpractice phenomenon as any of the specific 'legal doctrine' conflicts is an underlying core of antagonism that exists between law and medicine . . . the . . . generalized hostility that can be characterized as interprofessional."<sup>17</sup> This generality can be illustrated by a number of examples, some humorous, some serious, and some pathetic. A doctor described a judge as "an ordinary earthworm . . . plopped down into a big, soft leather-cushioned mahogany chair."<sup>18</sup> A Columbia professor of anatomy wrote: "The courts are the natural hunting grounds of the neurotics. . . . The neurotic, in turn, is the natural resource of opportunists in the legal profession,"<sup>19</sup> and accused the National Association of Claimants' Compensation Attorneys of falling "into the role of antagonist of the medical profession."<sup>20</sup> And Mr. Morris recounted the happily unkept vow of Dr. Frank Gerbode to quit practice because of *Salgo v. Leland Stanford Jr. University Board of Trustees*.<sup>21</sup> I have concluded that this hostility is endemic, perhaps congenital, and not yet shown to be curable by any known therapy. Another example will show the inescapable relation between this hostility and legal history.

In May 1871 a little boy was born. He was so frail no one expected him to survive. "As the family stood round his cot waiting to see him die, the old doctor turned to his mother and begged her 'not to grieve too much because had he lived he would have been an idiot.'"<sup>22</sup> But the baby lived to become Sir William Holdsworth, Vinerian Professor of English Law and author of *A History of English Law* in sixteen monumental and entertaining volumes. His working life was spent teaching in the morning, punting in the afternoon, and writing his history in the evening after two or three glasses of port wine with dinner.<sup>23</sup> Comparison of his work with that of some other historians suggests that his bibulous habit was beneficial.

Search of Holdsworth's *History* discloses nothing particularly relating to doctors. He simply lumps surgeons with smiths, horsedoctors, innkeepers, vintners, butchers and carriers. This juxtaposition could be construed as sly lawyer-like disparagement of the physician who predicted Holdsworth's untimely demise. But this construction would be wrong. Other historians make a similar amalgamation, and it reflects only the fact that even at the old law there were persons "who were considered by their calling to show a

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17. COMMISSION REPORT, *supra* note 4, at 36.

18. E. Kane, *Jawbones & Sawbones*, in W. PROSSER, *THE JUDICIAL HUMORIST* 32-35 (1952).

19. F. METTLER, *THE MEDICAL SOURCEBOOK* 60 (1959).

20. *Id.* at 76.

21. RIBBICOFF REPORT, *supra* note 5, at 453, citing *Salgo v. Leland Stanford*, 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

22. Goodhart, *Sir William Searle Holdsworth*, in SELDEN SOCIETY LECTURES, 8-9 (1954).

23. *Id.* at 15; S. WILLISTON, *LIFE AND LAW* 247 (1949).

certain degree of skill. . . . If they did not show this degree of skill they were liable to an action of trespass on the case for negligence.”<sup>24</sup> Similarly they might be liable for an action on the case for deceit even in the absence of express misrepresentations. “The ground for allowing an action in tort in both these classes of cases was at bottom public policy. It was for the interest of the community—then as now—that persons who professed a particular calling should show an adequate amount of care, skill and honesty in following their calling.”<sup>25</sup>

Since there is no discrete historical separation of the law relative to the quality of care in medicine as distinct from that of other skilled callings, I have made my own. For convenience and because it happens to fit the chronology, I have divided it under three heads: the standard of care applied in malpractice suits by which patients seek damages from doctors for alleged wrongs; legislative efforts to control the quality of care by licensing of physicians; and private efforts by medical societies and hospitals to control the quality of care, what has been called “Government by Medical Colleagues.”<sup>26</sup> In each of these categories the law has developed by reference to rules, adopted from fields totally unrelated to medicine, which the courts have considered to have general application. It is not an overstatement to say there is no law of medicine that can be dissociated from the law generally and considered solely as an integrated unit.

#### DEVELOPMENT OF THE STANDARD OF CARE

“[T]he law deals only or mainly with manifested facts.”<sup>27</sup> Thus it is not surprising that the facts of medicine appeared long before there was any law relating to them. As late as Tudor times much medical treatment was purely domestic. Even for the treatment of problems more serious than minor ailments, cuts and bruises, “[m]ost people had to rely on themselves and their neighbors . . . .”<sup>28</sup> Nevertheless, “besides home healing there were services rendered by people who depended on them for a livelihood and laid claim to special skill.”<sup>29</sup> The first practitioners are said to have been monks, frequently the abbot himself, and friars, who had the old Byzantine medical texts in their monastery libraries. After the Norman conquest in 1066 Jews appeared in England, and the Byzantine teaching was superseded by the

24. 3 W. HOLDSWORTH, *supra* note 1, at 385-86.

25. 3 W. HOLDSWORTH, *supra* note 1, at 385-86; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 471 (5th ed. 1956) [hereinafter cited as T. PLUCKNETT]; Prichard, *Scott v. Shephard* (1773) and *The Emergence of the Tort of Negligence*, in SELDEN SOCIETY LECTURES 22-33 (1976) [hereinafter cited as Prichard]; see A. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 225-34, 632 (1975) [hereinafter cited as A. SIMPSON].

26. D. LOUISELL & H. WILLIAMS, THE PARENCHYMA OF LAW 143 (1960).

27. O. HOLMES, *supra* note 10, at 234.

28. 1 G. CLARK, A HISTORY OF THE ROYAL COLLEGE OF PHYSICIANS OF LONDON 5 (1964) [hereinafter cited as G. CLARK]; see Creighton, *Medicine and Surgery* in 2 SOCIAL ENGLAND 83 (H. Traill ed. 1902) [hereinafter cited as Creighton].

29. 1 G. CLARK, *supra* note 28, at 1.

Arabian teaching, including the generalities of Avicenna, perhaps, because the "learned men of that nation [Jews] were, indeed, the chief depositaries of the Arabian medical teaching, which was then the dominant authority."<sup>30</sup> And the Arabian teaching remained authoritative until the Reformation.<sup>31</sup>

As early as the twelfth century there was a complaint that "[g]reed . . . and love of power or authority are the besetting vices of the physician."<sup>32</sup> But the monks became so esteemed as physicians that they neglected their religious duties, and in 1139 and again in 1163 the Pope interdicted their practice of physic and surgery. This interdiction was, apparently, easily evaded by the monks. Similarly the Jews evaded the canon law forbidding them to practice on Christians, because "[t]here were Jews practising medicine at every Court of Europe."<sup>33</sup> Presumably this was because neither monks nor Jews had any competent rivals.<sup>34</sup> But the stage was being set for the appearance of lay gentile physicians and surgeons.

In the light of subsequent history, it seems surprising that no malpractice actions against Jews, monks or friars have been unearthed. This gap is not an indication of the excellence of their ministrations; it has a legal rather than a medical explanation. The Jews were expelled from England in 1290, and the special laws under which they were serfs of the kings seem not to have left "any permanent marks upon the body of our law."<sup>35</sup> Monks professed were civilly dead, as were friars, and as a general rule lacked all legal capacity.<sup>36</sup> They could not have any property and could be sued only with the consent of their religious superiors, the abbots or bishops. If a suit were allowed, it had to be against the abbot or bishop in his capacity as a "corporation sole" not as a natural person. This distinction was difficult for the medieval lawyers and, coupled with the problems of effective recovery, was apparently enough to discourage litigation.<sup>37</sup> Thus, the absence of suits against Jews, monks and friars seems to reflect the problems of their special legal status rather than the quality of their medical treatment.

With the appearance of lay practitioners of ordinary legal status there began to be efforts to control the quality of care by guilds of grocers, barbers, apothecaries and surgeons and by suits for malpractice in the various local courts, as distinguished from the king's courts. There are

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30. Creighton, *supra* note 28, at 84.

31. Creighton, *supra* note 28, at 86.

32. Creighton, *supra* note 28, at 84, attributed to the Satirist, John of Salisbury. Greed was still a complaint 300 years later. "In these times [1416] many more [surgeons] dread the loss of money than are amenable to the dictates of honesty or conscience . . ." Cosman, *Medieval Medical Malpractice: The Dicta and the Dockets*, 49 BULL. N.Y. ACAD. MED. 22, 35 (1973). I am indebted to Drs. David Costanza of Greenbrae, California, and Gert Brieger of the University of California, San Francisco, for this instructive reference.

33. Creighton, *supra* note 28, at 84.

34. See Creighton, *supra* note 28, at 84.

35. I F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 475 (2d ed. 1968).

36. *Id.* at 489.

37. *Id.* at 433.

various instructive and entertaining accounts of these efforts, which show how some of our present problems replicate those of the thirteenth and fourteenth centuries.<sup>38</sup> There was also some effort to control medical practice by "ordinances," which then meant legislation by the king without the assent of Parliament.<sup>39</sup> But as Plucknett pointed out, these ordinances have played a very small part in the formation of English public law. And the suits in the local courts, although quaint and amusing, played little role in the formation of the common law. The local courts absorbed the rules of the king's court rather than vice versa, and "[w]e must look to the rules of the king's court for the foundations of the common law."<sup>40</sup> Clark, a nonlegal writer, warned against "the tendency of some medical historians to ascribe too much importance to the companies of barber-surgeons," and says, "[t]o some extent these writers were misled by economic historians who transferred some of the romance of the guilds from the Continent to England, where their history was altogether more modest."<sup>41</sup> The same precaution applies to legal history.

The legal history of medicine begins for practical purposes with the desire of litigants to evade the jurisdiction of local courts.<sup>42</sup> One device was by a petition to the Chancellor, through whom the king maintained a tribunal that claimed "to administer justice according to good faith and conscience" and which could compel the production of evidence.<sup>43</sup> Thus in the late 14th or early 15th century we find a petition to the Chancellor to appoint "the surgeons of our Lord the King" to examine the petitioner to establish the truth of his claim that a surgeon set his arm improperly.<sup>44</sup> The petitioner claimed he was oppressed by "maintenance" (unjustifiable litigation) at his residence.<sup>45</sup> If proved, this was a sufficient ground for what would now be called equitable relief.<sup>46</sup> Of course, the request to appoint independent and reputable surgeons suggests an early effort to escape what has since been

38. 1 G. CLARK, *supra* note 28, at 6-18; Cosman, *Medieval Medical Malpractice: The Dicta and the Dockets*, 49 BULL. N.Y. ACAD. MED. 22 (1973). See generally F. BULLOCK, *The Law Relating to Medical Dental and Veterinary Practice* (1929) [hereinafter cited as F. BULLOCK].

39. F. BULLOCK, *supra* note 38, at 9-27; 1 G. CLARK, *supra* note 28, at 17-18; A. DICEY, *THE LAW OF THE CONSTITUTION* 48 (6th ed. 1902) [hereinafter cited as A. DICEY]; T. Plucknett, *supra* note 25, at 322-23.

40. 2 W. HOLDSWORTH, *supra* note 1, at 8.

41. 1 G. CLARK, *supra* note 28, at 8.

42. See A. SIMPSON, *supra* note 25, at 224. On the evasion of the Statute of Gloucester, which was intended to confine actions for less than 40 shillings to the local courts, see 2 W. HOLDSWORTH, *supra* note 1, at 399. On the superior quality of the royal courts see 2 W. HOLDSWORTH, *supra* note 1, at 251-52.

43. T. Plucknett & J. Barton, *St. German's Doctor and Student*, 91 SELDEN SOCIETY xxviii, xii (1974).

44. Baildon, *Select Cases in Chancery*, 10 SELDEN SOCIETY 123-24 (1896).

45. *Id.* at 124.

46. *Id.*; Maitland, *English Law 1309-1600* (1894), in *SELECTED HISTORICAL ESSAYS* 131 (H. Cam. ed. 1957). There was a similar procedure by bill rather than writ before the King's Bench, but I have found no medical examples; Sayles, *The Court of King's Bench in Law and History*, SELDEN SOCIETY LECTURE 1959 at 14-15.



called the "conspiracy of silence." A contemporary suggested remedy is that of the Secretary's Commission on Medical Malpractice:

The Commission RECOMMENDS that organized medicine and osteopathy establish an official policy encouraging members of their professions to cooperate fully in medical malpractice actions so that justice will be assured for all parties; and the Commission encourages the establishment of pools from which expert witnesses can be drawn.<sup>47</sup>

But the more common way of invoking the jurisdiction of the king's courts was to obtain a writ of trespass "*vi et armis et contra pacem regis*," that is, with force and arms and against the king's peace. If this formula was omitted, the suit would have to be in the sheriff's court, for a distinction was made between the king's peace and the sheriff's peace.<sup>48</sup> And thus in the middle of the fourteenth century we find a number of what Prichard calls "dishonest writs of trespass *vi et armis*" brought in the king's courts.<sup>49</sup> He refers to:

the suspiciously large number of writs of trespass *vi et armis* brought against farriers shortly before 1367. The picture conjured up in one's mind by these last writs—that of a strange madness suddenly afflicting the stolid English blacksmith and causing him to rush about equicidally striking at horses *vi et armis et contra pacem*—is one that defies belief. Even the Black Death cannot make that picture credible; without doubt, we have another dishonest writ here.<sup>50</sup>

To cope with these dishonest writs the king's courts devised what came to be called the action of "trespass *sur son case*" later commonly called "trespass on the case" or even "case." This writ accommodated the desire of the litigants to remain in the royal courts and eliminated the alternative of returning non-forcible wrongs to the local courts. "The action against the incompetent farrier became an honest action on the case."<sup>51</sup> And it is from these honest actions against farriers brought in the king's courts and recounted in the Year Books that our present law of medical competence derives.

