HOLISTIC HEALTH CARE: INCLUDING ALTERNATIVE AND COMPLEMENTARY MEDICINE IN INSURANCE AND REGULATORY SCHEMES

Michael H. Cohen*

TABLE OF CONTENTS

---

* Associate Professor of Law, Chapman University School of Law (Orange County, California). B.A. 1983, Columbia University; J.D. 1986, Boalt Hall School of Law, University of California, Berkeley; M.B.A. 1988, Haas School of Management, University of California, Berkeley; M.F.A. 1990, Iowa Writers' Workshop, University of Iowa. I thank Inna Belopolsky, Rich Benenson, Teresa Lazo-Miller, Millicent Wise and Doug Wolfberg for research assistance, and Earl Beyer, Tom Baker, Daniel Cohen, William Dailey, Alan Dumoff, Greg Gelfand, Robert Power, and Irene Skidan for comments on the manuscript. I thank Wayne Jonas, M.D., Mac Beckner and Beth Clay at the Office of Alternative Medicine, Janette Carlucci, and faculty and friends at the Barbara Brennan School of Healing, for deepening my understanding of alternative/complementary medicine.

INTRODUCTION

Two centuries ago, colonial Americans gave little thought to who practiced medicine. Contemporary physicians practiced "heroic therapy," which involved bleeding, blistering, and inducing vomiting.[1] Most were "ignorant, degraded and contemptible," according to an 1818 presidential address at the New York State Medical Society.[2] One confessed: "Few physicians among us are eminent for their skill. Quacks abound like locusts in Egypt."[3]

Today, the practice of medicine is tightly controlled by state medical practice acts, licensing boards and disciplinary committees. State medical boards have extensive authority over physician activity, including, in many states, the authority to punish "any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice...irrespective of whether or not a patient is injured thereby."[4] Similarly, state medical practice acts authorize prosecution of the unlicensed practice of "medicine," including such acts as "diagnosis," "prescription," "operation" and "treatment" within the purview of medical practice.[5] Nonmedical health care professionals, such as nurses, physical therapists, and chiropractors, have limited licensure, authorizing them to perform specific functions such as supportive or restorative care under physician supervision,[6] or detecting and correcting structural imbalances in the spine.[7] To avoid charges of practicing medicine unlawfully, these nonmedical healing professionals must be careful not to "diagnose" or "treat" disease, but rather to limit the scope of their activities to the statutorily defined conduct.[8]

The regulatory scheme aims at preventing nondiagnosis, misdiagnosis, nontreatment and mistreatment by unlicensed medical providers.[9] Its goals are twofold: first, protecting the public from the dangers of unskilled practitioners and unsound treatment or advice, and second, protecting the public from

---

1. WILLIAM G. ROTHSTEIN, AMERICAN PHYSICIANS IN THE NINETEENTH CENTURY: FROM SECTS TO SCIENCE 41–62, 127 (1972).

2. RICHARD H. SHYROCK, MEDICAL LICENSING IN AMERICA 1650–1965, at 4 (1967) (quoting John Sterns, Presidential Address, I N.Y. ST. MED. SOC'Y TRANS. 139 (1818)).

3. T. Romeyn Beck, *A Sketch of the Legislative Provision of the Colony and State of New York, Respecting the Practice of Physics and Surgery*, N.Y. J. MED. 139 (1822) (quoting SMITH, HISTORY OF NEW YORK 236 (1814)).

4. *In re* Guess, 393 S.E.2d 833, 835 (N.C. 1990), *cert. denied*, 498 U.S. 1047 (1991) (quoting N.C. GEN. STAT. § 90–14(a)(6) (1985)).

5. *See* Michael H. Cohen, *A Fixed Star in Health Care Reform: The Emerging Paradigm of Holistic Healing*, 27 ARIZ. ST. L.J. 79, 97–98, app. I, tbl. 2 (1995).

6. *See, e.g.*, IOWA CODE ANN. § 152.1.4.a (West 1994) (defining practice of a "licensed practical nurse").

7. *See, e.g.*, VA. CODE ANN. § 54.1–2900 (Michie 1950) (defining chiropractic as "adjustment of the twenty-four movable vertebrae of the spinal column").

8. *See, e.g.*, State v. Beno, 373 N.W.2d 544 (Mich. 1985) (chiropractor who conducted physical examination of patient's elbow held to have "diagnosed an elbow ailment").

9. The concern is that a person afflicted with disease "might be induced to postpone or even forego necessary medical treatment," and that the alternative/complementary professional, lacking medical training, would "run a serious risk of either misdiagnosis or non-diagnosis" of the disease in question. Mitchell v. Clayton, 995 F.2d 772, 774 (7th Cir. 1993) (citing Maguire v. Thompson, 957 F.2d 374, 377–78 (7th Cir.), *cert. denied*, 503 U.S. 822 (1992)).

reliance on unskilled practitioners, and directing them to proper medical care.[10] These goals, in turn, reflect a paternalistic stance toward health care: the consumer presumably cannot distinguish between competent practitioners and quacks, and thus must rely on the State to root out the professionally infirm.

By separating medical from nonmedical practitioners, and granting state medical boards broad authority to punish deviation from medical orthodoxy, irrespective of patient injury, the existing regulatory environment favors a health care system dominated by orthodox medicine, based on technological approaches to disease and healing, and modeled on the assumption that patients lack the requisite sophistication to choose who may minister to the diseased body. This regulatory approach is not well suited to a health care system in which chiropractors, naturopaths, acupuncturists, nutritionists, massage therapists and the patient share responsibility for the task of healing,[11] in which patients value freedom of access to treatment,[12] and in which patient autonomy supersedes paternalistic approaches to well-being.[13]

In a system of integrated health care, yoking physicians to orthodoxy and monitoring providers for infringement on the turf of "medicine" inhibits both medical freedom and patient access to treatments. Even assuming that patients need protection from overreliance on nonorthodox providers or procedures, the existing paradigm imposes artificial and arbitrary limitations on scope of practice, and fails to draw workable boundaries between various approaches to healing. Rather than protecting patients, the regulatory apparatus protects medical orthodoxy, shutting off innovative and competing approaches to healing.[14]

This Article argues that current scope of practice and disciplinary schemes unduly inhibit the integration of alternative and complementary medicine into modern health care, and unfairly discriminate against physicians and others who utilize holistic therapies. Part I describes state regulatory schemes credentialing and disciplining healing arts practitioners. Part II describes the philosophical underpinnings of holism, the application of these principles in particular modalities, and the insurance status of holistic or alternative/complementary therapies.

Part III examines deviance and discipline. This Part evaluates whether medical board actions against physicians who incorporate treatments such as chelation therapy, ozone therapy and homeopathy, serve patients, or punish innovators in the guise of protecting patient health. This Part also evaluates whether functional descriptions such as "diagnosis" and "treatment" effectively distinguish physicians from their competitors and serve the regulatory values of

10. *See, e.g.*, People v. Amber, 349 N.Y.S.2d 604, 612 (Sup. Ct. 1973); People v. Steinberg, 73 N.Y.S.2d 475, 577 (Mag. Ct. 1947).

11. *See infra* part I.A.

12. *See infra* part III.

13. *See infra* part IV.C. Furthermore, overreliance on technological interventions creates an uncontrollable spiral of escalating costs and intractable bioethical dilemmas. *See generally* DANIEL CALLAHAN, WHAT KIND OF LIFE: THE LIMITS OF MEDICAL PROGRESS (1990); Mark A. Hall, *Rationing Health Care at the Bedside*, 69 N.Y.U. L. REV. 693 (1995).

14. Regulatory agencies generally are "so subject to influence by the industries they regulate that their decisions tend to advance or protect industry interests and neglect those of the nonindustry public." PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES ix (1981). The consistent tendency of regulatory agencies to serve the regulated industry, "to the neglect or harm" of the public, is known as "agency capture." *Id.* at 4.

preventing patient harm and ensuring appropriate care. Part IV suggests ways in which heightened tort law duties and access to treatment laws can more meaningfully regulate holistic therapies. Part IV further addresses the ways in which third-party reimbursement schemes can incorporate the prevalence of alternative and complementary modalities.[15]

I. CREDENTIALING AND DISCIPLINARY SCHEMES

A. Police Power Protection for Medical Regulation

The states' regulation of health practitioners finds authority in the Tenth Amendment to the United States Constitution, which provides that powers not expressly delegated to the federal government by the Constitution, nor prohibited by it to the states, are reserved to the states, or to the people.[16] Among these is the "police power," the power to protect the health, safety and welfare of citizens. This includes the power to require a license for the practice of healing arts, and to control practitioners through regulatory and disciplinary schemes.[17]

Over the years, the United States Supreme Court has upheld this power against numerous challenges in the area of medical regulation. In 1888, in *Dent v. West Virginia*,[18] a physician challenged a state statute requiring him to obtain a diploma from the state board of health in order to practice medicine. The state board had refused Dent a certificate, claiming that the medical college Dent had attended was not "reputable" under applicable Board rules.[19] Dent argued that practicing medicine was his only means of support, and that the statute unconstitutionally destroyed his vested rights, depriving him "of the estate he had acquired in his profession by years of study, practice, diligence, and attention."[20] The Supreme Court upheld the conviction for practicing medicine unlawfully, holding that the state's police power included "prescrib[ing] all such regulations as, in its judgment, will secure or tend to secure...[the public] against the consequences of ignorance and incapacity as well as deception and fraud."[21]

Courts usually have upheld the states' police power in medical regulation against free exercise, due process, and privacy challenges. For example, in *Jacobson v. Massachusetts*,[22] the Supreme Court upheld the state's right to order compulsory vaccination among public school children. The Court rejected the defendant's argument that vaccination violated the "inherent right to care for his own body and health in such way as to him seems best."[23] Similarly, in

15. Appendix 1, *infra*, canvasses chiropractic, naturopathic, acupuncture, and massage therapy licensure in each state.
16. U.S. CONST. amend. X.
17. Peckmann v. Thompson, 745 F. Supp. 1388, 1391 (C.D. Ill. 1990), *remanded on other grounds*, 966 F.2d 295 (7th Cir. 1992).
18. 128 U.S. 114 (1888).
19. *Id.* at 118.
20. *Id.* at 123.
21. *Id.* at 122.
22. 197 U.S. 11 (1905).
23. *Id.* at 26.

United States v. Rutherford,[24] the United States Supreme Court rejected efforts by terminally ill cancer patients to enjoin the federal government from interfering with interstate transportation of Laetrile, a non-FDA approved drug.

Courts have found some limitations to the police power in the area of forced antipsychotic medication for mentally ill patients.[25] However, in *Washington v. Harper*,[26] the United States Supreme Court held that a state's interest in maintaining the safety and security of its prisons justified forced medication of inmates in reasonable furtherance of this goal. Other courts have upheld, against constitutional challenges, ordinances permitting involuntary detention, examination and forced treatment of a person reasonably suspected of having a venereal disease.[27] Courts also have upheld detention giving the detainee a choice between staying in jail while an examination would be conducted, or submitting to an immediate injection of penicillin, without examination, and thus being eligible for immediate release.[28]

Courts have used the police power, in medical regulation, to override not only privacy and liberty interests, but also free speech interests. For instance, in *State v. Hinze*,[29] a licensed pharmacist, holding a degree in naturopathy from a Canadian college, gave seminars in which he was introduced as "Dr. Hinze," and in which he provided information regarding homeopathic and naturopathic remedies. The court permanently enjoined the pharmacist from engaging in the practice of medicine without a license, and thereafter held him in contempt for violating the injunction.[30]

On appeal, the Nebraska Supreme Court upheld the judgment, finding that the pharmacist had solicited participants' ailments, suggested specific remedies, and used the title "Doctor" without explaining his educational background.[31] The court further rejected the pharmacist's claim that his First Amendment right to freedom of speech protected the enjoined conduct.[32] According to the court, "[a]ny infringement on Hinze's freedom of speech created by this injunction is, at most, incidental and is outweighed by this State's compelling interest in regulating the health and welfare of the citizens of Nebraska."[33] Although the *Hinze* court may have relied on defendant's suggestion of specific remedies for particular ailments, the decision exemplifies the states' reliance on the police power as a basis for curtailing patient access to non-orthodox modalities of healing.

---

24. 442 U.S. 544 (1979). On remand, the Tenth Circuit held that the patient's selection of a particular treatment is not a protected privacy right, and can be curtailed as a valid exercise of the governmental interest in protecting public health. 616 F.2d 455, 457 (10th Cir. 1980).

25. *See, e.g.*, Davis v. Hubbard, 506 F. Supp. 915, 938 (N.D. Ohio 1980); Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979). *See also* Winters v. Miller, 446 F.2d 65, 69 (2d Cir. 1971) (upholding damages claim for forced medication by Christian Scientist who was never found mentally incompetent).

26. 494 U.S. 210, 223, 236 (1990).

27. *See* Reynolds v. McNichols, 488 F.2d 1378, 1382 (10th Cir. 1982) (citing cases).

28. *Id.* at 1381. According to the court, "[p]rostitution and venereal disease are no strangers." *Id.* at 1382.

29. 441 N.W.2d 593, 594 (Neb. 1989).

30. *Id.* at 594.

31. *Id.* at 595–96.

32. *Id.* at 596–97.

33. *Id.* at 598.

B. Licensing and Discipline

Pursuant to the police power, state legislatures have enacted legislative schemes to control entry into the healing arts. Admission to the practice of a healing profession typically is accomplished by qualifying for a license.[34] The license not only qualifies the licensee to practice the profession as defined in the statute, but also subjects the licensee to the designated procedures and penalties for misconduct.[35]

Professional misconduct includes such acts as obtaining the license fraudulently, practicing the profession fraudulently, beyond its authorized scope, with gross incompetence, or with gross negligence, committing unprofessional conduct, practicing while impaired by alcohol or drugs or while convicted of a crime, permitting or aiding an unlicensed person to perform activities requiring a license, or failing to comply with relevant rules and regulations.[36] State statutes frequently include "any departure...from the standards of acceptable and prevailing medical practice" within the definition of "unprofessional conduct."[37]

Disciplinary proceedings against licensees involve preliminary procedures (consisting of a complaint, investigation, charges, services of charges and notice of hearing) and adversary proceedings before a hearing panel of the appropriate state board (resulting in a written report which includes findings of fact, a determination of guilt or non-guilt, and a recommendation of the penalty to be imposed).[38] The complaint may be made by any person,[39] even anonymously. The hearing panel's decision is reviewed by the licensing board, which makes a decision and issues an appropriate order.[40] Penalties include censure and reprimand, suspension, revocation or annulment of license or registration, a fine, further education, or public service.[41] Theoretically, suspension or revocation is designed not to punish the licensee, but rather to protect the life, health and welfare of the public by preventing the "'evils which could result from ignorance or incompetency or lack of honesty and integrity.'"[42] Although the licensee may appeal, a court will not reverse unless there is no rational basis for the exercise of discretion complained of or the action is arbitrary and capricious.[43] Perhaps because the

34. *See, e.g.*, N.Y. EDUC. L. § 6501 (McKinney 1985). Some states exempt health care practitioners licensed in other states who provide emergency services. *See, e.g.*, CAL. BUS. & PROF. CODE § 900(a) (West 1990) (requiring that the emergency "overwhelm[] the response capabilities of California health care practitioners and only upon the request of the Director of the Emergency Medical Services Authority").

35. *See, e.g.*, N.Y. EDUC. L. § 6503 (McKinney 1985).

36. *See, e.g., id.* § 6509.

37. *See supra* note 4.

38. *See, e.g.*, N.Y. EDUC. L. § 6510 (McKinney 1985) (professional misconduct for physicians). Similar statutes exist for other professions. *See, e.g.*, CAL. BUS. & PROF. CODE § 1000–10 (West 1990) (chiropractic). Some contain unusual provisions, such as advertising that the practitioner will treat "any venereal...or...sexual disease, for lost manhood." *Id.* at § 1000–10(b).

39. *See, e.g.*, N.Y. EDUC. L. § 6510.1.a.

40. *See, e.g., id.* § 6510.4.c.

41. *See, e.g., id.* § 6511.

42. Keigan v. Board of Registration in Medicine, 506 N.E.2d 866, 869 (Mass. Ct. App. 1987) (quoting Levy v. Board of Registration & Discipline in Medicine, 392 N.E.2d 1036 (Mass. 1979)).

43. *See, e.g.*, Colorado State Bd. of Medical Examiners v. Reiner, 786 P.2d 499, 500 (Colo. Ct. App. 1989) (Board's determination should be upheld "unless it bears no relation to

standard of review is so high, relatively few cases result in published court decisions.[44]

C. Particular Professions

1. Physicians and Other Health Professionals

Each state licenses medical doctors, defines the "practice of medicine," and makes the unlicensed practice of medicine a crime.[45] Typical statutory definitions include:

> (1) diagnosing, preventing, treating, and curing disease; (2) holding oneself out to the public as able to perform the above; (3) intending to receive a gift, fee, or compensation for the above; (4) attaching such titles as "M.D." to one's name; (5) maintaining an office for reception, examination, and treatment; (6) performing surgery; and (7) using, administering, or prescribing drugs or medicinal preparations.[46]

These broad definitions of "practicing medicine" codify orthodox medicine's historical dominance over the provision of health care.[47] The definitions suggest use of licensing laws to contain competitors and preserve conventional medicine's professional turf. The broad language puts both licensed and unlicensed nonmedical practitioners at risk of prosecution for the unlicensed practice of medicine.[48]

In addition to defining the practice of "medicine," states license at least three different groups of allied health professionals: specialists who practice within the parameters of medical orthodoxy (examples include dentists, veterinarians, pharmacists, physical therapists and podiatrists); specialists who practice directly under physician supervision (such as physician assistants and respiratory therapists); and specialists considered "nontraditional, nonconforming or innovative,"[49] such as acupuncturists and chiropractors.[50]

The scope of practice allocated to each group is much narrower than that granted to physicians, and in many cases, allied practitioners are expressly

---

the conduct, is a gross abuse of discretion, or is manifestly excessive in relation to the needs of the public"); Kessler v. Department of Educ., 440 N.Y.S.2d 87 (N.Y. App. Div. 1981), *appeal dismissed*, 445 N.Y.S.2d 1026 (N.Y. 1981); Gold v. Nyquist, 376 N.Y.S.2d 670 (Sup. Ct. 1975).

44. *See infra* part III.A.

45. *See, e.g.*, N.Y. EDUC. L. §§ 6512, 6522 (McKinney 1985) (providing that any person not authorized to practice, or who holds himself out as able to practice, the defined profession is guilty of a felony; only a licensed person may practice "medicine"). The statute exempts furnishing medical assistance in an emergency and practicing "the religious tenets of any church." *Id.* § 6527.4.a.–b.

46. *See* Cohen, *supra* note 5, at 98 (citing statutes).

47. *See generally* JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984); Cohen, *supra* note 5, at 147 nn. 498–500 and accompanying text (citing PUBLIC AFFAIRS RESEARCH GROUP, PUBLIC REGULATION OF HEALTH CARE OCCUPATIONS IN CALIFORNIA 15 (1981)).

48. *See infra* part III.B.

49. BARRY R. FURROW ET AL., HEALTH LAW § 3–7.a, at 63 (1995).

50. Walter Wardwell refers to these three categories as limited medical professions (practice independently of the medical profession with a limited scope of practice), ancillary professions (function only under the direct supervision of a licensed physician), and marginal professions (challenge the validity of orthodox conceptions of illness and health and thus constitute a serious threat to orthodox medicine). Walter J. Wardwell, *Chiropractors: Challengers of Medical Domination*, 2 RES. SOC. HEALTH CARE 207, 208 (1981).

prohibited from practicing "medicine."[51] Although the purpose behind limiting nonphysicians' scope of practice is to ensure that providers offer services within their skill and training, the line between medical services and services offered by allied professionals is difficult to draw. Again, although designed for a sound regulatory purpose—to protect the public from overreaching providers—scope of practice limitations must be seen against a larger backdrop: the political and economic relations between the medical profession and its challengers. Frequently, the "nontraditional" practitioners hold ideas about health and disease that fundamentally challenge those of medical orthodoxy.[52] Thus, the relationship between these practitioners and the medical profession "tends to be unstable, full of unresolved conflict and tension."[53] Unlike dependent practitioners, who practice under physician supervision or referral, chiropractors, naturopaths and acupuncturists prefer to receive patients directly.[54] To date, osteopaths, psychologists, physician assistants, nurse practitioners, and midwives, among others, have pursued litigation, each to "broaden its statutory carve-out from the medical practice acts."[55]

2. Alternative and Complementary Health Care Professionals

Despite the label, "alternative"[56] health care providers such as chiropractors, acupuncturists, homeopaths, naturopaths, and massage therapists

---

51. *See, e.g.*, CAL. BUS. & PROF. CODE § 1000–7 (West 1990) (prohibiting chiropractors from "the practice of medicine, surgery, osteopathy, dentistry or optometry"). Some statutes are more specific. For example, Mississippi provides that chiropractors "shall not prescribe or administer medicine to patients...." MISS. CODE ANN. § 73–6–1 (1993). Similarly, in Michigan the practice of chiropractic "does not include the performance of incisive surgical procedures, the performance of an invasive procedure requiring instrumentation, or the dispensing or prescribing of drugs or medicine." MICH. COMP. LAWS ANN. § 333.16501 (West 1994).

52. For example, "'[t]he naturopathic view of illness as a process or activity initiated by the body in adaptive response to an unnatural environment challenges the Western view of disease as malfunction, as an entity—as something that happens to the individual as a consequence of assault by an external agent.'" Hans A. Baer, *The Potential Rejuvenation of American Naturopathy as a Consequence of the Holistic Health Movement*, 13 MED. ANTHROPOLOGY 369, 381 (1992) (quoting J. MCKEE, HOLISTIC HEALTH AND THE CRITIQUE OF WESTERN MEDICINE 788 (1988)).

53. Wardwell, *supra* note 50, at 211. As these professions "compromise...[their] original ideology and become medically orthodox in...theory and practice," as has, to some extent, osteopathy, they fuse with medicine. *Id.* On the other hand, as they gain acceptance and validation without abandoning their unique conceptualizations, these professions become parallel to orthodox medicine and perhaps even more threatening. *Id.* For a description of attempts to "eliminate or weaken," and subsequently, to "co-opt or absorb," osteopathy, see Hans A. Baer, *The Organizational Rejuvenation of Osteopathy: A Reflection of the Decline of Professional Dominance in Medicine*, 15A SOC. SCI. MED. 701 (1981).

54. Wardwell, *supra* note 50, at 244–46. Wardwell contends that the future of chiropractic depends more on legal, political and economic issues than on scientific validation of chiropractic.

55. *See* Cohen, *supra* note 5, at 147 (citing cases).

56. The label "alternative," like "nontraditional, nonconforming or innovative," perhaps is more helpful than "unorthodox," "unconventional" or "unproven," but still reflects the viewpoint of medical orthodoxy, since therapies are nontraditional, nonconforming, unconventional, or alternative only in comparison with twentieth-century Western medicine. Terms tend to be ethnocentric, politically motivated, or culturally biased. *See* K. Danner Clouser et al., *What's in a Word?*, 1:3 ALTERNATIVE THERAPIES HEALTH & MED. 78, 78–79 (1995) (describing semantic evolution from "marginal," "fringe," or "quack" to "holistic," "alternative," and "complementary," and arguing that cultural and political evolution must be reflected in legal

are widely credentialed. For example, chiropractors are licensed in every state and in Washington, D.C.[57] About half the states license massage therapists[58] and acupuncturists;[59] about a dozen license naturopaths.[60] Three states expressly define homeopathy,[61] and several others include homeopathy within the definition of other health care professions.[62]

Although the medical profession has referred to such treatments as unconventional, and historically has characterized chiropractic and other modalities as "cults,"[63] the statutory definitions express, in some measure, the legislature's acceptance of selected practices as valid, or at least licensable, health care modalities.[64] For example, many states define chiropractic as the

---

definitions that are "adequate and fair" to the modalities represented); Cohen, *supra* note 5, at 80 n.6.

Moreover, therapies labeled "nontraditional" in the United States are actually "traditional" elsewhere (for example, Aryuvedic and Chinese medicine). Jacqueline C. Wootton, *A Model for a Networked Information Resource on Alternative Medicine*, 1:2 J. ALTERNATIVE & COMPLEMENTARY MED. 197, 201 (1995).

57. See *infra* app. 1.

58. See *infra* app. 1.

59. See *infra* app. 1. Many other states authorize physicians and chiropractors to practice acupuncture. *See infra* part IV.B.2 (practice of acupuncture by chiropractors).

60. See *infra* app. 1.

61. *See infra* notes 87–90 and accompanying text.

62. *See, e.g.*, ALASKA STAT. § 08.45.200(3) (1962) (naturopathy includes use of homeopathic remedies); HAW. REV. STAT. § 455–1 (1995 & Supp. 1994) (naturopathy includes use of homeopathic medicines); N.M. STAT. ANN. § 61–4–2(A) (Michie 1978) (chiropractic includes use of homeopathic remedies); WASH. REV. CODE ANN. § 18.36A.040 (West 1989 & Supp. 1995) (naturopathy includes the prescription, administration, dispensing, and use of homeopathy). In addition, many states exempt healers, practicing in a religious context as part of a recognized spiritual tradition and practice. *See, e.g.*, D.C. CODE ANN. § 2–3301.4(d)(1) (1994).

63. The American Medical Association ("AMA") even declared osteopathy to be "cultist healing." *See* NORMAN GEVITZ, THE D.O.'S: OSTEOPATHIC MEDICINE IN AMERICA 110 (1982) (citing *Report of the Committee for the Study of Relations Between Osteopathy and Medicine*, 158 JAMA 736–42 (1955)); Walter I. Wardwell, *Chiropractors: Evolution to Acceptance*, *in* OTHER HEALERS: UNORTHODOX MEDICINE IN AMERICA 157, 157 (Norman Gevitz ed., 1988) (noting that chiropractors were labeled "cultists, quacks, and impostors") [hereinafter OTHER HEALERS].

The AMA's 1956 *Principles of Medical Ethics* stated: "All voluntarily associated activities with cultists are unethical." AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS § 3, at 1 (1956). The Principles adopted an almost fundamentalist duality between medicine and chiropractic: "Either the theories and practices of scientific medicine are right and those of the cultists are wrong, or the theories and practices of the cultists are right and those of scientific are wrong." *Id.* § 3, at 5. The AMA admonished physicians to adhere to scientific dogma, warning: "The physician who maintains professional relations with cult practitioners would seem to exhibit a *lack of faith* in the correctness and efficacy of scientific medicine...." *Id.* (emphasis added). The quasi-religious zeal of these statements suggests the extent to which complementary therapies threatened the orthodox medical model in its attempt—intellectually and politically—to monopolize the art of healing. References to chiropractic as "sorcery" and "voodoo" still find their way into trial practice. *See, e.g.*, Wengel v. Herfert, 473 N.W.2d 741, 744 (Mich. Ct. App. 1991) (plaintiff's counsel's remarks). *See also* Wilk v. American Medical Ass'n 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984), *on remand*, 671 F. Supp. 1465 (N.D. Ill. 1987) (successful antitrust action against the AMA and other medical groups alleging combination and conspiracy to eliminate the chiropractic profession).

64. "Chiropractic services and massage therapy have recognized therapeutic and rehabilitative value under the statutes." Washington v. Fireman's Fund Ins. Cos., 708 P.2d 129, 138 (Haw. 1985) (holding that chiropractic and massage both constitute "therapy," as well as "a reasonable expense incurred as a result of the accident," within the meaning of no-fault

"science of locating and removing any interference with the transmission of nerve energy."[65] In North Carolina, chiropractic means "the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body."[66]

It is not clear that legislatures understand exactly what it means to locate and remove interference with "nerve energy," let alone what "nerve energy" refers to, or what a "full quota of health current (nerve energy)" might include. Certainly, the terms *sound* unscientific, and yet, every state legislature provides examinations and grants licenses in chiropractic.[67] The statutory definitions suggest some measure of legislative acceptance that spinal manipulation has a salutary effect on health.

Similarly, the massage therapy statutes reflect a measure of legislative acceptance of massage as healing. For instance, in Colorado, massage means "a method of treating the body for remedial or hygienic purposes, including but not limited to rubbing, stroking, kneading or tapping with the hand or an instrument or both."[68] The notion that "rubbing, stroking" the body has "remedial" effects is implicit in the statutory language. Connecticut provides that massage therapy is, among other things, for the purpose of "maintaining good health and establishing and maintaining good physical and mental condition."[69] In the District of Columbia, massage includes "causing movement of an individual's body to positively affect the health and well-being of the individual."[70]

Idaho's massage therapy statute recognizes massage therapy as the "systematic manual or mechanical mobilization of the soft tissue of the

---

insurance statutes, although such therapy would not be covered for claimants receiving public assistance at no cost).

65. DEL. CODE ANN. tit. 24, § 701 (1974). *See also* ALA. CODE § 34–24–120(a) (1991) ("the science and art of locating and removing...any interference with the transmission and expression of nerve energy in the human body"); ARK. CODE ANN. § 17–81–102(2)–(3)(A) (Michie 1992) ("diagnosis and analysis of any interference with normal nerve transmission and expression"); IND. CODE ANN. § 25–10–1–1(1) (West 1993) ("diagnosis and analysis of any interference with normal nerve transmission and expression"); MISS. CODE ANN. § 73–6–1 (1972).

The statutes usually refer to adjustment or manipulation. *See, e.g.*, IOWA CODE ANN. §151.1(2) (West 1989) (chiropractors "treat human ailments by adjustment of the neuromusculoskeletal structures, primarily, by hand or instrument, through spinal care"); KAN. STAT. ANN. § 65–2871 (1993) ("adjust any misplaced tissue of any kind or nature, manipulate or treat the human body by manual, mechanical, electrical or natural methods or by the use of physical means, physiotherapy..."); MO. ANN. STAT. § 331.010(1) (Vernon 1989) ("examination, diagnosis, adjustments, manipulation and treatment of malpositioned articulations and structures of the body"). Many refer to the body's "inherent recuperative capability." *See, e.g.*, MICH. COMP. LAWS ANN. § 333.16401(b) (West 1992); S.C. CODE ANN. § 40–9–10(a)–(b) (Law. Co-op. 1976); WASH. REV. CODE ANN. § 18.25.005(1), (2), (4) (West 1989 & Supp. 1995).

66. N.C. GEN. STAT. § 90-143(a) (1994).

67. Even the military is beginning to integrate chiropractic care. A new military advisory panel, the Chiropractic Care Demonstration Project, advises the defense secretary on implementing chiropractic care for military personnel. *Military to be Advised on Chiropractic Care*, 1:3 ALTERNATIVE THERAPIES HEALTH & MED. 24 (1995).

