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CAN DENTISTRY HAVE TWO CONTRACTS WITH THE PUBLIC?

David A. Nash, DMD, MS, EdD, FACD

ABSTRACT

The social contract is an implicit agreement between parts of society and society as a whole. Since the Middle Ages, the learned professions, recently including dentistry, have had a covenantal relationship with the public based on trust, exchanging monopoly privileges for benefiting the public good. Unlike commercial trade in commodities, professional relationships are grounded in ensuring an adequate level of oral health to all. A second contract is emerging where dentists relate to society as business operators, exchanging commodity services for a price. Recent actions by the Federal Trade Commission and the U.S. Supreme Court make it unlikely that dentistry will be able to enjoy only selected aspects of each contract while avoiding obligations that it finds unfavorable.

Social contracts have existed since early in human evolution. Humans are not hermits—we are social animals living in societies. Understanding a society requires understanding the roles and responsibilities of individuals living in it. In more primitive societies, such as hunter-gatherer groups, social contracts existed implicitly. In more advanced societies, such as in Greece and Rome, expectations became more explicit, eventually becoming formalized in law. In the Abrahamic religions, a contract was understood as a covenant, a relationship with a supreme being who structured the interaction of the people through a faith commitment.

The Enlightenment of the seventeenth and eighteenth centuries brought new theoretical understandings to social contract theory through the writings of philosophers such as Hobbes, Locke, and Rousseau. These individuals raised the issue of the natural rights of individuals versus the extent to which a government had the right to organize a society. They also provided the intellectual leadership for the founding principles of the American democracy.

Basic to social contract theory is determining the relationship of humans to one another. How can a society be organized in such a manner that reciprocity and mutuality exist among individuals, thus helping ensure that each person is safe, secure, and free to pursue his or her individual goals and

aspirations. What constitutes fairness in a society?

Change and transformation best describe the dynamic of a social contract; a society continually evolves. (Reference the recent dramatic change in American society relative to gay marriage.) Civilized societies differ in their understandings of how economic and social relationships of individuals should be structured. Thus, we have societies whose economies have an orientation toward socialism and others toward capitalism; societies that are democratic and others that are authoritarian. Some societies understand universal health care to be a component of their social contract, others do not. Ultimately, the foundation for a society's contract among its members is its assumptions regarding human nature, as well as its corresponding value system. Political action through government participation is the basis of the evolving social contract. A social contract is enforced by the laws and regulations of a society's governance structure. As will later be noted, the transformative changes occurring in American dentistry have their roots in government action—action ultimately guided by politics informed by societal values.

The American democracy is grounded on two principles espoused



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since the country's founding: *freedom* and *equality*. In 1971, Harvard professor John Rawls published *A Theory of Justice*, which has become a classic in political thought regarding the social contract. Rawls raised the question: "How is it possible that there exist over time a stable and just society of *free* and *equal* citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?" American political differences today reflect this challenge. Some citizens are oriented more toward the value of freedom—*libertarians*, and others toward equality—*egalitarians*. For libertarians, the individual has a right to be left alone—to pursue the good life as personally conceptualized. The negative right of being left alone is emphasized—positive rights are deemphasized. Working for the common good would require society to take one's resources in the form of taxes to do things that may not directly benefit the individual. An example would be paying taxes to support government programs such as Medicaid in which one did not benefit. For libertarians, an open, free, and unregulated marketplace serves as a basis for justice in the social contract; the less government the better.

For egalitarians, equality is the ideal for a just social contract. Egalitarians believe that government is responsible for promoting and furthering equality; it is permissible to restrict an individual's freedom, such as in requiring the paying of taxes, in order to promote equality. Egalitarians stress positive rights; the

right to life's basic necessities of food, housing, education, health care, and a reasonable standard of living. The egalitarian criticism of the libertarian is that the right to be left alone does not mean anything if one lacks the resources to pursue a reasonable life. Egalitarians support a significantly regulated marketplace to ensure a measure of equality. (In our current presidential politics, Rand Paul represents a libertarian view of the social contract and Bernie Sanders an egalitarian one.)

