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Note

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Introduction

The current scholarly debate about the role of regulation in eighteenth- and nineteenth-century American public policy involves issues that question the nature of government and law during these periods.[1] These issues include the prevalence of regulation during this time period, the means by which government controlled society, the role of courts in shaping public policy, and the emerging distinction between private and public law. This Note will examine public health and medical regulation in colonial and early national America in light of the arguments surrounding these issues. Specifically, this Note will address the contemporary debate between historians Morton Horwitz and William Novak about when the separation of private and public law, which resulted in less government regulation of commercial activities, occurred.[2] This Note

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1. *See generally* Willard Hurst, *The Release of Energy*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 109 (Lawrence M. Friedman and Harry N. Scheiber eds., 1978); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 (1977); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); William Novak, *Public Economy and the Well-ordered Market: Law and Economic Regulation in 19th-Century America*, 18 L. & SOC. INQUIRY 1 (1993).

2. *See generally* HORWITZ, *supra* note 1; NOVAK, *supra* note 1; Novak, *supra* note 1; *see infra* notes 17-34.

contends that while public health was closely regulated by legislative bodies, medicine, contrary to historians' assertions about the level of regulation,[3] was a private concern controlled by private law.

Evidence of the lack of regulation of medicine comes from a variety of sources, including diaries. Elizabeth Drinker, a wealthy Quaker woman who lived in Philadelphia, kept a diary between 1758 and 1807, the year of her death.[4] Many of her diary entries discuss medicine and healthcare and offer a glimpse of the practice of medicine in Philadelphia.[5] Philadelphia had a thriving medical marketplace during the eighteenth and early nineteenth centuries.[6] Philadelphians could seek treatment from a wide variety of medical practitioners, or, if they chose to treat themselves, buy medicines from practitioners or shopkeepers.[7] Nothing in Drinker's diary indicates any legal restrictions on services or products offered in the medical marketplace. In fact, the wide variety of services and products available suggests a complete lack of government regulation.[8] Drinker's diary indicates that people living during the eighteenth and early nineteenth centuries were very familiar with medical issues and played a strong role in determining their diagnoses and treatments. Her diary shows how these people exercised their medical options and, combined with other evidence, suggests that the medical marketplace was controlled by consumers and not, as historians contend, by formal government regulation.[9]

This Note demonstrates that, while public health was controlled by legislative bodies, medicine and medical practitioners were primarily controlled by the market and social norms. This Note suggests that the lack of medical regulation was due to a profound difference between public health issues, which affected the entire community, and issues surrounding the private, or individual, use of medicine. Although Massachusetts, New York, and Virginia laws are

3. *See generally* Hurst, *supra* note 1; HORWITZ, *supra* note 1; NOVAK, *supra* note 1; Novak, *supra* note 1.

4. *See generally* ELIZABETH SANDWITH DRINKER, THE DIARY OF ELIZABETH DRINKER
(Elaine Forman Crane ed., 1991).

5. *See generally id.*

6. *See generally* Nissa M. Strottman, Medical Practice in Colonial Philadelphia, 1681-1765 (1994) (unpublished M.A. thesis, The Johns Hopkins University) (on file with The Johns Hopkins University Library). The term "medical marketplace" refers to the medical paraphernalia (medicines, instruments) as well as the number and type of medical practitioners available to the population. *See id* at 12.

7. *See id.* Unless otherwise specified, the term "practitioner" will refer to both elite, educated physicians and non-elite medical practitioners.

8. *See generally* DRINKER, *supra* note 4.

9. *See infra* notes 190-96 and accompanying text.

discussed, particular attention is paid to Philadelphia law.[10] Part I discusses the historiography of colonial and early national regulation as well as the debate about the emergence of public and private law. Part II examines public health and poor relief legislation and shows that these public concerns were closely regulated by legislatures and local governments to promote "the common good." Part III discusses attempts at medical regulation and licensure during the colonial and early national periods and argues that medicine was a private concern, controlled by private law. Part IV offers a detailed examination of the practice of medicine in Philadelphia and argues that medicine was regulated by consumers, not by formal laws.

I. Historiography

Prior to the 1950's, a dominant theme in American historical scholarship addressed the *laissez-faire* attitudes of the government and courts.[11] Willard Hurst attacks these notions, and argues that nineteenth-century public policy reflected the belief that the expression of "creative human energy" was socially beneficial, particularly where economic activity was concerned.[12] Instead of taking a *laissez-faire* approach to the economy, Hurst argues, the legislature and courts actively tried to shape law to promote "creative bursts."[13] Hurst contends that "we did not devote the prime energies of our legal growth to protecting those who sought the law's shelter simply for what they had; our enthusiasm ran rather to those who wanted the law's help positively to bring things about."[14] For instance, contract law was changed in the areas of negotiable instruments, agency, insurance, and banking to enable the growth of commerce.[15] The courts also created procedures that made it easier for parties to deal at a distance and on credit.[16]

Morton Horwitz also rejects the *laissez-faire* theory. Horwitz argues that during the first half of the nineteenth century, law was

10. Although most examples are taken from colonial and early-American periods, there is no evidence to suggest that the practice of medicine, at least those aspects with which this Note is concerned, changed drastically between the eighteenth century and the early nineteenth century. *See generally* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982).

11. *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM 7 (1967).

12. *See* Hurst, *supra* note 1, at 111-12. According to Hurst, "Human nature is creative, and its meaning lies largely in the expression of its creative capacity; hence it is socially desireable that there be broad opportunity for the release of creative human energy." HURST, *supra* note 11, at 5.

13. *See* Hurst, *supra* note 1, at 111-12.

14. HURST, *supra* note 11, at 10.

15. *See* HURST, *supra* note 11, at 13.

16. *See id.*

transformed from a protective, regulatory, and paternalistic system to one that actively facilitated the desires of commerce and industry at the expense of less powerful members of society.[17] Tracing this transformation, Horwitz notes that during the eighteenth century, law was viewed as "an eternal set of principles expressed in custom and derived from natural law[,] . . . a body of rules designed to achieve justice only in the individual case."[18] Legislation was almost exclusively the vehicle for social change. However, during the nineteenth century, common law began to play a dominant role in creating change.[19] This change is attributed to decisions made by instrumentalist judges,[20] who made, rather than discovered, legal rules based on considerations of social and economic policies.[21]

Horwitz emphasizes a split between public and private law.[22] For example, he contends that commercial interests sought to transform the system of private law (contracts, property, and torts) to serve their needs for low-cost development.[23] Commercial interests simultaneously sought to restrict state interference with their economic development (for example, by opposing or limiting compensation for land taken by eminent domain)[24] while using state power to their benefit in such areas as debt collection and bankruptcy legislation.[25] Public law also served commercial interests by protecting "vested rights" and preventing redistribution of wealth by the legislature.[26] According to Horwitz, "[f]or most of the antebellum period . . . while mercantile and entrepreneurial groups generally tied themselves to an instrumental conception of private law to achieve the goal of low cost economic development, they were simultaneously able to develop a noninstrumentalist conception of public law."[27] This split between public and private law meant that, for the most part, commercial actors were free to pursue their economic activities.

