LICENSING AMERICAN PHYSICIANS: 1870-1907

by

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A DISSERTATION

Presented to the Department of History
and the Graduate School of the University of Oregon
in partial fulfillment of the requirements
for the degree of
Doctor of Philosophy

December 2013

DISSERTATION APPROVAL PAGE

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Title: Licensing American Physcians: 1870-1907

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Degree awarded December 2013

DISSERTATION ABSTRACT

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December 2013

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In 1870, physicians in United States were not licensed by the state or federal governments, but by 1900 almost every state and territory passed some form of medical licensing. Regular physicians originally promoted licensing laws as way to marginalize competing Homeopathic and Eclectic physicians, but eventually, elite Regular physicians worked with organized, educated Homeopathic and Eclectic physicians to lobby for medical licensing laws. Physicians knew that medical licensing was not particularly appealing to state legislatures. Therefore, physicians successfully packaged licensing laws with broader public health reforms to convince state legislatures that they were necessary. By tying medical licensing laws with public health measures, physicians also provided a strong legal basis for courts to find these laws constitutional. While courts were somewhat skeptical of licensing, judges ultimately found that licensing laws were a constitutional use of state police powers.

The quasi-governmental organizations created by licensing laws used their legal authority to expand the scope of the practice of medicine and slowly sought to force all medical specialists to obtain medical licenses. By expanding the scope of the practice of medicine, physicians successfully seized control of most aspects of healthcare. These

organizations also sought to eliminate any unlicensed medical competition by requiring all medical specialists to attend medical schools approved by state licensing boards. Ultimately, licensing laws and a growing understanding of medical science gradually merged the three largest competing medical sects and unified the practice of medicine under physicians.

This dissertation includes previously published materials.

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ACKNOWLEDGMENTS

This dissertation would never have been possible without the guidance of James C. Mohr. His comments and insights were incredibly helpful and ultimately essential to successful completion of this project. Additionally, Jeffery Ostler and the late Peggy Pascoe helped shepherd this project during its early stages and Ellen Herman, Glen May, and Gerald Burk helped me cross the finish line. I am also appreciative of staff at the University of Oregon library Special Collections, the California State Archives, and the Oregon State Archives for assisting me in my research. This project also would not have possible without Google Books. Google Books has revolutionized historical research and was an essential part of this project. This research was supported in part by grants from the University of Oregon History Department and the Wayne Morse Center for Law and Politics at the University of Oregon School of Law. Additionally, I would like to thank the Yale Journal of Biology and Medicine to graciously allow me to use work that was originally published in the journal.

Several fellow students in the University of Oregon History Department have helped keep me sane during this long process, especially Carrie Adkins, Tristan Grunow, Amiel Angeles, Luis Ruiz, and Feather Crawford. I would also like to thank my parents, Robert and Joelle. Not only did the provide love and support, but they also babysat my beautiful daughters and allowed me to get some work done. I would like to thank Deidre Sandvick, my wife, and Patricia Mah, my friend, for carefully reading this dissertation and providing me with helpful comments and encouragement. Finally, this project would

not have been possible without my wife's support and her willingness to allow me to take this journey.

To Deidre, Ella and Chloe

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CHAPTER I

INTRODUCTION

This dissertation examines the passage and enforcement of medical licensing laws in the United States between 1870 and 1907.[1] During this time, every state and territory except Alaska enacted medical licensing laws that regulated their physicians. This legal transformation occurred at a time when there was a split in American medical practice among three major medical sects: Regulars, Homeopaths, and Eclectics. Each of these medical sects was hampered by a limited understanding of health and disease, and none of them could prove that their approach to healing was superior to any other. Despite this division, physicians persuaded state legislatures to enact laws that established government or quasi-governmental agencies run by physicians to license doctors. Instead of relying on the free market, physicians convinced state legislatures that medicine needed to be regulated to protect their citizens. In doing so, states helped create the beginnings of the twentieth-century administrative state.

What is licensing? Historian William Rothstein defined licensing "as [a] certification by the state of a member of a profession who meets certain criteria pertaining to practice of that profession." Rothstein noted that typically "members of almost all professions" actively lobbied for licensing "as a means of regulating the supply

[1] Approximately 8 pages of Chapters VII and X were originally was published as "Enforcing Medical Licensing in Illinois: 1877-1890" *Yale Journal of Biology and Medicine 82* (June 2009).

of labor in a profession."[2] During the colonial and early republic era, some states did have a few medical regulations. Typically, these laws were not true licensing laws, but they allowed physicians to collect payment from patients. Most of these early medical regulations were repealed during the Jacksonian era, and by 1850, state legislatures ended medical licensing. It was not until the 1870s that physicians began to pass true licensing laws in the United States.

Despite the importance of medical licensing, only a few scholars have ever focused exclusively on this legislative revolution. In 1967, Richard Harrison Shryock published *Medical Licensing in America, 1650-1965*. Shryock's book focused on the "dual themes of education and licensure – using each of those terms in a broad sense." While Shryock's work was groundbreaking, it was not meant to be comprehensive. Shryock sought to describe the gradual professionalization of the medical profession, but his study did not adequately address the messy reality of medical licensing at the turn of the nineteenth century. Shryock's primary goal was to combat the belief that physicians secured medical licensing because their stature grew during the nineteenth century. Shryrock effectively dismantled this notion, but he did not do nearly enough to explain how doctors finally persuaded legislatures to adopt medical licensing.[3]

In 1979, Ronald Harmowy argued that organized physicians (especially those in the American Medical Association) dramatically damaged health care in the United States by restricting the number of people who could become doctors from going to medical

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[2] William Rothstein, *American Physicians in the Nineteenth Century: From Sects to Science (*Baltimore and London, *John Hopkins University Press*, 1972), 20.

[3] Richard Harrison Shryock, *Medical Licensing in America, 1650-1965* (Baltimore, Johns Hopkins Press, 1967), viii.

school. He deprecated the idea that the adoption of medical licensing was an attempt by physicians to improve medical care and argued instead that doctors were primarily interested in improving their economic interests. Unfortunately, Harmowy undermined his argument by speculating that licensing resulted in lower quality care and higher costs. While he made several interesting arguments, he hypothesizes that most of the costs associated with health care could be dramatically reduced if licensing was avoided. Harmowy failed to provide sufficient evidence to support his broader claim regarding the ultimate effect of licensing on the cost of health care.[4]

In a 1984 article, Samuel Baker focused on tracking the type of medical licensing laws that were passed between 1870 and 1910. At times, the distinction he made between registration and licensing laws was somewhat confusing, but he did an outstanding job showing when states passed specific laws. He also attempted to explain whether the "appearance" was caused by advancements in germ theory or efforts by physicians to limit competition. Baker argued that because elite physicians were most likely to support licensing, they were not motivated by financial gain. He proposed that they were already secure in their profession and would have little financial benefit from the expansion of medical licensing. Therefore, they arguably had nobler reasons for their views.

While that was an intriguing idea, Regulars, Homeopaths, and Eclectics possessed different reasons for supporting or opposing these laws based on their status in the profession, their sect, their financial condition, their educational attainment, and the nature of their practice. Still, Baker's contention that organized, elite physicians wanted

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[4] Ronald Harmowy, "The Early Development of Medical Licensing Laws in the United States, 1875-1900," *The Journal of Libertarian Studies*, 1979.

to compromise with each other to enact licensing was accurate. Whether their support for licensing laws was motivated by lofty aspirations for the medical profession is debatable.[5]

Medical Licensing and Discipline in America by David A. Johnson and Humayun J. Chaudhry, examined the role of the Federation of Medical Examiners on licensing and enforcing discipline. While the book provides a solid synthesis of existing material on the nineteenth century, their work focuses on licensing reforms after 1921, when these laws were already substantially in place. Their book focuses on the key role played by the Federation of State Medical Boards during the twentieth century. They did not add any new information to our understanding of how licensing was originally enacted during the Gilded Age and Progressive era.[6]

The most recent book on medical licensing, James C. Mohr's, *Licensed to Practice: The Supreme Court Defines the American Medical Profession*, takes an in depth look into the history of the United States Supreme Court case, *Dent v. West Virginia*, that found medical licensing to be constitutional. Mohr examined the drama that followed the state's licensing law and explored the case that led to the Supreme Court's decision in *Dent v. West Virginia*.[7] Mohr's book is the definitive case study of this important Supreme Court decision that dramatically expanded the role of government in the nineteenth century.

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[5] Samuel Baker, "Physician Licensure Laws in the United States, 1865-1915," *Journal of the History of Medicine and Allied Sciences* (Volume 39, Issue 2, April 1984), 173-197.

[6] David A. Johnson and Humayun J. Chaudry, *Medical Licensing and Discipline in America: A History of the Federation of the State Medical Boards*, (Lexington Books, Plymouth UK, 2012).

[7] James C. Mohr, *Licensed to Practice: The Supreme Court Defines the American Medical Profession*, (Baltimore, Johns Hopkins University Press, 2013).

Aside from a few small journal articles that examine the history of medical licensing in Illinois, these are the only published works that focus exclusively on medical licensing.[8] A few more general medical histories such as William Rothstein's *American Physicians in the Nineteenth Century*, Paul Starr's *The Social Transformation of American Medicine*, and William Novak's *The People's Welfare* also have briefly examined medical licensing, but each of these works addressed medical licensing in a tangential fashion. Historians of Homeopaths, Eclectics, Osteopaths, and Christian Science also have examined medical licensing, but they almost exclusively focused on the impact of licensing on the specific medical sect in their study.[9] Nobody has written a broad-based history of licensing that shows how it expanded throughout the United States or how these laws were enforced.

Licensing was critical because it disrupted the key feature of nineteenth-century medicinal marketplace – unfettered competition. Eminent historian George Rosen, among others, contended that "competition" between physicians for clients was "an accepted fact of professional life" for American physicians.[10] The lack of significant medical licensing contributed to this unfettered competition. American newspapers and

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[8] Clinton Sandvick, "Enforcing Medical Licensing in Illinois: 1877-1890" *Yale Journal of Biology and Medicine* 82 (June 2009); Kenneth Schnepp, "Medical Licensure in Illinois: An Historical Review" *Federation of Bulletin* 64 (1977).

[9] Martin Kaufman, *Homeopathy in America: The Rise and Fall of a Medical Heresy* (Baltimore and London, The Johns Hopkins Press, 1971); John S. Haller, *Medical Protestants: The Eclectics in American Medicine, 1825-1939* (Carbondale and Edwardsville, Southern Illinois University, 1994); John S. Haller, *The History of Homeopathy: The Academic Years, 1820-1935* (New Brunswick, New Jersey, and London, Rutgers University Press, 2005); Norman Gevitz, *The DOs: Osteopathic Medicine in America*, 2nd edition, (Baltimore, John Hopkins University Press, 1982, 2004);, Rennnie Schoepflin, B., *Christian Science on Trial: Religious Healing in America*, (Baltimore, Johns Hopkins University Press, 2003).

[10] George Rosen, *The Structure of American Medical Practice: 1875 - 1941* (University of Pennsylvania Press, 1983), 19.

magazines of this era were littered with advertisements for physicians, healers, and miracle cures. Additionally, the number of medical schools in the United States exploded during the nineteenth century. Not only were the medical schools churning out large numbers of physicians, but tenacious Irregular physicians challenged the physicians from the dominant Regular medical sect. Historian Paul Starr argued that the position of physicians in the nineteenth century was "somewhat precarious." Physicians did not have a fixed path to success and prosperity. If anything, physicians struggled to develop medical practices that could support them and their families. Not surprisingly, Starr described a profession that was increasingly divided between well-connected, organized elites and ordinary practitioners. Entrance into top ranks of medicine often depended on the proper surname or the correct ethnic background.[11]

This is the medical marketplace described by Rosen. Regulars, Homeopaths, and Eclectics competed with each other across the country. While it is undeniable that this was a fiercely competitive marketplace, Rosen went one step further and argued that physicians generally believed that medical practitioners should be free from "governmental interference." He stated that most physicians celebrated their "egalitarianism" and generally believed in the wisdom of a competitive marketplace.[12]

Rosen's conclusion is suspect. While a few doctors praised competition and the free market, physicians were not committed champions of the free market. Between 1850 and 1900, medical societies throughout the country were obsessed with regulating

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[11] Paul Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry*, (Basic Books, Inc., 1982), 85, 89.

[12] Rosen, *The Structure of the American Medical Practice*, 19-20.

the practice of medicine and curbing the free market. The continuous and relentless efforts by physicians to pass state medical licensing laws demonstrated that they did not trust the free market. If physicians truly had accepted the free market, then they never would have attempted to impose licensing. Educated and experienced physicians desperately sought to short-circuit the chaotic medical marketplace and establish a less competitive, more orderly and regulated one. Physicians essentially sought to create government-mandated guilds that not only limited the total number of practicing physicians, but would eventually require all physicians to complete extensive education and practicable experience including graduating from a medical school, taking a specific set of courses, passing a licensing exam, and following a strict code of ethics to keep their licenses. While Rosen is correct that doctors did, to some extent, publicly laud the free market, their efforts to pass medical regulation clearly undermined the operation of the free market.[13]

Physicians favored licensing because they believed it could improve their standing in the community. Paul Starr wrote that "the rise of the medical profession depended on the growth of its own authority."[14] Physicians undermined their own authority because they were ineffective healers, but they hoped that they could elevate their status and increase their authority by imposing licensing. During the nineteenth century, physicians had been hampered by a fundamental lack of understanding of science, and the human body and its ailments. Physicians simply did not have the tools

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[13] Rosen, *The Structure of the American Medical Practice*, 13-37.

[14] Paul Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry*, (Basic Books, Inc., 1982).

or scientific understanding to effectively treat their patients. These failures were not their fault, but doctors at the time lacked the knowledge to improve the practice of medicine. Medical licensing gave physicians another route to legitimacy. By passing medical licensing laws, doctors hoped for the imprimatur of state authority and sought to control who could become a physician. The key question then becomes: How did physicians convince every state and territorial legislature to pass medical licensing in the United States over an approximately thirty year period despite the failure of any medical sect to successfully show that they were demonstrably superior in the healing arts? Physicians never demonstrated during the Gilded Age that they knew what constituted minimum standards for physicians because they fundamentally did not understand how the illness and disease operated. Despite a rudimentary understanding of medicine, physicians successfully persuaded state legislatures to create licensing laws.

This study attempts to answer this question. The primary goal of this dissertation is to highlight trends that were present across the country. To accomplish this task, several states have been examined thoroughly including Alabama, California, Illinois, Indiana, Missouri, New York, Oregon, and Texas. Each of these states is used to highlight different aspects of the development of licensing in the United States. Because of the uneven nature of medical regulation, definitive timelines of medical legislation are difficult to detail, but it is possible to discern three phases of medical licensing: 1865-1885, 1885-1900, and 1900-1910.

During the first phase of medical licensing between 1865 and 1885, medical organizations lobbied state legislatures for medical licensing. During this timeframe,

doctors typically proposed two different types of regulatory schemes: medical registration and medical licensing. Medical registration usually required physicians only to register with the county clerk. Registration laws were not designed to regulate medicine, but were seen as a gateway to medical licensing. Other states, including Illinois and California, created medical licensing systems where physicians were required to pass medical exams or graduate from a medical school in good standing to secure a license.

During the second phase of licensing, most states began to repeal registration acts and move slowly toward medical licenses issued by newly created examining or state boards of health. Medical registration laws had proven to be ineffective because they failed to eliminate medical practitioners that elite physicians had hoped to eliminate. After 1885, only two states passed medical registration laws. Increasingly, medical school boards began to evaluate the quality of various medical schools. Initially, medical boards sought to eliminate diploma mills, but their requirements for medical schools soon expanded. Medical boards became increasingly interested in dictating the length and type of education that medical schools offered.

In third phase starting around 1900, medical boards were faced with determining which of the new medical specialists were practicing medicine. Medical boards prosecuted anyone whose medical speciality could be seen as even tangentially related to the practice of medicine. Osteopaths and Christian Scientists were new challengers who threatened the hegemony of the three major medical sects. These new specialists often were forced to lobby state legislatures for either special privileges or exemptions to physician licensing laws. Additionally, states began to unify medical licensing boards and

increasingly required physicians to pass medical exams. States also began to create unified boards where Eclectics, Homeopaths, and Regulars served together. These unified boards gradually helped to erode the walls among the three major sects and unify medicine.

Ultimately, this study is focused on the passage of medical licensing laws and the early efforts to enforce them. Regulars originally intended to use licensing to eliminate their Irregular brethren, but it became obvious almost immediately that this was not going to work. Regulars relied on Irregular support to pass these laws, and licensing also legitimized Irregular practitioners. While Regulars and Irregulars continued to disparage each other publicly, medical licensing and boards of health prosecuted more marginal and less legitimate medical practitioners. Additionally, licensing laws were used to eliminate opposition to licensing by prosecuting physicians who refused licensing on legal grounds.

CHAPTER II

REGULARS, HOMEOPATHS, AND ECLECTICS

Nineteenth-century medicine was characterized by constant competition among three major medical sects: Regulars, Eclectics, and Homeopaths. These three medical sects meaningfully disagreed on how to treat illnesses and diseases. Arguably none of the three sects was superior to the others, but their adherents concluded that their sectarian beliefs were better than their competitors. Regulars were the inheritors of Galenic tradition and were the largest and most established of the three sects. Homeopaths represented a new approach to medicine with a new unified medical system developed in the eighteenth century. Homeopaths were quite successful in the United States and represented the biggest threat to the Regulars' dominance of medicine. The Eclectics were true to their name. They were a diverse sect composed of dissident Regulars, herbalists, and medical reformers.

Before 1800, western medical therapeutics changed remarkably little over the last 2,000 years.[15] Traditional Regular physicians (also known as Allopaths) might have viewed themselves as learned professionals, but Galen's 2,000-year-old "four humoral theory" was the basis for their therapeutic methods. "The body was seen, metaphorically, as a system of dynamic interactions with its environment," and physicians believed that

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[15] Charles E. Rosenburg, "The Therapeutic Revolution: Medicine, Meaning and Social Change in Nineteenth-Century America," in *The Therapeutic Revolution: Essays in the Social History of American Medicine,* ed. Moris J. Vogel and Charles E. Rosenburg, (Philadephia, University of Pennsylvania Press, 1979), 3.

specific diseases played an insignificant role in the system.[16] During the nineteenth century, this understanding of the human body came under assault because it was not effective in treating human illnesses.

Many formally educated physicians (Regulars) were the followers of Galen's therapeutic legacy, but during the nineteenth century they became increasingly devoted to the principles of scientific medicine. They began to believe in the "long-term efficacy of such principles as rational research and cooperative intercommunication." The Regulars created medical societies and journals and attempted to combat the abysmal standards of American medical schools.[17] Their approach to medicine was essentially scientific, but their alleged reliance on science produced few results until the late nineteenth century because they lacked the tools to truly understand viruses, bacteria, and human physiology.[18] As a result, the Regulars' dominance of American medical practice eroded dramatically between 1820 and 1850, and competing medical sects and systems evolved to fill the vacuum.[19]

During colonial period, some colonies had passed rudimentary licensing laws, but these licensing laws were ineffectual and were mostly eliminated by the Jacksonian era. Some historians have argued that the public's perception of the Regulars declined after 1830. According to Kenneth De Ville, physicians in the mid-1800s "saw an intimate

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[16] Rosenburg, *The Therapeutic Revolution*, 5, 6.

[17] James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (New York, Oxford University Press, 1978), 33.

[18] Joseph F. Kett, *The Formation of the American Medical Profession: The Role of Institutions, 1780-1860* (New Haven and London, Yale University Press, 1968), 162.

[19] Rosen, *The Structure of American Medical Practice*, 20.

connection between Jacksonian rhetoric, their decline in status, the abolition of licensure, and the increase in malpractice suits."[20] Richard Harrison Shryock argued that Americans always distrusted their doctors and that they had only become more vocal in their opinions by 1840.[21]

A number of the Regulars' problems were self-inflicted. The medical profession's inability to maintain those early colonial laws was "hampered by disorganization and slackened requirements."[22] Many Regular physicians were seen as incompetent and ineffective. During the mid-nineteenth century, Regulars were hobbled by a fundamentally flawed understanding of medicine. Woefully inadequate Regular medical schools also sprouted throughout the country. These schools were staffed by poorly trained practitioners and driven by profits, not educational excellence. Admission standards for most American medical schools could be best described as non-existent. Ronald Numbers quoted a physician who wrote, "[i]t is well understood among college boys that after a man has failed in scholarship, failed in writing, failed in speaking, failed in every purpose for which he entered college; after he has dropped down from class to class; after he has been kicked out of college, there is one unfailing city of refuge – the profession of medicine."[23]

As the Regulars' monopoly over medicine waned during the nineteenth century, numerous medical sects quickly developed. In time, these dissenters became known as

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[20] Kenneth Allen De Ville, *Medical Malpractice in Nineteenth-Century America: Origins and Legacy* (New York and London, New York University Press, 1990), 87.

[21] Shryock, *Medical Licensing in America*, 106.

[22] Kett, *American Medical Profession*, 31.

[23] Numbers, *Sickness*, 226.

Irregulars. In some ways, these medical sects were pushed and pulled by the same fervor that led to the creation of many new and unique Christian faiths during the Second Great Awakening. Like those assorted faiths, some of these sects were little more than fads and disappeared quickly after their birth. However, two Irregular medical sects, the Eclectics and the Homeopaths, became formidable competitors to the traditional Regulars during the nineteenth century. Several unorthodox medical sects arose because they believed that heroic medical practice of the Regulars was extremely dangerous.[24]

Homeopaths in many ways resembled Regulars. Like Regulars, they were initially trained by experienced physicians as apprentices, but eventually they developed their own medical schools. They created local, state, and national medical societies. Homeopathy replaced the earlier herbalist sect known as Thomsonianism to become the most prominent unorthodox medical practice in America. Samuel Christian Hahnemann, a German physician and theorist, developed the underlying theories and medical practices of Homeopathy in 1790s. Hahnemann established a medical system based on the principle of *similia* and the law of infinitesimals.[25] The principle of *similia* held that physicians should treat patients with drugs that created the same symptoms in a healthy person that were being exhibited by an illness. Hahnemann created the law of the infinitesimal and he argued that the smaller and more agitated the dose of medicine, the more potent it became. While Hahnemann's therapeutic theories were not particularly sound, Homeopathic patients benefited from their doctors' willingness to allow the body

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[24] Martin Kaufman, *Homeopathy in America: The Rise and Fall of a Medical Heresy* (Baltimore and London, The Johns Hopkins Press, 1971), 23.

[25] Kaufman, *Homeopathy in America*, 23-24.

to combat illness without much interference. Additionally, the drugs advocated by Homeopathic physicians were extremely diluted and did not actively harm their patients unlike Regulars. In essence, Homeopaths allowed their patients' bodies to heal themselves and they did not further endanger their patients with bleedings and purgings as the Regulars did.

Eclectic physicians differed from both Homeopaths and Regulars. Eclectic physicians were the indirect descendants of the preexisting botanic movement known as Thomsonians. Unlike the Thomsonians, however they did not just provide herbal remedies. They incorporated herbal remedies into their practice, but they also worked as surgeons and utilized some Regular medical practices. As Thomsonianism was displaced by Homeopathy as the second largest medical sect, the remaining professional Thomsonsian practitioners allied with disgruntled Regulars and other medical reformers to form Eclectic medicine in 1830s and 1840s. Eclectics were a discordant group. They were extremely independent and predisposed to oppose any type governmental regulation. Unlike Homeopathy, Eclectics did not have a rigid medical orthodoxy. Eclecticism was true to its name; it was a mishmash of different types of physicians who practiced medicine as they saw fit. Unlike traditional Thomsonians, Eclectics encouraged medical education, and they took a far more pragmatic approach to medical treatment.[26] Eclectics saw themselves as reformers and dissidents from traditional European medical tradition. Eclectics rejected the four humoral theory and sought to end "the vast amount of human suffering, the anguish of soul, the premature decay, and death, resulting from

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[26] Kaufman, *Homeopathy in America*, fn. 114.

this *Paganism* [Galenism] in medicine."[27] Their objections to Regular medicine were well-founded. Many Eclectics were originally trained in Regular medical schools or by Regular physicians, but became disenchanted with heroic medicine and shifted towards a more pragmatic approach to health care.

Like Regulars, both Homeopaths and Eclectics were interested in organization and formal education. Homeopathic and Eclectic physicians created medical societies and began publishing medical journals throughout the country. The Homeopaths and Eclectics created medical schools that taught their medical systems, and these schools competed for students with Regular schools.

Each of the three sects created local, state, and national organizations. Homeopaths formed their national organization, the National Institute of Homeopathy in 1843. The Regulars formed the American Medical Association, three years after the formation of the National Institute of Homeopathy. Eclectics also attempted to form a national organization, but it was scuttled after few years. The Eclectics would not reestablish a national voice until the 1870s.

While Numbers argued that the development of the Irregular sects undermined the status of the Regulars, it is just as likely that the ineffectiveness of traditional Regular medicine and the ambiguous benefits of early Regular medical science spurred the expansion of these new sects.[28] If Regulars had demonstrated to the public that their therapies were successful, patients might not have searched for alternatives. John B.

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[27] *Transactions of the National Eclectic Medical Association for the Years 1870 and 1871* (Geo. R. Yeates & Co., New York, 1872): 142.

[28] Numbers, *Sickness*, 226.

Beck wrote a series of articles in 1847 and 1848 in the *New York Journal of Medicine,* which argued that heroic treatments such as blistering, mercury, and bloodletting were dangerous and potentially lethal, especially when employed by reckless physicians.[29] Beck challenged the basic tenets and undermined Regular medicine in general. The gradual shift away from heroic treatments could have also undermined public trust in Regular medicine. While heroic methods were dangerous, the public would not necessarily have known that. All they would see was a major shift in how they were treated by their doctors. Homeopathy, Eclecticism, and later Osteopathy and Christian Science, gained adherents because of the growing public skepticism of the efficacy of Regular medicine. Homeopaths presented the greatest threat to Regulars because they persuasively argued that their therapeutic methods were potentially more scientific than those of the Regulars and they obtained credibility comparable to Regular physicians.

In 1912, Frederick R. Green, at the behest of the American Medical Association, wrote that medicine began to fundamentally change after the Civil War because "the old order of things had been practically wiped out." Green's assessment was accurate. Educated Regular physicians were forced to rethink the historical tenants of Regular medicine. Additionally, Regulars faced legitimate challenges from Eclectic and Homeopathic physicians who argued that Regular medicine was ineffective and unscientific.[30]

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[29] Cited by Rothstein, *American Physicians*, 180.

[30] Frederick R. Green, *Sixty-Six Years of Medical Legislation*, (Chicago, American Medical Association, Chicago, 1914).

Concerned physicians from the Medical Society of the State of New York sought to create a national movement to raise the standards in American medical schools. These Regulars called for a national convention of medical societies and schools to be held in 1846. In 1846, delegates decided to create a national medical society, the American Medical Association (AMA). The delegates hoped the AMA would enable the medical profession to regain some of its former luster. [31] The newly formed AMA immediately identified three aspects of American medical practice that needed to be reformed. First, the association conjectured that most students were inadequately prepared for the rigors of a medical education. The AMA argued that medical schools needed to demonstrate the "firmness to reject all importunity not sustained by real and appreciable qualification."[32] At the time, medical schools rarely refused admission to any candidates regardless of their qualifications or abilities. Second, the AMA wanted to ensure "competent and complete instruction" for the nation's medical students.[33] Finally, the AMA wanted to have a "severer test of qualification for admission into the profession."[34] The AMA would gradually see licensing as the best way to accomplish this final goal.

While the AMA's efforts to reform medical education were largely ineffectual in the nineteenth century, the group successfully established itself as the national hub for local and state medical societies. In this role, the AMA was a strong proponent of medical licensing and encouraged state and local societies to lobby their state legislatures

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[31] Rothstein, *American Physicians*, 115.

[32] *The Transactions of the American Medical Association, Vol. III* (Philadelphia, 1850): 147.

[33] *Transactions of AMA, Vol. III* (1850): 146.

[34] *Transactions of AMA, Vol. III* (1850): 146.

to eliminate Irregulars. The AMA advocated for medical regulation that would limit competition between Regulars and Irregulars, reduce the total number of practicing physicians, stop the growth of malpractice actions, and improve the quality of medical care. Regardless of the positions taken by the AMA, the general public did not appear to support medical licensing. Public support for registration or licensing laws was tepid at best. When physicians lobbied for medical licensing in state legislatures, they often did it on their own.

While the AMA was a strong advocate for licensing, its Code of Ethics and its general hostility towards Irregular practitioners were generally counterproductive in its fight for medical licensing. To become members of the AMA, the AMA required local and state societies to adopt its Code of Ethics. The code barred Regular physicians from consulting with any Irregular practitioners and fostered an antagonistic relationship between Regular and Irregular doctors.

The code further complicated efforts to pass medical licensing because Regular physicians were often initially both unwilling to cooperate and were openly hostile to the Irregulars.[35] The AMA code not only prevented Regular physicians from consulting with Irregulars, but encouraged local and state medical societies to expel Regular physicians who utilized Irregular treatments. If medical societies failed to purge those colleagues, they were not permitted to send delegates to the national AMA convention.

A prominent example of the problem arose in 1870, when the Massachusetts Regular chapter of medicine was given an ultimatum by the AMA to expel questionable

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[35] Kaufman, 54. Starr, 99.

members or else lose its privileges at the national convention. After a wrenching internal debate and the unpopular removal of several prominent physicians, the Massachusetts Medical Society ruined its reputation when the public supported Homeopaths in this dispute.[36] Instead of eliminating the influence of Homeopaths in Massachusetts, the "persecution [of the physicians] strengthened the will" of the martyred Homeopaths and reinvigorated Irregular practice. By antagonizing the state's Homeopathic physicians, Massachusetts's Regulars also undermined their attempts to passing medical licensing laws for the next twenty-four years. It also should not be surprising that Regular state medical societies vigorously renewed their push for licensing at the same time as the last Homeopaths were being purged from Regular state medical societies.[37]

After the American Medical Association had expunged Irregulars from local medical societies, Eclectics realized that they needed to reestablish a national association to protect themselves from the AMA. The original national organization was founded after a group of physicians from the "Eclectic Reform School" met in Cincinnati, Ohio, at the Eclectic Medical Institute for the National Convention of Eclectic Physicians in 1850. This first National Convention morphed into a new organization, the National Eclectic Medical Association (NEMA). Unlike the AMA, the first NEMA did not survive. In 1856, the chairman of the Committee on the State and Progress of Medical Reform complained that an insufficient number of Eclectic physicians were attending NEMA's convention.[38] During the organization's last convention, the vice-president of NEMA

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[36] Kaufman, 77-91.

[37] Kaufman, 91.

[38] *Transactions of National Eclectic Medical Association 1879-80,* (1880): 362.

decried the "apathy manifested by Eclectics in not sustaining their organizations." The diverse nature of Eclectic medicine undoubtedly undermined attempts to create a cohesive membership organization.[39]

In June 1869, in response to the growing threat of the AMA and Regulars pushing for new licensing laws, the Eclectic Medical Society of the State of New York and the Reformed Medical Association of the United States organized a committee to explore holding a nationwide convention for "Physicians belonging to the New School of Medicine." These physicians were deeply concerned about the Regular threat to their medical practice. Additionally, Eclectics did not have an effective national voice to advocate on their behalf. The early version of the Eclectic's national organization folded six years after it was founded in 1850.

In 1870, the New York Eclectic society contacted various state medical societies and Eclectic medical colleges and proposed holding a national convention in Chicago, Illinois. In fall 1870, Eclectic physicians from around the country descended on Chicago and created a new national Eclectic organization. A prominent New York physician, Robert S. Newton, welcomed the Eclectics to Chicago and informed them that "persons connected with the different branches of the profession" hoped their meeting would fail, but he asked the attending doctors to let "nothing but harmony and peace prevail." While Newton's congregation was quite small, he sought to create an organization that could represent the interests of an estimated ten-thousand American Eclectic physicians. These

[39] *Transactions of NEMA 1879-80,* (1880): 364.

physicians voted to create a new national organization, the National Eclectic Medical Association (NEMA).[40]

By 1870, these three national medical organizations along with their local and state affiliates began the thirty-year battle over licensing in America. All of these organizations played a critical role in shaping and passing the new licensing laws. While the differences among the three sects over medical licensing played out in legislatures, all of these organizations faced internal dissent and strife that complicated licensing efforts and fractured previously unified sects.

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[40] *Transactions of the National Eclectic Medical Association for the Years 1870 and 1871, Embracing the Proceedings of the Two Conventions Held at Chicago and New York Respectively*, (1872): 25-29.

CHAPTER III

THE EMERGENCE OF MEDICAL REGULATION IN THE 1870s

By 1870, Regular medical societies across the United States began pushing for medical licensing laws. These efforts previously had been disjointed and unsuccessful. Because state legislatures were leery of wading into sectarian medical disputes, Regulars were making little progress in advancing any type of medical licensing. While the medical marketplace was confusing, the public was not demanding governmental oversight of doctors. State medical societies around the country began to realize that if they wanted to pass new legislation, they were going to have to tie the necessity of medical licensing to broader medical reform efforts. The public's discomfort with the shady practices of abortion and the emerging science of sanitation presented physicians with two opportunities to enact medical licensing for an uninterested public.

One of the best early opportunities for passing medical regulation occurred in New York City during the summer of 1871. In late August, a young pregnant woman named Alice Augusta Bowlsby read an advertisement in the newspaper for Dr. Ascher. The advertisement stated that Dr. Ascher could help "[l]adies in trouble, guaranteed immediate relief, sure and safe; no fee required until perfectly satisfied; elegant rooms

and nursing provided."[41] Bowlsby went to Ascher's office where he performed an abortion. Bowlsby died from Ascher's botched abortion, and her tragic death provided an opportunity for New York's organized Regulars to open the debate for medical licensing.

Bowlsby's death captured the attention of the *New York Times* and the *New York Herald* because the details of her death were incredibly salacious. After Bowlsby died, Ascher attempted to hide the woman's death by shipping her body in a ramshackle trunk to Chicago by train. After an alert railroad employee searched the trunk, police authorities were quickly contacted and conducted an autopsy on the body. The coroner determined that the young woman died from several "severe lacerations" that "had been sustained in the attempt to affect an abortion." The police quickly ascertained the identity of the young women and tracked down Jacob Rosenzweig, a 39-year-old Polish physician. The police learned that Rosenzweig practiced in New York City under the name Dr. Ascher.[42]

The *Times* relentlessly reported on the Bowlsby case because it was not only a headline-grabber, but it gave the newspaper an opportunity to batter one of its chief rivals, the *New York Herald*. The *Times* had a golden opportunity to accuse the *Herald* of enabling abortionists and hypocrisy. Soon after Bowlsby's death, the *Herald* ran an editorial condemning abortionists, but the *Herald's* editorial staff failed to notice that Rosenweig's alias, Dr. Ascher, still advertised in the *Herald's* classified section. Naturually, the *Times* was overjoyed at the chance to castigate the *Herald*. While the *Times* may have had difficulty containing its glee, a quick scan of the *New York Times*

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[41] *New York Herald*, classified advertisement, August 29, 1871.

[42] Newspaper accounts refer to Rosenzweig as both Rosenweig and Rosenzweig.

classified section reveals that it, too, ran numerous advertisements for dubious doctors and patent medicine pushers.

The Bowlsby case was not the first abortion case to get publicity in 1871 in New York City. The New York City police had previously arrested two other physicians, Dr. Michael Wolff and Dr. Thomas Lookup Evans, for performing abortions that year. Both cases garnered media interest in New York City. Dr. Michael Wolff was convicted of second-degree manslaughter after the death one of his patients. The presiding judge in that case, Gunning Bedford, sentenced Wolff to seven years in prison and began a campaign in New York City to stamp out abortion. Bedford also presided over the trial of the other abortionist, Lookup Evans. Evans was charged with performing an abortion that killed twins. The *Times* refused to describe Evans' alleged crime in the newspaper because it was of such a "revolting character" that it was completely "unfit for publication."[43]

Judge Bedford spoke to the members of the New York Academy of Medicine on September 30th at the start of the Bowlsby case. These prominent abortion cases convinced Bedford that New York City was "living in an atmosphere of abortion." He stated that the authorities would "strain every nerve until these traffickers in human life be exterminated and driven from existence." Aside from prosecuting abortionists under the law, Bedford argued that the legislature should change the penalty for abortion or abortion-related deaths from second-degree manslaughter to first-degree murder. If

[43] "Lookup Evans Again." *New York Times*, May 13, 1871, 2.

convicted of first-degree murder, doctors could be executed for botched abortions.[44] At the same meeting, members of the New York Academy of Medicine passed a resolution promising to "promote public health and public morals" and pledged to support "any legislative or other measures" advocated by law enforcement officials to "remove the pestilence of criminal abortion."[45]

Bowlsby's "Trunk Murder" and Bedford's campaign merged and convinced members within the medical community that it was time they eliminated abortionists from their ranks. Abortionists undermined the already questionable reputations of doctors and lowered the profession's standing in the public's eyes. In step with Bedford's proposal ratcheting up the abortion laws, members of the New York medical community argued that doctors had to be regulated by the state to stem the tide of tragic abortion cases in the city. Prominent Regular physicians wanted to stigmatize physicians who preformed abortions with medical licensing. Regular physicians began to argue that medical licensing was the only effective way to stop abortionists from plying their trade.

"Medical and legal members" of the New York Medico-Legal Society had drafted "An Act to Protect the People against Quackery and Crime" two years earlier, but it received little or legislative support.[46] Soon after the Bowlsby case, Stephen Rogers, M.D., a member of the Medical Society of the State of New York and the President of the New York Medico-Legal Society, believed that it was critical for the New York medical

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[44] "Judge Bedford's Late Charge on Abortion – Complimentary Resolutions by the New York Academy of Medicine," September 30, 1871, *New York Times*.

[45] Judge Bedford's Late Charge on Abortion – Complimentary Resolutions by the New York Academy of Medicine, September 30, 1871, *New York Times*.

[46] Stephen Rogers, M.D., "The New Medical Law of the State of New York," *New York Medical Journal*, Vol. XX, July 1874, No. 1: 65.

community to stamp out abortion and focused the Medico-Legal Society on that mission. Not surprisingly, he believed that a medical licensing law was the best way to do it. Rogers' primary goals as the society's president was to pass medical licensing and a new severe abortion law. The *Times* reported on January 12 the Medico-Society proposed a "bill against quacks" which had authorized the creation of county medical societies. These county societies would each appoint five censors who would examine "resident practitioners." The proposed bill permitted prosecuting any unlicensed physicians "for obtaining money under false pretenses." After the Medico-Legal Society approved the draft bill, it agreed to print copies of the bill for distribution around the state.[47]

One of Rogers' primary arguments was that legitimate medicine was being "supplanted by superficial and criminal quackery" in New York City. Education also had failed to stem the rise of the most "absurd, preposterous and even dangerous systems of therapeutics." While Rogers did not say it explicitly, his jab against "dangerous systems of therapeutics" was a condemnation of competing Irregular medical sects. He argued that patients lacked sufficient information to protect themselves from the most dangerous practitioners, therefore the state had an obligation to intervene and protect its citizens from "becoming a victim to false pretenses."[48]

Rogers, along with other members of the Regular sect, accepted that the state's failure to regulate physicians permitted abortionists to prosper. An East River Medical Association of New York report discussing abortion argued that "the unrestricted practice

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[47] "Medical Legal Society: A Bill Against Quacks," *New York Times*, Jan. 12, 1872, 8.

[48] Stephen Rogers, M.D., "The True Object of Medical Legislation", *Papers Read Before the Medico-Legal Society of New York From its Organization* (New York: W.F. Vanden Houten, 1882), 105-120.

of medicine was the main case for the existence of professional abortionists." The report contended that only medical licensing could eliminate abortion.[49] While Rogers concluded that strengthening the penalties for criminal abortion were important, he argued that only medical licensing had the power to stop abortions. Rogers, along with most Regular physicians, believed that most abortionists could not meet even minimum medical licensing requirements. Even if a licensing board did give an abortionist a license, the state's Regulars contended that strong licensing board should be granted the power to revoke licenses for unprofessional behavior, such as performing abortions.

After the proposed law was drafted by the Society in 1872, Rogers took an active role lobbying New York physicians for both the abortion and licensing laws. Despite his efforts, physicians were not thrilled by the proposed licensing bill. Many physicians, both Regular and Irregular, were suspicious of licensing bills because they thought the laws might target them. Older physicians who had not graduated from medical schools were especially concerned that the proposed law could bar them from practicing medicine. In early February, Rogers spoke to the New York County Medical Society (a Regular medical society) but its members were cool to his proposal. After Rogers finished his speech, a member of the county society "questioned if any action by the Society" would have had "the slightest effect" because the bill had already been presented to the state legislature and would soon be presented to State Medical Society. Essentially, some members argued that discussing the bill was a complete and utter waste

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[49] James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy*, (Oxford University Press, 1978), 160, *citing* the East River Medical Association, *Report of the Special Committee Criminal Abortions*, (New York, 1871), 3-4.

of the Society's time. Rogers quickly stopped the debate and convinced the Society to adjourn the meeting until later.[50]

Rogers not only lobbied the New York County Medical Society, the Medical Society of New York, and the New York State Medical Society, but he also contacted members in both the Homeopathic and Eclectic medical communities for their approval. Rogers realized that any effort to pass a radical regulatory bill would require the support of physicians across the sectarian divide. Additionally, he argued that as long as the different sects could "pledge themselves to the common good" then they had to "unite."[51] Rogers' efforts to lobby the New York Homeopaths were essentially successful. Later, at the 1873 meeting of the American Institute of Homeopathy (Homeopathy's preeminent national organization), its Committee on Colleges reported that it approved of the Medico-Legal Society's law because it advanced the "march of freedom over the barriers of bigotry." The Committee understood that the statute allowed physicians to select a system of medical practice for themselves, but permitted students to attend the medical schools of their choice without interference from their sectarian rivals.[52]

Even though American Institute of Homeopathy approved of the bill, local New York City Homeopathic and Eclectic physicians attacked it. By February, the *New York Times* reported that New York's Homeopaths and Eclectics claimed that the bill would be "inimical" to practitioners of those two schools. The *Times* reported that there was a

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[50] "The New Medical Bill," *New York Times*, Feb. 4, 1872.

[51] Stephen Rogers, M.D., "The True Object of Medical Legislation", Papers Read Before the Medico-Legal Society of New York From its Organization (New York: W.F. Vanden Houten, 1882), 117, http://books.google.com/ebooks.

[52] *Transactions of the American Institute of Homeopathy 1873*, Volume 26: 524-525, http://books.google.com/ebooks.

clear split in the medical community between physicians who believed that the act was designed "to put a stop to quackery and crime" or, on the other hand, "to concentrate unwarrantable power in a ring of five physicians…" Proponents of the bill argued that the new law only reinforced existing New York law which already required physicians to join their medical society.

Proponents were correct: existing New York law required all physicians to join their local medical society but the provisions related to "non-compliance" been eliminated previously. After the "non-compliance" penalties were eliminated, physicians ignored the law. The proposed law was designed to force physicians to join their local medical society and submit to the new five-person censor committee. Under the bill, Eclectic and Homeopathic physicians could not only form their own sectarian societies to avoid being judged by Regulars, but the law encouraged them to do so. The law authorized the boards of censors from local medical societies to bar physicians from practicing medicine if they engaged in unprofessional conduct such as performing abortions.[53]

While the *Times* claimed that Eclectic, Homeopathic, and patent physicians were the strongest opponents of the bill, some Regular physicians also voiced opposition to it. Patent physicians were especially concerned because they believed that the bill could be a "death blow to their businesses."[54] Patent physicians were justifiably concerned because they, unlike the other sectarians, did not have existing state or local medical societies. The public was also suspicious of patent medicine physicians because they were

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[53] "The Medical Bill" *New York Times*, Feb. 17, 1872, 2

[54] *New York Times*, Feb. 17, 1872, 2.

perceived to be illegitimate. Patent physicians also understood that Regular and Irregular physicians despised them. Under the proposed law, they would have been at the mercy of the local medical societies while Eclectic and Homeopathic physicians could have conceivably created their own institutions.

While Rogers had reached out to Homeopaths and Eclectic, he contacted only the most prominent members of those communities. He also failed to garner sufficient support even within the Regular medical community to ensure unified support. While most of the medical societies declared for support medical licensing in principle, any efforts to create new licensing laws concerned both medical society members and unaffiliated physicians. Efforts to push for licensing brought these opinions to the forefront.