In responding to his basic question, Rawls further asked what sort of social contract rational individuals would design if they were to assume an "original position"; that is, setting aside all personal preferences in order to consider what would constitute a fair society. To do this, he suggested a thought experiment of standing behind a "veil of ignorance" and designing a society into which one would be born as a result of the 'natural lottery,' but not knowing what status one would have: rich or poor, born to well-educated parents or to parents poorly educated, highly intelligent or not, black or white. Rawls concluded that a rational person, being somewhat risk adverse, would design a society in which being born among the worst off in society would

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still provide an opportunity to participate fully in the various positions of society, and the opportunity to pursue a good life. Rawls believed that the society designed by rational individuals behind such a “veil of ignorance” would be one in which individuals would have both equal liberty and equal opportunity. It is important to note that Rawls does not suggest that all individuals will be equal, but rather all would have equal opportunity. As individual skills, efforts, and contributions would vary, individuals would fare differently economically and socially. Rawls’ contractarian approach to the social contract bridges the tension between liberty and equality by focusing on equality being equality of opportunity. In doing so he strikes a balance between the libertarian and the egalitarian.

Some individuals are heavily libertarian and others are devoutly egalitarian on principle. Most of us have a general preference but are eclectic, favoring one or the other policy as the situation matches our needs.

The question this essay attempts to address is both the historical and current status of social contract between dentistry and society. How and why has it changed through time? Is it a fair contract? Would rational individuals, behind a “veil of ignorance” design the system of oral health care existing today, not knowing whether they were going to be a dentist or a Medicaid recipient? Additionally, the question emerges as to who determines the elements of the contract? The contract between society and dentistry is best understood functionally through the laws and regulations imposed by

society that affect the practice of dentistry, as well as dentistry’s contribution in providing access to basic oral health to society.

CLASSICAL UNDERSTANDINGS OF THE NATURE OF A LEARNED PROFESSION

The designation “learned profession” was historically assigned by society to certain groups of individuals as a result of the unique role they played in the functioning of society. What is that role—how did it evolve?

Traditionally, sociologists have considered the learned professions to be the clergy, law, and medicine—with dentistry as a specialty thereof. These classical learned professionals emerged in the late Middle Ages, when in human history the overwhelming majority of people were illiterate. In those societies, there arose groups of individuals who, as a result of education, could read and write and thus were able to provide practical and needed services for those who could not. Attorneys were able to draft contracts for the legal exchange of goods and property; physicians were able to read and study, thus learning of medicaments and procedures to palliate or cure disease; clergymen were able to study and interpret scripture for the unlearned. These groups of individuals had access to knowledge to which the average human had no access, and as a result possessed special power. Knowledge is power. Attorneys had power over property; physicians, power over personal physical well-being; and the clergy, power over divine providence. Lay people seeking assistance had to trust that these groups would use their knowledge in their best interest. Thus, the relationship was a fiduciary one; one grounded in trust. Attorneys, physicians, and clergyman professed that they would always use their knowledge, and the power it brought, to further not their

own personal best interests, but rather the best interests of their clients, patients, and parishioners. Even though essential, financial considerations were understood to be derivative.

Today the terms profession and professional can have somewhat ambiguous meanings. In one sense a professional is “someone who is not an amateur.” Thus we say that Serena Williams is a “professional” tennis player—clearly, she is not an amateur. Yet in the original usage and in a much more profound sociological sense, the word *profess* means “to promise” or “to vow.” So foundational to the notion of a learned professional is one who has taken a vow or made a promise. These professionals are individuals with sophisticated, but practical knowledge, gained through advanced study, who have promised to use their knowledge and skills in the best interest of the society they serve. Professions are professions because they pursue the good of society, not primarily or necessarily their perceived personal good. Professions are professions because they organize, not to protect their own interests, as do labor unions and trade associations, but rather to promote the public good. Professions are professions because they are committed to respecting the well-being of society as an end in itself, not simply as a means to the profession’s private ends.

Abraham Flexner, a public intellectual, and a major reformer of medical education in the early part of the twentieth century, identified the characteristics of learned professionals (1915). His characteristics have endured through the twentieth century, though they are under assault in contemporary society: (a) the work of learned profes-

sionals is primarily intellectual; (b) their work is based in science and learning; (c) their work is practical; (d) their work can be taught and learned through education beyond the usual level; (e) they organize into democratic collegial units; and (f) they exist to achieve societally defined goals, rather than the self-interest of their members. The last characteristic is to be emphasized: “learned professions exist to achieve societally defined goals, rather than the self-interest of their members.” He went on to say, “Professions are organs contrived for the achievement of social ends rather than as bodies formed to stand together for the assertion of rights for the protection of interests and privileges of their members.” It is salient to reconfirm that the designation profession is not self-appropriated, but rather is a sociological concept, an appellation of society as a component of the social contract.