In contrast, William Novak argues that Horwitz and Hurst's theories fail to recognize that the state and economy were not separate entities.[28] Horwitz and Hurst see the law as a tool for achieving economic change, requiring a separation of market and

17. *See* HORWITZ, *supra* note 1, at 253.
18. *Id.* at 30.
19. *See id.* at 1-2.
20. *See id.*
21. *See id.* at 2.
22. *See generally id.*
23. *See id.* at 254-55.
24. *See id.* at 66.
25. *See id.* at 254.
26. *See id.* at 255.
27. *Id.* at 256.
28. *See* Novak, *supra* note 1, at 5-6.

state.[29] Novak contends that nineteenth-century economic and legal actors understood the economy "as inseparable from the basic institutions and local concerns of their daily lives. As such, the economy was held to the same rigorous public controls and legal standards that governed all aspects of antebellum life."[30] Novak argues that regulation was pervasive in eighteenth- and nineteenth-century America.[31] According to Novak, this regulation was essential to "well-regulated society," where the government pursued an agenda committed to ensuring people's welfare and happiness.[32] Novak attacks Horwitz's notion that the law was split into public and private spheres, with the private sphere serving commercial interests:

> Nineteenth-century America was a *public* society in ways hard to imagine after the invention of twentieth-century privacy. Its governance was predicated on the elemental assumption that public interest was superior to private interest. Government and society were not created to protect preexisting private rights, but to further the welfare of the whole people and community.[33]

For Novak, the split between public and private law did not occur until the 1870's, much later than Horwitz claims.[34]

This Note will test Horwitz' and Novak's theories about regulation and the separation of private and public law in the context of public health and medicine. An examination of public health regulation and the practice of medicine will show that public health was a public concern and heavily regulated, but medicine, although an important economic activity, was viewed as more of a private concern and consequently was not regulated by legislatures.

II. Regulation for the "Common Good:" Public Health and Poor Relief

During the eighteenth century, public health regulation was seen as a way for government to uphold the "common good."[35] Public health and hygiene were not regarded as medical specialties; instead, they were "public police philosophies closely intertwined with the growth of the early American polity."[36] Boards of health, generally established in the late-eighteenth and early-nineteenth centuries,

29. *See id.* at 2, 5-6.
30. *Id.* at 7.
31. *See* NOVAK, *supra* note 1, at 1.
32. *See id.* at 2.
33. *Id.* at 9.
34. *See id.* at 17. Horwitz contends this split occurred early in the nineteenth century. *See* HORWITZ, *supra* note 1, at 111-14.
35. *See* Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 312 (1993).
36. NOVAK, *supra* note 1, at 193.

were the first real administrative agencies in the United States; they were given the authority to make rules, regulations, and laws dealing with public health.[37] Public health regulations were often connected with the regulation of trade.[38] A typical regulation affecting trade set forth the physical dimensions allowed for a bake house.[39] Many Philadelphia regulations specified what could and could not be sold in the public markets.[40] These were particularly important for controlling the freshness and quality of foodstuffs sold to the public.

Public health regulations were passed in various colonies very early in the colonial period.[41] The Massachusetts Bay Colony's General Court passed public health laws limiting the number of passengers on each ship destined for the colony as early as 1629.[42] Public health laws continued to be enacted in Massachusetts throughout the colonial period; as a rule, these laws dealt with the prevention of epidemic disease, usually by quarantine.[43] A 1701 law provided that:

> [W]hen it shall happen any Person or Persons coming from Abroad, or belonging to any Town or Place within this Province, to be visited, or that late before have been visited with the Plague, Small Pox, Pestilential or Malignant Fever, or other Contagious Sickness, the Infection whereof may probably be communicated to others, the Select-men of such Town be, and hereby are impowered to take Care, and make effectual Provision, in the best Manner they can, for the Preservation of the Inhabitants, by removing and placing such Sick or Infected Person or Persons to and in a separate House or Houses, and by providing of Nurses, Tendence, and other Assistance and Necessaries for them, at the Charge of the Parties themselves, their Parents or Masters (if able) or otherwise at the Charge of the Town or Place whereto they belong.[44]

Governing bodies paid close attention to events and discussions affecting public health. For instance, during a 1772 smallpox epidemic in Boston, the legislature debated whether inoculation actually spread the disease, and passed a bill forbidding inoculation.[45]

37. *See id.* at 202.

38. *See* Parmet, *supra* note 35, at 291.

39. *See* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 194 (John Bioren ed., 1812).

40. *See id.*

41. *See* Parmet, *supra* note 35, at 285-302.

42. *See id.* at 287.

43. *See id.* at 287-88.

44. ACTS AND LAWS, PASSED BY THE GREAT AND GENERAL COURT OR ASSEMBLY OF THE PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND, FROM 1692, TO 1719, at 205 (1724).

45. *See* John Blake, *The Inoculation Controversy in Boston, 1721-1722*, *in* SICKNESS AND HEALTH IN AMERICA: READINGS IN THE HISTORY OF MEDICINE AND PUBLIC HEALTH 347, 350 (Judith Walzer Leavitt and Ronald L. Numbers eds., 1985). The bill

One of the most important aspects of public health regulation involved protecting cities from diseases brought by ships arriving in port. The city of Philadelphia, like other port cities, passed public health regulation requiring port officers to inspect ships for disease, and enforcing quarantine, on infected ships.[46] The yellow fever epidemic of 1793 prompted further action. The city created a board of health with extensive authority over quarantine, health nuisances, inspection of incoming ships, and the health office.[47] In 1806, the state legislature established the city's board of health as a corporation.[48] The Governor of the state appointed five people each year to serve on the board, no more than two of whom could be physicians.[49] The board's chief responsibility was to make rules and regulations about the health office and public hospitals, inspecting incoming vessels for disease, and establishing and maintaining quarantines of infected ships and their crews if necessary.[50] The board was also responsible for appointing officials to carry out the duties entailed in the act.[51] Among these officials were physicians who were appointed to inspect the ships and their crews.[52] The same act also strictly regulated the inspection of incoming ships to prevent the spread of disease to the city.[53] If ships were found to be infected, neither its crew, passengers, or cargo could enter the city without official authorization.[54] Violation of the statute's provision could result in a fine of two hundred dollars.[55]

Although these statutes are quite specific about the nature of the board's duties and enforcement mechanisms, they are silent with regard to physicians appointed by the board.[56] The statutes did not require city physicians to have any particular background or experience. Just as private citizens did not require that their medical practitioners possess particular credentials,[57] the legislature made no

was subsequently turned down by the council. *See id.*

46. *See generally* LAWS OF THE COMMON WEALTH OF PENNSYLVANIA, *supra* note 39.

