

Regulating the Practice of Acupuncture: Recent Developments in California

I. BACKGROUND

Acupuncture received little attention in this country until the recent political rapprochement with Mainland China. Beginning in 1971, delegations of U.S. physicians visiting China reported on the extensive use of acupuncture needling to treat a variety of human ailments and, in particular, to relieve pain. They also gave eyewitness accounts of how acupuncture needling enables Chinese patients to undergo major surgical procedures awake, alert and without apparent discomfort.¹ These observations received extensive press coverage,² and in California precipitated what one lawmaker referred to as an "instant market" for acupuncture treatments.³ Patients swamped newly opened clinics which charged as much as \$50 per treatment.⁴

¹See Dimond, *Medical Education and Care in the People's Republic of China*, 218 J.A.M.A. 1552, 1552-7 (1972) [hereinafter cited as Dimond, *Medical Education*]; Dimond, *Acupuncture Anesthesia*, 218 J.A.M.A. 1558, 1558-63 (1971) [hereinafter cited as Dimond, *Acupuncture Anesthesia*]; Gordon, *Acupuncture Anesthesia*, 222 J.A.M.A. 1310, 1310-11 (1972) [hereinafter cited as Gordon]; Malt & McDowell, *Cable from Cathay*, 228 N.E.J.M. 1353, 1353-4 (1973). Also see the account of a British physician who toured Chinese medical facilities in 1972, Capperault, *Acupuncture Anesthesia and Medicine in China Today*, 135 SURG., GYNECOL. & OBSTET. 440, 440-5 (1972) [hereinafter cited as Capperault].

²See Nelson, *Acupuncture is Convincing Americans*, San Francisco Chronicle, June 21, 1973, at 2, col. 1; Martin, *Acupuncture at Close Range*, U.S. NEWS, March 13, 1972, 24, 24-5; Saar, *Prickly Panacea Called Acupuncture*, LIFE Aug. 13, 1971, 32, 32-5; Tkach, *I Watched Acupuncture Work*, READER'S DIGEST, July, 1972, 146, 146-7. The most famous press report on Chinese acupuncture was written by columnist James Reston who underwent an emergency appendectomy while in China and wrote about the acupuncture treatments he was given for post-operative pain. See Reston, *Now About My Operation*, N.Y. Times, July 26, 1971, at 1, col. 6.

³Assemblyman Gordon Duffy, opening statement, ACUPUNCTURE HEARINGS, ASSEMBLY SELECT COMMITTEE ON HEALTH MANPOWER, Cal. Legislature Regular Session, at 2 (1972) [hereinafter cited as ACUPUNCTURE HEARINGS]; and see testimony of T. Elmendorf, then president-elect of the Cal. Med. Ass'n., ACUPUNCTURE HEARINGS, at 7.

⁴For a critical report on California's acupuncture clinics, see J. Kasindorf, *Acupuncture Phase II: The Promoters Take Over*, LOS ANGELES, June, 1973, 54, 54-6 & 88-90. For a more favorable view, see Declaration of Morton W. Barke, filed with Defendant's Declaration in Opposition to Plaintiff's Motion, Board of

Weekend seminars designed to train persons in acupuncture techniques proliferated.⁵

State officials now face the problem of regulating a burgeoning health care enterprise.⁶ California does not license acupuncture practitioners,⁷ and, except under limited conditions defined in recent emergency legislation,⁸ the administration of acupuncture treatments by persons not licensed by the state to practice medicine (hereinafter referred to as nonphysicians)⁹ violates California

Medical Examiners v. West Coast Medical Group, No. 661-569, San Francisco Sup. Ct., *preliminary injunction ordered July 3, 1973*.

⁵Although neither state law enforcement nor medical association officials have statistics on the number of acupuncture courses offered in California, Cal. Med. Ass'n. and Board of Medical Examiner files contain brochures and correspondence relating to a dozen courses offered to Californians since 1972. Offices of C.M.A. Division of Scientific & Educational Affairs, San Francisco, and California Board of Medical Examiners, Sacramento.

⁶State authority to regulate the professions and to define their limits derives from the reserved police power of the 10th Amendment (U.S. CONST. Amend. X). In California the broad outlines of health care regulation are established by the Legislature which has delegated authority to certify and discipline health care professionals to independent executive agencies: the State Board of Medical Examiners (BUS. & PROF. CODE § 2100 *et seq.* (West Supp. 1973)); the State Board of Dental Examiners (BUS. & PROF. CODE § 1600 *et seq.* (West Supp. 1973)); and the State Board of Nursing Examiners (BUS. & PROF. CODE § 2700 *et seq.* (West Supp. 1973)). The State Board of Chiropractic Examiners was created by voter initiative in 1922, BUS. & PROF. CODE § 1000-1 *et seq.* (West 1962). For a description and analysis of the administrative structure of the Board of Medical Examiners, see Marsh, *California Board of Medical Examiners*, 5 U.C. DAVIS L. REV. 114, 114-29 (1972). The Board's adjudicatory role is discussed in Guinn, *Judicial Review of Administrative Orders in Texas, A Comparative Analysis: The Board of Medical Examiners, Texas, California and Arkansas*, 23 BAYLOR L. REV. 34, 50-66 (1971). The operation of the other boards is similar.

⁷Although California statutes do not specifically provide for certification of persons to practice acupuncture, it appears that licensed physicians, dentists and possibly other health care professionals may administer acupuncture treatments. See note 9 *infra*, and accompanying text.

⁸See discussion of CAL. BUS. & PROF. CODE § 2145.1 at 396 *infra*.