The state of New York printed five thousand copies of the Medico-Legal Society's bill to be distributed to the general public. Soon after these copies were published, opponents of the bill began distributing these bills with a new cover sheet that warned every physician who "was not a member of an Allopathic County Medical Society; of every advertising; of every proprietor of a patent medicine, and of every druggist who does a counter-practice" that their businesses would be destroyed. The circular accused the Regular physicians of exploiting the public's "anxiety" to advance their own selfish good. Additionally, newspapers were cautioned that only Irregular physicians paid them for advertising and that the law would negatively affect the newspapers' "balance-sheet[s]." The circular achieved its goal and effectively stalled the bill's progress in the

legislature. Rogers went so far as to blame a member of Public Health Committee in the legislature for drafting the cover sheet and intentionally sabotaging the bill.[55]

The physicians who opposed the bill were justifiably concerned. The bill stated that anyone who sought to practice medicine, surgery, or midwifery was required to obtain a license from the censors of their local medical societies in order to practice medicine. If they failed to get a license, the bill stated that they could be arrested for a misdemeanor. The bill also permitted the censors of the state's medical societies to "summon" any individual who claimed through advertisements that they were a "practitioner of either medicine, surgery, or midwifery" and determine whether he or she was qualified to practice. While censors not only were allowed to issue certificates, they were given the power to "revoke any certificate" of a physician who was convicted of any felony or misdemeanor.[56]

During Medical Society of the State of New York 1872 annual meeting in Albany, Rogers dismissed the notion that charlatanism and quackery could be eliminated solely by educating the public to the dangers posed by these impostors. He attacked the ability of any public awareness campaign to stamp out quackery as "a purely utopian idea."[57] Even educated people were threatened by "impostures in medicine" because they were easily deceived. Voluntary medical societies, like the Medical Society of New York,

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[55] Stephen Rogers, M.D., "The New Medical Law of the State of New York," *New York Medical Journal, Vol. XX*, July 1874, No. 1: 65, http://books.google.com/ebooks.

[56] Stephen Rogers, M.D., "The New Medical Law of the State of New York," *New York Medical Journal, Vol. XX*, July 1874, No. 1: 67-68, http://books.google.com/ebooks.

[57] "The True Object of Medical Legislation," *Transactions of the Medical Society of the State of New York for the year 1872*: 175-176, http://books.google.com/ebooks.

failed to eliminate medical frauds because those societies could regulate only their own members. Rogers argued that while these societies could punish members for fraudulent or unethical conduct, they could do little to prevent those unaffiliated individuals from practicing medicine. Therefore, Rogers held that the only way medicine could be elevated was for each of the medical sects to "pledge themselves to the principle that the public good is before sectarian doctrine" and work with the "so-called other schools" to secure legislation to regulate the practice of medicine, which would require all physicians to be members of a sectarian society. Without some type of restrictive legislation, Rogers stated that the public would continue to be at "the mercies of ignorant and criminal charlatans" because people were incapable of selecting good physicians on their own. Rogers maintained that the state had to direct the public to capable and qualified physicians.[58]

When he presented his paper to the society's members, they felt ambushed and were unprepared to address the topic in depth. The day after Rogers presented his paper in favor of the 1872 regulatory bill, several members objected to his proposed licensing law. After a heated discussion, the members passed a resolution opposing the medical bill proposed by Rogers. Rogers believed that the negative publicity before the meeting undermined his presentation of bill and encouraged the members to oppose it despite their own interests.[59] The Society's members were concerned that they could be prosecuted by county boards composed of Irregular physicians for ethics violations or

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[58] *Transactions of the Medical Society of the State of New York for the year 1872*: 175-186, http://books.google.com/ebooks.

[59] Stephen Rogers, M.D., "The New Medical Law of the State of New York," *New York Medical Journal, Vol. XX*, July 1874, No. 1: 67-68, http://books.google.com/ebooks.

incompetence. While the bill encouraged sectarians to form their own local society, the proposed bill did not require county boards to be composed solely of Regular members. It would have been possible under the law, even if was unlikely, that if the only existing local medical society was either an Irregular or joint society, Regulars would have been governed by them. Several physicians were appalled by the idea that their ability to practice medicine could be suspended by Homeopaths or Eclectics. Rogers and some other Society members defended the proposed law and argued that Regulars would never be judged by Irregular physicians under the statute, but the opponents of the bill convinced the Society oppose it. At the same time, they wholeheartedly supported the proposed laws seeking to strengthen the penalties for criminal abortion and approved, without any debate, those proposed statutes.[60]

As New York's Regulars debated the merits of the proposed bill, New York's medical Eclectics were also in sharp disagreement over it. Edward B. Foote presented a paper at the 1872 meeting of the New York Eclectic Medical Society in Albany titled "The Allopathic Crusade."[61] Foote argued that Regulars sought "to take advantage of some recent appalling cases of malpractice, to create an impression that the true remedy [lay] in the enactment of a stringent law." He accused leading physicians from both the Homeopathic and Eclectic schools of medicine of collaborating with Regulars to concoct and lobby for this licensing bill. According to Foote, any efforts to regulate medicine were thinly disguised efforts to destroy Eclecticism and Homeopathy because "Allopathy

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[60] *Transactions of the Medical Society of the State of New York for the year 1872*: 47-51.

[61] Eclectics and Homeopaths often to Regular physicians as Allopaths. While this dissertation typically uses the term Regular to describe this sect, this dissertation occasionally refer to them as Allopaths.

can never be trusted."[62] Several other physicians supported Foote's objections and clearly distrusted the motives of the Medico-Legal Society.

Foote also assailed the bill because he disagreed that it would protect the public from malpractice. He even argued that Rosenzweig appeared from the newspaper accounts to be a "man of intellect and culture – just the sort a fellow as could pass an examination before a board of censors and receive a license to practice." Abortion was a widespread problem in New York City, Foote agreed, but he alleged the proposed law would do little to prevent it. Foote quoted the *New York Tribune,* which had estimated that at least 50 abortionists practiced in the city. Some reputable physicians were also believed to be willing to relieve "unfortunate ladies of their troubles for suitable consideration." Instead of eliminating abortionists, Foote argued that the law would instead be used as a way for Regulars to control the practice of medicine in the state. Because Foote believed that the law was a transparent attempt to seize control of medicine, he opposed any efforts to regulate the profession. He found it disingenuous for the Medico-Legal Society to consult with prominent Eclectic or Homeopathic physicians while denying them membership to their society.[63]

After Foote read his paper to the Eclectic Society, Dr. Alexander Wilder argued that while he disagreed with Foote's assessment that regulation was unnecessary, he did

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[62] "The Allopathic Crusade," Edward B. Foote, M.D., *Transactions of the Eclectic Medical Society of the State of New York for the Years 1871-1872*: 78-85, http://books.google.com/ebooks.

[63] Foote, *Transactions of the Eclectic Medical Society of the State of New York for the Years 1871-1872*: 78-98, http://books.google.com/ebooks.

not trust Rogers and the Medico-Legal members' motivations.[64] While he admitted that "[w]e have friends, good and true, in the Medico-Legal Society" he also acknowledged, as Foote had, that "[n]one of us, however skilled, however able, can enter that Society." Wilder urged the membership to be leery of the Allopaths, "especially when bringing presents." He admonished the Eclectic society and warned them that the Regulars demonstrated their hostility to Eclectic medicine in the past and said "[l]et us not forge fetters to be put on our own necks."[65]

While Foote and Wilder were wary of the ultimate goals of the Medico-Society, not all Eclectics opposed medical licensing on principle. Eclectics, like their Regular brethren, were concerned about the quacks and charlatans, especially since numerous quacks practiced under the Eclectic banner. Organized Eclectics knew that these rogue physicians undermined the creditability of their medical sect in the eyes of the public.

At the 1873 meeting of the National Eclectic Medical Association, the members passed a resolution that supported passing "laws by the various Legislatures of this Union" requiring that anyone who sought "to engage in the practice of medicine, surgery or obstetrics to pass a fair examination in the fundamental sciences" to demonstrate that the individual had a complete understanding of "the science of medicine and all its branches." Like the Regulars, the Eclectics believed that licensing was necessary because patients were "incapable of estimating – the scientific attainments of medical

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[64] Dr. Alexander Wilder was a prominent Eclectic physician, historian, faculty member at the Eclectic Medical College of the City of New York, and treasurer of the recently formed National Medical Eclectic Association.

[65] *Transactions of the Eclectic Medical Society of the State of New York for the Years 1871-1872*: 25-28, http://books.google.com/ebooks.

practitioners." Additionally, medical schools throughout the country passed many students who were "grossly incompetent" and lacked sufficient "scientific attainments."[66] In many ways, the case the Eclectics made on behalf of licensing was quite similar to their Regulars, but Eclectic support was more shallow. Only the formally educated and organized Eclectics consistently favored licensing. While Eclectics were aware of the problems quacks posed to their sect, they were not convinced uniformly that licensing was either necessary or capable of elevating Eclecticism. Even worse, many believed that licensing was intended to eliminate them from the medical marketplace.

In response to the successful opposition of the Medico-Society's proposed legislation, the society withdrew its first proposed bill and introduced "an Act relative to the Medical Laws of the State of New York." This new Act was essentially the same proposed law with a few minor revisions. Even though the revisions were modest, the bill surprisingly worked its way through both the New York House and Senate. Apparently, the name change and tweaks to the bill made it more agreeably to the legislature. Eventually, the bill was passed by both bodies and forwarded to the governor. Governor John Thompson Hoffman vetoed the bill and stated that he did not want to interfere with the medical marketplace. Rogers ultimately blamed the governor's veto on the opposition within the Medical Society of the State of New York. His assessment probably was correct because it was the largest and most prominent Regular society in the state.[67]

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[66] *Transactions of the National Medical Eclectics Association for the Year 1879-1880*, 15, http://books.google.com/ebooks.

[67] Stephen Rogers, M.D., "The New Medical Law of the State of New York," *New York Medical Journal, Vol. XX*, July 1874, No. 1: 70-72, http://books.google.com/ebooks.

This was not the first time that physicians had attempted to tie the criminalization of abortion with medical licensing statutes. In *Abortion in America*, James Mohr described how "young physicians" from the Baltimore Medical Society persuaded the Maryland legislature in 1867 to pass a medical licensing bill that regulated the practice of medicine and stiffened the penalties for performing abortions. While the bill was approved by both the legislature and signed by the governor, the medical licensing portion of bill was never enacted. Soon after the bill's passage, the legislature realized that the bill failed to include an enabling clause. In order to enact the law, the proponents were required to re-pass an amended bill through the legislature. Upon second reflection, the legislature stripped the bill of the provisions that regulated medicine, but kept the parts that strengthened Maryland's abortion prohibition.[68]

Other states also were trying to enact licensing laws. Unlike New York, laws in many of these states were getting far less support. Often these efforts were hampered by medical societies' inability to successfully explain to legislatures why these laws were important. In New York, the proposed licensing bill was paired with a popular abortion law. New York physicians successfully tied to the two laws together and created a compelling case for licensing.

Elsewhere, physicians were also floundering in their efforts to pass any type of licensing law. For example, in Oregon, the *Oregon Medical and Surgical Reporter* strongly advocated for the creation of a medical registry to help patients distinguish between educated physicians and charlatans or frauds. Unlike the proposed New York

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[68] James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy*, 1880-1900, Oxford University Press, 1978, 211-215.

law, which criminalized practicing without a license, the *Reporter's* sole goal was to create a list that patients could consult to verify if their doctor was reasonably qualified. While a registry would not prevent charlatans, quacks, or frauds from practicing, the public would be informed about a physician's skills and education. Medical societies typically proposed such medical registration laws in states where there was very little support for criminalizing the unlicensed practice of medicine.

While the *Reporter* advocated the creation of a registry, it claimed that the problem was the willingness of "individuals to swallow with marvelous capacity of all the assertions of pretenders" and that only if the public ceased to be gullible would charlatanism disappear.[69] The *Reporter* argued that a registry might solve this problem because the public would have the opportunity to educate itself. Oregon's physicians from The Medical Society of the Third Judicial District, the precursor to the Oregon Medical Society, pushed for medical regulation during the 1870 House session, but these efforts met with little success.[70] During the debate on House Bill Number 48, "A Bill Regulating the Practice of Surgery and Dentistry," the society sent a communiqué to the Oregon House stating that it did not want a law that controlled the actions of its members, but it desired "the Legislature to enact by a law by which the practice of medicine shall be clearly defined and regulated."[71] The Society's message did little to advance the proposed legislation, and the regulatory bill was eventually tabled.[72] Oregon's physicians

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[69] "Mercenary Design," *Oregon Medical and Surgical Reporter*, 2 (1871): 294-296.

[70] *Oregon Medical and Surgical Reporter 1* (1870): 345-46, 377.

[71] *Journal of the House of the State of Oregon 1870*, 6th House, 287.

[72] *Journal of the House, 1870*, 321.

failed to create a compelling narrative to explain how licensing laws could protect the public.

Still, the progress of the New York and Maryland licensing bills suggested that the opportunity existed for physicians to successfully push licensing laws through state legislatures. The most thoroughly organized physicians were carefully networked together through state and national organizations. The licensing efforts in New York were well-publicized. Even though the bill was vetoed by the governor, New York physicians had established a blueprint to pass licensing laws.

CHAPTER IV

MEDICAL LICENSING AND SANITATION REFORM

Physicians across the country quickly realized that it was necessary to link medical licensing to broader health reform if they wanted to pass anything. In both New York and Maryland, medical societies tied licensing to abortion to overcome opposition and made at least some headway in state legislatures. While the New York law was vetoed by the governor and the Maryland law was quickly repudiated the legislature, the tactic of linking abortion to licensing allowed medical societies in these two states to transform the debate of medical licensing from a sectarian battle to a public health issue. Previously, legislatures avoided medical licensing laws because they were viewed as remarkably transparent attempts by Regular physicians to marginalize their Irregular brethren. This new approach allowed physicians to argue to state legislatures that medical licensing was actually an integral part of public health and not an effort to change the medical marketplace. That way, physicians hoped to make these regulations more palatable to state legislatures. While New York's physicians piggy-backed licensing onto more stringent abortion laws, other state medical societies discovered a more appealing alternative. Regular physicians in Texas, Alabama and California

determined that medical licensing would be more palatable to state legislatures if they tied it to sanitary reform.

A year after the Medico-Legal Society's bill was vetoed by New York's governor, the Texas State Medical Association (TSMA) succeeded in passing the nation's first operational medical licensing bill, titled "An Act to Regulate the Practice of Medicine." The law both instituted medical licensing and created a board of health to enforce public health and sanitation laws. This act required physicians to either be a graduate of a "regularly established and well accredited medical college" or procure a certificate of qualification from one of the newly created county boards of medical examiners.[73] To advance these laws, physicians had to successfully argue to the legislature that state and county boards of health could not protect the public if the state failed to license its physicians.

A year after the legislature passed the Texas medical bill, the *Eclectic Medical Times* accused "[t]he Old School Conspirators" of using the American Public Health Association and the creation of state boards of health as a Trojan horse for discriminatory medical licensing. The *Eclectic Times* claimed that the Regulars were using this strategy in at least seven states across the country in 1875.[74] The *Eclectic Times'* accusation was accurate in Texas because the Texas legislature created a law that explicitly discriminated against Homeopaths and Eclectics. The 1873 medical law required Texas counties to

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[73] *General Laws of the State of Texas Passed at the Session of the Thirteenth Legislature began and held at the city of Austin*, January 14, 1873, (Austin: John Cardwell, State Printer, 1873): 74, http://books.google.com/ebooks.

[74] "No Eclectics or Homeopaths Need Apply," *The Medical Eclectic*, vol. 2, no. 2, 1875: 69, http://books.google.com/ebooks.

appoint a "board of medical examiners" composed of three physicians of "known ability" and graduates of a medical college recognized by the American Medical Association. At the time, the AMA explicitly refused to recognize any Irregular medical colleges and excluded Irregulars from its membership. Not only were Irregulars barred from admission to the AMA, but the AMA prevented members from consulting with Irregulars on any medical matters. The county, state, and national organizations could expel members if they violated this part of the AMA's Code of Ethics.

Under the new law, physicians needed to get a license from their local medical board. If the county they practiced in did not create a medical board, the law required applicants to petition the board in the closest county. In western Texas, this requirement would have been especially difficult to comply with because doctors were potentially hundreds of miles from the nearest county seat. Physicians presented diplomas or certificates of qualification and one dollar to the "clerk of the District Court of such county" within twenty days of beginning their practice. Physicians who did not adhere to the requirements of this act faced a fine between fifty and five hundred dollars. This statute specifically required physicians to present a degree of "Doctor of Medicine" and allowed for the appointment only of Regular physicians to the board of examiners. This statute made it relatively easy for a Regular board to exclude Irregular physicians from practicing medicine across the state. The perceived unfairness of the law quickly created an uproar in Texas.

While many physicians supported the goals of the TSMA and favored passage of laws that excluded Irregular practitioners, Joseph M. Toner, president of the AMA in

1874, expressed skepticism that Irregulars would ever be denied the right to practice medicine. Toner argued that Regulars may have hoped to eliminate "Irregular and incompetent practitioners from the profession by legislative enactment and penalties," but "in our country" this result was unlikely.[75] The AMA president knew that none of the medical systems had sufficient support or influence to eliminate any of the other organized medical sects. While the TSMA passed a restrictive statute, Toner knew that it would be difficult, if not impossible, to pass statutes excluding Irregulars from medical practice in other parts of the country.

In the short run, Toner's prediction proved prescient, even in Texas. Irregulars vociferously objected to the 1873 law. *The Medical Eclectic*, a journal based in New York and edited by Alexander Wilder, reported on efforts by the Texas State Board of Health "to prohibit the practice of medicine by any except graduates from institutions entitled to representation in the American Medical Association."[76] The Irregulars quickly and effectively lobbied for the repeal of the discriminatory law at the Texas constitutional convention in 1875. As a result of this pressure, the Texas constitutional convention drafted Article XVI, section 31 of the new Texas constitution which nullified the 1873 law and mandated that "no preference shall ever be given by law to any school of medicine."[77]

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[75] *Transactions of AMA* (1874): 76.

[76] "No Eclectics or Homeopaths Need Apply" *The Medical Eclectic*, Vol. 2, No. 2: 69, http://books.google.com/ebooks.

[77] *Texas Constitution 1875*, Article XVI, section 31, http://books.google.com/ebooks.

The new Texas Constitution forced the TSMA to lobby for a dramatically different regulatory bill that steered "between [the] prohibitory provision [discriminating against medical sects]…and the danger of too great laxity on the other."[78] Because the new Constitution explicitly prevented discrimination against any medical sect, Texas Regulars compromised with their Irregular cousins and developed a new, less discriminatory licensing scheme. The TSMA wanted to limit the influence of Irregulars but realized that the law would be enforceable only if it had "the unanimous and unbroken support of the physicians themselves."[79] In 1876, the Texas legislature passed a new law, which discarded the requirement that graduates have a medical degree and instead required each new applicant to pass a medical examination. The law gave county courts the responsibility to establish examining boards to administer the test.

While the TSMA argued before the legislature that the act would "establish a uniform, equable and unavoidable criterion by which to determine the qualifications" to practice medicine, the TSMA chairman for the Committee on the State Board of Health argued that the new law would not break down the barrier between Regular and Irregulars. The chairman did not believe that Irregulars were capable of passing any medical examination, and he assumed that most of them would barred from practice. The TSMA's president argued that the new law would create a stronger and more permanent "partition" between Regulars and Irregulars.[80] The TSMA told its membership that only

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[78] *Transactions of the Texas State Medical Association, Ninth Annual Session 1877*: 39, http://books.google.com/ebooks.

[79] *Transactions of the Texas State Medical Association, Ninth Annual Session 1877*: 39-42.

[80] *Transactions of the Texas State Medical Association, Ninth Annual Session 1877*: 55.

Regular physicians would benefit from an act requiring a medical examination of all applicants. This was clearly wishful thinking by the TSMA.

Instead of satisfying Texas Regular doctors, the new 1876 law enraged some of them. A member introduced a resolution at the TSMA meeting that approved of the actions of the Travis County Medical Society for refusing to cooperate with Irregular practitioners to set up a mixed county board. Many members of Travis County Medical Society not only refused to cooperate with the new county board, but accused the Regular physicians who did participate in the county board of collaborating with the enemy. A newly appointed member of the Examining Board of Travis County addressed the state's members and defended himself against accusations from both the TSMA and the Travis County Medical Society. He argued that he was not a traitor by serving on the board. The members of the board argued that he was doing his duty and was desperately trying to protect the profession from "attacks by ignorant men." While some physicians supported the board member, another physician condemned him with exceptionally florid language that claimed the board member had gone willingly into "the midst of the enemies of truth and aided them in carrying on a warfare with virtue." Ultimately, the resolution divided the TSMA, and it decided to postpone the vote on any resolution either applauding or condemning the actions of the Travis County Medical Society for six months.[81]

Even more problematic was that the Texas Regulars were saddled with a law they detested from the start. In the Report of Committee on Legislation, Dr. Thomas Wooten

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[81] "Minutes of the Ninth Annual Session*," Transactions of the TSMA 1877: 10-15.*

acknowledged that the law was polarizing and essentially apologized for dividing and demoralizing the state's Regular physicians. Still, he conjectured that it was essential for the TSMA and the state's Regular physicians to take an active role in supporting the new law. If the state's Regular physicians actively undermined the medical licensing law, Wooten believed that the state's physicians would be reduced to "humiliation and helplessness."[82]

While Wooten's concerns were understandable, ultimately they were moot. The legislature, because of a drafting error, failed to criminalize the illegal practice of medicine without a license. Consequentially, the medical licensing statute was crippled before it became active. The legislature then withdrew its support for the law and amended it to allow county clerks to license anyone who possessed a diploma.[83] Instead of creating a licensing statute, Regular physicians were stuck with a weak registration law they would spend decades trying to overturn.

In a bizarre twist, one of the earliest cases challenging a licensing law in Texas attacked the first licensing law passed in 1873. Even though the law became unconstitutional in 1875, anyone prosecuted between 1873 and 1875 was not protected. In one example, the county medical society accused a physician of practicing in Wood County without a license during this narrow timeframe. After the physician was indicted, the defendant convinced a district court judge to quash the county's indictment. The county was forced to appeal the lower court's decision to Supreme Court of Texas. The higher court affirmed the trial court's decision and found that while the indictment

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[82] "Report of the Committee on Legislation," *Transactions of the TSMA 1877: 39-42.*

[83] "Report of the Committee on Legislation," *Transactions of TSMA:* 34-37 (1877).

alleged that the physician did not appear to have received a "certificate of qualification" from the Wood County board of medical examiners, it failed to state whether the physician procured a certificate from another county board. The Texas Supreme Court determined that a physician did not necessarily need to receive a certificate from the county that he was practicing in. The court ruled that physicians needed only a certificate from any county in the state. The court also objected that the prosecution failed to determine if a physician had procured a license from elsewhere. Interestingly, the court did not bother to ask a doctor to prove that he filed his diploma somewhere else in Texas.[84] While the Texas Supreme Court might have complicated future prosecution efforts in the state, the court's broad interpretation of the medical licensing statute essentially demanded additional due diligence by county prosecutors.

Like Texas, the New York Legislature in 1874 passed another medical licensing act, but it did not exclude Irregular practitioners. Essentially, physicians who were either "licentiates or graduates of some medical society or chartered school" could practice medicine without a license. Only physicians who were not "medical graduates or licentiates" would be required to secure a certificate from the "censors of some one of the several medical societies of this State, either from the county, district or State society." The state could charge physicians who violated the law with a misdemeanor and fined between fifty and two hundred dollars or a sentence of not less thirty days in jail.

In reality, it would have been almost impossible to find physicians who did not meet at least one of the criteria to practice medicine. The law exempted most physicians

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[84] *State v Goldman*, 44 Tex. 104, (1875).

from the necessity of obtaining any type of certificate from a medical society. The law also did not bother to define what constituted a "chartered medical school" or explain which medical societies were recognized by New York. In effect, physicians could practice medicine in New York if they met any of the following requirements: attended a medical school, was a member of medical society, or failed to secure a certificate of practice from a medical societies board of censors. If physicians could not find a medical society that would either allow them to join or give them a certificate, they could create their own medical society.

Needless to say, Dr. Stephen Rogers, the drafter of original proposed law, was horrified. He lamented that the 1872 bill was vetoed because the 1874 law that was passed instead was toothless and failed to achieve any of the goals sought by the Medico-Legal Society in 1872.[85] Rogers' low opinion of the 1874 "Act to regulate the Practice of Medicine and Surgery" was merited. The *New York Times* stated that the law failed to "check quackery, but … provide[d] the opportunity whereby quacks and quackery may become legalized." The *Times* even accused various sectarian county medical societies of issuing certificates "either through thoughtlessness or venality" to candidates after cursory or nonexistent examinations. Critics of the 1874 law argued that it allowed too many "unqualified persons in the medical profession."[86]

In August 1874, the Sanitary Committee of the New York City Board of Health sought to enforce the new act. The Sanitary Committee argued that the "so-called doctors

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[85] Stephen Rogers, M.D., "The New Medical Law of the State of New York," *New York Medical Journal*, Vol. XX, July 1874, No. 1: 70-72.

[86] "To Regulate the Doctors," *New York Times*, April 5, 1878.

who have no recognition by any class of medically uneducated practitioners" and were primarily responsible for the most egregious deaths in the city. Separate from the licensing law, the Sanitary Committee passed a resolution requiring "a new registration of physicians in the city" in order to keep closer tabs on the medical community in the city.[87]

In September 1874, despite the limitations of the licensing law, the New York City Board of Health issued a legal opinion clarifying the new law. The opinion stated that only three types of physicians were permitted practice under the new law: graduates of chartered medical schools, those already licensed by some legally authorized body, and persons holding a certificate from "one of the several medical societies of the State." Additionally, the counsel for the Board acknowledged that "[n]o distinction between different schools of medicine" could be "recognized." Finally, the counsel observed that the law was both a "disappointment" for the "medical profession" and could be a challenge for medical societies to enforce unless the "societies have their own counsel and make a strong effort."[88]

Contemporaneously to the licensing battles in Texas and New York in 1875, Alabama established another model for medical licensing in the country. The membership of the Medical Association of the State of Alabama (MASA) asked the association's Board of Censors to present the Alabama General Assembly with a bill that authorized the creation of a Board of Health with licensing authority. The MASA, like most regular associations, was deeply concerned about the quality of the physicians in the

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[87] "The City's Health," *New York Times*, Aug. 26, 1874, 2.

[88] "The Board of Health" *New York Times*, Sept. 3, 1874, 2.

state. The MASA issued a report that stated, "[w]e have too many doctors," and the quality of medical education was "shamefully, low." Additionally, it acknowledged that the profession was "crowded with incompetents" and that medical schools had failed to guard "the fates of admission to its ranks." The problems with the medical profession was immense, the MASA's report argued that the lack of standards were an "evil" that was destroying the credibility of the medical profession. The MASA stated that if it did not act to pass a medical law, then the profession could be "utterly destroyed" by charlatans and quacks.

The MASA argued that Alabama desperately needed to establish a state board of health because the state often suffered outbreaks of serious tropical diseases such as yellow fever. Alabama needed a board of health to help it cope with these endemic diseases. The MASA argued that there were "thousands of cases of sickness occur[ring] every year from diseases which might be prevented" resulting in an extraordinary amount of suffering that could not be "exaggerated." The MASA not only advocated for the creation of a board of health, but sought to create medical licensing as part of the board of health bill. Thus again, a Regular medical association hoped to piggy-back licensing on another more popular public health bill. In 1875, the Board of Censors introduced the proposed bill for the membership's approval. Although the proposed bill generally pleased the Board of Censors, the board still was not comfortable introducing the law in the legislature and stated that the "time has not yet come when it is expedient to

memorialize the General Assembly to enact it into law."[89] The Board failed to provide any adequate explanation why the state legislature was unprepared to pass the law.

The bill proposed by the Board of Censors for MASA in 1877 had the potential to eliminate or severely limit the ability of future Homeopathic and Eclectic physicians to practice medicine in Alabama. The Board refused to acknowledge this potential outcome and argued that the law ultimately would not interfere with the ability of any current physician in the state to continue practicing whether they were "regular, irregular or defective."[90] The proposed bill created medical examining boards across the state, but either the MASA or the county regular medical society would be responsible for selecting the member of these boards. The MASA's Board of Censors sought to create a number of decentralized county boards, and it was averse to allowing any physician from a dissenting sect to serve on any of the examining boards. The various medical examining boards were tasked with determining the qualifications for physicians in their area. The bill did not create any testing standard, but stated that the MASA would establish the criteria. The bill was also vague about who would be responsible for licensing physicians if a county lacked a local examining board, but a physician could choose to be evaluated by the state examining board. It would have been simple for a board of exclusively

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[89] *Transactions of the Medical Association of the State of Alabama, 28th Session, 1875*, (Montgomery, AL, Barrett & Brown, Steam Printers and Book Binders, 1875), 27-41, http://books.google.com/ebooks.

[90] *Transactions of the Medical Association of the State of Alabama, 30th Session, 1877*, (Montgomery, AL, Barrett & Brown, Steam Printers and Book Binders, 1877), 35, http://books.google.com/ebooks.

Regular physicians to establish testing criteria that could have barred Homeopaths, Eclectics, or other Irregular physicians from passing the exam.

Like many registration and licensing bills proposed in the 1870s, the MASA claimed that this bill would not need any or very little state money to manage licensing. In its letter to the Alabama's General Assembly (the state legislature), the Board of Censors advocated on behalf of the proposed bill. It stated that not only would the bill protect Alabamians from diseases and quacks, but it would not cost the state any money. The Board argued that regardless of the impact of the bill, the state of Alabama would not have to pay for the examinations or the enforcement of the bill in the future. Licensed physicians would have to pay for all the county boards costs.

The Alabama legislature, along with others around the country, were either incapable or unwilling to subsidize licensing because the country was still experiencing a sever depression. In 1873, the United States's economy was wrecked by a serious financial downturn and descended into long depression. This downturn was triggered by the bankruptcy of Jay Cooke and Company, a major financial company. Like many depressions in American history, the Panic of 1873 was triggered by rampant speculation. Greed overruled fear as Wall Street invested heavily in dubious railroad bonds. Jay Cooke and Company's bankruptcy triggered a banking crisis that spread across the United States. The depression that followed the Panic of 1873 devastated state finances and emptied treasuries.[91] States were not in a position to fund licensing and public health laws on their own.

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[91] Nicolas Barreyre, "The Politics of Economic Crises: The Panic of 1873, the End of Reconstruction, and the Realignment of American Politics," *The Journal of the Gilded Age and Progressive Era,* Vol. 10, Issue 4 (Oct. 2011): 403-422.

The MASA, like other medical societies around the country, understood that any bill it proposed could not rely on state funds. To solve that problem, the MASA proposed creating a quasi-government organization funded exclusively through licensing fees. Medical associations understood that there was very little public support for licensing laws in general, and therefore it was critical to create bills that would be budget-neutral for state governments. While legislatures would not have established licensing laws if they had not been budget-neutral, the quasi-government organizations proposed by state medical societies often did not have enough revenue to robustly support these laws. Medical associations intentionally may have underestimated the cost of enforcing these laws and hoped that once these were established, they could get additional funding when the economy improved.

Ultimately, the Alabama General Assembly passed a licensing law that was fundamentally different from the law proposed by the MASA's Board of Censors. While the 1877 law was modeled on the MASA proposal, the assembly changed it in several significant ways. The MASA succeeded in convincing the legislature that the MASA and regular county associations should manage the examining boards, but to placate Irregular physicians, the Assembly distinguished between Regular and Irregular applicants. The examining boards could only test Irregulars on the following subjects: "anatomy, physiology, chemistry and the mechanism of labor." Instead of creating multiple sectarian examining boards or requiring the examining boards to administer sectarian exams, the General Assembly curtailed the subjects that the Regular boards could test Irregular physicians on, and also contrary to the MASA's proposed law, the Assembly

specifically stated that female midwives were not covered by this act or regulated by the MASA.[92]

The MASA's Board of Censors was incensed by the changes made to the bill by the Assembly. The assembly's alterations bestowed Irregular sects with "quasi-respectability." Still, the Board was convinced the Irregular sects were still fated to expire in the long run. The Board of Censors insisted that it only intended "to elevate, to purify, to regenerate, the regular professions itself." Despite these protestations, the Board had clearly hoped that the Assembly would put Irregular sects out of their misery sooner rather than later. Instead of permanently destroying Alabama's Irregulars, the Assembly not only granted them legitimacy, but created a lower standard for them.

The Board of Censors was forced to explain to the MASA's members that the lower testing standard actually was proposed to the Assembly by some Regular physicians in an effort to make the bill more palatable. The Regulars who proposed the testing rules believed that Irregulars were incapable of passing any scientific examination. The Board of Censors also tried to convince the MASA's membership that this examination still would eliminate Irregular competition even if it was not as effective as the "indirect operation of the measures included in the original bill." The Board of Censors understood that forcing a board of Regulars to test Irregulars would impose "a very delicate and unpleasant duty" on them.

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[92] *Transactions of the Medical Association of the State of Alabama, 30th Session, 1877*, (Montgomery, AL, Barrett & Brown, Steam Printers and Book Binders, 1877), 34-38, http://books.google.com/ebooks.

In an effort to minimize their disappointment, the Board of Censors assured the MASA that Alabama's licensing scheme would still permit the decay of these sects. The Board of Censors claimed that Eclectics were ready to "join the ranks of the regular medical army" at any moment and the only reason they maintained their Eclectic traditions was because it would take too much "time and money" to become Regulars. Homeopaths, while equally "doomed," were a bigger concern because they still exhibited some signs of life around the country. The Board of Censors summed up by saying that the Irregular ranks in Alabama were thin and would give the Regulars "little trouble."[93]

The Alabama law fundamentally differed from other laws around the country because it mandated examinations for all new physicians, yet avoided the creation of a centralized examination board. Like the New York law, it relied on both the county and state medical societies to certify and enforce the statute. Unlike New York, they were able to pass a law that excluded Irregular physicians from serving on licensing boards and examining physicians. Because the Regulars controlled both the examining and enforcement aspects of the law, they had the opportunity to create an environment hostile toward Irregulars by enforcing the statute in a discriminatory fashion. While the law made it possible for Regulars to discriminate against Irregulars, Irregulars did not have to study as many subjects for medical exams. Additionally, the MASA struggled to create Regular medical societies in each county. In a little under half of the state's counties, there was little or no oversight of physicians.

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[93] *Transactions of the Medical Association of the State of Alabama, 30th Session, 1877*, (Montgomery, AL, Barrett & Brown, Steam Printers and Book Binders, 1877), 34-40, http://books.google.com/ebooks.

During this same period, California's Regulars also pushed the state legislature to adopt medical licensing. While the California State Medical Society (CSMS) had been moribund for years, in 1870 the state's Regulars reorganized the CSMS. In 1870, the Legislature created a California State Board of Heath with the goal of looking "after the vital interest and physical condition of the people…" The Board was composed of seven physicians from Sacramento and five doctors from other parts of the state. The legislation did not bar Irregulars from serving on the board nor did it require it. Still, all of the members of the inaugural board were Regulars.[94] One of the chief responsibilities of the Board was to propose bills for the legislature that could improve public health.

In 1874, Thomas Logan, one of the most prominent members of the CSMS and the permanent secretary of the California State Board of Health, began an earnest effort to enact medical licensing in California. Logan made a strong case at the 1874 California Medical Society meeting that it was crucial for physicians to began to assert control "over admission to its ranks." He also argued that the disputes among the sects not only appeared to be "useless and unseemly" to the public, but they were counterproductive because these disputes "prevented or defeated all efforts to obtain legislation that would have … protected the people against medical frauds and ignorance." This conflict had weakened an already diminished profession. "Physicians of moral worth and personal dignity" were reduced to opposing any measure that would allow them to be categorized as a physician along with the numerous "shams and frauds" littering their profession. Logan argued that as long "as the demand" for licensing "is made irrespective of all so-

[94] Logan, Thomas, "Report of the Permanent Secretary", *First Biennial Report of the State Board of Health of California for the Years 1870-1871* (Sacramento, D.W. Gelwicks, State Printer, 1871), 16-17, http://books.google.com/ebooks.

called schools of medicine" the Legislature would be unable to "refuse." Logan called on the CSMS to support a regulatory bill that would create an independent board of medical examiners that would license all applicants and criminalize the practice of medicine without a license.[95]

Logan was not the only person calling for the creation of medical licensing in California. The *Los Angeles Herald* advocated on behalf of medical licensing in July 31, 1874. The editorial asked why ship pilots were required to secure licenses while physicians "were permitted to practice medicine without written evidence of their right to kill or cure the human family[.]" The editors argued that unlike lawyers, "the ignorance and efficiency of the quack doctor" were not apparent until "one or more lives have been sacrificed." The *Herald* demanded that the state of California needed to require physicians to get a license in order to "suspend operations" by "these murderers."[96]

In 1875, Logan presented a bill to the CSMS that could be best described as a confusing jumble. Instead of creating a single unified body, Logan's bill dispersed the authority to grant licenses to four different groups which, in turn, could license physicians in three different ways. First, physicians could present a "diploma" from a "*bona fide*" and "regularly chartered medical school" directly to the county clerk. Second, they could get a license from "a State Medical Society, or a State Board of Medical Examiners." Finally, physicians also could secure a "certificate of qualification" from the State Board of Health, any of the state's medical societies, or a state board of

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[95] *Transactions of the Medical Society of the State of California During the Year 1873 and 1874*, (Sacramento, H.A. Weaver, Printer, 1874): 49-61, http://books.google.com/ebooks.

[96] "Show Your Diplomas," *Los Angeles Herald*, Volume 2, Number 103, July 31, 1874, 2.

medical examiners. Additionally, the county clerk offices were required to determine whether a medical school was a "*bona fide*" institution.[97] The proposed bill was originally presented by the California State Board of Health in its biennial report. The bill was modeled on a Nevada registration law that was adopted a year earlier. The bill did not license physicians who lacked a medical degree, and it would have been opposed by a number of state's Regular physicians for that reason.[98]

After the bill was read, one member of the California Medical Society expressed concern that it was too long and proposed adopting the Nevada registration law that had been approved there. In lieu of approving the bill, it was submitted to a committee of three members who could reevaluate the proposal and report to the Society at a later date.[99] The CSMS failed to reach any definitive decision regarding the proposal and essentially punted it to a later date.[100]

Logan's bill was not the only one presented that year. The San Francisco Medical Society also proposed a similar law, but that one authorized the creation of a "Board of Medical Examiners." This board would be composed of seven practicing physicians who would be responsible for evaluating diplomas and conducting a "critical examination" of all medical licensing applicants. If an applicant presented a valid diploma and passed the

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[97] "Report of the Committee on State Medicine and Public Hygiene in California," *Thomas Logan, Transactions of the Medical Society of the State of California During the Years 1874 and 1875*, (Sacramento, H.S. Croker & Co., Printers an Stationers, 1875), 95-102, http://books.google.com/ebooks.

[98] "The Bill Against Quackery," *Sacramento Daily Union*, Volume 1, Number 205, Dec. 4, 1875, 4.

[99] T*ransactions of the Medical Society of the State of California 1874 and 1875*, 10-11.

[100] "Life and Professional Labors of Thomas Muldrup Logan, M.D. of California" Dr. J. M. Toner, *Transactions of the Medical Society of the State of California During the Years of 1875-1876*, (Sacramento): 136-137, http://books.google.com/ebooks.

licensing exam, the board would confirm the identity of each applicant to ensure that they were not practicing under an assumed name. The *Sacramento Daily Union* questioned whether it was necessary to every physician who wanted to practice in the state. The *Union* argued that it would be inappropriate for a select group of California physicians to question the judgments of American medical schools and "the Medical Colleges of Europe." The editors of the *Union* believed that California lacked physicians who possessed either the skill or credibility to question these august institutions. They argued that California would be better served if they relied on these schools to furnish "evidence of competency" for the prospective physicians.[101]

Finally, in March 1876, after a year of debate in the legislature, the California Assembly and Senate passed an act to "Regulate the Practice of Medicine in the State of California."[102] It permitted graduates of medical schools to practice without being tested by an examining board, but it differed somewhat from other licensing laws passed the 1870s, because it authorized "each State Medical Society, incorporated and in active existence" when the bill was passed to appoint seven people to separate boards of examiners. Potentially, each medical society in the state, including Homeopaths and Eclectics, could create their own boards, but there was a complication. The California State Medical Society of Homeopathic Practitioners (CSMSHP) strongly supported the passage of this law and adamantly opposed a single unified board. The multiple-board

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[101] "Legislation Against Quackery," *Sacramento Daily Union*, Volume 1, Number 232, Nov. 12, 1875: 2.

[102] "Annual Address by the President", A.B. Nixon, M. D., *Transactions of the Medical Society of the State of California During the Years of 1875-1876*, (Sacramento, 1876): 25, http://books.google.com/ebooks.

bill was approved because CSMSHP brought "influences to bear" and persuaded the Legislature to side with the more liberal law.[103] The statute mandated that in order for a medical society to supervise licensing its medical sect, the society had to require that its members were "to possess diplomas, or a license from some legally chartered institution" at the time when the law was passed. The bill also sought limit the influence of nostrum peddlers by requiring any "itinerant vendors of any drug, nostrum, ointment or appliance" to pay one hundred dollars a month.[104]

Before the bill was passed, the legislature engaged in a lively debate about the bill and numerous amendments were proposed in an attempt to radically alter it before its passage. The biggest debate centered around which existing physicians would be automatically licensed under the law. The bill originally proposed that physicians who had practiced in the state for twenty years could apply for a license if they could get two recommendations from other physicians who were in good standing. There were several attempts to reduce the number of years those physicians practiced in the state. Initially, the author of the bill rejected a proposal to reduce the number from twenty to fourteen years, but a later amendment changed the twenty-year requirement to only five years. This undoubtedly helped the law pass the legislature, because far more physicians from

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[103] "Report of the Secretary of the State Board of Examiners" W. N. Griswold, M.D., *The California Medical Times*, Vol. 1, No. 2, October 1877: 26, http://books.google.com/ebooks.

[104] *Transactions of the Medical Society of the State of California During the Years of 1875-1876*, (Sacramento): 24-25; "Medical Bill Passed," *Sacramento Daily Union*, Volume 2, Number 30, 27 March 1876, 1.

the three sects would have supported this law. The legislature would have struggled to pass this law without adopting this significant change.[105]

The *Sacramento Daily Union* generally supported the passage of the state licensing law, but its editors expressed a few misgivings. The *Union* was concerned that the provision requiring itinerant physicians to pay one-hundred dollars a month was potentially unconstitutional, but the *Union* still supported the measure because it attacked that "class of swindlers." Still, the editors were concerned that this provision explicitly discriminated against a "class of strangers" and could be undone by the courts. The editors for the *Union* hoped this would be avoided because the law potentially would alleviate the antagonism among the three major sects.[106] The medical sects also were pleased with the law and quickly sought to enact its provisions.

Immediately after the law was passed, the CSMSHP set up its own examining board of seven members in April. After forming its board, the CSMSHP faced many unforeseen circumstances. The Secretary of the Homeopathic Board of Examiners reported that prospective physicians began offering large bribes to board members from each of the boards. The Homeopathic secretary weakly proclaimed that fewer bribes were made to the Homeopathic board than "either of the other Boards." Still, physicians offered a variety of different bribes to members of the newly established Homeopathic board including "notes of $50 to cash of $200 to secure certificates," potential business partnerships, "compensating favors," and an offer to create "an endowment of untold

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[105] "Consideration of Medical Bills," *Sacramento Daily Union*, Volume 2, Number 22, March 17, 1876, 1.

[106] "The Medical Practice Act," *Sacramento Daily Union*, Volume 2, Number 31, March 28, 1876, 2.

thousands" for a medical college. The Secretary then assured the readership of the *California Medical Times* that even though he was "startled" and "nearly captured" by the offer to create a medical school endowment, these offers were "courteously but firmly informed that money, beyond the medical fee, would not buy certificates." At the end of the day, the Homeopathic board issued eighty-nine licenses (sixty-five via diploma and twenty-four by examination.)[107]

As the medical societies were establishing their boards, the law came under attack from multiple parties (both Regular and Irregular). In 1877, the President of the CSMS, W. Fitch Cheney, M.D., ranted that the bill contained "many absurd provisions." The statute forced the Regular Examining Board to lose money because it did not authorize the board to charge enough to cover the printing costs of the exam. In addition to losing money, the Examining Boards were required to hire more people to handle additional clerical work. Cheney sought to amend the bill to allow the society to charge more to administer the exams. Additionally, "three or four" members of the CSMS did not pass the medical examination, which cast the Society in a negative light. One of the society's members was outraged that the CSMS had done such a poor job policing its own members that quacks apparently infiltrated its ranks for years.[108]

Unlike Alabama, Regular physicians in California did not have to pair the state's licensing law with a public health measure. But they were significantly aided because the

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[107] "Report of the Secretary of the State Board of Examiners" W. N. Griswold, M.D., *The California Medical Times*, Vol. 1, No. 2, October 1877: 26-29.

[108] "Annual Address," *Transactions of the Medical Society of the State of California During the Years 1876 and 1877* (Sacramento, H. W. Weaver, Printer, 1877): 25–28, http://books.google.com/ebooks.

California Board of Health had been created the year before the licensing law was passed. Even though physicians did not piggy-back the state's licensing on the creation of the board of health, members of the Board of Health in California strongly advocated on behalf of licensing as an essential component of public health. The board members' support for licensing was unsurprising because all of the members of the board were Regular physicians. What was surprising was the state Regulars' willingness to compromise with Irregulars. In many states, Regular physicians proposed laws that clearly sought to limit the influence of Irregulars, but in California the leaders of CSMS fairly early on were committed to compromising with Irregulars. The leadership of CSMS and the Board of Health in California never sought to eliminate Irregulars. The Regulars' willingness to compromise encouraged the state's Irregulars to quickly support the law and overcame any objections in the legislature.

