

The Managed Health Care Industry—A Market Failure: How Healthcare Turned into Wealthcare for Big Insurers and Managed Care Companies

By Jack Charles Schoenholtz, MD. Second edition. North Charleston, SC: Create Space, 2012. 602 pp. \$82.95.

The second edition of *The Managed Health Care Industry—A Market Failure* (referred to as *Market Failure* in this review) became part of the health care literature on the eve of the U.S. Supreme Court decision on the Affordable Care Act of 2010. The book reads like the transcript of a free-flowing debate between experienced insiders. Every discipline with a stake in the outcome of the health care policy debates, from actuaries and economists, to administrators and attorneys, to regulators and legislators, is included. One problem with this book is the language. Dense with acronyms and professional shorthand, the text can be difficult to understand in places. A more comprehensive glossary and list of acronyms would improve the situation. Once the terms are clarified, however, the concepts involved are well within the capacities of an engaged reader. This is not the best book for readers seeking a systematic overview of the specific disciplines involved, for mental health professionals looking for an introductory text on the subject, or for those interested in debates on the aspects that affect forensic practice. For most of these readers, there are better books available. Dr. Jack Charles Schoenholtz's book is worth reading nonetheless. Unabashedly partisan, the energy of the text prompts questioning, examination, and further research into the topic.

The book is a narrative of health care in the United States from the Nixon to the Obama presidencies. The story unfolds under the long shadow of the 1944 Supreme Court decision in *United States v. South-Eastern Underwriters Association*¹ and Congress' response in 1945: the McCarran-Ferguson Act. The 1944 Court decision held that insurance companies could be regulated as interstate commerce under the Commerce Clause of the Constitution and are subject to the same antitrust standards as other busi-

nesses. The 1945 Act left regulation of insurance to the states and offered protection to the insurance industry from federal regulation.

Dr. Schoenholtz begins with an account of his decades of professional experience in the thick of the policy debates surrounding managed care with a special interest in antitrust issues (p xvi). He argues that managed care is a market failure that engages in the kinds of collusive activities for which the antitrust laws were written. The Supreme Court has found that peer review and managed care activities fall outside the purview of "the business of insurance" (p 331). Managed care companies are not regulated by the states and are not exempt from federal regulation based on the McCarran-Ferguson Act. As such, they could and, according to Schoenholtz, should be liable to prosecution under the Sherman Antitrust Act based on the evidence of collusive and anticompetitive behavior that is described in the book.

Throughout the book, Schoenholtz argues that managed care has created a market failure. This economic term can be better understood if we add one more: efficiency. Efficiencies are created when an exchange causes the seller and buyer to be better off. Nobody loses. A market failure occurs when the product for sale is worth less than it costs to produce it. In this case, everyone loses. The consequences of the intrusion of managed care corporations into the health care system in the United States and into the doctor-patient relationship are the creation of a market failure and the fragmentation of the system according to Schoenholtz.

Market Failure examines how the opinion of the treating physician has been systematically undermined over the past 40 years. In 1973, the Supreme Court case *Doe v. Bolton* overturned a Kentucky health care law because it, among other things, "substantially limited the patient's right to receive and the physician's right to administer the treatment required based on the licensed physician's best judgment."² In the early 1990s, explains Schoenholtz, deference to the treating doctor's best judgment was granted in court as long as the petition contained convincing supporting evidence and was consistent with existing case law. By 2003, the Supreme Court held that health insurance plan administrators under the Employee Retirement Income Security Act of 1973 (ERISA) are not required to accord special deference to the opinions of the treating physician and are under no obligation to explain their reasoning

if they deny the recommended treatment.³ Schoenholtz describes how the opinions of anonymous, invisible doctors, working for health insurance corporations, who never actually see the patients, have been afforded ever increasing weight in medical treatment decisions.

Dr. Paul Starr's book about the history of medicine in America, *The Social Transformation of American Medicine*,⁴ won the Pulitzer Prize for general nonfiction in 1984. In the book's final chapter, "The Coming of the Corporation," Starr anticipated some of the developments that are described in *Market Failure* almost three decades later. Unlike many of his more pessimistic contemporaries, Starr expressed optimism that corporations would not be able to control the working conditions of doctors in the way they control other workers. The state of medicine explored in *Market Failure* suggests that the pessimists may have been right after all.

References

1. United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944)
2. Doe v. Bolton, 410 U.S. 179 (1973)
3. Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003)
4. Star P: The Social Transformation of American Medicine. New York: Basic Books 1982, p 446

Angela Hegarty, MD
New York, NY

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Ethical Issues in Forensic Psychiatry: Minimizing Harm

By Robert L. Sadoff, MD. New York: Wiley-Blackwell, 2011. 222 pp. \$74.50 hard cover.

Dr. Robert Sadoff is a senior member and past president of the American Academy of Psychiatry and the Law (AAPL) and has a wealth of forensic experience. In the Preface to *Ethical Issues in Forensic Psychiatry: Minimizing Harm*, he mentions that he has been involved in more than 10,000 criminal and 2,000 civil cases during his 45 years of forensic practice, and he has exclusively practiced forensic work for the past 25 years. As the 2006 recipient of the Isaac Ray Award from the American Psychiatric Association, he prepared this book in light of Ray's "concerns

about minimizing harm to vulnerable mentally ill patients and applying his recommendations to the forensic psychiatric profession" (p xix). This book will become part of his legacy, in addition to his extensive teaching over the years at the University of Pennsylvania and his other published works.

Although the book considers a wide range of topics, Sadoff's overall thesis is that forensic evaluations are potentially harmful to evaluatees as a result of the forensic interview, expert report writing, and expert testimony. By extension, he argues, all litigants, evaluators, attorneys, and judges can also be harmed in the process. Forensic ethics standards, unlike those in clinical medicine, do not contain a do-no-harm component. He thereby hopes to improve the practice of forensic psychiatry, thus minimizing harm to the parties, evaluators, and other participants. He writes that he has witnessed unprofessional and unethical practices in the field, illustrating this point from his experience with experts who have used unscientific or inadequate evidence or have been overly biased or unqualified as evaluators. His claims ring true to many forensic evaluators who have verbalized their distress at having witnessed harm to civil plaintiffs caused by defense-oriented experts repeatedly retained by large or corporate defendants to conduct evaluations on their behalf or to criminal defendants evaluated by prosecution-oriented experts.

The text liberally cites Sadoff's personal experience, wisdom, and views, although he generously quotes the published views and literature of other forensic psychiatrists, using even a paragraph-long quotation at a time. He presents his material in a respectful and gentlemanly style. He reviews some of the field's controversies regarding the principles of forensic ethics, but the reader should not look to this work as a theoretical or empirical treatise on forensic ethics. It is often anecdotal, written in the first person, sometimes even entertaining, and often inspiring.

Sadoff's general notion is that evaluatees require protection from the litigation and the evaluation. At times, I wondered if, in actual cases, his fear of harming evaluatees led to a proevaluatee bias or favoritism resulting from his wanting to overcompensate for potential harm or to help the evaluatee. Certainly, trying to assist evaluatees clinically or financially transcends minimizing or avoiding harm to them. His examples include the harm done to a Social Security disability claimant whose evaluator was unaware of