

# Outlawing Medicine

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## The Health Care Exception

Despite the rapid worldwide privatization of state industries and services that followed the pioneering reforms of Margaret Thatcher, medicine is one sector of the economy in which bureaucratic regulation is still largely accepted as the norm, and where state control has never ceased to grow. The belief that medical care is a right to be provided by the national government has seeped even into the capitalistic fibers of the United States.

Although free-market exchanges are routine for essentials such as food, clothing, housing, and transportation, the U.S. government provides nearly half of the country's medical care through such welfare programs as Medicare and Medicaid. And yet, condemnation of the U.S. medical establishment spews from those who expect superior, costless doctoring, extended to unlimited numbers.

Tax-favored Health Savings Accounts, catastrophic insurance, and private or corporate charity, combined with fully deregulated medical and insurance markets, would undoubtedly offer more to all citizens than today's faltering bureaucratic delivery of medical services. Yet for the time being, only staunch defenders of liberty dare defend such a project in the United States or in other parts of the world.

Populations tethered by the welfare state have not fully shrugged off the myth of government's benevolence and omnipotence. They are still unable or unwilling to trust the market for the management and delivery of medical services. Primal fears linked to loss of health have probably hindered rational thought in this particular issue of human misfortune, opening the door to unreasonable expectations, emotional discourse, and demagoguery.

The illusion of protecting the sick, the poor, and the aging originally offered social engineers, parliamentary factions, and regulatory agencies a convenient moral pretext for intrusion into, as well as a predatory grip on, the medical industry. With time, the object of care moved from humans at risk, to tax booties in peril. Increasingly fierce government intervention followed, founded on the erroneous assumption that more regulation and control can cure the ills caused by government regulation and control.

The medical profession has paid a heavy price because of regulation, and it bears some responsibility for its own loss of autonomy.

## The Medical Corporation's *Via Crucis*

Medical practitioners of the 19<sup>th</sup> century probably believed that the licensing of their profession by the state, which they readily accepted, would rid them of the quacks and charlatans that had hitherto plagued medical markets. However, they underestimated the price for patronage. Licensure implied allegiance to an authority supporting values alien to medicine, and endowed with powerful tools of enforcement.

Physicians were the first victims of regulatory health policies developed by the modern welfare state. A combination of perquisites, threats, and bullying stifled token attempts at resistance. As the regulatory machine gathered steam, doctors lost control of their fees, their hospitals, and their schools of learning. They faced increasing restrictions on their rights to practice. Recently, the federal government of Switzerland, a cautious democracy, banned the opening of new private medical offices, based on the absurd theory that medical costs rise solely in proportion to the number of practicing doctors.

Managed care and statistical surveillance of medical activity are harbingers of more intimidation and control. Medical prescriptions are already heavily influenced by payment policies of third parties. Therapeutic options will shrink further once the trendy concept of "evidence-based medicine" is brought into full regulatory usage.

In most of the industrialized world, physicians have *volens nolens* accepted the guardianship of collective resources and blind subservience to health care bureaucracies. Despite the erosion of their prestige, income, and autonomy, most of them still reject—on ill-founded and sometimes insincere moral grounds—a return to the market and to the independence that was the mark of the profession from the time of Hippocrates.

## Medical Care as an Onus

Third-party financing of medical services brought a radical shift of empowerment from patient and physician to administrative regulators. Universal coverage and unrestricted access also led to a dilution of responsibilities, waste, high administrative costs, a lower quality of care, and ultimately to the general dissatisfaction of all parties involved.

Governments have begun to acknowledge that taxation has limits, and that deficit spending will not sustain the costs of public health systems forever. As the redistributive pie gets smaller, health

budgets face competition from flashier sectors of state expenditure supported by lobbies wielding more influence than ailing patients and their hapless physicians.

The aging of populations and growing pressure on the funding of social pensions has added to the concerns of social security accountants, who are taking a second look at medical care. Scientific advancements in medicine are not only costly, but they also extend the lives of individuals who have ceased to be productive. As a result, health expenditures are no longer seen as investments in the welfare of populations, but as net losses borne by society as a whole.<sup>1</sup> As the bankruptcy of social security systems nears, public health activists backed by environmentalists, whose preaching for Nature makes them instinctively wary of medicine's sophisticated modern tools, are now demanding tougher control of physicians. Overt rationing of medical care is no longer considered taboo.