One of the most consistent problems faced by licensing laws was that as soon as they were passed, special interest groups immediately sought to amend them in the next legislative session. Sometimes these amendments were proposed by Regular or Irregular medical societies, but often they were proposed to benefit a class of medical specialists who were disadvantaged by the existing law. There were a wide range of amendments proposed in states around the country to help itinerant physicians, unrecognized specialities, or some other group. California was no different.

Even though the law was passed with overwhelming support from the state's Regulars and Irregulars, Ira Oatman, Chairman of the Committee on Medical Legislation for the California State Medical Society, fought tooth and nail "to defeat" subsequent

legislation that upset the original compromise. Oatman often worked with several other state medical societies to defeat any and all proposals to amend the licensing law from the Regular society. In 1878, Oatman was faced with multiple bills that sought to upend the state's law. There were so many proposed alterations and amendments to the licensing, and Oatman admitted that he struggled to keep abreast of all the proposals. Oatman's struggle was not unique. After licensing laws were passed, legislators constantly sought to tinker with them.

Although, the California licensing law would be amended by the legislature in 1878, Oatman held his own. In addition to requiring examinations of all applicants, the new law explicitly authorized the creation of Regular, Eclectic, and Homeopathic boards. Each of these boards was explicitly tied to the dominant state board for each sect. Additionally, the medical societies retained the right to change the members without interference from the governor's office. This effectively prevented any additional medical sects from creating their own medical examining boards, thereby establishing a sort of medical cartel among the three dominate sects. Additionally, the law was altered to give the medical societies more money for examinations. Physicians who submitted false diplomas would be fined an additional fifteen dollars by the board. The examining boards also were required to refuse certificates to any applicant accused of unprofessional conduct. Finally, itinerant vendors were required to pay for one-hundred dollars licenses if they wanted to sell any "drugs, nostrum, ointment or appliance of any kind intended for

the treatment of disease."[109] Essentially, Oatman and the CSMS were successful in achieving almost everything they wanted from the 1878 amendments. Additionally, the 1878 bill enabled more rigorous enforcement of the licensing law.

One of the implications for the 1878 amendments was that non-graduates who had not presented themselves for an exam in 1876 had another opportunity in 1878. The Board of Examiners for the Medical Society of the State of California began advertising in newspapers providing notice to non-medical school graduates that they needed to take a medical examination to procure a license. One of the advertisements in the *Sacramento Daily Union* announced that all non-graduates had to go to San Francisco for the examinations. The examining board did not bother to schedule exams for Sacramento. The advertisement indicated that the board informed applicants that it would question physicians about why they had failed to take the earlier exam.[110] Allowing non-graduate physicians to apply for licenses even though they had failed to do so prior was a small compromise for California's Regulars in order to achieve their primary goals.

The Regulars' successful push for licensing laws unnerved Irregular physicians around the country. Efforts to license physicians had been stalled for decades until the 1870s, but licensing was clearly picking up steam across the country. More importantly, the Irregular medical societies were often placed in an extremely uncomfortable position. While Irregulars often favored creating state boards of health that were responsible for designing and enforcing sanitation laws, they saw that Regulars were piggy-backing

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[109] *Laws Regulating the Practice of Medicine in the State of California, Passed April Third, 1876, and April First 1878*, (San Francisco, A. L. Bancroft and Company, 1878): 7–11, http://books.google.com/ebooks.

[110] "Important to Physicians," *Sacramento Daily Union*, Volume 7, Number 67, May 8, 1878, 2.

medical licensing on state board of health laws. Additionally, most state's Irregulars were less willing than the Regulars to compromise with Homeopaths and Eclectics.

In 1875, at the twenty-eighth meeting of the American Institute of Homeopathy, members debated the recent push by Regulars to establish state boards of health and medical examiners. J. P. Dake, a prominent member of the American Institute of Homeopathy from Tennessee, drafted a report which argued that the AMA and American Public Health Service were essentially in cahoots to create "a regular scheme" to "seize governmental power, and its employment for the benefit and aggrandizement of a particular school and class of medical men." Dake described these efforts as an attempt by the Regular medical societies to create "state medicine," which he argued benefitted them. He believed that state boards of health were created under the guise of promoting sanitation, but that these organizations actually were formed to advance Regular medicine. The American Institute of Homeopathy members passed a resolution chiding the efforts of Regulars to pass medical licensing bills as an effort to promote "sectarian purposes and the aggrandizement of medical associations, to the disparagements of others…"[111]

While Alabama, California, and other states successfully passed rudimentary medical practice acts, Oregon's Regular physicians efforts continued to stall. Starting in 1876, the Medical Society of Oregon (MSO) resolved that its legislative committee should promote two bills to the legislature: one bill advocating the creation of a State Board of Health similar to California, and the second bill mandating the hanging and

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[111] *Transactions of the 28th Session of American Institute of Homeopathy, 1875* (Philadelphia, Sherman & Co., 1876), 50-51, http://books.google.com/ebooks.

framing of a doctor's diploma. While some members of the Medical Society of Oregon were in favor of creating a board of health, they hoped that at a bare minimum the legislature would acquiesce to the "hanging and framing" bill.

The "hanging and framing bill" proposed by the MSO as an alternative was a quirky scheme that required physicians to post their diplomas in their offices. If they did not possess a medical degree, they would have been required to post a sign stating in large print: "*Not a* Graduate in Medicine."[112] While the leadership of the Medical Society of Oregon's advocated on behalf of the more comprehensive board of health law, it was not able to get support from a majority of the society's members despite a recommendation from a special legislative committee.[113] The MSO failed to issue any resolutions regarding the proposed comprehensive board of health regulatory act. Instead, the MSO was resolved to promote the silly display law.[114] The failure of the leadership of the MSO to promote a board of health demonstrated that a clear split existed in the Oregon Regular community. This split was a result of mistrust between Regular medical school graduates and non-degreed doctors.

Compared to some of the other licensing bills proposed around the country, the Oregon "hanging" bill was embarrassingly hokey and ineffectual. Oregon's Regulars had failed to effectively tie a medical licensing bill to either anti-abortion laws or the creation of a board of health. The efforts by the Medical Society of Oregon to pass any

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[112] *Proceedings Third Annual Meeting of the Medical Society of the State of Oregon* (1876): 14.

[113] *Journal of the Oregon House of Representatives 1876, 9th House*, 346.

[114] *Proceedings of the Third Annual Meeting of the Medical Society of the State of Oregon* (1876): 13.

regulations were half-hearted and doubtful to succeed. The Society's silly attempt to distinguish between medical school graduates and non-graduates even generated opposition within the Society because it discriminated against many of the MSO's own members. While it demonstrated a growing rift between the state's medical and non-medical school graduates, it doomed any legislative efforts. While New York physicians rallied around anti-abortion laws to promote medical licensing, Oregon's physicians floundered to find a convincing argument.

Oregon's failure to effectively tie licensing to public health prevented the state's Regulars from advancing licensing. Unlike Alabama, Oregon did not have the same type of demand for a state board of health as did Alabama. Alabama constantly was faced with a rash of serious endemic tropical diseases. Oregon was not. Without any serious public health problems, Oregon physicians lacked the most credible argument for licensing. Instead, state Regulars argued about informing patients that their physician lacked a medical degree. There is little evidence to suggest that patients truly cared whether their physician was a medical school graduate. Physicians needed help to pass licensing laws, and circumstances in Oregon were not particularly favorable for licensing supporters.

CHAPTER V

LICENSING PUSH GOES NATIONWIDE

While physicians in Maryland and New York tied together licensing and anti-abortion laws to make medical regulation more palatable to their state legislatures, Illinois physicians focused on creating a board of health that would be responsible for both sanitation and medical regulation throughout Illinois. While debating a resolution that asked "members of the State Medical Society" to lobby "the representatives from this district" to create a State Board of Health, the Jersey County Medical Society of Illinois advocated the creation of a state board of health with broad responsibilities. They wanted to create a state agency that could limit the ability of former patients to file malpractice suits, require courts to pay physicians for medical testimony, regulate pharmacists, and establish a state board of medical examiners. The Jersey County Society clearly sought to overcome any lingering opposition to medical licensing by pairing it with measures popular with both Regular and Irregular physicians.[115]

The three most prominent medical sects agreed that boards of health were necessary because they advanced sanitation reform. Even many Homeopaths and Eclectics were abstractly in favor of creating state boards of health because they could

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[115] *Transactions of the Twenty-Sixth Anniversary Meeting of the Illinois State Medical Society, 1876* (Chicago, 1876): 255-259, http://books.google.com/ebooks.

ameliorate the lives of their patients, but they deeply mistrusted the Regulars' push for boards of health. Many Irregular physicians understood that generally "the individual does concern himself with the duties of the masses," which made state boards of health essential. These organizations needed broad powers to force citizens to comply with sanitary initiatives. Dr. Tullio Verdi, a Homeopathic member the American Institute of Homeopathy Committee on Legislation, stated that Homeopaths "were hygienists by virtue" of their medical practice and should not "fear boards of health" so as long as Homeopaths and Eclectics were permitted to serve on the boards of health. If Regulars worked with Homeopaths and Eclectics, than they could expect some assistance from their organized Irregular colleagues.[116]

Illinois's Allopathic physicians realized that they were going to have work with Homeopaths and Eclectics if they wanted to pass a licensing bill with teeth. The president of the Illinois State Medical Society argued for this approach in 1876. He demanded that his colleagues work toward the passage of a medical licensing law to protect the public from unqualified practitioners. He also conceded that Eclectic and Homeopathic practitioners were, like Regular physicians, "devoted to their patients and profession."[117] He advocated détente between Regulars and Irregulars in Illinois, and argued that the Medical Society should pass "wise and impartial legislation" which

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[116] *Transactions of the 13th Session of the American Institute of Homeopathy*, Section XIII (Philadelphia, 1877): 59-60 , http://books.google.com/ebooks.

[117] *Transactions of the Twenty-Sixth Anniversary Meeting of the Illinois State Medical Society, 1876* (Chicago, 1876): 196, http://books.google.com/ebooks.

recognized only "well-educated men" but debarred incompetents, "whether Regular or Irregular."[118]

In 1877, the state, county, and district medical societies in Illinois effectively pressured the legislature for action. Illinois did not have any existing sanitation statutes, and the Illinois State Medical Society committee assigned to lobby for the bill found that "the average legislator" knew very little about sanitation. Although the legislature was faced with managing serious economic problems because of a severe, national depression, the legislature did listen to the state's physicians regarding sanitary reform. Additionally, the Regular legislation committee drafted a bill that it believed would successfully "avoid objective criticism and needless opposition."[119] In a departure from his predecessor, the new president of the Illinois State Medical Society, T. D. Fitch, promoted a bill creating a state board of health, but he was skeptical of the bills circulating through the legislature. He stated that he was not "personally satisfied" with them because they were not drafted by the Illinois State Medical Society.[120]

Fitch, along with other members of the Illinois State Medical Society, opposed the proposed bill because the most popular and likely to succeed bill in the state's legislature in 1877 imposed a compromise on the Regulars, Eclectics, and Homeopaths. Regulars in several states were still leery of any laws that required them to collaborate with Homeopaths and Eclectics. There were members of the Regular medical society who still

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[118] *Transactions of the Twenty-Sixth Anniversary Meeting of the Illinois State Medical Society, 1876* (Chicago, 1876): 196, http://books.google.com/ebooks.

[119] *Transactions of the Twenty-Sixth Anniversary Meeting of the Illinois State Medical Society, 1877* (Chicago, 1877): 32-34.

[120] *Transactions of the Twenty-Sixth Anniversary Meeting of the Illinois State Medical Society, 1877* (Chicago, 1877): 28-29.

hoped to use licensing to eliminate Homeopaths and Eclectics despite previous statements by members or officers of the Illinois Regular society. It is understandable that they would have been unwilling to contemplate licensing laws legitimizing Irregular medicine.

Typically, licensing laws needed to be paired with some type of popular medical reform in order to be approved by state legislatures during the 1870s. While New York's physicians initially sought to team it up with strict anti-abortion measures, board of health bills that also licensed Regular, Eclectic, and Homeopathic physicians were much more popular. The legislatures in New York, Alabama, California, and Texas also demonstrated that state legislators were leery of marginalizing any of the major sects. Unlike Regulars who were wary of the bill, Homeopaths broadly favored the proposed law. The law grandfathered in physicians who had already practiced in the state for ten years and required that Homeopaths and Eclectics serve on the board of health. Later, Homeopaths around the country would question unified boards of health, but Illinois's Irregulars were pleased that they were being included.[121]

The most important licensing aspect of the Illinois Board of Health bill was that it gave the board to ability to determine whether a medical school was in "good standing." If the board found that a medical school was not in good standing, graduates of that school would be required to pass an examination instead of being automatically licensed. Therefore, the legislature gave the state board of health the power to evaluate medical schools and to determine whether a school met the board's minimum standards.

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[121] *Transactions of the 35th Session of the American Institute of Homeopathy, 1878* (Philadelphia, 1879): 59-60, http://books.google.com/ebooks.

After the legislature created the Illinois Board of Health, the board sought to develop sectarian neutral criteria to evaluate the quality of medical schools. The addition of Homeopaths and Eclectics on the board of health prevented it from classifying only Regular schools as being in "good standing." In addition to licensing Irregulars, the Illinois law included a provision for licensing midwives. Midwives, like physicians, were licensed after presenting a diploma from a midwifery school in good standing, taking an examination in obstetrics, or demonstrating ten years of continuous practice in Illinois. The Illinois board would eventually license large numbers of midwives. Aside from evaluating medical schools, testing applicants, and licensing midwives, the board also was responsible for creating and enforcing sanitary and quarantine policies. Moreover, the Illinois law sought to centralize all state medical authority under one body, unlike the California and Alabama laws that divided licensing responsibilities.

Soon after the legislature approved the law, the president of the Illinois Medical Society, J. L. White, M.D., sought to allay any fears Regulars or Irregulars had about a unified board. While White was dismayed that the governor decided to install two non-medical persons on the first board, White made an effort to acknowledge the contributions of Homeopathic medicine. White stated that Homeopathy "prov[ed] to the world that a great majority of acute diseases will, unaided, so far as medication is concerned, terminate favorably." White's compliment may be perceived as somewhat backhanded, but many Regulars would never have complimented Homeopathic medicine, much less acknowledge the limitations of the Regular medical practices. Additionally, he acknowledged that the *Boston Medical and Surgical Journal* published an article that

demonstrated that when doctors treated patients without medicine they often had "most happy results."[122] Instead of accusing Homeopaths of practicing medicine fraudulently, he admitted that some of the tenets of Irregular medicine had merits. White's efforts to reduce the rancor between the sects demonstrated that there were Regulars who were willing to work with Homeopaths and Eclectics.

The willingness to cross sectarian lines would be important because the Illinois medical practice act did not just create a system to regulate physicians; the law created a medical board that was responsible for public health, public records, and licensing. By creating the Illinois State Board of Health, the legislature entrusted state medicine to a new quasi-governmental agency. A member of the Illinois Board of Health best delineated the necessity and dangers of state medicine when he wrote that the Illinois Board was "charged with the protection of the health of the people from dangers which are beyond the control of public; just as its functions are derived from necessity and the necessity constitutes their limit; in their exercise, every unnecessary invasion of private right, every unnecessary interference with the perfect freedom of personal action, is a usurpation of power, an unjustifiable trespass upon the liberty of the citizen."[123] The board member argued that state medicine had three separate, but equally important goals: creating well-educated medical corps by casting out "ignorance, pretension,

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[122] J. L. White, M.D., "The President's Annual Address," *Transactions of the Illinois State Medical Society 1878* (1878): 26-29, http://books.google.com/ebooks.

[123] *Annual Report of the State Board Health of Illinois* (1881): 33-34, http://books.google.com/ebooks.

incompetence, and all manner of quackery," creating and enforcing sanitary regulations, and enforcing quarantines.[124]

While the rationale for investing the state with sanitation and quarantine powers may have been "obvious and undisputed" to many people, regulating who could practice medicine was much less obvious. Today it is assumed that the states should license physicians, but this was not as readily apparent to nineteenth-century Americans. They would have agreed that enforcing quarantines or sanitary regulations was a proper role for government because it was the only body that had the authority and power to handle such actions, but licensing was different. By licensing physicians, the state was imposing regulations on the operation of the free market. Medical licensing also does not have the same observable and immediate effect on public heath as sanitation or quarantines. Because most states possessed provisions that grandfathered older physicians it would take some time before all the physicians of a state were vetted under the law.

Instead of following Illinois's more centralized model, the Kansas legislature and governor in 1879 approved a medical licensing act (modeled after the California licensing act passed in 1876), which delegated state authority to license doctors to the Kansas Medical Society and the state's Eclectic and Homeopathic medical societies. Each society appointed its members to each of their respective boards of examiners. The act also permitted each sect to regulate its own members, without intrusion by Kansas' state government. Additionally, physicians paid licensing fees directly to their respective societies. Some physicians were disappointed with the law because licensing applicants

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[124] *Annual Report of the State Board Health of Illinois* (1881): 35.

could petition all three of the examining boards for a license. After one board declared an applicant incompetent, the applicant could simply reapply to another board.[125] The bill encouraged board-shopping by potential applicants. There also would have been a perverse interest for the medical societies to license as many people as possible because they could amass more fees for their society.

When the Regular members of the Kansas medical board attempted to exercise their authority, the Kansas attorney general challenged the constitutionality of the act and filed a suit in *quo warranto* against board members appointed by the Kansas Medical Society. The suit asked the court to determine whether the board members had the authority to act under the 1879 statute. The attorney general argued that the licensing law violated the Kansas Constitution because it granted state powers to the Kansas Medical Society, a private corporate entity. The court agreed that Kansas was not entitled to delegate these powers to the Society and completely invalidated the law.[126] Soon afterward, Kansas reverted back to its original registration law. Like physicians in Texas, Kanas physicians would have to wait more than twenty years for the medical community to convince the legislature to pass a more stringent licensing statute.

The Kansas ruling is unique because several states relied on their medical societies to administer their medical practice acts, but only in Kansas did a court bar a state medical society from administering a licensing law. The chief difference was that the Kansas Supreme Court relied on the state's constitution to justify its ruling. The law was not invalidated under the federal constitution and had little precedential value for

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[125] *Annual Report of Illinois State Board of Health* (1883): 71, http://books.google.com/ebooks.

[126] *Kansas v. Stormont, et al.*, 24 Kan. 686, 695-699 (1885).

anyone who sought to challenge other state laws. If the Kansas Supreme Court issued a broader ruling based on the United States Constitution, then it may have complicated the legal discussion surrounding licensing, but because the justices relied on state law their ruling was not particularly compelling or influential.

New Jersey also avoided the sectarian disputes entirely by passing a medical registration act. Unlike the Illinois medical licensing law, the New Jersey law did not allow physicians to regulate themselves. Instead, county clerks registered anyone who presented a diploma from any medical college. Unfortunately, county clerks had little incentive or ability "to discriminate between fraudulent and legal diplomas, and cannot, or do not, take the trouble to tell a medical from a literary or a dental diploma…" A clerk even registered an individual who presented a document in Russian and claimed that it was a medical school diploma. The clerk was not troubled that he could not read the diploma and simply registered the individual as a physician. If clerks would register diplomas in Russian, it is unlikely that they took any time to distinguish among Eclectic, Homeopathic, or Allopathic schools of medicine.[127] While several states passed analogous medical registration acts to New Jersey, they were mostly ineffective. Ultimately, states that employed medical registration acts were indistinguishable from completely unregulated states.

In 1879, the Medical Society of Oregon took a new tact in its quest for licensing, and its Committee on Medical Education issued a report arguing that there were far too many physicians in the United States and that physicians could not make a living because

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[127] *Annual Report of the State Board of Medical Examiners of New Jersey*, (1891): 5-6, http://books.google.com/ebooks.

of increased competition. Not surprisingly, the Committee attacked the notion that the market should play any role in determining the merits of one doctor over another. The Committee thought the public was essentially incapable of distinguishing between an educated and an incompetent physician. The Committee expressed concern that medical schools were quickly churning out "unscrupulous charlatans."[128] The society's president admitted that the lowest standards at European medical schools for attaining medical degrees were higher than the best standards in the United States.[129]

Concerned that even a medical degree no longer proved minimal competence, the MSO's committee asked for the legislature to help to purge the ranks of "disreputable and ignorant pretenders." The Committee stated that the legislature should allow the MSO to form county Examining Boards. These boards would examine every individual and compile a list of "worthy and well" physicians, which they would distribute to local newspapers. The committee shied from attempting to pass governmental regulations prohibiting quacks from practicing because it believed they would be unenforceable; instead it was interested in granting these local boards limited private powers to regulate medicine.[130]

The ineffectiveness of medical registration acts pushed many states toward adopting one of the medical licensing models. The Illinois practice act emerged as the most influential licensing law of the 1870s and 1880s. It served as a model statute for

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[128] "Committee on Medical Education Report," *Proceedings of the Sixth Annual Meeting of the Medical Society of Oregon* 6 (1879): 63, 66.

[129] H. Carpenter, "Address," *Proceedings Sixth Annual Meeting* (1879): 34.

[130] *Proceedings Sixth Meeting* (1879): 66, 70-71.

numerous states because it created an acceptable compromise for both organized Regulars and Irregulars. Illinois also provided advocates of medical licensing a model for how to enforce medical licensing laws. The Illinois board decision to revoke the licenses of doctors it believed behaved unprofessionally was appealing to organized physicians who were comfortable with medical societies that disciplined their members. The Illinois medical board adopted principles of professionalism from the organized Regular and Irregular medical societies. For years, state and local medical societies expelled members who violated their codes of ethics. The Illinois board sought to enact a code to those used by state medical associations and enforce the principles that had governed these societies for years.

Instead of targeting any specific medical sect, the Illinois board first focused on eliminating incompetents, regardless of their sectarian affiliation. Many of the Illinois board's enforcement actions focused on Chicago, which was overrun by scam artists and un-licensable medical practitioners. Their efforts successfully reduced the total number of physicians in the state and dramatically increased the percentage of physicians who attended medical school. The Illinois law not only evaluated medical schools, but required an examination of both non-graduates and graduates of schools not in good standing. The Illinois Board of Health encouraged most medical schools to change their curriculum and adopt the minimum standards advocated by the board. The Illinois board determined that the state's licensing law allowed it to actively prosecute unlicensed physicians or licensed physicians who violated the board's code of ethics. Despite this claim, it is not clear that the medical act gave the board this broad authority.

By the end of the 1870s, eighteen states had passed some type of licensing law. Of these states, thirteen passed simple registration laws, while the remaining five passed laws that created examining boards. The registration laws would prove to be ineffective and essentially useless over the next decade. All of those states would soon be forced to rethink their legislation schemes, but in many cases, it would take years to secure new licensing. Medical societies had lobbied effectively for licensing laws by tying them to board of health or anti-abortion laws. Ironically, after states passed sanitation and anti-abortion laws, it became difficult for medical societies to revisit medical legislation. California physicians were lucky that their board of health and licensing laws were passed in quick succession. In many other states, these registration laws lasted for as many as twenty years. Massachusetts, for example, was the first state to create a state board of health 1869, but Massachusetts Regulars did not secure a licensing law until 1894.[131]

Ultimately, it is also ironic that physicians successfully linked medical licensing to sanitation reform. Historian William Rothstein argued that "[p]ublic health programs...were of little interest to most nineteenth-century physicians." He claimed that physicians in urban areas "opposed compulsory reporting of contagious diseases" and did not see eye to eye with local public health authorities. Physicians often did not have direct relationships with public health authorities, and they "ignor[ed] many aspects of public health." Rothstein attributes physician disinterest with public health and sanitation to the fact that most of their clients lived in "private homes who did not encounter the

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[131] Alexander Wilder, M.D., *History of Medicine: A Brief Outline of Medical History and Sects of Physicians, from the Earliest Historical Period*, (New England Eclectic Publishing, 1901), 792-93.

sanitary problems of tenement residents." Rothstein's point is valid. Sanitation and public health were not part of physicians' medical school training and they were not tested on these fields. If physicians believed that public health was relevant to the practice of medicine, they would have made an effort to ensure that new physicians had at lest a rudimentary understanding of sanitation and public health issues. The notion that states needed licensing to ensure that the enforcement of public health was a disingenuous ruse to make licensing more appealing to wary legislatures.[132]

Alabama, Texas, California, and Illinois passed laws that created governmental licensing that had the potential not only to restrict the number of physicians in the state, but eliminated licensed practitioners that examining boards found unworthy. In other states such as New York, Kansas, and Texas, weak registration laws were passed after physicians failed to secure operative licensing laws. These laws were both unenforceable or ridiculously easy to circumvent. Registration laws were not enforced strictly because most of those statutes failed to state explicitly who was responsible for enforcing them. Alternatively, licensing law created quasi-public bodies that, if adequately funded, could administer their laws more robustly than the legislatures ever even intended. While in the 1870s medical societies sought to pass any licensing law, the 1880s would be defined by the states that implemented and enforced their statutes most effectively.

Advocates for licensing understood the public discomfort with overt governmental regulation of medicine. Dr. Horace Wardner, president of the Illinois State

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[132] Rothstein, *American Physicians in the Nineteenth-Century*, 312-313.

Board of Health, wrote an article for Illinois State Board of Health's 1880 annual report where he outlined both the necessity and potential dangers of government regulation. He stated: "State medicine is charged with the protection of the health of the people from dangers which are beyond control of private effort its just functions are derived from necessity, and the necessity constitutes their limit; in their exercise every unnecessary invasion of private right, every unnecessary interference with the perfect freedom of personal action, is a usurpation of power, an unjustifiable trespass upon the liberty of the citizen." Wardner believed that the Illinois State Board of Health was not intruding on individual liberty and was committed to determining whether a physician was "properly qualified to discharge his functions intelligently and with skill."[133]

The regulatory systems designed by medical societies in states such as Illinois demonstrated that legislatures were concerned about direct state action. Instead of creating official government agencies, legislatures passed laws that mixed self-regulation and state powers. In many situations the enforcement powers built into the medical licensing laws mimicked discipline systems already employed by state medical societies. The state boards were essentially medical societies augmented by state police powers. If private medical societies could not effectively enforce discipline on their own, it was only natural that they would want to co-opt state police powers to reshape the medical landscape. Instead of relying on the vagaries of the free market to regulate medicine, physicians wanted to rely on quasi-governmental medical boards to reduce competition and protect patients.

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[133] Horace Warder, M.D. "State Medicine in Illinois." *Third Annual Report of the State Board of Health of Illinois with the Official Register of Physicians and Midwives: 1880* (Springfield, Illinois, H.W. Rokker State Printer and Binder, 1881), http://books.google.com/ebooks.

CHAPTER VI

THE ECLECTIC DILEMMA

As states adopted medical licensing and registration laws during the 1870s, Irregular physicians faced a dilemma. Irregulars understood that Regulars originally advocated on behalf of licensing as way to eliminate Irregulars, but many of them agreed with the overall goals of licensing. The proliferation of unqualified medical practitioners concerned many Homeopaths and Eclectics. Eclectics were especially apprehensive because fraudulent doctors often passed themselves off as Eclectics. This further marginalized the weakest and smallest major medical sect. Eclectics were disquieted that Eclecticism's affiliation with outright frauds could undermine their standing as physicians.

Unlike Homeopaths, Eclectics did not practice a unified system of medicine. Eclectics were composed of a mixture of lonely local practitioners, botanic physicians, reformed Regulars, and graduates of Eclectic medical schools. The very name "Eclectics" accurately described the differing medical practices of its members. Sometimes, Eclectics in the National Eclectic Medical Association (NEMA) did not even appear to agree on who was a legitimate Eclectic physician. While, Homeopaths could draw on their unified medical system to assemble a more coherent and coordinated

approach to medical licensing. Eclectics lacked this cohesion when medical licensing became a defining issue. Homeopaths demonstrated their unity and influence when they effectively blocked medical licensing in two of their strongholds, New York and Massachusetts, until the 1890s.[134] Homeopaths' influence was derived not only from their larger numbers but also the nature of their patients. Urban and wealthy Homeopathic patients helped their physicians lobby in state legislatures on their behalf.

In contrast, Eclectics were in more precarious position. While they lacked the power to block legislation, they worked with Regulars and Homeopaths to help craft potentially beneficial medical licensing laws. Many Eclectics understood that medical licensing could improve Eclecticism's standing in the medical community by eliminating frauds who hid under their moniker. Eclectics faced a stark choice: cooperate with Regulars to draft helpful licensing or attempt to block licensing and risk further marginalization. Eclectics were increasingly torn on how to proceed with medical licensing.

Even though Homeopaths had more influence in state legislatures than Eclectics, they were faced with many of the same choices. In states where Homeopaths could kill licensing, they did, but in most states they were forced to compromise with Regulars on licensing. In many ways, the debate within Eclecticism mirrored the debate in Homeopathy, but the Eclectic debate is noteworthy because leaders within the movement publicly attacked each other in their battle over licensing.

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[134] Martin Kaufman, *Homeopathy in America: The Rise and Fall of a Medical Heresy*, (Johns Hopkins Press, 1971), 145.

The passage and implementation of the Illinois Medical Practice Act created a major rift in the leadership of the National Eclectic Medical Association over the issue of medical licensing. While many Eclectic physicians were concerned with licensing in other states, in Illinois the Eclectics worked with Regulars to create the Illinois Board of Health and establish medical licensing in the state. Eclectics also served on the joint mixed State of Board of Health. Dr. Anson Clark was not only the Eclectic representative on the Illinois Board of Health, but the editor of a leading Chicago Eclectic journal and a future president of NEMA. The willingness of Illinois' Eclectics such as Clark to align themselves with the state's Regular physicians rankled the older members of NEMA. These older members were much less willing to cooperate with Regulars on either regulation or public health then younger physicians such as Clark. Clark's actions angered many of the older members because he openly advocated for a unified medical board instead of establishing separate boards for each of the sects.

NEMA had focused on combating the new wave of licensing that began in the 1860s. Throughout that decade, unsuccessful licensing bills popped up all over the country. During the 1866-67 legislative session, for example, a bill was introduced that would require physicians to be examined by the Ohio State Medical Society and be graduates of a medical school. Ohio was the heart of Eclectic medicine, and this bill represented a serious challenge to Eclecticism.[135] It became increasingly clear to organized Eclectics that they would have to combat potentially hostile legislation across the country. The wave of medical licensing laws in the 1870s demonstrated that their

[135] *Transactions of NEMA 1869-70* (1872): 13, http://books.google.com/ebooks

concern was legitimate. However, it was the passage and implementation of the Illinois Medical Practice Act that forced open a crack in NEMA's leadership and led to an ongoing debate over licensing within the group for the next decade.

The passage of the Illinois law forced NEMA grapple with wave of new laws modeled after the Illinois law. Unlike the American Medical Association, NEMA's response to medical regulation was hampered by its membership's disagreement about what constituted an Eclectic physician was and its members' widely divergent views on medical regulation. The debate over medical regulation exposed the fissures within the Eclectic community. The older physicians, who cobbled together the Thomsonians, disgruntled Regulars, and medical reformers to give birth to Eclectic medicine in 1830s and 1840s, were a discordant group and predisposed to oppose any type governmental regulation. These medical reformers had fought hard to eliminate medical regulation in the first of half of the century. They believed that state regulations discriminated, marginalized, and limited their practice rights. They viewed Regulars with suspicion and distrusted their motives in advocating for medical licensing.

The younger generation of Eclectic physicians was not as hostile to medical regulation despite being trained by the original Eclectics. Unlike their older colleagues, many of them were Eclectic medical school graduates. They had very little in common with the illiterate Thomsonians who aligned themselves with Eclectics in opposition to medical regulation in the first half of the century. This younger generation was more concerned with legitimizing Eclecticism than expanding its definition to include uneducated and marginal medical practitioners. The second generation of Eclectic

physicians believed that they had to purge their uneducated colleagues from their ranks to legitimize Eclecticism. Instead of fighting regulation, they often worked with Regulars to pass nonpartisan legislation.

Eclectics realized that Regulars needed Irregular support to pass licensing laws, and they knew that discriminatory legislation often failed in state legislatures. Between 1870 and 1880, Eclectics reported to NEMA that state legislatures were unwilling to discriminate against Irregulars. A Nebraska report stated that its legislatures would not pass discriminatory legislation. Massachusetts, Ohio, and Wisconsin successfully defeated bills proposed by the American Social Science Association designed to consolidate control under the old-school medical societies. Even with these hopeful signs, medical licensing made Eclectics anxious.

The debate over licensing within the NEMA sparked an outright war between two of its most prominent members: Dr. John King and Dr. Anson Clark. While both physicians sought to downplay the severity of the clash, it is clear from their rhetoric that their battle represented a serious dilemma for NEMA. The tenor of the debate suggested that both physicians believed they were fighting for the soul of the Eclectic movement. King and Clark attacked each other mercilessly to shape its policy. King opposed any type of medical regulation, while Clark worked on the Illinois Board of Health with Regular physicians to regulate the practice of medicine in the state. This heated debate created confusion with NEMA and spawned an awkward and ambiguous policy towards medical regulation. Instead of presenting a united front and crafting a coherent policy, NEMA muddled its stance on medical licensing. NEMA sent mixed messages and left

local and state societies to develop their own policies on licensing. Whether NEMA could influence or shape the direction of medical legislation is unclear, but because of its befuddled position, it abdicated any leadership position it might have played in this nationwide medical debate when these laws were first being pushed through state legislatures.

John King was a pioneer in Eclectic medicine and one of its most ardent devotees. In 1838, he graduated from the Reform Medical School of New York founded by Wooster Beach (1794-1868) in 1827. As a graduate of the Reform Medical School, King ensured that he would be ostracized by the medical establishment as a "charlatan and quack."[136] After graduation, he traveled extensively and settled in Kentucky where he practiced medicine until 1849. He helped organize the first National Convention of Eclectic Physicians, and the attendees elected him secretary at the convention. Between 1849 and 1851 he served as the chairman of *Materia Medica* at the Memphis Institute. In 1851, King joined the faculty at the recently founded Eclectic Medical Institute of Cincinnati (EMI) and taught there for the next four decades. During his tenure, EMI became the leading Eclectic medical school in the country. King established himself as one of the leading writers of Eclectic textbooks, such as the *Eclectic Dispensatory*, and published most of his books on Eclectic medicine while at EMI. Eclectic physicians throughout the nineteenth century extensively used King's textbooks in their medical schools. He joined the second iteration of NEMA in 1872 and served as its president from 1878-1879.

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[136] *Eclectic Medical Journal, 1894*, Vol. LIV, No. 2: 57-8, http://books.google.com/ebooks.

Anson Clark was born in Massachusetts in 1836, but he moved to Cook County, Illinois, when he was five years old. He graduated from EMI in 1861, and likely attended King's classes as a student. During the Civil War, he worked as a surgeon in the 127th Illinois Volunteer Infantry. After the war, Clark moved back to Chicago and in 1868, became a member of the faculty and later its dean at the Bennett College of Eclectic Medicine and Surgery. In addition to working at Bennett, he served as an editor at the *Chicago Medical Times* and a member of the Illinois General Assembly in 1871. Starting in 1877, Clark served on the Illinois Board of Health. During his fourteen years on the board, he served as both its treasurer and secretary. As member of the Illinois board, he was responsible for regulating the practice of medicine under the 1877 and 1887 Medical Practice Acts. Additionally, Clark served as the president of NEMA in 1880-1881 and the Illinois State Eclectic Medical Society in 1898.[137] These two physicians were from different generations of Eclectics and they represented NEMA's split on medical licensing.

In 1873, NEMA began discussing the growing push for medical licensing in places such as Texas. The organization passed a resolution for requiring "every person" hoping to practice "medicine, surgery or obstetrics" to pass a comprehensive examination covering "the fundamental sciences, comprehending a course of study necessary for the acquirement of a full knowledge of the science of medicine in all its branches." NEMA

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[137] "The Eclectic News," *The Eclectic Medical Journal 1898* (July, 1898): 449, http://books.google.com/ebooks; Harvey Wickes Felter, *History of the Eclectic Medical Institute Cincinnati, Ohio: 1845-1902*, (Alumnal Association of the Eclectic Medical Institute, Cincinnati, 1902), 177, http://books.google.com/ebooks; H. G. Cutler, ed., *Physicians and Surgeons of the West, Illinois Edition*, (American Biographical Publishing Company, 1900), 238-240, http://books.google.com/ebooks.

believed that an examination was necessary because the general public could not determine "the scientific attainments of medical practitioners" as medical diplomas were so "freely granted" they had ceased to be "evidence of the scientific attainments" of their holders.[138] Additionally, Eclectics could pass this exam as easily as Regulars and Homeopaths. This resolution went far beyond the goals of the Illinois Medical Practice Act. It required an examination of non-graduates and graduates of medical schools that were not in good standing with the board. The NEMA resolution would have required all physicians to take the medical examination. This resolution is surprising because so many Eclectics were skeptical of medical licensing.

King, however, was not just skeptical about medical licensing; he was adamantly opposed to any medical licensing regulations. In his presidential address of 1879 at the NEMA conference in Cleveland, he attacked medical regulation generally. King argued that like religion, medicine did not require county, state, or federal regulation. Instead of outsourcing medical licensing to the state, each school of medicine should be responsible for regulating themselves. King believed that these laws did not protect the public and that they were an insult to the intelligence of the American people. King stated that the proposed regulatory schemes would not advance medicine or science; instead they were simply the work of "bigoted scheming minds" that sought to elevate their own medical sect. King was most concerned with the efforts of Regular physicians to regulate medicine because he considered their primary goal was to marginalize Eclectic medicine. Instead of elevating the medical profession, he believed that when the state legislatures

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[138] *Transactions of the National Eclectic Medical Association for the years 1879-1880* (1880): 14-15, http://books.google.com/ebooks.

passed medical licensing and registration acts they violated the "spirit of justice" in the United States Constitution.[139]

Not only did medical regulation undermine Eclectic medicine, King felt that Regulars would continue to discriminate and torment Irregular practitioners. Even after Eclectic physicians had complied with the Regulars' "legal enactments," Regulars still would refuse to consult with Irregulars and refer to Eclectics as "ignorant conceited quack[s]." He could not imagine that Regulars would ever stop maligning and persecuting Eclectics, even if Eclectic physicians demonstrated that they were qualified for medical licenses. King held that the Regulars did not seek to protect humanity from charlatanism, but instead sought to legislate the Eclectics out of existence. Thirty years of discrimination by Regulars convinced King that Regulars could not be trusted to treat Eclectics fairly. A state report issued by the New York delegation at the 1879 convention supported King's claims by emphasizing the historical efforts made by Regulars to degrade medical reformers. The report remarked that Regular physicians in the first half of the century secured medical regulations that criminalized medical practice for Irregular physicians. Additionally, Regulars were accused of actively seeking to drive Irregulars from the medical practice by encouraging former Irregular patients to sue their physicians.[140]

The actions of the Illinois State Board of Health in 1879 against King's own medical college, Eclectic Medical Institute (EMI), reinforced his belief that medical regulation was simply a Trojan horse to help Regulars destroy Eclecticism. Fifteen days

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[139] *Transactions of NEMA 1879-1880*: 14-15.

[140] *Transactions of NEMA 1879-80*: 91-92.

before the 1879 NEMA conference, the Illinois State Board of Health determined that EMI was not a medical school in "good standing." The Illinois Board of Health had the power to determine whether a medical school was in "good standing." Graduates of medical schools in good standing did not have to take medical examination to practice medicine in Illinois. According to the board, EMI, the most prominent Eclectic medical school in Illinois, was unacceptable because it insisted on only "giving two full courses of lectures in one year." At the beginning of the board's existence, instead of evaluating each school individually, it sought to apply rather mechanistic standards to evaluate medical schools. In 1878, the board determined that any medical school that had "two graduating courses in one year" was not in good standing. While the board's criterion was not particularly sophisticated, it was clear-cut. The board could use the medical schools' own literature to determine whether it satisfied their requirements. This criterion made it possible to cheaply evaluate hundreds of medical schools in the North America and Europe.

Clark not only served as a member of the board that decertified EMI, but he explicitly approved of the board's action. A *Chicago Medical Times* editorial by Clark in July 1879 stated that the board was simply "striving to make medical education more thorough, more comprehensive and more fully in accord with the progressive spirit of the times."[141] The editorial chastised the "belligerence" of EMI and asked for the school to "gracefully yield" to the board's demands. The editorial went as far as to suggest that "students and preceptors to take note of the existing states of affairs."[142] Yet, Clark was

[141] *The Chicago Medical Times, 1879*, Vol. XI, No. 4: 181-182, http://books.google.com/ebooks.

[142] *The Chicago Medical Times, 1879*, Vol. XI, No. 4: 181-182, http://books.google.com/ebooks.

one of only two editors listed on the *Chicago Medical Times* byline. Therefore, he probably wrote the editorial and even if he did not, he agreed with this editorial.

Illinois board's action against EMI most likely was not motivated by animus to Eclecticism, and Clark's support for the board undermined King's claim. Also, the mechanistic nature of the board's criteria would have complicated any attempts to punish only Eclectic schools. The board also asked numerous Allopathic medical schools to comply with the board's criteria. Still, the editorial's suggestion that "students and preceptors" should take note of the current situation did imply another reason for Clark's strong support of the action against EMI. While Clark simply may have agreed with the board's position as an attempt to elevate medical education, he also may have had a financial stake in decertifying EMI. As a faculty member of the competing Bennett Medical College in Chicago, he might have benefited by steering students to Bennett.

Despite King's attack against medical licensing, various state Eclectic medical organizations advocated on behalf of regulation in their legislatures. The Nebraska delegation even stated that it was concerned that the state might pass medical regulations that were "too liberal." It sought licensing that not only protected the public from harm, but advanced the reputation of Eclectic medicine. The Nebraska delegation also was concerned that charlatans often "assume[d] the name Eclectic" when they practiced medicine.[143] The Kansas delegation conjectured that passage of its state law enhanced the reputation of Eclectic physicians and "confidently believed" that it would spur growth in the state organization. Instead of aiding the Regular school, the Kansas report

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[143] *Transactions NEMA 1879-80* (1880): 86.

indicated that medical regulation was "a great discomfiture" to them.[144] Other Eclectics clearly were willing to forget past actions by Regulars and compromise with them if they could secure non-discriminatory legislation.

During the next convention in Chicago in 1880, several members raised legitimate concerns about the reputation of Eclectic medical education. In 1880, NEMA became aware that John Buchanan, one of the ringleaders of a large and notorious diploma mill in Philadelphia, listed serving as the president of NEMA as one of his chief credentials. Even though his statements and actions were fraudulent, NEMA justifiably was concerned that Buchanan's claims could undermine faith in NEMA. As a direct consequence of Buchanan and other Philadelphia entrepreneurs' trafficking in medical degrees, the Pennsylvania legislature passed a medical registration act two years later designed to end this unsavory practice. Benjamin Lee, a prominent Regular physician from Philadelphia, argued that act had at least "temporarily" closed the most egregious diploma mills.[145]

Buchanan's fraud encouraged members to discuss how diploma sales could be halted. Members proposed a resolution at the convention to support the creation of state medical boards that would end the traffic of fake diplomas and medicines. The proposal dictated that their support was contingent on the boards' beginning to be governed by the major medical sects. During Dr. Milbrey Green's address to the convention in 1880, he emphasized that since 1873, NEMA supported regulations designed to prevent

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[144] *Transactions of NEMA 1879-80* (1880): 77-78.

[145] *Transactions of the American Medical Association 1882* (1882): 385, http://books.google.com/ebooks.

"incompetent men" from receiving diplomas. Green acknowledged that the country had been flooded with fraudulent diplomas from Allopathic, Homeopathic, and Eclectic schools of medicine. He stated that it was critical for all physicians to unite against these practices because NEMA and other state medical societies could not eliminate these problems on their own.[146] Green's statement made it clear that NEMA needed to support some type of state legislation to eliminate diploma mills. He also underlined the threat they posed to Eclectic medicine. In Wisconsin, the state Eclectic society agreed with Green, and helped pass a medical licensing act that required physicians to possess a medical school diploma. The Wisconsin report stated that Eclectics did not want any "half-breed Eclectics here and shall be glad to slough them off."[147]

Other Eclectic physicians argued that medical regulation not only might eliminate fraudulent practitioners but improve relations between various medical sects. The report from Anson's Illinois delegation stated that medical regulation in the state thawed relations among the "Eclectic, Old-School or Homeopathic" physicians. Instead of discrimination, the report stated that Eclectics no longer reported "unpleasant encounters" with other Regular physicians.[148] When Regulars served side by side with Eclectics and Homeopaths, it made it more difficult for Regulars to demonize them. The Illinois report suggested a brighter future for Eclectics if they were willing to compromise their views on medical regulation.

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[146] *Transactions of NEMA* 1879-80 (1880): 2-63.

[147] *Transactions of NEMA* 1881-82 (1882): 82-83.

[148] *Transactions of NEMA* 1880-81 (1881): 8.

Whether licensing immediately ameliorated relations between Regulars and Irregulars is debatable, but mixed licensing boards gave these physicians an opportunity to meet each other as colleagues and equals. Clark stated that he did not feel threatened by the Regular physicians he worked with on the board. Where King saw enemies, Clark recognized physicians who were quite similar to himself. They were medical school graduates, who were deeply involved with medical education, active in their medical societies, and published in medical journals. These values and goals were shared also by organized, educated Eclectics and Homeopaths.