UNDERSTANDING SOCIETY’S CONTRACT WITH PROFESSIONALS AS COVENANT

The noted biomedical ethicist, William May (1983), uses the metaphor of “covenant,” rather than contract to help explain or explicate the nature of the relationship of a learned profession with society. There are three elements in the classical concept of a covenant: (a) a pledge or promise; (b) an exchange of gifts; and (c) a change of being. Marriage is a well-understood covenant today. In marriage humans promise they will love and cherish one another; exchange gifts—wedding bands—as symbols of the promises made; and finally, they undergo a transformation of being. Professor May argues that dentistry as a profession has entered into a covenant relationship with society. Society has promised the profession of dentistry a monopoly to care for the oral health of the American public. Dentistry has promised society that it will faithfully

care for society’s oral health. Society grants dentistry the gift of self-regulation, and in most instances a dental education that is partially state-supported; as well as student loans that are tax-subsidized. Dentistry gives society its knowledge and skills. As a result of the promises made and the gifts exchanged, dentistry has undergone a transformative change. Dentistry has become a profession; society has become the profession’s patient. May argues that understanding dentistry’s relationship with society as a covenant emphasizes the importance of reciprocity in the relationship.

The guiding principle of dentistry as a profession is that oral health is a primary human good, an end in itself. Means become subservient to ends in a profession. Helping society gain the benefits of oral health makes methods, including delivery systems, subsidiary. As a profession, the goal of dentistry is gaining the good of oral health for all Americans, however it can be gained. Social justice, fairness in the social contract, is the touchstone for a profession. The attitude of a profession is egalitarianism. If oral health is a basic human need, as it is, then it is a basic human good. Therefore, all members of society should have equal opportunity to gain the benefit of this human good.

While speculative, it can be judged that dentistry’s historical status as a profession, which society has granted, at least until recently, is the legacy of previous generations of practitioners who, in advocating for water fluoridation and personal preventive therapies, were seen and understood by society as placing the public good above personal

It can be judged that dentistry’s historical status as a profession, which society has granted, at least until recently, is the legacy of previous generations of practitioners who, in advocating for water fluoridation and personal preventive therapies, were seen and understood by society as placing the public good above personal monetary gain.

Professions are professions because they organize, not to protect their own interests, as do labor unions and trade associations, but rather to promote the public good. Professions are professions because they are committed to respecting the well-being of society as an end in itself, not simply as a means to the profession's private ends.

monetary gain. Historically, dentistry has focused on serving the oral health needs of patients and society, with the financial gain derived being a natural and appropriate consequence of the service provided.

LEARNED PROFESSION VERSUS PROPRIETARY ENTERPRISE

The eminent free market theorist, Adam Smith, in his 1776 *The Wealth of Nations* (1981), drew a distinction between social goods and consumer goods. He argued that for a market economy to function, it must be based on a foundation of what he called social goods. Among the identified foundational social goods are safety, security, education, and health. Such social goods were for Smith outside the marketplace and not subject to the forces of supply and demand. Rather they were seen as basic human needs and imperatives to be met by a society in order for a marketplace to even exist. It is difficult to imagine a market-based economy surviving without citizens having a strong sense of personal safety and security, the physical health with which to work, and a basic education in the cognitive skills necessary to function in the marketplace. A “decent, basic minimum” of oral health is a social good, not a consumer good. Oral health care is not analogous to purchasing furniture or buying a television. Basic oral health care that is not elective, care that is focused on preventing or eliminating oral disease, is not a commodity to be purchased in the marketplace.

Professor emeritus Kenneth Arrow (1963) of Stanford University won

the Nobel Prize in Economics in 1972 partly because of his ability to demonstrate that health care cannot be considered a commodity of the marketplace due to the complexity of medical knowledge that creates a significant power differential between health professional and patient, precluding the patient from being able to correctly determine the relationship between the cost and value—a requisite for a marketplace transaction.

Talcott Parsons, for many years professor of sociology at Harvard and frequently referred to as the “dean of American sociology,” put it this way: “The core criterion of a full-fledged profession is that it must have means of ensuring that its competencies are put to socially responsible uses... professionals are not capitalists...and they certainly are not members of proprietary groups” (1968).