The Year Books are collections of lawyers' or law students' notes of proceedings in the king's courts from the time of Edward I to Henry VIII, about 1270 to 1535.<sup>52</sup> They were reprinted in a folio edition in 1678-79 in old Gothic type. "The size is cumbrous;" the typography is "unpleasant to the eye;" the manuscripts "were read and reproduced with inadequate care, to use the mildest possible term;" they contain cryptic abbreviations; and

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47. COMMISSION REPORT, *supra* note 4, at xx and 36-37.

48. O. HOLMES, *supra* note 10, at 84-85.

49. Prichard, *supra* note 25, at 8.

50. Prichard, *supra* note 25, at 8-9.

51. Prichard, *supra* note 25, at 9.

52. 2 W. HOLDSWORTH, *supra* note 1, at 525.

they are in that peculiar language "Law French."<sup>53</sup> "Many lawyers in good business have never read a word of them. . . . Yet some knowledge of them is needful for every one who wishes to know the law as a scholar and not merely as a practitioner . . . ." <sup>54</sup> Some have been edited and translated but, unfortunately, not those referred to herein. The authors of the Year Books "cared very little who the parties were, and less about the end of the case. Good pleading was their ambition. . . ." <sup>55</sup> "Instruction for pleaders rather than points of substantive law was the primary object. . . ." <sup>56</sup> They were compiled to show how to get into court and stay there. Relating cases from the Year Books presents problems of paleotypography, translation, reinterment of the dead procedures, and resuscitation of the still living substance. But in these dusty, fusty antiques are the first glimmers of the modern law of the quality of medical care.

The first case was against a surgeon in 1374.<sup>57</sup> Dean Prosser, however, cited a case from 1369, which he purported to be against "a surgeon who negligently treated a patient."<sup>58</sup> His citation is so wrong that it could qualify for his own book *The Judicial Humorist*, for the defendant was a horse doctor and the patient was a horse.<sup>59</sup> But in 1374 "*Un home post bre de Trespass sur son cas devers un J. Mort surgeon.*"<sup>60</sup> (Is the name Mort, death, significant?) The man alleged that Mort undertook to cure his wounded hand of its *maladie*, that through Mort's negligence the hand was made worse, and that the man was *maihome* to his damage. The man did not allege the place of the undertaking in his writ but alleged it only in his "count," the oral pleading following the writ. Without an allegation of the place in the writ, the court did not know from which vicinity to summon the jury, for the undertaking may have been in one county and the misfeasance

53. F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 295-305 (4th ed. 1918).

54. *Id.* at 303.

55. F. POLLOCK, THE GENIUS OF THE COMMON LAW 24 (1911).

56. 2 W. HOLDSWORTH, *supra* note 1, at 538.

57. Y.B. Trin. 48 Edw. 3, f. 6, pl. 11 (1374). The reference *Trin.* is to the Trinity Term. Each year there were four terms of court, named after ecclesiastical festivals, Hilary, Paschal or Easter, Trinity and Michaelmas. The term is needed to fix the date of a regnal year if a king died or was deposed in mid-term. Terms of court were abolished in California by the Constitution of 1879. The matter is now regulated by statute, 1 B. WITKIN, CALIFORNIA PROCEDURE, Courts §53 at 332-33 (2d ed. 1970), and, hopefully, terms of court have been relegated to that "country from whose bourn no traveler returns."

58. W. PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 381 n.5 (1953); citing *Waldon v. Marshall*, Y.B. Mich. 43 Edw. 3, f. 6, pl. 11 (1369).

59. *Id.* Prosser's citation does not exist. 43 Edw. 3, f. 6 reports cases from the Hilary term pl. 13 to 18, and none are in point. The compilers of the Year Books had "a most remarkable contempt . . . especially for proper names," 2 W. HOLDSWORTH, *supra* note 1, at 536, so the cases are anonymous, and Prosser must have invented the name. There is a case in Y.B. Mich. 43 Edw. 3, f. 33, pl. 38 (1369), where "*Will. de Waldon post un briefe envs [envers] un J. Mareschal,*" because "said John" undertook to cure Will's horse of its *infirmite* and through "said John's" negligent care the horse perished. Obviously "Mareschal" was a description of John's occupation, one who treated horses, a farrier, or shoeing smith, Oxford Engl. Dic. sb. Marshal, not his surname. For more nearly correct citations and descriptions see F. BULLOCK, *supra* note 38, at 430. The case has some bearing on the characterization of malpractice as a tort rather than a breach of contract or crime. See note 68 *infra*.

60. Y.B. Trin. 48 Edw. 3, f. 6, pl. 11 (1374).

in another.<sup>61</sup> Therefore, the discrepancy between the writ and the count was an important matter, and the man lost.<sup>62</sup> The paucity of reported decisions does not necessarily indicate there was little litigation. There was an almost identical defective writ and result a year later, but not reported in the Year Books.<sup>63</sup>

What is interesting in Mort's case is not the result but the colloquy among the judges and the attorneys. The whole court agreed that an action on the case lay with neither allegations that the wrong had been committed "*vi et armis ne contra pacum &c*" in Latin or "*force et armes ne encounter le peace*" in French.<sup>64</sup> In reaching this conclusion two other possibilities were considered. Since an undertaking was alleged, should not the action have been covenant? To maintain covenant, however, would have required an *especialty*, a document under seal. But for "such a little thing one cannot always have a clerk available to draw the *especialty*."<sup>65</sup>

Therefore, covenant was not necessary and an action on the case was appropriate. In simple language, malpractice was treated as a tort rather than a breach of contract. And so the law is in California to this day,<sup>66</sup> although here, as in the later English cases, the result was derived not directly from the Year Books but from the later law relating to common carriers.<sup>67</sup>

Another and more obscure point was discussed. The plaintiff had alleged that he was *mai heme*. Mayhem was an appealable but not indictable felony.<sup>68</sup> Although not stated in the Year Books, perhaps because it was so elementary, the rule was "that if a tort amounts to a felony the injured party's right of action [is] barred."<sup>69</sup> This rule was rejected some 400 years later in what appears to be the first reported malpractice case in the United States.<sup>70</sup> But in the 14th century it was still alive and troublesome. Thus, there was considerable discussion of whether the plaintiff should have proceeded by appeal rather than by writ. If appeal were proper, the trial

61. A. SIMPSON, *supra* note 25, at 234-35. Eventually it was settled that the jury could be called from either. *Id.* at 236.

62. T. PLUCKNETT, *supra* note 25, at 409; see 2 W. HOLDSWORTH, *supra* note 1, at 250.

63. The Surgeon's Case (1375) translated in A. SIMPSON, *supra* note 25, at 627.

64. Y.B. Trin. 48 Edw. 3, f. 6, pl. 11 (1374).

65. *Id.*; cf. A. SIMPSON, *supra* note 25, at 223-24 (relating similar later holdings allowing the evasion of the local courts).

66. *Huysman v. Kirsch*, 6 Cal. 2d 302, 306, 57 P.2d 908, 910 (1936). The contract between a physician and patient is "merely a matter of inducement" out of which the duty to use due care arises.

67. *Harding v. Liberty Hospital Corp.*, 177 Cal. 520, 522-23, 171 P. 98, 99 (1918), following *Basler v. Sacramento Ry. Co.*, 166 Cal. 33, 134 P. 993 (1913).

The tug-of-war between contract and tort was fought out in one field alone . . . that of the common carrier; actions against smiths, surgeons, attorneys and the like, do not seem to have provoked judicial analysis until after the struggle was over. Prichard, *supra* note 25, at 25. The statement in D. LOUISELL & M. WILLIAMS, *THE PARENCHYMA OF LAW 174-75* (1960), that originally physicians' conduct "was bottomed on contractual responsibility" appears to be based on historically inaccurate authority. See A. SIMPSON, *supra* note 25, at 228-29.

68. 2 W. HOLDSWORTH, *supra* note 1, at 361.

69. 3 W. HOLDSWORTH, *supra* note 1, at 331.

70. *Cross v. Guthery*, 2 Root 90, 1 Am. Dec. 61 (Conn. 1794); W. PROSSER, *TORTS* §2 at 8 (4th ed. 1971).

could have been by battle rather than by jury; Mort, if vanquished, would have suffered loss of life or limb; and the plaintiff would have had no civil recovery.<sup>71</sup>

We can assume that the court had in mind the “dishonest writs” allowed against farriers then relatively recent,<sup>72</sup> and this led to a discussion of the analogy of a surgeon to a horseshoer. One judge said: “If I deliver my horse to a farrier to shoe, if he harms my horse, I shall have a writ of trespass against him, and if I deliver my horse to a marshall to care for and through his negligent care my horse is maimed, I shall have the same writ.”<sup>73</sup> To this another replied, “This is true because the horse cannot have an action.”<sup>74</sup> (A degree of flippancy is not uncommon in the Year Books.)<sup>75</sup> And then he continued: “But if the farrier or marshal does all that he can or shows all diligence in the care of the horse, there is no reason to hold him liable, because there is a great diversity between the two cases.”<sup>76</sup> The analogy was not acted on in the case against Mort because of the deficiencies in the pleadings, but this seems to be the first indication that surgeons are to be treated by the same substantive rules as the practitioners of other skilled callings.<sup>77</sup>

Once suggested, the analogy of surgeons to horse doctors became beloved of medieval lawyers. It was repeated and enlarged to include doctors generally at least as early as 1436.<sup>78</sup> And it was extended further in 1471 to hold a doctor liable for administration of medications through a servant, an early example of a physician’s possible liability for acts of his medical colleagues.<sup>79</sup>

71. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 466, 488, 632-34 (S. Milsom ed. 1968).

72. Y.B. Mich. 43 Edw. 3, f. 33, pl. 38 (1369); Y.B. Trin. 46 Edw. 3, f. 19, pl. 19 (1372), discussed in T. PLUCKNETT, *supra* note 25, at 471; Prichard, *supra* note 25, at 9, 36.

73. Y.B. Trin. 48 Edw. 3, f. 6, pl. 11 (1374).

74. *Id.*

75. 2 W. HOLDSWORTH, *supra* note 1, at 546-47. *E.g.*, one full report includes comments not found in the abridgements, *e.g.*, a delightful colloquy on the proper way to catch eels in which Percy J. tells counsel ‘you are not a good fisherman, I can see.’ *Id.* at 41. McGovern, Book Review (Yearbooks of Richard II; 2 Richard II, 1378-1379. Arnold ed.), 20 AM. J. LEGAL HIST. at 330 (1976).

76. Y.B. Trin. 48 Edw. 3, f. 6, pl. 11 (1374).

77. Many of the medieval cases are collected in F. BULLOCK, *supra* note 38, at 262-71. Bullock’s compilation was followed in Sandor, *The History of Professional Liability Suits in the United States*, 163 A.M.A.J. 459 (1957); Sandor’s was followed in Stetler, *The History of Reported Medical Professional Liability Cases*, 30 TEMP. L.Q. 366, 367 (1957); and Stetler’s was followed in C. KRAMER, MEDICAL MALPRACTICE 2 (1972). What I have tried to show is the integration of the medical cases into the general medieval law.

78. 3 W. HOLDSWORTH, *supra* note 1, at 430:

So if a smith makes a covenant with me to shoe my horse well and properly, and he shoes him and lames him, I shall have a good action. So if a doctor takes upon himself to cure me of my diseases, and he gives me medicines, but does not cure me, I shall have my action on my case.

Citing Y.B. Trin. 14 Hen. 6, f. 18, pl. 58 (1436).

79. Y.B. Trin. 11 Edw. 4, f. 6, pl. 10 (1471); 3 W. HOLDSWORTH, *supra* note 1, at 387.

If a man undertakes to cure me of a certain disease, and gives me medicine which makes me worse, I shall have action on my case against him; but if he thus undertakes

By 1534 the proposition was stated in general terms in Fitzherbert's *The New Natura Brevium*,<sup>80</sup> a student text book of somewhat doubtful authenticity and only arguable accuracy.<sup>81</sup> Anthony Fitzherbert was one of the judges of Henry VIII. He may appear to us as a somewhat sinister figure because he sat on the commission that condemned Saint Thomas More.<sup>82</sup> But his accuracy or character are of no moment to us, because his generalization was accepted and has itself become a historical fact. And "[e]very historian knows that belief itself is a historical fact. . . ."<sup>83</sup>

Fitzherbert wrote:

But if a smith prick my horse with a nail, &c. I shall have my action upon the case against him, without any warranty by the smith to do it well . . . . For it is the duty of every artificer to exercise his art rightly and truly as he ought.<sup>84</sup>

This generalization simply means that the artificer need not undertake specially to use due care.

It involves a shift in emphasis from a theory of self-imposed liability for negligence to a theory that liability is imposed by law . . . . For everybody knows that the one unforgivable sin in a smith is to drive the nail into the living flesh, an error that might be excused in an amateur but can never be excused in a professional. It is the medieval equivalent of leaving a swab in a patient. The professional status of the defendant can . . . be used to show . . . what standard of conduct is appropriate. . . . What was important was that he was an artificer, a skilled professional.<sup>85</sup>

Fitzherbert's generalization became so acceptable that it has since been cited without question by writers as diverse and as critical as Mr. Justice Holmes,<sup>86</sup> "the great dissenter," and Dr. Fred Mettler, some of whose animadversions against lawyers have already been related.<sup>87</sup> Furthermore, it has for hundreds of years been accepted and acted upon by the courts.

In 1614 Chief Justice Edward Coke, of whom more will appear hereafter, participated in *Everard v. Hopkins*,<sup>88</sup> an action on the case by a master

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and then commands his servant to administer the medicine and I am made worse, I have no action against the servant but against the master.