While medical licensing was not necessarily a *fait accompli* in 1880, it was becoming clear that state legislatures were becoming more inclined to pass these regulations especially if they were tied to sanitation reform. As Eclectics continued to debate the merits of licensing, the crawl toward nationwide licensing continued in the 1880s. While the 1870s was defined by these early efforts to pass any type of medical practice acts, in the 1880s, physicians, medical societies, and the newly created medical licensing boards often sought both to implement these laws and strengthen the newly created medical regulations. In states where legislatures passed registration laws, medical societies immediately attacked these regulations as ineffective and useless. Additionally, after tying together boards of health and medical licensing, Regulars created a strong argument in favor of licensing and expanding their power. Doctors effectively had turned medical licensing from an economic to a public health issue.

CHAPTER VII

STARTING FROM SCRATCH

This chapter includes material that was originally published elsewhere:

Sandvick, Clinton, "Enforcing Medical Licensing in Illinois: 1877-1890" *Yale Journal of Biology and Medicine* June 2009; 82(2).

The material is republished here with the explicit permission of the *Yale Journal of Biology and Medicine*.

Medical licensing represented a fundamental change for physicians. Instead of allowing the free market to determine the best and most successful, physicians coalesced around the idea that consumers were not capable of making informed health care decisions on their own. For Regulars, the success of Eclectic and especially Homeopathic medicine demonstrated to them that patients could not tell the difference between good doctors and frauds. Organized, educated Eclectic and Homeopaths also believed that licensing represented an opportunity to legitimize themselves to the public and their Regular competitors. The debate within the National Eclectic Medical Association demonstrated that younger organized Eclectics believed they would benefit from licensing. Both Homeopaths and Eclectic were deeply concerned because of the endless parade of frauds, incompetents and charlatans who called themselves Homeopaths and Eclectics who undermined the medical systems that they valued.

While organized, educated Homeopathic, Eclectic, and Regular physicians supported licensing, large numbers of unorganized physicians still opposed any

regulation. For the self-taught, isolated, immigrant, poorly educated, or more marginal doctors (Regular and Irregular), licensing represented a serious threat to their livelihoods. They were concerned that organized physicians sought to eliminate them from the practice of medicine through medical licensing.

Aside from opposition from physicians, these emerging new quasi-governmental boards faced numerous challenges when they began operation. Most of these new organizations were poorly funded, lacked infrastructure and encountered immediate opposition. Many doctors were concerned that they never would be able to pass any licensing standards and had strong incentives to quickly challenge these laws. Unsurprisingly, these laws would face numerous and continuous legal assaults for the next thirty years.

Three states, Alabama, Illinois and California, created three fundamentally different licensing schemes. These laws passed early in this process and became different paradigms for other states to follow. The legislature in Alabama passed a decentralized state law that relied on local medical societies to manage medical licensing. In some ways this approach made sense. The local medical societies, unlike the state association, would have a better idea of what was happening in their county. Potentially, these societies would be better able to adapt to local circumstances. On the other hand, Alabama was hampered because many counties did not have local societies. Additionally, most local societies had few resources to do anything much less manage the new law. In Illinois, the legislature created a centralized board. The Illinois Board of Health instantly sought to expand its powers beyond those granted in its founding

legislation by enforcing ethics rules. The Illinois board consciously sought to serve as a national model for licensing. The California legislature formed three separate boards for each of the largest medical sects: Regulars, Eclectics, and Homeopaths. The split boards were created to prevent undue pressure on Irregulars and also some Regulars, as it was deeply concerned that a unified board would violate the American Medical Association's ethics rule.

All of the newly created state boards faced numerous problems trying to get their organizations off the ground. Most of the boards relied on fees collected from their licensees to run the organizations but revenues often were barely enough to keep the organizations functional. Additionally, the licensing boards were poorly planned experiments. Often, the state legislatures passed licensing laws that were so poorly drafted that courts consistently nullified portions of them. In some states, it was not clear who was ultimately responsible for enforcing the laws. In others, legal enforcement was farmed out to private attorneys. Physicians often did not even agree on what type of responsibility these boards should have.

Each variation of medical licensing included advantages and disadvantages specific to its construction. Perhaps the most unique system was the county control model passed by the Alabama legislature. The Medical Association of the State of Alabama (hereinafter MASA) convinced the legislature to pass a decentralized medical licensing bill that operated differently from other states. Alabama did not centralize control of the medical board at the state level but instead relied on local medical societies to test and license its physicians. While most states created new quasi-governmental

bodies to administer the law, Alabama outsourced overall management of the law to the largest existing Regular medical society. While MASA was licensing's governing body, it had very little control over the county societies. Additionally, the state board of health, which was approved at the same time, did not have any control over licensing. The county medical societies had enormous amounts of leeway in both licensing physicians and enforcing the law. Perhaps this statute is unsurprising for a former Confederate state, but the legislature's unwillingness to consolidate control with a centralized board of health put the lion's share of responsibilities on poorly funded or nonexistent Regular county medical societies.

By 1880, Alabama's medical association began administering the state's medical practice act. That year, MASA contacted county probate judges and certified that county associations (if the county had an existing society) were now authorized to license physicians and enforce the medical practice act. MASA did conduct a small number of licensing exams (not all counties had county medical societies), but the county societies were responsible for licensing most physicians in their areas. While MASA determined "the standard of qualifications required of persons to practice medicine" the county boards were ultimately responsible in implementing their standards at the county level. This would be an extraordinary source of frustration for MASA in the coming decades. By tasking county medical societies with the primary authority to license physicians, MASA was never convinced that its guidelines were being followed.[149]

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[149] *Transactions of the Medical Association for the State of Alabama*, 1880: 97-101, http://books.google.com/ebooks.

In addition to managing the law, the Alabama State Board of Medical Examiners conducted ten medical examinations for licenses during its first year of operation. The state board conducted exams of physicians whose counties did not have licensing boards. Even though eight of the ten applicants previously practiced medicine in Alabama, only one applicant passed the board's examination. To protect the reputations of the unsuccessful applicants, the board did not publish their names. Later, the state board would abandon this policy and publish the names of all applicants who applied for a license within the state. The state board also bemoaned the fact that numerous applicants had complained that they were "too poor to afford the expense of medical schools" and pleaded with the board to sympathize with their problems. Despite this, the board ignored the applicants' pleas because it had a sacred duty as "faithful officers of the state" to protect the medical profession. Additionally, some of the failing applicants already were eligible to practice in the state due to their previous experience, but lacked medical degrees and sat for the state exam. Even though they were not required to successfully complete the exam, they wanted to pass the test to legitimize themselves to their patients.[150]

As soon as county medical associations were vested with their new powers, they immediately began licensing existing physicians and prosecuting unlicensed doctors. MASA's Board of Censors noted so-called "peripatetic practitioners" as a group that typically declined to be examined by the county boards. When county boards learned of unlicensed "peripatetic physicians," they quickly instituted legal proceedings against the

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[150] *Transactions of MASA*, 1880: 108-110, http://books.google.com/ebooks.

individuals. Instead of fighting the boards, the Board of Censors stated that many of the physicians simply decided to leave the state. The board cited two specific cases. In one instance, a "traveling occultist [sic]" from Atlanta distributed handbills around Barbour County describing his medical skills. While the "occultist" possessed a medical degree from a Baltimore school of medicine, he was not a resident of Barbour County or Alabama. The county board refused to examine the occultist and commenced legal proceedings against him after he treated several patients in the county. The occultist then traveled to another county where the county board threatened prosecution. Finally, he traveled to Montgomery and asked the state board to examine him. He failed the test and was forced to move back to Atlanta. Another physician, Dr. William Clark, challenged the law after he was indicted by a grand jury and tried by the City Court of Montgomery for practicing medicine without a license. While the court quashed the indictment (due to a technical problem), the court upheld the law and held Dr. Clark over on a $100 bond, because the court believed that he violated the medical practice act.[151]

By 1881, more than forty medical societies had been created in Alabama to administer the medical practice act -- up from seventeen in 1870. Unsurprisingly, these medical societies were not created equal. The state board complained that several of the societies were "defective in discipline and in professional and public spirit." Additionally, the state board reported that these societies did not adequately perform the basic tasks assigned to them by the medical practice act. Instead, the county societies procrastinated, failed to act and, when they finally did act, performed their task in a

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[151] *Transactions of MASA* (1880): 101-102.

"perfunctory" manner that undermined the credibility of the state board and licensing in general. Essentially, the state board quickly realized that relying on numerous county boards was an incredibly inefficient way to manage the medical profession and resulted in an uneven and unequal enforcement of the law. Even though forty county societies had been created, there were sixty-seven counties in the state, and a third of Alabama's counties still lacked any authority to regulate medicine.[152]

The Alabama law also faced an immediate challenge from eight Irregular physicians who advocated the repeal of the licensing law because it placed the Alabama Regular medical society in charge of administering the law. The Irregular physicians argued that MASA was incapable of treating them fairly because MASA and American Medical Association were openly hostile to all Irregular physicians. Dr. William Murrell, a licensed Homeopathic physician, claimed that another Homeopath was informed by the Huntsville County Association that "no irregular shall practice in our county."[153] Murrell signed the letter with the seven other Irregular physicians to protest this blanket policy. The Irregular physicians highlighted the existing ban imposed on members of MASA by consulting with Irregular physicians in their memorial to the legislature. The group sought to eliminate the role played by MASA in administering the state law and convert the law into a registration act. The petitioners argued that probate judges, not committees of Regular physicians, should determine who could practice medicine in the state.

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[152] *Transactions of MASA* (1881): 90-92.

[153] *American Institute of Homeopathy, 1883* Volume 36, (1884): 103-104, http://books.google.com/ebooks.

MASA responded to the allegations with a general statement, which argued that MASA and its county affiliates were testing Irregular physicians only on science and not medicine. While Regular physicians were tested on twelve subjects, Irregular physicians were tested only on four ("Chemistry, Anatomy, Physiology and the Mechanism of Labor"). MASA argued that it was not testing Irregular physicians on any principles of Regular medicine. Additionally, while MASA and Regular physicians did not recognize Irregulars as professionals under their "thousand years old" Code of Ethics, they did not question the general right that Irregular physicians could practice medicine in Alabama. Finally, MASA argued that the few Irregular physicians in the state "had not been touched, or in any way interfered with by any of the Boards of Medical Examiners..."[154] While the law on its face did not discriminate against Irregular practitioners, there was little to prevent local Regular boards from refusing to license any Irregulars in their county. MASA had little power to prevent the county boards from treating Irregulars unfairly. Still, it is difficult to determine if Irregulars faced illegal barriers to practicing medicine in the state.

MASA's claim that there were very few Irregular physicians in Alabama appears to be true. In 1879, while the National Eclectic Medical Association assigned an Alabamian physician to keep the society updated on the status of Eclectic medicine in the state, it reported that the state did not have any society for medical Eclectics.[155] There appears to be only one Homeopathic physician, William Murrell, in the state who was even a member of the American Institute of Homeopathy in 1880. The admittedly

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[154] *Transactions of MASA* (1881): 94-98.

[155] *Transactions* of NEMA (1880): 69.

incomplete annual register of physicians for 1880 shows that only six Eclectics, ten Homeopaths, ten botanics, an Indian Doctor, a Thomosonian and three unknown Irregulars were even licensed in the state.[156] The Alabama Eclectic Medical Association (AEMA) was not even formed until May 1884 with only twenty-four members. The AEMA estimated that there were perhaps only sixty to one hundred "Eclectic" or "Liberal" physicians in the entire state.

Additionally, AEMA stated that there were several Regular members who could be best described as "Reformed." Clearly, the AEMA wanted to classify the "reformed" Regulars as Eclectics, even if they were unwilling to adopt the moniker on their own. "Reformers and Old-School" were fairly collegial with one another even though the "Reformed" doctors could best be described as medical Eclectics. Because of the collegial relationship between Reformed and Old-School physicians, Regulars did not expect to face much opposition to the passage of the medical practice act.[157] Additionally, the simple fact that the Regular society successfully convinced the Alabama legislature to assign the state's Regular medical society to manage the state medical practice act demonstrates that the state's Irregulars were not capable of managing even token resistance to the bill's passage. In most states, Regular physicians were forced to compromise with the other sects to pass any medical licensing bills. Alabama's Regulars were not required to compromise with Irregulars because it was not clear who they would have compromised with.

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[156] *Transactions of MASA* (1880): 153-182.

[157] *Transactions* of NEMA (1885): 59 - 61, http://books.google.com/ebooks.

The Alabama Eclectic Medical Association did not view the Alabama Medical Practice Act as a success. It was skeptical of putting the state's Regular society in charge of licensing and enforcement and they did not believe that the law was particularly successful at eliminating quacks and charlatans from Alabama's medical ranks. Despite agreeing with the Regulars that there needed to be at least minimum requirements to practice medicine in the state, Dr. J.W.R. Williams described the State Board of Examiners as inefficient and ineffective. Eight years after the law was passed, the state board had asserted little control over half of Alabama's "seventy-odd" counties and six hundred of the state's approximately thousand Regular physicians. Dr. Williams' critique was not particularly surprising because it was becoming clear that Alabama's decentralized law made it difficult for MASA to guarantee that only qualified doctors were being admitted.[158]

Unlike Alabama, Illinois passed a medical licensing law that consolidated control under a unified state board of health. The Illinois board was comprised of a mixture of Regular, Eclectic, and Homeopathic physicians. These physicians had an expansive vision for the state's licensing law, and they quickly sought to regulate medicine in a meaningful way. Instead of just licensing physicians, the board also began to evaluate the quality of medical schools across the country, enforcing a strict code of conduct, and actively prosecuted anyone who violated the law.

The Illinois State Board of Health argued in its first annual report that the licensing law already made the state safer for its citizens. The board estimated that nearly

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[158] *Transactions* of NEMA (1885): 59 - 61, http://books.google.com/ebooks.

3,600 of the physicians practicing in the state were not graduates of a medical school before the law went into effect. They claimed that the licensing act had forced almost 1,400 these physicians to either stop practicing or leave the state.[159] Additionally, the board clearly sought to communicate to the state and its citizens that medical licensing was essential. In addition to driving out non-qualifying physicians, complaints about physicians began pouring into the board's offices. Although the Illinois board conceded that it did not have either the resources or the personnel to investigate each of the grievances, the sheer volume of complaints indicated that the public was convinced the board was the primary check on dangerous or unethical doctors. Physicians from around the state also filed numerous complaints against other physicians. The Board was deeply troubled, however, when it learned that physicians often took advantage of the new rules to lodge complaints against their potential competitors were therefore "unreliable."[160]

In an attempt to subvert the new licensing rules, bogus medical diplomas began to be sold soon after the licensing law went to effect. The Board reported that as many as "400 bogus diplomas" were submitted as evidence of a medical degree by applicants because "diploma-shops" hoped that the board would recognize them because they were "issued by legally chartered institutions."[161] These institutions were considered legally chartered because they were created under Illinois's business law, but they did not possess any more gravitas than that. Unfortunately for diploma mills, the Illinois

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[159] *Annual Report of the State Board of Health of Illinois 1878* (1879): 5.

[160] *Annual Report State Board of Health of Illinois 1878* (1879): 16, http://books.google.com/ebooks.

[161] *Annual Report State Board of Health of Illinois 1878* (1879): 16.

licensing act gave the board power to accept only diplomas from medical schools that were in "good standing." The legislature strengthened this power by allowing the board to determine what "good standing" meant. During the first year of the act, the board was not able to develop explicit criteria for what qualified as "good standing," but it determined that institutions that "sold their diplomas" would not qualify.[162] The board's rejection of fraudulent diplomas was the first successful attempt to reform medical education by evaluating the merits of medical education.

The Illinois board did not stop at rejecting fraudulent diplomas. It also conducted quasi-judicial hearings. At times, it appeared that attorneys also prosecuted other illegal practitioners on their own volition. In 1879, the Illinois board resolved to investigate physicians who were accused of "practicing specialties under assumed names" and of "defrauding" their patients.[163] By 1880, the Illinois board was conducting public investigations of unprofessional conduct by both licensed and unlicensed physicians. Despite its limited resources, the Illinois board was committed to stamping out unprofessional conduct. In 1880, the Illinois board reported that ninety-three suits were filed under the 1877 medical practice act. While prosecutors dismissed most of the suits after the defendants promised to vacate the state, Illinois courts convicted nine individuals under the Illinois law.[164]

Glancing at these early proceedings reveal the type of conduct the Illinois Board sought to eliminate. In 1880, the Board conducted several hearings about the alleged

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[162] *Annual Report State Board of Health of Illinois 1878* (1879): 16.

[163] *Annual Report State Board of Health of Illinois 1878* (1879): 53.

[164] *Annual Report State Board of Health of Illinois 1880* (1881): 53.

misconduct of two licensed physicians, John Bate and Edward Osbourne. Bate and Osbourne were accused of practicing medicine under assumed names. Bate, a graduate of Chicago's Bennett Medical College, had run a medical practice under the name "Dr. A. G. Olin" before he attended medical school. "Dr. Olin's" medical practice was well-known in the community because Bate extensively advertised in Chicago newspapers. Bate was admitted to Bennett Medical College (an Eclectic medical school in good standing) only after he had agreed to relinquish his fictitious name and medical practice. After completing the program at Bennett and receiving his diploma, he immediately went back to work as "Dr. Olin."[165] Edward Osbourne, Bate's nephew and another graduate of Bennett College, was accused of being Bate's associate, and Osbourne also claimed to be "Dr. Olin." The Illinois board considered Bate's practice offensive and illegal because "Dr. Olin's Private Hospital" specialized in "chronic and sexual diseases of men and women," "sexual debility, impotency, nervousness, seminal emissions, loss of memory from self-abuse or other cause." Dr. Olin also provided marriage guides, "[r]eliable female pills[,]" "rubber goods[,]" and "special care…for ladies during confinement."[166] Bate's and Osbourne's ultimate sin was that they were accused by the board of procuring abortions for their patients.

Bennett Medical College and Dr. Henry Olin, a Bennett Medical College professor and prominent member of NEMA, initiated the actions against Bate and Osbourne by contacting the Illinois board. Both Bennett College and Dr. Henry Olin believed that their good names were being tarnished by their association with the

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[165] *Annual Report State Board of Health of Illinois 1880* (1881): 4-5.

[166] *Annual Report State Board of Health of Illinois 1880* (1881): 5-7.

notorious "Dr. Olin" created by Bate. Dr. Henry Olin had offered five-hundred dollars to Bate and later two-hundred-fifty dollars to Osbourne to stop using the moniker "Dr. Olin." Both Bate and Osbourne refused the offers and continued their practice.

Osbourne's and Bate's defense consisted of the contradictory claims that they had not practiced under assumed names, but they then argued that the marriage guides were not offensive, they had not sold rubber products for a year (their lawyer argued that the advertisements were erroneous), and that their alleged abortion or "female" pills were ineffective because they actually were made of "brown bread."[167] The Illinois board was unimpressed by these claims and found that they were "guilty of gross professional misconduct" for practicing under assumed names and issuing unprofessional circulars and advertisements.[168] The board revoked their licenses and later denied the application for a license of the physician C. Pratt Sexton after learning that the notorious Dr. Olin employed him.[169]

Another physician, Generous L. Henderson, faced similar allegations. Henderson, like Bate and Osbourne, was a licensed physician, but he also practiced under the aliases "Dr. Stone" and "John Smith." Henderson was accused of selling products "offered by the vilest class of specialists" and performing "an abortion for $5."[170] Henderson sought to insulate himself from his alleged abortion practice not only by performing the abortions under the name "Dr. Stone," but also by adopting another moniker "John

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[167] *Annual Report State Board of Health of Illinois 1880* (1881): 5-7.

[168] *Annual Report State Board of Health of Illinois 1880* (1881): 7.

[169] *Annual Report State Board of Health of Illinois 1880* (1881): 13.

[170] *Annual Report State Board of Health of Illinois 1880* (1881): 7-8.

Smith." As "Smith," Henderson would solicit and then refer potential clients to the fictitious "Dr. Stone." As "Dr. Stone," Henderson would perform the abortion and collect the five-dollar fee. The Illinois board revoked and cancelled Henderson's license for "dishonorable and unprofessional conduct." [171]

While the Illinois state board aggressively enforced the state licensing law, its enforcement did not unduly antagonize Illinois's Irregular physicians. In 1881, Dr. H.K. Stratford, reported to NEMA that not only were Eclectics thriving in the state of Illinois, but that there were "no unpleasant encounters with brother practitioners; but all seem to be on good terms, whether Eclectic, Old-School or Homeopathic." Additionally, the board's pursuit of Dr. Olin was cheered by the faculty of the Bennett Medical School, an Eclectic institution. By defending Bennett, the organized and educated Eclectics believed that the state board would not just benefit Regulars. The Illinois board's actions do not appear to have raised any initial suspicions within the Eclectic community that the law was a subterfuge effort to eliminate Eclectic physicians from the state.[172]

In addition to licensed physicians practicing under assumed names, the Illinois board was concerned about the potential damage caused by untrained individuals who had stolen or bought valid medical school graduation certificates and practiced under those names. One of the more egregious stolen identity cases prosecuted by the Illinois board involved a physician allegedly named Henry A. Luders. Luders claimed that he was a graduate of the medical school at the University of Gottongen [sic], and he submitted his certification of completion to the Board. Despite Luders' initial failure to

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[171] *Annual Report State Board of Health of Illinois 1880* (1881): 5-7.

[172] *Transactions of NEMA for 1881* (1882) 88.

submit any letters of recommendation from the faculty on his behalf, the Illinois board issued him a license after some "reputable practitioners" finally vouched for him. After stories regarding the quality of his practice circulated throughout his town, concerned physicians contacted the University of Gottingen. The university informed the physician that Luders had practiced in the Duchy of Braunschweig until his death a few years earlier.[173] Luders was not actually Luders, but an alias for man named Lambrecht who had stolen his identity. Lambrecht, a barber, had fabricated the letters of recommendation and somehow came into possession of Luders' diploma. The Illinois board revoked Luders' license, but not before Lambrecht, through his incompetence, butchered and killed a woman and her child during a botched birth. After the local physicians learned of his deception, Lambrecht fled to Cincinnati before he could be prosecuted for violating the medical practice act.[174]

In Cincinnati, Lambrecht enrolled in the Cincinnati College of Medicine and Surgery, but suddenly left after the Illinois board published its initial report describing his practice. He then moved to Cleveland and enrolled in the Keokuk College of Physicians and Surgeons and received a diploma in 1884. After graduating from Keokuk College in Iowa he moved to Bismarck, Dakota Territory where he was using the alias "William Lambert." The board cited Luders as a perfect illustration for "the necessity of the strict

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[173] *Annual Report State Board of Health of Illinois 1883* (1883): xli, http://books.google.com/ebooks.

[174] *Annual Report State Board of Health of Illinois 1884* (1884): 11, http://books.google.com/ebooks.

enforcement of matriculation requirements and of proof of previous study and college attendance.[175]

The board also sought to eliminate the influence of itinerant or traveling doctors. Before the Illinois legislature passed the medical practice act, the board stated that seventy-eight itinerant doctors practiced throughout the state and fleeced its "sick, afflicted, and credulous" citizens of no less than $225,000 a year.[176] Of these seventy-eight practitioners, only five were eligible for a license ten years later. The remaining itinerants successfully had received licenses under the exemption for physicians who had practiced for at least ten years.[177] These itinerants made a living by combining show business and drug sales. They would often hawk nostrums and cure-alls as "Indian Remedies" during performances. These doctors would accompany or organize "Wild West" concert troupes in order to facilitate sales. Some of these companies employed as many one hundred different people. These medical practitioners had more in common with a traveling church revival than a medical practice. These traveling physicians were difficult to track down because they could quickly leave the state for safer pastures outside of Illinois. Additionally, they did a good job ingratiating themselves with local politicians who prevented prosecution.

California's model represented the third pattern of licensing. In California, the legislature created three licensing boards one representing each of the three major sect.

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[175] *Annual Report State Board of Health of Illinois 1885* (1885): xlviii-xlix.

[176] *Annual Report State Board of Health of Illinois 1887* (1890): xix, http://books.google.com/ebooks.

[177] *Annual Report State Board of Health of Illinois 1887* (1890): xix-xx.

These boards did not serve together, nor did they have any meaningful interactions. The members of those boards were selected by the medical societies of the three different sects. These examining boards were, organizationally speaking, under the board of health. The state board of health was responsible for sanitation and compiling the meaningful health statistics for the state. Unlike the examiners, the members of the state board of health were appointed by the governor. The governor was not required under the law to appoint members of any particular sect to the board of health. Thus, the three boards operated fairly autonomously. The make-up and composition of the three boards served as the basis for a legal challenge to the state's licensing law.

In 1880, an unlicensed physician challenged the 1876 California Medical Practice Act (amended in 1878). The physician who had been incarcerated for violating act filed a writ of habeas corpus that challenged the constitutionality of the law. The inmate argued that the law illegally conferred upon three corporations (the Regular, Homeopathic, and Eclectic Boards of Examiners) special powers (the right to appoint members to each of these boards) in violation of California law. He argued that any decisions made by the three boards were non-binding because they did not have a right to exist under the California constitution. The inmate alleged that it was impermissible under the California constitution for corporations (including the state's medical societies) to appoint people to the three governmental medical boards. Essentially, the petitioner alleged that appointments should have been made by the governor and not the medical societies.[178]

[178] *Ex Parte Frazer*, 54 Cal. 94, 95-97 (1880).

The California Supreme Court rejected this argument and found that the creation of the three boards "did not exceed the limitation of its [the legislature's] powers" and determined that they were not, in fact, corporations. While the petitioner argued that the law was unconstitutional, the court did not bother even to address those issues because they were deemed irrelevant to his conviction. Since the court failed to address the broader constitutionality of the medical practice act, this case was of limited value to other courts around the country. The court essentially dodged the constitutional issue and allowed the law to survive.

By 1880, Ira Oatman, the physician in charge of the Regular Medical Society of California's Committee on Medical Legislation, claimed that scores of the "lower order of charlatans from all pretensions" already had abandoned the state. Like a similar claim made by the Illinois Board of Health, there appeared to be little evidence to support this statement. While it certainly was possible that "lower order charlatans" had left the state, they could have just as easily stopped advertising and moved underground to avoid attention. It did not appear that the examining board could afford an extensive census of California's fraudulent or marginal physicians.[179]

Even though he claimed the law was successful, Oatman was frustrated that the California law did not give the state's examining board sufficient authority to fully regulate the medical profession. Oatman was also concerned that members of his Medical Society proposed, the year before, to eliminate the state examining board and give all of the licensing power to the Board of Health. The licensing law, as in other

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[179] *Transactions of the Medical Society of California 1879-1880*, (1880): 152-153, http://books.google.com/ebooks.

states, faced constant challenges and efforts to amend it in the state legislature in the 1880s. Undoubtably, the Regulars who proposed this new law primarily were motivated by a desire to eliminate the Irregular boards. Even though the California Medical Society presidents had demonstrated a willingness to compromise on legislation with the Irregulars, not all of the rank-and-file members were as pleased. Licensing originally was proposed as a way to eliminate their competitors, not legitimatize them. Not only did they seek to eliminate the three boards, they wanted to entrust the Board of Health with licensing because there were no Irregulars on that board.

Oatman was suspicious because he was fairly certain that investing the board of health with that power would turn the licensing process into a blatantly "political, instead of [a] professional" one. He was also noted that if this authority was granted to the board of health the legislature would require the board of health to be a mixed board. Unlike other Regular members, he understood that Irregulars had sufficient political clout to preserve licensing for themselves. His biggest fear was if Regulars refused to serve with Irregulars on a mixed board then a mixed board could be dominated by Irregulars. Consequently, he was adamantly opposed to unifying the board.

While California Eclectics were justifiably suspicious of the Regular's plans to create a single board, they were not necessarily opposed to it. In California, Eclectics were looking to amend the California Medical Act, but they were not interested in weakening the law. In 1880, The *California Medical Journal* (an Eclectic medical journal affiliated with the Eclectic California Medical College in Oakland) stated that the Eclectic Medical Society of California approved an effort to "require qualifications

parties practicing midwifery and obstetrics."[180] The Eclectics made it clear that they wanted to tighten restrictions, not loosen them for the individuals practicing in these areas. The editors at the *California Medical Journal* did not even oppose giving up their own board as long as they received equal representation on a new unified examining board. The journal favored allotting three members to the board from the three medical sects to ensure equality and justice for Eclectics. While the sects maintained three separate examining boards, the board of health did not require a mixed board. The Eclectics were concerned about equality because the board of health, at that time, was composed of only Regular physicians (the governor had the discretion to appoint whoever he wanted to the board).[181] Organized Eclectics in the states were more interested in shaping licensing to fit their needs rather than eliminating it. If anything, they sought to strengthen licensing and carve out a more powerful niche for themselves in any regulating authority.

In 1882, Oatman introduced a proposed law to the membership for approval. While he introduced the bill, he did not appear to fully support it. He insisted that the existing law continue the practice of allowing the various medical societies to appoint members to the examining boards, but he wanted to include provisions that required apothecaries and druggists to have licenses, permit the examining boards to revoke licenses for unprofessional conduct (he wanted to preserve the right appeal to the state

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[180] *The California Medical Journal*, eds. Don McClean, M.D. Bundy, J.H., M.D., "The Annual Meeting of the Eclectic Medical Society of the State of California," (Dec. 1880), 493, http://books.google.com/ebooks.

[181] *The California Medical Journal*, eds. Don McClean, M.D. Bundy, J.H., M.D., "The Annual Meeting of the Eclectic Medical Society of the State of California", (July, 1882), 314, http://books.google.com/ebooks.

societies), amplify the penalties for not complying with the law, and tax itinerant practitioners.[182] Ultimately, the proposed law was approved by the membership, "but not adopted as a whole" because it required amendments.[183] The committee on legislation, led by Oatman, did not bother to forward to the legislature because they were not comfortable with the bill and did not believe it would garner sufficient support.

One of the defining features of the 1880s was a constant effort by various parties to rewrite state medical licensing laws. This tug of war in most states was ceaseless during the 1880s. Each legislative session, one group or another would propose a medical licensing law. California was typical of other states in this regard. In each session, Oatman and advocates for the existing law repeatedly were forced to beat back the various proposed laws. Sometimes these laws were promoted by Irregular societies, but many of these laws sprang from other sources.[184] In California, Oatman described bills that were proposed by individual doctors or groups of doctors who sought to carve out special rights for themselves.

The process that Oatman detailed was not unique to California; licensing laws constantly were proffered during legislative sessions in several states. The constant efforts to amend these laws demonstrated widespread dissatisfaction with either the existence of these laws or how they operated. Once these laws were established, state legislators were compelled to constantly tinker with the these laws. The mixture of laws

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[182] Ira E. Oatman, M.D., "Report of the Committee on Medical Legislation," *Transactions California State Medical Society*, (1882) 106 - 109.

[183] Henry Orme, M.D., "Report of the Committee on Medical Legislation," *Transactions California State Medical Society*, (1882) 110-120.

[184] Ira E. Oatman, M.D., "Supplemental Report on Medical Legislation," *Transactions of the State Medical Society of California*, (1882-1883): 89-93.

seeking to both weaken and strengthen the laws showed that there still was not a consensus among the medical community or the general public on how medical licensing should be executed. Legislatures in each of the states discussed in this chapter faced efforts to repeal and modify their state licensing laws in the 1880s, even though they had only begun to enforce them.

CHAPTER VIII

FIGHTING FOR LICENSING IN MISSOURI AND OREGON

Passing licensing laws was neither simple nor easy. While a number of states passed various regulations during the 1870s, many others failed. Regular physicians in these latter states were inspired by new licensing laws in Illinois and California, but they had difficulty convincing their local legislators that the laws were necessary. Their efforts often were hampered by legislative disinterest, disorganized or nonexistent institutional support for licensing, and effective opposition by Irregulars that made passage difficult.

Regulars in non-licensing states became increasingly concerned that the robust efforts to actively enforce medical licensing standards in other states would turn their states into magnets for incompetent physicians. Organized physicians feared that an influx of these unqualified physicians could destabilize their medical marketplaces. Regulars from Illinois's southern neighbor, Missouri, watched with envy and concern as the Illinois State Board of Health sought to regulate both entrance into the medical profession and the ethical standards of practice. They were envious because their licensing efforts in Missouri failed and were concerned because they feared that Illinois' unlicensed physicians would cross into their state.

Before 1882, the Medical Association of the State of Missouri was described as disorganized and demoralized since its inception thirty-two years earlier. The Missouri association had failed to pass any serious medical regulations despite the typical complaints from its members. The state passed a medical registration law in 1874 and amended it in 1879. That law required physicians to register before practicing medicine and prevented them from collecting any fees if they failed to do so. Like most registrations, it was considered ineffectual and physicians dubbed it "the Physician Farce Bill." Organized Regulars stated that the only reason the bill passed by the legislature was because it benefitted county clerks.[185]

However by the early 1880s, Missouri's Regular physicians were committed to passing a medical practice act. They decided to use the successful strategies employed by other states and tie a licensing bill to a new sanitation law and the creation of a state board of health. In 1880, the president of the Missouri association pressured his colleagues to support the creation of Missouri Board of Health.[186] Like other states, Missouri's physicians were both inspired by the success of their Illinois brethren and fearful of an onslaught of incompetent Illinois physicians if they failed to pass their own bill. In 1881, Willis P. King, the new president of the Missouri association, addressed the failure of the Missouri association to pass a new licensing bill. Instead of attacking the legislature's intelligence, a common but counter-productive practice, King stated that it

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[185] Harold Walter Eickhoff, *The Organization and Regulation of Medicine in Missouri, 1883-1901*; Dissertation from the University of Missouri, 1964, 15-23; cited Ed. "State Medical Boards" *St. Louis Medical Records*, CVII (December, 1875): 210-211.

[186] See "The Exhortation by the President of the Association to His Members" and "Minutes," *Transactions of the Medical Association of the State of Missouri* (St. Louis, J. H. Chambers and Co., 1880): 12, http://books.google.com/ebooks.

was the general "want of sufficient general intelligence in the medical profession" that prevented physicians from "command[ing] the respect and confidence of its citizens…" Essentially, he argued that physicians were their own worst enemy because medical education was extraordinarily defective in the United States. Instead of requiring students simply to attend lectures at medical schools, King believed that they should require students to have a "thorough knowledge of medicine." In his mind, medical schools were more interested in collecting student fees than requiring students to learn about medicine. Not only were medical schools failing to meet their obligations, King argued that county medical associations had a duty to continue the education of its members. Physicians needed to work with the local medical associations to ensure that they were continually augmenting and updating their medical knowledge.[187]

King's speech was not intended just for the members of the Missouri association -- he also was communicating directly to the state legislature. He acknowledged that the American medical education system, in its entirety, was inadequate. Instead of blaming legislators for failing to pass previous bills, he was conveying to them that he understood they lacked confidence in the medical profession. While acknowledging the problems with medical education, he also sought to make it clear that only regulation could remedy the problem. King's speech in 1881 galvanized the Missouri association. Not only did his words encourage the Missouri association to ramp up its efforts to pass a medical licensing law, King signaled a willingness to work with Homeopaths and Eclectics physicians. Past reform efforts stalled because Missouri's Regular physicians had sought

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[187] "The Need for Thorough Medical Training and Teaching – The Importance of Local Medical Organizations," *Transactions of the Medical Association of the State of Missouri* (St. Louis, 1881): 21-27, http://books.google.com/ebooks.

to create a system that limited the ability of Homeopaths and Eclectics physicians to practice medicine. Two thousand copies of the speech were published, and the Missouri association put the copies into the hands of Missouri's legislators. Members of the association believed that his speech was the first salvo in an effort to secure meaningful legislation in the 1883 legislative session.

Despite efforts to smooth over relations with Homeopaths and Eclectics, the membership of the Missouri medical association was not willing to compromise with their Irregular brethren at the beginning of the 1883 legislative session. Whether this was stubbornness or an opening negotiating position is difficult to say. The organized Regular physicians who lobbied the legislature initially sought to pass licensing that discriminated against Homeopaths and Eclectics.[188] Despite King's speech and a growing body of evidence that it would be impossible to pass licensing without the approval of the state's Eclectics and Homeopaths, the Association's lobbyists continued to push unacceptable laws.

During the 1883 legislative session, Missouri's Regular physicians finally realized they needed to pair the law establishing medical regulation with the creation of a state board of health. As soon as it became clear that their initial bill was unacceptable, the Missouri Medical Association's representatives changed their stance on licensing. They understood that they could make a stronger case for licensing if the state board of health was given broad sanitary and quarantine powers. Additionally, they finally acknowledged that any proposed licensing law could not discriminate against Eclectics

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[188] *Eickhoff, Dissertation*, 47-48.

and Homeopaths. After acknowledging this reality, the Missouri association successfully pushed through a regulation bill that closely resembled the Illinois medical practice act. Like the Illinois practice act, the Missouri Board of Health was authorized to determine the authenticity of an applicant's diploma, administer an examination of non-graduates, and revoke medical licenses for unprofessional conduct.[189]

Since the Missouri law was modeled after Illinois' law, Regulars were required to sit on the state board of health with Eclectics and Homeopaths in a potential violation of the AMA's Code of Ethics. In 1883 at the Missouri Medical Association's annual meeting, Missouri Governor Thomas Crittenden provided the opening remarks for the conference and asked the association's members to cooperate with the Irregular board members. When the governor concluded his remarks, physicians in attendance objected to the law and compromise with the Irregulars. Physicians stated it would be impossible to cooperate with the state's Homeopaths because they were con men who fleeced the state's citizenry.[190] The association even published another Regular physicians' ode to AMA's the Code of Ethics. The physician wrote that the code was created because Homeopaths and Eclectics were heretics and "their practice inimical to mankind." The author dryly noted that only the physicians who happened "to live where Homeopathy is popular and encouraged" appeared interested in relaxing the code and permitting consultations with Irregulars. He complained that "licensing a man to practice Homeopathy" was ten times worse than consulting during an emergency. He also argued

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[189] *Eikhoff, Disseration*, 57; *Transactions of the Missouri Medical Association 1884*, http://books.google.com/ebooks.

[190] *Eikhoff Disseration* 60-61.

that the practice would ultimately "license quackery instead of preventing it."[191] Like other Regular members, he was incensed that the association compromised with Eclectics and Homeopaths to pass medical licensing. Even after licensing passed, organized Regulars were bemoaning its form. It was not surprising that the state board of health and the licensing law would struggle over the next decade.

The paper presented at the association's meeting condemning the licensing law sparked a fierce debate during the group's 1883 meeting. One physician noted that similar boards in Canada had succeeded in "stamping out Irregulars." Another argued that due to the overpopulation of "incompetent practitioners" in Missouri, it was necessary to pass a law to protect the people of Missouri even if it did not advance "the interests of medical profession." A third physician noted that he believed the bill was designed to limit the ability of itinerant vendors to profit by selling their wares in Missouri. He argued that section alone justified passage of the bill. While some members expressed support for the new law, others were clearly distressed by the recent alliance with Irregulars.[192]

Soon after the Missouri legislature passed the licensing bill, the newly appointed member of the Missouri Board of Health sought the advice, counsel, and aid of the Illinois board. In 1884, the Illinois board helped Missouri organize its own medical board of health. Members of the two boards even attended each other's meetings. Missouri members hoped to model the principles Illinois used to "establish precedents

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[191] G.M. Dewey, "The Code," *Transactions of the Medical Association of the State of Missouri* (St. Louis: E.E. Carreas, 1883): 31-34, http://books.google.com/ebooks.

[192] *Transactions of Missouri* (1883): 35-36.

and formulat[e] principles upon which to base decisions in the many difficult and delicate questions which continually present themselves." Dr. John Rauch, a member of the Illinois Board of Health, advised the board to adopt "the minimum requirements for Medical Colleges to held in Good Standing of the Illinois State Board of Health."[193] By convincing the Missouri board to adopt the Illinois standard, Rauch demonstrated both the appeal of the Illinois efforts to grade medical schools and expanded the Illinois board's credibility.

During the first year of the Missouri board's existence, it denied Edwin G. Granville, a graduate of the Kansas City Hospital College of Medicine, a license to practice medicine because the Missouri Board of Health followed the Illinois Board of Health's lead and determined that Granville's medical school was not in "good standing." Granville refused to take an exam for admission and filed a suit against the Missouri board demanding that it grant him a license to practice medicine in that state. Similar to the Illinois practice act, the Missouri Board of Health was given the authority to determine what criteria constituted whether a medical school was in "good standing." The Missouri board decided that three of the seven medical schools in the state did not meet their minimum requirements and refused to automatically admit their graduates.[194]

Granville challenged the board's ruling and took the board to court. The Missouri Supreme Court determined that the state legislature intended "to rid this commonwealth of that class of medical pretenders known by the various designation of empirics,

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[193] *Annual Report of the State Board of Health of Illinois* 1884 (1884): 70, http://books.google.com/ebooks; *Eickhoff dissertation*, 66.

[194] *Eickhoff, Dissertation*, 118-19.

mountebanks, charlatans and quacks." Instead of simply issuing in a perfunctory manner after an applicant produces a diploma, the court stated that the board had the power to determine whether a school was in "good standing." Citing a recent ruling by the Minnesota State Supreme Court, *State v. State Medical Examining Board*, the Missouri board determined that it did "not transcend [its] constitutional limits" by denying Granville's application as long as that "discretionary power does not extend to discriminating against any particular school or system of medicine, and that, should such discrimination ever occur, the limits of discretionary power will have been passed."[195] The Missouri Supreme Court found the Missouri law constitutional, but placed limits on the board's power. The court made clear that if Granville had been discriminated against solely on the basis of his medical sect, then he could approach the court again and get another hearing.

The Missouri and Minnesota court decisions were two of the earliest rulings that found centralized state board's health powers of sanitation, quarantine, and licensing to be constitutional. Both the Missouri and Minnesota Supreme Courts addressed the constitutionality of the Illinois model even before Illinois courts ruled on this question. Unlike earlier court decisions, the Missouri and Minnesota courts found that these laws were constitutional uses of state police power. The Missouri Supreme Court determined that because Missouri law did not discriminate against any particular school or system of medicine, it did not "transcend" its constitutional limits. The Missouri court did not express any particular misgivings with the law or the discretionary powers granted to the

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[195] *Granville v. Gregory, et al. constituting the State Board of Health*, 83. Mo. 123 at 137, (1884). *See State v. State Medical Examining Board*, 32 Minn. 324 (1884).

Missouri board by the state legislature.[196] These courts were more than willing to permit these newly created quasi-government agencies to interfere with the private contractual relationships between patients and physicians. Instead of allowing patients to determine who should treat their ailments, the courts were more than willing to intercede and allow a quasi-governmental agency to eliminate certain unacceptable physicians from the medical marketplace.

Neither of these courts looked at licensing laws from a patient's perspective. Licensing laws potentially prevented patients from being treated by the doctor of their choice. Instead, patients now had to rely on the boards of health to make these decisions for them. Both courts were willing to accept their state legislature's contention that medicine was different from other professions. The unique nature of medical practice permitted government to intrude on personal relationships between physicians and their patients. Neither court bothered to argue that licensing laws were an unfair intrusion of the free market. These decisions and most future licensing cases demonstrated that courts were not necessarily committed to free markets.

Even as the Alabama, Illinois, and Missouri medical boards were trying to consolidate and expand their powers, states like Oregon continued to struggle to pass any type of law. In 1880, a House bill that proposed "to regulate the practice of medicine and surgery in the State of Oregon" failed again. But unlike previous bills, it fell only two

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[196] *Granville* at 137-38.

votes short of passage in the House, which was the narrowest margin of defeat to date.[197] Encouraged by the positive momentum, the Oregon State Medical Association continued to discuss medical regulation at its next meeting. In the report from the Committee on Medical Education, Dr. Phillip Harvey stated that California's passage of medical regulation was forcing "mountebanks and impostors" into Oregon. During the 1880s, the association often argued that Oregon was becoming a haven for charlatans, quacks, and medical incompetents.[198] By this time, the association's Committee on Legislation understood that the Oregon legislature would not pass any bills protecting specific medical sects. The Oregon association, therefore, needed instead to focus on passing laws that tested applicants on "essential scientific knowledge."[199] Instead of attempting to carve out a special status for Regular physicians, they needed "to be placed under the same legal relations to the State as the 'pathies'." Only by ensuring that physicians were educated thoroughly in the sciences could the medical profession be rescued from "the grasp of total ignorance."[200] They hoped to "establish some competent tribunal in our State to decide the so-called genuineness of diplomas issued by some of the so-called Medical Colleges in other States."[201]

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[197] *The Journal of the House of the Legislative Assemble of the State of Oregon for the Eleventh Regular Session 1880, 11th House, 1880*, 327-328. (Yeas 29, Nays 24, Absent 7; bills needed to have an absolute majority of the entire legislature, regardless of how many members were present at the time of the vote.)

[198] Phillip Harvey, M.D., *Proceedings Seventh Annual Meeting of the Medical Society of the State of Oregon7* (1880): 51-53.