47. *See* NOVAK, *supra* note 1, at 201. State boards of health only appeared at mid-century. *See id.* at 202.

48. 4 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 302-303 (John Bioren 1810).

49. *See id.* at 303.

50. *See id.*

51. *See id* at 303-04.

52. *See id.*

53. *See id.* at 304-12. The statute left details regarding inspection to be determined by the board, but did require that some form of inspection take place. *See id* at 305.

54. *See id* at 305-06, 309.

55. *See id* at 305, 311.

56. *See id* at 302-12.

57. *See infra* notes 111-115 and accompanying text.

rule about what kind of practitioners could serve the city. Although the public health regulations were quite detailed, decisions regarding what kind of practitioner would serve the city best were left to the board of health. This was presumably because the board was in the best position to know who would best serve the city's needs.

Cities also provided assistance, including medical care, to the poor.[58] All city inhabitants benefited from this care, because stopping the spread of disease protected everyone and promoted "the common good."[59] During epidemics, relief was often given to families who were normally able to support themselves but could not work due to illness.[60] The Philadelphia poor laws provide an example of how these laws worked. Funds for poor relief came from various sources, including fines for such transgressions as "profane swearing" (5 shillings) and "Entertaining . . . [a] Negro woman" (10 shillings).[61] In addition, there was a poor tax.[62] Some of the poor relief funds paid for practitioners, midwives, and nurses[63] to administer to the poor. In addition, medicines were bought and distributed to those in need.[64]

The Pennsylvania Hospital, established in 1751 to care for the poor, is another example of the colonial legislature acting for the common good. The act creating the hospital stated that "saving and restoring useful and laborious members to a community is a work of public service, and the relief of the sick poor is not only an act of humanity, but a religious duty."[65] The act mandated strict guidelines about who could be a patient. The following were refused admission to the hospital: those judged incurable (except lunatics); those suffering from smallpox, the itch or "infectious distemper;" and women with young children who could not be taken care of outside of the hospital.[66] Preference was given to those patients who were recommended by Contributors to the Hospital.[67] Some provisions

58. *See* Blake, *supra* note 45, at 349.

59. *See* Parmet, *supra* note 35, at 293, 315. Most large towns were providing poor relief by 1700. *See id.* at 293.

60. *See* Blake, *supra* note 45, at 349.

61. Philadelphia Poor Records, 1758. Found in Christopher Marshall's Diaries, Historical Society of Pennsylvania.

62. *See* Gary B. Nash, *Poverty and Poor Relief in Pre-Revolutionary Philadelphia*, 33 WM. & MARY Q. 3, 9 (1997). Between 1756 and 1758, on average there were 6.7 people per 1,000 Philadelphians who could be classified as poor; roughly 110 people received some sort of aid during this period. *See id.*

63. The term "nurses" seems to have applied to both wetnurses and those who tended to the sick. *See generally* Philadelphia Poor Records, *supra* note 61.

64. *See id.*

65. *See* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 39, at 208.

66. *See* WILLIAM H. WILLIAMS, AMERICA'S FIRST HOSPITAL: THE PENNSYLVANIA HOSPITAL, 1745-1841, at 7 (1976).

67. *See id.*

were made to accept paying patients,[68] who were accepted only if there was room. These patients were generally indentured servants and slaves whose masters paid for their keep, paupers who were paid for by overseers of the poor, or insane persons from middle and upper class families.[69] However, as in the public health regulations, the statute made no mention as to what types of practitioners would serve at the hospital. Again, this was left to the governing board.[70]

Clearly, public health regulations, designed to promote the common good, were prevalent in the colonies and states. However, they were silent on issues of which practitioners could be appointed by or to boards of health; there was no mention of any qualifications necessary to serve. This silence is perhaps better understood after a review of colonial attitudes regarding medical regulation and medical practitioners, revealing that people were familiar enough with medical issues that they did not need the protection of regulations.

III. Medical Regulation: A Brief Background

During the nineteenth century many economic activities were regulated.[71] One way to regulate economic activities was to require a license.[72] The license signified a privilege granted by the state or local authority. In other words, performing the licensed activity was not a natural right, but rather one that came from the state or municipality.[73] The most prominent motive for requiring licenses was protection of the public good and general welfare.[74] A license gave the practitioner permission to do what was otherwise prohibited and gave the legislature an opportunity to control the practice of that activity.[75] This suggests that legislatures only sought to require licenses when a certain activity posed a potential threat to the public. In other words, licenses were required only when they would benefit the public, i.e., serve the common good.

Although there were a few attempts to pass legislation, no serious efforts were made to regulate the practice of medicine in the colonies.[76] The few laws that were made were either ineffective or ignored. For example, a law passed in Massachusetts in 1649 required

68. *See* JOHN DUFFY, THE HEALERS: THE RISE OF THE MEDICAL ESTABLISHMENT 59 (1976); WILLIAMS, *supra* note 66, at 15.

69. *See* WILLIAMS, *supra* note 66, at 15.

70. *See* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, *supra* note 48, at 208-11.

71. *See* NOVAK, *supra* note 1, at 10-13.

72. *See id.* at 13.

73. *See id.* at 13-14, 17.

74. *See id.* at 13.

75. *See* NOVAK, *supra* note 1, at 90.