In most countries, soft regulatory pressures generally succeeded in keeping doctors' fees under control. However, this in no way curbed health expenditures. Physicians still held the keys to costly products from allied industries, which had remained relatively free from bureaucratic tampering, except in Marxist states. Despite some tribute to regulation, innovative research, stimulated by competitive markets, contributed both to the prosperity and spectacular advances of modern medicine.

Even though pharmaceutical products comprise little more than 10 percent of total medical spending in most countries, the striking contrast between an "indecently" prosperous pharmaceutical industry, and regulated health systems close to bankruptcy, was not lost on public health ideologues and their allies. The marketing practices of the industry, the price of name-brand drugs versus that of generics, the unexpected effects of (registered!)<sup>\*</sup> drugs, offered many pretexts for government intrusion. The firepower necessary to shackle an industrial foe, one capable of more resistance than patient groups or medical associations, had to measure up to the target. Criminal law offered the weapons needed to prosecute the war against Big Pharma and its medical cronies.

### Changing Legal Paradigms

Innovative legal strategies were first tested on physicians. U.S. physicians have been mercilessly harassed under Medicare fraud and abuse regulations for such felonies as referral of patients to specific specialists, labs, or hospitals.<sup>2</sup> U.S. pain doctors have also been subjected to methods of surveillance, intervention, and ruthless prosecution more typically reserved for terrorists and drug kingpins.

Basic legal principles such as *mens rea*, burden of proof, or proportionality of sanction, have been noticeably ignored while attorneys have come to proudly compare persecution of doctors to Taliban hunts.<sup>3</sup> European physicians have not been spared. In 2003 and 2004, a police dragnet targeted approximately 5,000 Italian doctors suspected of prescribing (registered!) drugs from GlaxoSmithKline, and benefiting from generous promotional practices. Surveillance and an incredible 13,000 hours of phone tapping climaxed in police raids, seizure of computers, and a flurry of criminal indictments for "corruption."<sup>4</sup>

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<sup>\*</sup> In Switzerland, drugs have to be registered (i.e. approved) by a specific state agency before they may be marketed. Bureaucratic approval is no guarantee against unexpected adverse effects.

In 1999, 4,000 German physicians faced the same harsh treatment for similar pseudocrimes. Turkey has recently taken the war on Big Pharma a step further by arresting the entire board of directors of Roche in Istanbul for marketing anticancer drugs "above market prices"!

The Minoli Rota law reforms under discussion in the Italian Parliament aim to curb the marketing activity of the pharmaceutical industry and, more specifically, to restrict the autonomy of some of the industry's professionals.<sup>5</sup> The proposed criminalization of professional contacts between doctors and drug representatives will virtually eliminate most jobs in the pharmaceutical marketing sector. It will also hinder intellectual and scientific interchange between natural allies in the war against human disease and suffering. It will not, however, substantially curb promotional practices because companies will simply find less obvious ways to promote their products. The main danger of such legislation lies elsewhere. By seeking to forbid contacts between professionals for whatever reason, Italian members of parliament shift legal paradigms in a direction that scorns fundamental liberties. This unfortunately is part of a global trend. Innocuous business practices widely accepted in other fields have become criminal offenses in the medical sector. Arbitrary definitions of delinquency and victimless crimes have served to justify harsh sanctions against individuals, often unwary of a changing legal environment in which principles of justice and equity are no longer guaranteed.

### Conclusions

By opting into socialized systems of medical care, physicians not only become party to a rationing process directed against their own patients, but they are also dragged into a discriminatory system of justice. Criminalizing medical care is a powerful tool for intimidating medical professionals, and sterilizing medicine. In the United States it suppresses Constitutional protections of physicians, just as in Europe it destroys free enterprise and stifles innovation.

Justice and liberty are in great jeopardy when individuals are denied the protection of the law of the land by virtue of their race, their creed, or in this case, their profession. If we look closely for totalitarian patterns in the crusade against health pseudocrimes declared by zealous legislators today, we will find disquieting similarities with more spectacular modern wars against liberty waged on other battlegrounds by the modern state.

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