⁹The term "nonphysician" is defined for the purpose of this article as a person who is not licensed by the state to practice medicine, dentistry or podiatry. BUS. & PROF. CODE § 2141 (West Supp. 1973), proscribes the practice of acupuncture by persons not licensed by the state. See 394 *infra*. Although the question has not been addressed by the courts, existing law arguably permits licensed physicians, dentists, and podiatrists to practice acupuncture. BUS. & PROF. CODE § 2137 (West 1962) appears to authorize licensed physicians to administer acupuncture treatments:

The physician's and surgeon's certificate authorizes the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions.

California's Board of Medical Examiners and the California Attorney General interpret § 2137 to permit licensed physicians to practice acupuncture in the state. Because acupuncture includes "penetration of tissues" and is a "method" used "in the treatment of diseases or other physical or mental conditions," it falls within the broad language of the statute. See State Board of Medical Exam-

statutes.¹⁰ Nevertheless, nonphysicians have practiced acupuncture in California's oriental communities for generations, and probably constitute the bulk of California's population of acupuncturists.¹¹ Until recently these nonphysicians had not been prosecuted by state officials.¹²

Increasing public awareness of and demand for acupuncture treatments require that state policy toward the practice of this ancient oriental art be assessed and clarified. To this end the California Legislature has recently enacted one measure dealing with acupuncture,¹³ and additional legislation has been introduced.¹⁴ The legisla-

iners Medical Memo No. 1, 1973; Plaintiff's Points & Authorities, Board of Medical Examiners v. West Coast Medical Group, No. 661-569, San Francisco Sup. Ct., *preliminary injunction ordered July 3, 1973*. BUS. & PROF. CODE §1625 (West Supp. 1973) may permit dentists to use acupuncture to treat disease and malpositions of the human mouth and jaw:

Dentistry is the diagnosis or treatment, by surgery or other method, of diseases and lesions and the correction of malposed positions of the human teeth, alveolar process, gums, jaws, or associated structures; and such diagnosis or treatment may include the use of drugs, anesthetic agents, and physical evaluation.

See Cal. Legislative Counsel Opinion no. 16671, Aug. 4, 1971. BUS. & PROF. CODE § 2139 (West Supp. 1973) may similarly permit licensed podiatrists to use acupuncture in the treatment of the human foot:

The certificate to practice podiatry authorizes the holder to practice podiatry. As used in this chapter:

Podiatry means the diagnosis, medical, surgical, mechanical, manipulative, and electrical treatment of the human foot, including the nonsurgical treatment of the muscles and tendons of the leg governing the functions of the foot.

¹⁰See discussion of the applicability of BUS. & PROF. CODE § 2141 to the practice of acupuncture by nonphysicians at 394 *infra*.

¹¹That nonphysicians have for generations practiced acupuncture in California's oriental communities is undisputed. See Kasindorf, *supra* note 4, and H.R. 68, Cal. Legislature (1972). Precise data on physician and nonphysician practitioners of acupuncture, however, is not available. The head of a California institute for the study of oriental medicine testified at legislative hearings on acupuncture that the practice of acupuncture "has been clandestine for so long. It's very difficult . . . to determine exactly who is doing what in California." (Statement of W. Prensky, ACUPUNCTURE HEARINGS, *supra* note 3, at 18). One official estimates the number of licensed California physicians skilled in acupuncture at about 150. Interview with R. Reid, Executive Director, California State Board of Medical Examiners, Sacramento, April 11, 1974. A California legislative committee heard testimony that nonphysician acupuncturists were treating "hundreds of patients daily" in every county in the state. Statement of W. Prensky, ACUPUNCTURE HEARINGS, *supra* note 3, at 18. Also see testimony of J. Lee, ACUPUNCTURE HEARINGS, *supra* note 3, at 46, and Kasindorf, *supra* note 4.

¹²The Executive Director of the California Board of Medical Examiners estimates that fewer than six complaints relating to the practice of acupuncture were filed with the Board prior to 1972. Since the Board investigates and refers cases to law enforcement officials only after it receives formal complaints, prior to 1972 the Board did not actively enforce § 2141 against nonphysician acupuncturists. In 1972 and 1973 the Board received complaints which led to approximately 32 legal actions related to acupuncture. Interview with R. Reid, Executive Director, Board of Medical Examiners, Sacramento, April 11, 1974.

¹³See discussion of BUS. & PROF. CODE § 2145.1 at 396 *infra*.

¹⁴See discussion at 397 *infra*.

tion and this article address one of the most pressing issues regarding acupuncture: Should the state impose restrictions on the practice of acupuncture by nonphysicians? After an explanation of what acupuncture entails, this article discusses present and proposed statutory controls on the practice of acupuncture by nonphysicians in California. It is this writer's conclusion that, for the present, the Legislature should restrict the practice of acupuncture by nonphysicians to medical school sponsored, physician supervised research projects, and that proposals to license independent acupuncture practitioners or physician's assistants specializing in acupuncture are premature.