Holdsworth omitted the following:

And if one undertakes to shoe my horse, if he orders his servant to do so and the servant harms the horse, the action lies against the master.

80. A. FITZHERBERT, *THE NEW NATURA BREVIUM* at 214-15 (9th ed. 1793).

81. 2 W. HOLDSWORTH, *supra* note 1, at 522. Fitzherbert cites at 214-15 Y.B. Trin. 46 Edw. 3, f. 19, pl. 19 (1372), and an inconclusive case of malpractice against an attorney, Y.B. Hil. 11 Henry 6, f. 10, pl. 10, Pasch. f. 24, pl. 1, Trin. f. 55, pl. 36 (1433), which is discussed in 3 W. HOLDSWORTH, *supra* note 1, at 431-32. See A. SIMPSON, *supra* note 25, at 234.

82. 4 W. HOLDSWORTH, *supra* note 1, at 115.

83. Cam, *Magna Carta—Event or Document*, in SELDEN SOCIETY LECTURES 26 (1965).

84. A. FITZHERBERT, *THE NEW NATURA BREVIUM* at 214-15 (9th ed. 1793).

85. A. SIMPSON, *supra* note 25, at 233.

86. O. HOLMES, *supra* note 10, at 184.

87. F. METTLER, *THE MEDICAL SOURCEBOOK* 75 (1959).

88. 80 Eng. Rep. 1164 (K.B. 1614).

against a “common chyrurgeon” for administering “unwholesome medicines” to the master’s servant so that his services were lost “per spatium one whole year.”<sup>89</sup> Although the court held that such an action was proper, no judgment was rendered because the “pleading was not good nor formal,” and the case ended with a settlement.<sup>90</sup> But in the argument both Mort’s case from the Year Books and Fitzherbert were cited as authority, and the analogy of the smith pricking the horse was referred to repeatedly by the judges in language that was obviously paraphrased from Fitzherbert.<sup>91</sup>

Coke was a received authority in the United States. Thus it is not surprising that the first reported American malpractice case, in 1794, took the form of an action on the case (for an improperly performed mastectomy in which the plaintiff got a judgment for 40 pounds).<sup>92</sup> In another early action on the case for malpractice, *McCandless v. McWha*,<sup>93</sup> holding a surgeon liable for “professional negligence,” the court quoted Fitzherbert:

If he applies to a SURGEON and he treats him improperly, he is liable to an action even though he undertook *gratis* to attend the patient, because his situation implies skill in surgery. . . . The principle is contained in the pithy saying of Fitzherbert that ‘it is the duty of every artificer to exercise his art rightly and truly, as he ought.’<sup>94</sup>

*McCandless* became something of a leading case. It was cited by the New York Court of Appeals in *Pike v. Honsinger*.<sup>95</sup> *Pike* was cited by the California Supreme Court in *Hesler v. California Hospital Co.*,<sup>96</sup> which appears to be the first California case stating the general duty of care of a doctor. And *Hesler* was last cited in 1976 in *Landeros v. Flood*,<sup>97</sup> for the general proposition that “a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances.”<sup>98</sup> Thus we trace into our present law of doctors the medieval law of horseshoers.

89. *Id.*

90. *Id.* at 1166.

91. The reference to the “common surgeon” means only that he held himself out to treat the public. It does not mean that he was under a duty to treat all comers or enjoyed a monopoly like a present common carrier; here it means only that he was liable for negligence without the need to allege an *assumpsit* or special undertaking. A. SIMPSON, *supra* note 25, at 229; Prichard, *supra* note 25, at 25-26, 36, 39.

92. *Cross v. Guthery*, 2 Root 90, 1 Am. Dec. 61, 61 (Conn. 1794).

93. 22 Pa. 261, 269 (1853).

94. *Id.*

95. 155 N.Y. 201, 210, 49 N.E. 760, 762 (1898). “The leading case of *Pike v. Honsinger* recognized throughout the country as *the* authority, succinctly expresses the obligation owed by a doctor to his patient . . .” C. KRAMER, *MEDICAL MALPRACTICE* 6 (1972). *Cf.* Mecham v. McLeary, 193 Neb. 457, 464, 227 N.W.2d 829, 834 (1975) (citing *McCandless* on a patient’s contributory negligence in failing to follow a physician’s instructions).

96. 178 Cal. 764, 766, 174 P. 654, 655 (1918).

97. 17 Cal. 3d 399, 408, 511 P.2d 389, 392-93, 131 Cal. Rptr. 69, 72-73 (1976) (duty to diagnose and report battered child syndrome).

98. *Id.*

When Simpson wrote that driving a horseshoe nail into the living flesh was the medieval equivalent of leaving a swab in a patient, he was not engaging in a rhetorical flourish. His statement is startling only because of its accuracy. Despite all the twists and turnings of the law, and despite the actual results of cases that can be explained by procedural manipulations, the rule has remained the same. The persistence of the rule makes one wonder if there is not a "Law of Nature [which] consists . . . of those principles which are so fundamental that they [are] binding upon man . . . everywhere and for ever, irrespective of time, place, or circumstance. . . ."99

And the rule is not limited to farriers and doctors. It is a rule applicable to all cases of professional status or skilled callings. As was said in *Leighton v. Sargent*,<sup>100</sup> an action of trespass on the case against a physician:

These principles are of great consequence to all the classes of professional men who are employed by others to transact business requiring especial skill and knowledge. The duties and responsibilities of all these classes, as those of lawyers and physicians, engineers, machinists, ship-masters, builders, brokers, etc., are governed by the same general rules.<sup>101</sup>

So when the California Supreme Court in 1971 applied the statute of limitations as rigorously to attorneys as it had to doctors, it cited not only the analogy of physicians but also those of accountants, insurance agents and others.<sup>102</sup> The most comprehensive statement of the modern and general law is that in the American Law Institute's Second Restatement of Torts Section 299A:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.<sup>103</sup>

The comment to Section 299A says that it applies not only to doctors and lawyers but also to a variety of occupations ranging from accountants to plumbers.<sup>104</sup> On inspection, it is clear that it adds very little to Fitzherbert but some cautionary language about representations of greater or lesser skill

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99. T. Plucknett & J. Barton, *St. German's Doctor and Student*, 91 SELDEN SOCIETY XXVII (1974). The Puritans adopted the concept from Coke and others. See G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 118 (1960).

100. 27 N.H. 460, 59 Am. Dec. 388 (1853).

101. *Id.* at 468, 59 Am. Dec. at 389-90. The court noted another issue that is still current. "At the present moment, it is to be feared there is a tendency [by juries] to impose some perilous obligations beyond the requirements of the law upon some classes of professional men." *Id.* at 468, 59 Am. Dec. at 390. For a recent discussion of "the manner in which standards of medical care can be set by juries" see Rubsam, *Medical Malpractice*, 235 SCIENTIFIC AMERICAN 18, 21 (Aug. 1976).

102. *Neel v. Magana*, 6 Cal. 3d 176, 186, 491 P.2d 421, 427, 98 Cal. Rptr. 837, 843 (1971).

103. RESTATEMENT (SECOND) OF TORTS §299A (1965).

104. *Id.* at Comment b.

and a reference to the amorphous locality rule.<sup>105</sup> The Restatement is not only a correct paraphrase of the history, but it seems to be a prediction of the future. Recently the California Supreme Court applied it to a bank acting as an executor.<sup>106</sup> And the recommendation of the Secretary's Commission on Malpractice simply reiterates it.<sup>107</sup>

The notion that doctors are victims of some sort of legal malevolence has no historical or current support. On the contrary, doctors have recently become the beneficiaries of particular statutory benevolence precipitated by the so-called "malpractice crisis." For example, in California the statute of limitations is now more favorable to doctors than it is to lawyers.<sup>108</sup> And the limitation on recovery for "noneconomic losses," that is, pain and suffering, is more advantageous to doctors than it is to plumbers.<sup>109</sup>

Whether such legislative grace to physicians is constitutional is still an open question. In Illinois a limitation of damages to \$500,000 was held invalid under the state constitution.<sup>110</sup> Two lower courts have held the Ohio statute limiting general damages to \$200,000 unconstitutional on state and federal grounds.<sup>111</sup> In Idaho the court declined to pass on the question but sent a case back to the trial court to determine whether there is in fact a "medical malpractice insurance crisis."<sup>112</sup> The United States Supreme Court recently declined to review a case on the Ohio statute of limitations, but this is not equivalent to approval of the statute.<sup>113</sup> And there these matters rest for the moment.

#### LEGISLATIVE EFFORTS TO CONTROL THE STANDARD OF CARE

The deliberate effort to improve the quality of care by legal means has a history quite apart from the common law dealing with the redress of private grievances. It is the history of the legislation regulating the practice of medicine by establishing standards for licensing physicians and disciplining

105. *Cobbs v. Grant*, 8 Cal. 3d 229, 243, 246, 502 P.2d 1, 10, 12, 104 Cal. Rptr. 505, 514, 516 (1972); *Gist v. French*, 136 Cal. App. 2d 247, 269-71, 288 P.2d 1003, 1017-18 (1955); RESTATEMENT (SECOND) OF TORTS §299A, Comment g (1965).

106. *Estate of Beach*, 15 Cal. 3d 623, 631, 542 P.2d 994, 998, 125 Cal. Rptr. 570, 574 (1975).

107. See COMMISSION REPORT, *supra* note 4, at 31.

108. CAL. CIV. PROC. CODE §340.5.

109. CAL. CIV. PROC. CODE §3333.2(b).

110. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

111. *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976); *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976). See generally Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, citing *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (holding the California automobile guest statute unconstitutional) and stating: "[A] reviewing court could well conclude that forcing the most seriously injured plaintiffs to bear the full cost of continued availability of medical services is unreasonable, arbitrary and capricious." 1975 DUKE L.J. 1417, 1421.

112. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 874, 555 P.2d 399, 412, 416 (1976), petition for cert. filed, 45 U.S.L.W. 3520 (U.S. Jan. 13, 1977) (No. 76-972).

113. *Fay v. Richter* (Ohio App. unreported), cert. denied, 45 U.S.L.W. 3667 (U.S. Apr. 4, 1977) (No. 76-1128). The "denial of certiorari imparts no implication or inference concerning the court's view of the merits." *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365, n.1 (1973).



them for misconduct or incompetence. An abortive Act of Parliament, passed in the third year of Henry VIII 1511, provided for licensing of physicians and surgeons by the bishops on the advice of "expert persons."<sup>114</sup> Presumably the licensing function was delegated to ecclesiastics because only the church had a developed administration covering the whole country.<sup>115</sup> Today the most interesting aspect of the Act of 1511 is a portion of its preamble, which recites the need for "great learning" in the practice of medicine, its actual practice by "common Artificers, as Smiths, Weavers and Women," and the resulting "grievous Hurt, Damage, and Destruction of many of the King's liege People, most especially of them that cannot discern the cunning from the uncunning."<sup>116</sup> Discerning "the cunning from the uncunning," the skilled from the unskilled, remained a problem. In 1858 the preamble to the first British general Medical Act recited the same purpose: "Whereas it is expedient that Persons requiring Medical Assistance should be enabled to distinguish qualified from unqualified Practitioners."<sup>117</sup> And the California Supreme Court reiterated the need as recently as December 2, 1976, in upholding the statute requiring the licensing of midwives, "for many women must necessarily rely on those with qualifications which they cannot personally verify."<sup>118</sup> Thus, although this discussion is of antique materials, it is of current issues. We are still pouring old wine into new bottles.

The effect of the Act of 1511 was substantially diminished in 1518 when Henry VIII granted a charter to the "President of the College or Commonalty of the Faculty of Physicians, London."<sup>119</sup> The charter was confirmed by an Act of Parliament in 1522,<sup>120</sup> and it is with the Charter of 1518 and the Act of 1522 that the history of regulation has its practical beginning.

One striking feature of the Act of 1522 is the apparent lack of controversy over its passage. This seems to be due to two reasons. The first is the eminence of the sponsors of the Charter of 1518. King Henry "held it necessary to restrain the boldness of wicked men, who professed physic more for avarice than out of confidence and good conscience," and "partly imitating the example of the well governed cities in Italy," at the instance of his own physicians, including Thomas Linacre, and Thomas Wolsey, "Archbishop, and our well beloved Chancellor of our kingdom of Eng-

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114. 3 Henry VIII, Chapter 11 (1511).

115. 1 G. CLARK, *supra* note 28, at 54-58.

116. 1 G. CLARK, *supra* note 28, at 54. "Cunning" here has its archaic meaning of skillful without a derogatory connotation of slyness. OXFORD ENGLISH DICTIONARY.

117. F. BULLOCK, *supra* note 38, at 103; 2 G. CLARK, *supra* note 28, at 792-30.

118. *Bowland v. Municipal Court*, 18 Cal. 3d 479, 495, 556 P.2d 1081, 1089, 134 Cal. Rptr. 630, 638 (1976).

119. *Dr. Bonham's Case*, 77 Eng. Rep. 638, 639 (C. P. 1609). The Act of 1511 was not repealed until 1948. It had some vitality as late as 1602. *See* 1 G. CLARK, *supra* note 28, at 5.

