

# Restoring Medicine to the Free Market: Views of an Economist, Lawyer, Mother, and Patient

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## Introduction and Background

This discussion of the issues and needed reforms in American medicine is from a perspective based on an academic background in ethics and economics, a professional background in law, and extensive user experience. I've experienced everything from voluntary and experimental treatment for infertility to Medicare through my aging parents. I also have exposure to Title XIX Medicaid programs because I am the parent of a child who has severe physical and developmental disabilities. Our second child, our 16-year-old daughter Claire, has the mental development of a three-month-old. She has a severe seizure disorder with only intermittent control. I offer my ideas for reform as someone with day-to-day contact with the most complex of medical and insurance systems.

This article will develop three overarching observations about free markets and American medicine:

First, there has not been a free market in U.S. medical care for about 50 years, perhaps longer.

Second, a free market could be the answer to the multitude of medical and insurance problems that consume our emotions and media coverage but that we attempt to remedy with temporary fixes.

Third, and perhaps most important, is that a free market is inherently moral.

## The Morality of the Free Market

Many point to the Enron, Arthur Andersen, and WorldCom debacles, and their ultimate collapses with enormous losses for shareholders and employees, and conclude that the behaviors of these companies and their officers establish that the free market is inherently amoral, or immoral. However, the fact that these companies did collapse and that they are all under investigation, indictment, or in bankruptcy shows dramatically that those who do not behave in an ethical manner cannot survive in a free market.

Capitalism and ethics are certainly not mutually exclusive, but there is defensive sensitivity about capitalism. That sensitivity is heightened when free-market principles are applied to delivery of medical care.

The rest of the world turns to the U.S. for virtually all aspects of medicine, from training to research. Our medical systems and pharmaceutical companies are at the cutting edge of prevention and cure because there are incentives for development of procedures and drugs. Research, discovery, and even serendipity carry rewards in the form of intellectual property rights and return on investments.

These rewards have a moral basis. Adam Smith wrote *The Moral Sentiments of Markets* first, in 1759, before he explored the nature of free markets themselves in 1776 in *The Wealth of Nations*. Smith's moral philosophy and economic policy are summarized in a line from his first book: "What can be added to the happiness of the man who is in health, who is out of debt, and has a clear conscience?"<sup>1</sup>

There is discernment in a free market that leads us to that which is fair and honest, whether we are consumer or seller. Professor Smith elaborated: "And thus it is that the people begin to

discern the nature of things honorable and base, and in what consists the difference between them; and to perceive that the former, on account of the advantage that attends them, are to be admired and imitated, and the latter to be detested and avoided. What we have learned is that it is in everyone's self-interest to behave morally no matter what the subject matter."<sup>2</sup> Attempts to override free-market forces create unintended consequences, despite good intentions.

## Dangers of Price Controls

In human history, price controls have never worked. The result is always corruption, inefficiency, and distortions in allocation with overuse and scarcities.

For example, many countries have grappled with corruption among customs agents. Leaders and ethicists have wrung their hands mightily over bribery at ports of entry. The simple solution was based in economics: pay those customs agents and border guards more.<sup>3</sup> Under-paying those who guard your borders and keep track of your commerce is a prescription for immorality.

Robert Reich stated: "The most eloquent moral appeal will be no match for the dispassionate edict of the market."<sup>4</sup> In a match between ethics and the market, the market will rule. While Reich's view is a negative reflection of the markets, my research on market forces and morality leaves me with a positive view.

Consider the example of ticket scalping, which certainly has its share of immoral purveyors, and as a result engenders emotion in debate and demands for government controls.

Scalpers and brokers may pay homeless persons in drugs or alcohol to stand in long lines to buy blocks of tickets that will be resold at markups as much as 500 percent. One-time events have high demand and limited seating and trigger emotional responses that bring out the worst in human beings. The situation is similar in medical care. Consumers want a low price and immediate access.

When I first approached this subject, my reaction was to regulate, regulate, regulate. I favored price controls and heavy criminal penalties. But my colleague Stephen Hoppel and I found that the free market is like a tiger. When you try to regulate it with price controls, price limits, and delivery mechanisms, you attempt to grab the tiger by the tail. No matter what form of regulation cities and states passed to curb scalping and ticket re-sales, the market found a way to circumvent them.

After nearly a decade of research, we concluded that the best way to control prices and provide access was to allow the market to work. Before the NBA All-Star Game, we persuaded the Phoenix City Council to take one area outside the stadium, block it off, and allow ticket sellers to gather to do their trading. They would be immune from penalty.