II. ACUPUNCTURE: WHAT IT IS¹⁵

A. THE TECHNIQUE OF ACUPUNCTURE NEEDLING

To understand acupuncture as it has been practiced in the Orient and in oriental communities in the United States one must begin with the traditional Chinese concept of disease.¹⁶ Traditional Chinese theory explains illness as arising from an imbalance in the negative and positive forces in the body and a consequent disruption in the orderly flow of the Ch'i, or life energy, which flows from organ to organ through meridians. To cure illness the balance of forces and the flow of Ch'i must be restored. In many cases this can be achieved by one or more treatments with acupuncture needling.¹⁷ Chinese acupuncture theory teaches that there are hundreds of acupuncture or sensitive points along the body's meridians. When acupuncture treatments are administered, fine gauge needles from one to three inches long are inserted one-quarter to one-half inch beneath the skin at the acupuncture points which correspond with the source of the patient's discomfort. The needles are then twirled, moved up and down or attached to electric current.¹⁸ These treatments, alone or in con-

¹⁵The beneficial effects of acupuncture needling have been recognized in the Orient for over 3,000 years. For a historical review of the use of acupuncture and other components of traditional Chinese medicine in the Orient and Europe see Veith, *Acupuncture Therapy — Past and Present*, 180 J.A.M.A. 478, 478-84 (1962) [hereinafter cited as Veith, *Acupuncture Therapy*], and *Acupuncture in Traditional Chinese Medicine*, 118 CALIF. MED. 70, 70-9, Feb. 1973 [hereinafter cited as Veith, *Acupuncture*]. For a comprehensive treatise on acupuncture theory and practice see F. MANN, *ACUPUNCTURE, THE ANCIENT CHINESE ART OF HEALING* (1962) [hereinafter cited as MANN].

¹⁶This brief explanation of Chinese concepts of disease is necessarily simplified. For more detailed discussion see references cited at note 15, *supra*.

¹⁷*Id.*, and see Geiger, *How Acupuncture Anesthetizes: The Chinese Explanation*, WORLD MED., Aug. 22, 1973, 15, 15-23 [hereinafter cited as Geiger]; Dimond, *Ward Rounds with an Acupuncturist*, 272 Ward Rounds with an Acupuncturist, after cited as Dimond, *Ward Rounds*]; and references cited at note 1, *supra*.

¹⁸The attachment of acupuncture needles to electric current is a recent innovation. The effect is said to be the same as when the needles are manipulated manually. See Dimond, *Acupuncture Anesthesia*, *supra* note 1, at 1560-1, and Geiger, *supra* note 17, at 18.

junction with other remedies such as herbal medicines and massage, are said to correct the balance of positive and negative forces in the body, improve the flow of Ch'i through the meridians, and thus restore health.¹⁹

Though most contemporary scientists reject the meridian theory, they have not substituted an entirely convincing explanation of the apparent pain-inhibiting and healing properties of acupuncture.²⁰ Some suggest that acupuncture needling sends out nerve impulses which raise the patient's pain threshold by blocking the transmission of pain impulses from the site of the illness or injury to the brain.²¹ Others believe the apparent pain-inhibition associated with acupuncture is primarily the result of psychological conditioning, a form of hypnosis, rather than a physiological consequence of the insertion and manipulation of the needles.²²

B. ASSERTED MEDICAL VALUE OF ACUPUNCTURE

Although students of acupuncture disagree on whether and how acupuncture works, acupuncture proponents assert that it has many beneficial uses. A partial list of human ailments that are said to respond to acupuncture treatments include tuberculosis, asthma, high blood pressure, nerve deafness, drug addiction, drug withdrawal

¹⁹ References cited *supra* notes 15 & 17.

²⁰ For an excellent critique of the Chinese meridian theory and an analysis of the principal explanations of acupuncture posited by western scientists see J. Chapes & T. Barber, *Acupuncture Analgesia: A Six-Factor Theory*, no. 128 Medfield Foundation, Medfield, Mass. (1973) [hereinafter cited as Chapes & Barber].

²¹ Known as the "gate control theory," this explanation of acupuncture is among the most convincing. See Melzack & Wall, *Pain Mechanisms: A New Theory*, 150 *SCIENCE* at 971, 971-9 (1965), and Melzack, *How Acupuncture Can Block Pain*, XXIII *IMPACT OF SCIENCE ON SOCIETY* 65, 65-75 (1973).

²² This argument is presented persuasively in Chapes & Barber, *supra* note 20. For example, Chapes & Barber report that one of the foremost authorities on acupuncture, Dr. Felix Mann,

attempted to use acupuncture to produce analgesia to pinpricks in 100 volunteer subjects. Acupuncture failed to produce satisfactory analgesia to the pinpricks, which were severe enough to draw blood, in at least 90% of these subjects. Mann attributed the tremendous discrepancy between his success rate and the [90%] success rate reported from China as due to the following: in contrast to the Chinese, he did not attempt to lead his subjects to believe that acupuncture would be highly effective.

See F. Mann, Paper presented at N.Y.U. School of Medicine Symposium on Acupuncture, 1973, reported in Chapes & Barber at 6. Similar observations are made by visitors to China who report that acupuncture anesthesia is used only on patients who express full confidence in and acceptance of acupuncture therapy and that as much as four or five days before surgery are devoted to psychological preparation of the patient for the operation. See F. Warren, *Panel Discussion: Acupuncture*, in *TRANSCRIPT OF THE ACUPUNCTURE SYMPOSIUM*, Stanford, Cal., Academy of Parapsychology & Medicine 86, 86-92 (1972) [hereinafter cited as *STANFORD ACUPUNCTURE SYMPOSIUM*]; Geiger, *supra* note 17; Jain, *Glimpses of Chinese Medicine*, 106 *CAN. MED. ASSOC. J.* 1558, 1558-63 (1971).

symptoms, paralysis, migraine, and arthritis.²³

Acupuncture is claimed to be particularly effective in inhibiting and relieving pain. The Chinese reportedly use acupuncture supplemented by small doses of morphine or similar analgesics as the chief anesthetic in twenty to thirty percent of their surgical operations.²⁴ In ninety percent of these operations sufficient pain inhibition is achieved to conduct surgery without patient discomfort.²⁵ The operations include major procedures such as appendectomies and the removal of tumors from the brain and abdomen, as well as simpler procedures such as tonsillectomies and tooth extractions.²⁶ Chinese physicians state that acupuncture anesthesia is easier to administer and less expensive than western anesthesia, and does not have the undesirable side effects often associated with the latter such as nausea and vomiting.²⁷ Some cases of chronic pain not aided by conventional western medicine have responded to acupuncture therapy.²⁸ Recent experiments at the University of Southern California, for example, suggest that acupuncture may relieve chronic pain of the mouth and jaw in dental patients previously considered untreatable.²⁹

