All Costs Have a Right

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2. All Costs Have a Right.††

Martha T. McCluskey

To solve problems of inequality and insecurity, we need to advance universal human economic rights, not just increase discretionary targeted redistributive spending. This is the opposite of the conventional law and economic wisdom.

Orthodox law and economics tells us: all rights have a cost. Law can allocate economic gain, but not generate it. Any new

†† Thanks to Emily Villano of the LPEblog for helpful editorial suggestions on another version of this paper, which was published as a blog post at https://lpeblog.org/2018/04/05/economic-human-rights-not-tough-policy-tradeoffs/. A version of this essay was also produced in 2017 as part of a short audiovisual collection, APPEAL, Five Things They Don’t Tell You About Law and Economics (Oct. 18, 2017), https://www.youtube.com/watch?v=goak05enri4&feature=youtu.be.

economic rights aimed at alleviating socioeconomic disadvantages will thus require an inevitable tradeoff in public or private spending—that new right must come at the expense of some other economic benefit. Under this logic, a new legal right to affordable health care would mean fewer resources are available for education or jobs. In addition, this theory warns that an entitlement to economic support would replace market discipline with incentives for waste and abuse, further draining available resources.

What orthodox law and economics does not tell us: all costs have a right. That is, any costs associated with new economic rights arise not from essential economics, but from contingent legal and political arrangements. Particular legal and political regimes produce, organize, and limit access to human needs like education or health care. Law itself shapes the market forces that appear to be disrupted when law re-allocates rights to advance general human needs.

On the question of health care, for example, a complex system of legal rights and legal institutions already depends on government power to advance economic gain for some at the expense of health and economic security for others. Legal protections and privileges that distribute risks and rewards in health care include patent rights, insurance regulation, corporate governance rules, antitrust law, criminal law, and tax policy.

These legal rights are not firmly settled, natural, or necessary features of impartial economics. Instead, they are continually questioned and modified under the influence of specific contested interests and ideologies. Powerful industries regularly engage in extensive lobbying, litigation, and advocacy to re-design laws in their favor. The United States health industry, for example, spent half a billion dollars in 2016 on lobbying, and pharmaceutical

914–16 (arguing that a categorical right to health care based on moral resistance to “letting people die” ignores that spending to keep one person alive could instead be directed toward providing medical care for many poor people).

41. See e.g., International Health Care System Profiles, What Is the Role of Government?, https://international.commonwealthfund.org/features/government_role/ (describing the role of different governments in health care).

42. Id.

43. See, e.g., 8 IMPORTANT REGULATIONS IN UNITED STATES HEALTH CARE, REGIS COLLEGE, https://online.regiscollege.edu/blog/8-important-regulations-united-states-health-care/ (last visited Feb. 14, 2019).

companies, hospitals, and health professionals were among the largest contributors\textsuperscript{45} to this “market” for legal power.

New human rights to egalitarian economic support can similarly work to re-arrange economic gain and loss as a legitimate and beneficial function of democracy. As Sabeel Rahman explains, basic human economic needs like health care, housing, food, and water are often provided, produced, and governed through intertwined public and private structures operating to create and entrench systemic disadvantages and exclusions.\textsuperscript{46} Solutions to inequality will only be meaningful if they go beyond redistributing income to changing the background legal rules and governance systems that control vital goods and services.\textsuperscript{47}

We should not presume that new human economic rights are zero sum transfers or costly distortions of optimal economic conditions. That conventional “law and economics” thinking rests on a simplistic assumption of an essential market order that transcends law and politics, thereby closing off analysis of how re-structuring that market could generate far better economic and social outcomes. In contrast, the more complete and realistic perspective of political economy recognizes that legal entitlements do not intervene in naturally productive market activity. Instead, legal entitlements generate and govern market production. New legal rights can give people new power to resist existing market constraints, and that transformative power can lead the economy to new levels of prosperity and stability.

Like traditional property rights or the right to incorporate businesses, economic human rights can enhance security and liquidity by encouraging investments that improve productivity both for those who hold the particular rights and society overall.\textsuperscript{48} The existing market operates through legal rights designed to structure economic incentives to protect against certain forms of market pressure. This enables firms and individuals to make different, and potentially better, economic choices than would exist

\textsuperscript{45} Ctr. for Responsive Politics, Annual Lobbying on Health, OPENSECRETS.ORG, https://www.opensecrets.org/lobby/indus.php?id=H&year=2016 (last visited Feb. 15, 2019); see also id.


\textsuperscript{47} See id. at 11 (explaining that inequality is a problem of how background legal rules operate).