120. The Charter, Act and amendments are set out at length in Coke's report of *Dr. Bonham's Case*, 77 Eng. Rep. at 639-41.

land," therefore, granted the Charter.<sup>121</sup> Linacre was a man of remarkable attainments. He was not only a physician who had studied in Italy but also a scholar, a tutor to a prince, and "the first Englishman who gained a European reputation as a humanist."<sup>122</sup> He earned the highest accolade that can be given a doctor: all of his known patients, with one elderly exception, survived him. Considering Linacre's background and associates, it is possible to consider the Charter as one manifestation of the progress and popularity of the "New Learning" in England.<sup>123</sup> Wolsey was then at the height of his powers, which he later lost. We recall him now for his admonition to those in public life: "Had I but served God as diligently as I served the King, He would not have given me over in my gray hairs."<sup>124</sup>

The second reason for expedition in the grant of the adoption Charter and the passage of the Act seems to have been medical urgency. "It was in 1518 that an English government for the first time issued orders for the prevention of the plague. . . . There was evidently a sense of emergency."<sup>125</sup>

In gross outline the Charter and Act gave the College authority to license the "exercise of the faculty of physic" in London and its suburbs within a radius of seven miles and authority to punish malpractice and unlicensed practice by fining or imprisoning offenders.<sup>126</sup> We can infer that there was some problem enforcing the Act, because in 1554, under Queen Mary, it was amended to provide not only that the College had power to imprison offenders, but that the gaolers, except of the Tower of London, should receive them.<sup>127</sup> The need for this amendment may be no more than an example of some court's unreported "niggardly exposition of every legislating word."<sup>128</sup> But the Charter and Act did not come before the courts in any significant way until *Dr. Bonham's Case*<sup>129</sup> in 1609 and 1610. Then the Court of Common Pleas spoke through its Chief Justice, Sir Edward Coke.

To understand *Dr. Bonham's Case*<sup>130</sup> one must understand Lord Coke, said to be the greatest of all English judges.<sup>131</sup> (The name is pronounced "Cook," which led to some derisive punning.)<sup>132</sup> He was Attorney General

121. *Dr. Bonham's Case*, 77 Eng. Rep. at 639.

122. 1 G. CLARK, *supra* note 28, at 42.

123. *Id.* at 42, 50; 4 W. HOLDSWORTH, *supra* note 1, at 29.

124. E. CHEYNEY, *A SHORT HISTORY OF ENGLAND* 290-91, 294-96 (1945).

125. 1 G. CLARK, *supra* note 28, at 58.

126. *Dr. Bonham's Case*, 77 Eng. Rep. at 639.

127. 77 Eng. Rep. at 641, 656.

128. G. ELTON, *THE TUDOR CONSTITUTION* 233-34 (1962); F. MAITLAND, *HISTORY OF ENGLAND LAW IN SELECTED HISTORICAL ESSAYS* 114 (H. Cam. ed. 1957).

129. 77 Eng. Rep. 638 (C.P. 1609).

130. *Id.*

131. Goodhart, *English Contributions to the Philosophy of Law*, 48 COLUM. L. REV. 671, 674 (1948) [hereinafter cited as Goodhart].

132. Coke's second wife, Elizabeth, the relickt of Sir William Hatton, was with child when he married her; laying his hand on her belly (when he came to her bed) and finding a child to stirre, What, sayd he, Flesh in the Pott. Yea, quoth she, or else I would not have married a Cooke.

C. BOWEN, *THE LION AND THE THRONE* 125, 390 (1957) [hereinafter cited as C. BOWEN].

for Elizabeth I, Chief Justice of the Court of Common Pleas, Chief Justice of the King's Bench, member of Parliament, and a legal writer whose influence yet endures. In his personal life he was an "unpleasant, hard, grasping, arrogant and thoroughly difficult man, of whom his widow, after thirty-six years of married life could write. . . 'We shall never see his like again praise be to God.'"<sup>133</sup> Coke "never had misgivings about certitude, at least his own certitude," and "quite innocently put his own concepts back into the past before he began to look for them and, not surprisingly, he found them."<sup>134</sup> Therefore, reading his reports we must beware of a "cooked account."<sup>135</sup> A partial set of his Reports travelled over on the *Mayflower*, his "Revised Version of the Common Law," and some of his ideas "have taken firmer root abroad than they have at home."<sup>136</sup>

In his public life he hoped to subject both the Crown and Parliament to a paramount common law.<sup>137</sup> In Coke's sense the common law was above both the King and Parliament and defined their respective functions. "The devotion which the American feels for the federal Constitution is in 17th Century England felt for the common law because it is the Englishman's constitutional shield against tyranny."<sup>138</sup> Coke used *Bonham's Case* to assert his theory. He was unsuccessful at home, but his opinion remains as a landmark of American constitutional law. Although it has long since lost any special medical significance, it is important in this article because it is the first reported case involving the College of Physicians.<sup>139</sup>

Catherine Drinker Bowen, Lord Coke's most popular biographer, describes *Bonham's Case* as "piddling, almost farcical."<sup>140</sup> Professor Louis Jaffe of the Harvard Law School calls it "great."<sup>141</sup> They are both right.

Doctor Thomas Bonham, a graduate of Cambridge with the "degree and dignity of a doctor in physic," failed the examination of the College of Physicians but proceeded to practice medicine in London without a license from the College. The College, acting through its president and "censors or governors" had him imprisoned in the "Compter, London in the Poultry," (sometimes called the "Counter," a debtors prison, not a shelf in a hen house) and "evilily treated . . . him there so in prison for a long time, that is to say, by the space of seven days."<sup>142</sup> He brought an action for 300 pounds

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133. Thorne, *Sir Edward Coke 1552-1952*, in SELDEN SOCIETY LECTURE 1952 at 3, 4 (1954) [hereinafter cited as Thorne].

134. Sayles, *The Court of King's Bench in Law and History*, in SELDEN SOCIETY LECTURE 1959 at 3, 5.

135. *Id.*

136. G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS, 118, 123, 135, 231 (1968); Sayles, *The Court of King's Bench in Law and History*, in SELDEN SOCIETY LECTURE 1959 at 4; Thorne, *supra* note 133, at 4.

137. C. BOWEN, *supra* note 132, at 291-306; T. PLUCKNETT, *supra* note 25, at 337 (5th ed. 1956).

138. Goodhart, *supra* note 131, at 675.

139. 77 Eng. Rep. at 658.

140. C. BOWEN, *supra* note 132, at 309.

141. Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957).

142. Dr. Bonham's Case, 77 Eng. Rep. 638 (C.P. 1609).

against the president and censors for false imprisonment and recovered a judgment, even though this was in the days when a pound was worth a pound and Coke's annual salary as Chief Justice of Common Pleas was only 206 pounds, 19 shillings and tuppence.<sup>143</sup>

The obvious question was whether a "doctor in physic" graduated from Oxford or Cambridge needed a license from the College.<sup>144</sup> But this obvious question was not answered for ninety years when the King's Bench held that even a university graduate must be licensed to practice in London.<sup>145</sup> Instead Coke by-passed the obvious and proceeded to an interpretation of the Charter and the Act of 1522, which he held gave the Censors authority to imprison only for malpractice but not for unlicensed practice. For the latter they could only impose a fine, which they must collect by legal proceedings because they were not a court.<sup>146</sup> Although not stated in the opinion, by holding the Censors were not a court they lost the benefit of the ancient rule that judicial officers are not personally liable for the erroneous exercise of judicial powers,<sup>147</sup> and they thus became liable for false imprisonment.

So far the case was "piddling." Now why is the case great? It is great for two reasons: (1) it is the source of the American concept that courts can declare statutes unconstitutional; and (2) it is unconstitutional to require a person to proceed before a judge who has a personal interest in the outcome of the case. The charter and statute provided that one-half of the fines for unlicensed practice should be paid to the College and the other half to the king. This division gave the Censors a motive to levy fines to benefit the College, and it violated the maxim, as old as the Year Books, "No man shall be a judge in his own case."<sup>148</sup>

Coke, by way of dictum, went out of his way to declare the statutory division void. "And it appears in our books, that in many cases, the

143. There are at least two reports of the case, the one in 8 Coke's Rep. 107a, 113b, 77 Eng. Rep. 638, 646 (1609 and 1610), and the other in 2 Brownlow & Goldesborough 256, 123 Eng. Rep. 928 (1609), *sub nom.* College of Physician's case. I have used Coke's report, because it is more complete and more colorful. Coke's salary is given in Thorne, *supra* note 133, at 8. A trivial but striking example of the dangers of using secondary authorities is illustrated by the place of Bonham's imprisonment. Coke gives it as the Compter in the Poultry. 77 Eng. Rep. at 644, 645. Plucknett says Bonham was committed to the "Counter of Fleet Street." Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 32 (1926). Plucknett's error is repeated in Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543 (1938) and in C. BOWEN, *supra* note 132, at 315. But "[t]o the Counter in the Poultry he went." 1 G. CLARK, *supra* note 28, at 209. The Compter and the Fleet were two different institutions. W. KENT, AN ENCYCLOPEDIA OF LONDON 259, 454 (1951). Clark says that the judgement was for only 40 pounds and that the College paid the costs of the litigation so that no expense should fall on the officers in whose names it was conducted. 1 G. CLARK, *supra* note 28, at 213. Without access to the original records I have not been able to verify these statements.

144. 77 Eng. Rep. at 645.

145. *College of Physicians v. Levett*, 91 Eng. Rep. 1214 (K.B. 1699).

146. 77 Eng. Rep. at 651, 655, 657.

147. *Groenvelt v. Burwell*, 91 Eng. Rep. 1202, 1211-12 (K.B. 1699-1700); *cf.* *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 483, 551 P.2d 410, 420-21, 131 Cal. Rptr. 90, 100-01 (1976) (malicious prosecution); RESTATEMENT OF TORTS §890, Comment d (1939). See generally 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§168, 169, at 2456-59 (8th ed. 1974).

148. 77 Eng. Rep. at 641, 652. 14 W. HOLDSWORTH, *supra* note 1, at 199.

common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void."<sup>149</sup>

Although this is said to have been the most controversial dictum of Coke's life, it was received by his contemporaries "with complacency if not indifference."<sup>150</sup> That one should not be a judge in his own case was argued as a principle of "natural justice" and so accepted by Chief Justice Holt ninety years later. Holt appeared to think Coke meant what he said and said it correctly:

And what my Lord Coke says in *Dr. Bonham's case* in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be both party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, . . . and an Act of Parliament can do no wrong, though it may do several things that look pretty odd. . . .<sup>151</sup>

Much scholarship has since been expended on showing that Coke either had no authority for what he said about holding Acts of Parliament void, or did not mean what he appeared to say, and that the appeal to "natural justice" as a basis for authority to void an Act is groundless.<sup>152</sup> And we now know that Coke's dictum that the common law could control an Act of Parliament is not supportable.<sup>153</sup> As principle of English Constitutional law it is nonsense attributed to "his usual vehemence and even more than his usual inaccuracy,"<sup>154</sup> or, more charitably, to the later development of the modern conceptions of parliamentary sovereignty.<sup>155</sup>

Coke's dictum, however, took root in America. Here it "raised a harvest of political theory which was destined to be the food of far-distant states to which he had never given a thought."<sup>156</sup> The royal governor of Massachusetts cited the dictum against the Stamp Act in 1765.<sup>157</sup> James Otis and

149. 77 Eng. Rep. at 652.

150. C. BOWEN, *supra* note 132, at 316.

151. *City of London v. Wood*, 88 Eng. Rep 1592, 1602 (K.B. 1699).

152. G. ELTON, *THE TUDOR CONSTITUTION* 234 (1972); T. PLUCKNETT, *supra* note 25; S. THORNE, *A DISCLOSURE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES* 79 n.165, 86, 91 (1942); Thorne, *supra* note 133, at 3-4.

153. *Hurtado v. California*, 110 U.S. 516, 531 (1884); Goodhart, *supra* note 131, at 675.

154. F. POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 266 (4th ed. 1918).

155. S. THORNE, *A DISCLOSURE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES* 92 (1942); Goodhart, *supra* note 131, at 675; Albert Venn Dicey, whose book on the English Constitution was standard for years, after contradicting Coke out of his own later writings summarized the English law:

in a grotesque expression which has become almost proverbial. 'It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.'

Dicey wrote in 1902. What would he say in the light of present surgical virtuosity? A. DICEY, *supra* note 39, at 40-41; T. PLUCKNETT, *supra* note 25, at 337. Plucknett gives a tantalizing reference, which I have not been able to check, "It was easier to make a woman a man. 1 Mary, Sess. 3, C.1, S.3." T. PLUCKNETT, *supra* note 25, at 337.

156. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 30-31 (1926).

157. C. BOWEN, *supra* note 132, at 316.

Patrick Henry extolled it.<sup>158</sup> And William Cushing, later appointed to the Supreme Court of the United States by George Washington, relied on it in 1776 to persuade a grand jury to declare an Act of Parliament "void and inoperative."<sup>159</sup> Cushing's friend, John Adams, congratulated him for doing so:

You have my hearty concurrence in telling the jury the nullity of the Acts of Parliament, whether we can prove it by the *jus gladii* [the law of the sword] or not. I am determined to die of that opinion, let the *jus gladii* say what it will.<sup>160</sup>

Chancellor Kent of New York, the acknowledged leader of the American bench and bar of his day, wrote in 1826, "[w]e cannot but admire the intrepidity and powerful sense" of Lord Coke in uttering this dictum.<sup>161</sup> *Dr. Bonham's Case*<sup>162</sup> thus became a principal source of American Constitutional theory, although it has since been superseded by our written constitutions.<sup>163</sup>

The proposition that no man can be a judge in his own case has survived in England as a principle of "natural justice"<sup>164</sup> and in the United States as a fundamental requirement of that "due process of law" required by the Constitution. It is alive and flourishing in the United States Supreme Court.<sup>165</sup> The California Supreme Court applied it to invalidate the former statute prohibiting abortions "unless the same is necessary to preserve [the woman's] life."<sup>166</sup> This, in effect, delegated to the physician the duty to determine if the abortion was necessary. If he decided wrongly, he was subject to a criminal penalty if he performed the abortion, but he was under no penalty if he did not. Thus, there was enormous pressure on the physician to make his decision turn on his own penal interest rather than on the welfare of the woman. Such delegation of authority to decide to a person directly involved in the results of the decision was held, under the fourteenth amendment, to violate due process.<sup>167</sup> The California court relied on *Tumey*

158. C. BOWEN, *supra* note 132, at 316-17.

159. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 64 (1926).