²³Mann, *supra* note 15, at 149-64, contains a chapter on diseases that may be treated by acupuncture. Mann writes:

Theoretically it is possible to help or cure by acupuncture any disease that can be affected by a physiological process. Duodenal ulcer, acne vulgaris, migraine, for example . . . A trouble that is purely anatomical and uninfluenced by a physiological process, such as kidney stone, . . . a fully formed cataract, cannot be treated by this means.

For case histories and discussion of specific applications of acupuncture see Geiger, *supra* note 17; Dimond, *Acupuncture Anesthesia*, *supra* note 1; Gordon, *supra* note 1; Taub, *Addicts Cured with Acupuncture*, 25 PREVENTION 31, 31-46, Sept. 1973; Peng, *Acupuncture Treatment for Deafness*, 1 AM. J. CHI. MED. 155, 155-8 (1973); NIH ACUPUNCTURE RESEARCH CONFERENCE, PROCEEDINGS, D.H.E.W. Pub. no. (NIH) 74-165 (1973) [hereinafter cited as NIH ACUPUNCTURE CONFERENCE].

²⁴References cited *supra* note 17, and Dimond, *Medical Education*, *supra* note 1, at 1557.

²⁵*Id.*

²⁶See references cited at notes 1 & 17 *supra*.

²⁷Dimond, *Ward Rounds*, *supra* note 17, at 1561; Capperault, *supra* note 1, at 444-5.

²⁸See the following articles, all published in NIH ACUPUNCTURE CONFERENCE, *supra* note 23, at the pages indicated: Beebe *et al.*, *Preliminary Findings with Acupuncture Treatment of Pain*, at 1-2; Chen, *Therapeutic Effects of Acupuncture on Cases of Chronic Pain*, at 3-5; Kepes *et al.*, *A Critical Evaluation of Acupuncture for the Relief of Chronic Pain*, at 8-10; Matsumoto *et al.*, *Clinical Evaluation of Acupuncture in Chronic Musculoskeletal Pain Osteo-arthritis*, at 19-20; Moore, *Acupuncture as a Therapeutic Technique in the Management of Benign Intractable Pain*, at 21-3; Shibutani, *Evaluation of the Therapeutic Effect of Acupuncture*, at 28-31.

²⁹An official report of the U.C.L.A. study is not yet available. However, preliminary results of the experiments are reported by Saltus, *Dental Acupuncture*, Sacramento Bee, Aug. 15, 1973, § F, at 6, col. 1, and see testimony of Green, ACUPUNCTURE HEARINGS, *supra* note 3, at 22-3. Additional reports on the use of acupuncture to treat dental pain include Brennan & Veldhuis, *Acupuncture*

III. THE CASE FOR RESTRICTING THE PRACTICE OF ACUPUNCTURE BY NONPHYSICIANS

Proponents of legalizing the practice of acupuncture by non-physicians argue that acupuncture needling is medically beneficial and relatively risk free. However, acupuncture's medical value has not been proved, and there is substantial evidence that the practice of acupuncture by nonphysicians entails serious medical risks.

A. THE MEDICAL VALUE OF ACUPUNCTURE HAS NOT BEEN ESTABLISHED

Although acupuncture has been practiced in the Orient for over 3,000 years,³⁰ and has long been used in Europe³¹ and in oriental communities in the United States,³² there is only anecdotal evidence of acupuncture's effectiveness.³³ Systematic studies of acupuncture have only recently been initiated and as yet there is no data from controlled experiments to substantiate claims that acupuncture is medically beneficial.³⁴ The experience of investigators indicates that not all patients or all illnesses are helped by acupuncture³⁵ and that in some cases acupuncture increases patient suffering.³⁶ Initial investigation on the use of acupuncture to relieve arthritic pain revealed that persons treated according to correct acupuncture techniques experienced no greater relief than persons in a control group

Anesthesia and Dental Pain, NIH ACUPUNCTURE CONFERENCE, *supra* note 23, at 46-9, and Bresler, *Acupuncture Analgesia in Oral Surgery*, NIH ACUPUNCTURE CONFERENCE, *supra* note 23, at 68-79.

³⁰ On the origins of acupuncture in ancient China see I. VEITH, *THE YELLOW EMPEROR'S CLASSIC OF INTERNAL MEDICINE* (translated with introductory study 1949).

³¹ Veith, *Acupuncture Therapy*, *supra* note 15, at 478-84.

³² See *supra* note 11.

³³ For an indication of the inconclusive, anecdotal nature of available evidence on the efficacy of acupuncture see generally NIH ACUPUNCTURE CONFERENCE, *supra* note 23; STANFORD ACUPUNCTURE SYMPOSIUM, *supra* note 22; and articles in 1 AM. J. CHI. MED. (1973).

³⁴ *Id.* NIH-sponsored acupuncture research is in progress at Missouri Institute of Psychiatry, St. Louis (acupuncture hypnosis in experimental and chronic pain), University of North Carolina, Chapel Hill (acupuncture in hypertension therapy and acupuncture on normal and painful skin sensation) and at Emory University, Atlanta (acupuncture for post-operative and operative analgesia). Telephone conversation with H. Jenerick, Executive Secretary, NIH, Washington, D.C., April 11, 1974. In response to a 1973 Cal. Med. Ass'n. inquiry five California medical schools reported acupuncture research projects planned or in progress. Files of C.M.A. Division of Scientific and Educational Affairs, October, 1973. At this writing the above investigations have not been completed.