76. *See* DUFFY, *supra* note 68, at 23.

practitioners to consult with other members of the community.[77] This law called on practitioners not to:

> [P]resume to exercise or put forth, any act, contrary to the known approved rules of art, in each mistery or occupation, nor exercise any force violence, or cruelty upon, or towards, the body of any, whether young or old, (no not in the most difficult and desperate cases) without the advice and consent of such as are skilful in the same art (if such may be had) or at least of some of the wisest and gravest then present, and consent of the patient or patients if they be *mentis compotes*, much less contrary to such advice and consent, upon such severe punishment . . . .[78]

This law is generally regarded as having been ineffective, presumably because it was either never enforced or because irregular practitioners[79] thrived in the colony.[80] Nevertheless, it has been suggested that this law's significance is that it conceded that medical care would likely come from domestic or lay practitioners, not licensed physicians.[81]

Another example comes from a Virginia statute specifying fees practitioners could charge.[82] This law allowed formally-educated physicians to charge double what practitioners with only an apprenticeship in medicine could charge.[83] The statute also required practitioners who administered medicines to reveal the exact name and price of the medicine.[84] Presumably, this was to ensure that practitioners' bills were an accurate reflection of services rendered. In fact, the statute declared that:

> [S]uch Practiser, or any Apothecary making up the Prescription of another, shall be nonsuited in any Suit to be commenced, which shall be grounded upon such Bill or Bills; nor shall any Book or Account of any Practiser in Physic, or Apothecary, be given in Evidence before a Court, unless the Articles therein contained be charged, according to the Directions of this Act.[85]

The Virginia law lapsed after two years and similar legislation failed

77. *SEE* JOSEPH F. KETT, THE FORMATION OF THE AMERICAN MEDICAL PROFESSION: THE ROLE OF INSTITUTIONS, 1780-1860, at 7-8 (1968).

78. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUESTS 18 (1660).

79. Irregular practitioners were those pracititioners who possessed no formal training. *See generally* IRVINE LOUDON, MEDICAL CARE AND THE GENERAL PRACTITIONER (1986); ROY PORTER, HEALTH FOR SALE (1989).

80. *See* RICHARD HARRISON SHRYOCK, MEDICAL LICENSING IN AMERICA, 1650-1965, at vii (1967).

81. *See* STARR, *supra* note 10, at 44.

82. *See* AN EXACT ABRIDGMENT OF ALL THE PUBLIC ACTS OF ASSEMBLY OF VIRGINIA IN FORCE AND USE 204 (John Mercer 1738).

83. *See id.*

84. *See id.*

85. *Id.*

to pass.[86] Another attempt at regulation occurred in 1760 when the Provincial Assembly of New York passed the first colonial medical licensure law.[87] The law noted that:

> [M]any ignorant and unskilful Persons in Physick and Surgery, in order to gain a Subsistence, do take upon themselves to administer Physick, and practise Surgery in the City of New-York, to the endangering of the Lives and Limbs of their Patients; and many poor and ignorant Persons inhabiting the said City, who have been persuaded to become their Patients, have been great Sufferers thereby.[88]

New York's law provided for the examination of city practitioners by government officials. The punishment for violating this law was a fee of five pounds, half of which was intended for poor relief.[89] Like other attempts at medical regulation, New York's law was never enforced.[90] These laws were rarely, if ever, enforced and legislation dealing with regulation of medicine often lapsed without renewal, suggesting that medicine was a poor candidate for regulation.

Calls for the legislature to pass laws requiring licensing or some other form of regulation almost always came from the more elite practitioners.[91] Presumably they reasoned that if they could exclude less-educated practitioners, they could make more money, or at least cut down on competition. Towards the end of the eighteenth century and the beginning of the nineteenth century, the elite practitioners began to organize medical societies.[92] By 1830, these societies could be found in nearly every state.[93] Each society promoted tests and licensing procedures.[94] Some state legislatures responded by passing laws addressing these issues.[95] Medical licensing proved to be a difficult issue because, in the absence of previous regulation, there were many questions about what sort of regulation was needed and how it would be carried out. Some of these questions included whether the state or medical societies would regulate; whether there would be central or local licensing; what role, if any, medical schools would play; and whether violating the regulations would lead to penalties.[96] Most states that did pass legislation concerning medical

86. *See* DUFFY, *supra* note 68, at 68.

87. *See* 2 LAWS OF NEW YORK from the 11th Nov., 1752 to 22d May 1762, at 188 (William Livingston and William Smith, Jr. eds., 1762).

88. *Id.* at 188-89.

89. *See id.*

90. *See* DUFFY, *supra* note 68, at 69.

91. *See, e.g.*, SHRYOCK, *supra* note 80, at 17.

92. *See id.* at 17, 23.

93. *See id.*

94. *See id.*

95. *See id.* at 23.

96. *See id.* at 24.

regulation delegated licensing authority to the medical societies.[97] However, these attempts at medical licensing were, for the most part, unsuccessful.[98] Even in states that passed licensing legislation, it was assumed that licensed physicians would not be the source of all medical care.[99] In other words, domestic and "irregular" (non-licensed) practitioners would continue to provide medical care.[100] Licensing regulations typically set no standard for education or achievement, gave no ability to rescind licenses that had been rewarded, and lacked enforcement provisions.[101]

Moreover, as mentioned above,[102] many of these statutes were not enforced by the courts. An 1817 New York case, *Timmerman v. Morrison*, indicates that unlicensed practitioners could be fined twenty-five dollars unless they showed use of "roots, barks, or herbs, the growth or produce of the United States."[103] However, the fine was not imposed here, and it is unclear if it was imposed elsewhere.[104] The only restriction most of these laws placed on unlicensed practitioners was that they could not use the courts to collect their debts. However, this problem could be avoided simply by demanding payment in advance.[105]

During the latter half of the eighteenth century, the first American medical school was established in Philadelphia.[106] The development of medical schools in America weakened medical societies' attempts to license practitioners.[107] Pracititioners who attended these schools argued that their diplomas gave them the right to practice.[108] Medical schools and medical societies effectively competed with one another to offer licenses or certification; medical schools wanted graduation fees from their students, while medical societies sought licensing fees.[109] Neither side had greater authority than the other, as one could practice medicine with the authority of one or neither.[110] Consequently, the two groups effectively countered each other's authority to control the practice of medicine.