160. T. PLUCKNETT, *supra* note 25, at 64.

161. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 72 n.25 (1931), citing 1 J. KENT, COMMENTARIES ON AMERICAN LAW 420 (1826).

162. 77 Eng. Rep. 638 (C.P. 1609).

163. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 141-42 (Atheneum ed. 1963); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 68, n.5 (1931).

164. A. DICEY, *supra* note 39, at 356-57; D. HEWITT, NATURAL JUSTICE 17-19 (1972) (collecting the English cases); 14 W. HOLDSWORTH, *supra* note 1, at 199. Parliament could change this principle if it were so disposed. F. POLLOCK, A FIRST BOOK OF JURISPRUDENCE 268-69 (4th ed. 1918).

165. *Concerned Citizens v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 652 (1977); *Connally v. Georgia*, 429 U.S. 245, 249 (1977); *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (citing *Bonham*); *Tumey v. Ohio*, 273 U.S. 510, 524 (1927) (citing *Bonham*).

166. CAL. STATS. 1967, c. 327, §3, at 1523, held invalid in *People v. Belous*, 71 Cal. 2d 954, 972-73, 458 P.2d 194, 206, 80 Cal. Rptr. 354, 366 (1969).

167. *People v. Belous*, 71 Cal. 2d 954, 972-73, 458 P.2d 194, 206, 80 Cal. Rptr. 354, 366 (1969).

*v. Ohio*,<sup>168</sup> which, in turn, had relied on *Dr. Bonham's Case*, and thus Coke's dictum not only has influenced states Coke never thought of but produced results he may have abhorred.

Coke could recognize good medical advice. In the margin of his copy of Thomas Paynell's *Regimen of Health* he rhymed a Latin prescription into English:

“If physicke fayle  
For thy advayle,  
Three Doctors you shall find,  
Doctor due diet  
And Doctor Quiet  
And Doctor merry-mynde.”<sup>169</sup>

But in *Dr. Bonham's Case* Coke surrendered his medical common sense to his loyalty to his old school, Trinity College at Cambridge, for which he “kept a warm affection” and which he served as High Steward.<sup>170</sup> There was a degree of tension between the universities and the College of Physicians,<sup>171</sup> and Coke went out of his way to extol them and disparage the College:

The university is *a ma mater*, from whose breasts those of that private college have sucked all their science and knowledge . . . and, therefore, those universities exceed and excel all private colleges.<sup>172</sup>

But early in its history the College undertook teaching, although this was not one of the functions authorized by the Charter.<sup>173</sup> And the physicians sucked little from the “firm classical breast of *Alma Mater*.” The universities remained closed to “new methods such as anatomical dissection long after the Royal College, in William Harvey's person, uncovered the heart.”<sup>174</sup> The great Doctor Caius taught at Cambridge, but he had to perform his dissections at the College in London. The university considered such practices atheistical and the “business of mechanics, artisans, surgeons who worked with their hands . . . . For scholars it was enough to know that the body was regulated by the four humors . . . .”<sup>175</sup> Coke's panegyric of the universities expedited the passage of *Dr. Bonham's Case* to medical oblivion. Clark says that “[t]he judgment was reversed by writ of error in the king's bench.”<sup>176</sup> Actually, *Dr. Bonham's Case* was partially overruled, rather than reversed.

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168. 273 U.S. 510 (1927).

169. C. BOWEN, *supra* note 132, at 532.

170. C. BOWEN, *supra* note 132, at 58.

171. I G. CLARK, *supra* note 28, at 209, 112-13.

172. 77 Eng. Rep. at 650.

173. I G. CLARK, *supra* note 28, at 52.

174. C. BOWEN, *supra* note 132, at 317.

175. C. BOWEN, *supra* note 132, at 56.

176. I G. CLARK, *supra* note 28, at 213. Clark does not document his statement, and I have not been able to verify it. It is contradicted by Coke himself, who says the Chief Justice of the King's Bench “well approved of the judgement we had . . . given.” 77 Eng. Rep. at 658.

In *Dr. Bonham's Case* Coke had held that the Censors were not a court and, therefore, the Censors' findings of fact on the evidence could be "traversed," that is, denied and the facts tried again before a court. This holding was overruled in *Groenvelt v. Burwell*<sup>177</sup> in 1699 or 1700 by Chief Justice Holt. Groenvelt was imprisoned by the Censors for twelve weeks for malpractice, the administration "of unwholesome and noxious pills."<sup>178</sup> On his release he brought an action for false imprisonment, as Bonham had, relying on Coke's statement that he could attack the findings of fact of the Censors. Holt held that the Censors' findings could not be traversed, because they were a court. Since they were not a common-law court, however, their findings could not be reviewed by the customary appeal or writ of error, but could be reviewed only by common law certiorari.<sup>179</sup> On review by certiorari the Court would determine only whether the Censors had acted within their "jurisdiction." Actually, "jurisdiction" is virtually undefinable in the present context. The California Supreme Court says: "the concept [lack of jurisdiction] encompasses any error of sufficient magnitude that the trial court may be said to have acted in excess of jurisdiction."<sup>180</sup> The House of Lords says certiorari may be used to nullify an order on "the ground which without any great precision has been described as a departure from 'natural justice.'"<sup>181</sup> But whatever "jurisdiction" means, the Censors had it, therefore Groenvelt could not show the Court that he had in fact not been guilty of malpractice, and he lost his case.

By way of assigning reasons for the fact that Groenvelt could not attack the findings of fact of the Censors, Holt put a hypothetical situation: If the finding of malpractice could be attacked in a common-law court, the issue of malpractice would have to be tried to a jury, and this would be nonsense: "For the judges themselves do not understand medicines sufficiently to make a judgment. Whether they were sound or not."<sup>182</sup>

An analogous preference for expertise and reluctance to submit issues of medical discipline to juries appears in a California case decided last sum-

177. 91 Eng. Rep. 1202 (K.B. 1699); S.C. *sub nom.* Grenville v. College of Physicians, 88 Eng. Rep. 1398 (K.B. 1700). There are at least five other reports of the case under various spellings of the plaintiff's name. 2 G. CLARK, *supra* note 28, at 453 n.5. The defendant, Dr. Thomas Burwell, was President of the College in 1692. 2 G. CLARK, *supra* note 28, at 734.

178. See note 177 *supra*.

179. Common law certiorari is an order directing an inferior court to certify its record to a reviewing court. It is not the federal statutory procedure now used to obtain a discretionary review by the United States Supreme Court. The only similarity between the two is the name.

180. *In re Sands*, 18 Cal. 3d 851, 857, 558 P.2d 863, 866, 135 Cal. Rptr. 777, 780 (1977). See also *General Medical Council v. Spackman*, [1943] A.C. 627, 640;

Alice felt dreadfully puzzled. The Hatter's remark seemed to her to have no sort of meaning in it, and yet it was certainly English. 'I don't quite understand you, she said, as politely as she could.'

M. GARDNER, *THE ANNOTATED ALICE* 97 (1960). "The weakness of the jurisdictional fact concept of review has been the lack of an adequate logic for distinguishing jurisdictional facts from other facts." Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 959 (1957).

181. *General Medical Council v. Spackman*, [1943] A.C. 627, 640.

182. 91 Eng. Rep. at 1213-14.



mer.<sup>183</sup> Of course, complicated medical questions are tried routinely to juries in the malpractice cases seeking damages for personal injuries. But in the discipline cases, which may involve identical questions, juries are somewhat discountenanced. This paradox is explained by the history of the forms of legal proceedings and not by logic. "The life of the law has not been logic: it has been experience."<sup>184</sup>

In California, for reasons unrelated to the practice of medicine, there is another seeming paradox. Here certiorari is no longer available to review the action of medical licensing agencies. The appropriate vehicle is now a writ of mandate.<sup>185</sup> This has resulted in a change from the test of "lack of jurisdiction" to "abuse of discretion." In determining whether there has been an abuse of discretion by the licensing agency, the trial judge may exercise his independent judgment on the evidence.<sup>186</sup> "Thus the ultimate power of decision rests with the trial court."<sup>187</sup> This is not because the California Supreme Court necessarily has more confidence in the ability of trial judges to understand the soundness of conclusions from medical evidence than did Lord Holt. It is because of profound public policy. The Court adopted Jaffe's rationale of its position:

As Professor Jaffe, a leading authority in the field of administrative law has written: "The California rule can be justified in so far as it gives additional procedural protection to an interest of great importance as where a professional license has been revoked. The protection may be more needed to overcome likely prejudices of a professional licensing body against maverick and unconventional practitioners."<sup>188</sup>

The California Supreme Court thus deliberately protects the rights of "the independent thinker or crusader" who may be subjected "to the retaliation of the professional or trade group,"<sup>189</sup> and says:

Restricted to the narrow ground of review of the [sufficiency of the] evidence and denied the power of an independent analysis, the court might well be unable to save the unpopular professional or practitioner.<sup>190</sup>

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183. *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 484, 551 P.2d 410, 421, 131 Cal. Rptr. 90, 101 (1976).

184. O. HOLMES, *supra* note 10, at 1.

185. *Bixby v. Pierno*, 4 Cal. 3d 130, 138, 481 P.2d 242, 247, 93 Cal. Rptr. 234, 239 (1971).

186. *See id.* at 139, 481 P.2d at 248, 93 Cal. Rptr. at 240; *cf.* *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 32, 520 P.2d 29, 31, 112 Cal. Rptr. 805, 807 (1974) (applying the *Bixby* rule to decisions of the Board of a County Employees Retirement Association).

187. *Yakov v. Board of Medical Examiners*, 68 Cal. 2d 67, 72, 435 P.2d 553, 556, 64 Cal. Rptr. 785, 788 (1968); *Hohreiter v. Garrison*, 81 Cal. App. 2d 384, 402, 184 P.2d 323, 334 (1947), quoted in, *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301, 308, 196 P.2d 20, 25 (1948).

188. *Bixby v. Pierno*, 4 Cal. 3d 130, 145, 481 P.2d 242, 252-53, 93 Cal. Rptr. 234, 244-45 (1971). The court was referring to L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 191-92 (1965).

189. *Bixby v. Pierno*, 4 Cal. 3d at 146-47, 481 P.2d 254, 93 Cal. Rptr. at 246.

190. *Id.* at 147, 481 P.2d at 254, 93 Cal. Rptr. at 246; *cf.* *Patty v. Board of Medical*

This is the local counterpart of the preservation of the English "rule of law" praised by Dicey, which Holdsworth says would be abrogated were the courts ousted and administrative officials given sole jurisdiction over questions of a justiciable kind.<sup>191</sup>

In *Groenvelt v. Burwell*<sup>192</sup> Holt not only overruled Coke, he went out of his way to ridicule him. Despite his almost contemporaneous praise in *City of London v. Wood*<sup>193</sup> of Coke's dictum on holding statutes void as no extravagance,<sup>194</sup> in *Groenvelt* Holt took Coke to task for his praise of the universities. Holt said that in *Dr. Bonham's Case*:

Coke was transported [that is, carried out of his mind by strong emotion] that [because] the doctor was a member of the university, and of his own [Coke's] university (as one may see by his excursions in praise of it) which he looked upon as affronted by that prosecution. And as the said opinion was not judicial, so it has no authority in law for its foundation.<sup>195</sup>

Why was Holt so derogatory of Coke? And why was he so zealous to maintain the authority of the Censors? At this time we can only guess. Holt may have only been protecting an old client. Before he ascended to the King's Bench, Holt had been "standing counsel" to the Royal College of Physicians.<sup>196</sup>

That "eminently readable but biased" biographer, Lord Campbell, of whom "it was said that his biographies added a new terror to death,"<sup>197</sup> gives us another clue. Holt may have had a personal reason to want to maintain the authority of the College of Physicians. Holt's wife, Anne Copley,

was a shrew, and they lived together on the worst possible terms. She fell into ill health and he was in high hopes of getting rid of her. To plague her husband she insisted on consulting a physician with whom he had had a personal quarrel, and who, for this reason is said to have taken peculiar pains in curing her.<sup>198</sup>

The doctor was John Radcliffe. He had been fined by the Censors for improper association with an apothecary, expelled from his fellowship in the College in 1689, and consulting with him had been made an offense punishable by a fine of 10 pounds.<sup>199</sup> Radcliffe refused to obey the statute of

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Examiners, 9 Cal. 3d 356, 366, 508 P.2d 1121, 1127-28, 107 Cal. Rptr. 473, 479-80 (1973) (abuses of governmental power).

191. A. DICEY, *supra* note 39, at 191-93; 14 W. HOLDSWORTH, *supra* note 1, at 203.

192. 91 Eng. Rep. 1202 (K.B. 1699-1700).

193. 88 Eng. Rep. 1592 (K.B. 1699).

194. *City of London v. Wood*, 88 Eng. Rep. 1592, 1602 (K.B. 1699).

195. 91 Eng. Rep. at 1212; 88 Eng. Rep. at 1400.

196. 1 G. CLARK, *supra* note 28, at 367; G. CLARK, *supra* note 28, at 451.

197. G. WILLIAMS, *LEARNING THE LAW* 168 (3d ed. 1950). The quip was said to have been originated by Dr. John Arbuthnot more than a century and a half before Lord Campbell. F. MUIR, *AN IRREVERENT AND THOROUGHLY INCOMPLETE SOCIAL HISTORY OF ALMOST EVERYTHING* 128 (1976).