The free market worked, and with a vengeance! Prices declined as buyers saw how many tickets were available and were able to bargain openly with various sellers—without violence or threats. By the time the game started, ticket prices were lower than the going rate when the trading began. This open market worked so well that it was made permanent. When Phoenix hosted the Super Bowl the following year, brokers and scalpers complained that ticket prices were the lowest they had seen in the 30-year history of the Super

Bowl. Solving the supply and demand problem also took care of related social and ethical concerns, such as the exploitation of the homeless for the sake of ticket sales.<sup>5</sup>

Price controls produce fraud. Columbia/HCA Healthcare Corp. paid a \$745 million settlement with the federal government for Medicare fraud and is still grappling with charges of up to \$400 million for reimbursement on claims.<sup>6</sup> The FBI described the claims fraud at Columbia as “systemic.”<sup>7</sup> This conduct is a natural result of the government-imposed price constraints of Medicare. When the market cannot find its way in such a constricted environment, those who are forced to provide services at fees that do not reflect costs, let alone market value, will become corrupted. Price controls breed corruption whether we are dealing with Rolling Stones concerts or magnetic resonance imaging.<sup>8</sup>

Government attempts to control costs and types and quality of medical care result in astounding inefficiency. In 1994, at the height of debate on the Clintons’ socialized medicine proposal, I wrote in *The Wall Street Journal* about my experiences with state-sponsored health care administered through Title XIX, a Medicaid program, in which my daughter Claire is enrolled.<sup>9</sup>

Claire is cortically blind and can’t even hold her head up, let alone move or speak. When our financial status was being reviewed, one of her many caseworkers noted that we have Claire on the title to our car. The reason she holds title to a car is an inane Arizona regulation that will not allow a handicap license plate if the handicapped individual is not on the vehicle title.

The caseworker said, “I see she owns a Suburban.” She then asked, “Does she drive it?”

Claire is assigned at least five regularly visiting caseworkers. There are more who come only on a semi-regular basis. One of my favorites is the caseworker assigned to the state’s total quality management program who comes to the house to check on the quality of the other five or so caseworkers! The caseworkers ask identical questions, don’t remember the answer from the last time, and are unfamiliar with the content of my daughter’s file.

At one point Claire’s bank account, begun as a college savings account before we realized the magnitude of her health problems, reached \$1,801 because of interest, although we had not added to it in years. A caseworker monitoring such things found the balance and called me to say he was revoking all benefits. I offered to close the account that day because I knew that if her benefits were revoked, it would take six months to reinstate them. He revoked the benefits anyway. No HMO has ever been so cruel and arbitrary. If Denzel Washington as John Q believes that hospitals are cold and arbitrary, he should try navigating the maze of Medicaid.

Exposure helps. I wrote for *The Wall Street Journal* the next week, and Claire’s benefits were restored on the day after publication.

The Canadian system is inefficiency writ large. A woman who has malignant lumps removed from her lymph nodes will wait three months after surgery to begin chemotherapy. On average, a patient waits 32 weeks after referral to see an orthopedic surgeon, 20 weeks for a gynecologist, 7 weeks for an oncologist, and 4 months for a cardiologist.<sup>10</sup>

Canadians do pay a lower cost for many prescription drugs because of price controls. Americans who can cross the border to buy drugs may take advantage of this. However, Americans who buy their drugs at home are subsidizing the lower Canadian prices. Pharmaceutical companies have set prices higher here rather than denying access to life-preserving drugs to Canadians and other foreigners.<sup>11,12</sup> When commodities are under-priced in one market, and the commodity has universal demand, others subsidize the lower cost. We pay for the research, development, and approval process of drugs that are then sold in Canada. The Canadians are, in classic economics, free riders on the incentive markets of the U.S.

The laws of supply and demand are inexorable, and price controls are not the way to aid the poor. When I spent a year as a utility commissioner in Arizona, setting the rates for all utilities in the state, I followed a simple philosophy, “Don’t under-price electricity.” When the emotional appeals of those who were unable to pay their utility bills because of their circumstances came to me, I was the first in line to work to help them, and even became a founding member of a foundation whose sole purpose was to help those in need with their utility bills. But under-pricing products and services, from electricity to medical care, results in abuse. Pricing determines frequency of use, whether it involves electrocardiograms or kilowatts. If electricity is priced too low, demand increases, but supply does not respond appropriately, leading eventually to shortages, as shown in California’s recent rolling blackouts.<sup>13</sup>

### **Litigation and Other External Legal Controls**

Medical care, pharmaceuticals, and these days even McDonald’s, have additional costs because of litigation, settlements, and verdicts. Malpractice insurance has come to the forefront because doctors have simply refused to continue to work until there is tort reform. Work slowdowns and stoppages have resulted in West Virginia and Nevada.<sup>14</sup>

Those who block reform cloak themselves in the glory of the jury system, defending it as a component of the free market. The jury system is no substitute for the free market.