³⁵ See generally NIH ACUPUNCTURE CONFERENCE, *supra* note 23; and see account of unpublished report by B. Brandstater, M.D., in Metz, *Acupuncture Tried at Loma Linda*, San Bernardino Sun, § B, at 2, col. 1, March 4, 1973 [hereinafter cited as Metz] and references cited *supra* note 22.

³⁶ See Moore, *Acupuncture as a Therapeutic Technique in the Management of Benign Intractable Pain*, NIH ACUPUNCTURE CONFERENCE, *supra* note 23, at 21; Anon., 73 SCIENCE DIGEST at 6 (1972).

who were randomly stuck with needles.³⁷ Preliminary research on the use of acupuncture to cure nerve deafness showed similarly disappointing results.³⁸ There are numerous examples throughout medical history of drugs and procedures initially hailed as miraculous and later found useless or unsafe.³⁹ Thus, within the medical community, the official position toward acupuncture is a skeptical one.⁴⁰

B. MEDICAL COMPLICATIONS ASSOCIATED WITH ACUPUNCTURE AND THE DANGER OF DELAYED DIAGNOSIS OF ILLNESS

As acupuncture has achieved popularity, reports of complications from acupuncture treatments have followed.⁴¹ Most complications reported are the result of improper use of needles, including infection, bruising, broken needles lodged in the body, and puncture of vital organs. Continuing acupuncture research may reveal other medical risks or undesirable side-effects.

The practice of acupuncture by nonphysicians also invites delay in the diagnosis and treatment of serious illness. Some view this as the most important reason for restricting the nonphysician practice of acupuncture.⁴² Acupuncture is essentially a method of treating the

³⁷Shen *et al.*, *A Pilot Study of the Effects of Acupuncture in Rheumatoid Arthritis*, paper presented to Am. Rheumatism Ass'n. Annual Meeting, Los Angeles, 1973; also reported in Perlman, *Acupuncture Tested at U.C.*, San Francisco Chronicle, June 21, 1973, at 2, col. 1.

³⁸Metz, *supra* note 35.

³⁹Two recent examples include the drugs laetrile and krebiozen. Some experiments suggested that these drugs inhibited the growth of malignant tumors. Controlled studies found both drugs useless in treating cancer. See Cancer Advisory Council Report on Treatment of Cancer; Beta-Cyanogenetic Glucosides ("Laetriles"), Cal. Dept. Pub. Health (1963); Cancer Advisory Council Report on Treatment of Cancer; Krebiozen, Cal. Dept. Pub. Health (1963).

⁴⁰An official Am. Med. Ass'n. statement cautioned that acupuncture "is an experimental procedure which should be performed only by a licensed physician or dentist or under his direct supervision." W. Barclay, *American Medical News*, April 30, 1973. The Cal. Med. Ass'n. issued a public warning which stated that the practice of acupuncture by nonphysicians in California constitutes the illegal practice of medicine, cited the risks associated with acupuncture treatment, and cautioned that evidence on acupuncture must be "carefully gathered and analyzed" before acupuncture can be accepted. C.M.A. Health Tips no. 298, *Acupuncture* (1972).

⁴¹See statement of T. Elmendorf, ACUPUNCTURE HEARINGS, *supra* note 3, at 5, and statement of A. Hsieh, ACUPUNCTURE SYMPOSIUM, U.C. Davis, Nov. 3, 1973 (infection); Matsumoto *et al.*, NIH ACUPUNCTURE CONFERENCE, *supra* note 23, at 19 (bruising); Keller, *Possible Renal Complications of Acupuncture*, 222 J.A.M.A. 1559 (1972) (lodged needles); Corbett & Sinclair, *Acu- and Pleuro-Puncture*, 290 N.E.J.M. 167, 167-8 (1974); Waldman, *Pneumothorax from Acupuncture*, 290 N.E.J.M. 633 (1974) (puncture of vital organs).

⁴²See the statement of an A.M.A. spokesman who declared:

Use of acupuncture by nonphysicians is not in the best interest of the people's health. Pain is a signal that something is wrong. Re-

symptoms of illness, such as pain or tension. If a patient complains of discomfort in the abdomen, for example, the acupuncturist is trained to insert needles in points on the body which correspond to relief of the pain. Acupuncturists do not have the medical training which enables U.S. physicians to evaluate symptoms as evidence of an underlying illness and to ascertain and treat that illness.⁴³ If the cause of the patient's complaint of abdominal pain is a minor, self-limiting illness, such as indigestion or flu, failure to diagnose and treat it may be of little consequence. If, however, the source of discomfort is more serious, such as appendicitis or a malignant tumor, failure to diagnose and treat the cause as well as the symptoms at an early stage may have fatal results. Some of this risk may be avoided if nonphysician acupuncturists are allowed to treat patients only on referral from a licensed physician who has examined the patient and diagnosed the problem.⁴⁴ However, this will not protect the patient whose initial symptoms are not sufficiently specific to allow diagnosis, but who would have been found to have a serious, treatable disease in a subsequent visit to a physician.⁴⁵

The unproved therapeutic value of acupuncture, the risk of medical complications and the potential delay of diagnosis of serious illness support the conclusion that, to protect the public from the risk of useless or harmful treatment, the state should restrict the practice of acupuncture by nonphysicians.⁴⁶ Evidence that acupunc-

lieving pain without determining its cause can be extremely dangerous to health. A proper diagnosis is required to determine what is causing the pain. This diagnosis can be performed only by a licensed physician.