198. 2 J. CAMPBELL, *LIVES OF THE CHIEF JUSTICES* 177 (1861).

199. 1 G. CLARK, *supra* note 28, at 471.

the College providing that directions on prescriptions should not be written in Latin. He prescribed in Latin and thus made the apothecary an intermediary between himself and the patient.<sup>200</sup> In modern terms he seems to have been in violation of California Business and Professions Code Section 2392 by aiding an unlicensed person to practice medicine.

Eventually, Radcliffe submitted "with his usual bad grace" and was restored to his fellowship. He became so rich and such a medical benefactor that his gold-headed cane was treasured by the College as a symbol of medical excellence.<sup>201</sup> And it remains such a symbol to this day, witness the award of a gold-headed cane to the outstanding student in the graduating class at the Medical School of the University of California at San Francisco.

But it is easy to see why Holt may have disliked Radcliffe and how Holt developed his attitudes favorable to the College. There is an old Latin maxim emblazoned on the walls of the Harvard Law Library, "*Non sub homine sed sub deo et lege*," we are to be governed not by men but by God and law.<sup>202</sup> Consider what Holt said of Coke and what we know of Holt and realize that this remains as a goal to aspire to, not a statement of an achievement.

Holt's efforts to support the College of Physicians were eventually unsuccessful. The College became involved in a running battle with the surgeons and apothecaries over educational requirements and monopolistic practices. Public sentiment was against the College, and it lost in the House of Lords.<sup>203</sup> The result was that apothecaries were able to practice medicine, and, despite the apparent victory in *Groenvelt's Case*, the College of Physicians does not seem to have concerned itself with malpractice thereafter except for one fleeting reference to malpractice by an oculist.<sup>204</sup> The situation became so bad that in 1858 the retiring president of the California State Medical Society said: "London has been styled the paradise of quacks."<sup>205</sup>

This lack of concern of the principal licensing agency with malpractice continued even after the passage of the first comprehensive licensing statute, the Medical Act of 1858.<sup>206</sup> The Act provided that the name of a doctor could be "erased" from the register of practitioners if the Medical Council found him guilty "of infamous Conduct in any professional Respect."<sup>207</sup> The reported cases under this provision deal with such things as assisting an unlicensed person to practice as a "medical electrician"; improper advertis-

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200. 1 G. CLARK, *supra* note 28, at 734.

201. 1 G. CLARK, *supra* note 28, at 359-60; 2 G. CLARK, *supra* note 28, at 436, 437, 471.

202. *See, e.g.*, C. BOWEN, *supra* note 132, at 305, says the maxim goes back to Bracton, *circa* 1250; 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 33 (S.E. Thorne, ed. 1968).

203. 1 G. CLARK, *supra* note 28, at 361, 366; 2 G. CLARK, *supra* note 28, at 476-79.

204. 1 G. CLARK, *supra* note 28, at 363.

205. R. JONES, MEMORIES, MEN AND MEDICINE 52 (1950) [hereinafter cited as R. JONES].

206. 21 & 22 Vict., C. 90 (1858).

207. *Id.* at 306.

ing; performing an illegal abortion; adultery with a female patient; slander; having a bastard child; or publishing an indecent book.<sup>208</sup> But of malpractice, in the sense of failing to treat a patient in accordance with the standard of care, not a word have I found.

*General Medical Council v. Spackman*<sup>209</sup> is a good illustration of the elusiveness of “natural justice.” Spackman was a physician who committed adultery with a female patient. He was named as a party in the ensuing divorce suit and held liable for 1000 pounds. Thereafter the Council proceeded against him under the Medical Act of 1858 on the grounds that he had been guilty of professional misconduct. Under the statute the Council had authority “not merely to ascertain the facts, but also to decide what standard to apply and whether to hold that particular conduct is infamous . . . ‘in any professional respect.’”<sup>210</sup> The Council refused to allow Spackman to present evidence refuting the “prima facie” case made at the divorce trial. Of course, this refusal to allow Spackman to “traverse” the divorce proceeding seems in accord with Holt’s ruling in *Groenvelt*. Nevertheless, the House of Lords held that the refusal to allow Spackman to present such evidence was a denial of “natural justice.” Their Lordships recognized the inconvenience of retrying the divorce case before the General Medical Council but disposed of it with a truism: “Convenience and justice are often not on speaking terms.”<sup>211</sup> They invited Parliament to change the law, and Parliament did so in the Medical Act of 1956 by making the matrimonial proceeding conclusive.<sup>212</sup> Thus, not only can Parliament change “natural justice,” it did so, and some 300 years after Coke’s death it drove another nail into his coffin and resurrected Holt.

The history of the California legislation regulating medical practice shows some parallels to that of the first general English Act, that of 1858. We can infer that some of the California doctors knew of the English experience, *e.g.*, the reference in 1856 to examination by a “Board of Censors” as a qualification for admission to the State Medical Society.<sup>213</sup> In California, as

208. *Ong Bak Hin v. General Medical Council*, [1946] 2 All. E.R. 257; *General Medical Council v. Spackman*, [1943] A.C. 627, 635, 643; *Rex v. General Council of Medical Educ.*, [1930] 1 K.B. 562; *Leeson v. General Council of Medical Educ.*, 43 Ch.D. 366 (1889).

209. [1943] A.C. 627.

210. *Id.*

211. [1943] A.C. at 638. “[S]peed is not always compatible with justice.” *In re Marriage of Brantner*, 67 Cal. App. 3d 416, 422, 136 Cal. Rptr. 635, 638 (1977).

212. 4 & 5 Eliz. 2, c. 76; 21 HALSBURY’S STATUTES OF ENGLAND §33, (2) at 654 (3d ed. 1970). Another example of Parliament changing a rule of “natural justice” is the statute allowing parties to testify in their own law suits. 17 HALSBURY’S LAW OF ENGLAND ¶231 at 162 (4th ed. 1976). As late as 1823 it was argued that the old rule forbidding parties to testify on the *a priori* assumption they would lie on their own behalf was argued to be a principle of “natural justice.” *Stewart v. Lawton*, 130 Eng. Rep. 151 (C.P. 1823). But the court evaded the issue on the ground that the statute there involved had never been applied. Compare 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 194-95 (3d ed. 1944) with T. PLUCKNETT, *supra* note 25, at 339. Plucknett’s description is not quite accurate.

213. R. JONES, *supra* note 205, at 41. Similar references can be found in *New York. See Reid v. Medical Soc’y*, 156 N.Y.S. 780, 781 (Sup. Ct. 1915).

in England, legislation requiring the licensing of apothecaries preceded the licensing of physicians. Indeed one of the arguments in favor of the first California Medical Act was: "why, if the sale of poison was amenable to control, the men who prescribed it should not be under similar scrutiny."<sup>214</sup> The original legislation was secured only after intense debate within the medical profession both in England and California.<sup>215</sup> And when the Act was finally passed in California, like the English Act, it presupposed "the existence of strong voluntary associations side by side with the official machine."<sup>216</sup>

The first California Medical Act, that of 1876,<sup>217</sup> provided for a Board of Examiners appointed by the several medical societies then in existence, and gave the Board authority to grant certificates and to revoke them for "unprofessional or dishonorable conduct." The certificate entitled the holder to "append to his name the letters of 'M.D.'" The act actually provided for the licensing of itinerant vendors of drugs and nostrums and, although it was once known as "The Law to Prevent Quackery," was ineffective and repeatedly amended over the opposition of those who thought no law would be better.<sup>218</sup>

The scheme of composing the examining board of representatives of various medical societies or "schools" of medicine such as "Homeopaths" or "Eclectics" was eventually held constitutional.<sup>219</sup> But from the beginning the early legislation was subjected to the same sort of "niggardly exposition" that seems to have required the enactment of the statute of Queen Mary requiring gaolers to receive the prisoners of the old College of Physicians. In *Ex parte McNulty*<sup>220</sup> the court held that a physician whose license had been revoked could continue to practice. The Act of 1876 made it a misdemeanor to practice "without first having procured a certificate." McNulty had once procured a certificate and, since the Act said nothing about the effect of revoking a certificate, was, therefore, not guilty of a misdemeanor.<sup>221</sup> Thus, when we find that the current statute requires a physician to have a "valid, unrevoked certificate,"<sup>222</sup> we know that the

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214. R. JONES, *supra* note 205, at 118. On the English Apothecaries Act of 1815 see 2 G. CLARK, *supra* note 28, at 647-50.

215. Compare R. JONES, *supra* note 205, at 100-18 with 2 G. CLARK, *supra* note 28, at 718 *passim*.

216. 2 G. CLARK, *supra* note 28, at 730.

217. CAL. STATS. 1875, c. 518, §2, at 792.

218. R. JONES, *supra* note 205, at 119-20. *In re Gerber*, 57 Cal. App. 141, 206 P. 1004 (1922) reviews some of the early legislation. Its holding that a "naturopath" could practice optometry was disapproved in *Millsap v. Alderson*, 63 Cal. App. 518, 219 P. 469 (1923), as explained in *Hall v. Steele*, 193 Cal. 602, 226 P. 854 (1924), holding that a "naturopath" or so-called "beauty doctor" could not practice plastic surgery.

219. *Ex parte Gerino*, 143 Cal. 412, 77 P. 166 (1904); *Packer v. Board of Behavioral Examiners*, 52 Cal. App. 3d 190, 196, 125 Cal. Rptr. 96, 100 (1975); *Jaffe, Law Making by Private Groups*, 51 HARV. L. REV. 201, 229-34 (1937).

220. 77 Cal. 164, 19 P. 237 (1888).

221. *Id.* at 167-68, 19 P. at 239.

222. CAL. BUS. & PROF. CODE §2141.

word “unrevoked” was not inserted out of some lawyer’s abundance of caution. It was inserted to meet a real need.<sup>223</sup>

*Ex parte McNulty*<sup>224</sup> has a significance beyond its actual holding. The provision in Section 10 of the Act of 1876 that gave the Board of Examiners authority to refuse or revoke certificates for “unprofessional or dishonorable conduct” would seem to be a delegation of legislative power to further define the conduct. *General Medical Council v. Spackman*<sup>225</sup> and some states have upheld such delegations.<sup>226</sup> But in *McNulty* the California Supreme Court cast doubt on the validity of such a delegation of authority to an administrative agency. It was disturbed by the fact that the early boards represented various “schools” of medicine,<sup>227</sup> and when one of the justices made a particular point of lauding Dr. Hahnemann, the founder of the homeopathic school,<sup>228</sup> the handwriting was on the wall.

The result was that the legislature had to include various definitions of “unprofessional conduct.” But even this was not enough, and judicial hostility to the delegation of the definition continued. When “unprofessional conduct” was defined by statute to include “[a]ll advertising of medical business in which grossly improbable statements are made,”<sup>229</sup> the court held a physician licensed by the Eclectic Medical Society could not have her certificate revoked for advertising: “Cancer Cured. The Mrs. S. J. Bridge Remedy, the only sure cure known in the world.”<sup>230</sup> The court reasoned, if that is the correct word, that the statement might be grossly improbable but nevertheless true; that one board might find the statement merely improbable but not grossly so; that since different schools were represented on the board, the practitioners of a minority school might be the victims of invidious discrimination; and that it was “an easy matter for the legislature to declare what statements . . . shall be deemed ‘grossly improbable’ and it must do so, and not leave it to a board of medical examiners after publication . . . .”<sup>231</sup>

And the courts still subject to strict scrutiny any statute that restricts the right to work for a living in a common occupation, particularly where the licensing authority is delegated to persons who are themselves subject to the

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223. An intensive search might disclose the reasons for much of the current legislative language, but I have not been able to find that it has been done. The composition and difficulties of the early boards are outlined in H. HARRIS, CALIFORNIA’S MEDICAL STORY 203-07 (1932), but their legal problems are glossed over by general references to “the doubtful constitutionality of the laws,” *id.* at 203, and “bad as it [the law] was, the courts had distorted it further until California had become the medical dumping ground of the nation . . . .” *Id.* at 205. The early boards had to solicit doctors for funds to enforce the law and the litigation defending it. R. JONES, *supra* note 205, at 122, 139.

224. 77 Cal. 164, 19 P. 237 (1888).

225. [1943] A.C. 637.

226. Annot., 28 A.L.R. 3d 487 (1969); but see RIBICOFF REPORT, *supra* note 5, at 908-09.

227. 77 Cal. at 170, 19 P. at 240 (Paterson, J., concurring).

228. *Id.* at 169, 19 P. at 240 (Thornton, J., concurring).

229. *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, 591, 84 P. 39, 40 (1908).