68. COLO. REV. STAT. § 12–48.5–103(5) (1991).

69. CONN. GEN. STAT. ANN. § 20–206a(d) (West 1989 & Supp. 1995).

70. D.C. CODE ANN. § 2–3301.2(6A)(A) (Supp. 1995).

body...for the purpose of promoting circulation of the blood and lymph, relaxation of muscles, release from pain, restoration of metabolic balance, and other benefits both physical and mental."[71] Utah refers to "rehabilitative procedures involving the muscles by nonintrusive means and without spinal manipulation."[72] New Mexico and Texas expressly state: "Massage therapy is a health care service."[73]

Like the chiropractic and massage therapy licensing statutes, the naturopathy licensing statutes express legislatures' approval of a wide variety of approaches to health that are nonorthodox and nontechnological. For example, Alaska defines naturopathy as "the use of hydrotherapy, dietetics, electrotherapy, sanitation, suggestion, mechanical and manual manipulation for the stimulation of physiological and psychological action."[74] Connecticut includes counseling in its definition of naturopathy, reflecting integration of emotional and psychological factors into the concept of diagnosis and treatment of physical health.[75] Likewise, Washington, D.C. provides that naturopaths "may counsel individuals and treat human conditions through the use of naturally occurring substances."[76]

The naturopathy statutes not only grant naturopaths a broad scope of practice, but also embody assumptions about the value of naturopathic healing as a treatment modality. For instance, Alaska's statute refers to "establish[ing]" a "normal condition of mind and body."[77] Oregon also refers to "natural healing processes," as well as minor surgery, aimed at "maintaining of the body in, or of restoring it to, a state of normal health."[78] New Hampshire refers to stimulating the "individual's intrinsic self-healing processes,"[79] as does Montana.[80]

Hawaii's statute describes naturopathy as "natural medicine, natural therapeutics, and natural procedures, for the purpose of removing toxic conditions from the body and improving the quality, quantity, harmony, balance, and flow of the vital fluids, vital tissues, and vital energy."[81] Hawaii allows "diagnosing, treating" patients, "using a system of practice that bases its treatment of physiological functions and abnormal conditions on natural laws governing the human body."[82] The state of Washington also authorizes

71. IDAHO CODE § 54–705(c) (1994).
72. UTAH CODE ANN. § 58–47a–2(2) (1994).
73. N.M. STAT. ANN. § 61–12C–4(A) (Michie 1978); TEX. REV. CIV. STAT. ANN. art. 4512k, § 1(1) (West 1958 & Supp. 1995).
74. ALASKA STAT. § 08.45.200(3) (1962). *See also* CONN. GEN. STAT. ANN. § 20–34(a)(2) (West 1958 & Supp. 1995).
75. CONN. GEN. STAT. ANN. § 20–34(a)(2) (West 1958 & Supp. 1995).
76. D.C. CODE ANN. § 2–3309.1(b) (1994).
77. ALASKA STAT. § 08.45.200(3) (1962).
78. OR. REV. STAT. § 685.010(5) (1989 & Supp. 1994).
79. N.H. REV. STAT. ANN. § 328–E:2(IX) (Supp. 1994).
80. MONT. CODE ANN. § 37–26–103(7) (1993) (Naturopathy's purpose is "to promote or restore health by the support and stimulation of the individual's inherent self-healing processes. This is accomplished through education of the patient by a naturopathic physician and through the use of natural therapies and therapeutic substances.").
81. HAW. REV. STAT. § 455–1(1) (1995 & Supp. 1994). The naturopathic notion of "vital energy" may be related to "nerve energy" in chiropractic, and to vital energy or *chi* in Chinese medicine and acupuncture.
82. *Id.* § 455–1(2).

naturopaths to engage in "diagnosis, prevention, and treatment of disorders of the body,"[83] as do Montana,[84] New Hampshire[85] and Tennessee.[86]

As with definitions of chiropractic, massage therapy, and naturopathy, legislative definitions of homeopathy suggest again a broader, or perhaps more varied, view of health than that of the biomedical model. Homeopathy, in Washington, means "a system of medicine based on the use of infinitesimal doses of medicines capable of producing symptoms similar to those of the disease treated, as listed in the homeopathic pharmacopeia of the United States."[87] Nevada and Arizona, each of which has a separate homeopathic licensing board,[88] refer to the homeopathic principle "that a substance which produces symptoms in a healthy person can eliminate those symptoms in an ill person."[89] In Arizona, the practice of homeopathy includes "acupuncture, neuromuscular integration, orthomolecular therapy, nutrition, chelation therapy, pharmaceutical medicine and minor surgery."[90]

Acupuncture statutes also reflect a different orientation to disease than that of the medical model. The statutes typically describe such acts as the insertion of needles into the body or treating the body by mechanical, thermal or electrical stimulation, to regulate the "flow and balance of energy" in the body.[91] Maryland refers to "a form of health care, based on a theory of energetic physiology."[92] Nevada states: "Traditional Oriental medicine means that system of the healing arts which places the chief emphasis on the flow and balance of energy in the body mechanism as being the most important single factor in maintaining the well-being of the organism in health and disease."[93]

Many of these statutes refer to the practitioner's ability to use "diagnosis" and "treatment."[94] For example, New Mexico defines acupuncture as using

---

83. WASH. REV. CODE ANN. § 18.36A.040 (West 1989 & Supp. 1995).

84. MONT. CODE ANN. § 37-26-103(7) (1993) ("prevention, diagnosis, and treatment of human health conditions, injury, and disease").

85. N.H. REV. STAT. ANN. § 328-E:2(IX) (Supp. 1994) ("prevention, diagnosis, and treatment of human health conditions, injuries, and diseases").

86. TENN. CODE ANN. § 63-6-205(1) (1990 & Supp. 1994) ("prevention, diagnosis and treatment of human injuries, ailments and disease").

87. WASH. REV. CODE ANN. § 18.36a.020(9) (West 1989).

88. *See* ARIZ. REV. STAT. ANN. §§ 32-2901(4), 32-2902 (1992); NEV. REV. STAT. ANN. §§ 630A.040, 630A.100 (Michie 1995). Connecticut also has a separate board of homeopathic medical examiners, which is authorized to "(1) hear and decide matters concerning suspension or licensure, (2) adjudicate complaints against practitioners, and (3) impose sanctions where appropriate." CONN. GEN. STAT. ANN. § 20-8 (West 1989).

89. NEV. REV. STAT. ANN. § 630A.040 (Michie 1995); ARIZ. REV. STAT. ANN. § 32-2901(4) (1992).

90. ARIZ. REV. STAT. ANN. § 32-2901(4).

91. *See, e.g.*, FLA. STAT. ANN. § 457.102(1) (West 1991); HAW. REV. STAT. § 436E-2 (1995); N.M. STAT. ANN. § 61-14a-3(A) (Michie 1978) (effective until July 1, 2000); R.I. GEN. LAWS § 5-37.2-2(1) (1956).

92. MD. CODE ANN., HEALTH OCC. § 1A-101(b) (1994).

93. NEV. REV. STAT. ANN. § 634A.020(8) (Michie 1991 & Supp. 1993).

94. *See, e.g.*, CAL. BUS. & PROF. CODE § 4927(e) (West 1990 & Supp. 1995) ("treatment of certain diseases or dysfunctions of the body"); COLO. REV. STAT. § 12-29.5-102(1) (1991) ("evaluation and treatment"); FLA. STAT. ANN. § 457.102(1) (West 1991) ("diagnostic techniques"); ME. REV. STAT. ANN. tit. 32, § 12403(1) (West 1964) ("treat certain diseases and dysfunctions of the body...and promote health and well-being"). In Louisiana, the practice of acupuncture is declared to be the practice of medicine. LA. REV. STAT. ANN. § 37:1356(A) (West 1988). North Carolina refers to "acupuncture diagnosis and treatment." N.C. GEN. STAT. § 90-451(1) (1994).

needles to pierce the skin or "all allied techniques of oriental medicine, both traditional and modern," for the "diagnosis, prevention, cure or correction of any disease or pain."[95] Like New Mexico, other states include herbal medicine and the various techniques of oriental medicine in their statutory definitions.[96] Nutritional counseling, therapeutic massage, "energy flow exercise," and lifestyle counseling also are included.[97]

The statutes include in the practice of acupuncture acts such as "tonification," the "process of increasing the energy flowing along a particular acupuncture point's meridian," or energy channel, and "sedation," the "process of decreasing the energy flowing along a particular acupuncture point's meridian."[98] In some states, such as New York, acupuncture may be used for the treatment of alcoholism, substance dependency or chemical dependency in a hospital or clinic program which has appropriate approval.[99] In other states, acupuncture is used to treat drug dependency in criminal defendants. For example, a pioneering drug intervention and case management program called S.T.O.P. (sanction, treatment, opportunity, progress), managed by the Multnomah County District Attorney and Public Defender Offices in Oregon, "sentences" drug use defendants to treatment including counseling and acupuncture, instead of prison.[100] A defendant who successfully completes S.T.O.P. has his criminal indictment dismissed with prejudice.[101] Administrators report substantial cost savings in attorney and court time, reduction in recidivist property crimes used to fund drug use, and reduction in

95. N.M. STAT. ANN. § 61–14A–3(F) (Michie 1978).

96. *See, e.g.*, CAL. BUS. & PROF. CODE § 4937(b) (West 1990) ("drugless substances and herbs"); NEV. REV. STAT. ANN. § 634A.020(5) (Michie 1991 & Supp. 1993) ("herbal medicine"). Virginia prohibits prescribing of herbal preparations. VA. CODE ANN. § 54.1–2900 (Michie 1950 & Supp. 1995).

97. *See, e.g.*, N.M. STAT. ANN. § 61–14A–3(G) (Michie 1978) ("dietary and nutritional counseling"); VT. STAT. ANN. tit. 26, § 3401(1) (1989 & Supp. 1994) ("nutritional and herbal therapies, therapeutic massage, and lifestyle counseling"). Texas refers to "the recommendation of dietary guidelines, energy flow exercise, or dietary or herbal supplements...." TEX. REV. CIV. STAT. ANN. art. 4495b(f), § 6.02(1)(B) (West Supp. 1995).

98. Alvarez v. Department of Professional Regulation, 458 So. 2d 808, 808 n.1 (Fla. Dist. Ct. App. 1984), *aff'd*, 524 So. 2d 700 (Fla. 1988). The statutes also refer to the meridian system. *See, e.g.*, IOWA CODE ANN. § 148E.1(1) (Supp. 1995). Acupuncture schools differ with respect to techniques, such as depth and angle of needle insertion, and how a needle is manipulated to stimulate the point. *Alvarez*, 458 So. 2d at 809. Acupuncture licensure exams include demonstration of knowledge of state rules relating to acupuncture, health and safety requirements; theory and practice of acupuncture; diagnostic techniques and procedures and point/meridian selection; competency in the performance of needle insertion, manipulation, and removal; and competency in patient care, sanitation, and antiseptic application. *Id.* at 808–09.

99. N.Y. EDUC. L. § 8216(4).

100. S.T.O.P.: AN EARLY DRUG INTERVENTION AND CASE MANAGEMENT PROGRAM, Aug. 1991–Jan. 1993 (published by S.T.O.P. Court, Circuit Judge Harl Haas, Multnomah County Courthouse, Portland, Or.).

101. *Id.* at 7.

chemical dependency among participants.[102] The program has been duplicated around the country.[103]

In addition to accepting a broad range of nonorthodox healing modalities, many state legislatures expressly recognize complementary healing modalities as valid and in the public interest. For example, the Arizona naturopathy statute provides: "Since naturopathy is a health care system of diagnosing, treating and preventing disease...it has a direct relationship with the public health...[and must] merit and receive the confidence of the public...."[104] In Washington, the King County Council has approved a natural medicine clinic as part of the King County Department of Health.[105] As Florida's hypnosis statute declares, such modalities have "attained a significant place as another technique in the treatment of human injury, disease, and illness, both mental and physical."[106]

Legislative efforts to license modalities such as chiropractic, massage therapy, hypnosis, acupuncture, and naturopathy reflect an evolutionary process of integrating complementary therapies into a health care system currently tilted toward pharmaceutical and surgical intervention.[107] By including diagnosis and treatment in many of the licensing definitions, and by incorporating such concepts as "energy flow" and "balance," legislatures are abandoning the shibboleth that only medical doctors diagnose and treat disease, and that all healing can only be recognized as valid when scientifically legitimated by double-blind, controlled, randomized studies. Rather, legislatures are broadening opportunities for *healing*, alongside curing, in an integrative system of complementary health care professionals that includes chiropractors, massage therapists, and other modalities. This emerging paradigm assigns roles to medical and nonmedical providers that integrate,

---

102. *Id.* at 7–14. According to the Multnomah County Section Metropolitan Public Defender, the program is "innovative, effective, and cost efficient. The S.T.O.P. program not only meets the criminal justice standards of safety to the community, fairness to individuals, and rehabilitation of defendants, but it actually does lead to rehabilitation and saves the system money." Letter from James D. Hennings to Judge Harl H. Haas regarding evaluation of the S.T.O.P. Early Drug Intervention Program (Mar. 11, 1993) (on file with the S.T.O.P. Court, Multnomah County Courthouse, Portland, Or.).

103. *See* J. TAUBER, DRUG COURTS: A JUDICIAL MANUAL (1994).

104. ARIZ. REV. STAT. ANN. tit. 32, ch. 14, art. 1, § 1 (1992).

105. *Seattle Clinic A National First for Alternative Medicine*, 1:2 ALTERNATIVE THERAPIES HEALTH & MED. 18 (1995). The clinic will be managed by Bastyr University, an accredited natural medicine college, and will integrate natural and conventional medicine. *Id.* The clinic will report in 1998 on cost-effectiveness, patient satisfaction and medical outcomes. *Id.*

106. FLA. STAT. ANN. § 456.31(1) (1991).

107. For instance, in the 1970's, most acupuncture regulation reflected the interests of official medical groups, generally limiting the availability of acupuncture to the public. James S. Turner, *Representing Oriental Medicine Providers*, *in* ACUPUNCTURE & ORIENTAL MEDICINE LAWS 135, 138 (1995) [hereinafter ACUPUNCTURE LAWS]. Regulation attempted to limit the practice of acupuncture to scientific research programs, to licensed physicians, or to practitioners under scientific supervision. *Id. See also* Andrews v. Ballard, 498 F. Supp. 1038 (S.D. Tex. 1980) (upholding claim by patients that Texas Board of Medical Examiners rule proclaiming acupuncture to be the "practice of medicine" effectively deprived them of the constitutional right to obtain acupuncture treatment).

In the 1980's, as "discriminatory laws and regulations began to be challenged and overturned in the courts," states began to establish acupuncture as a separately licensable health care profession. ACUPUNCTURE LAWS, *supra*, at 138. Recently, the National Acupuncture Foundation has proposed a model acupuncture statute. BARBARA B. MITCHELL, LEGISLATIVE HANDBOOK FOR THE PRACTICE OF ACUPUNCTURE & ORIENTAL MEDICINE 1–24 (1995).

rather than fragment, patients' pursuit of health, and avoids historical demands that orthodox medicine be the basis for all healing.

II. HOLISM AND HOLISTIC THERAPIES

A. Holism

The term "holistic" is widely misunderstood. Defenders of medical orthodoxy attack holistic practitioners as not only unscientific, but even anti-scientific.[108] Such accusations rest on a false dichotomy between "orthodox" and other therapies.[109] Proponents of holism do not disclaim science, but merely advocate a more adequate epistemology of science, one which does not attempt to 'explain away' consciousness, but rather includes phenomenological and experiential data, and thus addresses "the totality of human experience."[110] Holistic practitioners find a mechanistic view of the human experience professionally limiting as well as personally unsatisfying. Thus, there exist professional associations of holistic physicians,[111] nurses,[112] dentists,[113] and

---

108. *See* Arnold S. Relman, *Alternative Medicine: A Shot in the Dark*, WALL ST. J., July 12, 1995, at A12 (review by editor emeritus of the *New England Journal of Medicine* of ANDREW WEIL, SPONTANEOUS HEALING (1995)) ("[T]he 'alternative'-medicine backlash reflects a strong element of antiscientism. Science is under attack from many quarters these days, and healing cults are yet another part of that attack.").

109. *See, e.g.*, Eliot Dacher, *A Systems Theory Approach to an Expanded Medical Model: A Challenge for Biomedicine*, 1:2 J. ALTERNATIVE & COMPLEMENTARY THERAPIES 187, 190 (1992) (proposing that the "adversarial distinction between conventional and holistic/alternative therapies disappears as we consider the intent, usefulness, and mechanism involved in each form of therapy and properly assign it to one of four healing systems: homeostasis, treatment, mind/body, and spiritual"). Dacher proposes that each system requires a "disciplined exploration of its efficacy by means of the research methodology appropriate to that specific system." *Id.*

110. WILLIS HARMAN & CHRISTIAN DE QUINCEY, THE SCIENTIFIC EXPLORATION OF CONSCIOUSNESS: TOWARD AN ADEQUATE EPISTEMOLOGY 2 (1994). The current scientific epistemology assumes that consciousness is ultimately biochemical, and the product of objectively observable interactions. *Id.* at 25.

111. The American Holistic Medical Association helps "educate people to the mind-body-spirit connection." Alan Gaby, *Is This Really Medicine*, HOLISTIC MED. 4 (1995). According to its president:

> Caring individuals who have been beaten down by an abusive system of medical education have...been able to rediscover their nurturing side...and... bec[o]me better doctors. In addition, the AHMA has taught us the importance of the human energy field; about the healing power of prayer and positive attitudes; about how to develop healthier personal relationships; and how to access our intuition...[and] incorporate these into...our medical practices.

Id. Other physicians' organizations, such as the American College for Advancement in Medicine, the American Preventive Medical Association, and the American Academy of Environmental Medicine, are primarily focused on teaching and validating alternative medicine. *See, e.g.*, American Preventive Medical Association, *Director's Report*, TOWNSEND LETTER FOR DOCTORS & PATIENTS, June 1995, at 20.

112. The American Holistic Nurses Association defines holism as "the concept of wellness: that state of harmony between body, mind, emotions and spirit in an everchanging environment." 15:3 BEGINNINGS 2 (1995). The association offers a program in energy healing, which included over 5900 participants in 1994. *Id.*

113. *See* Karen Anderson, *Holistic Dentistry Heads into the 21st Century*, CDS REV., Jan.–Feb. 1994, at 27; S.L. Gold, *Holistic Dentistry: Disease is a Result of Social, Psychological, and Physical Factors*, 56:6 DENTAL STUD. 48 (1978); L.G. Horowitz, *Holistic Dental Practice: A Developmental Perspective* 3:1 J. DENTAL PRAC. ADMIN. 13 (1986); L.D. Pankey, *Treat People as People Instead of as Teeth*, 3:5 DENTAL PRAC. 28 (1982); V. Penzer, *Holism: Treating the Whole Patient*, 102:1 J. AM. DENTAL ASS'N (1981).

even lawyers.[114] The organizations share a common theme: regarding the person as a whole being, rather than as a series of malfunctioning organs, degenerating gums or detached legal abstractions.

Jan Smuts coined the term "holism" in his 1926 book, *Holism and Evolution.*[115] Holism describes the notion that "[e]very organism, every plant or animal, is a whole, with a certain internal organization and a measure of self-direction, and an individual specific character of its own."[116] In wholes, "all the parts appear in a subtle indefinable way to subserve and carry out the main purpose or idea."[117] According to Smuts, nature expresses itself in wholes, from atoms, molecules and chemical compounds to "the creations of the human spirit in all its greatest and most significant activities."[118] Smuts expressed this "whole-making, holistic tendency, or Holism" not as a philosophical abstraction, but as an organic, creative evolutionary force in the natural world and human affairs.[119]

According to Smuts, a whole is more than the sum of its parts, largely because the whole is not purely mechanical, but rather, has inner tendencies and interrelationships between the parts which give rise to something "*more.*"[120] Evolution, or forward movement, consists in the development of "ever more complex and significant wholes."[121] The parts function in harmony, "either naturally or instinctively or consciously," toward a "definite inner end" such that together they form a distinctive character or identity.[122] Thus, Smuts views the world and the human organism not as "a collection of accidents put together like an artificial patchwork, but [as one] which is synthetic, structural, active, vital and creative."[123]

---

114. The American Holistic Medical Association, American Holistic Nursing Association, and the International Alliance of Holistic Lawyers share offices at 4101 Lake Boone Trail, Suite 201, Raleigh, North Carolina 27607. The founder of "holistic justice" explains:

> Like patients in the new medical paradigm, clients would accept responsibility for their conflict and advancement into a state of emotional and relational well-being. To do this, clients, with the help of their facilitating Justice professional, would come to understand the cause and effect of their predicament and release any associated blame or guilt which binds them to the conflict.

William van Zyverden, *A Call for Dreams of Justice*, THE WHOLE LAWYER 3 (Summer 1995). A new group, the American Holistic Bar Association (P.O. Box 1231, Philadelphia, Pennsylvania 19105), describes itself in its first newsletter as "embracing the law as a healing art by redefining justice," and also describes an Intuitive Bar Association dedicated to exploring the connection between law and intuition. *Cf.* Delida Costin, *Profiles: Anthony P. Griffin*, 4 BOSTON UNIV. PUB. INT. L.J. 107, 109 (1994) (describing law as a collective whole). Holistic justice clearly has counterparts in theories of alternative dispute resolution, particularly mediation. *See* Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

115. JAN C. SMUTS, HOLISM AND EVOLUTION (1973). "Holism...is the principle...that Evolution is nothing but the gradual development and stratification of progressive series of wholes...and [mirrors] the tendency towards wholes and wholeness in nature." *Id.* at v–vi.

116. *Id.* at 98.

117. *Id.*

118. *Id.*

119. *Id.* at 99–102.

120. *Id.* at 103.

121. The ultimate wholes in Smuts' view are ideals such as truth, beauty and goodness, which seem to resemble the Platonic forms. *See id.* at 107.

122. *Id.*

123. *Id.*

> Holism in all its endless forms is the principle which works up the raw material or unorganized energy units of the world, utilizes, assimilates and organizes them,

To consider the human organism as a whole, one must consider not only the physical body, but also what Smuts calls the "field."[124] The field is more than the organism's environment; it includes the organism's presence as "a historic event, a focus of happening, a gateway through which the infinite stream of change flows ceaselessly."[125] Thus, the organism in its field "contains its past and much of its future in its present."[126]

The organism, as a whole, is a "synthesis or unity of parts," and thus possesses unity of action and a "balanced correlation of functions."[127] Holistic action thus differs from mechanical action: whereas a mechanical system reacts to disturbance by adjusting to maintain equilibrium, a holistic system not only restores homeostasis, but additionally creates a new unity or synthesis.[128] Such a "creative synthesis" consists in "the making of a new arrangement of old elements."[129]

Smuts contrasts holism with mechanism, the view that wholes are merely and unalterably the sum of their parts.[130] Mechanism views physical reality as a closed and complete system; holism values volition and consciousness and views life as "an active creative process [which] means the movement...towards ever more and deeper wholeness."[131] Smuts points out that "[w]holeness, healing, holiness—[are] all expressions and ideas springing from the same root in language as in experience."[132]

Smuts' vision of holism has echoes both in bioethics, which is as much "'a matter of heart'" as well as mind,[133] and in regulatory language referring to the patient as a whole being. For example, California's acupuncture practice act refers to the legislature's "concern with the need to eliminate the fundamental causes of illness, not simply to remove symptoms, and with the need to treat the whole person."[134] Regulatory attention to the whole being echoes holism in the acknowledgment that disease and healing are not merely medical phenomena,

---

> endows them with specific structure and character and individuality, and finally with personality, and creates beauty and truth and value from them. And it does all this through a definite method of whole-making....

Id. at 108.

124. *Id.* at 113. Smuts draws an analogy to the field of the material world, which is the space-time continuum. *Id.* at 34. Thus, "[i]nstead of conceiving the universe as consisting of material bodies floating in a medium of uniform homogeneous space, we now look upon the vast variable masses of 'matter' associated with high-speed energies as developing huge 'fields' called Space-Time." *Id.* at 31.

125. *Id.* at 114.

126. *Id.* at 115.

127. *Id.* at 123–24.

128. *Id.* at 124–25.

129. *Id.* at 129. Smuts gives the example of metabolism, which transforms the inorganic into the organic. *Id.*

130. *Id.* at 145.

131. *Id.* at 146–47, 154–55.

132. *Id.* at 345.

133. Albert R. Jonsen, *American Moralism and the Origin of Bioethics in the United States*, *in* TRANSCULTURAL DIMENSIONS IN MEDICAL ETHICS 21 (Edmund Pellegrino et al. eds., 1992) (quoting James Mason, Assistant Secretary for Health at the Department of Health and Human Services, rejecting committee's recommendation to use human fetal tissue for research). *See also* Michael H. Cohen, *Toward a Bioethics of Compassion*, 27 IND. L.J. 667, 668–77 (1995) (describing caregiving model as expressive of respect for patient as person).

134. CAL. BUS. & PROF. CODE § 4926 (West 1990).

but also have neuroskeletal, muscular and emotional components related to balance within the environment.

B. Holistic Therapies

Holistic therapies "recognize the importance of considering the condition of the patient as well as the disease...[and] advance the theory that the psyche and the soma, the mind and the body, are one."[135] Holistic therapies account for physical illness, in large part, as the result of "an overload of emotional, psychological and spiritual crises."[136]

For example, naturopaths view disease "as a response to bodily toxins and imbalances in a person's social, psychic, and spiritual environment."[137] Germs "are not the cause of disease per se but rather parasites that take advantage of the body when it is in a weakened state. Naturopaths believe that the healing power of nature can restore one to health and emphasize preventive health, education, and client responsibility."[138]

Similarly, in chiropractic, diseases result from "a complex of factors, which drive the internal system out of balance."[139] Likewise, in acupuncture, "illness is seen as a disbalance of Yin and Yang which may be restored by adding or distracting energy from the diseased organs."[140] Acupuncture assists the flow or *chi*, or vital energy, through energy channels known as meridians.[141]

Like the preceding systems, homeopathy addresses disease as "an individual constellation of affective, cognitive, and somatic symptoms unique to his or her own physiology," and prescribes remedies to mirror the patient's unique response.[142] Massage uses touch, sensitivity and communication to facilitate self-healing, acknowledging that the wrong kind of touch—known as "toxic touch"—is counterproductive.[143] Bioenergetical therapies, often

---

135. Stephen Schwartz, *Holistic Health: Seeking a Link Between Medicine and Metaphysics*, 266 JAMA 3064 (1991) (quoted in Cohen, *supra* note 5, at 88).

136. C. NORMAN SHEALY & CAROLINE MYSS, THE CREATION OF HEALTH: MERGING TRADITIONAL MEDICINE WITH INTUITIVE DIAGNOSIS 7 (1988). The authors observe that "[w]ithout having...to recognize emotional, psychological or spiritual crises, the use of the word 'stress' provides a legitimate and non-threatening term to describe what holistically minded physicians and health care practitioners are comfortable discussing in detail, namely, the human response to the difficulties of life." *Id.*

137. Baer, *supra* note 52, at 370.

138. *Id.* Naturopathy also emphasizes intuitive knowledge. Baer, *supra* note 52, at 378. *See generally* ROGER N. TURNER, NATUROPATHIC MEDICINE: TREATING THE WHOLE PERSON (1984).

139. Baer, *supra* note 52, at 378.

140. C. W. Aakster, *Concepts in Alternative Medicine*, 22:2 SOC. SCI. MED. 265, 265 (1986).

141. *See generally* HARRIET BEINFELD & EFREM KORNGOLD, BETWEEN HEAVEN AND EARTH: A GUIDE TO CHINESE MEDICINE (1991). In Chinese philosophy, the Tao is "an undifferentiated whole. It is both the unity of all things and the way the universe works." *Id.* at 49.

142. Baynon McDowell, *Homeopathic Treatment of Mild Traumatic Brain Injury*, 1:3 ALTERNATIVE & COMPLEMENTARY THERAPIES 129, 131 (1995) (describing study to determine the clinical effectiveness of the homeopathic treatment of mild traumatic brain injury, which often resists conventional diagnosis and treatment).

143. ALTERNATIVE MEDICINE: EXPANDING MEDICAL HORIZONS (A REPORT TO THE NATIONAL INSTITUTES OF HEALTH ON ALTERNATIVE MEDICAL SYSTEMS AND PRACTICES IN THE UNITED STATES), Sept. 14–16, 1992, at 124 [hereinafter THE CHANTILLY REPORT].

subsumed under massage, combine touch with breathing to facilitate the release of emotions, conceived as held by body postures.[144]

Holistic therapies thus reflect Smuts' notion that the human organism is a whole, rather than a collection of parts.[145] These therapies view illness and wellness as expressions of a unified whole, all the parts of which interrelate, as Smuts noted, "in a subtle indefinable way"[146] to produce disease or health. The emphasis on holism negates any reduction of patients to parts.[147] Holism views the patient, in Smuts' words, as "synthetic, structural, active, vital and creative;" this implies a deeper partnership between patient-physician than the conventional model frequently allows.[148] Consistent with Smuts' theory, holistic therapies often consider the patient not only as a physical body, but literally, as a "field" of biopsychic energy.[149] The field is sensitive not only to pharmaceutical agents and surgical interventions, but also to subtler agents such as human touch.[150] For example, both osteopathy and chiropractic use touch to affect the patient's energetic structure; both were founded by practitioners of magnetic healing, a discipline which, like its latter counterparts, conceived of "health as the harmonious interaction of all the body's parts and the unobstructed flow of fluid, and [emphasized] the use of spinal manipulation."[151]

---

144. *Id.* at 133.

145. Thus, in naturopathy,

> the person is approached as a whole, living in continuous interaction and exchange with his environment, whose integrity may be challenged by unhealthy ways of eating, breathing, relaxing and so on. Disease is essentially the consequence of a disbalance of vitalizing and disruptive forces, which cause the organism to form auto-toxic...residues in the body.

Aakster, *supra* note 140, at 266.

146. *See supra* text accompanying note 117.

147. *See* Cohen, *supra* note 133, at 682 (observing that patients' experience of care frequently "occurs in a consensus reality that denies their capacity to feel and suffer," and that patient dignity is impinged by "reference to the body part, rather than the person (the 'penile implant in O.R. 23')").

148. The model most physicians use is "physician-centered," whereby "the physician is the authoritative expert and the patient is a receptive participant"; this relational model "encourages passivity in patients" and discourages patient commitment to healing. THE CHANTILLY REPORT, *supra* note 143, at xxxix. *See also* Sheldon Greenfield et al., *Expanding Patient Involvement in Care: Effects on Patient Outcomes*, 102 ANNALS INTERNAL MED. 520 (1985) (patient involvement in care decreased limitations imposed by disease on functional ability).

149. *See generally* DELORES KRIEGER, LIVING THE THERAPEUTIC TOUCH (1987).

150. *See* Cohen, *supra* note 5, at 88–96 (citing studies). An estimated 50,000 practitioners provide about 120 million sessions annually of "biofield therapeutics," also known as energy healing or laying on of hands. THE CHANTILLY REPORT, *supra* note 143, at 136. Of these, about 30,000 are trained in therapeutic touch. *Id.* Network chiropractic spinal analysis merges chiropractic and biofield approaches. *Id.* at 147.

151. Norman Gevitz, *Osteopathic Medicine: From Deviance to Difference*, *in* OTHER HEALERS, *supra* note 63, at 123, 156–57; Wardwell, *supra* note 50, at 157. In fact Andrew Taylor Still, founder of osteopathy, early on advertised himself as "A.T. Still, Magnetic Healer." Gevitz, *supra*, at 127. Today, D.O.'s (doctors of osteopathy) are eligible for unlimited practice in all states, putting osteopathy on an equal footing with medicine. Gevitz, *supra*, at 153.

Osteopathy "stresses a view of the human organism as a self-regulating and self-healing whole...[,] tends to employ surgery and drug treatments less frequently than does allopathy," and, like chiropractic, manipulates the neuromusculoskeletal system "in order to return the various bodily systems to their naturally harmonious state." Eatough v. Albano, 673 F.2d 671, 673 (3d Cir. 1982). An accredited osteopathic school is said to provide education equal in substance and quality to medical schools. *Id.*

Even though good medical practice can be holistic, the medical model frequently reduces the disease to biochemical reactions,[152] whereas holistic therapies specifically conceive of healing as "moving toward wholeness at all levels of being."[153] Holistic therapies thus draw a distinction between *curing*, which involves eradication of disease at the physiological level, and *healing*, which involves a movement toward wholeness or a physical, mental, emotional or spiritual level.[154] Healing means "bringing all aspects of the person into better balance, rather than just focusing on curing a given disease or disorder."[155] A person may be healed, without the disease being cured, although it is preferable for both to occur.[156] A treatment that "cures" the patient often leaves room for healing—for example, the patient who leaves the operating room without cancer, but also without a breast.[157]

This distinction between curing and healing clarifies the way in which medical practice acts, by assigning all "diagnosis" and "treatment" to physicians, unduly narrow patient care. Curing treats the body; healing treats the field. Curing emphasizes biochemistry; healing has synthetic or transcendental aspects.[158] Healing conceivably can translate into scientifically validated physiological benefits, but healing also may be experienced subjectively, as, for example, decreased pain, increased well-being, a peaceful death, or a deeper

---

152. Many physicians emphasize holism, empathy and relationship, as opposed to the model of physician as detached caregiver. *See, e.g.*, HOWARD M. SPIRO ET AL., EMPATHY AND THE PRACTICE OF MEDICINE: BEYOND PILLS AND THE SCALPEL (1993); Bambi Ward, *Holistic Medicine*, 24:5 AUSTRALIAN FAMILY PHYSICIAN 761 (1995). Ward observes that as a medical student,

> a 'hands-on' approach involving compassion, laughter and listening was frowned upon by many. We were often discouraged from getting involved with our patients and were taught to focus on their disease and organs rather than seeing them as a whole person with emotional, mental, spiritual and social needs—as well as physical ones.

Id. at 761. *See also* PATCH ADAMS, GESUNDHEIT! 13 (1993) (observing that in medical school, "getting close to the patients was forbidden because it might lead to transference—emotional involvement—or a lawsuit").