97. *See id.*
98. *See id.* at 27; STARR, *supra* note 10, at 44-45.
99. *See* STARR, *supra* note 10, at 44.
100. *See id.*.
101. *See id.*
102. *See supra* notes 76-90 and accompanying text.
103. 14 Johns. 369, 370 (N.Y. Sup. Ct. 1817).
104. *See generally* STARR, *supra* note 10; DUFFY, *supra* note 68; SHRYOCK, *supra* note 80.
105. *See* STARR, *supra* note 10, at 44-45.
106. *See id.* at 40. The school was established in 1865. *See id.*
107. *See id.* at 45.
108. *See id.*
109. *See id.*
110. *See id.*

The term "doctor" was used loosely in colonial and early national America since there were no strongly enforced laws about qualifications for medical practitioners or restrictions on the use of the title.[111] "Doctor" generally referred to any male who provided medical care, regardless of his training.[112] The absence of medical regulation in the colonies meant that, as a group, medical practitioners' educational backgrounds were widely varied. There were no established qualifications for practice, so aspiring medical practitioners could choose what sort of training, if any, they wished to undergo before practicing medicine.[113] Society did not demand a formal medical education of its practitioners; indeed, "friendship, professional acquaintances and personality" were likely to be just as important to a practitioner's career as his education.[114] While many practitioners may have been respected and affluent members of the community, this was due more to personal qualities than their status as "doctors."[115]

In the absence of state or local regulation, one can speculate that courts provided some form of regulation for practitioners and allowed patients some redress against incompetent practitioners. However, the concept of malpractice did not fully develop until later in the nineteenth century;[116] the first recorded appellate malpractice case in Pennsylvania was heard in 1834.[117] Malpractice cases did not receive attention from medical journals and legal scholars until the 1830's.[118] Two of the major treatises on medical jusrisprudence written in the early nineteenth century did not even mention malpractice.[119] Even when cases were decided in the plaintiffs' favor, damages either were not awarded or were substantially less than what the plaintiff

111. Eric H. Christianson, *The Medical Practitioners of Massachusetts, 1630-1800: Patterns of Change and Continuity, in* MEDICINE IN COLONIAL MASSACHUSETTS, 1620-1820: A CONFERENCE HELD 25 AND 26 MAY 1978 BY THE COLONIAL SOCIETY OF MASSACHUSETTS 49, 52-53 (Philip Cash et al. eds., 1980).

112. Christianson, Individuals in the Healing Arts and the Emergence of a Medical Community in Massachusetts, 1700-1792: A Collective Biography 16 (1976) (unpublished Ph.D. dissertation, University of Southern California) (on file with University of Southern California Library).

113. *Id.* at 85.

114. *Id.* at 11, 47.

115. *See* DUFFY, *supra* note 68, at 55.

116. KENNETH ALLEN DE VILLE, MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA: ORIGINS AND LEGACY 4 (1990).

117. Hubert Winston Smith, *Legal Responsibility for Medical Malpractice*, 116 JAMA 2670, 2672 (1941). Before 1830, there were only two appellate malpractice cases heard in the United States. *See id.*

118. *See* DE VILLE, *supra* note 116, at 4-5.

119. *See id.*

requested.[120]

There are several possible reasons for the infrequent use of malpractice before the 1830's. One reason may be that lawsuits were not regarded as a common or appropriate response to misfortune.[121] However, as the nineteenth century progressed, Americans began to move from the notion that they should accept misfortune as an act of God and instead sought "earthly" causes for their troubles.[122] Consequently, people began to turn to the courts for compensation for wrongs.[123] In addition, the doctrine of negligence changed during the first part of the nineteenth century. In the early nineteenth century, negligence meant neglect or failure to perform a preexisting duty imposed by contract, statute, or common law.[124] Carelessness was not central to the action; instead, it was presumed that carelessness followed from the liability for failure to perform.[125] Carelessness did not replace nonfeasance as the main component of a claim of negligence until the 1830's.[126] The increase of malpractice cases seems to coincide with the development of the negligence doctrine. Whatever the reasons for the lack of malpractice cases, it is clear that courts exercised little control over medical practitioners during the colonial and early national periods.

In the absence of legislative and judicial control over medicine, people were free to choose from a wide array of practitioners, medical services, or self treatment. All of these options were available to them within an unregulated medical marketplace. Unlike public health, medicine was a private concern, controlled by private law. For instance, in the absence of specific regulations setting the fees practitioners could charge, the determination of practitioners' fees moved from being a public concern to a private one, set by contract.[127] During the colonial and early national period, medicine was controlled by consumers, not by any formal means of regulation.

IV. Medicine and Medical Practice in Philadelphia

Philadelphia's medical marketplace was quite dynamic and involved almost all members of the community, either as practitioners, sellers of medical paraphernalia, or patients. During the colonial period, medicine and medical practice in Philadelphia

120. *See id* at 7.
121. *See id.*
122. *See id.* at 22, 24.
123. *See id.*
124. *See* HORWITZ, *supra* note 1, at 87.
125. *See id.* at 86-87.
126. *See id.* at 87.
127. *See* STARR, *supra* note 10, at 62.

bore a close resemblance to medicine and medical practices in England.[128] Medical practitioners were among the first settlers of Philadelphia in the seventeenth century,[129] although university-educated practitioners did not arrive to set up practice until the early eighteenth century.[130] These formally trained practitioners competed for clients with other medical practitioners who possessed little or no training. In addition, many shopkeepers who made no claim to be practitioners sold medical goods, thus adding to the competitive nature of the medical marketplace.[131] Women actively participated in the medical marketplace as caregivers and shopkeepers.[132] The city's medical marketplace offered consumers a wide variety of practitioners and services from which to choose.

For example, although the Drinkers, a wealthy Philadelphia family, could certainly have afforded to pay for the services of medical practitioners, they relied heavily on healthcare that was provided in the home. Elizabeth Drinker's diary reveals she was an important healthcare provider in her home, often caring for the family and making decisions about treatment. She frequently administered doses of medicine to the family and she occasionally treated servants.[133] Even when a physician was attending a member of the family, Drinker figured prominently as a caregiver.[134]

Although Drinker generally respected the opinions of the physicians who attended the family, she was not afraid to disagree. Drinker was quite confident about her ability to diagnose and treat certain maladies, though this does not mean that she was always correct, at least as far as the family's physicians were concerned. She once recorded that the family "sent for Redman to Nancy [their doctor] Sepr. the 28 1765 as we think tis the bloody flux she has—prov'd to be a Teething disorder."[135] On other occasions, the Drinkers had no idea what to diagnose and turned to the physicians for help.[136] Drinker, however, did not hesitate to take issue with physicians when she thought they were wrong. Shortly after her daughter was inoculated for the smallpox she wrote that "the Doctor thinks her Fever yesterday, was not of the small-Pox—I am of a different oppinion as her arm run, and her breath was very offencive,

128. *See* Strottman, *supra* note 6, at 61.

129. *See* Genevieve Miller, *European Influences in Colonial Medicine*, 8 CIBA SYMPOSIA 511-521.

130. *See id.*

131. *See* Strottman, *supra* note 6, at 30.