230. *Id.*

231. *Id.* at 595, 84 P. at 41.

authority delegated.<sup>232</sup> The most extreme example related to the present context seems to be that of the statute that once made five years of experience in this state or five years of licensure in another state prerequisites to obtaining a license as a dispensing optician. Neither standards of experience in California nor standards for judging the licensing elsewhere were stated. The California Supreme Court in *Blumenthal v. Board of Medical Examiners*<sup>233</sup> invalidated the statute as a device to give "presently licensed dispensing opticians . . . virtually absolute economic control over those employees who are required to serve under them in order to attain future professional objectives."<sup>234</sup> The citation of *Blumenthal* in juxtaposition to *Tumey v. Ohio*<sup>235</sup> in *People v. Belous*<sup>236</sup> shows how close the subject of regulation of doctors by doctors can come to the constitutional problems raised by decisions made by persons interested in the result. And the circumspection with which the California Supreme Court has regarded disciplinary agencies is shown by its holding that the Board of Medical Examiners may not entrap a licensee into selling drugs and then prosecute him. To allow an agency which has both investigatory and adjudicatory powers (Lord Holt's "judge and party") to engage in entrapment "is to invite the appearance and danger of abuse and discrimination."<sup>237</sup>

There are indications that the courts may be becoming somewhat less stringent in the professional licensing cases and are less ready to apply the so-called "strict scrutiny" standard to invalidate statutes under the Equal Protection Clause.<sup>238</sup> And they may now be more amenable to delegation of authority to a licensing agency to define the grounds of discipline. Thus, it has been held that the Board of Examiners in Veterinary Medicine could discipline a licensee on the statutory ground, among others, for "conduct reflecting unfavorably on the profession of veterinary medicine."<sup>239</sup> The court conceded that the quoted language "fails on its face to provide a standard by which conduct can be uniformly judged."<sup>240</sup> But despite its uncertainty it was held constitutional, "since this case pertains to a particular vocation, the common knowledge of the members of veterinary medicine

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232. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 16-17, 485 P.2d 529, 538-39, 95 Cal. Rptr. 329, 338-39 (1971); see *Antonine v. Department of Pub. Health*, 33 Cal. App. 3d 215, 226-28, 108 Cal. Rptr. 689, 696-97 (1973).

233. 57 Cal. 2d 228, 368 P.2d 101, 18 Cal. Rptr. 501 (1962).

234. *Id.* at 236, 368 P.2d at 105, 18 Cal. Rptr. at 505.

235. 273 U.S. 510 (1927).

236. See note 167 *supra*.

237. *Patty v. Board of Medical Examiners*, 9 Cal. 3d 356, 365, 508 P.2d 1121, 1127, 107 Cal. Rptr. 473, 479 (1973). But the mere fact that investigative and adjudicative functions are united in one agency "does not, without more, constitute a due process violation." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (medical disciplinary proceeding).

238. See *Naismith Dental Corp. v. Board of Dental Examiners*, 68 Cal. App. 3d 253, 261, 137 Cal. Rptr. 133, 136 (1977). On the "two-tiered" test under the equal protection clause see *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 16-17, 485 P.2d 529, 538-39, 95 Cal. Rptr. 329, 338-39 (1971).

239. *Hand v. Board of Examiners*, 66 Cal. App. 3d 605, 622-23, 136 Cal. Rptr. 187, 198 (1977).

240. *Id.*

will provide the required certainty.”<sup>241</sup> The court took no note of the fact that the statute has been changed to require that the licensee have knowledge that his acts reflect unfavorably; nor did the court note that its rationale is impaired, if not destroyed, by the recent statutes adding public members to the licensing board.<sup>242</sup> Thus, for the moment at least, we have applicable to professional licensing the same objection Justice Tobriner had to the obscenity statute: “[T]he jury is expected *both* to determine the applicable standard and to judge whether the defendant’s conduct conforms to it.”<sup>243</sup>

Although the California statutes for many years were quite specific, until 1965 they simply did not include anything resembling general incompetence as a ground of discipline. In 1965, “gross negligence” and “gross incompetence” were added as bases. In 1974, mere “incompetence,” as distinguished from “gross incompetence,” was made sufficient. And in September 1976, “repeated similar negligent acts” was added as a ground.<sup>244</sup> Historically California thus followed the general pattern until 1965 whereby it adhered to the fictitious theory that all licensed physicians meet the minimal requirements of competence required by their respective licensing boards.<sup>245</sup> It then anticipated the criticism stated a few years later to the United States Senate: “The medical profession has been loathe to weed out or restrict the practice of those physicians who are in fact guilty of medical negligence or abuse,”<sup>246</sup> and tried to create some more nearly effective public regulatory device. And what has resulted is in general, if not exact, accord with the recommendation of the Secretary’s Commission on Medical Malpractice: “[T]hat all State Medical Practice acts include specific authority to State licensing bodies to suspend or revoke licenses for professional incompetence.”<sup>247</sup>

The various excoriations of the former Board of Medical Examiners (now the Board of Medical Quality Assurance) must be evaluated against the facts that the Board lacked authority to discipline for malpractice until 1965, and that when authority was granted, it was circumscribed.

The old Board of Medical Examiners was, however, accused of not exercising even the authority it had under the 1965 changes. The Joint

241. *Id.*

242. CAL. BUS. & PROF. CODE §4882(k) (prior to its amendment in 1976). See *Hand v. Board of Examiners*, 66 Cal. App. 3d 605, 622-23, 136 Cal. Rptr. 187, 198 (1977), *hearing denied* — Cal. 3d —, — P.2d —, — Cal. Rptr. — (1977). The denial of a hearing by the California Supreme Court does not necessarily indicate a retreat from its prior views. 6 B. WITKIN, CALIFORNIA PROCEDURE, APPEAL §670 (2d ed. 1971), (Supp. 1977). On addition of public members see CAL. BUS. & PROF. CODE §4800. See also CAL. BUS. & PROF. CODE §2100; COMMISSION REPORT, *supra* note 4, at 55.

243. *Bloom v. Municipal Court*, 16 Cal. 3d 71, 89, 545 P.2d 229, 241, 127 Cal. Rptr. 317, 329 (1976) (Tobriner, J., dissenting). See Rabsamen, *Medical Malpractice*, 235 SCIENTIFIC AMERICAN 18, 21 (Aug. 1976).

244. CAL. BUS. & PROF. CODE §2361.

245. D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶18.06, at 213 (1973).

246. RIBICOFF REPORT, *supra* note 5, at 6.

247. COMMISSION REPORT, *supra* note 4, at 52.



Legislative Audit Committee reported in December 1975: "The Board of Medical Examiners has by default left the policing of the medical profession to the tort system and in some instances to the insurance industry."<sup>248</sup> It supported this accusation by references to my opinion in *Gonzales v. Nork*.<sup>249</sup> A sociologist has made a similar but more general accusation: "Thus in gross cases a man is likely to be expelled from the company of his present colleagues but not from his profession."<sup>250</sup> But the more recent enlargement of the authority of the Board of Medical Quality Assurance is so new, the legislation is so complex, and the administrative problems of implementing it are so great that there is yet no adequate basis of experience to warrant either conclusions or predictions.<sup>251</sup>

In the present context it is important to note that in 1961 the legislature added a public member to the then ten physician members of the Board of Medical Examiners. In 1975, when the name was changed to the Board of Medical Quality Assurance, it was enlarged to 19 members, "seven of whom shall be public members."<sup>252</sup> Here again California to a degree anticipated and to a degree paralleled the Secretary's Commission on Medical Malpractice, which, referring to the former California statute, recommended: "that all state licensing boards include lay members."<sup>253</sup> And so we encounter another modern counterpart of the problem in *Dr. Bonham's Case*, as amplified in *Blumenthal v. Board of Medical Examiners*,<sup>254</sup> the mistrust of confining the authority to regulate exclusively to those who are themselves subject to the regulations—the nagging suspicion of cats appointed to guard the cream. Whatever solution may eventuate, the problem lives on.

#### PRIVATE EFFORTS TO CONTROL THE STANDARD OF CARE

A third way of curtailing malpractice would appear to be through the action of private groups such as professional societies or hospital staffs, what has been called "Government by Medical Colleagues."<sup>255</sup> This method has not been particularly effective for reasons that have been

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248. CAL. LEGIS. JOINT LEGIS. AUDIT COMMITTEE, OFFICE OF THE AUDITOR GENERAL, REPORT 265.2, *Doctors' Malpractice Insurance* 14-15 (1975).

249. Memorandum at 139-40, *Gonzales v. Nork*, Civil No. 228566 (Sacramento County Sup. Ct. Nov. 27, 1973); *rev'd for failure to grant jury trial*, 60 Cal. App. 3d 728, 131 Cal. Rptr. 717 (1976); *hearing granted* by the California Supreme Court, Oct. 21, 1976 (the case was still pending at publication time).

250. E. FREIDSON, *PROFESSION OF MEDICINE* 181 (1970).

Data for medicine are very scarce, but it seems plausible that, as was found to be the case in law, actual loss of license for gross and obvious instances of unethical or incompetent behavior is the consequence of publicity that forces the professional group to act rather than the offense as such.

251. The new law, the Medical Injury Compensation Reform Act, Second Extraordinary Session, CAL. STATS. 1975, c. 1, 2, at 3949, 3979, is discussed in 7 PAC. L.J., REVIEW OF SELECTED 1975 CALIFORNIA LEGISLATION 544 (1976).

252. CAL. BUS. & PROF. CODE §2100.

253. COMMISSION REPORT, *supra* note 4, at 55.

254. 57 Cal. 2d 228, 368 P.2d 101, 18 Cal. Rptr. 501 (1962).

255. D. LOUISELL & H. WILLIAMS, *THE PARENCHYMA OF LAW* 143 (1960).

canvassed by sociologists, one of whom goes so far as to say: "In matters of peer regulation, doctors observe the Golden Rule," because each knows that he has made and is likely to make some terrible and obvious mistakes.<sup>256</sup> Another says:

The practitioner is prone to believe that mistakes are bound to be made by the very nature of clinical work, so that every practitioner at one time or another is vulnerable to reproach. This belief is used to excuse oneself and also to restrain one from criticizing others and them from criticizing him. In looking at others' apparent mistakes the physician is inclined to feel that 'there, but for the grace of God, go I' and that 'it may be my turn next.' When he 'gets into trouble,' he expects colleagues to cultivate the same sense of charity and is inclined to feel that those who are not so charitable are dogmatic fanatics, to be distrusted and avoided.<sup>257</sup>

There are enough cases in the law books to show that the above statements do not express universal truths. But they contain enough truth to suggest that when physicians through their private associations or hospital staffs do proceed against incompetents, the law would make it easy for them to do so. It might seem obvious that in a free society private groups could make their own rules as stringent as they please both as to substance and procedure, and then they could eliminate incompetents with a minimum of expense and delay. In fact this has not been so. While acknowledging some deference to the professional expertise of medical groups, the common law has insisted that their rules relating to admission and expulsion be in accordance with "fair procedure."<sup>258</sup>

The law concerning private medical groups has been developed from the general law concerning private groups. The practical beginning, for the present purposes, is *Dawkins v. Antrobus*.<sup>259</sup> In the language of the trial judge, Sir George Jessel, the case involved "English gentlemen, who are always lovers of fair play."<sup>260</sup> (Sir George, who was Master of the Rolls under Queen Victoria, not the twentieth century comedian, earned a niche in legal history by his remark: "I may be wrong, but I never have any doubts.")<sup>261</sup> Colonel Dawkins was expelled from his club for writing a derogatory letter to a fellow member in a wrapper openly labelled "Dishonourable Conduct of General Stephenson," which he sent to the General's public address, the Orderly Room at the Horse Guards. The expulsion was upheld, because it was found to be not maliciously motivated, in accordance

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256. M. MILLMAN, *THE UNKINDEST CUT* 99 (1976).

257. E. FRIEDSON, *PROFESSION OF MEDICINE* 179, 180-83 (1970).

258. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 555, 526 P.2d 253, 263, 116 Cal. Rptr. 245, 255 (1974); see *Ascherman v. San Francisco Medical Soc'y*, 39 Cal. App. 3d 623, 643-44, 114 Cal. Rptr. 681, 693-94 (1974).

259. 17 Ch. D. 615 (1881); 12 Cal. 3d at 550 n.8, 526 P.2d at 260 n.8, 116 Cal. Rptr. at 252 n.8.

260. 17 Ch. D. 615, 625 (1881).

261. 16 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 123 (1966).

with the club's procedures, and because those procedures were in accordance with "natural justice." Specifically, "natural justice" was held to include the opportunity to be heard before expulsion.<sup>262</sup> Thus "natural justice" came to be a judicially imposed restriction on the conduct of private groups.

The "natural justice" limitation was quickly adopted by the Supreme Court of California. Indeed, it had already been incorporated to a degree in the California statutes as a rule of interpretation.<sup>263</sup> And it has been appearing intermittently in cases involving medical associations and other vocational associations ever since.<sup>264</sup> The language has sometimes varied, but the result has in California always heretofore been the same. Groups occupying what amount to monopoly positions that affect a fundamental right, such as the right to work, and agencies, such as hospitals, intimately associated with the rendition of public services, must have rules both of substance and procedure that are fundamentally fair and in accordance with the court's conception of "public policy" and "contemporary application of common law principles."<sup>265</sup> For example, a hospital by-law may not require staff members to waive their rights to seek judicial review of disciplinary action taken against them by the hospital staff. Such a provision "transgresses public policy."<sup>266</sup>

The judicial requirement that the rules of private groups be in accordance with "natural justice," or "public policy," or "contemporary application of common law principles" is not limited to a medical context, but it has some special overtones in that context. Beginning with the first cases applying the doctrine of *res ipsa loquitur* to malpractice cases, that is the cases where the doctor must show that he has been careful rather than requiring the plaintiff to show that the doctor was negligent, and those enlarging the scope of the community so that a defendant doctor could not restrict expert testimony to his friends and associates, and continuing through the informed consent cases, are a number of deliberate statements of the courts' fear that doctors may arrogate absolute authority to themselves. The most recent statement I have found is that of Justice Tobriner:

Our court has long recognized, of course, that the existence of unrestrained authority in hospital boards or professional associa-

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262. *Dawkins v. Antrobus*, 17 Ch. D. at 631; D. HEWITT, *NATURAL JUSTICE* 98-99 (1972).

263. *Otto v. Tailors' Protective & Benevolent Union*, 75 Cal. 308, 315, 17 P. 217, 219 (1881); CAL. CIV. PROC. CODE §1866.