[199] E. P. Frasier, "Report on the Committee on Legislation," *Proceedings of the Seventh Annual Meeting of the Medical Society of the State of Oregon 7* (1880): 61.

[200] Frasier, *Proceedings Seventh Annual Meeting* (1880): 61.

[201] Frasier, *Proceedings Seventh Annual Meeting* (1880): 58.

Even as the Oregon association was campaigning actively for medical licensing, Oregonian physicians and surgeons were not united behind those efforts. A number of Oregon's practicing physicians did not have medical diplomas, and they lacked the scientific knowledge necessary to pass a medical licensing exam. The association, at times, was hostile to these physicians. At the 1881 meeting of the association, C. H. Merrick, M.D. chastised members of the association and Oregon physicians for failing to demand medical regulation.

> "Why should Oregon be almost the last state in the Union to move in this important matter? Why should we suffer our state to become the depository for nearly all the ignorant quacks and pretenders who have been driven out of other states by their vigorous laws? We find our state flooded with druggists' clerks, botch dentists and horse torturers who have come here and assumed the title of 'Doctor,' and in many instances unblushingly added 'M.D.' to their names."[202]

Merrick asked why Oregon's Regular physicians failed to "purge the state of these spurious and dangerous dabblers."[203] Despite the Regulars' complaints about medical science's public perception, Merrick claimed that they had made "very little effort to rescue it."[204]

But Merrick's demand for a unified action by the medical community would go unfulfilled for another eleven years. Whether this failure was due to dissent or simple ambivalence is not clear. Merrick argued that if the legislature failed to act, Regular physicians should organize their own local county or district boards. Those local boards

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[202] C. H. Merrick, M.D., "Report of the Committee on the Practice of Medicine," *Proceedings of the Ninth Annual Meeting of the Oregon State Medical Association* 9 (1881): 22.

[203] Merrick, *Proceedings Ninth Annual Meeting of the Oregon State Medical Association 9* (1881): 22.

[204] Merrick, *Proceedings Ninth Annual Meeting* (1881): 22.

could test the competency of local physicians. After testing of physicians, he advocated publishing the names of those physicians in the local newspaper. While Merrick blamed Oregon's doctors for failing to secure legislation or take appropriate action, the association's president attacked the legislators as narrow-minded political hacks who were more concerned with determining which medical group or sect would benefit the most from any proposed medical legislation, rather than protecting the public.[205]

In 1882, the Oregon association reached outside of its membership for support. It had fewer than one hundred members at this time, and it lacked the influence to pass any legislation on its own. The proposed bill in 1882 garnered even less backing in the House than the 1880 bill.[206] Since the 1882 bill lacked support, instead of simply discussing a medical licensing act at its annual meeting, the association published a proposed bill in pamphlet form separate from its annual report.[207] The association was reaching out to non-member physicians who did not read their annual report to garner sufficient backing for some type of legislation. A medical licensing bill needed support from physicians outside the association to pass.

In 1884, the association did not mention medical regulation in its annual report, but W.H. Saylor, a graduate and professor at the Willamette Medical Department called attention to the habit of druggists prescribing medicine without a prescription. Saylor grumbled about "[t]he pernicious habit indulged in by a large number of druggists – that

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[205] F. A. Bailey, M.D., "Medicine – Its Past, Present and Future," *Proceedings Ninth Annual Meeting of the Oregon State Medical Association* (1881), 52.

[206] *The Journal of the Oregon House of Representatives 1882, 12th House* (1882): 111, 539.

[207] *Proceedings of the Ninth Annual Meeting of the Oregon State Medical Society 9* (1882): 14.

of prescribing for many of the minor and some serious diseases – should be discontinued by the profession…Its evil effect is not only felt by the profession in a pecuniary point of view, but its disastrous consequences are mourned by an honest and confiding people who suffer from ill-timed and injudicious treatment."[208] Druggists were allowed to prescribe medicines to patients without a prescription because this area was completely unregulated. Saylor argued that a law governing the practice of medicine would prevent intrusions by druggists into the practice of medicine.[209]

Again in 1885, another bill to regulate medicine was proposed, but after the Committee on Education refused to endorse the bill, it was defeated.[210] Discouraged by yet another defeat, the association's leadership briefly considered a licensing bill proposed by the AMA for Oregon. The AMA bill advocated the creation of a board of medical examiners composed of nine physicians. The nine physicians were required to be graduates of legally chartered colleges or universities. The nine board members would be chosen from a list of twenty-one names submitted by the association. The board also would be granted power to summon medical practitioners to hearings regarding any unprofessional conduct on their part, and the governor could purge those physicians if at least two-thirds of the board voted for their removal. Since the association was limited to Regular physicians, Homeopaths and Eclectics most likely would have been frozen out of the board. The bill required that everyone, regardless of medical sect, would have to take

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[208] W.H. Saylor, "The Relations that Exist Between Physicians and Druggists," *Proceedings of the Eleventh Annual Meeting of the Medical Society of the State of Oregon* 11 (1884): 88.

[209] Saylor, *Proceedings Ninth Annual Meeting*, (1882): 91.

[210] *The Journal of the Oregon Senate 1885, 13th Senate*, 20: 82.

a test on anatomy, physiology, general chemistry, pathology, therapeutics, principles and practice of medicine, surgery, and obstetrics. To sit for the examination, the applicant had to present proof of a diploma from a legally chartered medical college or university. The bill defined the practice of medicine as treating or attending to any person for money, gift, or reward.[211]

Ultimately, the association's leadership conceded that the AMA bill was too extreme. The legislative committee and even the association's own membership both refused to endorse it. The association could only agree that the AMA bill should be published in the group's annual report and discussed at its next meeting.[212] Under the bill's provisions, every physician already practicing in Oregon would be required to take the exam. The rights of older physicians to practice under this law were not protected, and they could foment opposition against any attempts to pass it. Additionally, Regular physicians would not be able to become licensed if they simply had graduated from the local medical colleges. Even though the association membership agreed to revisit the AMA bill the following year, the AMA bill was not mentioned in the subsequent report.

Nonetheless, the 1887 legislative session convinced the association that they needed to develop a new plan and vigorously promote a medical licensing bill because the legislature came tantalizing close to passing a regulatory bill. In 1887, a proposed bill to regulate medicine was defeated in both the House and Senate by just one vote. Additionally, the legislature demonstrated its willingness to regulate another type of

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[211] "A Bill for an Act to Establish a State Board of Medical Examiners and Licensers, and to the Define the Duties of and Power of Such Board" *Proceedings of the Twelfth Annual Meeting of the Oregon Medical Society 12* (1885): 85-90.

[212] *Proceedings of the Twelfth Annual Meeting*, (1885): 7.

medical professional by overwhelmingly passing a bill to regulate the practice of dentistry. Before the medical bill was defeated, the *Oregonian* newspaper even published an editorial in favor the bill. The editorial suggested "the law ought to insist on proof of fair knowledge of those essentials of medical education that underlie all of the various schools." The *Oregonian* insisted that doctors should be required to know "enough about anatomy and surgery not to do mischief."[213]

A letter to the editor a few days after the defeat of the Senate bill clarified that under the proposed legislation, county clerks could issue licenses to graduates of reputable medical colleges and to physicians who had been practicing for three years and had one course of lectures. The letter blamed the bill's defeat on a single senator from Marion County. The senator claimed that he received letters from reputable physicians urging the defeat of the measure.[214] Whether the physicians opposed the measure because it was too lenient or too strict was left unstated. A number of physicians from the association would have opposed the bill if it did not provide for an examination of incoming physicians; and a number of existing physicians who had not taken medical classes would also have opposed the bill.

During the earlier 1880s, some states finally did join the licensing party, but other states such as Oregon failed to so. Unlike Alabama or Missouri, Oregon was not subject to dangerous tropical diseases that ravaged that region. If Oregon had been affected by frequent yellow fever outbreaks, the state's legislature may have been more interested in passing licensing legislation, but neither licensing nor public health were particularly

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[213] "Regulation of Medical Practice," *The Sunday Oregonian*,Feb. 13, 1887.

[214] "License to Medical Practitioners," *The Morning Oregonian*, Feb. 16, 1887.

interesting to it. Additionally, the state's Regular medical society was hapless in its negotiations with state's politicians. Regular physicians were not going to convince Oregon's state legislators to pass licensing by piggy-backing it on public health and sanitation laws. The state medical association was going to have to provide additional incentives to motivate the state legislature.

CHAPTER IX

THE CRESCENDO OF ECLECTIC OPPOSITION TO LICENSING

As state supreme courts around the country began to rule in favor of licensing laws, opponents were forced to double down against their passage. If state courts refused to invalidate licensing, then the only way to stop licensing laws was to prevent their progress in state legislatures. These early court decisions placed additional pressure on opponents of licensing within the National Eclectic Medical Association (NEMA). The debate in favor of passing nonpartisan licensing legislation continued at the 1883 NEMA annual convention in Topeka, Kansas. The president of NEMA, Andrew Jackson Howe, openly advocated the creation of "organized and efficient Boards of Health" as long as the "rules adopted" were equitable. Howe cited the creation of the Missouri Board of Health as an example of acceptable nonpartisan medical regulation. He even believed that this type of legislation eventually would eliminate the American Medical Association ethics rules that barred Regulars from consulting with Irregulars.[215] Eclectic opponents of medical licensing became more vocal and boisterous in their opposition. Organized Regulars already had demonstrated that they needed Irregular support in most states to

[215] *Transactions of NEMA 1883-84* (1884): 50.

pass licensing, and the opponents of these laws in NEMA continued the attack to convince NEMA's membership to oppose these laws and not compromise with Regulars.

In 1884, despite the continued advocacy by leadership on behalf of nonpartisan medical regulation, NEMA's position on medical licensing was in flux as John King and Anson Clark debated the topic at the annual convention in Cincinnati, the birthplace of Eclectic medicine. King's and Clark's speeches at the convention demonstrated that they not only disagreed fundamentally on the necessity and legality of medical regulation, but represented the fundamental split within NEMA. They had very different experiences with medical regulation up to this point in their careers. King had taken part, along with his older Eclectic colleagues, in the dismantling of discriminatory state medical regulations in the 1840s and 1850s. These earlier laws were passed by Regulars, and they were intentionally meant to marginalize Irregular physicians. King was sickened by the fact that Eclectics now were working with Regulars, who he believed still wanted to eliminate Eclectics and Homeopaths. On the other hand, Clark was twenty years younger than King and was not involved in this struggle. Clark may have been against discriminated by Regulars during his career, but he still believed that he could successfully compromise with them and elevate the medical profession.

At the 1884 convention, both King and Clark were invited to present their views on licensing to the membership. Their disagreement was not limited to medical legislation; the heart of their disagreement centered on the definition of Eclectic medicine. While King maintained an expansive definition and deemed numerous uneducated and marginal practitioners as medical Eclectics, Clark's definition limited

Eclecticism to his organized and educated colleagues. Numerous Eclectic medical practitioners, viewed by King as his brothers-in-arms, were seen by Clark as frauds and charlatans. They were arguing not only about medical legislation, but about who comprised the legitimate heart and soul of Eclecticism.

In many ways this definitional debate was limited to the Eclectics. While Homeopaths were threatened by licensing, they did not have the same problems defining Homeopathy. Unlike Eclecticism, Homeopathy was the product of a single physician. As long as Homeopaths agreed to follow Samuel Hahnmann's medical system, they automatically knew who was a Homeopath and who was not. On the hand, Eclectics were defined by their diversity. Medical licensing threatened this diversity because licensing was designed to eliminate medical practitioners who did not fit a certain mode. Medical licensing was beginning to coalesce around the notion that doctors needed to have a medical degree from a certain type of institution. Any physician who failed to attend the right type of institution risked being marginalized or eliminated.

King consistently opposed medical legislation in any form throughout his career and his position never changed. King was convinced that any Eclectics who were even just lukewarm to licensing were essentially "traitors" because they have forgotten the sacrifice made by early Eclectics to overturn the medical legislation propounded in the first half of the century.[216] He felt Eclectics had an obligation to oppose medical regulation in all its forms. In his address, King made several provocative arguments in opposition to licensing -- arguments that were focused on undermining the growing

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[216] *Transactions of NEMA 1884-85* (1885): 181.

support for medical licensing in NEMA. He attacked medical regulations and claimed that they were "despotic" enactments that violated the United States Constitution, which guaranteed rights "equally."[217] Not only did licensing violate the constitution, it was ultimately a "system or spying, of oppression and of usurpation, fully equal to the Machiavellian absolutism of certain European nations."[218] King declared that American civil rights grew "out of the Constitution" and that any effort to eliminate these rights would establish a precedent for future deprivations.[219] Even medical registration (the least onerous type of licensing) was described by him as "disgraceful, detestable, anti-republican, and in opposition to that Amendment of the Federal Constitution intended to prevent caste monopoly." He simply could not understand why physicians who had practiced "20, 30 or 40 years" should be compelled to register with the state.[220]

John King's opposition to medical regulation did not stop there. He also asserted that medical Eclecticism itself was an expression of American freedom and that any type of regulation would undermine the concept and practice of Eclecticism. In King's mind, Eclecticism represented not just freedom from the dogmatic views of the Old School, but mental freedom that could only preserved if "destructive legislation" was defeated. He thought that medical regulation could weaken the strength of reformed medicine by limiting the freedom of its practitioners.[221] Not only were individual physicians' rights

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[217] *Transactions of NEMA 1884-85* (1885): 178-79.

[218] *Transactions of NEMA 1884-85* (1885): 187.

[219] *Transactions of NEMA 1884-85* (1885): 178-79.

[220] *Transactions of NEMA 1884-85* (1885): 186-187.

[221] *Transactions of NEMA 1884-85* (1885): 15-16.

curtailed by medical legislation, but licensing laws would prevent the general public from seeking treatment from whomever they desired. The public wanted the same freedom in selecting their physician as they did in picking "their religion" or "their tailor."[222] King objected to the notion that only the state could evaluate physicians adequately and protect the public from fraudulent practitioners. Instead relying on the state, the public should be permitted to evaluate physicians on their own. King assumed that malpractice law could more than adequately protect the public from incompetent or unqualified physicians. The ability of citizens to sue their physicians, King argued, gave them sufficient enforcement power to ensure public health.[223]

King fervently believed that Old School physicians could not be trusted to pass fair and equitable licensing acts. Regulars used medical legislation in the first half of the century to marginalize and attack Irregulars, and King believed that the current push for licensing was no different. He stated that only Regulars and their proxies favored medical regulation. While Regulars argued that they sought licensing "to protect the people," King did not believe that the people shared their concern. The demand for medical legislation did not come from common citizens, but from Regulars and their proxies. The Regulars were not trying to protect the public's health and welfare; they simply sought to create a medical monopoly. The public, according to King, was in a much better position to protect its health and welfare than state legislatures.

Additionally, Regulars were interested in preserving their "vacillating, uncertain system" of medicine. According to King, Old School medicine was on the ropes and the

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[222] *Transactions of NEMA 1884-85*: 15-16.

[223] *Transaction of NEMA 1884-83*: 178-181.

Regulars were advocating only for medical licensing while they still possessed some credibility. While Regulars may have sneered and jeered at Irregulars from a distance, King argued that they had adopted Irregular medicine over the past forty years. Previous theories and hypotheses considered essential parts of the Old School, especially heroic medicine, had recently been questioned or even rejected. Over time, Regular physicians' understanding of disease underwent dramatic changes. King attempted to chart the changes in Old School medicine. First, he stated that disease was believed to be caused by "certain conditions of the fluids of the system." Later Regulars altered this dogma and became convinced that disease was caused by "conditions of both the fluids and solids." King declared that their understanding of disease was again being replaced by the "names of bacteria, bacilli, micrococci, microbes, or minute vegetable formulation in the fluids, in the solids, or in both."[224] The existence of competing sects of medicine was, in King's mind, "prima facia evidence of the fallibility of regular practice" and a demonstration of the Regulars' questionable reputation.[225] King believed that only medical regulation could preserve the Regulars' waning strength.

King also argued that medical legislation, instead of protecting American lives, ultimately would imperil public health because it would prevent talented individuals from entering the practice of medicine. King stated that many successful physicians had practiced without diplomas and that it was unnecessary to have one in order to treat patients effectively.[226] Medical legislation not only would prohibit numerous people

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[224] *Transactions of NEMA 1884-85* (1885): 180.

[225] *Transactions of NEMA 1884-85* (1885): 182-83.

[226] *Transactions of NEMA 1884-85* (1885): 177.

from practicing medicine, but if a "farmer, grocer or other non-professional person" discovered "a cure for cancer," licensing would bar them from sharing their cures.[227] While King did not disparage medical graduates, he stated that "too much legal importance has been given to it" because a medical degree cannot ensure that an individual was a "safe and successful medical practitioner."[228] Medical students were not exposed to any educational material that could not be learned from a textbook.[229] King did not believe that a broad education in math, science, anatomy, chemistry, "microscopic germs," and dead languages would benefit physicians. It was not uncommon for "illiterate men" to have a rare gift for treating the sick, but licensing laws would prevent them sharing their gifts with humanity.[230]

The biggest tragedy in King's mind was that honest, hardworking physicians and their families' very survival were threatened by the specter of medical regulations. People, King stated, who faithfully executed their jobs as healers, would be classified as criminals for the same work that previously had been lauded. The medical regulations in Illinois deprived many physicians of their rights and drove them from their homes. King cited the fact that almost two thousand "Irregular" physicians had been forced out of Illinois by medical licensing as evidence that licensing was targeting their kind.[231] Instead of praising the efforts of the Illinois board to eliminate the least educated and the

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[227] *Transactions of NEMA 1884-85* (1885): 180.

[228] *Transactions of NEMA 1884-85* (1885): 183.

[229] *Transaction of NEMA 1884-85* (1885): 185

[230] *Transactions of NEMA 1884-85* (1885): 184-85.

[231] *Transactions of NEMA 1884-85* (1885): 183

most unorganized physicians, he castigated them for destroying the lives of thousands of able physicians. King even went out of his way to defend the most reviled medical practitioners: nostrum peddlers. Nostrum peddlers sold medicines and potions that not only possessed little medicinal value, but could be dangerous. He pointed out the irony that Regular physicians often promoted nostrums while condemning their sellers as quacks. If anything, the hypocritical position taken by numerous Old School physicians simply underscored the collapse of their allegedly superior therapeutic system.[232]

Finally, King claimed that ultimately "[r]estrictive laws are enacted" to generate revenue for the government. When the government grants special privileges or licenses to some, but not others, it is a form of "indirect taxation."[233] As an indirect tax, it was antithetical to both the Constitution and American principles of freedom because it was essentially feudal in nature.[234] These taxes were premised on the idea that citizens were incapable of taking care of themselves and needed a "master or law to take care of him."[235] King then extended the same objection to boards of health. He stated that the nation successfully existed for more than one hundred years without these government boards. All of the functions granted to boards of health had been handled successfully by local medical societies and local government authorities. Americans were more than

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[232] *Transactions of NEMA 1884-85* (1885): 190-91.

[233] *Transaction of NEMA 1884-85* (1885): 190-91.

[234] *Transactions of NEMA 1884-85* (1885): 190-191.

[235] *Transactions of NEMA 1884-85* (1885): 191.

capable of taking care of themselves without these indirect taxes or unnecessary boards.[236]

Unlike King, Clark's statement on medical legislation was brief and tightly focused. Clark believed that if Eclectics failed to embrace medical regulations, Eclecticism's very existence would be endangered. While he directed his attention on the impact of the Illinois Medical Practice Act over its first five years, Clark also briefly attacked several of the key arguments advanced by King in his address. Clark's primary goal was to assuage his fellow physicians' fears and demonstrate that the success of the Illinois law benefited Eclecticism in the state. Clark first noted that the state had a legitimate interest in protecting the health and lives of its citizens. Therefore, he argued that protecting the lives of its citizens was part of its "police powers" and that the state had an absolute right regulate these matters. King's expectation that physicians should be exempt from government regulations was untenable, especially if their actions were found to "be detrimental to the welfare of the people composing the commonwealth."[237] Clark essentially acknowledged that the state had broad powers to regulate medicine.

Next, Clark stated that the "venomous" Eclectic objections were ultimately counterproductive and "shortsighted." While King claimed that Allopathy was collapsing, Clark acknowledged a readily apparent reality: Eclectics were vastly outnumbered by Regulars. In most states, Eclectics comprised only one-sixth to one-twelfth of the total number of physicians in the state. Eclectics were a fairly small minority, and they needed protection from the state to elevate their standing and protect

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[236] *Transactions of NEMA 1884-85* (1885): 191.

[237] *Transactions of NEMA 1884-85* (1885): 174-75.

their sect. In lieu of fighting each and every law regulating medicine, Clark believed that Eclectics needed to organize and secure the rights that Regular physicians were willing to grant them.[238]

Clark did not have the same benevolent view of the Irregular rabble that King lionized. Clark thought that the illiterate medical savants described by King were frauds, incompetents, and "medical mountebanks." King believed that these uneducated medical men were Eclectics, while Clark maintained a much more exclusive definition. Clark would not have seen an uneducated Thomsonian practitioner as a qualified physician, even though King saw him or her as a colleague and equal. Clark believed that Eclectic medicine's principled stand for freedom "allowed frauds to fill our nest with more dirt and rubbish than all the decent ones could clear out." The uneducated physicians were not allies in a war against the Regulars, but threats to the reputation of organized and educated Eclectic physicians. Unless the Eclectics purged their ranks of this "rubbish," they could not be "respected."[239]

Clark was thrilled that the Illinois Medical Practice Act chased one-thousand-five-hundred people from their medical practices. Instead of weeping for the displaced families, Clark was comforted that these individuals were forced to either abandon medicine or go to medical school. He maintained Eclectics were not harmed by the board's crackdown on itinerant physicians who lied about their skills in dishonest advertisements.[240] Clark did not believe that any of these individuals could be classified

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[238] *Transactions of NEMA 1884-85* (1885): 174-75.

[239] *Transactions of NEMA 1884-85* (1885): 175-76.

[240] *Transactions of NEMA 1884-85* (1885): 175-76.

as Eclectics. Clark argued that Eclectics actively had to secure their rights as qualified medical practitioners. If they simply opposed all medical legislation, then Eclectics faced a precarious future. If they cooperated with other organized and educated physicians they could ensure their survival. Clark believed that Illinois and Missouri were outstanding models for Eclectics because qualified practitioners, whether Allopath, Homeopath, Eclectic, benefited from just, nonpartisan medical regulation.

King's and Clark's positions on medical regulation demonstrated the fundamental rift in Eclectic medicine. King believed that medical regulation was a continuation of the ongoing war between Regular and Irregular medicine. What King saw as a last desperate attempt by the enfeebled Regulars to preserve their status and legitimacy, Clark viewed as an opportunity to unite organized, educated medical practitioners and elevate medical Eclecticism. King was unwilling to compromise on medical legislation, but Clark believed it was the best hope for helping qualified Eclectic physicians. King was vested heavily in the success of Eclecticism. He was recognized as a pioneer and leading scholar for the movement. He had educated numerous physicians, including Clark, during his long career, and he understood that medical legislation could potentially unite medicine. Instead of occupying its niche, Eclectic physicians might be incorporated into Allopathy if licensing succeeded. King clearly was concerned that Eclecticism would not be able to maintain its separate identity and ultimately disappear.

Clark was less concerned with preserving Eclecticism. He was a full generation younger than King, and he was willing to compromise with Allopaths and Homeopaths on licensing. He did not hate the Regulars; he simply believed that their medical system

was fundamentally unsound. His attack on unorganized, uneducated, and marginal practitioners confirmed his belief that medicine could not be effectively practiced by everyone. Education and training were essential for physicians, and Clark simply did not want to be associated with traveling itinerants and illiterate herbalists. Eclecticism accepted these individuals in the past, and he sought to eliminate their presence in Eclecticism and medicine. If medical societies could not purge the ranks of quacks and charlatans, then he thought the states had a responsibility to protect their citizens. Clark's assessment of these individuals undoubtedly was shaped by his own experiences as a practicing physician and his work on the Illinois board. The Illinois board conducted quasi-judicial hearings to punish physicians for misconduct and ethical violations. In 1880, the Illinois board prosecuted two physicians for practicing under aliases who assumed the identity of a prominent professor at Bennett Medical College, Clark's employer. The Bennett faculty asked the board to prosecute the physicians and ultimately the charlatans' medical licenses were revoked.[241] Clark had seen that medical licensing could protect prominent Eclectic physicians from King's rabble.

Interestingly enough, this generational gap also was appearing among the Regulars. Local and state Regular medical societies were forced to work with organized Irregular practitioners to secure legislation. These interactions softened their attitudes on Irregular practitioners. The president of the Illinois State Medical Society argued for this approach at the society's annual meeting shortly before the act was passed in 1877. While he demanded passage of a medical licensing law to protect the public from

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[241] *Annual Report State Board of Health of Illinois 1880* (1881): 5-7.

unqualified practitioners, he conceded that Eclectic and Homeopathic practitioners were, like Regular physicians, "devoted to their patients and profession."[242] He advocated détente between Regulars and Irregulars in Illinois and argued that the medical society should pass "wise and impartial legislation," which recognized only "well-educated men" but debarred incompetents, "whether regular or irregular."[243]

Many Regulars recognized that their understanding of medicine was changing, and some were beginning to acknowledge that the Old School profession did not have a monopoly on effective medicine. By 1884, most Regulars had rejected the heroic therapeutics that defined their practice a century earlier, even if they were still being taught in Regular medical schools. Organized Regular and Irregular physicians were beginning to resemble each other more than at any other time in United States history. While King still identified with the uneducated rabble, organized and educated Regular, Eclectic, and Homeopathic physicians began to see that they shared common interests.

In a democratic vote, NEMA sided with King and agreed to publish ten thousand copies of King's address to sell to Eclectics around the country. The association also unanimously approved a resolution thanking King for "his able and scholarly address."[244] In addition to recognizing King for his contributions, NEMA changed its official stance on medical legislation. It passed a strong resolution stating "[t]hat while the National

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[242] *Transactions of the Twenty-Sixth Anniversary Meeting of the Illinois State Medical Society, 1876* (Chicago, 1876): 196, http://books.google.com/ebooks.

[243] *Transactions of the Twenty-Sixth Anniversary Meeting of the Illinois State Medical Society, 1876* (Chicago, 1876): 196.

[244] *Transactions of NEMA 1884-85* (1885): 29.

Eclectic Medical Association is in favor of elevating the standard of Medical Education, it is opposed to all medical legislation."[245]

While the passage of this resolution might have suggested a major shift in NEMA's official stance on licensing, the resolution was altered the very next day. Instead of being a meaningful shift of its position, NEMA's adoption of an outright opposition to licensing looked increasingly like a token of appreciation and respect to King for his contributions to Eclecticism. A motion to insert "class" in front of "medical legislation" was adopted by NEMA. This change rendered the entire resolution meaningless. NEMA may have opposed "class medical legislation," whatever that meant, but it failed to state what it did support. Did it support non-class legislation or no regulation at all? NEMA had not changed its position as much as guarantee its ambiguity.

King failed to attend the next national convention because his wife was ill, but he sent a letter to be read at the conference. Again, he emphasized his opposition to any form of medical regulation. He stated that any Eclectics who supported medical legislation had "dough-faces and cowardly hearts." They had chosen to "lick the hands" of the Regulars who sought to "annihilate them." Instead of reforming physicians, Eclectics needed to focus their energy on educating the public. If educated patients foolishly chose to seek treatment from quacks, it was "their American right and privilege." [246]

In 1886, King again addressed NEMA about the dangers of medical licensing. His arguments changed little from the 1884 debate. He reemphasized that physicians did

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[245] *Transactions of NEMA 1884-85* (1885): 31.

[246] *Transactions of NEMA 1884-85* (1885): 22.

not need a scientific education and that it was inappropriate for medical boards to test them on this material. Uneducated physicians had advanced medicine in all three medical branches, and King believed that patients did not care if their doctor was an expert in science. King also proposed forming medical societies composed of Irregular physicians and anyone else who opposed medical legislation. He believed that the Knights of Labor, the largest national labor union in the United States at that time, could be used as an appropriate model for these new organizations, because "medical men, after all, are but laboring men." He asked Eclectics to "Organise [sic] Promptly" to fight medical legislation. Not only should Eclectics unite with anyone who opposed medical legislation, they should "avoid and banish" dissenters. King argued that Eclecticism faced extinction if they failed to organize themselves and fight.[247]

In 1885, NEMA attempted to clarify its position on medical regulation. It passed three separate resolutions addressing licensing. The resolutions claimed that it was still opposed to "Partisan Legislation," but in favor of the board of health, as they were "not empowered to act prejudicially to any class of physicians." The final resolution stated that NEMA favored "testing the constitutionality of laws" that discriminated against Eclectics. The resolution adopted the previous year, which opposed "all class medical legislation," remained the official policy of NEMA. While the new resolutions were clearly an effort to clarify its policy, they still did not advocate on behalf of anything.[248]

While King and Clark were not able to materially alter NEMA's official stance on medical licensing, Clark's vision for medical licensing ultimately became reality. By

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[247] *Transactions of NEMA 1886-87* (1887): 167-74.

[248] *Transactions of NEMA 1885-86* (1886): 10.

King's death in 1894, medical licensing had become a permanent feature of American life. King's complaints that medical licensing laws violated the Constitution were widely rejected. While courts occasionally expressed some skepticism about the merits and necessity of licensing, they universally held that the state had a strong interest in protecting the health and welfare of citizens under its police powers. Even in 1884, King would have been aware that these laws were consistently upheld. Ultimately, he was engaged in wishful thinking when he stated that the laws were unconstitutional. King sought to preserve the free market of medicine just as many other people were becoming weary of it.

Noted historian and Eclectic physician, Alexander Wilder, highlighted the shifting Eclectic position. By 1901, Wilder noted that even if Eclectics had "suffered persecution and resisted it manfully" at the hands of Regulars, they were not against licensing if it focused solely on "practitioners who follow methods and procedures that are not embraced in their category" instead of on Eclectics.[249] King's concerns ultimately were dismissed, and the Eclectics gradually moved towards Clark's position. King, however, was proven prescient in the end because when Eclectics accepted licensing, they gradually lost their distinctiveness and identity as a unique medical sect.

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[249] Alexander Wilder, History of Medicine. *A Brief Outline of the American Eclectic Practice of Medicine*, (New Sharon, Maine, 1901), 775.

CHAPTER X

MEDICAL BOARDS PROSECUTE ILLEGAL PRACTITIONERS

This chapter includes material that was originally published elsewhere:

Sandvick, Clinton, "Enforcing Medical Licensing in Illinois: 1877-1890" *Yale Journal of Biology and Medicine* June 2009; 82(2).

The material is republished here with the explicit permission of the *Yale Journal of Biology and Medicine*.

Most of the state licensing bills passed before 1890 recognized the rights of Eclectics and Homeopaths to practice medicine. In some states, supreme courts had even stated that licensing laws could not be used to discriminate against Eclectics or Homeopaths. Therefore, early prosecution efforts focused on medical practitioners that both Regular and Irregular physicians wanted to purge. Since Regulars originally pursued licensing as way to purge Irregular physicians, Regulars on licensing boards were forced to find new quarry. Therefore, licensing boards targeted physicians (Regulars, Eclectics, or Homeopaths) who simply refused to procure a license, itinerant doctors, and medical practitioners who practiced types of medicine outside of the three recognized sects. Despite severe funding limitations, the Illinois Board of Health aggressively pursued unlicensed practitioners. State medical societies or physicians

would alert the board of health to potential violations, and then both the board of health and local prosecutors would pursue them. Between 1880 and 1890, the Illinois Board of Health documented numerous prosecutions of physicians either for practicing without a license or for serious ethical violations.

In one of the early cases, an alleged "Indian medicine man" named James I. Lighthall accompanied a traveling show composed of "40 to 100 persons." Lighthall used a number of colorful aliases to establish his *bone fides* including "Kansas Jim," "Rastic Jack," and "The Indian Medicine Man."[250] Lighthall and his concert troupe appeared several times in the board's annual reports. As an itinerant medical man, he would return to the state and sell his wares and services. These included secret Indian "cure-all" remedies and teeth pulling. Instead of applying for a medical license, Lighthall circumvented the medical practice act in a number of ingenious ways. In 1883 and 1886, he hired licensed doctors "to shield himself from the law."[251] In 1886, he even procured "an itinerant vendor" license from the county clerk in Peoria. A prominent local attorney convinced the clerk to give Lighthall a license even though the clerk lacked the statutory authority to do so. In 1883, local physicians complained to the board about Lighthall, and he was arrested for violating the practice act. In 1883, Lighthall left Illinois to avoid prosecution, but the Illinois board could not prevent his return in 1886.

It was reported that Lighthall along with "a brass band, singers, gymnasts" were taking in over "five hundred dollars daily. He has about twenty tents of various sizes, and

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[250] *Sixth Annual Report State Board of Health of Illinois 1883* (1883): 62-63, http://books.google.com/ebooks.

[251] *Sixth Annual Report State Board of Health of Illinois 1883* (1883): 62-63.

a large audience tent capable of holding several thousand….He (Lighthall) calls himself the 'Diamond King' wearing $30,000 worth of jewels on his person….his watch is encrusted with jewels and is worth $25,000." The editor of *Georgia Medical Journal* was appalled by Lighthall and asked "[w]here is Dr. L.A. Clark (Anson Clark) and the rest of them?" If he "can run the traveling medial business in Illinois on a $100 per month license, a brass band, singers, and gymnasts, why can't Dr. Anybody do the same?" The Illinois board simply did not have the capital or manpower to prevent itinerants like Lighthall from conducting quick and profitable strikes into the state.[252] Even though the Illinois board quickly revoked the licenses of the two physicians who worked for Lighthall on the grounds of "unprofessional and dishonorable conduct," Lighthall continued his carnival show throughout Illinois.[253]

Despite limited manpower, the Illinois Board of Health also actively investigated a number of physicians who sent allegedly false and potentially obscene materials through the United States mail. The Illinois board issued a resolution that classified advertising or circulation of "marriage guides," which described or illustrated pictures of venereal disease, or offered to prescribe drugs designed to prevent conception or procure an abortion as "grossly unprofessional."[254] At the same time, the Illinois board settled on a fairly broad definition of "unprofessional misconduct" taking part in fraudulent or

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[252] *Georgia Medical Eclectic Journal, 1886,* 316-317, http://books.google.com/ebooks.

[253] *Eighth Annual Report State Board of Health of Illinois 1885* (1885): lix.

[254] *Annual Report State Board of Health of Illinois 1880* (1881): 10.

deceptive transactions, practicing under false aliases, or distributing circulars or handbills that were false or deceptive to attract patients.[255]

In one case, the *James Medical Institute* was accused of sending circulars by mail to public school girls. These circulars advertised nervine pills (pills of roots and herbs designed to cure "leucorrheoea or whites, nervous headaches, nervous debility, night sweats, melancholy feelings and general weakness" caused by "latent sexual feeling"), marriage guides, gentlemen's and ladies' rubber goods, and female pills.[256] Smith Whittier, operating under the alias of "Dr. James" and the *James Medical Institute*, had successfully gotten the addresses of several public school girls and their female instructors.[257] Whittier was arrested for his actions because his circulars violated decency laws maintained by the United States Postal Service. The board was able to track down Whittier because he legally chartered the *James Medical Institute* under Illinois corporate law. In an attempt to subvert the medical practice act, he and others had been legally chartering dispensaries, which could be accomplished for less than five dollars under the state's corporation act, to give their enterprises the sheen of credibility.

Other states followed Illinois's lead and sought to enforce professional standards. In Minnesota, E. C. Feller's license was revoked by the Minnesota State Board of Medical Examiners. He purchased advertisements in local newspapers claiming he had the "ability to speedily cure all chronic, nervous, blood and diseases of both sexes, also all diseases of the eye and ear, without injurious drugs or hindrance from business,

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[255] *Annual Report State Board of Health of Illinois 1880* (1881): 11.

[256] *Annual Report State Board of Health of Illinois 1880* (1881): 21.

[257] *Annual Report State Board of Health of Illinois 1880* (1881): 21-23.

etc."[258] Since Feller knew that these advertisements were false and misleadingly, the Minnesota board revoked his license. Feller appealed the board's decision to the state supreme court. The Supreme Court of Minnesota did not question the Minnesota board's authority and approved its decision in a fairly perfunctory decision. The state supreme court agreed that knowingly advertising false cures to desperate patients was clearly despicable conduct and qualified as unprofessional and dishonorable conduct for a physician.[259]

Illinois's efforts to enforce these ethical standards ran into a snag during the long prosecution of another physician named Lucas R. Williams. In 1880, Williams formed the corporation "Dr. Lucas' Private Dispensary" to treat "private, nervous and chronic diseases."[260] He formed the dispensary with two other individuals, Axel W. Boye and Dr. George J. Williams.[261] Williams established this corporation after he lost his license to practice medicine. Williams created "Dr. Lucas' Private Dispensary" in a blatant attempt to sidestep the Illinois Medical Practice Act, and he became a thorn in the side of the board for the next six years. While the board clearly was empowered by its initial success in investigating unprofessional practices, its dispute with Lucas would demonstrate some of the limits of the 1877 law. While the medical practice act had been found constitutional by various Illinois courts, Williams would demonstrate the difficulty of enforcing its criminal provisions.

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[258] *Feller v. State Board of Medical Examiners*, 26 N.W. 125 (1885).

[259] *Feller* at 125.

[260] *Annual Report State Board of Health of Illinois 1880* (1880): 26.

[261] George J. Williams unsuccessfully challenged a jury verdict convicting him of practicing medicine without a license in *Williams v. People*, 20 Ill. App. 92 (1886).

Williams received his certificate to practice medicine after he presented the Illinois Board of Health with his diploma and letters of reference soon after the law was passed. Shorting after granting his license, the Illinois board learned that Williams was practicing under an assumed name, "Dr. Lucas." In addition to that, "Dr. Lucas" published a circular which the Illinois board found to be evidence of unprofessional and dishonorable conduct. In the circular, Williams made a number of implausible claims. He stated that he had been in practice for more than twenty years (despite being only twenty-four years old), founded "the mammoth Bellevue Medical Institute in San Francisco," and guaranteed that he had permanently cured all of his patients during his lengthy career.[262] During his February 1880 hearing in front of the Illinois board, Williams stated that he was only practicing under the name "Dr. Lucas" because it was cheaper to advertise under the shorter moniker. Even though he had been asked to stop the advertisements by the board in the past, he had not done so because he claimed to have an "unexpired contract with the newspapers." Needless to say, the Illinois board dismissed these excuses and quickly revoked his license.[263]

Approximately one month later, Williams reorganized his medical practice as "Dr. Lucas's Private Dispensary" under Illinois corporation law, not the medical practice act. The board was powerless to revoke the charter of the "Private Dispensary." Williams began to practice medicine under the banner of his "Private Dispensary" and was arrested for violating the medical practice act. Williams was prosecuted under Section 13 of the

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[262] *Annual Report State Board of Health of Illinois 1886* (1886): lxxv-lxxviii, http://books.google.com/ebooks.

[263] *Annual Report State Board of Health of Illinois 1880* (1880): 7.

medical practice act, which stated that "any person practicing medicine or surgery in this State without complying with the provisions of the act shall be punished…"[264] After his conviction, Williams appealed the verdict of the criminal trial.

In 1885, Justice McCalister of the Illinois Court of Appeals rendered a decision that construed the authority of the board narrowly and eliminated its ability to revoke licenses and conduct investigations. The court found that the medical practice act gave the board authority to conduct only two types of activities. First, the board could conduct a simple verification of medical diplomas and the applicant's identity. Once the board verified the diploma and the identity of the applicant, it had absolutely no discretion to take any other action, ever. After the Illinois board issued a certificate "its power [was] exhausted and forever gone."[265] Second, the Illinois Board of Health could administer medical examinations to applicants who lacked a medical diploma. According the court, the Illinois board was not authorized to conduct investigations, hold hearings, or revoke certificates from graduates of medical schools. Additionally, the court found that the board was authorized to consider the character only of the applicants who took an examination, not those who were automatically approved after graduating from a medical school in good standing.[266] The court rejected the principle that the board had any power to regulate graduates of medical schools after they received their certificates.

The court was particularly angered by the Illinois board's actions against Williams. Under the 1877 law, people similarly situated to Williams could not appeal any

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[264] *Annual Report State Board of Health of Illinois 1886* (1886): lxxxix.

[265] *Annual Report State Board of Health of Illinois 1886* (1886): lxxxix.

[266] *Annual Report State Board of Health of Illinois 1886* (1886): lxxxviii.

revocation of their certificates. Instead they were required to resubmit their application to the same board that revoked it. Justice McCalister stated it was "highly improbable that the Legislature" ever intended to give the Illinois board such "absolute power over the reputation and fortunes of … graduates of medicine." If the legislature invested such powers in the Illinois board, they would have been "flatly against the teaching of the sages of the law and the best traditions of our revolutionary history; for it naturally leads to and terminates in favoritism, abuse and oppression…[267]" The principle that a medical school graduate's hard work and money could be invalidated was particularly offensive to the court. The court did not believe that it would ever be wise to give the Illinois board quasi-judicial enforcement powers.

While the board believed that the court's decision completely misconstrued the legislative intent of the statute, the legislature passed a new act because the court's decision pointed out that the board lacked the authority to revoke licenses for unprofessional behavior. Despite the court's strenuous objections to the board's quasi-judicial authority, the new bill attempted to eliminate any potential technical objections that could be made regarding the board's authority. Additionally, the 1887 bill clearly enumerated the powers possessed by the board and the basis of its authority. The legislature sought to eliminate any ambiguous language contained in the first medical practice act. Otherwise the only major difference between the two bills was that physicians could file an appeal with the governor if the Illinois board revoked their licenses.

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[267] *Annual Report State Board of Health of Illinois 1886* (1886): lxxxviii.

Most Illinois board members considered the first practice act to be a qualified success. The Illinois board achieved some of the goals sought by Regular and Irregular doctors during the first ten years of the law. When the law went into effect, Illinois had approximately 7,400 physicians. These physicians were almost evenly split between graduates of medical schools (48.6 percent) and non-graduates (51.4 percent). By 1887, graduates composed 89.2 percent of the 6,135 practicing physicians. A majority of the 10.8 percent of the physicians were only still practicing medicine in the state because they were exempted from complying with the licensing standards under the first law. The Illinois Board of Health also claimed that 1,923 unqualified physicians left the state. This number was repeated in numerous publications around the country and by Illinois' own physicians.

Even though the board did not bother to explain how it determined that 1,923 physicians left the state, it was irrelevant. Even if the law had not chased out 1,923 physicians, few people questioned the veracity of the claim. During its first ten years, the Illinois Board identified thirty-one diploma mills and widely published those schools' names to the nationwide medical community. Surprisingly, only forty-one licenses were revoked by the board for unprofessional or dishonorable conduct, despite have received more than two thousand complaints. Had the board been better funded, it would have undoubtedly pursued more of these claims. By 1887, the Illinois board restored six of these diplomas after the physicians met conditions imposed on them. Most physicians considered the first bill a success and promptly supported the passage of the amended 1887 law.

Soon after the amended law was passed, the state supreme court heard the case *People v. John C. McCoy*. John C. McCoy was a licensed physician in Illinois, but the board revoked his certificate for unprofessional conduct after reading several advertisements he purchased in St. Louis, Missouri, and Belleville, Illinois, newspapers. In the ads, he emphasized his extraordinary healing prowess. The Illinois Supreme Court did not believe that advertisements could be used as proof to convict an individual for practicing illegally, and ruled that the "contents of these 'advertisements'" were essentially "harmless."[268] While the court decided *McCoy* under the 1877 law, its decision made it more difficult for the Illinois board to prosecute individuals for fraudulent advertising. The *McCoy* decision threatened the newly minted 1887 medical practice act because the 1887 law explicitly stated that purchasing false or misleading advertisements was unprofessional and could be grounds for revocation. The decision in *McCoy* required the board to provide stronger evidence to support revocations.

By 1887, a large majority of states (thirty-nine states and territories) followed Illinois's lead and passed either medical registration or licensing. Seven states created statutes similar to Illinois's and allowed state boards to determine whether medical schools were in "good standing." While only seven states evaluated medical schools, that was enough to force most of the nation's medical colleges to comply with Illinois's minimum standards. Another five states at this time went beyond the Illinois requirements and forced all physicians, regardless of education, to pass their medical

[268] *People v. McCoy*, 125 Ill. 289, 296 (1888).

examinations. The remaining twenty-five states and territories had instituted only a medical registration law.[269]

As medical boards were empowered, they continued their efforts to reform American medical education. In its early years, the Illinois board focused simply on the number of terms of lectures taught at medical schools. It had not developed any additional methods to police medical schools. In 1882, the Illinois board requested that medical colleges require a minimum of three or more courses of lectures over a three-year period. In 1882, twenty-two medical schools complied with the Illinois board's request, but by 1890, sixty-four schools required the three courses. Over the same eight-year period, the average duration of the terms went from approximately twenty-three weeks to twenty-five weeks. The Illinois board also required medical schools to create admission standards. In 1882, only forty-five schools had any meaningful admission standards, but eight years later, one-hundred-and-twenty-four schools had admissions standards.[270]

As approval by the Illinois board became more important for medical schools, the schools voluntarily began to submit substantial amounts of information to the board. Schools started to send more detailed descriptions of their faculty, courses, admissions policies, laboratories, and clinical facilities. The Illinois board's publications on medical education became increasingly important and "attracted attention in newspapers as well

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[269] Ronald Harmowy, "The Early Development of Medical Licensing Laws in the United States, 1875-1900," *The Journal of Libertarian Studies*, 1979: 113-114.