153. Cohen, *supra* note 133, at 684; Olle Hellstrom, *The Importance of a Holistic Concept of Health for Health Care: Examples From the Clinic*, 14 THEORETICAL MED. 325, 325 (1993) (arguing, with examples, for treatment by "explicitly relat[ing] to patients as if they are conveying a personal meaning by means of experienced symptoms"). Hellstrom observes:

> Wholeness is something more than the sum of its parts. To relate to a person as a doctor, guided by a holistic view of health, means that one must...let oneself be guided by knowledge of symbols and their meaning. The nature of...[humanity] is three-dimensional: somatic, psychological and spiritual. One cannot reach the spiritual dimension without being touched or moved.

Id. at 338.

154. *Cf.* CALLAHAN, *supra* note 13, at 166 (arguing that medicine should focus on "how to improve life for those already existing, but poorly, within the present frontiers," rather than creating still more technologies to extend the frontiers of life, and observing that medicine "overreaches itself when it sets as its implicit goal that of curing all diseases and infinitely forestalling death").

155. THE CHANTILLY REPORT, *supra* note 143, at ix.

156. *Id.* at xi–xii.

157. *See* LYNN PAYER, MEDICINE & CULTURE: VARIETIES OF TREATMENT IN THE UNITED STATES, ENGLAND AND FRANCE 22 (1988) (discussing enthusiasm of U.S. doctors for hysterectomy, as opposed to myomectomy, in which fibroid tumor is removed while ability to have children is preserved); Marjorie M. Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 256 (1985).

158. *Cf.* Aakster, *supra* note 140, at 267 (orthodox medicine has a "pre-occupation with disease," taking health "to be a deviance from disease," whereas holistic therapies view health as a lifelong process of striving to maintain internal and external balance).

sense of self. In many cultures, healing may be as valuable or even more valuable than the cure.[159] A practitioner whose treatment aids the body's self-healing, so as to complement regular medical care, does not threaten patient health.[160]

Many providers offer treatments to assist the patient's healing, without purporting to "cure" or substitute for medical care. Examples include yoga, meditation, guided imagery, hypnosis, biofeedback, dance therapy, music therapy, and art therapy.[161] The idea that dance, music, art and massage, chiropractic, acupuncture and naturopathic treatments all are part of healing accords with holism; each aims to draw the individual not only toward equilibrium, but also toward a new and deeper unity or synthesis.[162] By pointing patients toward creative resolution of their disease processes, holistic therapies express Smuts' notion that "[w]holeness, healing, and holiness" are interrelated aspects of health.

C. Prevalence and Use of Holistic Therapies

Whether or not patients subscribe to holism, the data on use of alternative and complementary providers suggests there is more to patient interest than delusion, gullibility and desperation.[163] One in three Americans use alternative or unconventional therapies, defined as medical interventions not taught widely in U.S. medical schools or generally available at U.S. hospitals.[164] The therapies

---

159. *Cf.* Edmund D. Pellegrino, *Prologue: Intersections of Western Biomedical Ethics and World Culture, in* TRANSCULTURAL DIMENSIONS IN MEDICAL ETHICS, *supra* note 133, at 13, 14 ("Western values, however, may be strongly at odds with worldviews held by billions of other human beings. Those billions may be less inclined to an aggressive uncovering of the mysteries of nature and less obsessed with the need for experimental verification. Instead, they may be drawn more strongly by the spiritual and qualitative dimensions of life.").

160. *See infra* part IV.A.

161. These may be classified as mind-body interventions. *See* THE CHANTILLY REPORT, *supra* note 143, at 45. To clarify the point, some states separately license, register, or exempt some of these modalities. *See, e.g.*, ME. REV. STAT. ANN. tit. 32, § 14307(2) (West Supp. 1994) (excluding Reiki and polarity, two forms of touch or energy healing, from definition of "massage"); MO. STAT. ANN. §§ 337.015(3)–(4), 337.020(6) (Vernon Supp. 1994) (providing that the practice of psychology includes hypnosis, but that hypnotherapists must receive licensure as psychologists); N.M. STAT. ANN. § 61A–9A–3.H (Michie 1995); WASH REV. CODE ANN. § 18.108.030(2) (West 1989) (subjecting a "touch therapist" to massage licensing requirements).

162. *Cf.* N.M. STAT. ANN. §§ 61A–9A–3.N (1995) (recognizing use of art therapy "to promote perceptive, intuitive, affective and expressive experiences that alleviate distress, reduce physical, emotional, behavioral and social impairment and lead to growth or reintegration of one's personality").

163. Opponents of complementary therapies frequently highlight consumer ignorance and the dubious nature of some products and claims. *See, e.g.*, AMERICAN MEDICAL ASSOCIATION, GUIDE TO THE AMERICAN MEDICAL ASSOCIATION HISTORICAL HEALTH FRAUD AND ALTERNATIVE MEDICINE COLLECTION vi-vii (1992) (distinguishing "alternative therapy," which "occurs when a patient chooses a procedure other than generally recognized...therapies," from "health fraud," which "occurs when claims for alternative therapies and unproven methods cause more harm than good, solicit money for bogus devices and remedies *or remove patients from viable medically acceptable therapies*" (emphasis added), and noting that "[a]ny promotion which promises cures without scientific evidence has the potential of being fraudulent"). The phrase "health fraud" is frequently invoked without establishing actual fraud. *See* Cohen, *supra* note 5, at 134–47.

164. David M. Eisenberg et al., *Unconventional Medicine in the United States: Prevalence, Costs, and Patterns of Use*, 328:4 N. ENG. J. MED. 246, 246–48 (1993). The definitional reference to "not widely taught" may change as medical schools begin integrating

surveyed include relaxation techniques (13%), chiropractic (10%), massage (7%), imagery, biofeedback and hypnosis (6%), spiritual and energy healing (5%), homeopathy (1%), and acupuncture (less than 1%).[165] Americans in 1990 made an estimated 425 million visits to alternative health care providers, exceeding the 388 million visits to primary care physicians.[166]

While the medical model, or biomedicine, is "extremely effective for treating infectious diseases and traumatic injuries," it "is often ill equipped to handle complex, multifaceted chronic conditions."[167] Biomedicine, according to some policymakers, tends to seek a single "magic bullet" solution for each disease, while many chronic conditions require a multifaceted treatment approach, such as that offered by holistic modalities.[168] Worldwide, seventy to ninety percent of health care uses self-care or care based on an alternative tradition or practice; only ten to thirty percent is based on biomedicine.[169] Alternative and complementary therapies prevail because chronic, debilitating conditions such as arthritis, allergies, pain, hypertension, cancer, depression, cardiovascular, and digestive problems account for seventy percent of the health care budget, and affect 33 million Americans, 9 million of whom cannot work, attend school, or maintain a household.[170]

On the physician side, at least twenty-six major medical schools offer courses on alternative and complementary modalities.[171] Schools and course offerings include the following: Albert Einstein College of Medicine ("Complementary Medicine"), Columbia University College of Physicians and Surgeons ("Survey in Alternative/Complementary Medicine"), Harvard Medical School ("Alternative Medicine: Implications for Clinical Practice and Research"), John Hopkins School of Medicine ("The Philosophy and Practice of Healing"), Mount Sinai School of Medicine (courses include "The Power of Subtle Body: Innovative Qigong," "Hypnotherapy," "Introduction to Biofeedback Techniques and Medical Practice," and "Science of Yoga"), Penn State College of Medicine ("Folk and Alternative Health Systems"), UCLA School of Medicine ("Medical Acupuncture for Physicians"), and Yale School of Medicine ("Alternative Medicine in Historical Perspectives").[172]

---

courses on alternative/complementary therapies into their curriculum. See *infra* notes 171–72 and accompanying text.

165. Eisenberg et al., *supra* note 164, at 248, tbl. 2.

166. *Id.* at 250.

167. THE CHANTILLY REPORT, *supra* note 143, at ix.

168. *Id.*

169. *Id.*

170. *Id.* Larry Dossey argues that patients pursue alternative/complementary therapies because practitioners are much more receptive to questions of meaning than conventional medicine: they are "more willing to entertain the symbolic side of illness and to suppose that health and illness may reflect more than the blind play of atoms." Larry Dossey, *What Does Illness Mean?*, 1:3 ALTERNATIVE THERAPIES HEALTH & MED. 6, 9 (1995).

171. Deborah Daly, *Alternative Medicine Courses Taught at U.S. Medical Schools: An Ongoing Listing*, 1:2 J. ALTERNATIVE & COMPLEMENTARY THERAPIES 205 (1995). The list may be up to 40, according to a computer database maintained by the Richard & Hinda Rosenthal Center for Alternative/Complementary Therapies at Columbia University College of Physicians & Surgeons.

172. *Id.*

A recent survey randomly sampled the use of unconventional medicine by U.S. physicians.[173] Of 572 responding physicians, 92% encouraged at least one unconventional therapy, 83% at least two, 73% at least three, 63% at least four, and 51% five or more.[174] In addition, 36% practiced at least one unconventional therapy, 19% practiced at least two, and 9% practiced three or more.[175] Physicians were most likely to refer for relaxation techniques, biofeedback, therapeutic massage, hypnosis, and acupuncture.[176] Physicians surveyed personally provided the following therapies to patients: relaxation techniques (22%), lifestyle diet (vegetarian, macrobiotic, etc.) (17%), imagery (7%), spiritual healing, biofeedback and yoga (5% each), chiropractic, therapeutic massage, megavitamin therapy, energy healing, and herbal remedies (3% each), acupuncture (2%), homeopathy, meditation and rolfing (a system of bodywork) (1% each).[177]

D. Insurance Reimbursement

Insurers historically have denied coverage for holistic therapies, in part because orthodox physicians' view of what constitutes health care has underlied reimbursement policies.[178] Some necessary generalizations may establish a helpful comparison between the orthodox view or mechanistic model, and the holistic approach to disease and healing (see Table 1, *infra* page 107).

In the mechanistic model, the goal of treatment is to cure. The focus is on the body, with principles drawn from science, and using technologies relying on medicine, drugs, surgery and machines. Disease is viewed as an invading agent that attacks a part of the body and must be annihilated. Death signifies "nothingness or heaven,"[179] and must be delayed at all cost.[180] Spiritual beliefs have cultural significance, but cannot be scientifically measured and thus carry

173. Daniel L. Blumberg et al., *The Physician and Unconventional Medicine*, 1:3 ALTERNATIVE THERAPIES HEALTH & MED. 31 (1995). The survey used David Eisenberg's definition of unconventional medicine, and included acupuncture, hypnosis, meditation and chiropractic. *Id.* at 31. The list was limited to board-certified family physicians and internists with single-board certification. *Id.* at 32.

174. *Id.*

175. *Id.* Further, 94% were willing to refer for at least one unconventional therapy, 90% for at least two, 85% at least three. The authors conclude that "[a] considerable number of responding physicians could be considered advocates of these unconventional modalities. That is, they encouraged their patients in five or more modalities, or they were willing to refer patients for treatment in five or more modalities." *Id.*

176. *Id.* at 32–33.

177. *Id.* at 33, tbl. 2.

178. *See infra* notes 504–05 and accompanying text.

179. Cohen, *supra* note 133, at 684.

180. The doctrine of "medical futility" creates some counterpoint to the wish that technology be used to stave off death indefinitely. *See, e.g.*, Jeffrey W. Swanson & S. Van McCrary, *Doing All They Can: Physicians Who Deny Medical Futility*, 22:4 J. L., MED. & ETHICS 318 (1994); Tom Tomlinson & Diane Czlonka, *Futility and Hospital Policy*, 25 HASTINGS CENTER REP. 28 (1995).

Hospice care also suggests a movement in this culture toward greater acceptance of death and attention to compassion in the dying process. Although physician-assisted suicide remains controversial, many are beginning to acknowledge that "[d]eath with dignity, either alone or with others, is certainly preferable to death without dignity, whether it be lingering or rather sudden." Jordan J. Paust, *The Human Right to Die with Dignity: A Policy-Oriented Essay*, 17 HUMAN RIGHTS Q. 463, 463 (1995). *See also* Linda L. Emanuel, *Reexamining Death: The Asymptotic Model and a Bounded Zone Definition*, 25:4 HASTINGS CENTER REP. 27 (1995) (challenging the traditional Western understanding of life and death as a strict dichotomy and proposing a definition of dying in terms of "a bounded zone of residual states of life").

no implications for medical care. States of consciousness other than ordinary, waking consciousness are seen as delusional or even psychotic, triggering a response of sedation or medication. Emotions are marginally relevant to healing; the doctor and technology heal the patient.[181]

Table 1 - Mechanistic and Holistic Healing Models

	Mechanistic	*Holistic*
Approach to disease	cure	care and self-care
Focus on	body	body, mind, emotion, spirit (whole being)
Principles drawn from	scientific method and disciplines	systems theory, unifying scientific, philosophical, religious and other healing systems
Relies on	medicine; machines	ritual; relaxation; self-healing
Disease caused by	invading agent	stress; imbalance of energies
Role of spirituality in healing	possibly relevant	central
View of dying	the end; or heaven	life review and integration; transition to other states of being
View of non-drug altered states of consciousness	delusional; psychotic	natural; healing
View of emotions	marginally relevant	central to healing
Who heals the patient	the doctor; technology	the self; nature; grace

In holistic modalities, the goal of treatment is care.[182] Caregivers focus on the whole being, understood to be composed of body, mind, emotions and spirit. Caregivers use principles drawn from unified healing systems that

181. By and large, Western medicine is only beginning to engage in a dialogue that honors and integrates the insights of non-Western medical systems. For example, in a study of communication between Bolivian doctors trained in Western medicine and Andean patients, the doctors initially insisted that western medicine was superior to, and should replace, traditional medicine in the Andeas. Joseph W. Bastien, *Cross-Cultural Communication Between Doctors and Peasants in Bolivia*, 24:12 SOC. SCI. MED. 261 (1987). The doctors were taught in medical school that "what shamans teach are lies." *Id.*

Over time, developing an adequate understanding of Andean tradition allowed the Bolivian doctors to integrate their system of knowledge with traditional medicine. For instance, by working with local midwives, the doctors conceded that delivery by squatting, as was customary, was preferable to delivery in the supine position. *Id.* at 262. As Bastien describes it: "The mother squatted close to the earth floor over a thick sheepskin rug, and as the baby protruded, the midwife received the head in her palms." *Id.*

182. *See* Aakster, *supra* note 140, at 272 (arguing that alternative medicine reflects an ethics of care).

incorporate philosophical and religious principles.[183] Ritual and self-healing matter. Caregivers view dying as a process of integrating one's life tasks, and making a transition to other dimensions of being.[184] Spiritual values are of extreme importance; altered states of consciousness can assist patients both in reclaiming wholeness when sick, and in making transition during the dying process.[185] Emotions are central to healing, as it is the patient, and nature, or grace, that ultimately heal.[186]

Table 1 suggests ways in which the cultural consciousness historically has dictated reimbursement for conventional, as opposed to holistic, therapies. Proceeding down the table, an insurer likely would reimburse approaches to disease that cure, rather than care; that focus on the body; that are based on therapies backed by studies in prestigious medical journals; that attack invading agents and perpetuate biologic existence. On the other hand, an insurer is likely not to reimburse therapies focusing on mind, emotions and spirit; therapies involving ritual or shamanic states; therapies focusing on patient self-healing; or therapies facilitating a "letting go" in the dying process.

Thus, given the preference for technological interventions and therapies involving drugs, machines and surgery, holistic treatments such as herbal and manual therapies are unlikely to be covered as "medically necessary services."[187] Similarly, therapies such as acupuncture, which has a five-thousand year history, likely will be interpreted to be excluded from coverage as "experimental," since they do not share the basic assumptions of Western medicine.[188] The unwillingness to cover such services as herbal therapy and acupuncture is beginning to change, as physicians and insurers explore whether holistic modalities can serve as preventative therapies, thus lowering overall reimbursements.[189] Nonetheless, existing distinctions suggest the ways in which our present view of healing is at times ethnocentric and reductive.[190] In

183. *See, e.g.*, BILL MOYERS, HEALING AND THE MIND 251–55 (1993) (describing the "mystery of *chi*" in Chinese medicine).

184. *See, e.g.*, SOGYAL RINPOCHE, THE TIBETAN BOOK OF LIVING AND DYING, Appendix (1992). Recently, one author has researched 4,000 years of Jewish thought on the afterlife, and has compared the various stages immediately following death, as described in Jewish sources, to those described in the *Tibetan Book of the Dead*. *See* SIMCHA P. RAPHAEL, JEWISH VIEWS OF THE AFTERLIFE (1994). Raphael correlates these teachings in turn with insights from transpersonal psychology, and literature on near-death experiences, suggesting that it may be possible to draw a map, based on cross-cultural and multidisciplinary information, of the afterlife experience. *See id.* at 357–402. Such an approach is consistent with attempts in bioethics to define dying as "bounded zone of residual states of life," rather than as endpoint understood in a strict dichotomy with living. *See* Emanuel, *supra note 180*, at 27.

185. Bioethicists are beginning to urge greater recognition of the patient's *subjective* reality in making decisions regarding life-sustaining treatment. *See, e.g.*, Rebecca Dresser & Peter J. Whitehouse, *The Incompetent Patient on the Slippery Slope*, 24:4 HASTINGS CENTER REP. 6, 11 (1994) (arguing that patients suffering from progressive dementia have thoughts, emotions, perspectives, and perceptions of a world of experience, and that decisions about life-sustaining treatment for such patients should incorporate an evaluation of patients' perspectives and perceptions).

186. *See generally* SHEALY & MYSS, *supra* note 136.

187. *See infra* notes 531–33 and accompanying text.

188. *See infra* notes 523–25 and accompanying text.

189. *See* Terry Malik, *Healthcare Insurers Opening up to Alternatives*, 1:1 ALTERNATIVE THERAPIES HEALTH & MED. 12–13 (1995) (describing coverage of naturopathy, homeopathy, and acupuncture).

190. *See, e.g.*, PAYER, *supra* note 157; Bastien, *supra* note 181.

unconsciously adopting the mechanistic model of healing, insurance rules affirm a culturally biased model of healing.

III. DEVIANCE AND DISCIPLINE

When conventional health care practitioners, such as physicians, offer holistic care, they depart—almost by definition—from conventionally accepted medical standards. This is because alternative medicine often is defined as consisting of treatments not commonly used in U.S. hospitals.[191] Thus, when physicians, for example, use hypnosis or recommend herbal therapy, they risk discipline for "unprofessional conduct," particularly in states that have "prevailing practice" provisions.[192] Conversely, when holistic practitioners such as chiropractors, acupuncturists, massage therapists and naturopaths begin engaging in more conventional practices, such as prescribing nutritional supplements and ordering diagnostic tests, they risk professional discipline and prosecution under medical practice acts for exceeding their scope of practice. This is because state regulatory schemes view holistic practitioners as having limited authority, as compared to medical doctors.[193]

The statutory scheme thus effectively segregates healing modalities into the "conventional" and "unconventional" and sanctions each group for intruding into the other's province.[194] Paradoxically, this operates to limit treatments outside of orthodox medicine to nonmedical providers, and to prohibit such providers from conducting sufficient treatment to determine whether medical care is even warranted.[195] The result benefits neither patients nor providers. Patients find their care fragmented among various healing professionals, and providers find themselves yoked to the belief systems of particular state licensing boards and sanctioned for deviating.

This Part explores efforts to reign in medical practitioners who deviate from, and nonmedical practitioners who intrude upon, medical orthodoxy. Subpart A addresses homeopathy, ozone therapy and chelation therapy as illustrative of disciplinary issues facing physicians practicing holistic medicine. Subpart B focuses on chiropractors' efforts to dispense vitamins and to perform acupuncture as illustrative of scope of practice issues facing nonmedical providers.

A. "Unprofessional Practices" by Physicians

Three of the most controversial alternative/complementary practices offered by holistically minded physicians are homeopathy, ozone therapy and chelation therapy. Homeopathy is controversial because of the historical,

---

191. *See supra* note 164 and accompanying text.

192. These provisions have been construed to allow sanction for "any departure" from orthodox medicine, as defined by orthodox medicine. See the discussion of *In re* Guess, 393 S.E.2d 833 (N.C. 1990), *cert. denied*, 498 U.S. 1047 (1991), *infra* notes 211–22 and accompanying text.

193. *See supra* note 9 and accompanying text.

194. Ideally, the regulatory scheme could view the patient as a whole being, amenable to treatment in an integrated scheme of healing professionals that includes physicians, chiropractors, acupuncturists, massage therapists, naturopaths, and others. *See infra* part IV.

195. *See, e.g.*, Beno v. State, 373 N.W.2d 544 (Mich. 1985), discussed *infra* at notes 358–67 and accompanying text.

political, and philosophical challenge it has posed to medical orthodoxy.[196] Ozone therapy and chelation therapy are controversial because, in purporting to clear the human body of toxins caused by the environment—such as pesticide-laden food, air and water pollution, and electromagnetic radiation—they link health and healing to ecological, rather than strictly biochemical, factors.[197] Moreover, to the extent these treatments view mind, body, emotions and environment as inseparably linked, they treat the patient as a mind-body field, rather than addressing the afflicted part.[198] Finally—and perhaps most importantly—to the extent such treatments divert patients from orthodox medical practices, including surgery, they impact orthodoxy economically.[199]

To canvass the extent to which state medical boards actively discriminate against practitioners employing disfavored therapies would require a full review of every medical board decision, by state. These records are, in fact, usually confidential.[200] There are few reported cases, perhaps because the standard of review for medical board decisions is so high,[201] and because of the confidentiality requirements. Moreover, reported cases sometimes involve disreputable or unreliable practitioners, skewing the perspective on record.[202] Nonetheless, a review of cases involving homeopathy, chelation therapy and ozone therapy suggests problems of bias, harassment and censure based on deviance.

---

196. *See* Cohen, *supra* note 5, at 122–27.

197. *See, e.g.*, GARY R. OBERG, AN OVERVIEW OF THE PHILOSOPHY OF THE AMERICAN ACADEMY OF ENVIRONMENTAL MEDICINE 6, 9 (1992) (available from AAEM, P.O. Box 80216, Denver, CO 80216) (arguing that disease often results from "biologic dysfunctions triggered by environmental stressors in susceptible patients," including "dusts, molds, pollens, danders, venoms, food... radiation, and electro-magnetic fields"); *cf.* Wendy E. Parmet, *Book Review*, 23 J. L., MED. & ETHICS 288 (1990) (review of LAURIE GARRETT, THE COMING PLAGUE: NEWLY EMERGING DISEASES IN A WORLD OUT OF BALANCE (1994)) (suggesting the "the goal of health law...must be not only to delineate the rights of individual patients and providers, but also to create and nurture the delicate social and environmental balance necessary to ensure the health of communities").

198. *See* OBERG, *supra* note 197, at 44 ("Optimal health requires that all parts of the body be well nourished and in harmony with each other and with the environment.").

199. For example, a typical bypass surgery costs the patient over $30,000, while an average course of treatments through chelation therapy, discussed *infra* notes 233–72 and accompanying text, costs $5000. POSITION PAPER OF THE AMERICAN COLLEGE FOR ADVANCEMENT IN MEDICINE 5 (1995) (available from ACAM, 23121 Vedugo Dr., Ste. 204, Laguna Hills, CA 92653). Holistic medical providers challenge the need for overly invasive medical procedures and assert that holistic alternatives are more economical and safe. *See, e.g., id.* at 3–6 (arguing that at least half of the 300,000 or 400,000 coronary bypass operations performed annually in the United States are unnecessary, inappropriate, or of marginal benefit to patients, whereas over 500,000 patients have been safely treated with chelation therapy utilizing ACAM protocols).

200. *See, e.g.*, Doe v. Minnesota State Bd. of Medical Examiners, 435 N.W.2d 45 (Minn. 1989) (dismissed complaints against physician are not part of the Board's decision and not public documents) (citing MINN. STAT. ANN. §§ 13.41, 13.03). *See also* discussion of Atkins v. Guest, 601 N.Y.S.2d 234 (Sup. Ct. 1993), *infra* notes 273–89 and accompanying text.

201. *See supra* text accompanying notes 43–44.

202. *See, e.g., In re* Haimes, 173 B.R. 777 (1994) (declaring to be nondischargeable, for purposes of Internal Revenue Service collection, the debt of a physician who practiced alternative medicine and set up sham corporations to disguise income and conceal assets); Palmer v. Palmer, No. 94–CA–112, 1995 Ohio App. LEXIS 2877 (Ohio Ct. App. June 14, 1995) (physician who practiced holistic medicine and believed in "touch and the spiritual aspects of medicine...[and] told inmates [at the correctional facility where he worked] that he loved them

1. Homeopathy

Homeopathy is a healing system formulated by Samuel Hahnemann in the late eighteenth century, based on the belief that what causes symptoms in a healthy person can cure the disease in a sick person—in other words, "like cures like."[203] The "law of similars" holds that

> instead of suppressing symptoms—which would inhibit the organism's inherent defensive reaction—a homeopathic medicine is prescribed for its ability to mimic those symptoms. The best way to heal ourselves of disease may be to steer our body's own defenses into, rather than away from or against, symptoms. By aiding the body's efforts to adapt to stress or infection, the organism is best able to heal itself.[204]

Homeopaths believe in extremely small doses, and follow a system of radical dilution.[205] Although immunization and allergy treatments are based on the homeopathic law of similars, homeopathy has attracted controversy partly because of its metaphysical overtones: "A homeopathic medicine may be like a hologram. No matter how many times a substance is diluted, a smaller but complete essence of the substance remains."[206] Moreover, homeopathy contains an implied critique of conventional medicine's attempt to heal by suppressing or masking symptoms.[207]

In the late nineteenth century, homeopaths were wealthy, successful, and popular, but poorly organized.[208] As a result, they were expelled from allopathic medical societies, attacked in the medical literature, prohibited from associating with allopathic physicians, and publicly denounced as cultists and charlatans.[209] Today, only a few states have separate boards of homeopathic medicine authorizing licensed physicians, with appropriate training, to practice homeopathy, while a handful of others include homeopathy within the definition of health care professions such as acupuncture and oriental medicine, chiropractic, and naturopathy.[210]

In re Guess[211] involved a licensed physician practicing family medicine who administered homeopathic remedies to his patients when conventional treatment failed. The Board of Medical Examiners of North Carolina charged Dr. Guess with "unprofessional conduct," alleging that his use of homeopathic

---

and would hug them" confessed to "dysfunctional upbringing" and inability to be gainfully employed due to mental disability, in an action for child support modification).

203. In contrast, allopathic remedies produce effects opposite to symptoms caused by the illness. *See* HARRIS L. COULTER, DIVIDED LEGACY: THE CONFLICT BETWEEN HOMEOPATHY AND THE AMERICAN MEDICAL ASSOCIATION 157 (1973); ROTHSTEIN, *supra* note 1, at 152–54.

204. Dana Ullman, *Homeopathic Medicine: A Modern View*, WHOLE EARTH REV. 100, 100 (1993).

205. ROTHSTEIN, *supra* note 1, at 155–56.

206. Ullman, *supra* note 204, at 101–03.

207. Ullman points to coughs, inflammation and fever as the body's "impressive self-organizing, self-regulating, self-healing efforts," namely, clearing the bronchia, walling off and burning out invading foreign bodies, and creating an internal environment less conducive to bacterial or viral growth, respectively. Homeopathic medicines "augment the body's defenses," rather than allopathic medicines, "which suppress them." *Id.* at 100–01.

208. COULTER, *supra* note 203, at 439–40; Martin Kaufman, *Homeopathy in America, in* OTHER HEALERS, *supra* note 63, at 99, 100–02, 106–07.

209. *See* COULTER, *supra* note 203, at 158–95.

210. *See* Michael H. Cohen, *Legal Ramifications of Homeopathy*, 1:4 J. ALTERNATIVE & COMPLEMENTARY MED. 393 (1995) (citing statutes).

211. 393 S.E.2d 833 (N.C. 1990), *cert. denied*, 498 U.S. 1047 (1991).

medicines departed from "standards of acceptable and prevailing medical practice in North Carolina."[212] At the hearing, there was no evidence that the homeopathic treatment offered by Dr. Guess ever had harmed a patient, and indeed, there was anecdotal evidence that the treatment had helped several patients who could not find relief through allopathic medicine.[213] Following the hearing, the Board revoked the doctor's license to practice medicine, but stayed the revocation so long as Dr. Guess refrained from practicing homeopathy.

Guess appealed to the superior court, which stayed the decision pending judicial review.[214] After review, the court reversed and vacated the Board's decision, finding that the Board's findings, conclusions and decisions were "'not supported by competent, material and substantial evidence and [were] arbitrary and capricious.'"[215] The appellate court rejected the superior court's reasoning, but affirmed the superior court's order reversing the Board's decision.[216] According to the appellate court, the Board "neither charged nor found that Dr. Guess' departures from approved and prevailing medical practice either endangered or harmed his patients or the public."[217] In the court's opinion, the revocation of a physician's license must be based on conduct detrimental to the public and not "upon conduct that is merely different from that of other practitioners."[218]

The North Carolina Supreme Court reversed the appellate court and reinstated the Board's decision, finding that the statute, which allowed the Board to revoke a physician's license for "any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice...irrespective of whether or not a patient is injured thereby," did not require the Board to find an actual threat of patient harm.[219] The court upheld the statute as a valid exercise of the state's police power, bearing a reasonable relationship to the protection of public health.[220] The court also rejected the argument that the Board had acted arbitrarily in selecting Dr. Guess for sanction based on his use of homeopathy.[221] Finally, the court rejected the argument that the Board's decision invaded patients' constitutional privacy interests in choice of treatment.[222]

Like *Guess, Metzler v. New York State Board for Professional Medical Conduct*[223] involved disciplinary action against a physician who practiced

212. *Id.* at 835 (quoting N.C. GEN. STAT. § 90–14(a)(6) (1985)).
213. *Id.*
214. *Id.*
215. *Id.* (quoting lower court decision).
216. *Id.* The court of appeals initially dismissed for lack of jurisdiction, but the decision was reversed and remanded by the North Carolina Supreme Court. *Id.*
217. *Id.* (quoting *In re* Guess, 382 S.E.2d 459, 461 (N.C. Ct. App. 1989)).
218. *Id.*
219. *Id.* at 836.
220. *Id.*
221. *Id.* at 839.
222. *Id. See also* Guess v. Board of Medical Examiners, 967 F.2d 998 (4th Cir. 1992) (declining on jurisdictional grounds to review North Carolina Supreme Court's decision that Guess' license was properly revoked, as well as related claims by patients based on right to homeopathic care); Majebe v. North Carolina Bd. of Medical Examiners, 416 S.E.2d 404, 407 (N.C. Ct. App. 1992) (citing *Guess*, holding that "there exists no protected privacy right to practice unorthodox medical treatment, here acupuncture").
223. 610 N.Y.S.2d 334 (App. Div. 1994), *appeal dismissed*, 616 N.Y.S.2d 479 (N.Y. 1994).

homeopathy. A Hearing Committee on Professional Conduct of the State Board for Professional Medical Conduct charged the petitioner with gross negligence (and failing to maintain records).[224] On appeal, the New York Supreme Court affirmed the decision, rejecting the physician's argument that his professional conduct could not be judged by standards of orthodox or allopathic medicine.[225] The court observed that New York does not separately license or recognize homeopathy or homeopathic physicians.[226] Further, it held that a physician who practices homeopathy will be judged by the same standard of care as all other physicians in the relevant geographic area; there is no requirement that members of a review board be of the same specialty, school or philosophy of medicine as the physician under review.[227] Nor did the physician's practice of informed consent relieve him of the duty to treat the patient with the usual standard of care.[228]

In both *Guess* and *Metzler*, state statutes gave medical licensing boards considerable leeway in investigating and sanctioning practitioners who incorporate therapies, such as homeopathy, which are outside the medical mainstream. The statutes permitted revocation of licensure for "any" departure, as interpreted by the medical board. No showing of patient injury was required. No definition of "acceptable and prevailing medical practice" was established, leaving the determination of violation up to the medical board orthodoxy.[229]

Guess, in particular, suggests that even safe, competent practitioners can become targets of hostility or bias on the part of state medical boards opposed to a particular therapy. In fact, the evidence in *Guess* showed that the defendant was a "highly qualified physician," one who used homeopathic medicines "as a last resort when allopathic medicines...[were] not successful."[230] His was "not a case of a quack beguiling the public with snake oil and drums, but a dedicated physician seeking to find new ways to relieve human suffering."[231] The Board appears to have singled out Dr. Guess for termination of licensure merely because of his homeopathic leanings—just as allopathic physicians had singled out homeopaths for extinction some ninety years earlier.[232]

2. Chelation Therapy

Chelation therapy involves the use of the amino acid ethylene diamine tetra acetic acid ("EDTA"), together with vitamins and minerals, to clean out the arteries by breaking down arterial plaque.[233] Chelation treatments were widely used during World War II to treat sailors who had lead paint

224. *Id.* at 335.
225. *Id.* at 336.
226. *Id.* at 335.
227. *Id.* at 336.
228. *Id.* at 335–36.
229. *Cf.* Bryce v. Board of Medical Quality Assurance, 229 Cal. Rptr. 483 (Ct. App. 1986) (citing CAL. BUS. & PROF. CODE §§ 2227–29) (severity of discipline which may be imposed on physician does not depend on whether patients have been injured by illegal medical practices); Morfesis v. Sobol, 567 N.Y.S.2d 954 (App. Div. 1991), *appeal denied*, 574 N.Y.S.2d 937 (App. Div. 1991) (same).
230. *In re* Guess, 393 S.E.2d 833, 841 (N.C. 1990) (Frye, J., dissenting), *cert. denied*, 498 U.S. 1047 (1991).
231. *Id.*
232. *See* Cohen, *supra* note 5, at 124–25.
233. Moore v. Baker, CV No. 491–93, 1991 U.S. Dist. LEXIS 14712, at *11 (S.D. Ga. Sept. 5, 1991).

poisoning.[234] Since then, over 1500 scientific articles and studies have been published concerning the chelating process in various parts of the body.[235] Proponents claim EDTA chelation helps prevent circulatory disease, angina, heart attacks and strokes as an alternative to bypass surgery.[236] Many claim dramatic restoration of blood flow to extremities.[237]

Several significant professional organizations have declined to accept EDTA as a proven treatment for cardiac disease.[238] On the other hand, approximately one thousand physicians routinely treat occlusive arterial disease with EDTA, and protocols and educational courses on EDTA treatment are sponsored by the American College for Advancement in Medicine, the American Board of Chelation Therapy, and the American Holistic Medical Association.[239] Proponents point out that the medical profession once dismissed many currently recognized treatments as quackery.[240] Moreover, chelation therapy is claimed to be safer than bypass surgery, since many patients cannot tolerate the surgery, and approximately 12,000 die from it each year.[241]

The Food and Drug Administration has approved chelation therapy for the treatment of lead poisoning, but not for conditions such as a blocked carotid arteries.[242] Use of chelation therapy for heart conditions therefore is "off-label."[243] Off-label drug use is legal and widespread in the medical profession,[244] especially in cancer treatment.[245] In fact, an Alabama statute mandating insurance coverage, under certain circumstances, for off-label use, notes that "[o]ff-label use of an FDA-approved drug is legal when prescribed in

234. Rogers v. State Bd. of Medical Examiners, 371 So. 2d 1037, 1039 (Fla. Dist. Ct. App. 1991).

235. *Id.*

236. *Moore*, 1991 U.S. Dist. LEXIS 14712, at *11.