132. *See id.* at 25-28.

133. *See, e.g.*, DRINKER, *supra* note 4, at Jan. 2, 1780.

134. *See, e.g., id.* at July 10, 1778.

135. *Id.* at Sept. 28, 1765.

136. *See id.* at June 20, 1765.

she is gone to Bed with much fever; after having been very cold."[137] On another occasion, she accompanied a friend to see a doctor, after which she made the following entry: "Dollys Breast worse, I went with her to Dr. Jones . . . he did not say it was worse, but it is obvious to me."[138] When Drinker felt she was in comfortable medical territory, she had no qualms about voicing her contrasting opinions, at least to her diary. When she was unsure of a diagnosis or treatment, she did not quarrel with the physician's opinion.

The Drinkers employed a variety of the medical options available to them. They appear to have been discriminating consumers. Although they could afford to consult any practitioner at any time, practitioners were called in only when necessary, and then according to their skills.[139] Among the practitioners they consulted were toothdrawers, nurses, and physicians.[140] Although physicians, who were formally educated, often bled their clients and drew teeth, the Drinkers preferred to call in other "irregular" practitioners, who did not possess any formal medical education, to bleed them and perform dentistry.[141] In many cases, Elizabeth Drinker took on the responsibility of diagnosing and treating sick family members and servants.[142] Drinker's diary indicates that the family relied on a combination of services and goods purchased within the medical marketplace and care that was provided in the home. There is no reason to suppose that the Drinkers were unique in employing the various options that the medical marketplace offered them. Their behavior was probably typical of most Philadelphians who could afford to pay for their healthcare. The people of Philadelphia were quite knowledgeable about medicine and their medical choices and took full advantage of the options available to them.[143] They did not need or want the protection of government regulations.

A. Doctors and Shopkeepers

Doctors in Philadelphia performed a variety of medical tasks, inclusing dispensing drugs, performing surgery, and giving advice to their patients.[144] Some doctors advertised special skills and qualifications in local papers.[145] More often, doctors advertised in the

137. *Id.* at June 15, 1779.
138. *Id.* at August 22, 1780.
139. *See generally id.*
140. *See generally id.*
141. *See e.g. id.* at August 4, 1759, October 18, 1772, and September 24, 1778.
142. *See e.g. id.* at January 2, 1780.
143. *See* Strottman, *supra* note 6, at 61.
144. *See id.* at 1.
145. Philadelphia was unique among the North American colonies in that it had two newspapers, the *Pennsylvania Gazette* and the *American Weekly Mercury*; both were

form of requests for payment. For instance, prior to a trip to Europe, W. Henderson, "Practitioner in Physick and Chirurgery," called upon Philadelphians to settle their debts with him.[146] At the end of his notice he added: "This is the Person who cures Cancers, Wens, and Evils, without drawing Blood; he does it by Unction, & c."[147] Another doctor placed the following advertisement in a newspaper:

> All Persons indebted to Doctor Rymer Landt, living in Adams town, in Lancaster, are hereby desired to discharge their respective Debts .... And whereas said Rymer Landt has been informed by some of his distant Patients, that it has been reported that Doctor Landt was dead; this is to assure the Public, that (God be thanked) he is very well at Lancaster, where he endeavouors to serve every One who is in want of his Assistance, as much as lies in his Power, as well in internal as external Cases. He also cures, with Operation, or without it, by Bandages and proper Medicines, all Sorts of Ruptures, and large small Ecrescences, on any Part of the human Body; single and double Hair Lips in Children and grown Persons, &c.[148]

Many practitioners in Philadelphia used different titles to identify themselves and were involved in a variety of economic activities, both medical and, as will be shown below, non-medical. For instance, in the *Pennsylvania Gazette*, Evan Jones is identified as "chymist" and "Doctor of Physick," although no available source indicates he ever used these titles simultaneously.[149] Patrick Baird, a surgeon, promoted his store as a place where "are to be sold, all sorts of useful Medicines and Druggs: where also all Masters of Trading Vessels may be Furnish'd with Boxes of Medicines, fitted for their respective Voyages, with ample Directions for their Use."[150] Even though Baird identifies himself as a surgeon in this ad, he does not promote his surgical skill but rather his shop's wares, demonstrating that medical practitioners did not necessarily restrict their activities to the medical sphere. Similarly, people who generally supported themselves by non-medical activities could still earn money practicing medicine. John Hanson, a weaver from England, declared that he was:

> [W]illing to serve Town or Country, with Weaving Woollen Cloth... Linen, Plain Cloth, Bed Ticks, Huckabacks, corded Dimithies, worsted Tammies, Cloth Sarges, Sagathies, Duroys, common Camlets, boil'd Camlets, Camlettees, Calamancoes, Russels, and Sargdenims. Note, The said John Hanson lets Blood

established early in the eighteenth century.

146. PA. GAZETTE, Sept. 12, 1732-Sept. 18, 1732.

147. *Id.*.

148. *Id.*, Apr. 5, 1764.

149. *See id.*, Feb. 2, 1730; Sept. 16, 1736.

150. AM. WEEKLY MERCURY, Apr. 7, 1726-Apr. 14, 1726.

and draws Teeth, greatly to the Satisfaction of the Patient.[151]

Although there were no legal limits on the use of the title "doctor,"[152] not all doctors offered the same services. A wigmaker advertising his services noted the presence at his shop of Anthony Noel, "an experienced doctor . . . who can bleed, draw teeth, and cure all manner of wounds incomparably well."[153] The language used in this advertisement is less sophisticated than the advertisement of Adam Thomson from Edinburgh, also identified as a doctor, who claimed to be proficient in "Physick, Surgery and Midwifery."[154] Thomson's ad gives the impression that he studied at Edinburgh, site of a prominent medical school, while Noel's ad cites only his experience. Whatever the differences in their backgrounds and their medical sophistication (Thomson's claim to practice physick, surgery and midwifery compared with Noel's offer to bleed, draw teeth and treat wounds), they both used the same title. Presumably, people reading the ads would be aware of differences between the two practitioners and would choose between them according to the type of medical service they wanted.[155] This point is crucial to understanding medicine in Philadelphia: People were sophisticated in their recognition and evaluation of their medical options and chose according to their own personal criteria.[156] The people of Philadelphia did not need protection via medical regulations because they knew what medical options they wanted to pursue.