[270] *Report of Medical Education, Medical Colleges, and the Regulation of the Practice of Medicine in the United States and Canada 1765-1890*, Illinois State Board of Health (1890): iv.

as in medical journals."[271] This allowed the Illinois board to require to schools to lengthen students' studies and teach specific subjects.

During the 1890s, the Illinois Board of Health continued to pressure medical schools to comply with its more stringent demands. In 1896, the Iowa, Missouri, and Illinois medical boards held a meeting in Des Moines, Iowa, to discuss which standards the three boards should approve. Collective action by the boards would put more pressure on schools to comply. At the summit, the boards addressed admission requirements for medical students. These boards wanted medical schools to require a certificate of "good moral standing," "diplomas from literary or college or high school," and testing of students on these subjects: English, grammar, arithmetic, elementary physics, United States history, geography, and Latin." While the boards struggled with developing criteria for medical school applicants, there was a general agreement that medical school admissions needed to be more rigorous.[272]

By 1896, the Illinois Medical Board began requiring increasingly specific information from medical schools to determine their standing. Its reach began to include the physical conditions of medical schools. The Illinois board had representatives conducting site inspections of schools such as the Dunham Medical College in Chicago. These inspector described the buildings, their leases, and the facilities. The inspector noted the condition and number of laboratories. The board refused to find that it was a

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[271] Shryock at 54.

[272] *Nineteenth Annual Report of the Illinois State Board of Health* (1896): xxviii-xxx, http://books.google.com/ebooks.

school in good standing because it lacked sufficient clinical facilities.[273] The Illinois board's efforts to regulate medical education were no longer limited to requiring certain of number of terms, but ensuring that students would receive a comprehensive medical education during those terms. The Illinois board appears to have had sufficient resources to both manage medical licensing and enforce sanitary regulations. The efforts and reports of the Illinois board "may have exerted more influence" than the reform efforts of any one college.[274]

While the efforts of the Illinois board were significant, they did not fundamentally improve medical education. The worst medical schools were still awful, but the Illinois board created a mechanism and system that could change medical schools. A number of schools were still more concerned with making money than developing well-prepared students. Even in Illinois, predominately commercial schools such as Harvey Medical College thrived. Harvey Medical College was perhaps "the most extraordinary example" of unrestrained commercialism because it ran "a day college, an evening college, a hospital, a free dispensary, a training school for nurses, a dime drug store, and an 'out practice'."[275]

The Illinois law did have a noticeable impact on medical education. By the last decade of the nineteenth century, Chicago was one of the largest and most important cities for medical education. Chicago's medical school enrollment grew dramatically during the Progressive era. By 1896, it had more medical students than any other city

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[273] *Nineteenth Annual Report of the Illinois State Board of Health* (1896): xxxiii.

[274] Shryock, 54.

[275] Rothstein, 291-292.

(one in nine medical students in the country was in Chicago), and its medical schools flooded the Midwest with physicians.[276] All of the medical schools in Chicago needed to be in good standing with the Illinois State Board of Health to attract students. As the Illinois boards required medical schools to add years onto their programs and provide clinical training, these schools compiled. Additionally, many other states adopted the Illinois board's determinations as their own. By 1890, the Illinois Board required colleges to provide four years of study and three annual courses of lectures as conditions for graduation. Critically, forty-nine medical schools across the country compiled with the board's demands by 1891 even as the board expanded its list of minimum requirements. Illinois's state board of health already had altered medical education.

[276] *Report of the Secretary of the Interior,* Volume V, part 2, (1896), 1224-1227.

CHAPTER XI

LITIGATING MEDICAL LICENSING

After state legislatures approved medical licensing laws, physicians immediately challenged the constitutionality of these laws in court. While it is difficult to say how many physicians contested these laws, hundreds of these cases wound their way through state appellate and supreme courts between 1873 and 1900. Physicians brought these cases to courts either to nullify the statutes before they could be enacted or in response to being prosecuted for practicing medicine without a license. While courts questioned these laws and occasionally found that they violated state constitutions, they consistently found that medical licensing laws were broadly constitutional under the common law police power. No court in the United States ever found that states did not have the constitutional right under the police power to regulate physicians. Therefore, while many of these cases questioned the constitutionality of these laws, people who wanted to overturn them successfully had to do so using other legal grounds.

Courts in several states were willing to nitpick at these laws to reverse convictions. While courts consistently found these laws to be constitutional, they appeared uncomfortable with their broad reach and were unhappy because licensing laws often "contained some specifically objectionable feature."[277] These objectionable

[277] Arthur N. Taylor, *The Law in its Relations to Physicians* (New York, D. Appleton and Co., 1900), 18.

features included carving out specific privileges for a select group of physicians, such as graduates of a particular school, or limiting fees for certain physicians.[278] Altogether, courts found that licensing statutes were simply part of the state's police power, which extended to the protection of "the lives, limbs, health, comfort, and convenience as the property of all persons within the state."[279] Still, the constitutionality of these laws was not cemented until the United States Supreme Court decided *Dent v. West Virginia* in 1889. The *Williams* case, which was cited in the previous chapter and decided before *Dent*, was just one example of judicial efforts to rein in these laws. As has been shown in many situations, courts invalidated several licensing laws because they were poorly constructed by state legislatures. Courts in Kansas, Texas, and Illinois, for example, either threw out certain provisions or invalidated laws entirely because state legislatures were not careful when they wrote the laws.

In New Hampshire, a graduate of the Eclectic Medical College of the City of New York was denied a license by the New Hampshire Eclectic Medical Society (NHEMS). The New Hampshire medical practice act authorized the state's three sectarian medical societies to elect boards of censors that were responsible for licensing the state's physicians. NHEMS's board of censors denied his license because they found the physician "was unqualified and unfit to practise [sic] medicine, surgery and midwifery" and "unworthy of public confidence." The board claimed that even if it issued him a license, it would immediately revoke it. The New Hampshire Supreme Court ruled that the board of censors could not refuse to issue him a license without a trial before the

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[278] Taylor, 21.

[279] Taylor, 18.

board. The New Hampshire law required the board of censors to issue licenses to medical school graduates. If the board of censors believed that applicants lacked the requisite skills to practice medicine, the board was required to prove that at trial.[280]

The Iowa Supreme Court determined that the State Board of Medical Examiners illegally denied an applicant after concluding that his medical school was not in good standing. The Iowa Eclectic Medical College (IEMC) awarded the applicant a medical degree in 1890. The Iowa State Board of Medical Examiners established that his school was in good standing when he was in attendance, but after he graduated, the board changed its mind. The board denied him and every other graduate from the school licenses based on that determination. The board reaffirmed its determination after holding a hearing with the applicant and the dean of the IEMC. The court found that while the board had the right to decide that medical school was in good standing, it did not have the right to make that decision "arbitrarily and without restraint." The court ruled that the board's action was illegal and that the board should have issued licenses to all the applicants of the IEMC.[281]

While the California Supreme Court in *Ex parte Frazer* determined that the state's medical practice act was broadly constitutional, the court did not evaluate every provision of the law. The court reevaluated the law in a *writ of habeas corpus,* in the case *Ex parte McNulty*. P. Roscoe McNulty petitioned the court after he was imprisoned for practicing medicine without a license. In 1884, McNulty had been issued a license by the one of the

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[280] *Gage v. Censors of the N.H. Eclectic Medical Society*, 63 N.H. (1884) 92, 93-95.

[281] *Iowa Eclectic Medical College Association v. Schrader, et al., Board of Medical Examiners*, 87 Iowa 659, 661- 670.

state board of examiners, but the licensing board revoked his license a year later after he advertised in the *San Francisco Chronicle* that he was a "specialist in certain enumerated diseases." Despite the revocation, McNulty continued to practice medicine and was arrested soon thereafter.

The court found that McNulty was imprisoned illegally because he had not violated the state's practice act. The law criminalized only practicing "without first having procured a certificate." Since McNulty procured a license from the board, the court ruled that it did not matter whether the board revoked his license later. In a concurring opinion, two judges argued that the examining boards never should be allowed to revoke a physician's license after granting one. They argued that the police power did not grant the legislature authority to revoke a license for "what is styled 'unprofessional conduct.'" The judges stated that the advertisement did "no harm to any one." The judges argued that revoking a licenses for advertising was just as ridiculous as if the board had ruled that "wearing any other hat than one a white color, by a physician, should be unprofessional" and punishable by a misdemeanor.

These cases demonstrated that while state courts had not ruled these laws to be broadly unconstitutional, they were on the lookout for provisions that were objectionable. In these cases, the courts were concerned that physicians were not given due process under the law. The courts did not want licenses to be revoked or a medical school's "good standing" taken away without formal procedures and hearings. Some judges questioned whether state boards should be given the right to revoke any physicians' licenses after granting it. As physicians learned during the *Williams* case in Illinois,

courts were going to examine these laws carefully to determine whether provisions went too far.

While courts scrutinized these laws, they were averse to ruling that medical licensing laws were inherently unconstitutional. In Alabama, the state supreme court upheld the validity of the medical practice act after an unlicensed physician sued his patient for payment. The Supreme Court of Alabama evaluated the original practice act in the 1885 case, *Harrison v. Jones*. In the case, Joseph Harrison sued his former patient, Joseph R. Jones, to collect payment for rendering care to Jones's wife. Unfortunately for Harrison, he failed to secure a license from either his county or state board. Harrison was eligible for a license because he was a graduate of the Medical College of the state of South Carolina and the state board even printed a license for Harrison. Inexplicably, Harrison declined to accept the certificate and failed to register in his county. The court dismissed Harrison's lawsuit and found for the defendant because any existing contract between the two was void. It did not appear that Harrison challenged the legitimacy or constitutionality of the state's medical licensing law, and the court did not even bother to address whether the law was constitutional.[282] Despite Harrison's conviction, he continued to practice medicine in Butler County, Alabama, and he later obtained a license.[283]

Later, the Supreme Court of Alabama found that the Alabama practice act failed to criminalize the practice of medicine without a license. The defendant, Dr. S.W.

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[282] *Harrison v. Jones*, 80 Ala. 412, (1885) 413-416.

[283] *Transactions of the Medical Association of the State of Alabama* (1887), 246-247, http://books.google.com/ebooks.

Brooks, moved to Russell County, Alabama. Instead of going to the Russell County Board and securing a license, Brooks recorded his diploma from a "regular medical college in the state of Georgia" with the judge probate of Russell County. The court found that the statute failed to criminalize practicing medicine in Alabama if the physician recorded his diploma with the probate court. The court elucidated that if someone practiced medicine "without a diploma, without a license, and without a certificate of qualification," it was much graver than the actions taken by the defendant in this case. The court objected because Alabama Regular medical school graduates were allowed to simply register with the probate court and the court did not believe that Brooks should be treated any differently just because he had gone to school in Georgia.[284] Besides invalidating Brooks's conviction, the court also reversed the conviction of another unlicensed physician on the same grounds.[285]

While the board of censors for MASA was heartened that the court did not invalidate the law entirely on constitutional grounds, the board was extremely distressed that the decision permitted "ignoramuses and quacks, whose sense of honor is very elastic" to "enjoy immunity from criminal prosecution." The board of censors maintained that regardless of this decision, the state and local board would continue to license physicians as it had in the past. They simply hoped that new physicians would be honorable and comply with the previous interpretation of the law. Unsurprisingly, the board of censors also called upon the members of the society to lobby the state legislature

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[284] *Brooks v. The State*, 88 Ala. 122 (1889), 123-127.

[285] *Stough v. The State*, 88 Ala. 234, 234-235 (1889). This was the other conviction the court set aside.

to amend the medical practice act and permit criminal prosecution under the law. The board realized that the only way to fix the act would be to completely amend it.[286]

The Alabama legislature acted reasonably quickly and amended the medical practice act. In 1891, the state legislature remedied this problem and successfully criminalized the statute. In 1893, another physician, Seaborn Bell, challenged the medical practice act after being indicted for practicing without a license. Bell claimed that the new law was unconstitutional; he maintained that the indictment failed to charge the defendant with an offense that violated the laws of Alabama. This time the Alabama Supreme Court spent little time addressing the defendant's claim and found that the medical practice act's previous problems had been remedied by the legislature. The court simply stated that the defendant unquestionably violated the law and upheld his conviction.[287]

In California, Lee Wah, a Chinese druggist, sought to overturn his conviction for practicing medicine without a license. Wah's defense rested on his contention that he only practiced medicine in an emergency. Under the 1876 California Medical Practice Act, any individual could practice medicine without a license in cases of an emergency and avoid prosecution. Wah tried to exploit this exception to avoid a conviction. Wah ran a Chinese medicinal herb pharmacy. Two women bought "certain medicines, consisting of Chinese teas and herbs," from him. Wah contended that he had an absolute "right to prescribe, recommend and the teas and herbs to the ladies as an apothecary and

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[286] *Transactions of the Medical Association of the State of Alabama* (1890), 88-89, http://books.google.com/ebooks.

[287] *Bell v. The State*, 104 Ala. 79, (1893) 79-83.

druggist, under his general merchandise license." Neither of the women paid for any services from him -- they only paid for the herbs and teas. Wah argued that the women were informed by several physicians that their conditions were untreatable and ultimately fatal, so there situation constituted an "emergency" under the medical practice act.

In the California Supreme Court, Wah objected to the jury instructions read by the trial court judge to the jury. After stating that the jury had the right to decide what constituted an emergency, the trial judge informed the jury that Wah's conduct was not an emergency and that they should disregard Wah's claim. In essence, the court nullified Wah's defense. The jury had little choice but to ignore Wah's argument.[288] Along with arguing exigent circumstances, Wah stated that he had not practiced medicine under the statute because he simply prescribed herbs and teas to the women. As a druggist, he did not charge for any services he provided the women. He simply sold herbs and teas. According to Wah, the medical practice was not designed to interfere with druggists, but "to prevent the legal qualification of quacks in the practice of medicine and surgery.[289]

The California Supreme Court did not agree and affirmed Wah's conviction. The court found that Wah did practice medicine under the statute and the women's cases did not constitute exigent circumstances. An emergency could be best described as a situation where "some person might get hurt, or faint, or fall in the street, and a person might render him assistance and him from pressing danger." A person could face criminal prosecution if he failed to render aid, but if someone believed that they may be

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[288] Wah, *Appellant's Brief*, 5-7.

[289] Wah, *Appellant's Brief*, 6-8.

treated more beneficially or efficiently by a physician from a different school medicine, that was not an emergency.[290]

The court's ruling in *Wah* was questionable. Did Wah's services really constitute the practice of medicine? The court did not even bother to explain how Wah practiced medicine when he prescribed herbs and teas. The functions of druggists and physicians were different under California law. Wah arguably, under the facts presented in the case, did not practice medicine. It would have been difficult for the jury and judge to ignore the fact that Wah was Chinese. By 1886, anti-Chinese sentiment was rampant in California. This case occurred only four years after the Chinese Exclusion Act was passed. Apart from outright discrimination, Wah was a Chinese immigrant and he was not permitted to testify on his own behalf in court. He could not defend himself from the allegations in the complaint. With the proliferation of various medical sects, whether someone practiced medicine was a legitimate question for debate. Wah appeared to work primarily as a druggist. When does selling drugs become practicing medicine? In the 1880s, people practiced several different types of healing practices and not all of them relied on prescribing medications or operating on patients. The court in Wah's trial did not even bother to cite any cases in support of its contention that Wah was practicing medicine.

If the Court in *Wah* had looked, it possibly could have cited *Bibber v. Simpson* to assert a broad understanding of the practice of medicine. In Maine, the Supreme Judicial Court for the Western District ruled that a clairvoyant practiced medicine when she

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[290] *The People v. Wah*, 71 Cal. 80, (1886) 80-82.

prescribed seances ranging from fifteen minutes to an hour for her patient. She did not pretend that she understood anatomy or medicine, but she believed her treatment was helpful to her patient. After her patient died without paying, she sued the patient's estate for her fees. The court stated that the services were "medical in their character." Under an old 1831 Maine law, physicians could only collect for services rendered if they had a medical degree or license from the Maine Medical Association. This law was one of the last remnants of earlier efforts to regulate medicine during the first half of the century. The court stated it was irrelevant whether Bibber called herself "a medical clairvoyant, or as a clairvoyant physician, or a clear-seeing physician," she was a physician under existing Maine law. By prescribing seances, she was labeled a physician under Maine law and denied an opportunity to collect her fees.[291] Unlike the court in *Wah*, numerous other courts have repeatedly cited *Bibber* for its extraordinarily broad interpretation of the practice of medicine.

Courts struggled to determine who was practicing medicine under some of these practice acts. In *Smith v. Lane*, a court found that massage was not within the scope of practicing medicine under New York law. The plaintiff in the case demanded payment from the defendant for "rubbing, kneading and pressuring" the defendant's body. The plaintiff's action was dismissed because the court found that he was not a licensed physician. The plaintiff appealed the case to the First Department of the Supreme Court of New York. The plaintiff argued that his actions did not fit under the rubric of a physician; the medical licensing authorities in the state would not issue him a license

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[291] *Bibber v. Simpson*, 59 Me. 181 (1871), 181-182.

because massage did not fit under any branches of medicine. In essence, even the state's medical licensing bodies would have agreed that it was unnecessary to license him. Even if a massage therapist exaggerated the effects of massage to a patient, it still did not constitute the practice of medicine. Therefore, people who practiced massage did not need to procure a medical license to practice their therapy. The court found that the practice of medicine was generally understood to include surgery and the use of medicines to cure, mitigate, or alleviate diseases. Unlike the practice of medicine, the court found that the incompetent practice of massage posed little threat to the health and welfare of the general public. Therefore, it was unnecessary to protect the public from any potential harm. The court reversed the lower court's opinion and found that the plaintiff could pursue his debt claim.[292]

Smith v. Lane grew increasingly controversial. Other medical specialists cited *Lane* to claim that specialists who did not use medicine were not practicing medicine. As other non-drug prescribing medical specialties were created, such as osteopathy, chiropractic medicine, and Christian Science, these specialists would cite the legal reasoning in *Smith v. Lane* to support their contention that they were not practicing medicine. In theory, *Smith v. Lane* had little value as precedent because the decision was not adjudicated by the state's highest court and it was not even binding for all of New York. But the case provided useful legal reasoning for other challengers when they were prosecuted for violating licensing laws. Perhaps more important is that medical societies and medical examining boards across the country viewed these drugless medical

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[292] *Smith v. Lane*, 24 Hun 632 (1881) 632-635.

specialties as serious threats and sources for medical frauds. Several states, including a different court in New York in 1907, rejected the reasoning of the *Lane* court and found that manipulating the body could be considered practicing medicine.[293] This issue would become increasingly contentious at the start of the twentieth century.

Wisconsin courts faced a difficult task determining whether a clairvoyant was practicing medicine. The clairvoyant was sued for malpractice after he unsuccessfully treated the hip injury of a fifteen-year-old patient. The clairvoyant was an unlicensed physician, but he held himself out as "competent to treat diseases of the human system." He had treated numerous patients in the past. In this specific case, the clairvoyant failed to conduct an examination of his patient and misdiagnosed his hip pain as rheumatism. The clairvoyant prescribed walking as the treatment for his patient. Instead of getting better, the hip condition deteriorated. Despite the noticeable worsening of the patient's hip, the physician continued to prescribe walking as treatment and informed the patient that he was not in fact getting worse, but better. The patient finally was not able to walk and lost the use of his leg. Over time the patient regained some movement, but he "will be a cripple for life."[294]

The clairvoyant countered that he should not sued for medical malpractice as a physician, because he was not one. Therefore, any potential damages against him should have been limited to an action for breach of contract. The clairvoyant claimed that he had not violated any principles of clairvoyant medicine during his treatment of his patient,

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[293] *People v. Allcut*, 102 N.Y. Supp 678. Buditt A. Rich and Henery P. Farnham, eds. *Lawyers' Reports Annotated, Book 33*, (1911), 185-86, http://books.google.com/ebooks. *The Hahnemannian Monthly, vol. 42*, July, 1907, 538-39, http://books.google.com/ebooks.

[294] *Nelson v. Harrington* 72 Wis. 591, 592-593 (1888).

because clairvoyants did not practice in accordance within any existing rules for physicians to treat or diagnose disease. Instead "his mode of diagnosis and treatment consisted of voluntarily going into a sort of trance condition."[295] The clairvoyant's legal position was designed to limit his monetary liability because the patient would have been entitled to far less money for a breach of contract than in tort.

The court disagreed with the clairvoyant and determined that simply because a person resorted "to a peculiar nature of determining the nature of the disease and the remedy," it did not exonerate any unskillfulness on his part. The court held that clairvoyant physicians were still physicians and their actions would be evaluated against a more rigorous standard of care. Instead of being compared only to physicians within their own medical sect, clairvoyants would be evaluated against "the ordinary skill and knowledge of physicians in good standing, practicing in that vicinity." The verdict against the clairvoyant did not disturb the original verdict, and the damages were upheld.[296] Even though the clairvoyant case was a malpractice action and not a criminal prosecution, its definition would have been applicable to any licensing case.

In another case, *Davidson v. Bohlman*, the plaintiff physician Davidson demanded payment from his patient Bohlman for a series of electric treatments for the defendant and several family members. Davidson possessed an electric medical degree and he practiced in the state for thirty years as a physician, but he had failed to register at the time of the treatment in 1882 as a physician with the county clerk's office. It is unclear

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[295] *Nelson*, 598.

[296] *Nelson*, 603-606.

from the case if he was unknowingly violating the state's medical registration law.[297] Even though Davidson was the person who originally filed the lawsuit, he would have been better served by eating his financial losses then pursing the Bohlman family in court. At trial, Davidson presented evidence that he conducted electric treatments on the family and put forward another physician to establish the going rate for that type of treatment in St. Louis. The trial court found in Davidson's favor, but after Bohlman appealed the trial court decision, Davidson and his counsel quickly learned that his failure to register as a physician barred him from collecting his debt. In desperation, Davidson claimed that he was not practicing as a physician when he conducted the treatments on the Bohlman family despite the evidence he offered at trial. He argued that electric treatments were not medical in their nature and should be treated differently from the standard notion of practicing of medicine. Davidson could not have been too surprised when the court overturned the trial court's decision and ruled in favor of the Bohlmans.[298]

While various courts meandered around the notion of what constituted a physician, throughout the country state courts were united regarding the constitutionality of medical licensing. Despite efforts by courts to rein in medical licensing laws, courts had been unwilling to claim that states lacked the authority to license physicians. While courts may have expressed skepticism regarding certain aspect of licensing laws and struck down statutes that were poorly constructed, they were unwilling to go any further. Before the United States Supreme Court addressed licensing laws' constitutionality, state

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[297] Davidson worked for most of his career as an Allopathic physician, but later switched to electric medicine. He would register as a physician with the state in 1883.

[298] *Davidson v. Bohlman*, 37 Mo.App. 576 (1889), 576-580.

courts already had ruled that licensing and registration were constitutional under both state and federal constitutions.

In 1888, Michigan's supreme court ruled on the constitutionality of its licensing laws. The state was operating at the time under a medical registration law passed in 1883. Michigan granted medical licenses to any practitioner who was a graduate of a "legally authorized medical college." Therefore, only graduates of diploma mills could be excluded from the practice of medicine by the state's law because they would not have been considered "legally authorized." William W. Phippin was not eligible to obtain a license to practice medicine in Michigan because he was not a medical school graduate. Despite this hindrance, Phippin advertised in a Grand Rapids newspaper that he was physician. While Phippin was not a medical school graduate, he claimed that he had practiced medicine in Canada for more than nine years and then another year in Michigan. His experience in Canada did not protect him from being prosecuted in Michigan for violating its medical practice act. The Michigan Supreme Court convicted him for "unlawfully advertising and holding himself out to practice medicine."[299]

Phippin realistically could not challenge the facts in the case, so instead he chose to test the constitutionality of Michigan's law. Like most attempts to challenge the constitutionality of the statutes, it was rejected. Most courts, even the most skeptical, held that states had a right to regulate medicine under a state's police power. What makes the Phippin case intriguing is not the holding or facts of the case, but the dissent. Despite the growing number of cases supporting the constitutionality of these statutes, two judges

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[299] *People v. Phippin*, 37 N.W. 888, 889 (1888).

still questioned the underlying wisdom of state medicine. The dissenting judges viewed medical regulation as unnecessary and an unconstitutional restriction of individual freedom. They came to this conclusion because they believed these laws prevented patients from consulting with the physician of their choice and barred some potentially qualified individuals from practicing medicine.

The dissenting justices argued that this was the first instance where "citizens … have been prevented from employing such medical aids and advisors as they have seen fit." They were concerned that licensing would eliminate dissenting views in medicine. Instead of an active dialogue, those with "new or peculiar views" would be completely shut out. Apprenticeship should not have been rejected in favor of formal collegiate medical education because there was only one medical school in the state and medical education was uneven throughout the country. The justices described the quality of medical schools outside Michigan as "notoriously imperfect, and some [were] fraudulent. There can be no possible equality under such a system." The justices also were concerned that potential physicians who did not agree with the two medical systems taught at the Michigan medical school would be prevented from receiving a medical education. Licensing would create an "aristocracy in a free government." People with talent and experience would be prevented from practicing medicine, while "a mere quack or ignoramus, without learning or experience, with a bogus certificate, or a *bona fide* graduate" could become a physician. Examinations, they argued, would have been a much fairer method to evaluate applicants for licenses and would not exclude physicians who did not attend medical school. By 1888, most states had provisions that still

permitted non-graduates to take the medical examination and practice medicine.[300] While this dissent expressed lingering doubts about the fairness of medical licensing, those objections would be swept away by *Dent*.

In 1882, the West Virginia legislature passed a licensing law that on its face looked similar to other state laws. When the law was implemented, it created both a state board of health and medical licensing board at the same time. Anyone who wanted to practice medicine in West Virginia was required to obtain a certificate from the state board to practice. If a physician practiced for ten consecutive years, he or she was required to submit evidence of their practice in the state to either the state board of health or two members of a local board of health in his "Congressional district." The only stated rationale for denying a certificate was if the affidavit was "false." Additionally, if a physician had not practiced for ten years, he or she could submit a diploma from a "reputable medical college." The state board determined which schools were reputable under the law. If the physician was not a graduate and did not attend a "reputable" medical college, he or should would have to submit to an examination which tested all or majority of "its departments." The licensing statute required anyone practicing obstetrics and surgery to comply with all the provisions of the law. Unlike other licensing laws, Regulars controlled the state board of health and intentionally discriminated against Irregular physicians. The state board deemed only Regular schools to be "reputable" under the law. All Irregulars were required to take the examination.

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[300] *People v. Phippin*, 37 N.W. 888, 889-891 (1888).

Unlike the state board of health in Illinois, Regulars did not have to share the board of health with Irregulars, and the legislature did not even bother carving out a different testing standard for Irregulars. In Alabama, even though Regulars controlled the state board of health, Irregulars were not tested on Regular medicine. West Virginia law permitted all physicians to be tested on Regular medicine. Essentially, Regulars in West Virginia were able to create a law that insured their domination of medical practice in the state. West Virginia was unusual because it was one of the few states that was able to achieve the original goals the AMA and Regular medical societies had for licensing.[301] Unsurprisingly, due to discriminatory enforcement of this law, Irregular physicians challenged its constitutionality.

Frank Dent was a physician who started his "lucrative practice" in West Virginia in 1876. Because he had practiced medicine in West Virginia for fewer than ten years, Dent was required to submit his diploma to the board of health. According to the statute, Dent submitted his diploma from the American Medical Eclectic College of Cincinnati, Ohio, to members of the board of health. The board of health denied his application because it determined that his school was not "reputable." Instead of sitting for the licensing exam, Dent continued to practice medicine without a license. Dent was later indicted and convicted for practicing medicine without a license. Dent never disputed the fact that he practicing medicine. He was fined fifty dollars and required to cover "costs of the proceedings." Dent appealed the trial court's decision to the Court of Appeals of the state of West Virginia, which affirmed his conviction.

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[301] *Dent v. West Virginia*, 129 U.S. 1214, 9 S.Ct. 231, 1889 U.S. LEXIS 1669.

Dent's alma mater, the American Medical Eclectic College (AMEC) of Cincinnati, Ohio, was somewhat problematic. While the West Virginia law appeared to be administered in a discriminatory manner, the AMEC may not have been the best example of a quality Eclectic medical school. The details regarding the school are extremely sketchy.[302] It is certainly possible that the West Virginia board's finding that the school was not reputable could have been justified. Putting the AMEC's credibility aside, clearly West Virginia was blatantly partisan in the battle of the sects. In front of the United States Supreme Court, the attorney general for West Virginia argued that its board of health could not only legally exclude Irregulars from practicing medicine in the state, but was also justified in doing so. "Regular physicians had no obligation to prove that their practices" were superior to Eclectic medicine. These statements by the attorney general eliminated any doubt that even if AMEC had been a credible school, it still would not have been deemed reputable by the board because the law was "engineered policy" to benefit "elite" West Virginian Regular physicians.[303]

The United States Supreme Court ultimately sided with West Virginia in this case. While Justice Field in his decision acknowledged that people had a "right" to practice a

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[302] Historian John S. Haller stated that AMEC was "organized in 1876 and declared not in good standing by the Ohio State Medical Board in 1896." The AMEC that was declared not to be in good standing in 1896 by the Ohio board may not be the same organization that was founded in 1876, if in fact it was founded in 1876. According to the Illinois Board of Health's reports on medical education of 1885-86 and 1890 AMEC was organized in 1883. It is possible that the first incarnation of AMEC went out of business or was simply reorganized in 1883. It should be noted that AMEC was an extremely small school (only six graduated in 1883-84 and eight in 1885-85) which might explain the dearth of evidence regarding its existence. While it was listed as medical school in "good standing" by the Illinois Board of Health in 1885, by 1890 the Illinois board no longer recognized its diplomas. All in all, it is somewhat difficult to determine if AMEC was a particularly reputable school in the abstract sense.

[303] James C. Mohr, late draft of *License to Practice: The Supreme Court Defines the American Medical Profession*, (Baltimore, Johns Hopkins University Press, 2013), 10-9, 11- 3.

"lawful calling, business, or profession" and the state was not allowed to arbitrarily restrict this right, the state's desire to protect society was not arbitrary. He stated that the "power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud." Due to the nature of the medical profession, Justice Field argued that a state could understandably be compelled to prevent people from practicing medicine without a license if they were not considered to be "fully qualified." Additionally, Field did not find that there was anything "of an arbitrary character in the provisions" of the West Virginia statute because Dent could have taken an examination to become licensed after his license was denied. Field acknowledged that if Dent had been denied a license after passing the state's examination, he would have had a legitimate claim. He then could have petitioned the state courts to order the board of health to license him, but Dent failed to do that.[304]

The *Dent* decision ended any reasonable claim that licensing laws were unconstitutional. Physicians would continue to include constitutional claims in their efforts to invalidate licensing, but those efforts were foolhardy and a waste of paper. The Supreme Court's ruling was clear and concise. This decision also laid the groundwork to expand state licensing beyond medical licensing. *Dent* has become a touchstone case and has been cited numerous times.[305] *Dent* has been expanded to state authority to license

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[304] *Dent v. West Virginia*, 129 US 114, 121-128.

[305] A brief Lexis query showed that *Dent* has been cited nine-hundred fifty-seven times in court decisions, legal briefs, academic law journals, etc. This search even included references from books, magazines, newspapers, and other sources.

all types of professions, including the practice of law. *Dent* also was critical to the expansion of medical licensing because it removed any doubt that these laws were legal.

The West Virginia law was quite possibly enforced by the state board in a more discriminatory way than any other law in the nation. If the Supreme Court refused to overturn a law that was explicitly enforced excluding Irregulars on somewhat suspect grounds, then it would be hard to imagine a law that would be invalid on constitutional grounds. The courts ruled that states had a right to pick sides in the medical sectarian disputes. *Dent v. West Virginia* confirmed the growing consensus that medical licensing laws were constitutional and a valid use of the police powers.

Litigants after Dent were forced to shift their constitutional claims from federal to state law. In 1892, R. H. Randolph, an unlicensed Oregon physician, challenged the constitutionality of the licensure act under the Oregon Constitution, but his claim gained little traction. Randolph argued that the law violated the state's constitution because it grandfathered in physicians and surgeons who practiced in Oregon before the act was passed.[306] Randolph argued that the act discriminated against out-of-state physicians who moved their practice to Oregon. The Oregon Supreme Court again upheld the licensing act because the state had the power to enact laws to protect the general public from "ignorant pretenders and charlatans."[307] Nearly every state's special provisions for physicians who had practiced in a state for a certain length of time were upheld because

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[306] *State of Oregon v. Randolph*, 23 Ore. 74-79 (1892).

[307] *Randolph* at 84.

those physicians were seen as having experience, which offset the degree requirement.[308] Efforts to nullify practice act under state constitutions were not successful.

Still, despite the *Dent* decision, courts would struggle to define the practice of medicine after 1890. Instead of arguing that the laws were unconstitutional, medical specialists argued that they were not physicians and not regulated under the acts. The endless variety of medical treatments and sects made it difficult for courts to determine who was or was not practicing medicine. Determining who was a medical practitioner was a far more important debate than if the laws were constitutional. Moving into the 1890s, examining boards, medical societies, and prosecutors would continue to try expand the notion of who was practicing medicine and force them to get medical licenses. Even though the question of constitutionality was settled by *Dent* in 1889, courts would face numerous future licensing cases on narrower legal grounds. Over the next twenty years, courts would be forced to define the practice of medicine as new medical specialties expanded in competition with the three major medical sects.

[308] Arthur N. Taylor, *The Law in its Relations to Physicians* (New York, D. Appleton and Co., 1900), 19.

CHAPTER XII

IF AT FIRST YOU DON'T SUCCEED...

While physicians in most states managed to pass one form of the three major licensing schemes, other physicians, like those in Oregon, continued to struggle to advance any form of medical regulation. Oregon's Regulars proposed several unsuccessful bills over the years and were running out of patience. Physicians began to sound the alarm that Oregon soon would become a haven for quacks and incompetents from other states. Oregon's physicians did not want physicians who could not get licensed anywhere else to flood into the state. In 1888, the Oregon State Medical Association (hereafter OSMA) made yet another dedicated push to pass some type of medical regulatory act.[309] This time, the OSMA was willing to grease the appropriate palms to push the licensing bill through the legislature.

At the 1888 annual OSMA meeting, the legislative committee appointed Charles C. Strong and five other members to spearhead the lobbying effort. According to Strong, the committee chair, they were told by the OSMA leadership "to go to work" on passing a medical licensing act.[310] In December 1888, a month before the legislature's general session, the legislative committee sent out a fundraising letter to its members requesting

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[309] The Medical Society of Oregon changed its name to the Oregon State Medical Association a few years earlier.

[310] "Report of the Legislative Committee," *Proceedings of the Sixteenth Annual Meeting of the Oregon State Medical Association 16* (1889): 203.

ten-dollar pledges because the committee confidently stated "that such a law will be passed" if they could raise enough money. The committee stated in the letter that it hoped to raise one-thousand dollars. Eventually, the committee raised three-hundred-and-five dollars in pledges from the members. The committee never explained why it needed the money.[311]

To limit opposition and debate within the medical community, the legislative committee refused to draft a bill "until shortly before it was sent to the legislature." Strong wanted to avoid telling members specifically what type of medical bill they were planning to propose. After receiving the fundraising solicitation, several physicians who had been practicing in Oregon "ten, fifteen or twenty years without a diploma, began to ask, 'What kind of bill are you going to pass? Are you going to shut us out?" Strong evaded this question by sending postcards to any members who requested information about the bill; the cards stated that "the Committee ha[s] not as of yet drafted a bill. We have substantially agreed that a bill must be a reasonable in all its provisions; and it has proposed to not disturb the present relations of anyone practicing medicine and surgery at the time the bill becomes a law."[312]

The legislative committee approached legislator and Regular physician, Dr. James V. Pope, to introduce the Oregon association's bill in the House. Pope studied medicine in St. Louis and worked as a physician during the Civil War, but he was not a medical

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[311] *Proceedings Sixteenth Annual Meeting* (1889): 204.

[312] *Proceedings Sixteenth Annual Meeting* (1889): 205-206.

school graduate.[313] After Pope introduced the bill, he abruptly threatened to scuttle it. Strong wrote, "[N]ow came the point to find out where the shoe pinched with Dr. Pope; but I knew it pinched somewhere, and surmised that probably he wanted the credit of introducing and passing the Medical Bill, and wanted it to be known as Pope's bill." Strong also stated that rumors had spread in the legislature that the OSMA raised a lot of money to smooth passage of the bill.[314]

The legislative committee sent one of its members to meet with Pope in Salem, to determine why he intentionally tried to stall the bill. The member magnanimously offered to name the medical bill "Pope's Bill" and told him:

> "but in a way as not to accuse us of bribery--to be careful about that--that we had $200 down here, and if he would draw a draft on me for $200 I would recognize it, and he could see where the *corruption* fund was and where it was used. Well of course that knocked it all into 'pi.'" [315]

After the OSMA offered Pope two hundred dollars and told him who else they planned to give money to, the bill began moving swiftly through the legislature. Within a few days of the committee's meeting with Pope, Pope was selected to serve on a special legislative committee to review the legislation. Pope's committee acted quickly and offered a few amendments. The only meaningful amendment created an exemption from licensing for any physician who practiced in state at the time the law went into effect.[316]

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[313] O. Larsell, *The Doctor in Oregon: A Medical History* (Portland, Oregon State Historical Society 1947), 210.

[314] *Proceedings Sixteenth Annual Meeting* (1889): 206.

[315] *Proceedings Sixteenth Annual Meeting* (1889): 206-207.

[316] *The Journal of the House of the Legislative Assembly of the State of Oregon for the Fifteenth Regular Session 1889, 15th House*, 1889, 305.

Pope's amendment provided broader protection for any physician than what the original bill offered. Under the original bill, Oregon physicians who had practiced in Oregon could have obtained licenses, but the licenses would have stated whether the doctor had attended medical school. Pope's amendment ensured that physicians who were practicing without a diploma, such as himself, would not be listed any differently than other doctors in their community; the county clerk's registry would indicate only that Pope and his ilk were simply practicing physicians and surgeons. The local registry would not state whether a physician went to medical school.

During the legislative session, the local newspaper, *The Morning Oregonian*, covered OSMA's push for licensing. While the *Oregonian*, the state's largest newspaper, supported medical regulation, it published an article about the fight to further regulate physicians in Massachusetts that was occurring at the same time. An attorney speaking before the Massachusetts legislature testified that medical science failed in treating patients, and argued that the doctrine of supply and demand was the best way to regulate medicine.[317] A letter to the editor of *Capitol Evening Journal* lambasted the so-called "quack bill" as an attempt to eliminate competition. Additionally, the writer was aghast that the bill invested enormous power with a three-physician medical board.[318] These complaints were essentially the same ones that scuttled previous medical regulation.

The bill passed and authorized the creation of a medical licensing board and established specific criteria to receive an Oregon medical license. The medical board consisted of three members who had the power to approve three separate types of licenses

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[317] Editorial, *The Morning Oregonian*, Feb. 26, 1889.

[318] "The Quack Bill," *Capitol Evening Journal*, Feb. 27, 1889.

that would permit the practice of medicine. First, individuals who could establish that they received a diploma or license from a legally chartered institution of good standing could qualify. Second, the board could issue licenses to anyone, regardless of educational background, by administering a test that evaluated the qualifications of the potential practitioner. Finally, doctors and surgeons already practicing in Oregon at the time the act was passed could simply register with the office of the county clerk sixty days after the act's approval and continue their practices.[319] Anyone who practiced medicine in violation of this act was guilty of a misdemeanor.

Even though the bill had passed, the OSMA still feared that the governor would veto it. Governor Sylvester Pennoyer had expressed several concerns about the bill. If he chose to veto the bill late in the legislative session, it would have been at least two years before the bill could be reintroduced. Fortunately for the OSMA, Pennoyer decided not to veto it. Instead, Pennoyer issued a non-signing statement arguing that the bill should have been vetoed because it gave the medical board too much power to take away a physician's diploma for unprofessional conduct. These broad powers were not circumscribed because the act failed to define dishonorable conduct, but Pennoyer instead decided "to obviate any difficulty by appointing as examiners men known to be cool-headed and conservative."[320]

After almost fifteen years of failure, the OSMA finally succeeded in passing a regulatory act by paying a two-hundred dollar bribe from the "corruption fund" to a

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[319] *Oregon Sessions Law*, "An Act to Regulate the Practice of Medicine," 1891, section 3.

[320] "The Governor Dodges. The Medical Bill Becomes a Law Without His Signature – His Excellency longed to a farewell shot at the bill, but he concluded to check the veto impulse and trust in luck." *The Oregonian*, Feb. 28, 1889.

legislator who then passed an amendment to protect his own medical practice. Additionally, the remaining one-hundred-and-five dollars were distributed to other legislators on Pope's suggestion. Despite Pope's self-dealing, his modifications to the bill made it more palatable to Oregon physicians who were practicing without diplomas. Pope's concerns were similar to other physicians in the state, and those doctors would have opposed the 1889 bill without those changes. The conclusion that the three-hundred-five dollars raised by the association was intended for bribes is unavoidable. It is not surprising that Strong was cagey about explaining what the money was for. Strong also acknowledged that even with Pope's help and the OSMA members' money, getting the bill passed was extremely difficult; "[i]f they knew the way that committee worked, the difficulties that arose, and the pressure brought to bear, the thumb screws we used here and there of one kind or another."[321]

The legislative committee of the OSMA was not satisfied with the final bill, but it was willing to accept it because the committee was convinced that the bill could be easily remedied in the future. Even though the act fell "far short of perfection," it fundamentally altered who could become an officially sanctioned physician in the state. The OSMA, like most other state societies, decided it was more important to pass something then to continue without any licensing law.[322] Strong also stated that the bill would silence the dissent of diploma-less practicing physicians. As long as any future bill did not encroach on those physicians' rights, he argued that they would support future

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[321] *Proceedings Sixteenth Annual Meeting* (1889): 208.

[322] A. C. Panton, M.D., "Address," *Proceedings of the Sixteenth Annual Meeting of the Oregon State Medical Society 16* (1889): 6

legislation. He stated it would be in the best interest of those physicians to support "the most stringent law against the admission of others."[323] Strong understood that "it is to be hoped that it may go through a course of evolution that may ultimately bring our State abreast of the other states and territories in respect to legislation to regulate medicine and surgery."[324]

Under the original 1889 act, physicians and surgeons were required to receive a diploma from a medical institution in good standing, but the act explicitly stated that the medical board was not permitted to discriminate against the holders of genuine licenses or diplomas from a licensed medical school or system. Therefore, the Oregon law did not discriminate against Homeopaths or Eclectics but due to sloppy drafting, the law not only avoided discriminating against any of three major sects, it prevented the board from excluding physicians who acquired medical degrees from diploma mills.[325] In the end, Strong was correct. Even though the law originally was amended to eliminate the drafting problem, the 1891version was modified in several ways, and it ultimately resembled the original bill proposed by the OSMA rather than the bill promulgated by Pope.

The report of the State Medical Board to the OSMA by James Dickson, M.D, a member of the new board, addressed these changes. Dickson told the OSMA that the phrasing of the original bill was flawed and the board's lawyers were concerned that if

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[323] *Proceedings Sixteenth Annual Meeting* (1889): 108.

[324] C.C. Strong, M.D., "Opening Address," *Proceedings of the Sixteenth Annual Meeting of the Oregon State Medical Society 17* (1889): 6.

[325] *Oregon's Sessions Laws*, "An Act to Regulate the Practice of Medicine," (1889).

the law was challenged, it most likely would be scrapped by the courts.[326] The 1891 amendment eliminated this problem by augmenting the power of the medical board to set its own standards for medical schools. The board was no longer obligated to admit any physician who had graduated from a university if it had a proper charter. Instead, the board was allowed to set certain rules, as had been originally intended, to determine what the board considered to be a school in good standing. The board immediately decided to require that medical schools mandate three sessions of six months each of school and no two of those sessions could be in one year. The board, in essence, adopted the recommendations of the Illinois State Board of Health. Unlike Illinois, Oregon did not have the resources to conduct any meaningful investigations on its own.[327]

Under the promulgated standards, Dickson postulated that graduates of forty of the existing one-hundred-and-thirty-five American medical institutions would be forced to take an exam under Oregon law. The 1891 revision also placed physicians who registered with the county clerks under the control of the medical board. Under the 1889 Act, the board lacked jurisdiction over these physicians and could not discipline them for dishonorable conduct.[328] The 1891 act remedied the problem and compelled all practitioners to submit themselves to the board for a license. Not only did the medical board draft standards; it immediately exercised its statutory authority and began rejecting applicants.

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[326] James Dickson, M.D. "Report of the State Medical Board," Proceedings of the *Eighteenth Annual Meeting of the Oregon State Medical Society 18* (1891): 176-177.

[327] *Proceedings Eighteenth Annual Meeting* (1891): 177-180.