237. *Rogers*, 371 So. 2d at 1039. This is because chelation is said to remove calcium deposits from the cells and interior walls of blood vessels. *Id.*

238. *See Moore*, 1991 U.S. Dist. LEXIS 14712, at *9.

239. *Id.* at *13–14 (citing testimony of plaintiff's expert).

240. *Id.* The example given is the practice of washing hands before delivering babies; the doctor who innovated the practice was persecuted by colleagues. *Id. See also* Cohen, *supra* note 5, at 96 n.109 (describing historical fate of some innovators in medicine).

241. *Rogers*, 371 So. 2d at 1038 n.2.

242. *Moore*, 1991 U.S. Dist. LEXIS 14712, at *10.

243. Off-label use occurs when physicians dispense medical drugs or devices for purposes other than those originally authorized by the FDA. Robin Margolis, *Off-Label Uses of Drugs and Medical Devices: Should the FDA Crack Down*, 10:1 HEALTHSPAN 18 (1993).

244. *See, e.g.*, W.F. Rayburn, *A Physician's Prerogative to Prescribe Drugs for Off Label Uses During Pregnancy*, 81:6 OBSTET. GYNECOL. 1052 (1993). However, dangerous or inappropriate use has led to proposals to curb off-label use. Examples of inappropriate or dangerous off-label use include use of Retin A, an acne cream, for wrinkles and aging skin; use of liquid silicone, a lubricating agent, for breast augmentation; and use of collagen to enlarge lips. Margolis, *supra* note 243, at 18 (citing HUMAN RESOURCES SUBCOMM. OF THE HOUSE GOV'T OPERATIONS COMM., IS THE FDA PROTECTING CONSUMERS FROM DANGEROUS OFF-LABEL USES OF MEDICAL DRUGS AND DEVICES?, H.R. REP. No. 102–1064, 102d Cong., 2d Sess. (1992)).

A recent Senate bill has been introduced to protect manufacturers from FDA enforcement action for disseminating information to physicians on off-label use. *See* S. 1197, 104th Cong., 2d Sess. (1995). The move to liberalize off-label use is part of a larger focus on FDA reform. *See* FDA Modernization Act, H.R. 1742, 104th Cong., 2d Sess. (1995) (proposing to amend the Federal Food, Drug and Cosmetic Act to liberalize drug approval).

245. *See* UNITED STATES GOV'T ACCOUNTING OFFICE, OFF-LABEL DRUGS: REIMBURSEMENT POLICIES CONSTRAIN PHYSICIANS IN THEIR CHOICE OF CANCER THERAPIES, GAO/PEMD–91–14, at 11 (1991); Charles G. Moertel, *Off-Label Drug Use for Cancer Therapy and National Health Care Priorities*, 266 JAMA 3031 (1991).

a medically appropriate manner and is often necessary to provide needed care," that approximately fifty percent of cancer drug treatment uses off-label indications, and that Medicare and Medicaid patients receive reimbursement for off-label use, if the use is stated in recognized compendia.[246]

Although the use of chelation therapy for heart conditions is not illegal,[247] has not been proven unsafe or ineffective, and is controversial rather than prohibited within the medical community,[248] state medical boards, composed primarily of conventional physicians, have sanctioned proponents merely for using the therapy. For example, the litigation in *Rogers v. State Board of Medical Examiners*[249] began with an order by a county medical association to discontinue the use of chelation therapy. The physician refused and was expelled. The State Medical Board then issued an administrative complaint, followed by a hearing, at the conclusion of which the physician was reprimanded, ordered to cease using chelation therapy in the treatment of arteriosclerosis, and placed on probation for one year. The physician sought judicial review.[250]

The court observed that neither the hearing officer nor the Board had made any finding that chelation therapy was harmful or hazardous to the patient.[251] Rather, the Board's decision was based on the hearing officer's determination that chelation therapy is "quackery under the guise of scientific medicine."[252] In referring to the offending technique as "quackery," the Board's decision mirrors historical attacks on rivals.[253]

The court observed that the physician had offered chelation therapy as a "treatment," rather than a "cure," for arteriosclerosis, and only after fully disclosing to the patient that chelation therapy had not been proven effective and was disfavored by the medical mainstream.[254] The record contained neither allegation nor proof of "fraud, misrepresentation, coercion or

246. ALA. CODE § 27–1–10.1(a)(5) (1991). Generally, third-party payors have covered off-label uses of approved drugs, unlike experimental or investigational drugs. Drusilla S. Raiford et al., *Determining Appropriate Reimbursement for Prescription Drugs: Off Label Uses and Investigational Strategies*, 49 FOOD & DRUG L. J. 37 (1994). *See also* CONN. GEN. STAT. ANN. § 38a–492b(a) (West 1995) and R.I. GEN. LAWS § 27–55–2(a) (1994) (providing that insurance policies covering certain prescribed, FDA-approved drugs may not exclude coverage for off-label use, under specified conditions).

247. The FDA has provided:

> Once [an approved] new drug is in a local pharmacy after interstate shipment, the physician may, as part of the practice of medicine, lawfully...vary the conditions of use from those approved in the package insert, without informing or obtaining the approval of the Food and Drug Administration.... Congress did not intend...[to] regulate the practice of medicine as between the physician and the patient.

United States v. Evers, 643 F.2d 1043, 1048 (5th Cir. 1981) (quoting 37 Fed. Reg. 16,503 (1972)).

248. Proposals to curb off-label drug use include restricting use to specialized physicians or treatment facilities, encouraging peer-review regulation, improving informational flow, augmenting related informed consent claims, and allowing the FDA to specifically disapprove certain off-label uses. *See* William L. Christopher, *Off-Label Drug Prescription: Filling the Regulatory Vacuum*, 48 FOOD & DRUG L.J. 247, 261–62 (1993) (citing sources).

249. 371 So. 2d 1037 (Fla. Dist. Ct. App. 1979).

250. *Id.* at 1038.

251. *Id.* at 1040.

252. *Id.*

253. *See supra* note 63 and accompanying text.

254. 371 So. 2d at 1040.

overreaching."[255] In fact, the doctor's patients desired to testify as to the beneficial effects of chelation therapy on their bodies, and were specifically excluded from the Board hearing on the basis that "[p]atients themselves are not competent to make those judgments."[256] The administrative record, as reviewed by the courts, suggests strong paternalism on the part of the Board, a disregard for patient decision-making and risk/benefit assessment, and a stance of hostility toward the therapy and its practitioners.

The court held that, based on due process rights granted to patients by the Florida state constitution, the Board could not deprive the patients of their right to receive chelation therapy, in the absence of a showing of harm, fraud, coercion or misrepresentation, "simply because that mode of treatment has not received the endorsement of a majority of the medical profession."[257] Thus, unlike the lower court in *Guess*, the *Rogers* court appears to have agreed that, despite broad statutory grants of authority to the state medical boards, Board bias against a particular treatment alone is an insufficient basis for disciplining a practitioner. The lower court thus proposed to restrict the disciplinary power of state medical boards based on patients' due process rights.

The appellate court affirmed the lower court's decision, but on a different basis, looking to the due process rights of physicians rather than patients. The appellate court held that the Board's action restraining the physician from further use of chelation treatment was an arbitrary and unreasonable exercise of the police power.[258] The applicable Florida statute, like the statute in *Guess*, defined "unprofessional conduct," for purposes of Board sanction, in terms of "*any* departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice in...[the physician's] area of expertise as determined by the [state medical board], *in which proceeding actual injury to a patient need not be established....*"[259] Unlike the *Guess* court, however, the appellate court in *Rogers* found the statute, as applied by the medical board, to be unconstitutional under the Florida constitution's due process clause. According to the court, a medical board

---

255. *Id.* at 1041.

256. *Id.* at 1041 n.3.

257. *Id.* at 1041. The court pointed to the courageous persistence of innovators in medicine and science who were scorned by colleagues, including Copernicus, Pasteur and Freud. *Id.* The court further pointed to the slow approval of chiropractic, adding:

> We can only wonder what would have been the condition of the world today and the field of medicine in particular had those in the midstream of their profession been permitted to prohibit continued treatment and thereby impede progress in those and other fields of science and the healing arts.

Id. The court further quoted:

> Orthodoxy in medicine is like orthodoxy in any other professional field. [I]t starts as a theory or tentative belief in some particular course of action...[and] begins to be held as a passionate belief in the absolute rightness of that particular view. Right or wrong, a dissenting view is regarded as a criminal subversion of the truth and the holder is frequently exposed to slander and abuse by his orthodox colleagues....It was the dead hand of orthodoxy that delayed the advance of knowledge through the Middle Ages. Even today, these same oppressive forces may shackle the advancement of medicine.... It is only on the edges of the stream of medicine in which advancement can take place.

Id. at 1041–42 (quoting HAROLD HARPER & GARY GORDON, REPRINTS OF MEDICAL LITERATURE ON CHELATION THERAPY).

258. State Bd. of Medical Examiners v. Rogers, 387 So. 2d 937, 937 (Fla. 1980).

259. *Id.* at 938 n.4 (quoting FLA. STAT. ANN. § 458.1201(1)(m) (West 1975)) (emphasis added).

decision based on such a statute "must not amount to an arbitrary or unreasonable interference with the right to practice one's profession which is a valuable property right protected by the due process clause."[260]

The court concluded that absent evidence of fraud, deception, harm or quackery, and because sanctions were imposed solely because the Board did not accept chelation therapy, the Board's limitation on chelation therapy was not shown to have a reasonable relationship to the protection of public health and welfare.[261] The court thus used Florida's due process clause to limit medical boards' ability to sanction physicians for "any departure" from prevailing and acceptable medical standards. Some legislatures have in effect codified this result, at least with respect to chelation therapy, by prohibiting medical boards from basing a finding of unprofessional or dishonorable conduct solely on the basis that a licensee practices chelation therapy, provided informed consent and other criteria are met.[262]

While *Rogers* involved a court's review of a medical board decision sanctioning a physician's use of chelation therapy, *Moore v. Baker*[263] involved a court's review of a malpractice claim based on *failure* to offer chelation therapy. In *Moore*, the patient sought to recover for malpractice, based on the neurologist's failure to disclose the existence of chelation therapy as an alternative to a carotid endarterectomy (surgery) to relieve the blockage of her carotid artery, which impeded the flow of oxygen to her brain.[264] The complaint alleged that EDTA was as effective as a carotid endarterectomy and less risky, and that the physician failed to provide informed consent, as a result of which, the patient agreed to the surgery.[265] After a brief recovery from surgery, a blood clot developed. The doctor had to reopen the operative wound, but the clot already had caused the patient permanent brain damage.[266]

The relevant statute required physicians, before performing surgery, to inform patients of the risks and of alternatives "generally recognized and accepted by reasonably prudent physicians."[267] The court reviewed the evidence regarding acceptance of chelation therapy. The court concluded that although some physicians approve of chelation therapy, the plaintiff did not show that reasonably prudent physicians *generally* recognize and accept the treatment, and thus did not meet her burden of proving that the physician violated Georgia's informed consent statute.[268]

---

260. *Id.* at 939. The decision appears to depart from U.S. v. Dent, 128 U.S. 114 (1888).

261. 387 So. 2d at 939–40. *See also* Ireland v. Eckerly, 1989 Minn. App. LEXIS 13, at *3 (unpublished opinion) (upholding jury verdict for defendant doctor in malpractice case, where plaintiff alleged that seizures were due to chelation treatment, defendant's expert testified there was no relation between treatment and seizures, and there was no evidence that defendant used fraud or deception in prescribing the chelation treatment or adversely affected the public interest).

262. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 32–1401.24(gg), –1854.42 (Supp. 1994); OKLA. STAT. ANN. tit. 76, § 20.2 (West 1995); S.D. CODIFIED LAWS ANN. § 36–4–20 (Supp. 1995).

263. Moore v. Baker, CV No. 491–93, 1991 U.S. Dist. LEXIS 14712, at *2 (S.D. Ga. Sept. 5, 1991).

264. *Id.*

265. *Id.*

266. *Id.* at *2–3.

267. *Id.* at *7 (quoting GA. CODE ANN. § 31–9–6.1(a)(5) (Supp. 1991)).

268. *Id.* at *17. *But see* Gemme v. Goldberg, 626 A.2d 318 (Conn. App. Ct. 1993) (upholding patient's informed consent claim where physician failed to inform patient that

In *Day v. Aetna Employees Benefit Division*,[269] the court upheld the decision of a municipal court that chelation therapy, which the patient decided to undergo in lieu of bypass surgery, was "broadly accepted professionally as essential to the treatment of the disease" and thus "necessary" to treatment within the meaning of the patient's insurance policy for reimbursement purposes. In the proceeding below in *Day*, the parties had submitted conflicting articles in medical journals as to the acceptance of chelation therapy.[270] In reviewing these materials, the trial judge had placed great weight on an article from the Journal of Holistic Medicine, which suggested that chelation therapy had been used extensively over twenty years and had resulted in fewer deaths than bypass surgery. On appeal, the appellate court found that this reliance was not "erroneous or arbitrary, unreasonable, or unconscionable."[271]

Moore and *Day* suggest the shifting contours of legal doctrines around alternative/complementary therapies. As alternative treatments gain recognition in medical education and literature, failure to disclose the treatment may violate informed consent, just as failure to reimburse for the treatment may violate the insurer's promise to pay for "medically necessary" services. Furthermore, as treatments such as chelation therapy gain in recognition and usage, the decision to sanction proponents for using such treatments suggests a posture on the part of some medical boards unable to recognize positive new treatments originating in the holistic community, rather than any concern for demonstrated patient injury. But contrary to *Guess*, cases such as *Rogers* indicate judicial reluctance to uphold medical board discipline merely for a physician's use of disfavored techniques, legislative grants of authority to sanction notwithstanding.[272]

3. Ozone Therapy

Robert C. Atkins was a New York physician who touted ozone therapy, an alternative cancer therapy used to avoid more invasive medical techniques.[273] Like chelation therapy, ozone therapy is disfavored by the mainstream medical community. Because of Atkins' use of ozone therapy, he became the target of a medical board disciplinary investigation. In *Atkins v. Guest*, he sought to quash a subpoena seeking records of a patient receiving ozone therapy, and an order compelling the Board for Professional Conduct to produce the complaint.[274]

Atkins' patient had been diagnosed with breast cancer, undergone a left mastectomy, "endured six months of chemotherapy," and was cancer-free for

---

corrective surgery was elective, and that conservative treatment plan involving diet and lifestyle modification was an option).

269. No. 88CA004463, 1989 Ohio App. LEXIS 2458 (Ohio Ct. App. June 21, 1989).

270. *Id.* at *4.

271. *Id.*; *but see* Westover v. Metropolitan Life Ins. Co., 771 F. Supp. 1172 (M.D. Fla. 1991) (dismissing an insured's claim for coverage of chelation therapy for arteriosclerosis, and finding that although procedure may have been widely used, nonharmful, and performed by a licensed physician with patient consent, the therapy failed to conform to generally acceptable medical standards).

272. To the extent that access to treatment acts represent freedom of choice for *patients* seeking holistic therapies, *see infra* part IV.C, *Rogers* stands for freedom of choice for *physicians* using such modalities.

273. Atkins v. Guest, 601 N.Y.S.2d 234 (Sup. Ct. 1993).

274. *Id.* at 234–35.

four years until a blood test indicated the presence of cancer cells.[275] At this point she consulted Dr. Atkins, who commenced ozone therapy and a nutritional program.[276] During the second week of treatment, the patient felt weak and was sent to a hospital, and thereafter transferred to another hospital's emergency room.[277] She was treated in a hyperbaric chamber and released with no apparent side effects or injuries.[278] The emergency room doctor who treated the patient complained to the Office of Professional Medical Conduct ("OPMC") about Atkins' treatment.[279]

In evaluating Atkins' motion to quash the subpoena, the court pointed to two unusual factors. First, the patient specifically had requested that OPMC not be permitted access to her medical records.[280] This was in fact an attempt by the patient to protect her doctor, since she willingly revealed her name in an affidavit in support of Dr. Atkins' petition to quash the subpoena.[281] Second, the "cloak of confidentiality" of the complaint was held waived since *the complaining doctor* publicized his complaint against Dr. Atkins in the press.[282] Whether motivated by concern for the patient or otherwise, the doctor openly characterized Atkins' ozone therapy as "quackery," pointing "at length" to the OPMC investigation.[283]

The court, however, rejected Atkins' assertion that he could not legally be found negligent or incompetent simply for practicing ozone therapy, observing that this issue was "best left up to the Board."[284] The court noted that to warrant the issuance of a subpoena in such an investigation, all that is necessary is "'some basis for inquisitorial action'...not a threshold substantiation of the charges made in the complaint."[285] The court refused to quash the subpoena, holding that the legislature intended the OPMC's subpoena powers in the course of an investigation to override the physician-patient privilege.[286] The court also refused to order release of the complaint for use by Dr. Atkins as the basis of a defamation action, finding this prohibited by the relevant statute's requirement that the complaint be kept confidential.[287]

There are elements in *Atkins* which resonate with the homeopathy and chelation therapy cases: the allegations of "quackery;" the emotionally charged origin of the complaint; the broad investigative powers of the medical board;

---

275. *Id.* at 235.
276. *Id.* at 236.
277. *Id.*
278. *Id.* The hyperbaric chamber is used to treat scuba divers suffering from the "bends," or nitrogen in the bloodstream. *Id.*
279. *Id.*
280. *Id.* at 237–38.
281. *Id.* at 237.
282. *Id.* at 236–37.
283. *Id.* at 237.
284. *Id.* at 238.
285. *Id.* at 237 (quoting *In re* Levin v. Murawski, 449 N.E.2d 730, 730 (N.Y. Ct. App. 1983)).
286. *Id.* at 238–39 (citing N.Y. PUB. HEALTH LAW § 230(10)(l)). The appellate court upheld the decision, citing the "important public interest in investigating misconduct by licensed physicians." 607 N.Y.S.2d 655, 657 (App. Div. 1994).
287. *Id.* at 239 (citing N.Y. PUB. HEALTH LAW § 230(11)(a)). The appellate court reiterated that the statute provides that such reports are confidential and may not be admitted in any administrative or judicial proceeding, and that such confidentiality "protects the Board's ability to gather information in aid of its investigations, now and in the future." *Id.* at 656–57.

the lack of attention to patient benefit or injury; and the licensee's lack of access to investigative information. As with homeopathy or chelation therapy cases, the physician using ozone therapy risks sanction and discipline for stepping outside the mainstream. The risk is particularly acute since, unless other representation is statutorily mandated, the political appointees who sit on state medical boards presumably represent the interests of medical orthodoxy.[288] Greater representation by alternative practitioners on medical boards at least would create a more open debate about the risks and benefits of particular procedures, and a focus on competence and conduct, rather than on the physician's relative conformity to orthodox medical practices and beliefs.[289]

4. Other Disfavored Therapies

Homeopathy, chelation therapy and ozone therapy are not the only therapies to draw the unfavorable attention of some state medical boards. Physicians substituting any mind-body therapy for medication, or even complementing standard medical treatment with a mind-body therapy, likewise may risk discipline simply for deviating from medical orthodoxy. Consider the following examples:

1. A surgeon teaches cardiac patients self-hypnosis to reduce post-operative depression and pain.[290]

2. A anesthesiologist dangles a pendulum to test a patient's chakras, or vortices of energy, and employs energy healing, running *chi* into a patient's kidney meridian, while reducing anesthesia levels as appropriate just prior to surgery.[291]

3. A psychiatrist treating a depressed, suicidal patient not only prescribes appropriate medication, but also mentions the Tibetan Book of the Dead for contemplation of what might happen immediately following suicide.[292]

4. A neurosurgeon consults with a healer to confirm the suspected diagnosis against her "intuitive diagnosis."[293]

The Chantilly Report, a report to the National Institutes of Health on Alternative Medical Systems and Practices in the United States, describes at least seven fields of practice which conceivably could be integrated into conventional medical practice by properly trained physicians:[294] (1) mind-body interventions (including meditation, imagery, and support groups), (2) bioelectromagnetics applications (for example, electroacupuncture), (3) alternative systems of medical practice (including, for instance, traditional oriental medicine, Aryuveda of traditional Indian medicine, and Native American Indian medical systems), (4) manual healing methods, (5)

288. On the subject of regulatory capture, see generally QUIRK, *supra* note 14.

289. *See infra* notes 492–93 and accompanying text.

290. *See* Chip Brown, *The Experiments of Dr. Oz*, N.Y. TIMES MAG., July 30, 1995, at 21, 23.

291. *See id.*

292. This example was conveyed to the author at the fifth annual meeting of the International Society for the Study of Subtle Energies and Energy Medicine in Boulder, Colorado.

293. *See generally* SHEALY & MYSS, *supra* note 136. Shealy, a conventionally trained neurosurgeon, reports that Myss, the healer, was 93% accurate in her "intuitive" diagnoses of patients. *Id.* at 74–78.

294. THE CHANTILLY REPORT, *supra* note 143, at xi–xxiii.

pharmacological and biological treatments not yet accepted by mainstream medicine,[295] (6) herbal medicine, and (7) focus on diet and nutrition in the prevention and treatment of chronic disease. Some of these practices are explored privately, others in prestigious medical schools and hospitals.[296] Physicians who offer such treatments risk loss of licensure and attempts by medical boards to curb deviance from orthodoxy.

In short, although physicians are said to have an unlimited scope of practice, once they deviate from orthodox notions of care, they are subject to medical board sanction under "prevailing practice" provisions[297] and other statutory language granting medical boards broad authority to discipline physicians. In fact, since complaints are initiated anonymously, the very fact that a physician chooses to employ the offending therapy makes the physician vulnerable to sanction.[298] The fact that unorthodox treatments are supported by data showing efficacy,[299] or are supported by significant numbers of

---

295. See *infra* part IV for a description of the proposed Access to Medical Treatment Act, which would authorize licensed caregivers to utilize treatments not yet approved by the Food and Drug Administration, provided certain disclosure requirements are met.

296. For example, Dr. Mehmet Oz, who has been pioneering research efforts to test hypnosis and energy healing, is at New York's Columbia-Presbyterian Medical Center, where he has created the Cardiac Complementary Care Center. *See* Brown, *supra* note 290; *see also supra* notes 171–77 and accompanying text.

297. *See supra* text accompanying note 219.

298. Physicians refer to this as the "tomato effect in medicine," which occurs "when an efficacious treatment for a certain disease is ignored or rejected because it does not 'make sense' in the light of accepted theories of disease mechanism and drug action." James S. Goodwin & Jean M. Goodwin, *The Tomato Effect: Rejection of Highly Efficacious Therapies*, 251 JAMA 2387 (1984) (cited in OBERG, *supra* note 197, at 8)). *See* David Reilly et al., *Is Evidence for Homeopathy Reproducible?*, 344 LANCET 1601, 1606 (1994) (discussing, in light of evidence that "homeopathy differs from placebo in an explicable but reproducible way," the objection that homeopathic dilutions lack significant molecules of the original substance). Reilly states:

> [W]e must ask if the technique of randomised [sic] controlled clinical trials is fundamentally flawed, and capable of producing evidence for effects that do not exist, by, for example, the effects of clinicians' expectation of outcome transmitted by subtle effects that circumvent even double blinding. To question the tool which has built most of today's pharmacological practice is no less perplexing than asking whether homeopathic treatments are active. Either answer suggested by the evidence to date—homeopathy works, or the clinical trial does not—is equally challenging to current medical science.

Id. at 1605–06. Reilly proposes that the answer may be more comfortable for theoretical physicists than pharmacologists. *Id.*

299. For example, on chelation therapy, see N. Lerner et al., *Chelation Therapy and Cardiac Status in Older Patients with Thalassemia Major*, 12:1 AM. J. PEDIATR. HEMATOL. ONCOL. 56 (1990); E. Olszewer & J. Carter, *EDTA Chelation Therapy in Chronic Degenerative Disease*, 27:1 MED. HYPOTHESES 41 (1988); Alessanolro Politi et al., *Reversal of Haemochromatotic Cardiomyopathy in Beta Thalassaemia by Chelation Therapy*, 73 BR. HEART J. 486 (1995); *but see* Ajit N. Bebu & Hephzibah Gonzalez–Pena, Letter, *Iron Chelating Agents Are Not Useful in Treating Atherosclerosis*, ANNALS INTERNAL MED., Sept. 1, 1994, at 384.

On ozone therapy, see Gary E. Garber et al., *The Use of Ozone-Treated Blood in the Therapy of HIV Infection and Immune Disease: A Pilot Study of Safety and Efficacy*, 5:8 AIDS 981 (1991); G. Ionescu et al., *Ozone Therapy: A New Therapeutic Method for Chronic Obliterating Arteriopathies*, 34:3 CHIRURGIA 207 (1985); *but see* B. Frankum & C. Katelaris, *Ozone Therapy in AIDS—Truly Innocuous?*, 159:7 MED. J. AUSTL. 493 (1993).

On homeopathy, see PAOLO BELLAVITE & ANDREA SIGNORINI, HOMEOPATHY: A FRONTIER IN MEDICAL SCIENCE 307–29 (1995) (citing studies); Jennifer Jacobs, *Treatment of Acute Childhood Diarrhea with Homeopathic Medicine: A Randomized Clinical Trial in Nicaragua*, 93 PEDIATRICS 719 (1994); Jos Kleiknen et al., *Clinical Trials of Homeopathy*, 302 BRIT. MED. J. 316 (1991); Reilly et al., *supra* note 298.

conventionally trained physicians,[300] does not prevent medical boards from stripping a target physician's license.

The twin issues of physician vulnerability and unfettered medical board discretion in disciplining physicians threaten medical freedom and innovation and unfairly discriminate against medical freethinkers. Moreover, once medical boards initiate an investigation, they may use unrelated grounds, such as inadequate record-keeping, as a means to control and contain good physicians whose medical philosophy simply differs from that of board members.[301] Use of multiple investigations to harass and contain doctors further abuses prosecutorial discretion in the guise of patient welfare.[302] Embattled practitioners may enter into settlements with state medical boards simply to avoid further censure.[303] This is not to say that medical boards should refrain from investigating and disciplining physicians whose conduct represents a demonstrable risk of patient harm, including diverting patients from beneficial treatments. Rather, medical boards adverse to holistic therapies should not remain free to set narrow boundaries of practice, stifle innovation, and chill physicians merely for integrating alternative and complementary therapies.

B. Exceeding the Scope of Chiropractic Practice

Disciplinary actions against nonmedical holistic practitioners frequently allege that the practitioner has exceeded the scope of statutorily authorized practice, and consequently, has practiced medicine.[304] Because statutes tend to

---

300. For example, ACAM's membership includes approximately 750 licensed physicians, who propose "that chelation therapy is a valid and proper course of treatment, based upon scientific rationale, supported by many published clinical studies, and consistent with sound medical practice." ACAM POSITION PAPER, *supra* note 199, at 1. Another organization, the American Academy of Environmental Medicine, has over 500 medical and osteopathic members, who believe that "a large number of acute and chronic illnesses may result when the functioning of...biologic systems is de-stabilized or disrupted by environmental stressors." OBERG, *supra* note 197, at 5.

301. Once a complaint is filed, the medical board need not limit its investigation to the specifics of the complaint. Alter v. New York State Dep't of Health, State Bd. for Professional Medical Misconduct, 546 N.Y.S.2d 746 (Sup. Ct. 1989).

302. *See* Glenn Warner, *Dr. Warner's License Revocation*, TOWNSEND LTR. FOR DOCTORS & PATIENTS, Aug.–Sept. 1995, at 10 (describing reinstitution of same charges four months after administrative law judge overruled first medical board findings).

303. *See, e.g.*, Sletten v. Briggs, 448 N.W.2d 607, 608 (N.D. 1989) (physician stipulated to cease prescribing chelation therapy for patients with arthrosclerosis, heavy metal poisoning, and strokes, and in stipulation agreed with medical board that such chelation therapy departs from acceptable and prevailing medical standards).

304. For example, in states that have not passed statutes licensing naturopaths, practitioners of naturopathy have been prosecuted for the unlicensed practice of medicine and chiropractic. *See, e.g.*, Feingold v. Commonwealth, State Bd. of Chiropractic, 568 A.2d 1365 (Pa. Commw. Ct. 1990); FURROW ET AL., *supra* note 49, § 3–7, at 64 (citing cases).

Such prosecutions suggest the extent to which the existence of licensure leads to rigid notions of professional activities. For instance, in *Feingold*, the practitioner's treatment consisted of the following: "crossing one of the investigator's legs over the other, and further placing his knee behind the investigator's knee while his hands were on the investigator's arms and shoulders...[until] a 'pop' sounded from the investigator's back." *Feingold*, 568 A.2d at 1365. Similarly, prosecutions of mental suggestion, massage, hypnotism, nutritional advice, and even ear piercing, suggest "how far courts are willing to go in supporting the medical profession's desire to protect its domain." Mark Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431, 453 n.80 (1988). The law in many ways "absorbs and reflects the values and relationships of traditional medicine." *Id.* at 447.

define holistic practices narrowly, as compared with the broader authorization for medical doctors, and because medicine is defined as encompassing such general activities as "diagnosing" and "treating," holistic practitioners easily push the boundaries of scope of practice.[305] Although scope of practice limitations are intended to ensure that practitioners act commensurate with their skill and training, and do not assume responsibility for health care beyond their specialty,[306] the limitations, as will be seen below, can be interpreted to enforce rather artificial distinctions between professional practices.