264. *Duby v. Baron*, Mass., 341 N.E.2d 870, 876 (1976); Annot., 20 A.L.R.2d 531 (1951). *Duby* is an illustration of both the reluctance and the difficulty of a medical staff in proceeding against a member. By agreement the hospital first limited the doctor's surgical privileges, placed him under a monitor and requested an investigation by the American College of Surgeons. The College expelled him. *Duby v. American College of Surgeons*, 468 F.2d 364 (7th Cir. 1972). Only thereafter did the hospital refuse to reappoint him. *Duby v. Jordan Hospital*, Mass., 341 N.E.2d 876 (1976). The proceedings took some seven years.

265. *James v. Marinship Corp.*, 25 Cal. 2d 721, 734, 155 P.2d 329, 337 (1941).

266. *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 479, 551 P.2d 410, 415, 131 Cal. Rptr. 90, 95 (1976).

tions has at times enveloped an arbitrary selectivity that threatens to convert the operating room into the province of an elite clique. Our past decision demonstrate that this court has been adamant in its endeavor to eradicate monopolistic control of professional opportunities.<sup>267</sup>

The references to “unrestrained authority,” “arbitrary selectivity,” “elite clique,” and monopolism are, when considered against the past reluctance of the profession to discipline itself, readily transposed into Lord Coke’s maxim that no one should be a judge in his own case. This maxim of “natural justice” has become a rule of constitutional law, as has the rule requiring the opportunity for a hearing before being disciplined by a public agency. But the constitutions do not apply to conduct of private groups unless the groups are involved in “state action.”<sup>268</sup> “[T]he Fourteenth Amendment was designed to protect the citizen against government and not against other citizens.”<sup>269</sup>

Thus in *Pinsker v. Pacific Coast Society of Orthodontists*<sup>270</sup> (*Pinsker II*), which is really the most comprehensive and illuminating discussion of the problem of government by private medical groups I have found, and which in interests of time and space I have not adequately treated, the court was careful to point out:

It is important to note that the legal duties imposed on defendant organizations arise from common law rather than from the Constitution as such; although *Pinsker I* utilized ‘due process’ terminology in describing defendant associations’ obligations, the ‘due process’ concept is applicable only in its broadest, nonconstitutional connotation. [Citation omitted.] In an attempt to avoid confusing the common law doctrine involved in the instant case with constitutional principles, we shall refrain from using ‘due process’ language and shall simply refer instead to a requirement of a ‘fair procedure.’<sup>271</sup>

If all that is involved are common law principles and public policy, presumably the legislature could change them and give the private groups

267. *Id.* at 486, 551 P.2d at 422, 131 Cal. Rptr. at 102. See also *Cobbs v. Grant*, 8 Cal. 3d 229, 243, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972); *Rosner v. Eden Township Hosp. Dist.*, 58 Cal. 2d 593, 598-99, 375 P.2d 431, 435, 25 Cal. Rptr. 551, 555 (1962); *Huffman v. Lindquist*, 37 Cal. 2d 465, 484, 234 P.2d 34, 46 (1951) (Schauer, J., dissenting); *Ybarra v. Spangard*, 25 Cal. 2d 486, 490-91, 154 P.2d 687, 689 (1944); *Ascherman v. Saint Francis Memorial Hosp.*, 45 Cal. App. 3d 507, 512-13, 119 Cal. Rptr. 507, 510 (1975); *Berkey v. Anderson*, 1 Cal. App. 3d 790, 805, 82 Cal. Rptr. 67, 78 (1969); *Bernstein v. Alameda-Contra Costa Medical Ass’n*, 139 Cal. App. 2d 241, 246-47, 293 P.2d 862, 865 (1956); *Gist v. French*, 136 Cal. App. 2d 247, 257-58, 288 P.2d 1003, 1009-10 (1955).

268. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).

269. Friendly, *The Dartmouth College Case and the Public-Private Penumbra*, 12 TEX. Q. 17 (1969) [hereinafter cited as Friendly].

270. 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974).

271. *Id.* at 550, n.7, 256 P.2d at 259, n.7, 116 Cal. Rptr. at 251, n.7. This effort to distinguish constitutional and common law principles is not discussed in the otherwise comprehensive article, Butler, *Medicare Appeals Procedures: A Constitutional Analysis*, 70 NW. L. REV. 139, 160-63 (1975). I assume that the article, although published after, was written before *Pinsker II*.

more authority than the courts have allowed them, unless the common law is treated in some sense as a higher law, as Lord Coke did, and binding whether or not it is prescribed in the Constitution.<sup>272</sup>

Another possibility is to hold that the test of "state action" is not merely "governmental involvement" of the private agency but whether the agency is exercising a "public function."<sup>273</sup> The latter is the test the California Supreme Court has almost, but not quite, accepted. The most penetrating analysis I have found is that of Judge Friendly, who distinguishes "significant state involvement" from serving "essentially public functions" or "public purposes" and says, "a principle that all Fourteenth Amendment guarantees apply to all institutions serving 'public functions' is much too expansive."<sup>274</sup> He uses the example of a private hospital, which might be constitutionally required not to discriminate against blacks in its policies of admitting patients but, nevertheless, might not be required to afford constitutional protections in its staff recruitment or admissions policies, and suggests, "different values may be assigned to various Fourteenth Amendment protections."<sup>275</sup> The intensity of the conflict in views is illustrated by the memorandum opinion on denial of review in *Greco v. Orange Memorial Hospital Corp.*<sup>276</sup>

The problem is brought into focus by two of the *Ascherman* cases.<sup>277</sup> The United States Court of Appeals held that *Ascherman* could not state a cause of action under the old Civil Rights Act against a hospital that denied him staff privileges on the basis that the hospital had received a federal grant for construction of facilities. Receipt of such funds was not sufficient governmental involvement to constitute state action.<sup>278</sup> But a few months later a State Court of Appeal held that *Ascherman* had a right to have his application for staff membership considered under fair procedural standards. It applied to a private hospital "criteria analogous to the constitutional ones used for 'public hospitals'" and put the hypothesis:

272. Goodhart, *supra* note 131, at 675; Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. REV. 67, 67-69, 71 (1931). Overtones of this approach can be heard in Justice Tamura's dissenting opinion in *Anton v. San Antonio Community Hosp.*, 127 Cal. Rptr. 394, 403 (1976) (hearing granted May 14, 1976).

273. Butler, *Medicare Appeals Procedures: A Constitutional Analysis*, 70 Nw. L. REV. 139, 160-63 (1975) neatly describes the two approaches. See also *Murphy v. Society of Real Estate Appraisers*, 388 F. Supp. 1046, 1050-52 (E.D. Wis. 1975), *vacated and remanded without opinion*, 544 F.2d 521 (7th Cir. 1976).

274. Friendly, *supra* note 269, at 18, 24.

275. Friendly, *supra* note 269, at 22. "There is still less reason for creating a constitutional mandate that a child care agency receiving a grant-in-aid must have more elaborate procedures for dismissal of employees than do employers generally . . ." *Id.* at 30.

276. 423 U.S. 1000, 1001 (1975) (White, J., dissenting).

277. *Ascherman v. Presbyterian Hosp.*, 507 F.2d 1103 (9th Cir. 1974); *Ascherman v. Saint Francis Memorial Hosp.*, 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1975).

278. *Dee v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 643 (4th Cir. 1975); *Murphy v. Society of Real Estate Appraisers*, 388 F. Supp. 1046, 1050-52 (E.D. Wis. 1975), *vacated and remanded*, 544 F.2d 521 (7th Cir. 1976). *Contra Ascherman v. Presbyterian Hosp.*, 507 F.2d 1103 (9th Cir. 1974); Butler, *Medicare Appeals Procedures: A Constitutional Analysis*, 70 Nw. L. REV. 139, 160-63 (1975).

if the proposition that any hospital occupies a fiduciary trust relationship between itself, its staff and the public it seeks to serve is accepted, then the rationale for any distinction between public, 'quasi public' and truly private breaks down and becomes meaningless, especially if the hospital's patients are considered to be of primary concern.<sup>279</sup>

The apparent conflict between the state and federal decisions may seem surprising, but it is not anomalous. The conclusions federal courts reach under the Federal Constitution are not necessarily indicative of the conclusions the state courts may reach under analogous provisions of the state constitutions. The state courts are free to impose higher standards under state constitutions than the Federal Constitution requires.<sup>280</sup> Which approach California will take may be resolved in the pending case of *Anton v. San Antonio Community Hospital*.<sup>281</sup> But since the case is still pending, I, as a sitting judge, cannot comment on it<sup>282</sup> beyond pointing out that it involves a private hospital and a by-law suggested by the Joint Commission on Accreditation of Hospitals, which puts the burden of proof of freedom from fault on physician charged rather than on the body making the charge.<sup>283</sup> For me, prediction is neither possible nor permissible. But I recall Justice Holmes wrote, "[t]he truth is, that the law is always approaching, and never reaching, consistency."<sup>284</sup> Unfortunately, only the latter half of his statement is necessarily so.

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279. *Ascherman v. Saint Francis Memorial Hosp.*, 45 Cal. App. 3d 507, 513, 119 Cal. Rptr. 507, 510 (1975). The court was quoting from *Silver v. Castle Memorial Hosp.*, 53 Haw. 475, 482, 497 P.2d 564, 570 (1972). The state court did not cite *Ascherman v. Presbyterian Hospital* and relied on the authorities the federal court rejected. In the *Duby* cases, *supra* note 264, the Massachusetts court avoided the problem by holding that the procedures afforded constitutional due process whether it was required or not.

280. *People v. Brisendine*, 13 Cal. 3d 528, 549, 531 P.2d 1099, 1112, 119 Cal. Rptr. 315, 328 (1975).

281. 127 Cal. Rptr. 394 (1976) (hearing granted May 14, 1976).

282. Cal. Judicial Council, Code of Judicial Conduct, Canon 3A(6).

283. The case involves an earlier but apparently similar version of the following: the body whose adverse recommendation or action occasioned the hearing shall have the initial obligation to present evidence in support thereof, but the practitioner shall thereafter be responsible for supporting his challenge to the adverse recommendation or action by *clear and convincing evidence* that the grounds therefor lack any factual basis or that such basis or the conclusions drawn therefrom are either arbitrary, unreasonable, or capricious.

JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, FAIR HEARING PLAN FOR PRACTITIONERS, Rule 3.7, at 10, (Oct. 6, 1975).

The opinion of the California Supreme Court was published after this paper was prepared for printing. *Anton v. San Antonio Community Hosp.*, 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 140 (1977). The regulation was upheld, but the case was remanded to the superior court with directions to reweigh the evidence in accordance with Section 1094.5(c) of the Code of Civil Procedure. The extension to a private group of the requirement that the superior court reweigh the evidence is beyond the scope of this discussion.

284. O. HOLMES, *supra* note 10, at 36.

CONCLUSION

"History does not provide the answers to the problems of today; it merely helps to frame the questions."<sup>285</sup>

When one finds the California Supreme Court in 1974 referring to the cases of farriers, which we have seen originated about 600 years earlier, one may get the impression that time stands still.<sup>286</sup> Of course, it does not. We now know how to discern the "cunning from the uncunning." The Joint Commission on Accreditation of Hospitals has developed one method, which I cite merely as an example.<sup>287</sup> The problems now seem to be to motivate the medical profession to implement and execute the methods at hand by means that will be held legally permissible. How are we to balance the need for professional expertise against the desire for professional dominance?<sup>288</sup> Translated into legal terms this is Lord Coke's rule of natural justice that one should not be a judge in his own case. Of course, Coke was afraid of judges who would take overly severe action because they were motivated by self interest. But our current problem is the converse—that of doctors as judges or jurors who decline to act because of fear of overt or subtle retribution. Indeed it may be possible to write a history of medical quality control through the biographies of physicians such as Dr. Holmes, Justice Holmes' father, or Semmelweiss, or Codman, or others who were secure and selfless enough to risk the wrath of their colleagues.<sup>289</sup> For by and large the law has followed, not caused, the improvement; it simply requires doctors to do what they have shown they can do.

Obviously some steps have been taken towards solution by the addition of public members to licensing boards and by the establishment of the Professional Service Review Organizations under the Social Security Act. But countervailing these we find the efforts that have been made to relieve physicians of liability rather than to eliminate malpractice, and the reluctance of physicians to concede or expose "the possibility that the true root of the crisis may be medical negligence, malpractice itself."<sup>290</sup> With these opposing tendencies we seem to be both legally and medically "at the beginning of what will be a long development."<sup>291</sup>

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285. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 533 (1964).

286. *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 551 n.9, 526 P.2d 253, 261 n.9, 116 Cal. Rptr. 245, 253 n.9 (1974). We now know that the reference is not quite accurate historically. A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 229-33 (1975). But it has been accepted, and that is what matters. See Cam, *Magna Carta—Event or Document*, in SELDEN SOCIETY LECTURES 26 (1965).

287. JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, TRUSTEE, PHYSICIAN, ADMINISTRATOR INSTITUTES (1973).

288. Freidson analyzes the problem in sociological terms. E.g., E. FREIDSON, *DOCTORING TOGETHER* 213 (1975); E. FREIDSON, *PROFESSION OF MEDICINE* 336 (1970).

289. Schlicke, *American Surgery's Noblest Experiment*, 106 ARCHIVES OF SURGERY 379 (1973), gives some clues to this possibility.

290. Henahan, *Malpractice*, *Atlantic Monthly*, April 1976, at 11.

291. Friendly, *supra* note 269, at 7.

I would have liked to close by following the traditional advice: “Cure sometimes, relieve often, and comfort always.” I have failed on all three counts—a triple error. At least I have not committed the fault attributed to legal philosophers, that is of discussing a problem only after it has been solved.<sup>292</sup> I do hope I have given a little insight into how and why the law develops.

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292. Goodhart, *supra* note 131, at 679.