\textsuperscript{48} For a discussion of the contested idea that society overall benefits from an entitlement to incorporate, see Martha T. McCluskey, The Substantive Politics of Formal Corporate Power, 53 BUFF. L. REV. 1453, 1469–73, 1479–81 (2006).
without those particular rights. In standard law and economics theory, economic rights like limited liability for corporate investors offer protection against risks of large scale coordination and planning, so that firms and investors have opportunities for higher gains with lower costs that may (in theory) lead to general economic growth. A broad legal right to free health care similarly can insulate people from existing costs that limit their opportunities for productive activity likely to benefit society overall.

For example, at the microeconomic level, that protection can create the flexibility and opportunity that encourages greater individual achievement. If people can count on access to good health care, insulated from the risk of losing their homes, their credit, or their retirement savings, they are better able to think about their financial futures. Without medical debt and costly insurance, or without depending on an insurance-providing job or spouse, individuals may be freer to invest in advanced education, new business ventures, or in moving to better jobs or communities. Businesses may be freer to compete and invest in developing high quality products and personnel without unpredictable and burdensome employee health care costs.

Similarly, at the macroeconomic level, encouraging societal investment in access to health care may lead to overall economic growth. Healthier and happier children, workers, and citizens are better able to perform at school and on the job and to contribute to the well-being of their families and communities. More generally, a universal right to health care may produce indirect economic benefits by supporting social and political solidarity, trust, and confidence. A society that presses individuals and families to make tough choices between the risk of losing life-saving health care and the risk of financial devastation undermines those intangible qualities. This is especially true if individuals perceive their own choices as even tougher because the protections are reserved for a select group of seemingly less deserving others.

Economic human rights can not only induce greater productivity, but also reduce wasteful administrative costs and controls involved in systems that distribute basic human needs as

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49. For a discussion of the historical debate about the right to corporate limited liability, see id. at 1481–82.

market commodities supplemented by targeted redistributive subsidies. Health law scholar Allison Hoffman describes the current market approach to U.S. health care as propped up by a massive and costly regulatory structure. A universal individual right to health care, in contrast, could streamline and simplify delivery of U.S. health services. This would encourage economies of scope and scale and equalizing bargaining power, while also giving patients increased flexibility, freedom, and predictability to enhance their individual control over care.

Even though human economic rights can lead to transformative improvements in overall economic and social well-being, it is nonetheless true that the immediate political economic context includes costly barriers to such beneficial transformation. But those costly barriers are fundamentally a matter of legal and political design and ideology, not natural or necessary economics.

For example, in the United States, a candidate campaigning to expand the Medicare program’s right to health care will confront not only simplistic economic thinking, but also an electoral system skewed by lavish campaign spending aimed at preserving the existing unequal and destructive system of rights to profit from scarce and costly health care. That campaign finance system is not natural or inevitable but rather results from particular recent judicial rulings, such as the Supreme Court’s creation of a First Amendment right to electoral spending.

To resist the existing structures that make broad economic security scarce and unequal, efforts to expand substantive economic human rights will depend on concurrent efforts to support and improve other general and procedural rights and institutions that uphold principles of democracy, fairness, and expansive well-being. In the United States, for example, a broad human right to free health care need not come at the price of federal funding for education or jobs, if we also confront limits on democratic government designed to enforce unequal tough tradeoffs.

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52. See Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right’s Rise*, 54 BUFF. L. REV. 1191, 1265–77 (2007) (explaining how both right and left critiques of legal rights obscure and reify the legal rights behind the economic and political power to make certain rights costly).

53. For a political economic analysis of this right, see generally Jedediah Purdy, *Beyond the Bosses’ Constitution: Toward a Democratic First Amendment*, 118 COLUM. L. REV. 2161 (2019).

54. See Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right’s Stealth Plan for America* (2017) (tracing the influential movement, based on rational choice theories, to change constitutional doctrine to
range of legal reforms could contribute to undoing the barriers to democratic economic rights, such as: changing monetary policy and deficit spending rules designed to keep public capital scarce; defending expansive Congressional spending powers; lifting constitutional constraints on political campaign spending; re-districting gerrymandered electoral districts; or prohibiting state suppression of voting rights.

As long as health care is viewed as a costly and confusing tradeoff due to natural scarcity, individuals, businesses, medical providers, and governments will be forced into destructive competition driven by arbitrary and risky bets on human lives. But if there were a universal right to high quality health care, competitive expertise and societal resources could be re-routed toward improving health and prosperity instead. To solve problems of inequality and insecurity, we need to advance universal human economic rights as not only fundamental for democracy and social justice, but also as a necessary element of a sound and successful economy.

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