With chiropractic, the conflict over scope of practice is in some ways inevitable: chiropractors sometimes "claim to treat all kinds of conditions,"[307] or at least address spinal and nervous system issues in patients with a variety of conditions, whereas organized medicine claims the exclusive prerogative to diagnose and treat, and would rather limit chiropractors to spinal problems, or, ideally, eliminate them altogether.[308] Chiropractors' attempt to incorporate nutritional care into their practice has been especially controversial, and in many ways, parallels consumers' efforts to obtain greater freedom of access to vitamins, minerals and food supplements.[309] The controversy seems, in many ways, unjustified, since few medical doctors currently offer their patients specific nutritional support. The use of medical practice acts to prosecute chiropractors for incorporating nutritional suggestions may in fact reflect the historical medical antipathy to perceived encroachment by competitors.[310]

1. Chiropractors and Nutritional Care

Some statutes include nutritional care within the chiropractic scope of practice. For example, Louisiana provides that a chiropractor "may also make recommendations relative to the personal hygiene and proper nutritional practices for the rehabilitation of the patient."[311] Similarly, Massachusetts permits "dietary and nutritional advice, as treatment supplemental to a

305. Scope of practice issues in fact affect all nonmedical health care practitioners, whose authorized practices are deemed "limited" in comparison to those of physicians. For example, in *Lavergne v. Louisiana State Bd. of Medical Examiners*, a physical therapist who examined an athlete's injured ankle was sanctioned for "undertaking and purporting to diagnose and prescribe appropriate treatment" in violation of the Physical Therapy Practice Act. 539 So. 2d 656, 657 (La. Ct. App. 1989). The physical therapist had in fact told the patient that he should see a physician, and that until then he should keep ice on the ankle. *Id.* at 656. The court, reversing the decision of the medical board, disagreed with the board's conclusion that "a clear distinction can be drawn between medical diagnosis and physical therapy evaluation." *Id.* at 657.

306. *See, e.g.*, LaCour v. State, 522 So. 2d 33 (Fla. Dist. Ct. App. 1987) (upholding conviction of masseur who manipulated bony tissue, rather than merely massaging muscle tissue, for attempting to practice chiropractic without a license).

307. Wardwell, *supra* note 50, at 246.

308. *Id.* at 246–47. The issue may be largely economic and political, since many patients think of chiropractors as "back doctors" and "exercis[e] a quite rigid self-selection of the disabilities brought to chiropractors." *Id.* at 247. *See also* State *ex rel.* Dep't of Health v. Van Wyk, 320 N.W.2d 599, 601 (Iowa 1982) (describing "protracted philosophical dispute" between Iowa Department of Health and Board of Chiropractic Examiners over scope of chiropractic).

309. *See* Dietary Supplement Health and Education Act of 1994, Pub. L. 103–417, 108 Stat. 4325, (codified in scattered sections of 21 U.S.C. and 42 U.S.C.); *see also infra* notes 452–63 and accompanying text.

310. *See* Cohen, *supra* note 5, at 119.

311. LA. REV. STAT. ANN. § 37:2801(3) (West 1988).

chiropractic adjustment."[312] Other statutes include sale of nutritional products, as well as nutritional advice.[313] Still other statutes limit chiropractors' activities with respect to nutrition. For example, Iowa permits "rendering nutritional advice," but prohibits a chiropractor from "profit from the sale of nutritional products coinciding with the nutritional advice rendered."[314] Most statutes are silent on nutrition. In such cases, courts creatively strain to read nutritional care in or out of chiropractic practice.[315]

Stockwell v. Washington State Chiropractic Disciplinary Board[316] involved a disciplinary action against a chiropractor for selling or dispensing vitamins and, among other things, for practicing a form of acupuncture known as "meridian therapy." The chiropractor argued that the statutory prohibition on selling or dispensing vitamins and food supplements was inconsistent with separate statutory authorization for dispensing dietary advice.[317] The court disagreed, holding that although "dietary advice" constituted an exception to the statute, to be strictly construed, mere advice differed from prescribing vitamins to treat disease.[318] According to the court, even though the vitamins and food supplements prescribed by the defendant were readily available without prescription in retail stores, the items were "dangerous when improperly used," and presented "great potential for abuse" when prescribed to treat disease by "practitioners whose training and licensing requirements are limited."[319] The court thus seems to have drawn a line between advising on nutrition to improve health and using nutritional advice to "treat" disease; however, unless the provider encourages the patient to rely solely on nutrition, this may be a distinction without a difference.

As in *Stockwell*, *Foster v. Board of Chiropractor Examiners*[320] involved administrative proceedings to sanction a licensed chiropractor for dispensing nutritional substances to a patient. Although the substances which the defendant prescribed were sold without prescription and commonly available in health food stores, the state claimed that the chiropractor had engaged in prescribing drugs and thus exceeded his statutorily authorized scope of practice.[321] Georgia's definition of chiropractic was silent on nutritional care, but authorized "utiliz[ing] the inherent recuperative powers of the body..., particularly of the spinal column and the nervous system, in the restoration and

312. MASS. GEN. LAWS ANN. ch. 112, § 89 (West 1983). *See also* N.M. STAT. ANN. § 61–4–2(A) (Michie 1978) (authorizing use of "nutritional supplements, homeopathic remedies").

313. *See, e.g.*, COLO. REV. STAT. § 12–33–102(1) (1991) (authorizing "nutritional...measures necessary to such practice").

314. IOWA CODE ANN. § 151.1 (West 1989).

315. Perhaps to avoid further creative interpretation, Pennsylvania provides that including nutritional counseling within the scope of chiropractic practice should not be "construed to require licensure as a chiropractor in order to engage in nutritional counseling." PA. STAT. ANN. tit. 63, § 602(b) (repealed 1986).

316. 622 P.2d 910, 913 (Wash. Ct. App. 1981).

317. *Id.* at 914.

318. *Id.*

319. *Id.* (citing State v. Wilson, 528 P.2d 279 (Wash. Ct. App. 1974)). *See also* Norville v. Mississippi State Med. Ass'n, 364 So. 2d 1084 (Miss. 1978) (finding that chiropractor who recommended and prescribed vitamins and food supplements to his patients engaged in unlicensed practice of medicine); State v. Wilson, 528 P.2d 279 (Wash. Ct. App. 1974) (same; vitamins, minerals and food supplements were "drugs" within meaning of medical practice act since they were recommended to treat disease).

320. 359 S.E.2d 877 (Ga. 1987).

321. *Id.* at 878.

maintenance of health."[322] The statute also prohibited the use of "drugs or surgery," and provided that chiropractors could not "prescribe or administer medicine to patients."[323]

The defendant argued that nutrition is a proper part of chiropractic education and practice, and that the body's inherent recuperative powers cannot be restored without providing the proper vitamins and minerals, which are necessary for "the normal transmission...of nerve energy...essential to the restoration and maintenance of health."[324] The court, however, held that the legislature did not intend to extend chiropractic beyond "existing statutory authorization to adjust the articulation of the human body according to specific chiropractic methods."[325] It further held that Georgia law did not authorize chiropractors to prescribe or dispense vitamins, minerals or nutritional substances, and that such acts constituted the unauthorized practice of medicine.[326] The court appears to have relied on the limiting statutory language relating to drugs or surgery, rather than the broader statutory language referring to chiropractors' role in maintenance of health and flow of nerve energy.

Stockwell and *Foster* thus represent limiting approaches to scope of practice for holistic practitioners based on the notion that nutrition is properly conceived of as medical, and hence unavailable to chiropractors. Neither court addressed the defendant's argument that nutrition is an inherent part of supporting the body's recuperative powers, which is essential to chiropractic care, to the holistic view of health, and to the legislative definition of chiropractic as embracing a view of health geared to the whole being. Rather than relying on statutory language defining the practitioner's function expansively (e.g., assisting the body's inherent recuperative powers), the courts found the holistic practitioner to have invaded the province of medicine. The courts assumed that only medical doctors are authorized to "prescribe" and "treat," and that a line can be drawn between acts such as advice on one hand, and prescription or treatment on the other. The courts, however, were not able to draw this elusive line with any precision.

Nor have legislatures succeeded in line-drawing. The statutes seem to hedge the issue, attempting to tie the nutritional care into that elusive something which chiropractors do, which medical doctors do not do, which does not constitute medical prescription or treatment but has something to do with patients and health. The Massachusetts statute is one example ("dietary and nutritional advice, as treatment supplemental to a chiropractic adjustment"), as is Wyoming's chiropractic statute ("nutritional methods for which those persons licensed under this chapter are trained"), and West Virginia's statute, which does not expressly authorize nutritional care, but with crafted ambiguity states that "[p]atient care and management is conducted with due regard for environmental and nutritional factors."[327] Nutrition is a particularly interesting

322. *Id.* at 879 (quoting GA. CODE ANN. § 43–9–1(2)).
323. *Id.* (quoting GA. CODE ANN. §§ 43–9–1(2), 43–0–16(c)).
324. *Id.* (quoting GA. CODE ANN. § 43–9–1(2)).
325. *Id.* at 882.
326. *Id.*
327. MASS. GEN. LAWS ANN. ch. 112, § 89 (West 1983); WYO. STAT. § 33–10-101 (1977); W. VA. CODE § 30–16–2(c) (1993). *See also* WASH. REV. CODE ANN. § 18.25.005

issue in chiropractic scope of practice, since it involves a nontechnological path to wellness, embracing the patient's attempt at self-nourishment. In one sense, judicial efforts to limit chiropractors in this area suggest the medicalization of nutrition, just as birth, death, and procreation arguably have been medicalized.[328]

As with nutritional care, statutes vary as to whether they expressly prohibit[329] or permit[330] chiropractors' use of colonic irrigation. Most statutes are silent, leave no trace of legislative intent, and again invite courts to strain creatively against ambiguity.

For instance, in *Ohio State Board of Chiropractic Examiners v. Fulk*,[331] the court held that colonic irrigation was within the scope of chiropractic practice. Here, the defendant chiropractor had referred patients to an individual for colonic irrigations.[332] The individual was not a licensed chiropractor, was not licensed to perform such irrigations,[333] and was not supervised by the chiropractor. The court held that the colonic irrigations were "sufficiently related to hygienic and nutritional procedures in conjunction with musculoskeletal treatment" that it was not an abuse of discretion for the chiropractic board to find that the procedure fell within chiropractic practice.[334] Moreover, the relevant statute listed procedures which chiropractors were restricted from performing; colonic irrigations were not included.[335]

Although *Fulk* dealt with referral to an unlicensed practitioner, rather than the chiropractor's authorized practice, the decision suggests an alternative approach to *Stockwell* and *Foster*: finding a procedure within the scope of chiropractic practice precisely because it has not been expressly excluded. Rather than viewing chiropractic as a "limited" healing art, in contradistinction to medicine, the court viewed chiropractic expansively to include a broad range of procedures related to the goal of assisting the body through nutritional and hygienic measures along with spinal adjustment.

---

(1), (2), (4) (West 1989 & Supp. 1995) (allows "recommendation of nutritional supplementation except for medicines of herbal, animal, or botanical origin").

328. *See* Patricia Branca, *Towards a Social History of Medicine*, *in* THE MEDICINE SHOW 89–93 (Patricia Branca ed., 1977); Donna M. Peizer, *A Social and Legal Analysis of the Independent Practice of Midwifery: Vicarious Liability of the Collaborating Physician and Judicial Means of Addressing Denial of Hospital Privileges*, 2 BERKELEY WOMEN'S L.J. 139, 143–45 (1986) (describing medicalization of birth).

329. *See, e.g.*, N.H. REV. STAT. ANN. § 316–A:1 (1984 & Supp. 1994); WASH. REV. CODE ANN. § 18.25.005 (1), (2), (4) (West 1989 & Supp. 1995).

330. NEB. REV. STAT. § 71–177 (1990).

331. 617 N.E.2d 690 (Ohio Ct. App. 1992).

332. Colonic irrigation refers to "a cleansing of the colon or bowel with a liquid, normally water, many times under pressure," for hygienic and nutritional purposes. *Id.* at 692. The fluid returns through a tube and removes "junk" from the colon. *Id.* at 691–92.

333. The court did not address whether Ohio requires a license to perform colonic irrigations, which presumably would be relevant to the charge of engaging in unlicensed practice. On the other hand, some courts have held that "anyone...intending to practice the act of healing can be required to meet the standards set for the medical profession." Reisinger v. State Bd. of Medical Educ. and Licensure, 399 A.2d 1160, 1164 (Pa. Commw. Ct. 1979). Legislatures are not constitutionally required to enact statutes to cover a particular healing modality. Feingold v. Commonwealth of Pa., State Bd. of Chiropractic, 568 A.2d 1365 (Pa. Commw. Ct. 1990).

334. 617 N.E.2d at 692.

335. *Id.*

2. Chiropractors and Other Forms of Care

Similar problems arise when chiropractors attempt to use acupuncture.[336] Two states expressly permit chiropractors the practice of acupuncture,[337] while two others prohibit the practice.[338] Other state statutes are silent, resulting in litigation. Again, in the absence of legislative guidance, courts sometimes turn to their own conceptions of chiropractic as limited to spinal problems, or read such a limitation into legislative intent.

For example, in *Stockwell*, the defendant chiropractor, who included "meridian therapy" in his practice, was charged with practicing acupuncture. The therapy involved using pressure on acupuncture points on the body to relieve pain.[339] Interestingly, the chiropractor distinguished meridian therapy from acupuncture by arguing that acupuncture required the piercing of skin and thus was prohibited as a "surgical act."[340] No Washington statute or rule defined acupuncture, although the relevant statutes prohibited chiropractors from practicing "surgery" or from using needles to treat patients or holding themselves out as practicing acupuncture.[341] The court agreed that the chiropractor had not practiced "acupuncture,"[342] since he had not pierced the skin. Nonetheless, since the chiropractor had, among other things, prescribed and sold "massive doses" of vitamins, and had used urinalysis to detect cancer, the court found that revocation of his license was not arbitrary and capricious.[343]

In *Acupuncture Society v. Kansas State Board of Healing Arts*,[344] the court analyzed whether the Kansas legislature had intended to grant chiropractors the right to use acupuncture in their treatment.[345] The trial court, in denying chiropractors such right, had made a finding of fact that "[a]cupuncture, being neither 'fish nor fowl,' is a separate modality of treatment and is not a natural part of any other modality of treatment."[346]

Indeed, the Kansas Supreme Court, reversing, criticized the findings of "fact," and observed that acupuncture "[c]ertainly...was not a natural part of any other modality or treatment known to the branches of the healing arts

336. Chiropractors and other practitioners accused of violating scope of practice provisions face problems similar to those of physicians investigated by state boards. In Majebe v. North Carolina Bd. of Medical Examiners, 416 S.E.2d 404 (N.C. Ct. App. 1992), an acupuncturist sought injunctive and declaratory relief and damages relating to a criminal investigation for practicing medicine without a license. Pursuant to a request from the state Board of Medical Examiners, the attorney general obtained a warrant and searched plaintiff's clinic, seizing records and files. *Id.* at 405. The court held that the acupuncturist had no protected privacy to practice unorthodox medical treatment, and that the search and seizure did not violate the acupuncturist's privacy rights. *Id.* at 405–08.

337. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32–925 (1986 & Supp. 1994); COLO. REV. STAT. § 12–33–102(1) (1991) ("when performed by an appropriately trained chiropractor as determined by the Colorado state board of chiropractic examiners").

338. LA. REV. STAT. ANN. tit. 37, § 2801(3) (West 1988); OHIO REV. CODE ANN. § 4734.09 (Anderson 1994).

339. Stockwell v. Washington State Chiropractic Disciplinary Bd., 622 P.2d 910, 910, 914 (Wash. Ct. App. 1981).

340. *Id.*

341. *Id.*

342. *Id.* at 915.

343. *Id.*

344. 602 P.2d 1311 (Kan. 1979).

345. *Id.* at 1314.

346. *Id.* at 1313.

because it was not known to the Western World until the early 1970's [...but in fact] was adopted by all three branches of the healing arts [(medicine and surgery, osteopathy, and chiropractic)] in the early 1970's, and became a modality of their treatment."[347] The court further criticized the lower court's conclusions of law, including a holding that because acupuncture involves "the piercing of skin for treatment, not diagnostic purposes," it constitutes the practice of "surgery," legislatively forbidden to chiropractors.[348] According to the Kansas Supreme Court, "'[s]urgery is what surgeons do'—sever the tissues of the body for the purpose of penetration for treatment, replacement or removal of afflicted parts."[349] The court concluded that the piercing of skin by a solid wire or needle for the purpose of acupuncture was not "surgery."[350]

Other courts have followed the lower court in *Acupuncture Society* in denying chiropractors the right to practice acupuncture absent express legislative authority.[351] For example, in *Commonwealth v. Schatzberg*,[352] the court upheld a regulation by the State Board of Chiropractic Examiners, promulgated pursuant to advice from the State Attorney General, which stated that the practice of acupuncture was not within chiropractic scope of practice. Chiropractic, according to the court, is "limited" to "the relationship between...the nervous system...[and] misaligned or displaced vertebrae and other articulations."[353] Acupuncture, on the other hand, deals with the "vital essence of the human body [which] is a mixture of Yin and Yang...[and] is conveyed through the body in ducts or meridians which emerge at the surface of the body at certain designated points, at which points vital energy can be influenced by manipulation."[354] Acupuncture holds that "by inserting and

347. *Id.* at 1314.

348. *See id.* at 1313.

349. *Id.* at 1315. The prosecution had urged the Kansas Supreme Court to uphold a broad definition of surgery, not limited to procedures in hospitals involving major incisions in the body, but rather, embracing a "branch of medicine concerned with diseases and conditions requiring or amenable to operative or manual procedure." *Id.* at 1315 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY). The court, rejecting this broad definition, observed that the prosecution's position "would render the Healing Arts Act nonsensical," since the Act grants chiropractors the right to "'treat the human body by manual, mechanical...or natural methods or by the use of physical means,'" and a broad definition of "surgery" would include any "manual procedure." *Id.* (quoting KAN. STAT. ANN. § 65–2871 (1978 Supp.)).

350. *Id.* The court also found that the legislature had intended to permit chiropractors to practice acupuncture. The court relied on the fact that the legislature had authorized chiropractors, along with osteopaths, physicians and surgeons, upon meeting certain requirements, to use acupuncture in their practice to file a report for the legislature as to results of acupuncture; the legislature knew that acupuncture was being taught in accredited chiropractic schools; the legislature knew that acupuncture had been adopted as a modality of treatment by chiropractors; and the legislature "must have known of the analgesic values of acupuncture used and searched for by all branches of the healing arts to reduce the feeling of pain and relax the patient for treatment." *Id.* at 1316.

351. *See* Kelley v. Raguckas, 270 N.W.2d 665 (Mich. Ct. App. 1978) (holding that acupuncture is a surgical act and requires a license to practice medicine); Ohio v. Rich, 339 N.E.2d 630 (Ohio 1975) (holding that acupuncture constitutes the unlicensed practice of medicine, and that chiropractor who practices acupuncture has exceeded chiropractic scope of practice).

352. 371 A.2d 544, 544–45 (Pa. Commw. Ct. 1977).

353. *Id.* at 546 (citing the Chiropractic Registration Act of 1951, § 2(b)). An "articulation" is "'[t]he structure which unites two bones, usually allowing some movement.'" *Id.* at 546 n.3 (quoting J. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER A–247 (1974)).

354. *Id.* at 546.

manipulating needles energy may be supplied where lacking or calmed where present in excess."[355]

Crucial to the court's decision was its reliance on testimony that "'there is little but speculation on why or how acupuncture works'"; the notion that acupuncture is "of ancient Chinese origin and is based on the Chinese medical concept"; the legislative reference to chiropractic as a "limited science"; and the exclusion of chiropractors from the practice of medicine.[356] Each of these notions poses difficulties. For example, from the perspective of Chinese medicine, acupuncture encompasses a 5000-year-old complete and coherent system of knowledge. Similarly, the court's reference to "speculation" ignores mounting efforts to understand acupuncture within Western scientific models.[357] In the same way, although acupuncture does have Chinese origins, and chiropractic is of American origin, the two systems share a view of disease and healing based on energy-level dysfunction or imbalance: acupuncture focuses on the meridians, while chiropractic focuses the nervous system.

Many other activities by chiropractors have been held to exceed the chiropractic scope of practice. For example, in *State v. Beno*,[358] the Michigan Supreme Court held that the scope of chiropractic does not include a general physical examination of a patient complaining of low back pain and a sore elbow.[359] The defendant argued that chiropractors were authorized to "diagnose an elbow ailment to determine [whether the] cause is local (*i.e.*, originates in the elbow area) or results from nerve interference created by spinal subluxations or misalignments."[360] The Attorney General argued that "the treatment of or attempt to treat an extremity falls outside the statutory authority of a chiropractor and constitutes the practice of medicine."[361] The hearing officer concluded that "x-ray of an elbow is outside the scope of chiropractic," since the "statute is clear and it stretches logic as to how the x-ray of an right elbow is any way encompassed by" the statutory authorization.[362] Although the Board of Chiropractic maintained that "diagnosis may involve other parts of the body since the nerve network, efferent from the spinal column, affects other parts of

355. *Id.* at 545–47.

356. *Id.* at 546. *See also* Oregon v. Won, 528 P.2d 594 (Or. Ct. App. 1974)(upholding conviction of licensed chiropractor and naturopath who used acupuncture, without physician supervision, for practicing medicine without a license).

357. *See, e.g.*, V. Brewington, *Acupuncture as a Detoxification Treatment: An Analysis of Controlled Research*, 11:4 J. SUBSTANCE ABUSE TREATMENT 289 (1994); J. Kleijnen et al., *Acupuncture and Asthma: A Review of Controlled Trials*, 46:11 THORAX 799 (1991); Y. Li et al., *The Effect of Acupuncture on Gastrointestinal Function and Disorder*, 87:10 AM. J. GASTROENTEROLOGY 1372 (1992) (literature review supports the efficacy of acupuncture in the regulation of gastrointestinal motor activity and secretion through opiod and other neural pathways, although no firm conclusion can be drawn about the effectiveness of acupuncture in the treatment of specific gastrointestinal disorders because of the lack of properly randomized controlled trials). *See also* Beverly Rubik, *Can Western Science Provide a Foundation for Acupuncture*, 1:4 ALTERNATIVE THERAPIES HEALTH & MED. 41 (1995) (using the Zhang–Popp hypothesis, based on endogenous electromagnetic fields of the body, to accommodate puzzling features of acupuncture).

358. 373 N.W.2d 544 (Mich. 1985).

359. *Id.* at 546, 549–55.

360. *Id.* at 549–50.

361. *Id.* at 550. The Attorney General further argued that a chiropractor was limited to using x-rays to locate spinal subluxations or misaligned spinal vertebrae, and that a chiropractor who wanted to rule out a localized problem had to refer the patient to a physician. *Id.*

362. *Id.* at 551.

the body," the trial court found that "[i]t stretches credibility to conclude that the elbow is so related to the spine that spinal subluxations or misalignments may produce nerve interference in the elbow. The logic of this position would extend chiropractic through the entire body and even the brain!"[363]

While the trial court declined to recognize a relationship between the spine, nervous system, and elbow, the Michigan Court of Appeals accepted the chiropractor's view that "nerve interference efferent [from] the spinal column may produce symptoms in other parts of the body."[364] The Michigan Supreme Court, reversing, acknowledged the "hazy line between the jurisdiction of the health care professions," but emphasized its duty to interpret the law so as to secure "protection of the health, safety, and welfare of the people of this state."[365] The court adopted the view that the chiropractor was *not authorized to "examine the elbow* to determine if there is nerve interference," since "the existence of a spinal subluxation or misalignment cannot be observed by examin[ing] areas away from the spine that may be experiencing the pain of nerve interference."[366] The court reasoned that giving chiropractors such diagnostic authority could mislead the patient that a definitive diagnosis as to non-spinal injuries has been made, particularly in light of the chiropractor's testimony that "we must look wholistically, at the entire body."[367]

Although the court in *Beno* purported to follow legislative intent,[368] the opinion reflects a mechanistic view which separates the body into spine, elbow, and knee, and limits practitioners to one body part or technique.[369] This kind of thinking is echoed in decisions such as *Zabrecky v. Connecticut Board of Chiropractors*.[370] Here the court held that a statute authorizing chiropractors to "treat the human body...by the oral administration of foods, food concentrates, food extracts or vitamins," did not authorize the defendant chiropractor to inject substance or inform the patient how to inject a substance into the body.[371] According to the court, the purpose of the injection was "to treat the patient's cancer rather than any condition legally treatable by the practice of chiropractic." Although the court's conclusion may be unobjectionable under these facts, its language suggests a misreading of the statute, which does not authorize chiropractors to "legally treat," or limit chiropractors to the treatment of, a particular condition or range of conditions.[372] In other words, although chiropractic practice acts authorize chiropractors to engage in

363. *Id.*
364. *Id.* at 552.
365. *Id.* (quoting MICH. STAT. ANN. § 14.15(1111)(2)).
366. *Id.* at 552–53 (emphasis added).
367. *Id.* at 553 & n.7.
368. *See id.* at 553–55. Among other things, the court, analyzing the statute's plain meaning, found "nothing in this wording which shows an intent to authorize the treatment of areas other than the...spine." *Id.* at 555.
369. *Cf.* Kerkman v. Hintz, 406 N.W.2d 156, 161 (Wis. Ct. App. 1987) (observing that "chiropractic only minimally intrudes into the medical field," and relying on a chiropractor's testimony that a chiropractor does not diagnose and treat a diseased area of the body, but rather adjusts a subluxation in order to allow the body to restore itself).
370. No. 0702118, 1991 Conn. Super. Ct. LEXIS 2682 (D. Hartford Nov. 15, 1991).
371. *Id.* at *7.
372. *See also* Wengel v. Herfert, 473 N.W.2d 741, 744 (Mich. Ct. App. 1991) (legislative language leaves unclear "whether the practice of chiropractic includes the use of spinal manipulation to ameliorate conditions other than those *directly related to the spine*") (emphasis added).

therapies within a specified scope of practice, the statutes do not prohibit practitioners from seeing patients with particular conditions, such as cancer. Moreover, from a policy perspective, so long as the patient is not induced to rely on a chiropractic treatment to cure the cancer, there is no reason why a chiropractor should not be able to offer therapy to complement the patient's conventional medical treatment.[373]

The notion that chiropractors are limited to treating the spine, as distinct from the being, finds echoes in arguments made by the prosecution in *State Board of Chiropractic Examiners v. Clark*.[374] Here, a chiropractor was charged with exceeding his scope of practice, with engaging in the practice of medicine, physical therapy, and cosmetology, and with engaging in fraud, deception or misrepresentation in advertising his activities to the public. The chiropractor had used and advertised a helium neon laser, in conjunction with manipulation, for a treatment known as "bio-stimulation."[375] The device in question directed a beam of light toward certain points along "twelve energy channels" on the human body, known as acupuncture points.[376]

According to the chiropractor's testimony, use of the laser, in conjunction with manipulation, was a procedure taught and approved by Missouri chiropractic colleges.[377] The State Board of Chiropractic Examiners appealed the dismissal by the Administrative Healing Commission of its disciplinary action against the chiropractor. The Board's evidence against the chiropractor consisted of a deposition of the chiropractor, a "Talk Paper" issued by the Food and Drug Administration cautioning about use of the neon laser, and a copy of the chiropractor's advertisement.[378]

The relevant statute defined chiropractic as "'the science and art of examination, diagnosis, adjustment, manipulation and treatment of malpositioned articulations and structures of the human body.'"[379] The Board urged a narrow interpretation of this definition, limiting chiropractic to the "'science and art of palpating and adjusting by hand the movable articulations of the human spinal column.'"[380] The court disagreed, observing that bio-stimulation was a "reflex technique," and thus was permitted under existing Board rules allowing "[t]herapeutic exercise, muscle therapy, reflex techniques, postural and structural supports."[381] The court further noted that the Board acknowledged that it supported the development and teaching of expanded techniques such as biostimulation in chiropractic schools, and that the Board had failed to carry its burden of proof that the defendant had engaged in the practice of medicine, physical therapy, or cosmetology.[382] Finally, the court found no fraud, since

373. *See infra* part IV.A.
374. 713 S.W.2d 621 (Mo. Ct. App. 1986).
375. *Id.*
376. The chiropractor used biostimulation to tonify the muscles, among other things. *Id.*
377. *Id.*
378. *Id.* at 623, 626.
379. *Id.* at 626 (quoting MO. REV. STAT. § 331.010 (Supp. 1982)). A chiropractic "adjustment" consists of "a manual manipulation of a patient's spine for the purpose of replacing subluxated vertebrae." Kerkman v. Hintz, 406 N.W.2d 156, 157 n.2 (Wis. Ct. App. 1987).
380. 713 S.W.2d at 626.
381. *Id.* (quoting 4 C.S.R. § 70–2.030).
382. *Id.*

defendant had advertised a technique taught in chiropractic schools and in which he was trained.[383]

Although judges often ignore that part of statutory authorization linking chiropractic care to a broader, more holistic view of health and healing, the judicial stance toward chiropractors may evolve along the lines of the chiropractic profession itself. The profession has two schools of thought, the "straight" and "mixing" schools. The straight school of chiropractic focuses exclusively on analyzing the spinal column to detect and eliminate nervous system interferences known as "vertebral subluxations," and has no interest in adding medical procedures or services to chiropractic practice. The mixing school, on the other hand, uses a wide variety of procedures including manipulation of the body and soft tissues, massage, physical therapy, nutrition, acupuncture, counseling, hypnotherapy, and minor surgery. The mixing chiropractor believes in "expanding his professional armamentarium" to increase his or her professional range.[384] Thus, the "'mixer' is legislatively active to further broaden the law to...expan[d] his services."[385] To the extent that most chiropractors follow the "mixing" school, they threaten the medical profession by offering complementary or overlapping professional services. Scope of practice rules protect the medical profession from such competition by limiting chiropractors' ability to address disease. In this sense, scope of practice rules unfairly hinder chiropractors' attempts to offer fuller professional services.

---

383. *Id.* at 627.

384. *See In re* Sherman College of Straight Chiropractic, 397 A.2d 362 (N.J. Super. Ct. 1979). The case involved an appeal by the New Jersey Chiropractic Society of the New Jersey State Board of Medical Examiners' decision to approve the Sherman College for accreditation, thereby allowing the school's graduates to sit for the state examination and receive state licensing. The Society followed the "mixing" school of chiropractic philosophy. Because of the Sherman College's limited scope, the national Council on Chiropractic Education denied accreditation.

The Society argued that this denial rendered the College's application before the Board of Medical Examiners premature, if not unacceptable. A committee of the Board of Medical Examiners, consisting of a physician and two chiropractors who were of the "mixing" school, recommended against accreditation. The full Board disagreed. The Board found that the College met statutory requirements and taught diagnosis limited to services a chiropractor may by law provide, and therefore would be approved. The court, upholding the Board's decision, characterized the dispute as "an attempt by one school of thought to deny entry into the chiropractic ranks to adherents of doctrine disapproved by them." *Id.* at 364–65. The court noted that the legislative enactments failed to recognize either school specifically held that the Board's approval of Sherman College was "neither arbitrary nor capricious," and found no basis for overturning the Board's decision. *Id.* at 367.

385. *Id.* at 365. If courts do read chiropractic statutes expansively, however, chiropractors may face additional problems, such as increased malpractice liability. *See infra* part IV.B.1. Recently, for example, acupuncturists in Oregon have been granted the right to use Western diagnostic tests. *See* Paul Rosen, *Issues Surrounding Primary Care Status and Incorporation of Western Modalities*, *in* ACUPUNCTURE LAWS, *supra* note 107, at 133, 133. *See also* OR. REV. STAT. §§ 677.757(1)(b)(A) (1995 Supp.) (authorizing acupuncturists to engage in "[t]raditional and modern techniques of diagnosis") and 677.762(3) (providing that legislation does not prohibit dispensing vitamins or minerals or dietary advice). Changing the standard of acupuncture care to include Western modalities irrevocably alters the way acupuncturists legally can function. Acupuncturists who feel Western tests "have no place in Oriental medicine" will be held liable for failing to order such tests, and will be forced to order Western tests "defensively which is one the very behaviors for which we criticize our western practitioner cousins." Rosen, *supra*, at 134.

Most chiropractic acts, if read broadly, seem to contemplate the mixing approach, giving chiropractors the authority to use a variety of methods to ameliorate nervous and spinal problems in patients with any condition. Whether they are unduly protecting medical interests, overprotecting patients from chiropractic practice, or simply reading statutes narrowly, courts tend to impose the "straight" view upon the chiropractic profession, prohibiting patient access to a broader range of healing.