My jury research focuses on auditor malpractice, and I have found that juries go with gut reaction.<sup>15</sup> We have had jurors endorse jury nullification.<sup>16</sup> In nearly 20 years of research, we explored whether jurors disregard a judge’s instructions on the law, and we found that almost universally they will, because of a sympathy factor or personal experiences.<sup>17</sup>

Professional liability is not the only problem from the judiciary. Judges’ interpretations of laws, insurance policies, and group coverage are also major problems. Courts have required that medical insurers cover contraceptives and even Viagra. Covering day-to-day minimal expenses sentences us to poor quality while inflating costs. By analogy, your auto insurance covers the costly events in your driving life. If we were to try to insure to cover every oil change on every automobile we would soon not be able to afford autos, or at least insurance for them.

### **Utilitarianism: An Inhuman Ethic**

Discussions in literature in my field focus on reforming medical care by doing the most good for the most people. Apart from data that show drops in quality, this allocation system bucks human nature as it attempts to substitute population-based ethics for individual decision making.

When large businesses got into medical care they tended to lose sight of the moral grounding of business, while focusing on the health of populations. Many of the companies involved in HMOs got into them with the best intentions. But they sought short-term gain—not a failing peculiar to HMOs—while forgetting that in the long term, everyone is better served by customer satisfaction.<sup>18</sup>

A medical crisis shows the stark differences between the two approaches to ethics. For our daughter Claire, we have always had a do-not-resuscitate order. It seemed like the logical thing to do because life itself is a struggle for her, and it would also be compatible with a utilitarian ethic. We made some arrogant assumptions.

Recently, she had what I would describe as the perfect storm in her lungs. She had influenza followed by pneumonia, with lungs that were already scarred from many previous pneumonias, then developed an asthmatic wheezing episode as well. Despite 100 percent oxygen, her oxygen saturation was about 80 percent. The

physician on emergency duty asked whether the no-intubation status still applied. Because I was unable to reach my husband, I was left alone with this decision. As I wrestled with this, a young physician entered, and I asked, "Is it reversible?" His insight was, "You'll never know unless you try."

Upon intubation, our Claire stunned everyone in the hospital. They all thought her life was ending, but she fought for it. Five days later she was out of critical care. Two days later she was at home and has not been ill since. When facing death, how can we deprive people of that choice to stay and fight? Was it right? Was it wrong? I don't know, but human nature wants us to have the opportunity to decide. We cannot delegate it to a system.

### Conflicts of Interest

Recently *The New York Times* has covered hospital-buying syndicates.<sup>19</sup> Buying supplies using the discounts available to large groups of hospitals makes economic sense. But to the extent that the conglomerate that is doing the purchasing for the hospitals owns a portion of those companies from which they are purchasing, a conflict affecting buying decisions exists. Conflicts build distrust and resentment.

A free market is dependent upon full disclosure. Conflicting ownership interests should be disclosed, as should physicians' financial arrangements with companies. Finding out that information from another source only leads to distrust and suspicions about an interconnected network interested only in profit.

There are only two ways to resolve a conflict: avoid it, or disclose it.

### Accurate Information

Quality checks and controls are provided by the market, but a functioning market requires accurate and complete information. We would need to know the death rate in hospitals, and the malpractice record of doctors. We need to trust those with a vested interest in accuracy and quality—the patients and their families—to have skills of discernment. In this lies the restoration of human dignity with control over one's own medical care.

To assure accurate information, we need more media responsibility. At present, results of many poorly done studies are further distorted by journalists.

Consider this example from *USA Today*: "Study blames 18,000 deaths in USA on lack of insurance."<sup>20</sup> The sub-heading reads: "Millions don't get preventative care." There is a chart titled, "Deaths among the uninsured." The chart reveals that in the U.S., there are greater numbers of older people who die, than there are younger people who die. What can we conclude when told there are more people dying in the older-than-55 age group than between ages 25 and 34? Why, it's age discrimination, of course! The story notes that in the younger age group, there are 1,930 deaths attributable to lack of insurance and preventative care. But before you conclude that young people are rapidly dying because they lack medical care and insurance, you should realize that 1,500 of the 1,930 deaths were attributed to adult immunodeficiency syndrome (AIDS), and that another 400 were among intravenous drug users.

### Systemic Changes

It is clear that major reforms are needed—in the direction of more freedom and patient choice, not more government.

In an ideal system, everyone would have insurance coverage, but it could be of many different types. Some would be self-insured. Some would carry only catastrophic coverage. Insurance would come through large, national insurance pools. Groups such as religious organizations should be able to offer insurance. Those who cannot afford insurance could receive vouchers to buy it.

Tort reform is an essential part of needed change, including a curb on punitive damages, 60 percent of which are used to cover costs and attorney fees.<sup>21</sup> Excessive verdicts may bear no relationship to the harm done.

Consumers need ready access to more information. And the power to make choices based on that information should be in their hands: not the hands of insurers, lawyers, or regulators.

### Conclusion

Medical decisions belong in the hands of human beings. Governments, boards, and even businesses are ill suited for making such decisions. In a free market, considerations of quality and dignity, and decisions based on full information take charge of the medical tiger. Free markets function well. We must allow them to function, without attempts to override them with government, juries, or allocation systems.

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