Barclay, *American Medical News*, April 30, 1973. Similar statements appear in C.M.A. Health Tips no. 398, *Acupuncture* (1972) and in the testimony of T. Elmendorf, then president-elect of the Cal. Med. Ass'n., ACUPUNCTURE HEARINGS, *supra* note 3, at 5-6. And see the opening statement of Assembly Select Committee on Health Manpower, Assemblyman Gordon Duffy, Chairman, ACUPUNCTURE HEARINGS, *supra* note 3, at 2.

⁴³ Acupuncture treatment is only one component of traditional Chinese medicine. Persons trained in all facets of traditional Chinese medicine also learn diagnostic techniques which include taking the patient's pulse at the wrists, observation of the patient's color, and consultation with the patient and the patient's family. These diagnostic techniques and traditional Chinese concepts of disease do not approach the level of sophistication and accuracy of diagnostic techniques and disease concepts of western medical science. See Veith, *Acupuncture and Veith, Acupuncture Therapy*, *supra* note 15.

⁴⁴ A referral system is advocated by some who do not want acupuncture co-opted by or integrated with the medical profession.

⁴⁵ This is not infrequently the case with, for example, tuberculosis, cancer and collagen-vascular diseases. Interview with E. Ograd, M.D., Div. of Hematology and Oncology, U.C. Davis, February 7, 1974.

⁴⁶ Advocates of immediate legalization of nonphysician practice of acupuncture criticize current California law which proscribes the giving of acupuncture treatments by skilled acupuncturists except when engaged in research on medical school premises and under physician supervision, but permits licensed physicians to administer acupuncture treatments irrespective of whether they are trained in

ture may relieve pain and be useful in treating a wide range of ailments, some of which are not now treatable by conventional western medicine, leads to the further conclusion that the state should encourage acupuncture research.

IV. CURRENT LEGAL STATUS OF THE PRACTICE OF ACUPUNCTURE IN CALIFORNIA

A. STATUTORY RESTRAINTS

Except under special conditions defined in recent emergency legislation,⁴⁷ the practice of acupuncture by persons not licensed by California to practice medicine is illegal.⁴⁸ Section 2141 of California's Business and Professions Code proscribes the practice of medicine by unlicensed persons:

Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor.⁴⁹

When acupuncture clinics began to proliferate in California, the Board of Medical Examiners warned that nonphysicians who practice acupuncture in the state are subject to prosecution under section 2141.⁵⁰ This crackdown on acupuncturists sparked enormous con-

the art. Whether, in the long run, the state should restrict physician practice of acupuncture is beyond the scope of this article. Such a decision should be made after scientific evaluation of acupuncture is completed. (See discussion at 398 *infra*). During the period of scientific investigation of acupuncture, the interests of patient safety and rigorous analysis are best served by placing acupuncture research under the supervision of licensed physicians whose professional, ethical and legal responsibility is proper patient diagnosis and care. See W. PROSSER, *LAW OF TORTS* 161-8 (4th ed. 1971); Mulford, *Experimentation on Human Beings*, 20 *STANFORD L. REV.* 99 (1967); IV PROFESSIONAL NEWSLETTER (Nov., 1972).

⁴⁷BUS. & PROF. CODE § 2145.1 (West Supp. 1973), enacted in 1972 (Stats. 1972 c. 826 p. 1474) allows nonphysicians to engage in acupuncture research when on the premises of an approved medical school and under the supervision of a licensed physician. See discussion at 396 *infra*.

⁴⁸This is the position of California's Board of Medical Examiners (State Board of Medical Examiners, Medical Memo no. 1, 1973) and of the California Attorney General (Plaintiff's Points & Authorities, Board of Medical Examiners v. West Coast Medical Group, No. 661-559, San Francisco Sup. Ct., *preliminary injunction ordered* July 3, 1973). As discussed in the accompanying text, this is a proper interpretation of existing California statutes.

⁴⁹BUS. & PROF. CODE § 2141 (West Supp. 1973).

⁵⁰State Board of Medical Examiners, Medical Memo no. 1 (1973).

troversy and resulted in litigation challenging the applicability of section 2141 to nonphysician acupuncturists.⁵¹

Although section 2141 was enacted in essentially its present form in 1913,⁵² long before acupuncture became a matter of legislative concern, the provisions of the statute logically encompass acupuncture needling when used to treat human afflictions. The broad language, coupled with the absence of any reference to particular methods of treatment, indicates that the Legislature designed the act to proscribe the unlicensed practice of all methods of treating human affliction, including those, such as acupuncture, which may not have been known to it at the time the measure was approved.

B. THE APPLICABILITY OF *MAGIT V. BOARD OF MEDICAL EXAMINERS*

Although there are no reported cases directly addressing the issue of the practice of acupuncture by nonphysicians,⁵³ the case of *Magit v. Board of Medical Examiners*,⁵⁴ suggests that, if faced with the issue, the California Supreme Court would uphold the Board's application of section 2141 to acupuncture. In *Magit* the court sustained disciplinary action taken by the Board against a licensed physician who had employed unlicensed physicians to administer anesthesia to patients. The employees were graduates of foreign medical schools who had been trained in the United States as anesthesiologists, but who were not licensed to practice medicine or any other health care profession by any of the states. The Supreme Court agreed with the Board that Dr. Magit was guilty of aiding and abetting the unlicensed practice of medicine by his employees.⁵⁵ It was no excuse that the employees were competent to administer anesthesia. The court noted its previous approval of restricting "the right to administer anesthetics which produce local or general insensibility to pain" to per-