C. Regulatory Distortions

In sum, the current regulatory scheme embodies a strong dose of paternalism in aiming to protect patients from their own ill-advised choices. To this end, licensing statutes grant medical doctors unlimited authority, and nonmedical competitors a more limited authority to help patients heal. Medical doctors' unlimited authority in turn is subject to unlimited medical board power to sanction deviance. Nonmedical providers' authority is subject to prosecutorial power to enforce statutory prohibitions on the unlicensed "practice of medicine." Such strong paternalism is unjustified, given that consumers can and do choose to address their health needs, in many states, by visiting licensed chiropractors, acupuncturists, naturopaths and others, and by relying on self-care and nutrition, including dietary supplements which they purchase in health food stores.[386]

But even if strong paternalism were necessary, prevailing legal rules distort health care by chilling providers who offer holistic therapies, effectively limiting patient access to alternative and complementary modalities. Drawing distinctions between advising and treating or prescribing does not adequately separate medical from nonmedical professionals, since these definitions frequently overlap,[387] and, in fact, in many cases have been legislatively defined so as to overlap.[388]

The premise that only medical doctors diagnose and treat disease assumes that practitioners address only parts, not wholes (e.g., the conception that chiropractors deal not with human health as a whole, but only with the spine).[389] If disease reflects a combination of causes, some biological and others

386. *See infra* notes 457–63 and accompanying text; Cohen, *supra* note 5, at 139 (evaluating whether the criteria for strong paternalism apply to access to alternative and complementary medicine).

387. *See* Rosenberg v. Cahill, 492 A.2d 371, 377–78 (N.J. 1985) (noting that "it is clear from the statutory and regulatory scheme that there is an 'overlap' between the medical and chiropractic professions with respect to both the use of x-rays and the diagnosis of conditions that may require medical attention," and that "[w]ith respect to...diagnosis, there is a commonality of education, training, and licensure between the chiropractic and medical professions").

388. *See supra* part I.B.2 (citing statutes authorizing nonmedical professionals to diagnose and treat).

389. This premise undergirds not only scope of practice decisions in chiropractic, but also decisions concerning fields such as podiatry. *See, e.g.*, DeHart v. State Bd. of Registration in Podiatry, 293 N.W.2d 806, 810 (Mich. Ct. App. 1979) ("Essentially, then, a podiatrist is one who treats ailments of the human foot, a limited practitioner who is only authorized to treat human feet. A podiatrist is not a medical or osteopathic doctor who specializes in treatment of the foot."). Curiously, the court observed that chelation therapy "affect[s] the whole body of the patient and not just ailments of the foot," and thus is outside the scope of practice of podiatry. *Id. Cf.* OBERG, *supra* note 197, at 49 (arguing that "this notion that it is appropriate to artificially divide the body into isolated organs or systems that are then jealously guarded as the provinces

connected to lifestyle, stress, mindset or imbalance, and if healing entails—in addition to medicine—restoring balance, freeing the flow of "nerve energy" or "vital energy," and inviting the patient's own inner resources as agents of self-healing, then nonmedical practitioners have a more significant role to play in diagnosis and treatment.

Finally, the regulatory scheme fragments the pursuit of health by assuming that all healing must come from a medical doctor. If the individual is an organic whole, rather than "a collection of accidents put together like an artificial patchwork,"[390] then a regulatory scheme designed to protect public health and healing should protect wholeness and whole-making.[391] This implies addressing health as a synthetic unity, rather than a collection of parts, and using the law to mirror wholeness, the goal of health care itself.[392]

IV. REGULATORY REFORM

The extensive statutory scheme credentialing alternative and complementary health care professionals suggests the extent to which health care has moved from a paradigm of strict medical orthodoxy, to a creative synthesis in which complementary modalities flourish. The physician is no longer sole gatekeeper to health, but rather one provider who functions cooperatively and integratively with other health care professionals, and with the patient, in the task of care and healing.

In this collaborative scheme, the physician employs medical diagnosis and treatment, while other professionals have roles, according to their training and skill, in the process of healing. For example, a patient undergoing chemotherapy under a physician's care might receive nutritional advice, massage therapy, acupuncture, energy healing, and counseling to support the client's return to wholeness. The nutritionist, massage therapist, acupuncturist, healer and counselor each are "treating" the patient, but they are focusing on healing the person, rather than curing the disease. Their healing may focus on emotional, nutritional and other components of the disease process, as expressed in the body, rather than on the biochemical aspects of illness. They may work on imbalances reflected in the musculature, nervous system, digestive system, or meridian system, but these professionals will not prescribe pharmaceutical drugs, sever tissues, or utilize medical techniques and procedures. Such an integrative approach, which fully respects the possibilities and limits of both

---

of separate specialties may be useful for the political and economic agendas of medicine, but it defies the true nature of how the body works").

390. *See supra* note 123 and accompanying text.

391. There are additional reasons why scope of practice distinctions as currently interpreted by courts are unworkable. For one, the shift in focus in health care in this century from infectious diseases to chronic, long-term illness has suggested the limitations of a monolithic approach to health and well-being. This is underscored by the creation of an Office of Alternative Medicine at the National Institutes of Health. Further, issues surrounding patients in persistent vegetative states, anencephalic infants, "frozen embryos," and other bioethical dilemmas, as well as the debate over health care reform and the crisis of cost in health care, have suggested the limitations of a healing system based on technological intervention. *See generally* CALLAHAN, *supra* note 13. Finally, the emerging notion of freedom of access to medical treatment, along with licensing of chiropractors, naturopaths, homeopaths, and massage therapists, suggests that orthodox medicine may have reached its zenith as an exclusive and authoritative provider. *See infra* part IV.C.

392. *See supra* notes 152–60 and accompanying text.

medicine and nonmedical healing, would facilitate patient access to the full spectrum of health care approaches.[393] To support such an approach within a more appropriate framework of consumer protection, I propose the following regulatory reforms:

1. Expand the scope of practice legislatively authorized to chiropractors and other providers to clarify the inclusion of nutritional guidance and related ancillary modalities; relax judicial limitations on providers' scope of practice.

2. Replace criminal sanctions, embedded in medical practice acts, with contractual arrangements, clarifying rules and expectations, and heightened tort law duties for alternative and complementary providers whose claims and practices exceed professional boundaries. This can include applying, where appropriate, the medical standard of care, the tort law duty to refer, and tort liability for misrepresentation.[394]

3. Enact legislation to protect the patient's interest in freedom of choice in health care. Such freedom of access laws would include federal legislation curbing enforcement actions against physicians who use unorthodox therapies, state legislation modifying state "prevailing practices" rules to recognize the requirement of patient injury prior to medical board sanction, and other state laws shielding physicians who use innovative or complementary approaches from discriminatory medical board sanction.

A. Relaxing Scope of Practice Limitations

1. Expanding Statutory Authorization for Complementary Providers

As noted, when courts find that alternative and complementary providers have exceeded their legislative authorization or scope of practice and have unlawfully practiced "medicine," the decisions rarely reflect a clear vision of legislative wisdom or public policy. Rather, the decisions reflect confusion over scope of practice boundaries, deference to medical dominance and orthodoxy, and references to unorthodox providers as "cultist," "fringe," "marginal," and "quacks."[395] Courts finding scope of practice violations frequently do little better than legislators in attempting to delineate the distinctions between

---

393. Such an integrative approach has numerous potential benefits. For example, acupuncture, when added to conventional treatment for stroke victims, reduces recovery time by 50% and costs by $26,000 per patient. Robert M. Duggan, *Complementary Medicine: Transforming Influence or Footnote to History?*, 1:2 ALTERNATIVE THERAPIES IN HEALTH & MED. 28, 30 (1995) (citing K. Johansson et al., *Can Sensory Stimulation Improve the Functional Outcome in Stroke Patients?*, 43 NEUROLOGY 2189, 2189–92 (1993)). Premature infants receiving massage therapy gained more weight and had shorter hospitals stays than the control group, resulting in a reduction of $3,000 in managed care costs. *Id.* (citing T. Field et al., *Tactile/Kinesthetic Stimulation Effects on Preterm Neonates*, 77:5 PEDIATRICS 654, 654–58 (1986)). Biofeedback and behavioral medicine, when integrated into conventional care, dramatically reduced treatment costs. *Id.* (citing R. SHELLENBERGER ET AL., CLINICAL EFFICACY AND COST EFFECTIVENESS OF BIOFEEDBACK THERAPY (1989)).

394. At the same time, medical practice acts should be amended to redefine the "practice of medicine" in terms of "medical" diagnosis and treatment, which in turn will limit the broad concepts of diagnosis and treatment in medical practice acts to medical education, training and skills, rather than to the entire spectrum of healing. *See* Cohen, *supra* note 5, at 148–50.

395. *See supra* note 63. *See also* Ian D. Coulter, *Chiropractic Observed: Thirty Years of Changing Sociological Perspectives*, 3:1 CHIROPRACTIC HIST. 43 (1983) (criticizing the conceptual framework created by Walter Wardwell and others which conceived of chiropractic as a socially "deviant" or "marginal" profession).

services legally offered by medical doctors and those of acupuncturists, naturopaths, chiropractors, and other competitors to medicine.

State legislatures can better guide judges by clarifying the scope of practice for these nonmedical professions. Legislatures can hold public hearings on the various professions and determine whether to include or exclude such specific activities as prescribing and dispensing vitamins, drawing blood for samples, taking x-rays, and utilizing acupuncture. Such hearings will allow providers to update legislatures on developments in their field of practice, to determine areas of overlap with medicine, and to refashion boundaries of each discipline within an integrated healing model. For example, to the extent chiropractic has evolved from the straight to the mixing school, the statutory language can indicate a broader range of authorized practice. On the other hand, to the extent chiropractors focus on spinal subluxations as indicators of overall health, and lack the full training of medical doctors, expanding scope of practice to include such procedures as CAT scans may be inappropriate.

Reopening the scope of practice question at the legislative level also will place medicine and competing health care professions on a more even footing. Orthodox medicine, while conceived by courts as having an unlimited scope of practice, actually has scope of practice limitations, since physicians without proper training cannot perform acupuncture, spinal manipulation, herbal treatment, or other such therapies. Expanding the scope of practice of chiropractic and other disciplines, as appropriate, may in fact place boundaries around medicine's scope of practice, and thus refashion the way regulators conceive of health care.

Redefining scope of practice will require both flexibility and precision. While loose statutory definitions provide leeway to read scope of practice authorization broadly, courts, as we have seen, tend to read statutes narrowly and look for more specific grants of authority. Legislatures can provide greater guidance and reduce providers' risk of criminal prosecution for unauthorized medical practice by specifically authorizing particular modalities or procedures as they evolve into professional practice. For example, an authorizing statute could expressly permit or prohibit chiropractors from taking throat cultures and urinary samples, making Pap smears, and conducting complete physical examinations.[396] Similarly, the licensing statute could authorize chiropractors to provide nutritional guidance, as follows: *A chiropractor may provide dietary and nutritional advice and may recommend or dispense dietary and nutritional supplements, including homeopathic remedies. In such case, a chiropractor shall not be deemed to be practicing "medicine" within the medical practice act, nor shall dietary/nutritional guidance be deemed to constitute "prescription" or "treatment" under the medical practice act, provided that no prescription medications are ordered or dispensed.*

396. Some courts have found these activities to be beyond chiropractors' scope of practice. *See, e.g.*, People v. Bovee, 285 N.W.2d 53 (Mich. Ct. App. 1979) (chiropractor who took throat cultures and urine samples was practicing medicine unlawfully, since such procedures could not reveal the existence of misaligned or displaced vertebrae); Spunt v. Fowinkle, 572 S.W.2d 259 (Tenn. Ct. App. 1978) (drawing and analyzing blood, making Pap smears, and conducting complete physical examinations exceeded scope of practice). *See also In re* Stockwell, 622 P.2d 910 (Wash. Ct. App. 1981) (upholding revocation of chiropractor's license for using urinalysis to detect cancer).

Under this statute, for example, a chiropractor—without invading the practice of medicine—could tell a patient who has kidney stones that asparagus juice "contains the alkaloid asparagine, which reduces acidity of the blood and cleanses the tissues and muscles of waste."[397] A patient with anxiety could be advised that "[c]elery juice has a calming effect on the nervous system."[398] The chiropractor might recommend B-complex vitamins to strengthen the nervous system, or dispense a nutritional product or homeopathic preparation to relieve sports injuries.[399] By directly prohibiting use of prescription medications, the statute would ensure that chiropractors do not exceed the scope of their training.

Authorizing specific areas of professional practice in this way—such as the provision of dietary and nutritional guidance—would resolve the need to draw subtle and elusive distinctions between "advising" and "prescribing," or between "dietary advice" and "treatment."[400] Clearer statutory language would serve as the obvious antidote to judicial perplexity. At the same time, legislative authorization for specific activities could have the effect of stifling development by limiting practitioners to the enumerated activities. For example, if chiropractors begin incorporating energy healing,[401] a prosecutor could argue that because the practice is not expressly authorized, it invades the province of "medicine." Requiring statutory authorization for every new development in the profession would create a burden on practitioners and legislators.[402] Inevitably, practitioners will engage in new therapeutic modalities as their science and art unfolds. The question then would arise—for example, with chiropractors—as to whether such actions are sufficiently related to spinal adjustment to be considered within the scope of chiropractic, or should be classified as the unlawful practice of medicine.[403] The scope of practice question becomes thornier as chiropractic education and practice move closer to medicine.[404]

---

397. STEPHEN BLAUER, THE JUICING BOOK 32 (1989).

398. *Id.* at 39.

399. For example, homeopathic preparations might be appropriate for injuries such as "runner's knee," shin splints, sprains, and tendinitis. *See* DANA ULLMAN, DISCOVERING HOMEOPATHY: MEDICINE FOR THE 21ST CENTURY 175–83 (1991) (describing uses of homeopathy in sports medicine).

400. Of course, a chiropractor who attempts to feed a patient celery juice in the midst of a psychotic outbreak would probably be liable for malpractice, not to mention disciplinary proceedings. Chiropractors are required by their Code of Ethics to refer patients to physicians when appropriate, and in any event, have a common law duty to refer. *See infra* notes 440–41 and accompanying text.

401. *See* Cohen, *supra* note 5, at 88–92.

402. *See* State *ex rel.* Dep't of Health v. Van Wyk, 320 N.W.2d 599, 604 (Iowa 1982) (noting chiropractors' argument that they should "not be locked in to the level of professionalism that existed for them long ago," but should be free to develop chiropractic "without being required each time to seek a legislative enactment").

403. *See, e.g.*, Jutkowitz v. Department of Health Servs., 596 A.2d 374, 384 (Conn. 1991) (rejecting chiropractor's argument that statute authorizing methods of diagnosis taught in recognized chiropractic schools "merely establishes the scope of diagnostic techniques that are presumptively valid, and...does not limit chiropractors to the use of diagnostic techniques that are taught at a school or college of chiropractic approved by the board"); Kuwik v. Starmark Star Mktg. & Admin., 597 N.E.2d 251, 253 (Ill. App. Ct. 1992) (discussing whether treatment of Epstein–Barr virus or systemic Candidiasis is within the scope of chiropractic knowledge and licensure).

404. As alternative medicine becomes more mainstream, it moves closer to regular medicine and eviscerates scope of practice boundaries. *See* Susan M. Hobson, *The Standard of*

As noted earlier, current legal definitions in large part reflect relations between orthodox medicine and alternative providers, which tend to be "unstable, full of unresolved conflict and tension."[405] In orienting their efforts toward integrated health care, legislators face a difficult task in crafting appropriate legal definitions. The very nature of healing defies legal definition, whether the definition involves the more conventional notion of "treatment" or the more specific notion in acupuncture of "improving...the flow of vital energy." Legal definitions are inherently reductive and unsatisfying, especially in describing specific therapeutic modalities outside conventional medicine. For example, in defining massage therapy as "rubbing, stroking, kneading or tapping with the hand or an instrument or both,"[406] legislators are attempting to articulate in legal terms a therapeutic exchange that occurs at a far less mechanical, and more subtle, level—one which does, despite definitional boundaries, involve treatment or healing.[407] The same problem arises in defining chiropractic in terms of facilitating transmission of nerve energy. In other words, the definitional deficiency in scope of practice results not so much from the lack of legislative precision as from the inherent ambiguity in the enterprise of healing.

A useful analogy to the problem of defining scope of practice is that of the spectrum of color in a prism: the spectrum shows a gradual change between colors, rather than discrete points where one color ends and another begins.[408] Thus, "drawing lines between groups of practitioners based on scope of practice definitions that are as broad as the description of a color is futile."[409] Functional definitions such as "diagnosis" and "treatment" simply do not and can not capture what it is that medical doctors, as opposed to other healing professionals, actually do.[410] Scope of practice by its nature creates fuzzy boundaries, since professional functions tend to overlap.[411]

Admissibility of a Physician's Expert Testimony in a Chiropractic Malpractice Action, 64 IND. L.J. 737, 752 (1989) (proposing that training "bring the chiropractor's education closer to the physician's in the diagnosis area" to avoid routine liability of chiropractors for failure to make proper diagnosis).

405. *See supra* note 53 and accompanying text.

406. COLO. REV. STAT. § 12–48.5–103(5) (1991).

407. While sometimes dismissed as simply being "relaxing," bodywork has been recognized as much more rich and complex. Many diseases are theorized to originate in emotional distress, stored in the body in what Wilhelm Reich called "muscular armor." *See, e.g.*, STEPHEN M. JOHNSON, CHARACTEROLOGICAL TRANSFORMATION: THE HARD WORK MIRACLE (1985); ALEXANDER LOWEN, THE LANGUAGE OF THE BODY (1958). Massage therapy also may have important implications in the corporate environment, where, in a preliminary study, the treatment enhanced alertness, reduced fatigue, and allowed employees to complete math problems with approximately 50% fewer errors and in half the time required without massage. Richard A. Lippin, *Alternative Medicine in the Workplace*, 2:1 ALTERNATIVE THERAPIES IN HEALTH & MED. 47, 48 (1995).

408. The analogy comes from Sandra H. Johnson, *Regulatory Theory and Prospective Risk Assessment in the Limitation of Scope of Practice*, 4:4 J. LEGAL MED. 447, 449 (1983). Johnson does not address scope of practice considerations involving nonmedical practitioners such as homeopaths and naturopaths. *Id.* at 447 n.1

409. *Id.*

410. *See supra* notes 387–88 and accompanying text.

411. For example, in Iowa, a registered nurse is authorized to "[f]ormulate nursing diagnosis and conduct nursing treatment...." IOWA CODE ANN. § 152.1.2.a (West 1994). For the most part, regulators have not effectively differentiated the meaning of medical, nursing, and other kinds of "diagnosis." Johnson, *supra* note 408, at 453.

Scope of practice is, to a large extent, a mechanistic concept: it reflects the idea that the enterprise of healing can be carved into neatly severable and licensable blocks.[412] Each healing nonmedical profession operates in a holistic rather than mechanistic fashion—i.e., it affects the whole being, since neither muscles, nor emotions, nor spines can be subject to healing without affecting the individual as a whole. Each profession necessarily diagnoses and treats the disease or condition of a whole being. In a sense, the scope of practice boundary might be better drawn by specifying what nonmedical professionals may *not* do—for example, sever tissues, suggest prescription medication, or induce patients to defer or avoid medical consultation. The nonmedical professional may not offer a *medical* diagnosis or treatment.[413] At the same time, narrowing medical practice acts to more accurately reflect medical practitioners' skill and training may help free nonmedical practitioners from prosecutions based on ambiguous allocation of practice authority.[414]

2. Liberalizing Judicial Interpretation

When courts lack clear legislative guidance, they interpret statutes restrictively—upholding convictions of nonmedical practitioners for practicing "medicine"—or liberally, finding treatments within providers' authorized scope of practice. In the restrictive scenario, courts interpret statutes to prohibit whatever practice is not expressly mentioned (as in *Stockwell*). In the liberal scenario, courts interpret statutes to permit what is not expressly prohibited (as in *Fulk*). The strict reading does not mesh with extensive statutory references to nonmedical diagnosis and treatment, and with statutory references to broad concepts such as "vital energy" and facilitation of self-healing. The liberal reading challenges the monolithic view that ascribes all "treatment" to medical doctors. The liberal reading does accord, however, with the distinction between "curing" and "healing." If modalities such as chiropractic entail utilizing the body's self-healing powers, then adjusting the spine to restore the free flow of nerve energy, like good nutrition or using acupuncture to restore *chi*, vital energy, has some positive effect on healing—even if it does not result in "curing" a disease.[415]

Healing is a process involving the whole person—curing, a biochemical and physiological result. Providers are not practicing "medicine" when they

412. Johnson agrees that "[n]o statute can accurately, unambiguously, and completely define desirable delegation of medical tasks or permissible independent practice," and proposes that the task be relegated to a multi-disciplinary regulatory board, which would empirically assess risks of mistaken choices by consumers. *Id.* at 450, 450–64.

413. For example, orthodox medicine can be said to use "morphological diagnosis," which emphasizes identifiable local signs and symptoms, whereas alternative medicine adopts a more "functional" diagnosis, such as observing dietary habits, muscular tension, energetic flow along acupuncture meridians, mental and emotional habits, body constitution, and type of pulse. Aakster, *supra* note 140, at 267. *See also* Cohen, *supra* note 5, at 148–49 (distinguishing medical diagnosis from energy healer's "energy diagnosis").

414. *See supra* note 394.

415. When a patient visits a chiropractor or massage therapist, for example, the patient may experience emotional as well as physical releases, which theoretically could affect, for example, a prostate condition or ovarian cyst. Similarly, surgically opening a patient's heart presumably has emotional as well as physiological implications. *Cf.* Aakster, *supra* note 140, at 268 (observing that alternative medicine aims at "strengthening the healing forces of the organism" so that results may be slower and less dramatic, although they therefore may be inappropriate "where the disease process progresses faster than the rebuilding process").

complement the healing process, rather than assume complete responsibility for the uncovering of causes and eradication of symptoms.[416] The regulatory concern behind scope of practice supports this conclusion. Scope of practice aims to prevent patients from overrelying on nonmedical providers and thus losing the opportunity to receive proper medical diagnosis and treatment. Thus, the nonmedical provider exceeds scope of practice when the provider fails to inform the patient that the patient is not receiving a medical diagnosis and treatment and should consult a licensed physician regarding the underlying condition.

For example, a chiropractor and massage therapist would be required to inform a client that manipulation and massage may help clarify emotional issues expressed in the body, but that chronic depression requires a consultation with a psychiatrist.[417] Similarly, naturopaths may recommend nutritional and homeopathic remedies for chronic fatigue syndrome, in conjunction with a visit to a physician for any necessary laboratory and other diagnostic tests. Providers will need to exercise judgment as to when the patient's presenting complaint, be it depression or fatigue, augurs referral to medical doctors. The duty to refer, heightened malpractice standards, and the tort of misrepresentation, discussed below, provide mechanisms to keep providers' services and representations within their experience and training. To distinguish activities which complement the curative process, rather than purport to substitute for medical care, is to assign scope of practice an appropriate, but not punitive role in an integrated system of complementary healing professionals.

B. Heightened Tort Law Duties

Because the definitional requirements for criminal liability rely on vague concepts such as "diagnosis" and "treatment," tort liabilities provide more appropriate tools for sanctioning practitioners who exceed professional

---

416. Ultimately, technological advances may frustrate the broad view of "diagnosis" and "treatment." The information network promises to alter radically the way individuals respond to disease. For example, an individual interested in treating himself can use his home computer, access the Internet, and obtain a wealth of information on naturopathic remedies. *See, e.g., Natural Medicine on the Internet: Natural Medicine, Complementary Health Care and Alternative Therapy*, 143 TOWNSEND LTR. FOR DOCTORS & PATIENTS, June 1995, at 16. The website listed is http://www.teleport.com:80/~amrta. A second website provides introductory information on IBIS, the Interactive BodyMind Information System.

Cyberspace databases include herbs, alternative medicine research, aromatherapy, chiropractic, medicinal and aromatic plants, homeopathy, holistic living, oxygen and ozone therapies, wellness, aryuveda, hypnosis, meditation, diet, healing rituals, shiatsu, Reiki healing, and t'ai chi. Amos Jessup, *The Healing Highway: Alternative Health and the Internet*, 1:2 ALTERNATIVE THERAPIES HEALTH & MED. 14 (1995). The Internet may afford individuals unlimited access to information about therapies and treatments, as well as the possibility that anonymous strangers from around the globe can "diagnose," "treat," or "prescribe" for the enumerated disease. *See, e.g.*, http://qurlyjoe.bu.edu/cducibs (URL cite for herbal remedies for irritable bowel syndrome, listed in Jessup, *supra*, at 15, tbl. 3).

In fact, if Internet databases include acceptable studies showing superior results and lower risk factors for, say, naturopathic or homeopathic treatments, as opposed to medication and surgery, then medical doctors who fail to include such procedures in obtaining a patient's informed consent may be liable for malpractice. *Cf.* FURROW ET AL., *supra* note 49, § 6–2, at 240 (noting that "physician relying on a contraindicated drug, an outdated surgical technique, or an inappropriate description of risk factors in getting a patient's informed consent may be attacked by the plaintiff using the results of a computer search").

417. On the duty to refer and liability for misrepresentation, see *infra* notes 440–51 and accompanying text.

boundaries. The function of tort law is to compensate an injured party for the harm suffered, whereas with crimes, the state brings the proceedings, and "there is an emphasis on a bad mind, on immorality."[418] Because the lines between professional functions are blurred, because providers offer complementary services, and because providers may not be expected to know when they have given nutritional "advice," for example, as opposed to "treatment,"[419] scope of practice violations lack the "immoral behavior"[420] necessary for criminal prosecution.[421] Unless a provider intends to derail a patient from proper medical care, examining an elbow to determine whether chiropractic treatment even is warranted hardly seems suited to criminal liability. Moreover, tort law remedies are more consistent with the notion that tort law emphasizes harm, whereas criminal law emphasizes behavior without the requirement of harm.[422] As we have seen, scope of practice violations have been found irrespective of patient harm. To some extent, criminal liability itself reflects medical orthodoxy's dominance and dismissal of alternative providers.

Tort law remedies serve patients and providers from the perspective of setting an appropriate level of deterrence. If, from some physicians' perspectives alternative and complementary providers all are "quacks," then the maximum level of deterrence through criminal sanctions is socially desirable. On the other hand, if nutritional and homeopathic remedies, emotional adjustments, lifestyle changes, and bodywork, including spinal manipulation, can complement medical care, then criminal liability is too disproportionate a penalty for exceeding scope of practice. Furthermore, the deterrent feature of criminal sanctions may prevent patients from fully exploring nonmedical options which might ameliorate injurious effects of medical treatment, such as post-operative pain or side-effects of chemotherapy. Tort liability provides injurers with an incentive to take a level of care that is socially efficient.[423]

---

418. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.3(b), at 13 (2d ed. 1986).

419. *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12–31, at 1033 (1988) (describing constitutional doctrine of vagueness, in which a statute is void when "persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'" (quoting Connally v. General Const. Co., 269 U.S. 385, 391 (1926))).

420. LAFAVE & SCOTT, *supra* note 418, at 13.

421. In tort law, social unreasonableness provides the moral "fault" necessary for liability. Michael H. Cohen, *Reconstructing Breach of the Implied Covenant of Good Faith and Fair Dealing as a Tort*, 73 CAL. L. REV. 1291, 1307 (1985). Fault there "consists of failure to meet an objective societal standard of behavior or of personal blameworthiness." *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 21–23 (5th ed. 1984)). Such fault may consist in failing to conform, for example, to chiropractic standards of practice by overexaggerating the healing claim. *See infra* notes 447–51 and accompanying text.

422. LAFAVE & SCOTT, *supra* note 418, § 1.3(b), at 13.

423. Thus, the law "promotes an efficient level of precaution and maximizes social efficiency whenever both parties internalize the sum of precaution and accident costs." Cohen, *supra* note 421, at 1309 (citing Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985)). The model presumably places responsibility on health care consumers to inform themselves as to the various complementary providers and to avoid overreliance on nonmedical modes of healing. This, in turn, supports the model of healer as "caregiver," rather than "curegiver," and accords with the notion of patient and healer as partners or contractors in a healing relationship, rather than as child and benevolent parent. *See* Cohen, *supra* note 133, at 669 (citing JAMES CHILDRESS, WHO SHOULD DECIDE?: PATERNALISM IN HEALTH CARE 6 (1982)). *See also* Heidi M. Rian, *An Alternative Contractual Approach to Holistic Health Care*, 44 OHIO ST. L.J. 185 (1983) (proposing contract model for holistic health care providers); Jerry A. Green, *Minimizing Malpractice Risks by Role*

1. Heightened Standard of Care

First, a heightened standard of care can protect patients from practitioners who overreach and intrude into medical care. Ordinarily, a nonmedical practitioner is held to the same standard of care as the reasonable nonmedical practitioner under the circumstances.[424] For example, in a malpractice action against a licensed chiropractor, the plaintiff has the burden of proving the "degree of knowledge and skill possessed or the degree of care ordinarily exercised" by practicing chiropractors in similar communities and under similar circumstances.[425] Thus, a chiropractor is held to a chiropractic standard of care, a naturopath to the standard of care of the naturopathic profession, and acupuncturist to the same standard as other acupuncturists.

However, when there is an overlap between the provider's expertise and training and that of the medical provider, then the nonmedical provider may be held to a medical standard of care.[426] For example, a chiropractor who purports to use spinal manipulation to *cure* diabetes may be held to a heightened, medical standard of care—one that compares the chiropractor's treatment to the standard of care in the medical community.[427] Similarly, a massage therapist who prescribes homeopathic remedies to relieve a medical condition should be liable for medical malpractice in any patient claim based on adverse consequences of the homeopathic treatment.[428] Whereas ordinarily, physicians may not testify against nonmedical practitioners regarding the practitioner's professional standard of care (for example, chiropractic), such testimony is permitted when there is an overlap in an area of knowledge or treatment.[429]

Often such cases are analyzed in terms of scope of practice, in which the practitioner is said to have unlawfully "treated" the patient and "practiced medicine."[430] The violation might more clearly be analyzed as an attempt to cure so as to deter the patient from seeking medical attention.[431] The problem,

---

Clarification: The Confusing Transition for Tort to Contract, ANNALS INTERNAL MED., Aug. 1, 1988, at 234.

424. Kerkman v. Hintz, 406 N.W.2d 156, 161 (Wis. Ct. App. 1987) (referring to the chiropractic standard of care).

425. LA. REV. STAT. ANN. § 9:2794, *quoted in* Piazza v. Behrman Chiropractic Clinic, 601 So. 2d 1378, 1379 (La. 1992).

426. *See, e.g.*, Wengel v. Herfert, 473 N.W.2d 741, 742 (Mich. Ct. App. 1991) (holding that the trial court erred in failing to read the chiropractic statute to the jury as part of the jury charge; court should have formally advised the jury that the scope of defendant's practice was limited by law).

427. *See id.* at 744.

428. *See* Alan Dumoff, *Malpractice Liability of Alternative/Complementary Health Care Providers (Part I)*, 1:4 ALTERNATIVE & COMPLEMENTARY THERAPIES 249, 250 (1995).

429. *See* Hobson, *supra* note 404, at 741–42 (citing cases).

430. *See, e.g.*, *Wengel*, 473 N.W.2d at 742.