Patients approached doctors for a variety of reasons. They could expect them to distribute medicines, attend them when ill, or perform surgery. Setting broken bones and treating wounds or sores were common occurrences in doctors' practices.[157] Occasionally they performed minor surgery, such as cutting harelips, lancing abscesses, setting broken bones and "extirpating" toenails.[158] In addition, they also practiced physic.[159] Doctors tended the sick and prescribed treatment for such ailments as venereal disease and ulcers.[160]

151. PA. GAZETTE, Sept. 1, 1743.

152. *See supra* notes 111-115 and accompanying text.

153. PA. GAZETTE, July 14, 1748.

154. *Id.*, Nov. 3, 1748.

155. *See* Strottman, *supra* note 6, at 14.

156. *See id.* at 61.

157. *See id.* at 32.

158. *See id.*

159. Physic was taught at universities and was based on the work of Hippocrates, Aristotle, and Galen. Illness was believed to be caused by an imbalance of the four humors (blood, phlegm, black bile, and yellow bile). Health was restored by curing this imbalance, generally through bloodletting, purges, or emetics. *See* KEITH THOMAS, RELIGION AND THE DECLINE OF MAGIC 8 (1971).

160. *See generally* John Kearsley's Debt Book 1711-1720, Cadwalader Collection, Thomas Cadwalader Section, Historical Society of Pennsylvania; Phineas Bond's Daybook

Physicians' account books indicate their practices consisted mostly of distributing medicines and visiting the sick; performing surgery and prescribing courses of treatment were less frequent occurrences.[161] Everyone except the extremely poor, who relied on poor relief for medical care,[162] and servants and slaves, could directly consult a doctor or another practitioner. However, a patient's wealth determined how practitioners were used. For instance, those who had little money called on doctors only for serious cases, and generally did not see doctors often unless their illness required repeated visits.[163] Those who could afford to see a doctor frequently did so, often running up rather large medical bills in the process.[164] People who either could not afford to see a doctor, or did not wish to, had other medical alternatives.

B. Self-Diagnosis and Self-Medication

One of the most important aspects of medical practice in Philadelphia was the sale of drugs and medicines. Practitioners were so eager to attract business that they placed advertisements in German (to attract the German-speaking community in and around Philadelphia) as well as English in the English-language newspaper the *American Weekly Mercury*.[165] Many Philadelphia doctors owned shops and advertised their wares in the local newspapers. One ad ran as follows:

> Lately imported from London, and to be Sold by Dr. Peter Sonmans over against the Baptist Meeting House in Second-street, Philadelphia; all sorts of Druggs and Chymical and Galencial Medicines; also the best Hungary Water and very good Sweet Almonds.[166]

This ad is similar to other ads run by Philadelphia doctors and demonstrates that practitioners in Philadelphia focused a good deal of their attention (and money for advertisements) on selling drugs and medicines.[167] This suggests that the successful sale of drugs and medicines made a significant contribution to the practitioners' economic well-being and that they were actively involved in this

1762-1763, Cadwalader Collection, Phineas Bond Section, Historical Society of Pennsylvania.

161. *See id.;* Strottman, *supra* note 6, at 32.

162. *See supra* notes 58-69 and accompanying text.

163. *See* Strottman, *supra* note 6, at 30.

164. *See id.* at 31-37.

165. *See* AM. WEEKLY MERCURY, Aug. 22, 1734-Aug. 29, 1734 (English advertisement); *id.,* Sept. 12, 1734-Sept. 19, 1734 (German advertisement).

166. *Id.,* July 10, 1735-July 17, 1735.

167. *See, e.g.,* PA. GAZETTE, Nov. 3, 1748; *id.,* May 18, 1749; *id.,* Dec. 8, 1748; *id.,* Nov. 3, 1748.

trade.

In addition to the city's medical practitioners, many Philadelphia shopkeepers, some of whom made no claim to practice medicine, profited from selling various drugs and medicines.[168] The increase of imported medical goods from Britain further expanded the medical marketplace and offered consumers a greater variety of medical choices.[169] An advertisement in the *American Weekly Mercury* noted that, "[t]here are to be sold by Mr. Scot at Mr. Oliver Galtree's in High-street near the Prison, Philadelphia, All Sorts of Medicines, Drugs, & c. for ready Money, and any Person may there be supplied with Lancets for Bleeding, at very reasonable Rates. They are very choice, and lately come from London."[170] The Widow Sharp advertised that she would sell "fine Bermuda Platt, at 4 pence per Score, good sewing Strings at 1 s. per Pound, choice Indigo at 8 s. by the single Pound, a parcel of Drugs with some Chymical Preparations, and a small Box of Instruments belonging to Surgery, very cheap."[171] One shopkeeper, Charles Osborne, ran an ad which noted that "Masters of Ships not carrying Surgeons out with them may be furnished with Medicine Chests, and Directions. Families living distant from a Doctor, may be furnished with Chests of all Sizes, at very low Rates."[172] Osborne's advertisement targeted those who lived outside the reach of practitioners and thus had to treat themselves. However, self-diagnosis and self-treatment were not limited to those who lived far away from doctors.

The prevalence of advertisements for drugs and medical tools indicate that Philadelphians relied heavily on self-diagnosis and self-medication. The number of advertisements for medical goods aimed at non-practitioners indicates a demand existed in the community for these items. Studies show that in eighteenth-century England, if people believed they knew what was wrong with them, they could go to the store and purchase the medicines advertised as effective cures.[173] There is no reason to believe that life in Philadelphia was different. It has been noted that "the sick probably experienced little measurable difference between the rather mixed benefits of physician-prescribed, apothecary-supplied medication, and the patent and proprietary concoctions of the nostrum-mongers."[174] Doctor James's fever powders were advertised as being particularly effective

168. *See* Strottman, *supra* note 6, at 23.
169. *See id.*
170. AM. WEEKLY MERCURY, May 17, 1722-May 24, 1722.
171. PA. GAZETTE, Apr. 3, 1740.
172. *Id.*, April 20, 1758.
173. *See* ROY PORTER, HEALTH FOR SALE 134-35 (1989).
174. *Id.* at 24.

because "1 or 2 doses does the cure."[175] Another remedy, American Balsam, was touted as being able to cure various fevers, sprains, the flux, etc. and was deemed "valuable on account of its working off so easy, that it seldom ever disorders the body in the least."[176] These promotional techniques, which emphasized rapid recovery, were also used in England.[177] There, proprietary mixtures were advertised as effective without bedrest, while the doctors' purges and vomits resulted in a few days away from work—not likely to be a popular option among those who depended on daily wages.[178]

Self-diagnosis and self-treatment were not restricted to lower classes. Elizabeth Drinker used Turlington's Balsam, a British patent medicine, advertised as a cure for kidney and bladder stones, colic, and "inward weaknesses" to stop bleeding from a cut on her daugther's head.[179] Drinker gave another daughter Venice treacle, another store-bought remedy, for worms.[180] As mentioned above, the Drinkers did not hesitate to call on physicians to come visit them.[181] They did not use one medical option to the exclusion of another, and their behavior was probably typical of Philadelphians who could afford to pay for their healthcare. They knew what sort of medical treatment they wanted and did not need the protection of government regulations.