⁵¹ *Hoffman v. Reagan*, No. 667-473, San Francisco Sup. Ct., (patient's action claiming right to receive acupuncture treatment from unlicensed acupuncturists) *demurrer sustained without leave to amend*, Feb. 25, 1974; *Foster v. Board of Medical Examiners*, No. 669-611, San Francisco Sup. Ct., (physician's suit claiming physician's right to refer patients for treatment by unlicensed acupuncturists) *demurrer sustained without leave to amend*, Feb. 25, 1974; *Barke v. Cork*, No. C45857, Los Angeles Sup. Ct., (physician's suit asserting physician's right to employ unlicensed acupuncturists to assist physician in treating patients) *complaint withdrawn*; *Clapp v. Martin*, No. 243943, Sacramento Sup. Ct., (physician's suit claiming physician's right to employ unlicensed acupuncturists as physician's assistants) *pending*.

⁵² Stats. 1913 c. 354 § 17, p. 734.

⁵³ At this writing there are no reported cases on the issue of the practice of acupuncture by nonphysicians.

⁵⁴ 57 Cal. 2d 74, 336 P.2d 816, 17 Cal. Rptr. 488 (1961).

⁵⁵ *Id.*

sons certified by the state to be ethical and competent,⁵⁶ and declared:

In the absence of some statutory basis for an exception, such as those with respect to nurses and persons engaged in medical study or teaching, one who is not licensed to practice medicine or surgery cannot legally perform acts which are medical or surgical in character . . .⁵⁷

The court reasoned that this restriction was

the necessary result of our statutory system which, in order to assure the protection of the public, requires that a person's competency be determined by the state and evidenced by a license.⁵⁸

The reasoning of *Magit* is applicable to the practice of acupuncture by nonphysicians. When acupuncture is used as an anesthetic, it falls directly within the language of the decision. Acupuncture includes acts which are surgical (the penetration of the skin with needles) and medical (the treatment of human ailments) in character.⁵⁹ The administration of acupuncture anesthesia by nonphysician acupuncturists, many of whom are highly skilled and are licensed to practice acupuncture in other countries, is similar to the administration of conventional anesthesia by the foreign-trained, competent, but unlicensed physician employees of Dr. Magit.⁶⁰ The *Magit* court's reading of the purpose of the statute further underscores the applicability of the act to the practice of acupuncture, a mode of treatment which has not been proved safe or efficacious, by nonphysicians whose competence and ethics have not been certified by the state.

V. LEGISLATIVE ACTION TO ENCOURAGE ACUPUNCTURE RESEARCH

In 1972 the California Legislature enacted a state policy encouraging acupuncture research. Since few U.S. physicians are highly trained or skilled in the administration of acupuncture treatments,⁶¹ the Legislature decided to permit nonphysician acupunc-

⁵⁶ 57 Cal. 2d at 82, 366 P.2d at 819, 17 Cal. Rptr. at 491 (1961), citing *Painless Parker v. Board of Dental Examiners*, 216 Cal. 285, 295, 14 P.2d 67, 71 (1932).

⁵⁷ 57 Cal. 2d at 84, 366 P.2d at 820, 17 Cal. Rptr. at 492 (1961).

⁵⁸ 57 Cal. 2d at 85, 366 P.2d at 821, 17 Cal. Rptr. at 493 (1961).

⁵⁹ See text of BUS. & PROF. CODE § 2137 (West 1962), *supra* note 7.

⁶⁰ In *Magit v. Board of Medical Examiners*, 57 Cal. 2d 74, 81, 82, 366 P.2d 816, 819, 17 Cal. Rptr. 488, 491 (1961) the court notes:

. . . the [California] code speaks of anesthetics in a manner which indicates a legislative intent that their use be considered as coming within the practice of medicine. Section 2192 includes in the curriculum required of applicants for a physician's and surgeon's certificate adequate instruction in "surgery, including *** anesthesia," and section 2139 provides that no chiroprapist shall "use an anesthetic other than local."

⁶¹ *Supra* note 11.

turists, many of whom have extensive training and years of experience in the art,⁶² to participate in acupuncture research projects. The 1972 measure permits unlicensed persons to practice acupuncture only when engaged in research on the premises of an approved medical school under the supervision of a licensed physician.⁶³ In response to complaints that the act is unduly restrictive,⁶⁴ a bill to substitute medical school sponsorship for the requirement that research be on medical school premises has been introduced.⁶⁵

There is pressure on the Legislature to go much further in easing the restrictions on the practice of acupuncture. Major proposals include licensing acupuncturists as physician's assistants, or as independent practitioners who would be permitted to treat only patients referred by licensed physicians. A bill embodying the first alternative was introduced in the 1973 session of the Legislature.⁶⁶ It would have created a special category of physician's assistants certified and regulated by the Board of Medical Examiners to practice under direct physician supervision. A special advisory council on acupuncture, composed of qualified persons from the fields of acupuncture and medicine would have been appointed to assist the Board in setting standards of competence for acupuncture assistants. Although the bill was approved by the California Assembly,⁶⁷ it failed by one vote to gain approval of the Senate Subcommittee to which it was referred.⁶⁸ The defeat of the bill is considered a victory for a growing

⁶² Since California does not license acupuncturists, no statistics are available. For indication that California has a large population of skilled nonphysician acupuncturists see ACUPUNCTURE HEARINGS, *supra* note 3, generally, and testimony of W. Prensky at 36-9. On the desirability of permitting such persons to participate in acupuncture research see testimony of D. Bresler, W. Hersh and G. London, ACUPUNCTURE HEARINGS, *supra* note 3, at 31-3, 47-58.