431. Thus, those providers who truly are quacks, or who overreach and induce reliance on unsafe or worthless nonmedical treatments, will be liable for malpractice under a medical standard of care, even if other nonmedical providers in the community offer the same treatment. *Cf.* Boudreaux v. Panger, 481 So. 2d 1382, 1385 (La. Ct. App. 1986), *aff'd*, 490 So. 2d 1083 (La. 1986) (noting that "courts have held non-physicians to the standard of physicians where the actions of defendant have transcended the bounds of the defendant's profession and intruded into the area of physician expertise..."). In *Boudreaux*, the court declined to find that the chiropractor's actions "indicated an intrusion into the field of medicine," observing that although the chiropractor did state she was attempting to correct a bulging disc, she "qualified that statement by testifying that she was attempting to relieve the pressure on the nerve from the disc." *Id.* at 1388. Thus, although defendant did "treat" the bulging disc, her actions arguably

creating detrimental reliance, is one of professional negligence, rather than criminal behavior.[432] In a malpractice action, as opposed to prosecution or sanction for a scope of practice violation, the patient, not the state or state medical board, charges the practitioner. Holding the practitioner to a medical standard of care in such cases creates legal responsibility, where the practitioner has in fact assumed professional responsibility for the patient's medical condition.[433]

The standard of care for medical malpractice provides a particularly appropriate mechanism for protecting patients where nonmedical providers offer services *within* their legislatively authorized scope of practice, which overlap with medicine. For example, in some states chiropractors are authorized to take x-rays,[434] conduct urine analysis,[435] take or order blood tests and other routine laboratory tests,[436] or perform physical examinations.[437] Here, failure to perform the enumerated procedure may constitute malpractice even though performing the procedure will encroach on the practice of medicine.[438] Many jurisdictions, contrary to *Beno*, authorize chiropractors to utilize some medical procedures, such as physical examinations and laboratory tests, to determine whether chiropractic care is appropriate.[439] These statutes implicitly recognize areas of overlap between chiropractic and medicine,

---

aimed at supporting self-healing, rather than curing. *See Boudreaux*, 490 So. 2d at 1086 (chiropractic procedure "merely mobilizes the joint to allow the body to heal the disc...").

432. If the conduct is truly egregious, criminal statutes such as manslaughter or criminal negligence might apply.

433. *Cf.* Ellen L. Hodgson, *Restrictions on Unorthodox Health Treatment in California: A Legal and Economic Analysis*, 24 UCLA L. REV. 647, 690 (1977) (proposing that tort liability replace medical practice acts, so that charges "would follow upon consumer complaint rather than being state-instituted on technical grounds...").

434. *See, e.g.*, KAN. STAT. ANN. § 65–2871 (1993); PA. STAT. ANN. tit. 63, § 602(b) (repealed 1986); WYO. STAT. § 33–10–101 (1977).

435. *See, e.g.*, NEB. REV. STAT. § 71–177 (1943).

436. *See, e.g.*, IOWA CODE ANN. § 151.1 (West 1989).

437. *Id.*

438. *Compare* Salazar v. Ehmann, 505 P.2d 387, 389 (Colo. Ct. App. 1972) (where chiropractors are expressly authorized to take x-rays, failure to take an x-ray may violate the standard of chiropractic practice and constitute malpractice) *with* Tilden v. Board of Chiropractic Examiners, 898 P.2d 219, 222 (Or. Ct. App. 1995) (remanding for more adequate explanation by chiropractic board as to why failure to take or examine x-ray of spine or pelvis was unreasonable).

439. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32–925 (1986 & Supp. 1994) (authorizing "physical and clinical examinations, diagnostic, x-rays and clinical laboratory procedures by referral in order to determine the propriety of a regimen of chiropractic care or to form a basis for referral of patients to other licensed health care professionals, or both"); D.C. CODE ANN. § 2–3301.2(3)(A) (1994 & Supp. 1995) (authorizing "the referral of a patient for diagnostic x-rays, tests, and clinical laboratory procedures in order to determine a regimen of chiropractic care or to form a basis for referral of patients to other licensed health care professionals"); VT. STAT. ANN. tit. 26, § 521(3) (Supp. 1994) (authorizing "use of diagnostic imaging read and interpreted by a person so licensed and clinical laboratory procedures to determine the propriety of a regimen of chiropractic care"). In some states, the statutes expressly limit activities such as taking x-rays to "chiropractic examination," as opposed to, say, medical examination. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 112, § 89 (West 1983) ("X-ray and analytical instruments may be used solely for the purposes of chiropractic examinations"); MICH. COMP. LAWS ANN. § 333.16401(b) (West 1992) (authorizing "use of x-ray machines in the examination of patients for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine"); MINN. STAT. ANN. § 148.01 (West 1989) (use of x-rays "which are necessary to make a determination of the presence or absence of a chiropractic condition"). This seems to beg the scope of practice question.

providing a well-defined area in which to apply a heightened, medical standard of malpractice to chiropractic activities.

2. The Duty to Refer

In addition to a heightened, medical standard of care in areas of overlap, courts impose on chiropractors a duty of reasonable care which includes the "duty to (1) determine whether the patient presents a problem which is treatable through chiropractic means; (2) refrain from further chiropractic treatment when a reasonable chiropractor should be aware that the patient's condition will not be responsive to further treatment;" and (3) if the problem is outside the chiropractic skill, training and expertise, inform the patient that the condition is not treatable through chiropractic.[440] In some states, the latter requirement involves a duty to refer the patient to medical care.[441]

A chiropractor who negligently fails to inform the patient that the condition is not one amenable to chiropractic treatment—or, in some states, to refer the patient in such cases to a medical doctor—may be liable for malpractice.[442] For example, a chiropractor's negligent failure to inform the patient of a possible herniated disk and to refer the patient to a physician would constitute malpractice.[443] Similarly, a chiropractor who takes an x-ray pursuant to statutory authorization and finds a fracture, has a duty to refer the case to a medical doctor or face malpractice liability.[444]

In many states, the oath administered to chiropractors by the state licensing board requires referral to medical doctors where the patient's problem exceeds the limits of chiropractic care.[445] Such an oath may be admitted into evidence to show the standard of chiropractic care and possible violation.[446]

3. Misrepresentation

Heightened malpractice liability, including the duty to refer, may be bolstered by holding practitioners liable for misrepresentation when they make claims exceeding their training and ability. For example, a chiropractor may be

440. Kerkman v. Hintz, 418 N.W.2d 795, 802–03 (Wis. 1988).

441. *See, e.g.*, Rosenberg v. Cahill, 492 A.2d 371, 378 (N.J. 1985); Mostrom v. Pettibon, 607 P.2d 864 (Wash. Ct. App. 1980); Rian, *supra* note 423, at 191–92 (citing cases). *See* Dumoff, *supra* note 428, at 250 (proposing that "a referral be made, or at the very least, that the provider makes a disclaimer regarding his or her treatment as nonmedical," to avoid liability). In fact, the practitioner may have defenses of assumption of risk and contributory negligence. *See* Rian, *supra* note 423, at 192–93, 207. Rian proposes that providers and patients contract for an appropriate standard of care, so that patients "will be on notice that holistic practitioners cannot substitute for physicians in diagnosing and treating pathology." *Id.* at 205.

442. Tschirhart v. Pethtel, 233 N.W.2d 93, 94 (Mich. Ct. App. 1975). The appellate court in *Kerkman* stated the duty as follows: the chiropractor must (1) recognize a medical problem, in contrast to a chiropractic one, (2) refrain from further chiropractic treatment where it may aggravate the condition, and (3) refer the patient to a physician when medical treatment is indicated. 406 N.W.2d 156 (Wis. Ct. App. 1987). The Wisconsin Supreme Court rejected a duty to refer, arguing that implicit in the requirement that a chiropractor must refer to a medical doctor is the chiropractor's ability to "make a medical determination that the patient needs medical care." 418 N.W.2d at 802.

443. *Tschirhart*, 233 N.W.2d at 95–96.

444. Salazar v. Ehmann, 505 P.2d 387, 389 (Colo. Ct. App. 1972).

445. *Id.*

446. *Id.*

liable for misrepresentation in claiming that chiropractic can cure diabetes.[447] A plaintiff must introduce evidence of intent to defraud, deceive, and/or misrepresent.[448]

In such cases, a plaintiff may prove that the statements were misrepresentations by introducing expert testimony.[449] If such statements are "within a generally accepted view of the science of chiropractic," then there is no misrepresentation.[450] Again, rather than using scope of practice to draw abstract and artificial boundaries between shades of "treatment," the tort of misrepresentation focuses on claims made by the practitioner and the resulting injury to the patient.[451]

C. Freedom of Access to Treatment

The notion of freedom of access to treatment goes back to the period between 1844 and 1891, in which "the predominant anti-monopolist position was that the common man should be capable of selecting a qualified physician from among those claiming to be competent."[452] Since then—coinciding with the growth and influence of the American Medical Association ("AMA")—the dominant view has been "that the vulnerable layperson requires protection from professional experts...[and is] ignorant...even as to which profession...[to] consult."[453] The protection argument has been reinforced by "guild-like monopolization of an area of work or practice," usually by the dominant profession's control of licensure and discipline.[454]

Proponents of freedom of access have had some success in attempts to ground access to nonorthodox healing modalities in a constitutional right to

---

447. Wengel v. Herfert, 473 N.W.2d 741, 744 (Mich. Ct. App. 1991). The chiropractor who in good faith overstates the curative possibilities of a treatment may be liable for failure to meet chiropractic standards of care, which presumably include, within the bounds of informed consent, a duty to clarify the risks and benefits of a particular procedure.

448. State Bd. of Chiropractic Examiners v. Clark, 713 S.W.2d 621, 627 (Mo. Ct. App. 1986). On the other hand, treatment offered in good faith will negate a finding of misrepresentation or perhaps even criminal negligence. *See* People v. Cabral, 190 Cal. Rptr. 194, 196–97 (Ct. App. 1983) (holding that the distinction between medicine and chiropractic turns on methods employed rather than type of ailment, that nothing prohibits a chiropractor from treating epilepsy, and that the chiropractor may condition his acceptance of a patient on patient's agreeing to forego medication which chiropractor feels would interfere with treatment; moreover, the chiropractor's good faith belief in efficacy of treatment precludes finding of criminal negligence and illegal practice of medicine).

449. *Wengel*, 473 N.W.2d at 744.

450. *Id.* A chiropractor could misrepresent the health benefits of a proposed treatment while remaining within the scope of practice; conversely, a chiropractor could properly state purported benefits of a procedure, while exceeding the scope of the patient's consent. *Cf.* Jones v. Malloy, 412 N.W.2d 837, 841 (Neb. 1987) (in alleging that chiropractor overstepped the bounds of initial consent by failing to inform patient of the risks associated with manipulation of her pelvis, plaintiff had stated an issue of informed consent, absent allegation of fraud or misrepresentation).

451. *Cf.* Rian, *supra* note 423, at 212 (massage therapist who uses Rolfing but does not inform patient that increased height may result from manipulating connective tissue, may be liable for lack of informed consent if failure to make proper disclosure led to cognizable patient injury).

452. Wardwell, *supra* note 50, at 220.

453. *Id.* at 221.

454. *Id. See also* QUIRK, *supra* note 14; Cohen, *supra* note 5, at 143–45 (describing organized medicine's historical control over health care licensure).

privacy. In *Andrews v. Ballard*,[455] the Southern District of Texas upheld a constitutional challenge by Texas patients to medical board rules proclaiming acupuncture to be the "practice of medicine." Some courts' reluctance to follow *Andrews* has led Congress to consider statutory means to grant patients a right of access to the full range of health care treatments.[456]

1. Access to the Full Spectrum of Healing

While states license and define practitioners' scope of practice, the federal government, through the Food, Drug, and Cosmetic Act, limits the treatments practitioners can offer.[457] The Food and Drug Administration ("FDA") has broad enforcement authority against drugs and devices which have not been approved and do not conform to labeling and other requirements and thus are "misbranded."[458] These enforcement actions include injunctions against use, criminal felony and misdemeanor charges, and broad powers of seizure of misbranded food, drugs, and devices.[459] The FDA, however, is limited in its ability to regulate the practice of medicine, which falls within the state's police power.[460]

In response to concern over FDA regulation of health claims for herbs, foods, and dietary supplements, the Dietary Supplement Health and Education Act ("DSHEA")[461] was enacted in 1994 to "protect the right of access of consumers to safe dietary supplements...in order to promote wellness."[462] The DSHEA established guidelines under which manufacturers and distributors could make labeling and marketing claims for dietary supplements, but did not address whether health care professionals could recommend and dispense dietary supplements without risking an FDA enforcement action.[463]

The Access to Medical Treatment Act, recently introduced in Congress, addresses this gap. The Act would "allow patients to receive any medical treatment they want under certain conditions...."[464] The Act grants individuals the right "to be treated by a health care practitioner with any medical

455. 498 F. Supp. 1038 (S.D. Tex. 1980).

456. *See, e.g.*, New York State Ophthalmological Soc'y v. Bowen, 854 F.2d 1379 (D.C. Cir. 1988) (declining to follow *Andrews*). *See also* Rutherford v. United States, 438 F. Supp. 1287 (W.D. Okla. 1977), *remanded*, 582 F.2d 123 (10th Cir. 1978), *rev'd*, 442 U.S. 544 (1979), *on remand*, 616 F.2d 455 (10th Cir.), *cert. denied*, 449 U.S. 937 (1980).

457. The Federal Food, Drug, and Cosmetic Act defines any "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease..." to be either a drug, 21 U.S.C. § 321(g)(1)(B) (Supp. 1996), or device, 21 U.S.C. § 321(h)(2) (Supp. 1996). Such drugs or devices must be approved for use by the Food and Drug Administration. *See* 21 U.S.C. §§ 352, 355(a), (i) (1972 & Supp. 1996).

458. 21 U.S.C. § 331 (1972 & Supp. 1996).

459. *Id.* §§ 331–34.

460. *See* United States v. Evers, 643 F.2d 1043 (5th Cir. 1981) (holding that physician's providing information on off-label drug use to patient and to other physicians did not constitute "misbranding" and "labeling," respectively).

461. Pub. L. No. 103–417, § 1(a), 108 Stat. 4325 (codified in scattered sections of 21 U.S.C. and 42 U.S.C.).

462. Congressional Findings Related to Dietary Supplements Health and Education Act of 1994, Pub. L. No. 103–417, §§ 2, 15(a), 108 Stat. 4325, 4326.

463. For a brief history of the DSHEA, see Michael H. Cohen, *Guaranteeing Freedom of Access to Healing: The Access to Medical Treatment Act of 1995*, 1:6 ALTERNATIVE & COMPLEMENTARY THERAPIES, Nov.–Dec. 1995, at 408.

464. Preamble, H.R. 2019, 104th Cong, 1st Sess. (introduced July 12, 1995); *see also* S. 1035, 104th Cong., 1st Sess. (1995).

treatment...that such individual desires..." provided the practitioner has personally examined the individual, the individual agrees to the treatment, and administering the treatment does not violate licensing laws.[465] Furthermore, the treatment may be provided only if: "(1) there is no reasonable basis to conclude that the medical treatment itself, when used as directed, poses an unreasonable and significant risk of danger to such individual;"[466] (2) in the case of a treatment requiring but lacking approval, certification or licensure by the Secretary of Health and Human Services, there is an appropriate notification and a warning that the government has not declared the food, drug or device to be safe and effective, and that the individual uses such food, drug or device at his or her own risk; (3) the provider gives notice to the patient concerning the nature of the treatment, including, among other things, "reasonably foreseeable side effects;" (4) no advertising claims are made as to efficacy;[467] (5) the label of any drug, device or food used in such treatment is not false or misleading, and (6) the individual signs a written statement indicating that such individual has been fully informed as to (1) through (4) and desires the treatment.

The Act would expand consumer access to a fuller range of health care treatments in at least several ways. First, the bill would allow interstate shipment of non-FDA-approved substances to legally authorized caregivers, as long as no advertising claims are made.[468] Second, the legislation would allow caregivers, acting within their licensure, to offer patients non-FDA-approved treatments in accordance with the Act's disclosure and other consumer protection guidelines.[469] Third, the legislation presumably would shield physicians who prescribe herbs, dietary supplements, and off-label drug use, in accordance with the Act, from an FDA enforcement action. Finally, the bill would establish a clear statement of Congressional intent to grant patients access

---

465. H.R. 2019 § 3(a). "Health care practitioner" is defined as "a physician or another person who is legally authorized to provide health professional services in the State in which the services are provided." *Id.* § 2(6). This would include chiropractors, acupuncturists, naturopaths, massage therapists and other licensed practitioners. The requirement that such treatment not violate licensing laws presumably refers to acting within the scope of licensure—i.e., not taking responsibility for healing beyond the practitioner's statutory training and authorization.

466. *Id.* § 3(b)(1). "Danger" is defined as "any negative reaction" that causes serious harm, occurred as a result of the treatment and would not have otherwise occurred, and is "more serious than reactions experienced with routinely used medical treatments for the same medical condition...." *Id.* § 2(2). The definition appears to put the burden of proof on opponents to the treatment to show harm, causation, and that the treatment creates reactions more serious than conventional alternatives.

467. "Advertising claims" refers to "representations made or suggested by statement, word, design, device, sound, or any combination thereof...." *Id.* § 2(1). The prohibition on advertising claims excludes "an accurate and truthful reporting by a health care practitioner of the result of the practitioner's administration of a medical treatment in recognized journals or at seminars, conventions, or similar meetings or to others..." so long as the practitioner has no financial conflict of interest. *Id.* § 3(c)(1). The Act also exempts statements made by the health care practitioner to an individual patient or prospective patient. *Id.* § 3(c)(2).

468. The bill provides that, notwithstanding any provision of the Federal Food, Drug, and Cosmetic Act, a person may introduce or deliver into interstate commerce and may produce a food, drug, device, or any other equipment, solely for use in accordance with the Act, provided there have been no advertising claims by the manufacturer, distributor, or seller. *Id.* § 6.

469. As noted, the Act contains significant disclosure and consumer protection provisions, and incorporates informed consent requirements by requiring that practitioners notify consumers of risks and benefits and of the fact that treatments have not yet received FDA approval. The legislation further prohibits false or misleading labeling, forbids advertising claims, and contains provisions for public reporting of dangerous and beneficial treatments. *Id.* §§ 4–5.

to a fuller range of treatments than authorized by orthodox medicine or accepted by the FDA.

Whether or not the Act, in its current form, ultimately passes, its introduction signifies an important shift in policy and perspective. The legislation shifts the regulatory focus from protecting medical orthodoxy to protecting the patient's interest in innovation and access to a fuller range of healing modalities.[470] In allowing consumers to make an informed choice regarding alternative and complementary treatments, the Act accords with traditional notions of informed consent.[471] The Act follows an ethic of care[472] and expresses deep respect for patient autonomy. It favors disclosure over medical paternalism, and expresses, through the notion of freedom of access, a "largely unrecognized legal right: the right to maximize the individual's opportunity for healing disease."[473]

The Act, while controversial, has attracted the support of many legislators interested in the right of patient access to a full spectrum of healing. For example, former Congressman Berkley Bedell testified as follows:

> As you know, I left Congress because I came down with Lyme disease. My Lyme disease was cured by a milk product at a cost of about $500 after pharmaceutical treatments costing an estimated $26,000 were not effective. I also came down with prostate cancer, and again it appears that a $600 alternative treatment was successful after it appeared that my surgery and radiation at an estimated cost of $10,000 had not cured my cancer. It breaks my heart to have to tell the Lyme disease patients who contact me because their pharmaceutical treatments are not curing them, that the cow's milk treatment that I believe cured me is not available to them because of government regulations....[474]

---

470. *Cf.* Ray Beck, *The Legality of Natural Healing*, QI: J. TRADITIONAL E. HEALTH & FITNESS 25, 26 (1995) (challenging the assumption that orthodox medical procedures are "safer, superior, and necessary...to protect the public..."). Beck, an attorney and reflexologist, argues:

> The *Journal of the American Medical Association* reported in its July 5, 1995 issue that approximately 180,000 people are killed each year by iatrogenic (medically caused) injuries. That is more than...were killed during the entire Vietnam war and makes health care the number three cause of death in this country. Also, two million people acquire nosocomial (hospital caused) infections. State legislatures have granted a monopoly to some pretty dangerous practices and practitioners.

Id. at 25–26.

471. *See* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972) (holding that informed consent doctrine requires the physician to disclose all information material to the patient's decision to submit to a particular medical procedure).

472. *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 88–89 (1994) (describing the ethics of care); Ann Sprengel & Jane Kelley, *The Ethics of Caring: A Basis for Holistic Care*, 10:3 J. HOLISTIC NURSES 231 (1992).

473. Cohen, *supra* note 463, at 409.

474. Testimony of Berkley Bedell on S–2140 before the Senate Labor/Disability Policy Committee, July 22, 1994 (Fed. Doc. Clearing House Cong. Testimony). Bedell also addressed the issue of "quackery" and medical opposition to alternative/complementary therapies:

> Be warned, Mr. Chairman and members of this committee. There are some powerful forces that are doing very well financially under the present system. Pharmaceutical firms and some sectors of organized medicine are seriously threatened by alternative treatments. If Lyme disease patients were to be cured by the $500 treatment I received, or if the $600 I spent to overcome my cancer were to become common, it would be great for the people, but there are some powerful interests that would lose a lot of income. To defeat this legislation, these special interests can be expected to spend whatever is necessary, using their supporters

The testimony echoes some of the economic and political issues underlying the rhetoric of "quackery," and, reflects an interest in broadening patient access to alternative and complementary therapies which, like that of other legislators, emerges from a personal experience of healing.[475] The testimony also suggests a return to the anti-monopolist position, which vested authority to make personal health care decisions in the citizen, rather than in a government agency or group of medical experts.[476] This is turn augurs a shift from a paradigm based exclusively on medical orthodoxy, to one in which treatments that do not fit the conventional scientific mold or may not be verifiable according to conventional criteria[477] may have a legitimate place in healing.

2. Authorizing Use of Complementary Therapies

Federal access to treatment legislation may dissuade, but not prevent state courts from enforcing medical practice acts against unlicensed healers or against licensed practitioners who allegedly violate their scope of practice. Nor would such legislation prohibit medical boards from censuring physicians who deviate from mainstream thinking.[478] The Access to Medical Treatment Act does not purport to preempt state medical practice acts or state medical board procedures, nor could it, consistent with the states' police power.

In addition to revising medical practice acts and scope of practice rules, state legislatures should consider legislation expressly enabling practitioners to incorporate holistic modalities without fear of sanction or discipline for deviance from orthodox thinking. Physicians who come under investigation "now must vigorously litigate their cases to protect their reputations as well as their livelihoods."[479] Physicians under investigation often have a limited right

---

> and the press, some of whom they have convinced that all alternative treatments are "quackery." Mr. Chairman, I am living proof that all such treatments are not "quackery."

Id.

475. *See, e.g.*, Jim Moran, *Making Alternative Therapies Everyone's Issue*, 1:4 ALTERNATIVE THERAPIES IN HEALTH & MED. 79 (1995) (describing Congressman's response to cancer diagnosis of his three year-old daughter). Senator Connie Mack (R-Fla.), co-author of pending legislation to expand off-label use of drugs, has survived cancer. *Dissemination of Scientific Information on Off-Label Uses Would Be Permitted With Full Disclosure Under "Safe Harbor" Provisions in Mack/Frist Bill*, 57 PINK SHEET, July 3, 1995, at 27 (*available on* LEXIS).

476. *See* Bedell, *supra note* 474 (observing that the Act will allow "non-toxic, nonpatentable, low cost treatments and medicines developed by firms and individuals of limited means" to reach the public "without spending millions and millions of dollars to get FDA permission to do so").

477. For an FDA view, see Prepared Statement of Mary K. Pendergast on S–2140 before the Senate Committee on Labor and Human Resources, July 22, 1994 (Fed. News Service) (describing existing "compassionate" use standard and other accelerated review procedures for investigational new drugs, and arguing that the Act's reporting requirements "can be uninformative in the absence of a requirement for scientifically valid testing").

478. By ending FDA enforcement actions against legally authorized providers who, acting within their scope of practice, offer no-FDA-approved treatments, the Act would at best remove FDA enforcement action as a basis for state medical board investigation and discipline against a particular practitioner.

479. Pauline Rosen, *Medical Staff Peer Review: Qualifying the Qualified Privilege Position*, 27 LOY. L.A. L. REV. 357, 361 (1993) (referring to physicians in hospitals or HMOs who innovate and are "[s]wept into the net and labeled as bad doctors...for reasons unconnected to the quality of their patient care...").

to discovery[480] and face prosecutors with "startling...combinations of functions."[481] These procedural hurdles often make defense difficult and burdensome. Added to the emotional, financial and professional costs is the fact that complaints are initiated anonymously, may be motivated by jealousy or competition or may be emotionally charged, and need no probable cause to trigger investigation.[482] Medical boards that zealously pursue proponents of therapies such as homeopathy or chelation therapy without a showing of patient injury ignore that there are at least three competing interests at stake (the profession's, the individual physician's, and the public's),[483] and that the latter includes the patient's right to expect "the maximum opportunity" for healing.[484]

To safeguard these interests, boards should at least be required to evaluate complaints for probable cause or personal animus.[485] State legislators should open state medical board records, investigate whether discrimination against holistic practitioners exists, and determine whether procedural imbalances create opportunities for abuse of prosecutorial discretion.[486]

Statutory language allowing state medical boards to sanction physicians for "any" departure from "prevailing practices" places too much discretion in the hands of boards adverse to homeopathy's philosophical underpinnings.[487] Such language also unduly protects medical orthodoxy, and reinforces the historical domination of allopathy over homeopathy. These provisions should at least be modified by providing that treatments such as homeopathy and chelation therapy do not, in and of themselves, constitute a "departure" from

480. *See* FURROW ET AL., *supra* note 49, § 3–16, at 73.

481. *Id.* § 3–18, at 74. For example, the office of attorney general may investigate and prosecute the case before the medical board, serve as legal counsel to the board, and represent the board in any litigation over challenges to the board's ultimate decision. *Id.*

482. *Cf.* Sally Lloyd–Bostock & Linda Mulcahy, *The Social Psychology of Making and Responding to Hospital Complaints: An Account Model of Complaint Processes*, 16 L. & POL'Y 123, 144 (1994) (observing that complaints filed in the British National Health System hospital are "extremely varied and fluid," and often emotionally charged).

483. *Cf.* Rosen, *supra* note 479, at 391 (noting that hospital reviewing complaint must balance three competing interests: the public's, the accused doctor's, and the hospital's).

484. Alan Dattner, *Holistic Medical Legislation*, HOLISTIC MED. 7, 7 (1995).

485. *Cf.* Rosen, *supra* note 479, at 383 (suggesting that in hospital peer review, "[a]ny charges emanating from a specific colleague should be reviewed for personal animus"); *id.* at 390 (suggesting that malice or bad faith may be inferred from severity of hospital's disciplinary actions, compared to physician's conduct); *cf.* Miller v. Eisenhower Medical Ctr., 166 Cal. Rptr. 826 (1980) (hospital rule permitting exclusion from staff membership solely on the basis of physician's inability to "work with others" required showing that doctor posed a "real and substantial danger" to the quality of medical care; exclusion was improper because hospital could not show link between doctor's "flamboyant" personality and effect on patient care).

486. *Cf.* Daily Gazette Co., Inc. v. West Va. Bd. of Medicine, 352 S.E.2d 66, 69 (W.Va. 1986) (holding that the public has a constitutional right of access to physician disciplinary proceedings). According to the court, if the medical board makes a preliminary determination that probable cause exists to substantiate the charges, all proceedings on such charges must be open to the public, who is entitled to all reports, records, and nondeliberative materials introduced. *Id.* at 70. If the board finds no probable cause, the public may access the complaint "and the findings of fact and conclusions of law supporting the dismissal." *Id.* at 71.

487. The narrow standard of review strengthens that discretion, placing a difficult burden on licensees. *See, e.g.*, Colorado State Bd. of Medical Examiners v. Reiner, 786 P.2d 499 (Colo. Ct. App. 1989) (Board's determination should be upheld unless it bears no relation to the conduct, is a gross abuse of discretion, or is manifestly excessive in relation to the needs of the public).

standards, for purposes of a finding of unprofessional conduct.[488] Further, medical boards should be prohibited from targeting physicians for discipline solely because they offer treatments outside orthodoxy, and should be required to find substantial and convincing evidence of patient harm from the challenged practice.[489] To encourage mutual dialogue and education, and end the dismissal of non-orthodox therapies as "quackery," boards should contain representatives of non-orthodox modalities.[490]

Language safeguarding physicians from discriminatory discipline, and authorizing greater diversity on medical boards, already exists in several states. Recently, New York amended its Education Law to permit the "physician's use of whatever medical care, conventional or nonconventional, which effectively treats human disease, pain, injury, deformity, or physical condition."[491] The legislation also created a board for professional medical conduct, which must contain at least two physicians "who dedicate a significant portion of their practice to the use of non-conventional medical treatments...."[492] Such representation provides an important voice in medical affairs patients and providers interested in alternative treatments. Moreover, the legislation provides legislative recognition of patient interest in access to therapies, whether conventional or unconventional, that help treat disease and pain. The bill shifts power away from medical orthodoxy and, by providing a more neutral disciplinary forum, frees physicians to diversify treatment options by

488. As the dissent in *Guess* argued, the "common thread" running through the "unprofessional conduct" provisions is the threat of potential harm to patients and the public. *In re* Guess, 393 S.E.2d 833, 840 (N.C. 1990) (Frye, J., dissenting), *cert. denied*, 498 U.S. 1047 (1991).

489. Courts also could follow *Rogers* in finding that medical board decisions sanctioning practitioners, without evidence of patient harm, are arbitrary or unreasonable or violate due process, even given authorization to sanction departure from "prevailing practices." State Bd. of Medical Examiners v. Rogers, 387 So. 2d 937, 939 (Fla. 1980). *See supra* notes 260–62 and accompanying text.

490. Such representatives will come from the ranks of caring physicians who are good scientists and happen to have training and interest in other modalities. For example, Wayne Jonas, M.D., Director of the Office of Alternative Medicine, formerly served as Director of the Medical Research Fellowship at Walter Reed Army Institute of Research, and held faculty appointments in the Departments of Family Practice and Preventive Medicine/Biometrics at the Uniformed Services University of the Health Sciences. In addition to conventional training, Dr. Jonas has training in homeopathy, bioenergy therapy, nutritional therapy, mind/body methods, spiritual healing, electro-acupuncture diagnostics and clinical pastoral education. Charles Marwick, *Complementary Medicine Draws a Crowd*, 274:2 JAMA 106 (1995); *OAM Watch*, HOLISTIC MED. 22 (Spring 1995). Recently, the House of Delegates of the American Medical Association passed a resolution encouraging M.D.s to become better informed regarding alternative/complementary medicine and to participate in appropriate studies. American Medical Association House of Delegates Resolution: 514 (1–95), *printed in* TOWNSEND LTR. FOR DOCTORS & PATIENTS, Feb.–Mar. 1995, at 24.

491. NEW YORK EDUC. LAW § 6527(4)(e) (McKinney Supp. 1995). The legislation addresses existing "concerns regarding the treatment of non-conventional physicians in the professional medical conduct process by recognizing the role of legitimate non-conventional medical treatments in the practice of medicine..." and "secures the rights and freedoms of patients to choose their own medical treatments." N.Y. State Assembly Memorandum in Support of Legislation (Bill No. 5411–C (Assembly), 3636–C (Senate)) (1994) (on file with the *Arizona Law Review*).

492. NEW YORK PUB. HEALTH LAW § 230(1) (McKinney Supp. 1995). New York state medical associations "dedicated to the advancement of non-conventional medical treatments" may make available experts in disciplinary investigations. *Id.* at § 230.10(a)(ii).

exploring alternative modalities.[493] At the same time, by requiring that treatments be "effective," the legislation ensures that physicians do not misdirect patients toward useless therapies.

Other states have passed or are considering similar legislation. For example, in response to *Guess*, North Carolina recently amended the disciplinary provisions of its medical licensing act, to provide that "[t]he Board shall not revoke the license of or deny a license to a person solely because of that person's practice of a therapy that is experimental, nontraditional, or that departs from acceptable and prevailing medical practices unless, by competent evidence, the Board can establish that the treatment has a safety risk greater than the prevailing treatment or that the treatment is generally not effective."[494] Similarly, Oklahoma's new law provides: "The Board shall not revoke the license of a person otherwise qualified to practice allopathic medicine within the meaning of this act solely because the person's practice or a therapy is experimental or nontraditional."[495] Oklahoma also provides that its Allopathic Medical and Surgical Licensure and Supervision Act does not prohibit "services rendered by any person practicing any nonallopathic healing practice."[496] Alaska provides that the medical board "may not base a finding of professional incompetence solely on the basis that a licensee's practice is unconventional or experimental in the absence of demonstrably physical harm to a patient."[497]

The statutes represent a first step toward greater recognition of patients' right of access. Further refinement may be necessary as regulators and healers explore the possibilities of a less authoritarian health care environment. Future legislation could reduce the wiggle room available for discriminatory medical board treatment of holistic practitioners.