Rashi Fein (1982), the noted Harvard health economist, expresses distress regarding the transformations occurring in contemporary society: “A new language has infected the culture of health care. It is a language of the marketplace, of the tradesman, and of the cost accountant. It is a language that depersonalizes both patients and health professionals, and treats health care as just another commodity. It is a language that is dangerous.”

Arnold Relman, long-time distinguished editor of the *New England Journal of Medicine*, put it bluntly: “Health care is not a business” (1980).

The esteemed American medical educator and ethicist, Edmund Pellegrino (1999), concluded an article in the *Journal of Medicine and Philosophy*: “Health care is not a commodity, and treating it as such is deleterious to the ethics of patient care. Health is a human good that a good society has an obligation to protect from the market ethos.”

The Federal Trade Commission and the U.S. Supreme Court have not shared the understanding of the nature of learned professionals' historical contract with society, nor the doctor-patient relationship, nor even the economics of health care generally. They have not agreed with America's sociologists, economists, physicians, and ethicists as quoted. Certainly they have not appreciated Adam Smith's distinction between consumable and social goods. In the mid to late 1970s, the FTC in a series of rulings, with subsequent support by the U.S. Supreme Court, determined that the codes of ethics of attorneys, physicians, and dentists prohibiting these learned professionals from advertising was a restraint of trade (Goldfarb, 1975; Virginia State Board of Pharmacy, 1976; Bates, 1977; American Medical Association, 1979; American Dental Association, 1979). The argument had always been made by the American Bar Association, the American Medical Association, and the American Dental Association that their members were professionals with a primary goal of service, and were to be distinguished from trades or businesses. Thus, they should be able to prohibit advertising, a tool of commerce in which to promote business and profit.

The FTC and the U.S. Supreme Court, serving as instrumentalities of society, altered the social contract with learned professionals. Henceforth, these professionals were to be assigned the status of a trade. The FTC chairman at the time declared that a "way to control the seemingly uncontrollable health sector could be to treat it as a business and make it respond to the same marketplace influences as other American businesses and industries" (Federal Trade Commission, 1978). The commission's perception of health care was that of a "commercial marketplace

in which goods and services are bought and sold." A strong case can be made that these rulings have resulted in the environment that exists today in dentistry and health care generally.

It can be further speculated as to why the FTC and the courts took the perspectives they did. A number of possibilities present themselves. As indicated by the FTC chairman, the commission thought healthcare costs were increasing significantly and needed to be controlled. Deregulating advertising by the health professions was viewed as a mechanism to accomplish increased competition and reduced costs. It is also possible that a motivating factor was the increased valuing of and commitment by society to capitalism and the free market that was occurring in the 1970s. Possibly there was perceived societal concern that the learned professions were not providing access to their services for significant numbers of society members, and that moving to a marketplace approach would result in expanding services. Access to the services of learned professionals was an issue then as it is today. It is also possible that society had come to believe that the learned professions were beginning to focus on their own economic self-interest at the expense of their service commitment to society; again, with advertising seen as a means of reducing costs. Bioethicist William May's 1977 comment that Americans stood a better chance of fair dealings in the marketplace than in the offices of learned professionals can be understood to be supportive of the action of the FTC and the courts.

As a learned profession, dentistry serves the end of human well-being, that is, oral health for individual patients and for society at large. While professionals derive financial gain from their life's work, it is truly derivative; a byproduct of fulfilling the promise or vow they made in becoming a professional. A

profession is a way of life, a vocation, not only or simply a way of making a living (Nash, 1994). As a trade, dentistry is to be understood as a business viewing the oral health of patients, not as ends in themselves, but merely means to the dentist's personal ends. Dentistry as a trade serves the end of personal profit, with oral health being understood as a means to that end. Understanding dentistry as a trade places dentistry in the marketplace, where oral health care becomes a commodity produced and sold for a profit. The marketplace model of selling cures undermines the traditional learned professional model—a model rooted in a tradition of caring. Certainly there are relevant business dimensions to operating as a learned professional, as professionals must pay overhead costs, provide for their families and certainly deserve an honorable financial return for their services to individuals and society,

THE CURRENT ENVIRONMENT OF THE PROFESSION

In surveying the environment of dentistry today, it becomes obvious that, in contrast to the views of Adam Smith and other notable scholars previously identified, dentistry is existing in the marketplace of health care. For-profit corporations have become significantly involved in the delivery system; dentists understand themselves to be the proprietors of small businesses; students are graduating from dental schools with significant levels of debt, essentially coercing them to focus on making money—lots of money.