⁶³ BUS. & PROF. CODE § 2145.1 (West Supp. 1973) reads as follows:

The performance of acupuncture by an unlicensed person, alone or in conjunction with other forms of traditional Chinese medicine, when carried on in an approved medical school for the primary purpose of scientific investigation of acupuncture, shall not be in violation of this chapter, but such procedures shall be carried on only under the supervision of a licensed physician and surgeon.

Any medical school conducting research into acupuncture under the provisions of this section shall report to the Legislature annually on the fifth legislative day of the regular session of the Legislature concerning the results of such research, the suitability of acupuncture as a therapeutic technique, and performance standards for persons who perform acupuncture.

⁶⁴ See testimony of D. Bresler, M. Hersh and G. London, ACUPUNCTURE HEARINGS, *supra* note 3, at 32-3 and 48-58.

⁶⁵ A.B. 1841, Cal. Legislature, April 26, 1973.

⁶⁶ A.B. 1691, Cal. Legislature, April 25, 1973.

⁶⁷ Cal. Legislature, Assembly Weekly History, March 21, 1974, at 376.

⁶⁸ Cal. Legislature, Assembly Daily History, March 26, 1974, at 32, and interview with W. Abalona, Consultant, Assembly Select Committee on Health Manpower, Sacramento, March 26, 1974.

constituency of nonphysicians who favor the second proposal, the recognition of acupuncture as an independent profession.

Even if one believes that acupuncture will eventually be accepted in this country as a valuable addition to western medicine, the California Legislature should not now authorize nonphysicians to practice acupuncture in nonresearch settings or without physician supervision. Statutory recognition of a separate profession of acupuncture, whether physician's assistants or independent practitioners, and the creation of administrative machinery to regulate that profession, are first steps toward permanent institutionalization of a separate profession. In the long run, such a policy may be inappropriate.⁶⁹ Steps toward the recognition of a new profession should await the results of acupuncture research now in progress. If acupuncture is found to be safe and medically efficacious, then the Legislature should consider whether it is desirable to recognize a separate profession of acupuncture,⁷⁰ or whether acupuncture should be incorporated into the practice of physicians or other existing health care professionals. In France, for example, where acupuncture is accepted therapy, acupuncture is a medical specialty, under physician control.⁷¹ In China it is being added to medical school curricula and taught in conjunction with western medical procedures.⁷² In the U.S. there already exist three major mechanisms for integrating new techniques into the practice of medicine by physicians: addition to medical school curricula, residency training programs, and continuing post-graduate

⁶⁹The cost of setting up administrative machinery to regulate a profession of acupuncture which the state may ultimately not want to recognize, and the danger that institutionalization of that profession, once begun, may become politically difficult or impossible to undo, suggest that even temporary licensing of physician's assistants specializing in acupuncture is inappropriate. Although current law creates no special body to police the competency of nonphysician acupuncturists engaged in research, this is the responsibility of medical school sponsors and physician supervisors of acupuncture research projects who ethically and legally are responsible for proper patient diagnosis and care. Moreover, the medical profession has declared acupuncture an experimental procedure, subject to particularly rigorous professional and legal standards. (See references cited *supra* note 40). A special temporary body to regulate nonphysicians engaged in medical school sponsored, physician supervised acupuncture research is not needed.

⁷⁰At this writing, one state, Nevada, has created a Board of Chinese Medicine which licenses nonphysician acupuncturists as independent practitioners. Stats. 1973 c. 441 p. 635 and Rules and Regulations of Nevada State Board of Chinese Medicine.) In contrast, Kansas bans the practice of acupuncture by anyone. In many states (Ariz., Colo., Conn., Del., Ill., Ia., Mich., Minn., Mo., Nebr., N.Y., Ohio, Okla., Pa., Wash., Wis.), officials have declared that, under state law, acupuncture constitutes the practice of medicine and thus may not be practiced by nonphysicians. Some states (Ariz., Cal., D.C., Maine, Mass., N.Y., Ore., Tenn.) permit nonphysicians to participate in acupuncture research. Data supplied by Dept. of Investigation, Am. Med. Ass'n., Chicago, October, 1973.

⁷¹ACUPUNCTURE HEARINGS, *supra* note 3, at 22.

⁷²Capperault, *supra* note 1, at 441-5; Dimond, *Medical Education*, *supra* note 1, at 554.

education programs.⁷³ If acupuncture effectively supplements western medical procedures, the Legislature must weigh the social benefits and costs of creating a new health care profession against those of integrating acupuncture into the practice of established health care professions.

VI. CONCLUSION

Although there is considerable evidence that acupuncture is of medical value, until its safety and efficacy have been established, the California Legislature should restrict its practice by nonphysicians to medical school sponsored, physician supervised research projects.

Jean Harrison Ogrod

⁷³ Acupuncture could be incorporated into medical school curricula or residency training programs. For practicing physicians who have completed formal training, acupuncture could be added to the continuing medical education process (C.M.E.) which the medical profession has developed to update the knowledge of practicing physicians and to teach them new techniques. The C.M.E. system includes special training programs, seminars, visual aids, monthly taped lectures and journals. The extent of C.M.E. is indicated in a recent issue of the official journal of the Alaska, California, Hawaii, Montana, Oregon and Washington medical associations which lists 289 C.M.E. programs in those states during the months of March, April and May, 1974. The list is by no means a complete catalog. 120 WEST J. MED. 40, 40-51 (1974). Other recognized health care professions such as dentistry and nursing have similar C.M.E. programs which could be used to train their members in acupuncture techniques.