For example, New York's statute, while permitting a physician to utilize any "effective" treatment, does not state whose judgment of efficacy matters. Although the patient's treating physician might deem an unconventional therapy effective and therefore worth trying, a medical board could, without further evidence, simply condemn the treatment as ineffective and proceed to sanction physicians. The result would be a return to the statute as analyzed by the majority in *Guess*—sanction for *any* departure from conventional medicine,

493. This is consistent with defenses to malpractice such as the respectable minority exception and clinical innovation. The first gives physicians "some leeway in defending their deviation from customary medical practice," while the second "allows physicians to vary standard treatment to suit the needs of a particular patient, where the patient presents a particular problem or a desperate situation." FURROW ET AL., *supra* note 49, § 6–5a–b, at 250–52.

494. N.C. GEN. STAT. § 90–14(a)(6) (Supp. 1995).

495. OKLA. STAT. ANN. tit. 59, § 509.1(D) (West Supp. 1995).

496. OKLA. STAT. ANN. tit. 59, § 492(F) (West Supp. 1995). The Medical and Surgical Licensure and Supervision Act applies "only to allopathic and surgical practices and...exclude[s] any other healing practices." *Id.* § 480. Allopathy is "a method of treatment practiced by recipients of the degree of Doctor of Medicine, but specifically excluding homeopathy." *Id.*

497. ALASKA STAT. § 08.64.326 (1991). *See also* WASH. REV. CODE ANN. § 18.130.180(4) (West Supp. 1995) (amending Washington's Uniform Disciplinary Act to provide that "the use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed"); 1995 Ill. H.B. 407, § 15 (SN) (establishing an Illinois Clinical Trial Review Board and authorizing the board, among other things, to accept donations "devoted to the research and promotion of new or alternative medicine or procedures"). An updated list of state access laws is maintained on the Legal and Legislative Center of HealthWorld Online at http://www.healthy.net.

without any showing of patient harm. While, presumably, this is not what the legislature intended, a court might, applying the usual standard of review, decide not to overturn the medical board's decision without evidence of arbitrariness or capriciousness.

A similar issue could arise under the Alaska and North Carolina statutes. Each fails to specify what constitutes a violation of the statute. The statutes could further clarify that appellants from such proceedings need not prove that the board's decision was arbitrary and capricious, but need only show that the board's decision was influenced by the provider's use of an unconventional therapy. Further, the statutes should provide guidelines for courts to decide whether a medical board has discriminated against, harassed, or sanctioned a practitioner based on use of unconventional therapies, and thus violated the statute. For example, discrimination could be shown by the following factors: (1) the therapy is disfavored by medical orthodoxy and has triggered investigation in the past (e.g., chelation therapy, ozone therapy and homeopathy); (2) the complaint is anonymous and/or motivated by personal animus or professional jealousy; (3) the penalty imposed by the medical board is disproportionate to the alleged infraction (for example, loss of licensure merely for offering a homeopathic remedy); and (4) the sanction is disproportionate compared to sanctions for similarly situated physicians using conventional treatment. Finally, the statutes could require a higher showing of patient harm.[498]

State legislative access acts not only promote patient access to a full range of treatment, but also promise to curb discrimination or harassment of practitioners offering alternative and complementary therapies. The new laws shift the burden of proof from proponents of such therapies to opponents, requiring, for example, at least in North Carolina's case, that state medical boards show lack of safety or effectiveness relative to standard treatments. The statutes expressly recognize the interest of patients in experimental, nontraditional, and unconventional therapies, as well as physicians' interest in using "whatever medical care, conventional or nonconventional," effectively treats disease.[499] The statutes generate increased understanding of the role of complementary therapies in an integrated system of healing professionals, by requiring that licensed caregivers who offer holistic therapies be given representation on state medical boards. The legislative reforms suggest that, without abandoning goals of consumer protection, lawmakers are relaxing paternalistic notions of health care which, for the past century, have dominated health care licensing and regulatory schemes.[500]

---

498. *Compare* ALASKA STAT. § 08.64.326 (1991) ("demonstrable physical harm") *with* WASH. REV. CODE ANN. § 18.130.180(4) (West Supp. 1995) ("injury to a patient or...an unreasonable risk that a patient may be harmed").

499. NEW YORK EDUC. LAW at § 6527(4)(e) (McKinney Supp. 1994).

500. "[I]f a disease is something with a nonunderstandable Latin name, which can only be measured by experts and which can only by cured by doctors, who know the solutions," then patients have little role in healing themselves. Aakster, *supra* note 140, at 268. On the other hand, if treatment requires patient participation and commitment, then alternative medicine emphasizes "deprofessionalization" by emphasizing patient responsibility, "explaining things in common language, [and] seeing the person as in [sic] integrated whole, as the patient sees himself." *Id.*

D. Third-Party Reimbursement of Holistic Modalities

1. Prospects for Inclusion

There are good reasons for including alternative and complementary therapies in third-party reimbursement schemes. First, as a practical matter, patient access to these modalities often depends on third-party payment. A statutory right to access to homeopathy, chiropractic, naturopathy, or massage therapy means little if patients cannot afford the treatment, or, if insurance schemes skew treatment in favor of orthodox therapies. Although ideally, patients will and frequently do pay for desired treatments irrespective of third-party reimbursement rules,[501] realistically, patient choice is limited by what the insurer will reimburse.[502]

Second, including complementary treatments in insurance schemes satisfies the goal of using health insurance for risk transference and distribution, assuming health care is viewed not only in terms of sick care, but also in terms of prevention and wellness. For an appropriate premium, health insurance transfers to the insurer the risk of particular health losses, and allows the insurer to pool, distribute and manage the risks of large numbers of insureds.[503] Historically, health losses have been viewed through the lens of the mechanistic model, in terms of physical disability[504] or specific medical procedures.[505] This is perhaps because health insurance grew out of a physician-dominated system, beginning with employers contracting with physicians to care for employees with work-related injuries.[506] However, when

---

501. In David Eisenberg's study, of the one in three respondents who reported using at least one unconventional therapy in the past year, a third of these saw providers for unconventional therapy. Eisenberg et al., *supra* note 164, at 246. This group made an average of 19 visits to such providers during the year, with an average charge per visit of $27.60. *Id.* Three-quarters of expenditures associated with use of unconventional therapy in 1990 were paid out-of-pocket, which is comparable to the $12.8 billion spent out-of-pocket annually for all hospitalizations in the United States. *Id.*

502. For example, pressures by insurers to restrict postpartum hospital stays to 24 hours after childbirth have resulted in "drive-through deliveries," irrespective of empirical evidence regarding health risks of shorter stays. Sandra Johnson, *Managed Care as Regulation: Functional Ethics for a Regulated Environment*, 23 J. L., MED. & ETHICS 266, 267–68 (1995) (citing Marina Pisano, *Drive-Through Deliveries*, SAN ANTONIO EXPRESS–NEWS, Sept. 17, 1995, as cited 1995 WL 9502145).

503. ALAN I. WIDISS, INSURANCE: MATERIALS ON FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES AND REGULATORY ACTS 4 (1989).

504. For example, disability insurance frequently defines disability in terms of inability to perform duties relating to one's occupation. *See, e.g,* Moots v. Bankers Life Co., 707 P.2d 1083, 1084 (Kan. Ct. App. 1985) (policy defined total disability as inability to engage in "any work or occupation for which he is reasonably fitted by education, training or experience").

505. *See infra* notes 531–33 and accompanying text.

506. *See* Congressional Research Service, *Health Insurance and the Uninsured: Background Data and Analysis* (House Committee on Education and Labor, 1988), *in* BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 533, 534 (2d ed. 1991). Before the 1930's, Americans paid over 90% of their medical expenses out-of-pocket. *Id.*

The earliest plans were developed by the railroad, mining, textile, and lumber industries. *Id.* During the Depression, hospitals sponsored health insurance plans to ensure hospital solvency and patient access to services. *Id.* In 1932, the first Blue Cross plan was established, providing service benefits to subscribers. The American Medical Association, together with local hospitals and physicians, lobbied to exempt Blue Cross plans from certain state insurance regulations and for separate enabling legislation. *Id.* at 534–35. At the same time, commerical insurers offered indemnity coverage against hospital expenses. *Id.* at 535. In 1939, Blue Shield

"health" is viewed in terms of overall wellness, then the notion of health "losses," to be transferred into a larger risk pool, comes to include a broader set of deviations from health.[507]

Third, including alternative and complementary therapies in insurance reimbursement schemes will facilitate greater integration of mainstream medicine and its holistic counterparts. As health care evolves from a paternalistic relationship between patient and orthodox medical specialist, to a system in which various providers cooperatively evaluate and treat the whole being, insurance reimbursement decisions and arrangements can play an important role in integrating the diverse modalities.[508]

Many insurers already are required to reimburse for services by chiropractors and acupuncturists.[509] Some provide coverage only when acupuncture is administered, prescribed or supervised by a licensed physician, while others cover acupuncture irrespective of physician involvement.[510] Recently, some insurers voluntarily have begun covering multiple holistic therapies and exploring whether such reimbursement is actuarially attractive. For example, American Western Life Insurance Company's new Wellness Plan features a 123-page patient handbook describing natural remedies including massage and herbs.[511] The company offers Prevention Plus, an integrated health insurance plan, based on the HMO model, with naturopathic physicians, acupuncturists, chiropractics, massage therapists and bodyworkers, homeopathic practitioners, hypnotherapists, herbalists, yoga therapists, and others, to complement a conventional medical network with over 650 hospitals.[512] Mutual of Omaha Companies covers the Reversal Program, a prevention and behavior modification program, popularized by Dean Ornish, M.D., to reduce risk of heart disease through yoga, meditation, diet, and

---

plans were established, reimbursing physicians based on a negotiated payment schedule. *Id.* Later, health maintenance organizations evolved out of arrangements by which physicians contracted to furnish medical care to groups for a pre-arranged fee. *Id.*

507. For example, the distinctions between Blue Cross/Blue Shield and commercial insurance plans have blurred, and today health insurers cover alternatives to hospital care, such as hospice care, ambulatory surgery, skilled nursing care, and preventive services, FURROW ET AL., *supra* note 506, at 536, thus reflecting a shift away from the historical physician and hospital dominance of health insurance.

508. Including these treatments in insurance plans, however, may have unintended, adverse effects on holistic practitioners, including "systematically distor[ting]" holistic disciplines by requiring that they more closely conform to scientific standards and the medical model. Robert Padgug, *Alternative Medicine and Health Insurance*, 62:2 MT. SINAI J. MED. 152, 156 (1995). Some modalities, such as energy healing, herbal therapy, and even homeopathy, may not be susceptible to scientific testing since they vary by individual. *See id.* at 155. Nonetheless, the extent of both patient demand and physician involvement in these therapies suggest that insurers inevitably will begin integration.

509. At least six states require private health insurers to cover acupuncture, and 41 require chiropractic coverage. Barbara Carton, *Insurance: Health Insurers Embrace Eye-of-Newt Therapy*, WALL ST. J., Jan. 30, 1995, at B1 (Jan. 30, 1995). Almost half of HMOs offer chiropractic coverage. *Id.*

510. *See* ACUPUNCTURE LAWS, *supra* note 107, at 141 (citing survey by the National Commission for the Certification of Acupuncture, 1991).

511. See Carton, *supra* note 509, at B1 ("Even stodgy mainstream insurers who wouldn't know a yucca extract from Norwegian kelp are wading in. The reason? Patients are demanding it, and insurers say it just might save money.").

512. *California Insurance Company Releases the Country's Most Comprehensive Health Plan Covering Natural Medicine and Conventional Medicine*, TOWNSEND LTR. FOR DOCTORS & PATIENTS, July 1995, at 22.

support groups instead of surgery or medication.[513] The "wellness" approach, which emphasizes prevention, may be attractive to employers, who currently pay for immunizations, cholesterol screens, and blood pressure checks.[514] In addition, employers and insurers may find approaches such as the Reversal Program to be cost-effective.[515]

Insurer inclusion of alternative and complementary therapies is likely to expand as therapies gain acceptance and credibility, and gain support by data showing that such treatments can contribute to health so as to minimize insurers' overall costs. Insurer recognition also may expand as states mandate inclusion in insurance contracts of specific benefits or providers,[516] or mandate equal treatment of certain alternative and complementary providers.[517] Among the latter are "any willing provider" laws, which provide that insurers offering preferred provider policies must establish terms and conditions for eligibility as a preferred provider, that such terms and conditions may not discriminate against or among health care providers, and that such policies may not exclude any preferred provider willing to meet the terms and conditions set forth.[518] Some insurers have resisted such laws by attempting to exclude particular plans and providers, adding on various hurdles or requirements for alternative providers, or limiting the number of visits or maximum benefit amount depending on the provider.[519] Such industry resistance mirrors medical board

513. *See Insurers Unlikely to Embrace Alternative Therapies in Policies*, 1 HEALTH CARE POL'Y REP. 16 (1993). Mutual will provide coverage in individual health policies in a two-year pilot program. *Id.* Mutual covers approximately 5.5 million individuals through individual and family policies and covers 3.4 million through group policies. *Id.*

514. *Id.*

515. The program costs $4,000 per individual, whereas bypass surgery on average costs $43,000, and angioplasty costs $18,000. *Id. See also Holistic Care PPO Set to Operate in Chicago*, 1:3 ALTERNATIVE THERAPIES HEALTH & MED. 25 (1995) (noting that Ethix Corp., a Preferred Provider Organization and unit of New York Life, is operating a holistic care program at Grant Hospital in Chicago).

516. *See* Padgug, *supra* note 508, at 157 n.13 (citing statutes).

517. For example, Florida provides that "when any health insurance policy, health care services plan, or other contract provides for the payment for medical expense benefits or procedures, such policy, plan or contract shall be construed to include payment to a chiropractic physician who provides the medical service benefits or procedures which are within the scope of a chiropractic physician's license." FLA. STAT. § 627.419(4) (1987) (cited in Weldon v. All Am. Life Ins. Co., 605 So. 2d 911, 912 (Fla. Dist. Ct. App. 1992)). Louisiana provides that whenever an insurance policy provides for reimbursement of any service, and that service may be legally performed by a chiropractor, such reimbursement may not be denied when the service is performed by the person so licensed. LA. REV. STAT. ANN. § 22:668 (West 1975) (quoted in Chiropractic Ass'n of La. v. State, 595 So. 2d 316, 317 (La. Ct. App. 1991)). Moreover, "[t]erminology in such policy or contract deemed discriminatory against any such person or method of practice shall be void." *Id.*

518. *See, e.g.*, VA. CODE ANN. § 38.2–3407.B (Mitchie 1994) ("No hospital, physician or type of provider listed...willing to meet the terms and conditions offered to it or him shall be excluded."); 1995 PA H.B. 571 (SN), 1995 CT H.B. 5201 (SN), and 1995 RI H.B. 6765 (SN) (proposing "any willing provider" provisions); Richter v. Capp Care, Inc., 868 F. Supp. 163, 166 (E.D. Va. 1994) (managed health care company did not violate Virginia Any Willing Provider Law and unreasonably discriminate against plaintiff physician in denying her application based on fact that she was disciplined for professional misconduct).

519. For example, Washington recently passed legislation requiring every health plan renewed by a health carrier to permit every legally authorized health care provider, acting within the scope of practice, to provide services or care for conditions covered by the state's basic health plan. WASH. REV. CODE § 48.43.045 (1996). The statute requires that providers agree to abide by standards related to (i) provision, utilization review, and cost containment of health services; (ii) management and administrative procedures; and (iii) provision of cost-effective and clinically efficacious health services.

hostility to alternative providers, prompting insurance regulators to respond by clarifying the statutory reimbursement requirements.[520]

While mandated coverage provides a legislative means of addressing inclusion of alternative and complementary modalities in third-party reimbursement schemes, managed care offers particularly rich possibilities for contractual inclusion of these therapies. Although, by shifting back to providers and patients some of the financial risk for health care, managed care arrangements create some incentive to withhold beneficial care from patients, managed care plans also shift the focus to disease prevention and health promotion and coordinate services "based on the totality of a patient's health needs (rather than on isolated responses to specific symptoms)...."[521] In this way, managed care plans may create ways to integrate the physician's expertise with perspectives from other disciplines, so as to determine the optimal course of patient healing. At the same time, managed care providers can utilize existing quality assurance mechanisms for alternative and complementary providers, to integrate such providers in ways that advance patient care.[522]

2. "Experimental" Exclusions and "Medically Necessary" Coverage

Even when covered by insurance policies, acupuncturists, naturopaths, chiropractors, massage therapists, and others may find their treatments declined because the insurer views their therapy as falling within the "experimental treatment" exclusion. Conceptually and actuarially, however, experimental treatments and alternative/complementary therapies are, by and large, different.

Experimental treatments might be said to involve procedures designed to test a hypothesis or contribute to generalized knowledge.[523] Examples include

---

The state Insurance Commissioner responded in several bulletins to "disturbing reports" regarding carriers' efforts to dodge the requirements of the new law. Deborah Shen, Insurance Commissioner, *Every Category of Provider*, Wash. Office of Ins. Comm. Bull. No. 95–9 (Dec. 19, 1995).

520. Among other things, the Washington Insurance Commissioner's bulletin clarified that carriers may not exclude a category of provider by asserting that the category fails to meet the carrier's standards for provision of "'cost-effective and clinically efficacious health services,'" that services within the provider's permitted scope of practice must be covered "without discrimination on the basis of provider type." *Id.* The bulletin stated the Commissioner's willingness "to take all enforcement actions necessary to prevent any other practices that circumvent" the statute. *Id.*

521. Wendy K. Mariner, *Business vs. Medical Ethics: Conflicting Standards for Managed Care*, 23 J. L., MED. & ETHICS 236, 236 (1995).

522. *See* Alan Dumoff, *Malpractice Liability of Alternative/Complementary Health Providers: A View from the Trenches (Part 2)*, 1:5 ALTERNATIVE & COMPLEMENTARY THERAPIES 333 (1995). Dumoff suggests, for example, that managed care organizations ensure that providers possess relevant state credentials—such as a license to practice acupuncture—as well as any relevant private credentialing, such as certification from the National Commission for the Certification of Acupuncturists. *Id.* at 334.

Dumoff observes that of the 23 jurisdictions that license acupuncturists, 18 rely in whole or in part on the NCCA examination, which includes a written examination and a practical examination of point location skills and of clean needle technique. *Id.* The American Academy of Medical Acupuncturists provides its own quality assurance review for physicians practicing acupuncture. *Id.* According to Dumoff, therapeutic massage and other modalities are rapidly developing accrediting bodies for quality assurance and to provide a forum for disciplinary matters. *Id.*

523. OBERG, *supra* note 197, at 10; Dale L. Moore, *An IRB Member's Perspective On Access to Innovative Therapy*, 57 ALB. L. REV. 559, 560 (1994). *See also* Paul J. Molino, *Reimbursement Disputes Involving Experimental Medical Treatment*, 24:11 J. HEALTH &

high-technology organ transplant procedures, and high dose chemotherapy and autologous bone marrow transplant ("HDC/ABMT").[524] Experimental treatments often are measures of last resort and are costly. Insurers exclude coverage of "experimental treatments" to avoid paying for expensive medical treatments of unknown efficacy.[525]

Alternative and complementary therapies typically are preventive or oriented toward overall health and well-being. Their intended effects may be psychological, emotional or spiritual, and secondarily, physiological. They involve unknown efficacy only insofar as they derive from systems of knowledge that historically have been foreign to conventional scientific research methodologies. As the Fifth Circuit stated in *Andrews v. Ballard* with respect to acupuncture, "[w]hat is experimental is not acupuncture, but Westerners' understanding of it, and their ability to utilize it properly."[526] Therapies such as homeopathic remedies, acupuncture treatment, massage therapy, body-oriented psychotherapy, herbal treatment, and energy healing are practiced largely by nonphysicians, are individualized and not research-driven,[527] typically are not "medical," not expensive, and, for the most part, not subject to proof along conventional scientific lines,[528] although efforts have been made to subject such treatments to randomized, double-blind controlled studies.[529] As such, these treatments should neither be excluded nor be construed to be excluded under policy language precluding reimbursement for "experimental" procedures.[530]

HOSP. L. 329 (1991); Lee Newcomer, *Defining Experimental Therapy—A Third-Party Payer's Dilemma*, 323:24 N. ENG. J. MED. 1702 (1990).

524. *See, e.g.*, Lehman v. Mutual of Omaha Ins. Co., 806 F. Supp. 859 (D. Ariz. 1992); *but see* Dahl-Eimers v. Mutual of Omaha Life Ins. Co., 986 F.2d 1379, 1382–84 (11th Cir. 1993) (relevant medical specialists do not consider HDC-ABMT experimental; moreover, the term "experimental" in policy is ambiguous); *but see* Westover v. Metropolitan Life Ins. Co., 771 F. Supp. 1172 (M.D. Fla. 1991) (finding chelation therapy to be excluded as "experimental"); Washington Winn–Dixie of La., Inc. 736 F. Supp. 1418 (E.D. La. 1990) (holding that "hyperbaric oxygen therapy" is experimental).

525. Fuja v. Benefit Trust Life Ins. Co., 18 F.3d 1405, 1411–12 (7th Cir. 1994) (upholding insurer's refusal to pay for HDC/ABMT under policy).

526. 498 F. Supp. 1038, 1053 (1980).

527. Chiropractors, in fact, attempt to distinguish themselves from other professions based on acceptance through reimbursement:

> Considering the fact that 19 million patients visit D.C.s yearly, that 85% of major employers cover chiropractic services under their employee health plans and that most major federal, state and commercial health care programs cover chiropractic services, it becomes clear that chiropractic does not belong in the same category as these professions.

Alternative Medicine: Hearing Before the Subcommittee on Labor, Health, and Human Services, and Education and Related Agencies of the Senate Committee on Appropriations, 103d Cong., 1st Sess. 153–54 (1993) (statement of the American Chiropractic Association) (quoted in DAVID M. SALE, OVERVIEW OF LEGISLATIVE DEVELOPMENTS CONCERNING ALTERNATIVE HEALTH CARE IN THE UNITED STATES 53 (1995)).

528. *Cf. Fuja*, 18 F.3d at 1410 (noting that policy excluded from coverage treatment, such as HDC/ABMT "subject to ongoing, recognized and accepted medical research procedures").

529. *See, e.g., supra* note 299. Even so, as insurers attempt to limit reimbursement by "apply[ing] more 'scientific' definitions and standards of acceptability," patients and physicians will prefer the caregiver's "individual therapeutic intuition to govern insurer reimbursement decisions." Nancy M.P. King, *Experimental Treatment: Oxymoron or Aspiration?*, 25:4 HASTINGS CTR. REP. 6, 8 (1995).

530. The FDA no longer classifies acupuncture needles as experimental, and has made the devices more available for general use by trained professionals. *See* Rick Weiss, *FDA Removes*

Many policies, while including a variety of providers and covered services, limit coverage to "medically necessary" treatments. "Medically necessary" treatments are those treatments, in a typical policy definition, that are "reasonably intended, in the exercise of good medical practice, for the treatment of illness or injury."[531] Some policies expressly vest judgment as to what treatments are "medically necessary," and hence reimbursable, in the judgment of the treating physician; others subject the judgment to retrospective review by a panel of physicians.[532] In any event, a major purpose in limiting coverage to "medically necessary" treatment is to limit patients' overconsumption of care. Again, such overconsumption may have different cost implications when laboratory tests and high-technology procedures are involved, as opposed to chiropractic, massage, or acupuncture sessions. At the same time, the term "medically necessary" harkens back to the medical model and the notion that "doctor knows best."[533]

Whether alternative and complementary treatments for services by contracted-for providers will be covered as "necessary" depends on the willingness of courts and insurers to adapt to evolving consumer preferences and a more tolerant health care consciousness. Peer review panels need to include physicians using homeopathy and other such therapies, as well as alternative providers, to ensure that review of services claimed as medically necessary encompasses efficacious alternative treatments. Future insurance policies might recognize that medical necessity includes modalities and therapies outside the medical model, such as procedures necessary to balance the patient energetically for prevention and maintenance of well-being.[534] Necessity arguably depends as well on nonmedical health professionals involved in complementary aspects of care.[535] The shift from a strictly medical interpretation of necessary care will, of course, raise additional issues, as judges, legislators and insurers struggle to fashion guidelines as to whose view of the patient's health care needs will be authoritative.

Bar to Coverage of Acupuncture by Insurance: Needles Are Classified as Medical Devices, WASH. POST, Mar. 30, 1996, at A3.

531. Sarchett v. Blue Shield, 729 P.2d 267, 270 (Cal. 1987). Policies sometimes require, as one of the criteria for medical necessity, that a treatment not be "experimental," *see Fuja*, 18 F.3d at 1405, and courts sometimes use "medically necessary" and "experimental" as antonyms. *See, e.g.*, Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989) (holding that AZT is medically necessary and not experimental for treatment of Medicaid patients with AIDS).

532. *See Sarchett*, 729 P.2d at 269.

533. *See generally* KATZ, *supra* note 47. *See also* Margaret Gilhooley, *Broken Back: A Patient's Reflections on the Process of Medical Necessity Determinations*, 40 VILL. L. REV. 153, 153–91 (1995).

534. *See, e.g.*, Scalia v. Liberty Mut. Ins. Co., No. 9308, 1995 WL 296772, at *3, (Mass. App. Div. May 10, 1995) (describing plaintiff's claim for chiropractic expenses as "medically necessary"). *Cf.* Wait v. Metropolitan Life Ins. Co., 564 N.Y.S.2d 535 (App. Div. 1990) (favorably reviewing plaintiffs' claim that they suffered from conditions making massage therapy "medically necessary").

535. *Cf.* James E. Sabin & Norman Daniels, *Determining "Medical Necessity" in Mental Health Practice*, 24:6 HASTINGS CTR. REP. 5, 12 (1994) (evaluating clinical decisions about medical necessity in mental health, and proposing ways in which the clinician can serve as "not simply a *gatekeeper*, determining whether the person receives treatment covered by insurance, but a *caregiver*, who offers guidance and compassion if the person's suffering comes from causes other than mental disorder").

CONCLUSION

Many patients who might benefit from alternative healing modalities find themselves unable to afford, or even obtain, such treatments. Defenders of orthodoxy urge further randomized, double-blind studies proving efficacy. Yet, even as studies emerge, medical boards, insurers and lawmakers must move beyond a paradigm which, for historical and economic reasons, has dominated American health care since the late nineteenth century. The paradigm belittles or dismisses healing modalities outside medical orthodoxy, and reflects an overreliance on surgery and medication to heal disease.

The prevalence of alternative/complementary modalities among patients and caregivers and within regulatory and, increasingly, reimbursement schemes suggests a shift to an integrated, holistic system of health care, in which healing addresses the whole person, not just the body part that has malfunctioned; in which orthodox medicine becomes part, rather than the whole, of healing; in which practitioners combine the best of Western medicine with safe, complementary therapies; and in which physicians join chiropractors, acupuncturists, massage therapists, healers, counselors, nutritional experts, and other healing professionals to help patients understand and manage disease. In this system, healing refers not to a particular technology, medication or procedure, but rather to a process of moving toward wholeness at all levels of being. The approach is multidisciplinary and patient-centered. The focus is on wellness, not just sick care, and prevention, not simply repair. Lifestyle, dietary and emotional issues become an integral part of the healing process. In the effort to protect and promote the health of whole beings, lawmakers must not only deepen access to innovative treatments, but also facilitate integration in the patient's pursuit of wholeness and health.

APPENDIX: STATE STATUTORY REGULATION OF ALTERNATIVE/COMPLEMENTARY PRACTITIONERS

Table 1 - Licensing of Practitioner by State and Modality

States	*Chiropractic*	*Massage*	*Acupuncture*	*Naturopathy*	*Homeopathy*
Alabama	X				
Alaska	X		X	X	
Arizona	X		X	X	X
Arkansas	X	X			
California	X				
Colorado	X	X	X		
Connecticut	X	X		X	X
Delaware	X	X			
Dist. of Col.	X		X	X	
Florida	X	X	X	X	
Georgia	X				
Hawaii	X	X	X	X	
Idaho	X	X			
Illinois	X				
Indiana	X				
Iowa	X	X	X		
Kansas	X			X	
Kentucky	X				
Louisiana	X	X	X		
Maine	X	X	X		
Maryland	X		X		
Massachusetts	X	X	X		
Michigan	X				
Minnesota	X				
Mississippi	X				
Missouri	X				
Montana	X		X	X	
Nebraska	X	X			X
Nevada	X		X		X
New Hamp.	X	X		X	

States	*Chiropractic*	*Massage*	*Acupuncture*	*Naturopathy*	*Homeopathy*
New Jersey	X		X		
New Mexico	X	X	X		
New York	X	X	X		
N. Carolina	X				
N. Dakota	X	X			
Ohio	X	X			
Oklahoma	X				
Oregon	X	X	X	X	
Pennsylvania	X		X		
Rhode Island	X	X	X		
S. Carolina	X		X		
S. Dakota	X				
Tennessee	X	X			
Texas	X	X			
Utah	X	X	X	X	
Vermont	X		X		
Virginia	X		X		
Washington	X	X		X	
W. Virginia	X	X			
Wisconsin	X		X		
Wyoming	X				

Table 2 - Statutory Definitions of Chiropractic

ALA. CODE § 34–24–120(a) (1991).
ALASKA STAT. § 08.20.900(3) (1962 & Supp. 1994).
ARIZ. REV. STAT. ANN. § 32–925 (1986 & Supp. 1994).
ARK. CODE ANN. § 17–81–102(2)–(3)(A) (Michie 1992).
COLO. REV. STAT. § 12–33–102(1) (1991).
CONN. GEN. STAT. ANN. §20–24(1) (West 1958 & Supp. 1995).
DEL. CODE ANN. tit. 24, § 701 (1974).
D.C. CODE ANN. § 2–3301.2(3)(A) (1994 & Supp. 1995)
FLA. STAT. ANN. § 460.403(3)(a) (West 1991).
GA. CODE ANN. § 43–9–1(2) (1994).
HAW. REV. STAT. § 442–1 (1995).
IDAHO CODE § 54–703(1) (1994).
IND. CODE ANN. § 25–10–1–1(1) (West 1993)
IOWA CODE ANN. § 151.1 (West 1989)
KAN. STAT. ANN. §65–2871 (1993).
KY. REV. STAT. ANN. § 312.015(3) (Michie 1990 & Supp. 1994).
LA. REV. STAT. ANN. § 2801(3) (West 1988).
ME. REV. STAT. ANN. tit. 32, § 451(1) (West 1964).
MD. CODE ANN., HEALTH OCC. § 3–101(f) (1994)
MASS. GEN. LAWS ANN. ch. 112, § 89 (West 1983).
MICH. COMP. LAWS ANN. § 333.16401(b) (West 1992).
MINN. STAT. ANN. § 148.01 (West 1989).
MISS. CODE ANN. § 73–6–1 (1972).
MO. ANN. STAT. § 331.010(1) (Vernon 1989).
MONT. CODE ANN. § 37–12–101(3) (1993).
NEB. REV. STAT. § 71–177 (1943).
NEV. REV. STAT. ANN. § 634.013 (Michie 1991).
N.H. REV. STAT. ANN. § 316–A:1 (1984 & Supp. 1994).
N.J. STAT. ANN. § 45:9–14.5 (West 1991).
N.M. STAT. ANN. § 61–4–2(A) (Michie 1978).
N.Y. EDUC. LAW § 6551(1) (McKinney 1985).
N.C. GEN. STAT. § 90–143(a) (1994).
N.D. CENT. CODE § 43–06–01(2) (1993).
OHIO REV. CODE ANN. § 4734.09 (Anderson 1994).
OKLA. STAT. ANN. tit. 59, § 164 (West 1989).
OR. REV. STAT. § 684.010(2) (1982).

PA. STAT. ANN. tit. 63, § 602(b) (repealed 1986).

R.I. GEN. LAWS § 5–30–1 (1994).

S.C. CODE ANN. § 40–9–10(a),(b) (Law. Co-op. 1976).

S.D. CODIFIED LAWS ANN. § 36–5–1 (1992).

TENN. CODE ANN. § 63–4–101(a) (1990).

TEX. REV. CIV. STAT. ANN. art. 4512(b), §1 (West 1976 & Supp. 1995).

UTAH CODE ANN. § 58–12–51.2(2) (1953).

VT. STAT. ANN. tit. 26, § 521(3) (Supp. 1994).

VA. CODE ANN. § 54.1–2900 (Michie 1950).

WASH. REV. CODE ANN. § 18.25.005 (1), (2), (4) (West 1989 & Supp. 1995).

W. VA. CODE § 30–16–2(c) (1993).

WIS. STAT. ANN. § 446.01(2) (West 1988).

WYO. STAT. § 33–10–101 (1977).