[328] *Proceedings Eighteenth Annual Meeting* (1891): 177-180.

In 1895, Oregon again altered its medical licensing law by requiring all applicants to pass a licensing exam. The 1895 amendment also expanded the power of the Oregon Medical Board to revoke the license of a physician for unprofessional or dishonorable conduct including any physician who was originally exempted in the first law.[329] Soon thereafter, the Oregon board immediately targeted physicians in the state. The 1895 statute specified the grounds for unprofessional or dishonorable conduct: Taking part in a criminal abortion, employing "cappers" and "steerers," obtaining a fee and claiming the ability to cure an incurable disease or condition, betraying a professional secret, using untruthful or improbable statements in advertisements, conviction of any offense involving moral turpitude and habitual intemperance, and advertising medicines claiming to regulate the monthly periods of women.[330]

State medical boards throughout the country were adopting similar licensing criteria. Before 1890, only nine states adopted codes of ethics, but during the 1890s, twenty-four more states developed codes of conduct for physicians. These codes governed what grounds could be used by the board either to deny a license or revoke one after issuance. Typically, "the exercise of the same wide discretion cannot be extended to a case where, when one has been regularly admitted, the revocation of his license is sought under another independent provision of the statute."[331] Like Oregon's, these codes typically barred unprofessional or dishonorable conduct, procuring abortions, gross

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[329] *Oregon Laws, 1895*, 61-65, sec. 6.

[330] *Oregon Laws, 1895*, 61-65, sec. 6.

[331] Hugh Emmett Culbertson, *Medical Men and the Law: A Modern Treatise on the Legal Rights, Duties and Liabilities of Physicians and Surgeons*, (Philadephia and New York, 1913), p. 47. Culbertson was citing *Czarra v. Board of Medical Supervisors of District of Columbia*, 25 App. D.C. 443.

immorality, false statements and promises, false advertising, distributing indecent and obscene material, and the fraudulent use of diplomas.[332] Several of these criteria were similar to those adopted by the Illinois board in the 1880s.

The Oregon Medical Board enforced its ethics code and revoked the license of an Astoria physician, Otis Burnett Estes, for providing an abortion. Estes was a Regular physician and a graduate of College of Physicians and Surgeons at St. Joseph, Missouri. Estes had been described in the community as "Daddy Estes" because he had delivered more than two-thousand-five-hundred babies around Astoria, Oregon.[333] Estes's was convicted in the Oregon criminal court of performing an illegal abortion. After his conviction, a local Astoria physician, Dr. Oswald Beckman, filed a complaint against Estes with the state medical board. At the hearing, the full board heard the case against Estes. The prosecution questioned three witnesses at the hearing: Sophia Schultz and two other Astorian physicians. Schultz was Estes's patient and she recanted her earlier testimony and stated that Estes had not performed an abortion. Estes's counsel introduced sixty-four affidavits from Astorian citizens in support of the physician. Despite Estes's support and Schultz's testimony, the full board revoked Estes's license. [334]

Estes challenged the board's decision to revoke his license, and the trial court reversed the revocation.[335] While Estes was convicted of performing an illegal abortion,

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[332] Culbertson, 47 – 51.

[333] Larsell, *The Doctor in Oregon*, 285.

[334] *State v. Estes*, 1897 Ore. LEXIS1. Citing LEXIS because it is not clear if this portion of the decision is cited in the other reproductions of this decision; "Dr. O.B. Estes, of Astoria, Found Guilty by State Medical Board," *Daily Capitol Journal*, October, 21, 1896.

[335] *Estes*, 14-15.

his patient recanted her testimony during the license revocation hearing and claimed that she was confused and sick with a fever during the criminal trial.[336] His patient's inability to speak English also hampered the efforts of the prosecutor to cross-examine her. The prosecution failed to provide any other admissible evidence to support the charges. The board also failed to file an appeal of the circuit court's decision in a timely fashion.[337] The board was forced to reinstate Estes as practicing physician and surgeon. The Estes cases demonstrated the difficulty in enforcing ethics laws. Even though Estes was convicted of performing an abortion, the court was not willing to use that conviction as evidence against Estes. Medical boards had to prove their cases in their own administrative hearings.

Even as Oregon's physicians were amending their practice act in 1891, another state, New York, that was slow to adopt actual licensing slowly began to move forward. In 1891, the New York Medical Practice Act finally went into effect after laboring under a mishmash of laws for almost twenty years. While there is no any evidence that New York's Regulars resorted to bribery to pass the bill, it was an incredibly difficult task for other reasons. Even though New York was one of the first states to pass a medical licensing law complete with an examining board (later vetoed by the governor) the state's Regular physicians were stymied in their efforts to pass another law to create an examining board. While there had been efforts to reform the medical education from the state's public medical schools, Regulars had not come any closer to forcing the state's physicians to take a licensing exam.

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[336] *Estes*, 20-21.

[337] *Estes*, 24.

Unlike doctors in California and Illinois, New York's physicians, both Regular and Irregular, repeatedly failed to compromise with each other and pass a bill acceptable to the each group. Additionally, the state's Regulars were divided between two competing medical societies. The state's original medical organization, the Medical Society of the State of New York, was excommunicated by the AMA after it admitted a former Homeopathic physician. The split eroded cooperation among the state's Regular members and made it more difficult to pass licensing.

Still, New York's failure to pass a licensing law is surprising in one respect. Even if the state's Regulars were divided, the medical society would have appeared to be the perfect organization to compromise with the state's Homeopaths and Eclectics. The medical society had driven the AMA to distraction after its physicians rejected the AMA's strict anti-consultation prohibition in the 1880s. Its rejection of the AMA's Code of Ethics represented a serious threat to the AMA's authority and demonstrated a willingness to treat the state's Homeopaths as colleagues rather than enemies. At first glance, the flexibility of the state's largest Regular medical society would have appeared to suggest a willingness to compromise with state's Irregulars on a licensing law, but, unlike other states, Regulars did not have much sway over the legislature. New York's Homeopaths were influential in the state's legislature and they refused to compromise with the Regulars.[338]

In several ways New York's inability to pass a licensing law mirrored Massachusetts. Not only did both states have powerful and influential Homeopathic

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[338] Rothstein, 144-145.

societies, they already had created state boards of health. Massachusetts established the first state board of health in 1868, and New York built its own in 1880.[339] Advocates for medical licensing had their greatest success when they tied licensing to public health bills, but in Massachusetts and New York they did not have that option. In Massachusetts, it was exceptionally hard to argue that medial licensing was an essential part of public health, because the board of public health thrived in the absence of licensing. New York was running into a similar problem.

At the February1889 Homeopathic Medical Society of the State of New York annual meeting (before the 1889 medical licensing was passed), Dr. William Helmuth acknowledged that relations between Regulars and Homeopaths in New York had improved dramatically over the years. He stated that the Regulars' "tide of persecution by the old sectarians and the violence of their invective is no more."[340] Despite the thawing relations between Regulars and Homeopaths,. Helmuth insisted that each sect should still have its own examining board. The Homeopaths successfully prevented a unified board from being created, and Helmuth argued that there was no reason to give in now. Helmuth most likely understood that Regulars desperately wanted licensing and would eventually agree to the Homeopaths' demands.

Regulars in the Medical Society of the State of New York were becoming increasingly desperate. New York's Regulars were extremely frustrated that they could

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[339] Lewis Balch, M.D., "The Relation of Physicians to Boards of Health," *Transactions of the Medical Society of the State of New York* (1890): 387, http://books.google.com/ebooks.

[340] Dr. William Helmuth, "Introductory Remarks by the President" *Transactions of the Homeopathic Medical Society of the State of New York for the Year 1889*, Volume XXIV (1889), 4-5, http://books.google.com/ebooks.

not get any traction for instituting a licensing board. In 1886, the society proposed creating an examining board with nine members. The bill failed because the Regular medical society insisted on six of the members being Regulars. The state's Homeopaths had little incentive to create a board that permitted Regulars to outvote them and vociferously opposed the bill. In 1889, the Regulars again discussed a bill, the same "compromise bill" that was originally drafted in 1885.[341] That bill still established a nine-person board, but the Regulars wanted only a simple majority of five. The physicians who pushed for this new configuration failed to explain why this would be any more palatable to Irregulars or what incentive they had to agree to it. One physician who favored the bill even acknowledged that the society had to "conform to their (homeopaths) wishes" if they wanted to secure passage of any bill. The bill proposed would not have accomplished that, and it is astounding that after twenty years, they had not figured that out.[342]

During an open discussion at the society's meeting, a member bemoaned that he had "little faith in the sincerity of the better class of homeopaths to work in harmony with us on the bill." Still, he was willing to support a bill that "drop[ped] the question of therapeutics." Even though some members still wanted licensing to give more powers to the state's Regulars, most doctors in the society realized that there was absolutely no way Homeopaths would agree to a unified board with a majority of Regular members. The member's suggestion also did not inspire opposition or angry responses from the other

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[341] "Minutes of the Annual Meeting," *Transactions of the Medical Society of the State of New York*, (1889): 14-15, http://books.google.com/ebooks.

[342] "Minutes," *Transactions of the Medical Society of the State of New York, for the year 1889*, (1889): 23.

members. The lack of acrimony on this issue is illuminating because during the previous thirty years any suggestion that therapeutics be eliminated from a licensing bill had sparked heated debates. While the board did plan to submit another bill with a unified board, the members were resigned to accepting any bill they could get approved.[343]

The Regular medical society submitted another licensing bill to the legislature that included a unified board. Homeopaths immediately voiced outrage and united in opposition to the bill. Their opposition was extremely straightforward. The state Homeopathic society believed that a unified examining and licensing board represented an existential threat to Homeopathic medicine. Instead of a unified board, New York's Homeopaths proposed a law modeled after the California licensing law. Instead of one board, the three major medical sects would have their own separate boards.[344]

The outcry that a unified board represented a threat to the survival of Homeopathic medicine was perhaps overdramatic, but there was increasing concern within the Homeopathic ranks that unified boards posed a serious threat to the distinctiveness of Homeopathic medicine. While these Homeopaths were primarily upset about the potential for Regulars to prevent Homeopaths from being licensed, there were legitimate concerns about the long-term viability of Homeopathic medicine. Regardless of whether the therapeutic differences had blurred among the three medical sects, there was some evidence that unified boards had discriminated against Homeopaths in the past. Homeopaths pointed to the fact that the unified medical board in Canada licensed more

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[343] "Minutes," *Transactions Medical Society New York* (1889): 24.

[344] "Will Fight the Allopaths" *New York Times*, Oct.11, 1889, 4.

than 1,350 Regular physicians between 1870-1890 and only nineteen Homeopaths.[345] Still, it is difficult to pin down any place in the United States where there was widespread discrimination against Homeopaths. Regardless, New York's Homeopaths had little incentive to compromise. Eventually, New York's Regulars relented in their pursuit of a unified board and agreed to Homeopathic demands. Like Oregon's Regulars, New York's Regulars finally were willing to soften their views and pass a licensing law.

When New York's medical practice law went into effect in 1891, three separate sectarian boards of seven members each were established. The board positions were filled by members of the three statewide sectarian medical associations: the Medical Society of the State of New York, the Homeopathic Medical Society of the State of New York, and the Eclectic Medical Society of the State of New York. Those members were appointed by the Regents of the University of New York, the organization traditionally responsible for medical education in New York. The Regents also developed the medical examination for each of the three boards. Aside from questions on therapeutics, the examinations for each board were identical. The law required all physicians to pay a twenty-five dollar fee and submit evidence that they were "twenty-one years old and of good moral character, has a medical diploma or license and studied medicine for three years, 'including three courses of lectures in different years in some legally incorporated

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[345] H.M. Paine,, M.D., "Report on Medical Legislation" *Transactions of the Forty-Third Session of the American Institute of Homeopathy held in Waukesha Wisconsin* (1890): 78, http://books.google.com/ebooks.

medical college or colleges' before they received their diploma or license was conferred upon them."[346]

After the New York law was passed, J.P. Dake, a prominent Homeopathic physician from Tennessee and member of the American Institute of Homeopathy's Committee on Medical Legislation, addressed its creation. While he acknowledged that New York Homeopaths generally were pleased with the "very cumbersome, round-about" law, he said this law was unlikely to work anywhere else in the United States. He did not believe that should be used as an appropriate model for medical licensing anywhere else.[347]

While Dake was critical of the New York Law, one of his colleagues on the committee, H. M. Paine, was marginally enthusiastic. While Paine was skeptical about whether licensing improved medical care, he argued that the New York law was an "unparalleled" victory for Homeopaths over Regulars. He also stated that despite the New York Homeopaths' success, it was still critical for Homeopaths to continue fighting against the creation of unified boards, like the one created in Oregon in 1889. He was dismayed that licensing and especially unified boards still had the potential to "to repress independent and original inquiry and discourage invention and improvement" of American medicine. Paine criticized Homeopaths for pursuing unified boards with the hope of achieving equal representation because they had "never been indorsed [sic] by

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[346] "Recent Medical Legislation in New York," *The New York Medical Journal*, July 12, 1890: 46, http://books.google.com/ebooks.

[347] J.P. Dake, "The Proper Attitude of the Institute in Matters of Medical Legislation," *Transactions of the 43rd session of the American Institute of Homeopathy* (1890): 76-77.

the allopathic school, on account of the risk to themselves of being controlled by the homeopathic and eclectic members of a board."[348]

It is obvious that New York and Oregon laws differed because New York's large Homeopathic population was able to shape its licensing bill. Homeopaths and Eclectics in Oregon clearly did not have enough power, or perhaps failed to pay large enough bribes, to state legislators to influence the Oregon bill. Each of these examples also illustrated how difficult it still was to pass medical licensing in some states. In Oregon, Regular physicians resorted to bribery, while New York's Regulars had to overcome hostility by the state's Homeopaths and the inability to curb their ambitions. Even though Oregon and New York were two of the last states to pass medical licensing, the few remaining would take anywhere from five years to a decade more to pass meaningful licensing laws.

[348] H.M. Paine,, M.D., "Report on Medical Legislation" *Transactions of the 43rd session of the American Institute of Homeopathy* (1890): 77-81.

CHAPTER XIII

OSTEOPATHS AND CHRISTIAN SCIENTISTS

As Regulars, Eclectics, and Homeopaths asserted control over medical practitioners through licensing, they faced two serious challenges to their authority: Osteopathy and Christian Science. Medical specialists from each of these specialties concluded that they could treat disease and human ailments more successfully than physicians from the three major medical sects. Neither of these medical specialities considered that advances in medical science were correct and both rejected the emerging germ theory. While Regulars, Homeopaths, and Eclectics had argued over the past thirty years about which sect was the most scientific, Osteopathy and Christian Science dismissed scientific medicine entirely. Osteopaths manipulated the body to treat their patients health, while Christian Scientists convinced their patients that disease was a metaphysical dilemma rather than a physical one. Because of their unusual treatments, licensing boards struggled with how to deal with them.

In response to these new challengers, state licensing and examining boards tried to bring these new drugless specialities under their purview by expanding the definition of practicing medicine. Regardless of the treatment protocol, licensing boards insisted that these care providers were practicing medicine under existing medical practice acts. They began prosecuting specialists who did not secure licenses under existing laws.

Osteopaths, Christian Scientists, opticians, midwives, and other medical professionals all came within the crosshairs of licensing authorities after they expanded their interpretation of the "practice of medicine." Osteopaths and Christian Scientists received extra attention because they were perceived by the three major sects as the greatest threats to their control over licensing.[349]

The threat posed by Osteopathy and Christian Science galvanized cooperation among Regulars, Eclectics, and Homeopaths. The three major sects did not want to expand licensing to these newer sects, and they sought to limit their expansion by forcing these medical specialists to operate under existing licensing laws. In many states, Regulars and Irregulars worked together to eliminate these recently minted competitors. Some Irregulars even contemplated phasing out separate state licensing boards in favor of unified boards to minimize the Osteopathic threat to their practices.[350] Courts also struggled to classify these new medical specialists. Medical licensing boards prosecuted Osteopaths and Christian Scientists for practicing medicine without a medical license, but the courts across country came to widely disparate conclusions. Unlike determining constitutionality of licensing laws, courts struggled to classify these new medical specialists.

Andrew T. Still, a former Regular physician from Missouri, developed the treatments that morphed into Osteopathy during the 1870s and 1880s. In 1874, Still

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[349] Allan McLane Hamilton, Md., Lawrence Godkin, Esq, eds. William A. Purrington, Esq., "Of Certain Legal Relations of Physicians and Surgeons to Their Patients and to One Another," *A System of Legal Medicine, Vol. 1*, (New York, E.B. Treat 1895), 595-598.

[350] Kaufman, *Homeopathy in America*, 161; Gevitz, Norman, *The DOs: Osteopathic Medicine in America*, 2nd edition, (John Hopkins University Press, Baltimore, 1982, 2004), 28-31.

renounced Regular medicine and became a magnetic healer. Magnetic healers passed magnets over a patient's body to restore the flow of the "invisible magnetic fluid" that circulated throughout the body. Magnetic healing was developed in Austria in late eighteenth century and migrated to the United States. Magnetic healers postulated that people became ill when this fluid pooled inside the body instead of flowing freely. [351]

While practicing magnetic healing, Still added bonesetting to his practice to attract more patients. Bonesetters alleviated pain by moving bones back into alignment. Bonesetting had been practiced since colonial times, and these specialists were dispersed widely throughout the country. After learning the bonesetter trade, Still became convinced that bonesetting could do more than just address simple aches and pain. He argued that it had the potential to cure chronic conditions such as asthma.[352]

During the 1870s and 1880s, Still traveled around Missouri and demonstrated his healing techniques. He avoided prosecution for his work because he was licensed as a Regular physician. Still's demonstrations intrigued numerous people, and he convinced a number of people that his techniques had merit. By 1889, he was successful enough to establish a hospital in Kirksville, Missouri. At this time, he proclaimed to the public that he had discovered a new branch of medicine. Next, Still opened an Osteopathic school in Kirksville. After establishing the American School of Osteopathy, he began to draw the attention of the Missouri State Board of Health and the medical societies of three major sects in Missouri.[353]

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[351] Gevitz, 13-15.

[352] Gevitz, 17-19.

[353] Gevitz, 20-28.

The medical societies of the three sects were concerned about Osteopathy's growing popularity, and successfully lobbied the Missouri legislature in 1889 for a law requiring anyone who manipulated bodies to treat disease to pay a licensing fee of one-hundred dollars per month. Even though the law was approved, state authorities neglected to enforce it. In 1893, the three sects then lobbied for another law that required Osteopaths to be graduates of medical schools in good standing. The only school of Osteopathy in the United States was Still's and it would not have satisfied the Missouri board's requirements for this rating. The Missouri legislature rejected this bill and instead passed a bill legalizing Osteopathy. While this first law was vetoed by the governor, another law in 1897 that legalized Osteopathy was passed and went into effect across Missouri after the governor, an Osteopathic patient, refused to veto it. Osteopathy spread rapidly from Missouri into neighboring midwestern states over the next decade.[354]

Unlike Osteopaths, Christian Scientists did not manipulate bodies. Instead, Christian Science had been described as a "medicoreligious hybrid" that combined physical well-being with religious beliefs. In 1875, Mary Baker Eddy published a book titled *Science and Health*. This widely read text started the Christian Science movement and created a unique example of faith healing in the United States. While Christian Science initially was perceived as simply another type of faith healing, over time it acquired notoriety and acclaim unusual for spiritual healing. During the 1880s and 1890s, the movement picked up steam and became a legitimate challenger to scientific

[354] Gevitz, 28-31.

medicine. By the 1890s, state courts and legislatures debated whether Christian Scientists practiced medicine under state licensing laws.[355]

Despite widely exaggerated claims by members of the medical press that there were more than one million Christian Scientists practicing medicine in the United States in 1890s, it was likely that there were no more than fifty thousand Christian Scientists in the entire country. Additionally, few of these adherents worked as faith healers. Regulars, Homeopaths, and Eclectics were not overrun by a horde army of faith healers despite their repeated assertions to the contrary. Christian Science was a small religious community, but physicians were outraged by the religious beliefs espoused by Mary Baker Eddy and her adherents.[356]

Christian Scientists dismissed the traditional remedies of Homeopathic, Eclectic, and Regular medicine. They also argued that Louis Pasteur's germ theory was fabricated. Instead of medicine or physical manipulation to cure illnesses, Christian Scientists relied on religion and metaphysics. Historian Rennie Schoepflin argued that faith healers appealed to Progressive-era Americans because their central claim was that disease was caused by the "fallen human nature." As the United States rapidly changed during the Gilded Age, many Americans were concerned that society was becoming increasingly immoral. Christian Science offered an intriguing alternative to people who were concerned about the constantly changing understanding of science and medicine. The central belief of Christian Scientists questioned whether physicians were even necessary.

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[355] Rennnie, B. Schoepflin, *Christian Science on Trial: Religious Healing in America*, (Johns Hopkins University Press, Baltimore, 2003), 5-7, Kindle edition.

[356] Schoepflin, 112-114.

The dramatic shifts by the three major medical sects away from their traditional understanding of disease and to new theories such as germ theory also might have alienated Americans. Even if earlier medical practices were ineffective, patients might have found them more comforting than the new alternatives. Paradoxically, even though Christian Science rejected the existence of disease, patients paid Christian Scientists to cure their illnesses.[357]

Just as Regulars had demonized Homeopaths and Eclectics in the past, licensed physicians from the three medical sects worked together and relentlessly attacked these new medical specialists. Licensing united the three sects against these new interlopers. While the sects still viewed medicine somewhat differently, their differences were not nearly as great as those between them and these new medical apostates. Additionally, Regulars, Eclectics, and Homeopaths dominated medical licensing, and they did not want these specialities to flourish unchallenged. Licensed physicians directed their state organizations to prosecute Osteopaths and Christian Scientists.[358]

There were several early decisions that addressed whether Osteopaths needed to be licensed as physicians under existing licensing laws. Typically, Osteopaths defended themselves by claiming that they were not physicians and did not fit within the existing licensing laws. In Missouri, the state legislature passed an exemption in 1892, but Osteopathy presented a conundrum for most state courts. Courts struggled to develop a consensus on whether Osteopathy was a practice of medicine. Interestingly, courts ended

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[357] Schoepflin, 119-121, 127.

[358] Martin Kaufman, *Homeopathy in America: The Rise and Fall of Medical Heresy* (The Johns Hopkins University Press, Baltimore, 1971), 141-142.

up analogizing Osteopathy to Christian Science. Typically, if courts believed that Christian Science was a medical practice, then they would come to the same conclusion about Osteopathy.[359]

Not only were the court decisions at odds, but Osteopaths also were forced to make contradictory arguments about their medical specialty. They advertised that their medical system could cure numerous ailments. They also were competing with physicians from the three major medical sects for patients. While Osteopaths primarily treated patients for chronic conditions, they argued that Osteopathy could treat other types of diseases and deserved to be viewed as more than simply a system of body manipulation.[360] From their patients' perspectives, Osteopaths performed the same services as licensed physicians. Osteopaths achieved their results by different methods, but their clients would have viewed Osteopaths as doctors. When licensing and state boards of health prosecuted Osteopaths for practicing medicine, Osteopaths argued that they were not physicians despite their public pronouncements to the contrary. From a legal perspective, Osteopaths made a credible argument. They contended that they did not practice medicine because they did not prescribe drugs. It may have been a solid argument in court to compare to Osteopaths to nurses or massage therapists, but it also would also have undermined their credibility as legitimate healers. Osteopaths wanted to be seen as more than just nurses.[361]

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[359] In Nebraska, both Osteopathy and Christian Science were found to be medical practices. See *Little v. Nebraska*, 60 Neb. 749 (1900) and *Nebraska v. Buswell* 58 N.W. 728 (1894).

[360] Gevitz, 42.

[361] *State v. Gordon*, 194 Ill. 560, 62 N.E. 858 (1902)

Eugene Holt Eastman was one of the first Osteopaths prosecuted for practicing Osteopathy. Eastman was unique because he was tried in two separate states, Illinois and Ohio, for practicing Osteopathy in two consecutive years. He was a graduate of the newly formed American School of Osteopathy in Kirksville, Missouri.[362] As a practicing Osteopath, Eastman's treatment "consisted wholly of rubbing and manipulating the affected parts with his hands and fingers, and flexing and moving the limbs of the patient in various ways."[363] Eastman argued to the Illinois Board of Health that he was not a practicing physician because he did not prescribe medicine or use instruments to treat his patients.[364] The Illinois board ignored his arguments and determined that he was a physician. The Illinois board ruled that Eastman was a physician because he stated that his treatments could cure a "long list of diseases" relying only on the "manipulation, flexing, rubbing, extension" of his client's limbs. Both the Illinois board and the court of appeal simply defined medicine as "the art of understanding diseases and curing or relieving them when possible."[365] Under this definition, Eastman was found to be practicing medicine and his conviction was upheld.

After the Illinois board's decision, Eastman left Illinois and moved to Akron, Ohio, late in 1896. In Akron, he continued his Osteopathic practice, but within one month he was charged with practicing medicine without a license. Contrary to the Illinois Court of Appeals, the Court of Common Pleas in Ohio did not believe that

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[362] *Eastman v. Ohio*, 6 Ohio Dec. 296, 297 (1897).

[363] *Eastman v. People*, 71 Ill. App. 236, 238 (1896).

[364] *Eastman*, 238.

[365] *Eastman*, 239.

Eastman was a practicing physician. The court refused to find that Osteopaths, clairvoyants, mind healers, faith curers, massage therapists, and Christian Scientists were physicians under the Ohio licensing statute. If the legislature sought to ban or regulate these practices, the court argued it would need to do so explicitly, as Iowa had done.[366]

In 1899, the Ohio Supreme Court in *State v. Liffring* supported the earlier lower court decision in the *Eastman* case and confirmed that Osteopathy did not constitute the practice of medicine in Ohio. A grand jury indicted William Liffring for practicing with a license, but went to circuit and quashed the indictment. The state sought to overturn the lower court's decision and prosecute Liffring for violating the state's licensing law. Prosecutors argued that medicine had "a wider significance than has the word drug." They also cited "The Ohio Osteopath," which was published by the faculty of the Ohio Institute of Osteopathy. This publication identified fifty diseases that could be treated successfully by Osteopathy. The court disagreed and found that the practice of medicine required the use of "drug or medicine."[367]

In *Nelson v. State Board of Health*, an Osteopath named Harry Nelson filed a petition of equity to enjoin the Kentucky State Board of Health from harassing him. Nelson was concerned that the board was going to prosecute him for violating the state's practice and he sought to short circuit their efforts. They refused to enjoin the board from enforcing the law against Nelson. After the lower Law and Equity Division entered a judgment in favor of the board, Nelson asked the Kentucky court of appeals to reverse the

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[366] *Eastman v. Ohio*, 299-301.

[367] *State v. Liffring*, 61 Ohio St. 39; 55 N.E. 168 (1899), 39-51.

decision and force the board to recognize his college, the American College of Osteopathy in Kirksville, as legitimate under the state's medical practice act.[368]

The Kentucky Court of Appeals determined that American College of Osteopathy was not a reputable medical college, but it still found in Nelson's favor. The court found that Osteopathy did not constitute the practice of medicine and it was unnecessary to for the board to evaluate Nelson's school. The court stated that because Osteopaths did not prescribe drugs or conduct surgery, they were not physicians. Therefore, Nelson's medical speciality was not covered by the Kentucky medical practice act, and the state's board of health had absolutely no right to interfere. The American College of Osteopathy was not legitimate medical school because its graduates did not practice medicine. The court cited *Liffring* in support of its decision.[369]

The Supreme Court of Nebraska also wrestled with a similar question of whether Osteopathy was a recognizable part of the practice of medicine. Charles Little, an Osteopath, was convicted of practicing medicine without a license. Little argued at trial that he was not a physician under the Nebraska medical practice act. The Nebraska Supreme Court rejected Little's argument and found that "those who practice osteopathy for compensation come within the purview of the statue as clearly as those who practice what is known as 'Christian Science,' and therefore this case f[ell] within the principle of *State v. Buswell*." While the court acknowledged that other courts' decisions around the country were "in conflict with it," it was satisfied with its decision because Osteopaths and physicians had the same goals. They both sought to restore "the patient to sound

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[368] *Nelson v. State Board of Health*, 108 Ky. 769, (1900), 770-774.

[369] *Nelson*, 779-781.

bodily or mental condition." The court was not interested in quibbling over whether the practice of medicine required physicians to prescribe drugs.[370]

Unlike the court in *Little*, the Alabama Supreme Court's decision focused directly on the notion of whether the practice of medicine required use of medicines. In *Bragg v. State*, E. Eugene Bragg was convicted by the Jefferson County Criminal Court of practicing medicine without a license and violating the Alabama medical practice act. Bragg appealed to the state's supreme court to overturn his conviction. Bragg's defense was that he was not engaged in the practice of medicine because he did not use medicines. The court rejected his claim and stated "the word medicine has a technical meaning, is a technical art or science, and as a science the practitioners are not simply those who prescribe drugs or other medicinal substances as remedial agents, but it is broad enough to include and does include all person who diagnose diseases and prescribe or apply any therapeutic agent for its cure." The court cited *Bibber v. Simpson* in support of its decision. As discussed earlier in *Bibber*, the Maine Supreme Court determined that the actions of a medical clairvoyant constituted the practice of medicine.[371] *Bragg* is another example of a court that took a broader interpretation of what constituted the practice of medicine.

Since, the courts were deadlocked over the issue of Osteopathy, Osteopaths quickly realized that the only way to ensure the survival of their medical speciality was to lobby for their own licensing laws. While a majority of courts exempted Osteopaths from licensing laws, Osteopaths wanted their practice to be not only be legal throughout

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[370] *Little v. Nebraska*, 60 Neb. 749 (1900), 751-752.

[371] *Bragg v. State*, 134 Ala. 165, 32 So. 767, (1901), 768-772.

the country, but legitimate. Like Regulars and Irregulars, Osteopaths quickly organized themselves in medical societies and created research journals. Aside from giving Osteopaths a sheen of respectability, the infrastructure gave Osteopaths a way to wage a concerted campaign to secure licensing. Between 1897 and 1901, fifteen states passed separate licensing laws for Osteopaths. Unsurprisingly, most of these state were in the Midwest, but New York, California, and Connecticut also passed laws favoring Osteopaths.[372]

These new laws were not ideal. In order to secure medical licensing, Osteopaths lobbied in favor of laws that were not always particularly beneficial to them. They struggled to get traction in state legislatures, because Osteopaths were hampered by their small numbers, the relative youth of the specialty, disorganized campaigns, and lack of agreement among themselves about the type of laws that were most appropriate. In many states, efforts to secure legislation flamed out. In the states where Osteopaths secured licensing, they often were placed at the mercy of licensing boards that they did not have any representation on.

One of these states was Illinois which passed a new licensing law in 1899 designed to license Osteopaths and other medical specialists. Under the new law, the practice of medicine was broadly defined to include physicians who practiced medicine and surgery in all their branches and anyone who wished to practice a specific system of medicine without the use of medicine or instruments. This law was designed to put the state board of health in charge of all medical practitioners including midwives,

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[372] Gevitz, 47.

Osteopaths and potentially Christian Scientists. Physicians from the three major medical sects controlled the board and Osteopaths had little say over how the law was administered. Even under the 1887 medical practice act, practitioners who rubbed or manipulated their patients were classified as physicians.[373] Suffice it to say, the state's new law did not necessarily help Osteopaths. Under Illinois law, Osteopath were required to meet the same standards as all other physicians. They were not given a lower standard to become a physician in the state. Laws like Illinois' would require Osteopathic schools of medicine to rethink their school's curriculum to help their students pass licensing exams.

Still, Osteopaths did benefit from a majority of courts' unwillingness to interfere with their practice rights. Despite the split between the courts, a clear majority ruled that Osteopathy did not constitute the practice of medicine. In some ways, these decisions suggested that the ambivalence expressed earlier by courts about medical licensing in general. They did not hesitate to hobble these laws because of sloppy drafting or overreaching provisions. By finding Osteopathy to be outside the practice of medicine, a majority of courts sent a clear message to state legislatures that they would not allow an expansion of who was a physicians without explicit legislation classifying Osteopath as doctors.

While these decisions typically favored Osteopaths, the outcome was still problematic. These court decisions essentially stated that Osteopaths were not equal to physicians as healers. If Osteopaths wanted to be considered by the public to be

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[373] *Eastman v. People*, 71 Ill.App. 236 (1896).

legitimate, they needed to gain state validation. Osteopaths already had been somewhat successful in establishing licensing laws in several states between 1892 and 1904, but they wanted to create separate licensing boards controlled by Osteopaths and expand the legislative recognition of their sect. With separate boards, Osteopaths could develop their own criteria for licensure and increase the status of legitimate practicing Osteopaths. In California alone, the newly established Osteopathic board between 1901 and 1907 issued more than nine hundred certificates to practice Osteopathy.[374] Even as Regulars, Homeopaths, and Eclectics were moving toward unified boards, Osteopaths realized that separate boards could preserve their unique sect.

The American Osteopathic Association developed a model law that was similar to licensing laws used to create Regular, Eclectic, and Homeopathic boards. Osteopathic physicians throughout the country pushed for licensing based on this model. While they did not always succeed, as historian Norman Gevitz pointed out, this effort was fairly effective. Despite pushback from the three major medical sects, Osteopaths secured practice rights in thirty-nine states and created seventeen independent boards around the country by 1913.[375] By 1923, Osteopaths secured licensing in forty-six states and about half of those states created separate osteopathic boards. Osteopaths established a secure foothold in America and have never relinquished it. Contrarily, after the major sects established unified boards and the AMA admitted Irregulars to its ranks, Eclecticism and Homeopathy began their slow decline.

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[374] Dudley Tait, M.D., "Report of the Committee on Medical Education," *California State Journal of Medicine,* Vol. VI, No. 5 (1908): 161, http://books.google.com/ebooks.

[375] Gevitz, 54-56.

Christian Scientists were never able to acquire the same type of legislative protections for their practice rights as Osteopaths. Arguably, they did not need protection from medical licensing laws because state courts were less willing to rule that they practiced medicine. Unlike Osteopaths who did everything in their power to look, act, and behave like traditional doctors, Christian Scientists' practices were dramatically different. As Osteopathic medical schools began to teach students about surgery and obstetrics during the first decade of the twentieth century, Christian Scientists still focused on religion and metaphysics.[376] Osteopathy quickly began to adopt aspects of Regular medicine, and it was even wryly noted by a Regular medical journal that the American School of Osteopathy recommended a book list to its students where one-hundred-and-twelve of the one-hundred-and-eighteen books were written by Regulars.[377] Even more problematic was that when Christian Scientists treated patients, they did not behave as doctors and their practices did not resemble traditional medical care. Even though Osteopaths did not utilize drugs, they physically performed active services such as manipulating limbs, joints, and muscles. The differences between the two specialities were stark.

Christian Scientists claimed "that the work of healing through Christian Science is accompanied by religious instruction or spiritual teaching which is calculated to destroy the foundation of disease."[378] Following Mary Baker Eddy's teaching in *Science and*

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[376] Gevitz, 69-70.

[377] "Another Phase," *California State Journal of Medicine*, Vol. V, No.2, (1907): 20, http://books.google.com/ebooks.

[378] Clifford Peabody Smith, *Christian Science, Its Legal Status: A Defense of Human Rights* (Boston, 1914), 8, http://books.google.com/ebooks.

Health with Key to the Scriptures, they argued that Jesus "demonstrated the power of Christian Science to heal mortal minds and bodies."[379] Eddy believed that she rediscovered Christ's healing powers after analyzing the Bible. Essentially, she contended that the "mind govern[ed] the body, not partially but wholly."[380] Christian Scientists stated it was a sin to take drugs to alleviate suffering or to cure a disease. Because the mind governed the body, medicines were unnecessary. Instead of medical treatment, Christian Scientists offered their patients a unified "system of medicine" and a "system of ethics" that promised a complete "system of healing."[381] Christian Scientists never pretended to be physicians because they believed that doctors were completely unnecessary.

Medical licensing authorities were concerned about the spread of Christian Science and began actively to prosecute them for violating licensing laws. Even though they did not behave like traditional physicians, Christian Scientists made it clear that their methods could cure human ailments. Like physicians, they also readily accepted payment for their services. Christian Scientists argued that their system of healing was as valid as any other, and defended themselves from overzealous licensing boards by alleging that any interference with them was a violation of their First Amendment right to freedom of religion. Clifford Smith, a judge and Christian Science advocate, argued that medical regulations discriminated against other healing practices "create[d] a monopoly,

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[379] Mary Baker Eddy, *Science and Health: With Key to the Scriptures* (Boston, 1916), 110, http://books.google.com/ebooks.

[380] Eddy, 110.

[381] *Nebraska v. Buswell* 58 N.W. 728, 730 (1894).

and in effect establish[ed] a state system of healing"[382] that unfairly discriminated against Christian Scientists. State licensing boards in several states actively pursued Christian Scientists. Historian Rennie Schoelpflin combed through state courts records and identified several cases where Christian Scientists were prosecuted for practicing without a medical license. In most of the cases Schoelpflin found these practitioners were ultimately exonerated by lower level courts or appellate, but this was not universally true. Some states courts did find that Christian Scientists were practicing medicine.[383]

In Nebraska, a Christian Scientist, Ezra M. Buswell, was charged with violating the Nebraska medical practice act. Buswell was acquitted by the district court after it ruled that he was not practicing medicine. The Court of Appeals came to the opposite conclusion and found that Buswell was a physician. Buswell had studied with Mary Baker Eddy at the Metaphysical College in Boston. Buswell was convinced that Christian Science was valid system because he was cured of his ailments after his conversion. Buswell stated that he had never administered any medicine to his patients. Instead, his treatment centered on reading the scriptures and prayer. Buswll stated that when a person "request[ed] aid and c[a]me to us for and assistance we treat them as a mother treats her child that is frightened of objects it fears…we seek to dispel the fear by showing them the presence of love…Perfect love casts out fear." Buswell admitted treating as many as a hundred patients in the previous eighteen months this way.[384]

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[382] Clifford Peabody Smith, *Christian Science, Its Legal Status: A Defense of Human Rights* (Boston, 1914), 12.

[383] Schoelpflin, 149, 151, Appendix.

[384] *State v. Buswell*, 40 Neb. 158, 58 N.W. 728.

Buswell stated that payment was not mandatory and he would "leave the question to them and God."[385] Still, Buswell hoped his patients would compensate him for his services. He informed his patients that, "[i]f they are not willing to part with the sacrifice themselves, it is not expected that those should reap the benefit."[386] The expectation of a fee or a gratuity prevented Buswell's actions from being classified as either "an act of worship" or "the performance of a religious duty," according to the court. The court found that the payments were exchanged for services rendered.[387] The court also found that Buswell believed that he was similar to a physician. The court was convinced that Buswell "engaged in treating physical ailments of others for compensation."[388] It should be noted that the Nebraska Supreme Court found that both Osteopaths and Christian Scientists were practicing physicians and held an expansive notion of the "practice of medicine."

In 1898, the Supreme Court of Rhode Island disagreed with the Nebraska Supreme Court and found that Christian Science was not a medical practice. Walter E. Mylod was adjudged "probably guilty" by a district court based on the complaint of the secretary of the Rhode Island State Board of Health. Mylod was convicted after a witness testified that he sought Mylod's help to treat malaria. Mylod informed the witness that he was a doctor and continued to pray for ten minutes during their meeting. After praying, Mylod stated "I guess you will feel better" and gave the witness a book

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[385] *Buswell*, 731.

[386] *Buswell*, 731.

[387] *Buswell*, 732.

[388] *Buswell*, 732.

titled *A Defence* [sic] *of Christian Science*. The witness then paid Mylod one dollar for his services and left his office. Another individual also sought treatment from Mylod and received a prayer and copy of a different book, *A Historical Sketch of Metaphysical Healing*. The second patient also paid Mylod one dollar for each of his visits. Mylod told his patient that he needed to look on the bright side of life because "thought governs all things."[389]

The court found that Mylod did not practice medicine. Even though Mylod referred to himself as "Dr. Mylod," the court argued that claim did not prove he was actually a physician. Mylod neither attempted to ascertain what ailed the witnesses nor took any actions to treat them except praying for them and giving them a book. Even though the secretary of the board of health testified that "physicians often cure disease without the use of drugs or medicine," the court held that "prayer for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer" did not constitute the practice of medicine.[390]

In another Christian Science case, the Supreme Court of Ohio was faced with determining whether a Christian Scientist who was paid for his services by patients was practicing medicine under the Ohio Medical Practice Act. Unlike the Osteopath in *Liffring*, the Christian Scientist in this case was subject to the 1902 medical practice act, not the 1896 version. The 1902 law expanded the definition of the practice of medicine. The new law invalidated *Liffring* and brought into question an earlier lower court

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[389] *State v. Mylod*, 20 R.I. 632, 40 A. 753, (1898), 754- 758.

[390] *Mylod*, 757-758.

decision stating that under the 1896 law, Christian Scientists were not practicing medicine.[391]

In the case, the justices admitted that they did not know anything about Christian Science. They relied on evidence presented at trial that Christian Scientists considered their practices to be "treatment." "If the defendant prayed for the recovery" of the patient and cured the patient, then the Christian Scientist "was practicing healing or curing disease." The medical practice was designed to regulate "the public health and the practice of healing," and it was irrelevant how medical specialists achieved their results. In other words, the court found it was "the conclusion of disease" and "not the method of treatment" that was subject to the medical law. The court also rejected the defendant's contention that the law discriminated against his religious beliefs.[392]

These cases demonstrated the difficulty courts had in defining whether Christian Science was the practice of medicine. William Purrington, the legal counsel for the New York State Medical Association at this time, was forced into the uncomfortable position of both agreeing that Christian Science was the practice of medicine and disagreeing with the principle that praying for patient was barred by licensing laws. Unlike the Ohio Supreme Court in *Marble*, he believed that it was the method of treatment that was regulated and the intent to treat disease that triggered licensing laws.[393] Purrington was opposed to prosecution of Christian Scientists under licensing statutes. Purrington's

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[391] *State v. Marble*, 72 Ohio St., 21; 73 N.E., 1063 (1905): 25-28.

[392] *Marble*, 29-40.

[393] Schloepflin, 156-157.

views most likely were contrary to the beliefs of most of the physicians in the New York State Medical Association.

Ultimately, like Osteopaths, Christian Scientists sought protection from state legislatures. Christian Scientists pursued two different paths with state legislatures. In some cases they attempted to argue that they deserved to be licensed professionals. Some leaders of Christian Science movement in the 1890s and 1900s sought to professionalize its ranks by establishing orthodox practices, creating medical journals and societies, and building Christian Science medical schools. These efforts were controversial and did not draw support from Eddy. Other members of the church took an alternative path and argued that they should be exempted from licensing laws because they were practicing their religion. After several states "prohibited Christian Science practice or forced practitioners to comply with medical practice acts" and others exempted Christian Scientist from medical practice acts and protected their rights, Christian Scientists began to favor lobbying for exemptions from licensing laws.[394] These two different approaches to legalization represented a split within the Christian Science community between healers who made a living treating patients, on one hand, and religious adherents, on the other.

Christian Science was less successful than Osteopathy in acquiring legal recognition in the twentieth century. Schloepflin identified thirty-eight states between 1900-1915 that attempted either to ban the practice or force all Christian Scientists to comply with medical licensing laws. But over the twentieth century, many states

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[394] Schloepflin, 164-166.

gradually carved out limited exemptions for Christian Scientists. As licensing and examining boards continued to apply pressure to Christian Science, leaders within the Christian Science community shifted away from the professional practice of Christian Science medicine. Christian Science leaders later recognized that "healing the sick [was] a consequence of Christian Science practice and not its prime object."[395] Still, Christian Scientists continued to ply their trade and charge patients for their services into the 1980s.

Ultimately, medical licensing boards and physicians from the three major sects worked together to challenge the expansion of Osteopathy and Christian Science. Whatever differences these sects may have had with each other, they realized that they shared common interests and goals. After working together for thirty years to enact licensing, they were not interested in allowing new medical sects to benefit from the fruits of their labor. Medical licensing boards prosecuted Osteopaths and Christian Scientists in accordance with the wishes of the three major sects. By the turn of the century, medical licensing continued to unite the three sects. This unification would quicken in the twentieth century.

[395] Schloepflin, 161-166, citing Farlow, *Relation of Government*, 6.

CHAPTER XIV

THE FINAL PIECES

At the same time legislatures and courts were debating Osteopathy and Christian Science, the direction of medical licensing was being altered by three distinct events and trends. First, the AMA reversed its long-standing policy and agreed to admit Homeopaths and Eclectics to its ranks. Second, the last few holdout states finally enacted medical licensing laws. One of these, Indiana, was an excellent example of a state that delayed enacting licensing, but aggressively enforced it once it was approved. Finally, as mentioned in the previous chapters, states passed laws that recognized the new drugless medical sects. In 1907, the California legislature passed a new medical practice act that explicitly addressed the legitimacy of these new medical specialists. Often, these laws carved out special privileges for Osteopaths, but several other drugless medical specialists were granted practice rights only if they could pass a fairly traditional medical licensing exam.