Contrasting this situation with the traditional concept of the role of health professionals in society suggests prob-

It seems patently unreasonable for an individual seeking oral health care today to seek care from an individual in whom they do not trust. Being able to trust a dentist to care for a patient's best interest is a critical ingredient of the contract between a dentist and a patient.

lems. Accepting dentistry's existence in a market-driven economy immediately restructures the role of a dentist, both in attitude and practice. The marketplace is a place of competition between seller and buyer. Sellers want to sell as much of their product as possible and at the highest price possible. Buyers want only the desired amount of the product and to purchase it at the lowest price possible. Thus, the relationship becomes one of competition. While this works in commodity transactions, it does not work in a healthcare profession where the primary dimension of the relationship between professional and patient has to be one of trust. This references again the reason learned professions emerged initially in the social contract. They had the power of knowledge, power unavailable to their client. Thus individuals seeking their assistance had to trust them. It seems patently unreasonable for an individual seeking oral health care today to seek care from an individual in whom they do not trust. Being able to trust a dentist to care for a patient's best interest is a critical ingredient of the contract between a dentist and a patient.

Medical ethicist Ezekiel Emanuel (1995) has emphasized that trust is the quintessential quality of the doctor-patient relationship. How is such trust possible in a culture and climate of a competitive marketplace? The aggressive advertising and marketing strategies of for-profit businesses emerging in the dental environment are inconsistent with the historical practice of learned professionals. The abuse of children

by corporate practices, some owned by offshore equity firms, has and is continuing to be documented. Such is not only inconsistent with the practice of learned professionals, it is immoral. There is evidence that it is not uncommon for corporate dental practices to impose daily financial quotas on their dentist-employees. Practice management courses encourage dentists to set daily revenue goals for their practices. Overtreatment by dentists, ostensibly to generate more revenue, is being increasingly commented upon by thoughtful observers. Overtreatment is inconsistent with the practice of learned professionals. It is immoral, deviating as it does from standards of evidence-based care.

Dentistry's monopoly by society to care for the oral health of society exposes an additional problem. Fair reciprocity, even if one accepts a marketplace culture, requires that the profession provide access to basic care for all. Marketplace economics abhors monopolies; they are anticompetitive. How should society respond to a profession to which it has granted a monopoly when that monopoly fails to serve all members of society? Theoretically, one might suggest that the monopoly be dismantled allowing others to perform the function of dentists. In fact, this appears to be how society is beginning to adjust its contract with the dentistry. There is increasing advocacy for expanding the functions of dental hygienists, as well as for introducing the international concept of the dental therapist to the workforce. Many in dentistry lament these changes. However, they are occurring due to the failed responsibility of the profession in honoring the reciprocity and mutuality expected in society's contract with the profession which is, as suggested, potentially a reason for the FTC's ruling initially. Additionally, when inadequate

access to care affects children, a key element of Rawls' just social contract is challenged—there is a negative impact on equal opportunity.

The monopoly dentistry has previously enjoyed is being eroded on another front. The U.S. Supreme Court, in a six-three decision, recently sided with the FTC and against the North Carolina State Board of Dental Examiners when it upheld Fourth U.S. Circuit Court of Appeals ruling that the Dental Board illegally suppressed competition when it told nondentists to stop offering teeth-whitening services (North Carolina Board of Dental Examiners, 2015). Again, society through its regulatory agencies and courts are continuing to revise the social contract, reaffirming that dentistry and the health professions are simply businesses engaged in competitive commerce not unlike any other business.

CONCLUSION

The deeply entrenched and pervasive marketplace culture in the United States has breached the traditional culture of the learned professions in the social contract. Learned professions have become trades; dentists have become proprietors in the marketplace. To employ Adam Smith's distinctions, American society has endorsed basic health care, including nonelective dental care, as a consumable good, not a social good. John Rawls would join Smith in affirming that a social contract that does not include health care (including basic oral health care) does not meet the demands of a society of freedom and equal opportunity—a just society. It is highly unlikely there will be a return to that era in which dentistry was assigned special consider-

ation as a learned profession. Rather, marketplace economics will not only continue, but will strengthen as the basis of the contract between the profession of dentistry and society. ■

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