C. Medicine, Trade and Regulation

Although public health regulations were often connected with trade,[182] there were no regulations controlling what medicine and medical services were sold within a town's medical marketplace.[183] Statues controlling regulation of trade in colonial and early-national America are extremely specific about the types of wares that could be sold and even the types of buildings in which they could be produced.[184] This level of detail clearly indicates that legislators had specific goals in mind when they drafted and passed these laws. Therefore, the exclusion of medicine or medical practice in these statutes appears to be a conscious omission.

As has been shown above, the practice of medicine and sale of

175. PA. GAZETTE, June 22, 1749.

176. *Id.*, Feb. 24, 1747.

177. This is not too surprising considering that most of the medicines sold in colonial shops were imported from England.

178. *See* PORTER, *supra* note 173, at 143.

179. *See* DRINKER, *supra* note 4, at 121.

180. *See id.* at 122.

181. *See supra* note 136 and accompanying text.

182. *See supra* notes 38-40 and accompanying text.

183. *See generally* LAWS OF THE COMMON WEALTH OF PENNSYLVANIA, *supra* note 39.

184. *See id.*

medicines was an important economic activity.[185] Often, medical goods were sold by shopkeepers who also sold non-medical goods.[186] Conversely, practitioners often sold non-medical goods or services to augment their income.[187] The sale of medical goods and services was a common activity in colonial and early national America, and an integral part of its economy. However, city and state regulations do not ever mention medical goods or services. Similarly, as shown in Section III, the courts did not provide any meaningful level of control.[188] In fact, it was the medical consumers, the patients, who effectively regulated medicine.

D. Social regulation

In the absence of formal medical regulation, society placed restrictions on the practice of medicine. For example, not all practitioners were identified as doctors. Women were never referred to as doctors, despite their active participation in the medical marketplace.[189] Lydia Ellis was remembered after death for her command of, "Physick, Surgery, and the Virtue of Herbs, by which she performed many and great Cures in the country round her, and was always ready to run to the Assistance of the Afflicted, without expecting or requiring any thing for her Trouble."[190] Even though she was never referred to as a doctor, her elegy attributed to her all the skills ("physick and surgery") of a highly respected male practitioner who would have undoubtedly been referred to as a "doctor." Runaway slaves and servants who practiced medicine were often identified as "passing for" a doctor or "pretending" to be a doctor by their masters in announcements. In one ad, James Leonard offered a reward in the *Pennsylvania Gazette* for the return of his slave Simon who could "bleed and draw Teeth, [and pretends] to be a great Doctor."[191] Simon's skills differ little from those of Anthony Noel, a self-identified doctor (mentioned above),[192] who advertised that he could "bleed, draw teeth, and cure all manner of wounds."[193] The only real difference between Simon and Noel was Simon's slave status. In the eyes of his owner, Simon was not entitled to be called a doctor, while Noel, a free white man, did not encounter similar resistance. Instead of formal medical regulations, social conventions

185. *See supra* notes 145-154, 165-72 and accompanying text.
186. *See supra* notes 168-172 and accompanying text.
187. *See supra* notes 149-50 and accompanying text.
188. *See supra* notes 116-127 and accompanying text.
189. *See supra* note 112 and accompanying text.
190. PA. GAZETTE, Dec. 21, 1742.
191. PA. GAZETTE, Sept. 11, 1740.
192. *See supra* note 153 and accompanying text.
193. PA. GAZETTE, July 14, 1748.

imposed restrictions on the use of the title "doctor."

Society's control of medicine extended to more than merely determining practitioners' titles. As active and knowledgeable consumers, people controlled the medical marketplace. As mentioned above, self-diagnosis and self-medication predominated in Philadelphia.[194] Philadelphians were well-informed about their medical options and exercised medical choices based both on medical knowledge and on cost.[195] Where Philadelphians lacked the ability to exercise their first choice, as in the case of the city's poor who could afford neither medicines or the services of practitioners, regulations provided for medical attention via either poor relief or the Pennsylvania Hospital.[196] These regulations served to protect the public and promote the common good. However, this legislation only laid the framework for the provision of medical care. Decisions about who would provide care and what kind of care was to be provided were left to governing boards, which presumably made decisions based on their members' knowledge of local practitioners and medicine. Even in the area of public health, governing bodies were deferential to an individual's knowledge of medicine.

Conclusion

A comparison of public health and the practice of medicine in colonial and early national America clearly shows a split between public and private interests. Public health was not regarded as a medical specialty, but rather a public philosophy.[197] Public health regulations were promulgated and enforced because they promoted the common good and because some centralized authority was required to look after public health concerns.[198] Medicine, on the other hand, was a private concern, controlled by private law. Americans did not need the protection of medical regulations; they could make their own medical choices and did not require, or probably even want, local or state authorities to control their medical options. Arguably, medicine and personal health issues were so central to peoples' lives that they would not have supported any regulations that interfered with their medical choices. In addition, the wide number of options available within the medical marketplace ensured that all but the economically dependent could control their medical care. Regulating medicine would not have promoted the "common good;" rather, the common good was promoted by allowing

194. *See supra* notes 165-181 and accompanying text.
195. *See supra* notes 162-164 and accompanying text.
196. *See supra* notes 58-68 and accompanying text.
197. *See supra* note 35-36 and accompanying text.
198. *See supra* note 35 and accompanying text.

people to make their own medical decisions and thereby control the practice of medicine. At least in the case of medicine, regulation during the eighteenth and early nineteenth centuries was regarded as unnecessary because the people had enough information to protect themselves rather than needing the law to protect them.

The apparent distinction between public and private spheres herein indicates that Novak's claim that the split between public and private law did not occur until later in the nineteenth century[199] does not apply to medicine. Likewise, this Note finds fault in Horwitz's claim that the split between public and private law occurred during the nineteenth century. As far as public health and medicine were concerned, a split between public and private law occurred as early as the colonial period.

199. *See supra* notes 30-34 and accompanying text.