In 1870, the AMA had purged the remaining Homeopaths from the Massachusetts state medical society, the last state organization that permitted them in its ranks. The AMA along with state and local Regular medical societies around the country kept Irregulars out of its organizations for the next thirty years. In 1901, the AMA embarked

on a series long overdue reforms and began to reshape itself into a more representative and responsive institution. This reorganization was inspired partially by the reformation of the British Medical Association.[396] As part of this reorganization, the AMA began to explore reversing its long-standing policy barring the admission of Irregulars.

While the AMA was the largest of the national medical societies by the 1900s it was no longer growing and it failed to play a major role in enacting medical licensing across the United States. The AMA's influence was fairly limited. Additionally, Regular physicians around the country ignored the AMA's consultation clause. Thirty years of conflict with Irregulars had accomplished little for the national organization. The AMA was in danger of becoming increasingly irrelevant.

Leaders in the AMA also were concerned that the organization was insufficiently democratic. At annual meetings, members of the AMA voted on issues that affected the organization. Everyone who attended the annual meeting had an equal voice in these votes. Therefore, the decisions made at these meetings did not represent the will of a majority of the AMA's members, but instead reflected the views of the physicians located nearest to the AMA conference site. Typically, most of the attendees at the annual AMA conventions were doctors from that region. The AMA realized that the votes at the convention needed to represent a broader scope of the organization's members. Instead of allowing its policies to be dominated by different groups of regional voters each year, it sought to create a system that could more representative of Regulars across the country.[397]

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[396] Rosen, *The Structure of American Medical Practice*, 62.

[397] Haller, 206-207.

The AMA's exploration of expanding its membership was well-timed because the three major medical sects already were starting to merge into a more unified professional group. The AMA had an opportunity to take advantage of the gradual elimination of the three medical sects and secure its place as the national association for all physicians. As the three major sects adopted the principles of scientific medicine, sectarian disputes were fading away. Most of these disputes centered around medical beliefs and practices, but scientific medicine eroded the legitimacy of each group's beliefs. Scientific medicine created an understanding of medicine that crossed sectarian borders and united physicians.[398]

As early as 1893, two Homeopathic medical schools, the Hahnemann Medical College of San Francisco and the Homeopathic division of the University of Michigan School, repudiated Homeopathic medicine and sought to merge with their Regular medical colleges. As Regular and Homeopathic medicinal practices became increasingly similar, the Homeopaths at these schools argued that it made little sense to continue with the division.[399]

Numerous other medical licensing and state boards of health also had been working together in violation of the AMA's consultation clause by including Irregulars. Because most of the board members of these organizations were appointed by governors, board members were often the most politically savvy and influential physicians in their states. These board members were typically the most prominent physicians from their respective sects in their states. The connections established in these organizations

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[398] Rothstein, 323.

[399] Rothstein, 149-150.

between these physicians eroded long-standing hostility between the leaders of these sects and permitted sectarian physicians to realize that they were fairly similar.

These alliances permitted some Allopaths to ignore the AMA's consultation clause and accept Homeopaths as "legitimate practitioners."[400] The Medical Society of the State of New York broke apart in 1882 after it admitted two former Homeopaths into its ranks. After a civil war broke out in the state society, the AMA refused to seat the members of the medical society. Dissenters split from the Medical Society and formed the New York State Medical Association. Over the next thirty year both organizations muddled along.[401] This dispute shattered the largest and most important Regular medical society in the country, but it encouraged other Regular medical societies to do the same. In 1893, a former Homeopath was admitted to the New York Academy of Medicine. The academy was Regular society that had previously been a strong supporter of the AMA's code of ethics. In 1892, the Mississippi Valley Medical Association (another prominent Regular association) also invited Eclectics and Homeopaths to apply for admission.[402]

Since the breakup of the Medical Society of the State of New York, the AMA desperately wanted to unify the state's Regulars and end this lingering division. The AMA needed to broker a settlement between the two New York Regular medical societies, but that would be impossible unless it changed its code of ethics. Instead of

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[400] Rothstein, 149-150.

[401] Rothstein, 301-304.

[402] Rothstein, 313.

excluding Homeopaths and Eclectics, the AMA seriously investigated inviting them into the AMA.[403]

Even though Regular, Eclectic, and Homeopathic medicinal practices also were increasingly merging together from a therapeutic perspective, the AMA's longtime policies had kept the sects organizationally distinct. Despite the AMA's best efforts, its code of ethics did not harm Homeopathy or Eclecticism. Homeopathy and Eclecticism thrived even though they were excluded from the AMA and Regular state and local medical societies. Instead of weakening these competing sects, the Regular profession's hostility united and preserved them. By the turn of the century, the AMA was willing to explore more pragmatic options.[404]

Not only did the AMA fail to destroy the Homeopathy or Eclecticism, the AMA itself was struggling. Instead of being a truly national Regular medical society, it behaved more akin to large midwestern regional association. The AMA failed to expand into the South or the West, and its membership represented only eight percent of the country's 100,000 Regulars.[405] It was neither a truly national organization nor a particularly effective one. To ensure its survival, the AMA needed to expand its membership and broaden its geographical reach. Admitting Homeopaths and Eclectics to the AMA had the potential to achieve both of those goals.

By 1903, the American Medical Association completed its reorganization and agreed to admit Homeopaths and Eclectics to its ranks. The AMA freed state and local

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[403] Rothstein, 322.

[404] Starr, 107.

[405] Rothstein, 317.

societies and allowed them to admit Irregulars. In New York, the newer New York Medical Association ignored the AMA's change and sought to preserve the consultation clause and the old code of ethics. This move backfired, and Regulars fled the organization and joined Medical Society of the State of New York, which was quickly readmitted to the AMA. Eventually, the New York Medical Association was taken over by the medical society, and the state's Regulars embraced the AMA's policy change.[406] The AMA ended the division within its largest state organization, and Regular medical societies now could recruit from a large pool of potentially new Irregular members. This shift encouraged the AMA and other Regular societies to aggressively court and "absorb" Eclectics and Homeopaths.[407]

The Eclectics and Homeopaths viewed the AMA's transformation with suspicion. Some Eclectics were justifiably concerned that AMA's primary goal was to swallow 20,000 "innocent eclectic and homeopathic lambs." The AMA's shift in policy also threatened to entice sectarians from their own organizations and into the larger AMA. Membership in the AMA promised legitimacy that had eluded Eclectics and Homeopaths in some states for years.[408] The shift in policy was effective for the AMA. Not only did Eclectics and Homeopaths join the AMA, Eclecticism and Homeopathy began their long gradual descent into obscurity or extinction.

As the AMA was reorganizing itself, the last few states transitioned from registration laws to comprehensive medical licensing. Indiana was one of the last states

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[406] Rothstein, 322.

[407] Haller, 207.

[408] Haller, 207-208.

to license its physicians. Unlike the earlier states, Indiana's transition to licensing was relatively smooth. Indiana's medical societies drew from more than twenty years of experiences by other state licensing boards when they crafted their licensing medical laws. These laws had been litigated heavily already throughout the country, and Indiana had a unique opportunity to pass a law that could potentially avoid legal pitfalls. Additionally, the Indiana Board of Health was not hampered by the ambiguity of the earlier licensing laws that stalled aggressive enforcement of licensing against illegal practitioners.

After twelve years of laboring under a medical registration law, Indiana passed a medical licensing act in 1897. Before 1897, county clerks issued certificates to practice medical to applicants. Applicants went to their county clerk, presented a copy of their medical diploma, and submitted the required affidavits. Dr. William P. Whery, of the Indiana State Medical Society, argued that county clerks did not try "to prevent fraudulent claims."[409] Not only did the state not make an effort to restrict the practice of medicine to qualified practitioners, it did not have any way to supervise medical study or practice in the state. While Illinois, Indiana's next-door neighbor, mandated changes in the medical education and prosecuted illegal practitioners decades before, Indiana registered anyone who presented a diploma and affidavit.

All of this changed when the Indiana legislature created a licensing statute similar to the 1887 Illinois medical practice act and created a unified licensing board. Applicants could earn a certificate if they had a diploma from medical school in good standing or

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[409] *Transactions of the Indiana State Medical Society 1896, Forty-Seventh Annual Session* (1896): 111, http://books.google.com/ebooks.

they could submit to a medical examination. Like previous licensing laws, practitioners who served in the state for more than ten years would be waived in after they presented their original registration license and two affidavits attesting to that fact. Midwives had exactly the same privileges as physicians and they, too, could apply for a license, but they were required to pass the obstetrics portion of the medical examination administered by the Indiana board. While midwives were licensed by the board, they lacked representation on it.

Just as in Illinois twenty years earlier, passage of the Indiana medical licensing act caused a panic among the state's most marginal medical practitioners. Physicians who possessed questionable credentials attempted to comply with the new requirements by obtaining new medical diplomas. Some physicians obtained diplomas "from alleged schools of medicine so utterly disreputable as to require but little if anything more than a commercial consideration for graduation."[410] Because of the large volume of applicants and the dubious nature of numerous diplomas, the newly formed State Board of Medical Registration and Examination lacked sufficient funds and time to meet all of its responsibilities. It fell behind processing the new applicants.[411] Like most state licensing boards of the time, the Indiana board did not receive any money from the state. It was supported financially solely by applicant fees. At its inception, the Indiana board did not have a sufficient of amount of money to process the crush of application in a timely manner.

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[410] *Sixteenth Annual Report of the State Board of Health of Indiana* (1897): 409, http://books.google.com/ebooks.

[411] *Sixteenth Annual Report of the State Board of Health of Indiana* (1897): 410.

Still, the Indiana board attempted to expedite the verification process of early applicants and approved licenses for physicians with questionable qualifications. One such physician, Dr. John A. Burroughs, initially slipped through the approval process, but the Indiana board later reevaluated his eligibility. Burroughs began practicing medicine in Indiana in 1896, and he claimed to be a graduate of both the American Eclectic Medical College of Cincinnati and the American Medical College of Indianapolis. Burroughs received a license under the previous registration law in 1896, and he applied under the new licensing act in 1897. The Indiana board initially issued Burroughs a new license in March 1897 based on provision in the 1897 medical practice act that permitted current license holders new licenses. This issuance appears to have been perfunctory, because by October 1897, the Indiana board sought to revoke his license. The Indiana board alleged that he misrepresented "the character of the colleges" on which the original license was based, circulated false and obscene literature, and provided false guarantees of cures.[412]

Burroughs took the Indiana board to court, but he was unable to challenge successfully the validity of the Indiana board's power or the constitutionality of the statute. While the court was concerned that the licensing law was perhaps unwise, because "such laws repress independent investigation, and so retard the progress of medical knowledge," it found that was a question better left to the purview of the legislature.[413] Additionally, the Indiana legislature clearly learned from previous licensing laws' mistakes because the new act gave physicians a right to appeal any revocation to the Indiana courts. Courts previously struck down medical boards'

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[412] *State, ex. Rel. Burroughs v. Webster, et al.*, 150 Ind. 607, 609-610 (1898).

[413] *Burroughs*, 614-615.

enforcement abilities because they failed to provide for an appropriate appellate process. While courts were still skeptical of the utility of licensing laws, the Indiana act withstood court scrutiny.

Like Burroughs, Eliza Coffin also challenged a decision by the Indiana board for refusing to grant her a license to practice medicine. Coffin practiced in Indiana before the 1897 law took effect, but she was not a graduate of a medical school. The Indiana board denied her a license because she was "guilty of gross immorality." After the Indiana board denied Coffin a license, a proxy of the prosecuting attorney for Starke County came to an agreement with Coffin and decided to terminate the prosecution of the Indiana board's appeal. Under the settlement, Coffin was awarded a license, and the board's objections to her licensing were ignored. After the prosecuting attorney for Starke County was replaced, the new attorney challenged the bargain made by his proxy and argued that the prosecuting attorney could not simply dismiss the Indiana board's complaint and license Coffin.

The Indiana Supreme Court agreed and contended that prosecuting attorneys in Indiana had the duty to advocate the position of the board until the appeal's conclusion. In the *Coffin* case, the medical board's case was handled by an attorney who was filling in for the prosecuting attorney. This case highlighted a problem faced by medical boards throughout the country. They typically had direct control only over the administrative hearings that they held. Once a physician appealed the Indiana board's decision to the local trial court, medical boards relied on either prosecuting or contract attorneys to advocate for their positions. Medical boards essentially were required to outsource their

prosecution efforts. In the *Coffin* case, the failure of their attorney to prosecute Coffin undermined the ability of the Indiana board to enforce medical licensing, but the court ultimately supported the board's authority under the law. Still, if the next prosecuting attorney had not reexamined this case, the Board would have been forced to license Coffin.[414]

By 1901, the Indiana board contracted a private legal firm, Gavin & Davis (Gavin), to represent the Indiana board and to prosecute individuals under the medical practice act. Gavin appeared to have been working in concert with prosecuting attorneys around the state. In some cases Gavin served as the prosecuting attorney, but in others, the county prosecuting attorney was in charge. Regardless of who handled the prosecution, Gavin began to issue yearly reports to the Indiana board in 1901. While Gavin identified the defendants, the reports often failed to provide details of its cases. In its first report to the Indiana Board, Gavin stated it prosecuted twenty-seven separate physicians. Gavin's report showed that eleven of the cases prosecuted by it were ultimately successful; it had either secured a conviction or affirmed the decision of a trial to revoke a medical license. Each of the convictions resulted only in twenty-five-dollar fines. Five of the cases were concluded when the defendants either fled or left the state. On four occasions, juries acquitted defendant physicians. The Indiana board or circuit courts dismissed another three cases, and five cases were still pending.[415]

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[414] *In Re Application Eliza E. Coffin*, 152 Ind. 439, 439-442 (1901).

[415] *The Fourth Annual Report of the Indiana State Board of Medical Registration and Examination 1901* (1902): 99-101, http://books.google.com/ebooks.

In 1902, Gavin failed to provide a complete breakdown of all of the cases it prosecuted, but it discussed a number of key cases decided during the year. In *State v. Parks*, George Parks, a magnetic healer, was convicted of practicing without a license. Parks appealed his conviction, but the court sided with the Indiana board. It upheld the medical practice act and found that magnetic healing was not a separate school of medicine. Parks argued that the provision of the 1901 law granting Osteopaths a limited right to practice medicine was discriminatory, because it did not provided for other sects, such as magnetic healers. The court disagreed and determined the legislature was well within its authority to provide limited practice rights only to Osteopaths. Therefore, it was unnecessary for the Indiana board to license magnetic practitioners. If magnetic healers wanted to practice medicine, they would need to be a graduate of a medical school in good standing and pass the examination administered to physicians.[416]

The *Parks* decision had an immediate effect in Indiana because another magnetic healer in Montgomery County left the state two days after the decision was rendered. This magnetic healer already had been indicted for numerous violations of the medical practice act and tried once for violating the act. In his first trial, the jury became deadlocked and failed to decide the case. After the Parks case, any ambiguity regarding the status of magnetic healing would have disappeared. Therefore, a conviction, while not assured, became much more likely. Instead of fighting the case, the healer fled for greener pastures.[417]

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[416] *The Fifth Annual Report of the Indiana State Board of Medical Registration and Examination 1902* (1903): 89-90, http://books.google.com/ebooks.

[417] *The Fifth Annual Report of the Indiana State Board of Medical Registration and Examination 1902* (1903): 91.

In 1904, Gavin reported that it had initiated approximately twenty prosecutions. Of those prosecutions, a third resulted in convictions, a third in acquittals or dismissals, and the other third still were pending.[418] While Gavin was prosecuting twenty cases a year, the Indiana board did not have the resources to investigate questionable practitioners throughout the state. Therefore, the Seventh Annual Report of the Indiana Board asked people to conduct investigations on their own and report any evidence of a criminal practice to the board. In order to facilitate this, the annual report included a checklist and affidavits for potential informants to use to substantiate their claims. The checklist included the following suggestions:

"1. Ascertain from County Clerk or Secretary of the Medical Board whether accused has license to practice medicine.

2. Get statements, signed and in writing if possible showing-

a. Who made first arrangement with the accused.

b. The name of the patient and the character of the diseases treated.

c. What examination and diagnosis was made.

d. What treatment was prescribed or given.

e. How long the treatment continued.

f. What was the result.

g. What was the compensation paid and by whom paid.

j. A copy of any advertisement:

m. Examine records for birth or death returns."[419]

Whether this checklist was distributed only through the Indiana board's annual reports is unknown, but it was clearly encouraging physicians and private citizens to investigate and report any suspicious activities by other physicians.

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[418] *The Sixth Annual Report of the Indiana State Board of Medical Registration and Examination 1903* (1904): 54, http://books.google.com/ebooks.

[419] *The Seventh Annual Report of the Indiana State Board of Medical Registration and Examination 1904* (1905): 21-22, http://books.google.com/ebooks.

The Indiana board's efforts to enlist informants bore fruit in 1905 when it revoked Dr. John Milton Rhodes' license for offering to perform an abortion. Rhodes graduated from the Marion-Sims College of Medicine of St. Louis in 1899. He received his license from the Indiana board that year and began practicing medicine in Indianapolis. Rhodes believed that Boykin falsely testified after she approached him for an abortion. She claimed that he offered to abort her pregnancy for "$10, $15, or $25 according to the character of the operation." Rhodes alleged that the Indiana board hired Boykin to solicit abortions from various physicians. He also claimed that the Indiana board used Boykin and another unnamed man because it "desired to make some examples in order to stop abortions."[420] Rhodes was concerned that the Indiana board would not make Boykin available for him to question at the revocation hearing. When Rhodes learned that he had been summoned to appear before the Indiana board, he short-circuited the process by filing a permanent injunction and temporary restraining order against the Indiana board to prevent it from revoking his license. A circuit court judge agreed and granted Rhodes's injunction and temporary restraining order. The Indiana board appealed his decision.[421]

The five members of the Indiana board stated on appeal that they had not hired Boykin and did not plan to make an example of him. Instead, the Indiana board stated that not only would Rhodes be permitted to question Boykin, but he could also produce his own witnesses to refute her testimony. The Indiana board claimed that it would evaluate the evidence fairly and impartially determine whether the preponderance of the

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[420] *Spurgeon, et al. v. Rhodes*, 167 Ind. 1, 2-7 (1906).

[421] *Spurgeon*, 5-7.

evidence supported revocation.[422] The only fact that the Indiana board and Rhodes agreed on was that Boykin was no longer in Indiana and she could not be compelled to testify at his hearing.

The Supreme Court of Indiana found that Rhodes could not prevent the Indiana board's hearing from going forward. If Rhodes wanted to challenge the allegations, he could do so at their hearing. Additionally, the medical practice act permitted Rhodes to appeal any decision made by the Indiana Board to the court system. It reversed the decision of the trial court and annulled the temporary injunction. Despite the Supreme Court's decision, the Indiana board did not revoke Rhodes' medical license. As late as 1911, Rhodes was still a legally practicing physician in Indianapolis.[423]

Indiana essentially went through the same process as other states that adopted the medical licensing statutes, but in Indiana it was a much smoother transition. The Indiana courts did not challenge the authority of the Indiana board to regulate physicians and midwives because they were persuaded to follow earlier decisions that had sustained licensing. The Indiana board was able to move quicker than other states to expand its enforcement efforts. Indiana's law licensing had been designed to withstand the type of legal challenges that had been successful in the past and avoid the setbacks that had plagued other licensing laws.

Only six states and territories (Michigan, Idaho, Oklahoma, Vermont, Kansas, and Alaska) created examining boards after Indiana. By 1903, Alaska was the only state or

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[422] *Spurgeon*, 5-8.

[423] *The Thirteenth Annual Report of the Indiana State Board of Medical Registration and Examination*, (Indianapolis, Wm. Burford,1911): 276.

territory that had not created a type of medical examining board. Additionally, by 1901, a large majority of states required new applicants to be graduates of approved medical schools. Fourteen states did not require applicants to be graduates of medical school and another seventeen states did not exclude graduates from underperforming medical schools, but many of these applicants were required to pass licensing exams.[424] Medical licensing laws were becoming standardized enough that several states began developing reciprocity agreements with each other. As standards became more consistent across state lines, physicians again were given the opportunity to move freely from state to state without having to take an examination for each move.

As medical boards successfully consolidated the medical profession, they strengthened the requirements for medical schools. As state medical boards increasingly emphasized clinical and laboratory education, commercial medical schools became less able to pay for these educational necessities. By 1906, there were one hundred and sixty medical schools in the United States, and a study by the AMA concluded that many of those schools were worthless. The worst schools lacked laboratory equipment that was essential for teaching medical science. Not only did the study demonstrate that many of the schools were woefully underperforming, but it highlighted that medical students could no longer afford to pay what it cost to teach them. Medical schools had to "secure state aid and private endowment" to ensure a quality education.[425] Physicians believed that one of the best ways to improve the quality of education at the country's medical

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[424] Harmowy: 113.

[425] *Transactions of the Indiana State Medical Association Fifty-Eighth Annual Session* (1907): 452-453, http://books.google.com/ebooks.

schools was to require all physicians to take an exam to practice medicine. In California, the state legislature not only decided to require applicants to attend legally chartered medical schools, but required all physicians to pass a comprehensive medical exam regardless of their medical sect after 1907.

As part of the 1907 licensing law, the California legislature also addressed how to license the growing number of drugless specialists. Osteopaths were the most prominent drugless practitioners, but other specialists such as magnetic healers, naturopaths, neuropaths, electric healers, and Chinese medical doctors continued their practices into the twentieth century. These physicians and medical specialists in the state of California battled with each other for control over licensing in the state. In February 1907, the *California State Journal of Medicine* (the official of the journal California State Medical Association) reported that there were numerous medical licensing bills were being peddled to the state legislature. The journal complained that a number of these bills related to the "licensing of osteopaths, naturopaths, neuropaths, etc." The journal was concerned that layman would not realize "the true nature of bill like the naturopathy bill which would license any form of quackery known."[426]

The *Los Angeles Times* reported that a lobby was forming to break up the "Doctors' Trust." According the *Times*, several different "pathies," including osteopathy, naturopathy, hydropathy, and chromopathy were lobbying for legislative recognition under the law.[427] Members of the Regular medical society and its members from the

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[426] "Public Health Legislation," *California State Journal of Medicine*, Vol. 5, , No. 2, (February, 1907): 21, http://books.google.com/ebooks.

[427] B. Frank Greaves, "Going for the Medicine Men," *Los Angeles Times*, Jan. 27, 1907, 15.

State Board of Medical Examiners favored preserving the 1901 Medical Practice.[428] One bill proposed by a Regular member of the state legislature would have required Osteopaths to pass the same exam as Regulars, Homeopaths, and Eclectics, while bill sought to preservethe pre-existing separate Osteopathic board.[429]

Ultimately, the legislature passed a law that kept the unified board of medical examiners and added two Osteopathic members to the new eleven-person board. The law also authorized awarding three different types of licenses. The first license authorized a physician to "practise medicine and surgery." The second permitted Osteopaths to practice medicine, and the third certificate was designed to be a catchall for any other medical specialists who wanted to practice in the state.

To be eligible for any of the three certificates, applicants had to graduate from a legally chartered medical school and pass an examination administered by the board. To practice "medicine and surgery," the applicant had to be a graduate of a school that followed the requirements of the Association of American Medical Colleges. The Association of American Medical Colleges was an organization sponsored by the AMA that was seeking to reform medical education in the United States. Applicants for an Osteopathic certificate had to present a diploma from a legal chartered school of Osteopathy. Any other applicant had to present a diploma from a "legally chartered college of the system or mode of treatment which the applicant claims or intends to follow."

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[428] The 1901 Medical Practice Act created a unified board and ended the operation of the three sectarian boards established in 1877 by the state's first medical practice act.

[429] "Medical Men Fight it Out," *Los Angeles Times*, Feb. 12, 1907, 15.

The legislature also required that all applicants were required to pass an exam administered in English on anatomy, histology, gynecology, pathology bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, and hygiene. Applicants would be tested on ten questions in each of these areas and they would be graded on scale of one to ten. In order to pass the exam, applicants had to average at least seventy-five percent over the entire exam and no less than sixty percent on any one subject. While California legislature gave all medical specialists an opportunity to practice medicine in California, applicants essentially needed a traditional medical education in order to pass the state's exam. It would be difficult for any medical specialist to pass this exam unless they previously attended a comprehensive medical school for Regulars, Homeopaths, Eclectics, or Osteopaths.[430]

The legislature also designed the law to permit the board to enforce a code of ethics and gave the board the power to revoke licenses. The board was required by the legislature to deny a license to any applicant who was proven guilty of unprofessional conduct in the past. The statute defined unprofessional conduct as taking part in an abortion, "willfully betraying a professional secret," advertising in a way that was intended to deceive the public, running advertisements that claimed to regulate "the monthly periods of women," any conviction for "moral turpitude," "habitual

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[430] "Medicine - Practice of Medical Examiners", (Stats. and Amdts. 1907, p. 252, ch. 212), *The Statutes of California and Amendments to the Codes Adopted at the Special Session, 1906 and the Regular Session, 1907, Annotated,* (Bender-Chaquette Company, San Francisco, 1907), 734-738, http://books.google.com/ebooks.

intemperance," or practicing under a false name.[431] The California law clarified the rights and responsibilities of the board and established what type of unprofessional conduct was impermissible. Previous laws in other states were much less explicit about type of conduct that was considered unprofessional and what actions a board could take against unethical physicians.

While the law explicitly disclaimed discrimination against any specific medical sect, the law raised the bar for all medical practitioners. The California law forced Osteopathic medical schools to broaden their curriculum beyond physical manipulation and into traditional medical subjects. Additionally, nauropaths, neuropaths, hydropaths, Christian Scientists, and other specialists would pass the examinations only if they were already well-versed in the medicine. These smaller medical specialities did not have the resources or comprehensive medical schools like the three major sects or Osteopathy. Even though Mary Baker Eddy and the Church of Christ, Science opened the Massachusetts Metaphysical College in 1882, she closed it in 1889 and converted into a mail-driven degree program.[432] This new law effectively would bar most other medical specialists, including Christian Scientists, from legally practicing medicine in state.

In addition to targeting the more formalized "pathies," the legislature also sought to marginalize traditional Chinese "physicians and herb givers." Chinese medicine was not considered to be a particular school of medicine under the law. Even if a Chinese

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[431] "Medicine - Practice of Medical Examiners", (Statutes and Amendments. 1907, p. 252, ch. 212), *The Statutes of California and Amendments to the Codes Adopted at the Special Session, 1906 and the Regular Session, 1907, Annotated,* (Bender-Chaquette Company, San Francisco, 1907), 734-738.

[432] Schoepflin, *Christian Science on Trial*, 86, 158.

doctor was graduate of a Chinese medical school, it was unlikely that the state board of medical examiners would have considered it to be legally chartered. In Los Angeles alone, their were dozens of Chinese doctors outside of Chinatown and many more who practiced within the Chinese enclave. The *Los Angeles Times* speculated that Chinese doctors would be limited to practicing in Chinatown under the law.[433]

By the summer of 1907, the *Los Angeles Times'* prediction proved correct. The new state board of medical examiners began to crack down on Chinese herb doctors in the state. In June, the board arrested managers of three of the largest herb pharmacies in Los Angeles. The board promised to reveal that not only were these pharmacies exploiting their patients by charging them large sums for bottles of alfalfa juice, but that Chinese herb doctors actually were backed by "white men." The board argued that these "white directors" were making huge sums of money from "white women" who frequented these pharmacies. The board also claimed that they were targeting only Chinese pharmacies run by "quacks" and not more legitimate operations.[434] The 1907 law gave the board an opportunity to target Chinese practitioners, and it acted immediately. Whether the board's action were predominately motivated by paternalism, racism, or concern for the welfare of California consumers, or all of the above is difficult to ascertain. Regardless of the motivations, Chinese physicians were increasingly marginalized by the new law.

Aside from targeting Chinese doctors, the new board also expelled one of their longtime members and their former chairman of the board. Dr. Dudley Tait was a

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[433] "Restrictions for Doctors," *Los Angeles Times,* April 4, 1907, 16.

[434] "Herb Quacks in Law Net," *Los Angeles Times*, June 4, 1907, 11.

prominent Regular physician and a longtime member of the board. He was also the most polarizing figure during his long tenure on the previous unified board. Various medical sects, including Eclectics, accused Tait of discriminating against Irregular practitioners. Some Eclectics lobbied for the 1907 law because they hoped that it would allow them finally to get Tait off the board. Although his term expired in 1907 and he was not appointed to the board by the governor, Tait was hired by the board to serve as its secretary. The board hired Tait even though it was no longer controlled by Regulars. Regulars had only five members of the eleven-person board. Soon after his hiring, the Homeopathic, Eclectic, and Osteopathic members of the board grew weary of his presence and decided to end Tait's affiliation with the board after he was accused of wielding undue influence over the Regular members. The *Los Angeles Times* reported that Tait "was inclined to overstep bounds over reason" to prevent certain types of physicians from practicing in the state. The dismissal of Tait was in response to numerous negative responses to the board since it was revamped. Some of the newer board members were disturbed enough by his conduct that they raised the ratings of several medical schools that they believed were singled out by Tait.[435] Instead of exacerbating tensions between sectarians, the new board finally decided to ease tensions by terminating its most controversial physician.

Despite the dismissal of Tait, the new medical board struggled to find its footing. By the time the 1908 legislative session rolled around that "rollicking vaudeville entertainment know as 'Medical Bills' [was] booked for another run before the

[435] "Board Drops Former Head," *Los Angeles Times*, Dec. 6, 1907, 11.

Legislature of California." Some Regulars and Eclectics actually wanted to reinstate separate boards, but Osteopaths were satisfied by the new law even though the 1907 law eliminated their separate board. Despite these calls for reform, some physicians argued that the laws only had been in effect for twenty months and needed more time shake out.[436] The law was not revised until 1913, but the continued discussions about the form of medial licensing demonstrated that even after thirty years, physicians failed to create a consensus regarding medical licensing. By 1910, states still were constantly passing new laws and revising old ones.

This problem represented a broader dilemma for advocates of medical licensing throughout this entire time period. No matter what type of licensing law was passed by a state legislature, there were physicians or medical specialists who were dissatisfied with whatever compromise the legislature reached. This problem was present after the first licensing laws were passed and continued as multiple medical sects competed against each other in the medical marketplace. The nonstop debate of the form of licensing was a constant feature of this period and would continue well into the twentieth century.

While the debate over the form of licensing continued, people no longer questioned whether licensing was necessary. Thirty years of licensing had overcome earlier misgivings and convinced physicians that it was essential. What had started as a binary dispute between Regulars and Irregulars had grown more complex as new medical specialists challenged Regular, Eclectic, and Homeopathic dominance over licensing, but Regulars and Irregulars were unquestionably united in their support of licensing.

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[436] "Old Diagnosis is a Failure," *Los Angeles Times*, Dec. 23, 1908, 15.

Additionally, what had started as an effort to force physicians to register with their county clerks had morphed into system that required almost all applicants, regardless of sect, to be graduates of medical schools and to pass a medical examination to receive a license. Licensing created new governmental or quasi-governmental institutions that enforced new rules and were given the power to revoke licenses. Future debates would no longer question the ability of states to license physicians, but the scope of physicians' control over medicine.

CHAPTER XV

CONCLUSION

In 1914, Frederick R. Green in an AMA publication on the history of licensing stated that the previous forty years of "public health legislation has been chaotic, uncorrelated, subject to accident rather than to design and in a large measure the result of compromise, following more or less spasmodic and intermittent effort." He bemoaned that public health legislation was driven less by science and public health concerns, than by "political or personal influence, rather than through convincing the public or legislation of their merit." Because these bills were by their very nature political, they were often poorly constructed laws which ultimately were "emasculated by compromises." Once these bills were passed, they often either mismanaged or they were given too little attention.[437] Green's assessment was mostly correct. These laws often were problematic and did not necessary achieve the goals sought by medical societies, but despite these problems, elite physicians still succeeded in spreading these laws throughout the country.

Medical licensing was not demanded by the public to solve a problem. Physicians almost exclusively promoted and lobbied for medical licensing. While many people were concerned about the practice of medicine in the United States, physicians convinced state

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[437] Frederick R. Green, *Sixty-Six Years of Medical Legislation*, (American Medical Association, Chicago, 1914), 10, 19, http://books.google.com/ebooks.

legislatures that licensing laws were necessary and could improve American medicinal practice. Physicians did everything they could think of to make medical licensing palatable for state legislatures. There is little evidence that large numbers of physicians bribed legislators, as they did in Oregon, to pass licensing laws, but physicians did everything in their power to make these laws appealing to state legislatures. In most states, that meant tying licensing to popular public health laws.

The emergence of medical licensing was a story of messy, incremental changes in numerous states over a forty-year period. No single event convinced either the general public or state legislatures that medical licensing was essential. While the Bowlsby death may have pushed physicians to lobby for licensing in New York in 1871, most states did not have any such galvanizing event. Instead, Regular and Irregular medical societies succeeded in passing medical licensing because they successfully tied pubic health reforms and never relented in their pursuit of licensing. Previously licensing was perceived by the public and state legislatures as a dispute between competing medical sects for market dominance, but physicians successfully turned it into a discussion about public health. Organized, educated Regular and Irregular physicians gradually convinced state legislatures that medical licensing was a key component to public health. If medical societies had not tied public health and medical licensing together so well, it may have taken much more time to enact state licensing.

Medical societies' approach to passing medical legislation made sense. States aggressively passed numerous medical regulatory laws throughout the nineteenth century. Not only did states pass these laws, they consistently were deemed constitutional under

the state's police power. By explicitly tying medical licensing to other types of public health reforms, licensing advocates ensured that these laws would be found constitutional.[438] Physicians not only passed the laws, but built a strong argument for licensing at the same time that would withstand judicial scrutiny.

Courts, despite their skepticism, universally ruled that licensing law were constitutional under the state police powers. Even while approving these laws, however, many of the state court decisions expressed concerns about medical licensing. Often, courts appeared disturbed that licensing laws interfered with the intimate decision made by patients when they entrusted physicians with their lives. Medical licensing laws also upended free-market principles in favor of government regulation. Courts often were hostile to this significant shift. Courts also tried to influence the direction of licensing laws by restricting powers used by the boards to sanction physicians or revoke licenses. They also struck down laws because they were overly broad or poorly drafted. Still, the basic principle that states had the right to license never truly was established by the courts.

Aside from convincing the courts that licensing laws were legal, organized, educated Regulars and Irregulars worked together to enact these law despite legitimate reasons to distrust and dislike one another. Eclectics and Homeopaths understood that the original primary motivation behind licensing for Regulars was a desire to eliminate their Irregular competitors. Despite this recognizing the Regulars bad intentions, organized, educated Homeopaths and Eclectics aided Regulars in their fight for licensing. Without

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[438] William Novak, *The People's Welfare: Law & Regulation in the Nineteenth-Century America*, (University of North Carolina Press, 1996), 194-95.

Irregular help, Regulars would have found it far more difficult, and in some states impossible, to enact any significant medical licensing laws. While the previous historical literature focused on the battle between Regular and Irregular physicians, this binary dynamic needs to be reevaluated. Organized, educated Regular and Irregular physicians formed tacit alliances to pass these laws and then pushed their unorganized, uneducated colleagues out of the profession.

These alliances between elite Regulars and Irregulars strained unity within the three medical sects. The medical sects experienced divisive debates about licensing. Licensing divided the Eclectics into warring camps. Younger, educated and organized Eclectics ended up collaborating with Regulars to pass laws and ensure their smooth operation. In states like Oregon, older, uneducated Regular physicians were the opponents and prevented licensing laws from being enacted for years. Divisions between older physicians and younger physicians who possessed medical degrees were pronounced. The fight for licensing convinced many Regulars and Irregulars that their interests were more aligned with each other than with physicians in their own sectarian medical societies.

While William Rothstein's statement that "conflict between regular physicians and homeopaths and eclectics continued to be a dominant feature of the organized profession in the later years of the century" is certainly true, that conflict appears less important to the development of American medical licensing than the eventual collaboration among organized Allopaths, Eclectics and Homeopaths.[439] If anything,

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[439] William G. Rothstein, *American Physicians in the Nineteenth-Century: From Sects to Science*, (Baltimore and London, The Johns Hopkins Press, 1972), 298.

medical licensing allowed Regulars and Irregulars to discover their common interests and collaborate with each other. Regulars and Irregulars worked together on numerous state health boards. Eclectics, Homeopaths, and Regular worked together to pass more restrictive and comprehensive medical licensing bills throughout this period. Regulars and Irregulars labored together to drive out unorganized sects and fraudulent practitioners. The collaboration between Regulars and Irregulars along with fundamental changes in the understanding of medicine slowly melted away differences among the three major medical sects.

By passing medical licensing, organized, educated physicians created an environment where Regulars, Homeopaths, and Eclectics established a more unified and less sectarian medical system. Changes in medical science aided this unification, but licensing laid the foundation for this transition. By 1903, even the AMA permitted Eclectics and Homeopaths to join its ranks. In many states, Regulars, Eclectics, and Homeopaths worked together to exclude Osteopaths, Christian Scientists, and other medical specialties from practicing medicine.

Despite the opposition of the three major sects, Osteopaths also succeeded in carving out licensing for their medical specialty by mimicking the efforts of traditional sects. By quickly building institutions such as medical schools, local, state and national societies and journals, Osteopaths acquired a sheen a credibility that other medical specialists lacked. Additionally, Osteopathic medical schools quickly incorporated scientific and traditional medicine into their curriculum, despite internal disagreement. This allowed their graduates to acquire licenses in states such as California that required

them to pass comprehensive medical exams. Osteopaths also aggressively pushed for licensing across the country even though many courts ruled that they did not need them.

Osteopaths also benefitted from the earlier exceptions carved out by Homeopaths and Eclectics when licensing laws first were established. Osteopaths quickly made alliances with prominent politicians and successfully pushed for separate licensing boards as did their Irregular colleagues years before. These separate boards help preserve some of the distinctiveness of Osteopaths longer, as the three major sects slowly merged together.

Medical licensing also laid groundwork for future medical education reforms. Even though licensing laws were perceived to be ineffective, medical licensing boards, especially Illinois's board, radically altered medical education between 1870 and 1900. By the end of this period, medical schools admitted students who were more prepared for medical school than anytime before. They also required medical schools to add several years onto their degree programs and forced them to invest in clinical training for their students to comply with the requirements of the state board. These laws also reduced and eventually eliminated physicians who were not graduates of medical schools. Finally, as most licensing boards shifted to requiring all applicants to take exams, licensing boards dictated which subjects were taught in medical schools. Illinois' board was able to force medical schools to change their curriculum because Chicago had more medical students than any of city and physicians from around the country wanted to practice in the rapidly growing metropolis.

While historian James Burrows in *Organized Medicine in the Progressive Era* described reform efforts after 1900, he did not sufficiently acknowledge that these reforms would not have been possible without the creation of state medical boards in the nineteenth century.[440] Without these state medical boards and the powers that courts already had granted to them, it would have been difficult to enforce more selective standards. Efforts to revamp medical licensing were only achievable after the implementation of medical licensing. These laws served as a beachhead for the more restrictive laws that would be proposed in the twentieth century.

Licensing laws also demonstrated how regulation could alter the operation of free markets. Licensing created state and quasi-governmental organizations that exerted authority over the country's physicians. By 1910, it was no longer possible for anyone to put out a sign and call themselves a doctor. Most physicians had to graduate from a three-year medical school and pass a licensing examine that tested multiple subjects. Medical licensing represented a significant expansion of state power.

State governments intentionally interfered with the medical marketplace and forced patients to pick physicians who were vetted by either the state or quasi-governmental organizations. Since these laws were upheld universally, they did represent a significant expansion of a state power. Most of these laws created new hybrid, public/ private organizations, which administered and enforced these regulations. The state licensing or examining boards often were independent government agencies, which were managed and funded almost exclusively by physicians. The state essentially ceded

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[440] James G. Burrows, *Organized Medicine in the Progressive Era: The Move Toward Monopoly*, (Baltimore, The Johns Hopkins, 1977).

control of medicine to quasi-public organizations and gave them the power to license and prosecute physicians for their misdeeds. Oddly enough, these quasi-public organizations were given a fair amount of latitude to regulate and enforce medical laws as they saw fit. State governments exerted little control over these independent organizations.

These laws also demonstrated that the expansion of state governmental power after 1870 was significant. William Novak previously had explained that the American state during the nineteenth century was not as weak was once believed. Novak showed that there was a great deal of regulation at the local level. Communities consistently used nuisance laws as a beachhead for the expansion of state power. Novak discussed the expansion of health-policing laws during the Gilded Age. He saw the rapid expansion of laws that depended on the state's police power. States actively passed laws regulating sanitation and quarantine. He simply missed that medical licensing laws were passed in conjunction with these other health laws. Arguably the medical licensing laws were more significant because licensing had a much more tenuous connection to police powers than sanitation or quarantine laws.[441]

Medical licensing laws resembled other regulations that were promulgated during this era. Susan Pearson recently investigated the expansion of laws protecting animals and children during the Gilded Age. It is startlingly how similar these laws were to medical licensing. Both of these laws relied upon on an expansive reading of state police

[441] Novak, *The People's Welfare*.

powers by legislatures and the courts. In both situations states often relied on quasi-governmental organizations to administer and enforce these laws.[442]

Doctors were not only some of the earliest proponents for expanding the regulatory state, but also some of the most effective. While physicians often failed to immediately achieve their stated goals, licensing laws, along with these other regulatory reforms, allowed physicians to take control of American health care. Their success in regulating medicine demonstrated a newfound willingness of legislatures and courts to intervene in personal contracts. The spread of medical regulation is remarkable because all physicians, regardless of sect or medical therapy, were only beginning to use science to understand medicine. Physicians successfully persuaded state legislatures to upend the conventional wisdom that free markets were the best way to determine which physicians were the most effective and to rely instead on a regulated market.

Past discussion about licensing focused more on why physicians pursued licensing. The answer is surprisingly simple. Organized, educated physicians, (Regular, Eclectic, Homeopath, or Osteopathic) had several extremely powerful reasons to enact licensing and very few good reasons to oppose it. Clearly, most physicians believed that they would make more money if the most marginal physicians or medical practitioners were excluded from the medical marketplace. The patients of those quacks, charlatans, or marginal practitioner would be forced to use legitimate practitioners. Licensing offered physicians an opportunity to make a better living then they had in the past.

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[442] Susan J. Pearson, *The Rights of the Defenseless: Protecting Animals and Children in Gilded Age America*, (University of Chicago Press, 2011).

Licensing also offered the potential to turn medicine into a respectable profession. The medical marketplace in 1870 was chaotic. Nostrum pushers, patent medicine physicians, and quacks of all stripes were common in this era. It is abundantly clear from perusing any nineteenth century newspaper that the medical marketplace was overrun by frauds. Physicians often were repulsed by the ridiculous claims of these charlatans and quacks. Doctors constantly made outrageous claims regarding their medical prowess and curative powers every day in these advertisements. During this era, educated physicians increasingly understood that they knew less about illness and disease than they previously believed. Legitimate physicians were understandably upset that the public fell prey to healers who clearly were scamming their patients. Physicians understandably did not want patients to be seduced by false promises, but pay for the services of legitimate physicians. Licensing gave organized, educated physicians a way to eliminate these competitors and license only respectable physicians.

State-sponsored licensing also gave not just individual physicians credibility, but entire sects. Once states' recognized Homeopathy and Eclecticism, they thrived because they could demonstrate to the public that their medical practices were deemed legitimate. Additionally, as scientific medicine advanced during this era, physicians began to acquire credibility that doctors, due their sectarian differences, previously lacked. Licensing also helped advance scientific medicine in the United States by requiring medical schools to teach it.

Ultimately, medical licensing was wildly successful for physicians. Licensing allowed physicians to dominate health care in the United States into the twenty-first

century. Whether an individual suffers from a sprained ankle or lymphoma, he or she most likely will end up in front of licensed physician. Licensing effectively restricted the number of medical specialists who could treat patients in the United States. Licensing also standardized medical education for all physicians. Instead of attending different and distinct graduate school programs in surgery, psychiatry, or internal medicine, any one who wants to be a physician is required to go to medical school. People still question whether physicians were too successful in expanding their role over medicine during the Gilded Age.

Aside from historian Ronald Harmowy, who argued that licensing dramatically increased the costs of health care for Americans, other people have began to question aspects of American medical licensing. As recently as October 14, 2013, the *National Journal Online* published an article titled "Lifting Doctor-Licensing Restrictions Could Drive Competition, Lower Costs." The author of the article described efforts to lift restrictions on foreign-born physicians, expand the ability of nurses to prescribe medicine, and embrace telemedicine. When the California legislature sought to expand nurses' scope of practice, the California Medical Association served its traditional role and effectively quashed the legislation. The American Medical Association aggressively has opposed any efforts that they believed encroached on the privileges of physicians. Additionally, state medical groups have opposed efforts to expand the distances that physicians can practice telemedicine to limit competition between physicians.[443]

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[443] Darius Tahir, National Journal, http://www.nationaljournal.com/innovations-in-health/lifting-doctor-licensing-restrictions-could-drive-competition-lower-costs-20131014?mrefid=HomepageRiver, Oct. 14, 2013.

Physicians still are fighting in the state legislatures to preserve their authority and privileges. Licensing helped physicians define the practice of medicine in an exceptionally broad and beneficial way for them. It is unlikely that they willingly would allow any other medical specialists to intrude on their turf. The contours of their power were ultimately defined during the first forty years of medical licensing.

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