

**United States versus
American Medical Association *et al.***

**The Medical Antitrust Case
of 1938-1943**

Patricia Spain Ward

That poverty and illness often go hand in hand was hardly news at any time in the twentieth century. This relationship took on particular urgency during the Great Depression, when the United States suffered more than half of the total industrial decline occurring worldwide. Sickness rates, like that of suicide, increased dramatically during the Depression; among families of the unemployed, the incidence of illness was 66 percent greater than in those with one full-time worker. Without traditions of government responsibility and instruments of control for its citizens' welfare, America, of all the world's major countries, was the least prepared to cope with the pervasive effects of global economic disaster. Health services for the poor, to the extent that they existed, remained the prerogative of state and local governments.¹

Even in the affluent twenties, amid the prosperity that preceded the crash, many Americans could not meet rising costs of medical, dental and hospital care. As a result both physicians and health care consumers began experimenting with prepayment plans, a form of risk-sharing in illness: the Blue Cross group hospitalization plan for school teachers in Dallas, Texas, started in 1929, as did Dr. Michael Shadid's hospital cooperative in Elk City, Oklahoma. "To study the economic aspects of the care and prevention of illness," forty-two representatives of medicine,

public health, the social sciences and the public at large constituted themselves as the Committee on the Costs of Medical Care (CCMC) in 1927. Chaired by Ray Lyman Wilbur, then Secretary of the Interior, and financed by eight major private foundations, the CCMC compiled overwhelming evidence, published in twenty-eight volumes between 1928 and 1932, that large numbers of Americans failed to receive adequate health care under the prevailing fee-for-service method of payment.²

In a final volume issued in 1932, a majority of the CCMC agreed that health services in the United States suffered from chronic structural flaws. They recommended that health services be furnished by professionals—physicians, dentists, nurses, pharmacists and associated personnel—grouped into comprehensive community medical centers, organized regionally around hospitals and reimbursed by group payment through insurance, taxation, or both, with individual fee-for-service available to those who preferred it. Several physician-members of the CCMC dissented from this view. In counter-recommendations that explicitly stated organized medicine's position on public policy for the first time since the Association formally condemned compulsory health insurance in 1920, the minority objected to group organization and to the use of insurance plans, unless sponsored and controlled by organized medicine.³

Once, in the 1890s, when it was seeking the formation of a national health department, the American Medical Association had championed the health of the people as the first law of government.⁴ It now decried the majority report of the CCMC as an attempt "to socialize medical practice in this country." Morris Fishbein, ostensibly speaking for all American doctors in his position as the editor of *Journal of the American Medical Association (JAMA)*, charged that the majority recommendations raised the question of "Americanism versus sovietism for the American people." He suggested that a shift to group practice would deprive the American citizen of the "right to pick his own doctor and his own hospital." Playing on physicians' fears of losing autonomy and on public ambivalence toward government regulation and intervention, Fishbein skillfully wielded rhetoric to mask distortions. Ignoring the fact that the CCMC included a number of physicians and that many practitioners were engaging in experiments with various forms of prepayment, the editor of the most widely read medical journal in the nation railed against the majority report with purposeful illogic: "Let the big business man who would reorganize medical practice, the efficiency engineers who would make doctors the cogs of their governmental machines, give a little of their sixty horse power brains to a realization of the fact that Americans prefer to be human beings."⁵

So it was that the most powerful journalistic voice in organized medicine turned away from the high road at the very beginning of the Depression, setting a retrogressive course the nation is still trying to correct. As

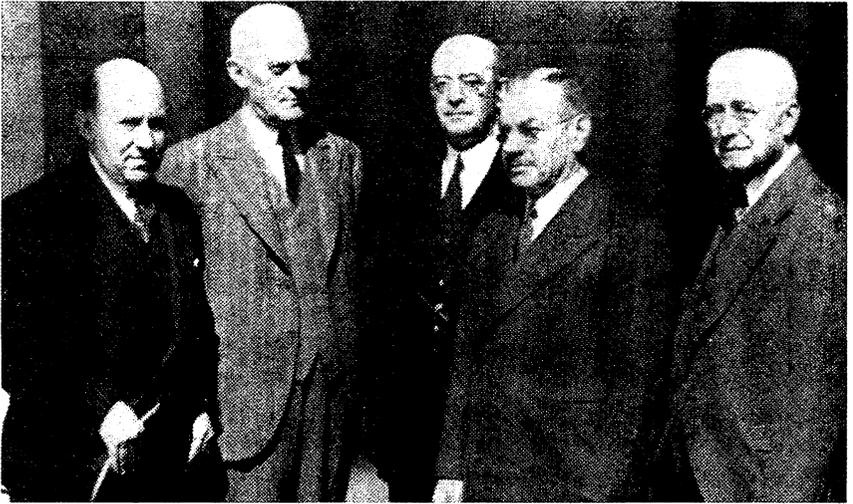
I. S. Falk, a participant in medical reform efforts extending over the intervening half-century, summed it up:

The leadership of America's 'organized medicine' had committed the profession to preservation of the inherited and then prevailing system of medical care, based on solo practice and fee-for-service payment, and to the continuing professional domination and control of the system, deaf to appeals from other professional disciplines and from spokesmen for the consumers of medical care, and blind to the needs for better design of organization and for more adequate methods of payment.⁶

Thus the battle lines stood shortly after Franklin Delano Roosevelt's election in 1932. On one side were those, including many physicians, who hoped to see health care redistributed according to medical need rather than ability to pay. On the other were the leaders of organized medicine, determined to maintain American practitioners in an autonomous position which they saw as threatened by the growth of specialization; by expanding city, county and state health departments; by workman's compensation; by free and low-cost clinics; and by a growing number of successful group practices and medical cooperatives, estimated at 150 by 1930.⁷

Organized medicine won a significant victory in 1935, when it forced the administration to delete from the Social Security Act even a bare reference to the need to study health insurance.⁸ The three surviving health related provisions of this landmark legislation were Title V, Part 1, establishing programs for maternal and child health and crippled children; Title V, Part 2, authorizing appropriations to assist the states in locating crippled children and providing them with hospital and medical services and after-care; and Title VI, authorizing public health grants-in-aid to the states and funds for intramural research in the Public Health Service. With only slight modifications these provisions furnished the framework for much of America's social welfare apparatus over the following decades.⁹

Other New Deal measures also expanded the role of the federal government in health matters, if only temporarily. As early as June 1933 the Federal Emergency Relief Administration (FERA) allowed its funds to be used for medical care and supplies, nursing, and emergency dental services (but not hospitalization, dental care or chronic illness). The Public Works Administration built hospitals, adding some 120,000 beds to the nation's total, while the Works Progress Administration pursued both construction and service programs related to health and sanitation. By the late thirties, when these two units were combined under the Federal Works Agency, they had produced veterans' hospitals, medical research stations, general



Defendants from headquarters office in Chicago: Morris Fishbein, Olin West, W. D. Cutter, R. G. Leland, and W. C. Woodward.

As editor of *JAMA* and other AMA publications for more than twenty years beginning in 1924, *Morris Fishbein* led AMA opposition to group and prepaid medical practice and to national health planning. As AMA "field secretary" and "general manager" beginning in 1922, *Olin West* visited state and county medical societies across the nation, "to promote medical organization and medical economics"; the House of Delegates elected him AMA President in 1946. As Secretary of the AMA Council on Medical Education beginning in 1931, *William D. Cutter*, used the AMA's power to accredit hospitals for internship training to discipline institutions that admitted to their staffs physicians who engaged in group practice or prepayment; Cutter resigned his AMA position while the antitrust case was under litigation. From 1928 through World War II *R. G. Leland* served as director of the AMA's Bureau of Medical Economics. In 1922 *W. C. Woodward* became the first director of the AMA's Bureau of Legal Medicine and Legislation; he retired from this position in 1940, during the antitrust prosecution.

Except for the photograph of Hugh Cabot, all illustrations in this article are reproduced from *The United States of America, Appellants, vs. the American Medical Association, A Corporation; The Medical Society of the District of Columbia, A Corporation; The Harris County Medical Society, An Association, et al., Appellees* (A reprint of the official documents with a condensation of the trial) (American Medical Association, Chicago, 1941). Reprinted by permission of the American Medical Association.

hospitals, tuberculosis hospitals, mental hospitals, and homes for the aged and indigent; medical and dental schools; clinics; and dispensaries and research centers for educational institutions. They also contributed to non-federal waterworks projects and sanitation efforts that reduced death rates from malaria and typhoid fever.¹⁰

The Federal Works Agency furnished existing health agencies with doctors, dentists and nurses who maintained clinics and health centers for maternal and child health, the treatment of venereal disease and the prevention of tuberculosis. The same agency furnished personnel who, under the auspices of the Public Health Service, conducted the National Health Survey, the most extensive inventory of health in America up to that time. Federal Works Agency professionals ran dental clinics that had treated more than three and a half million Americans by July 1938. Agency nurses provided almost a million immunizations as well as more than four and one half million home nursing visits to the ill and elderly.¹¹

Other New Deal innovations included a variety of health-related measures. The Civilian Conservation Corps taught attention to health and sanitation in its camps. Within the Tennessee Valley Authority (TVA) an administrative substructure established employee medical centers at various construction sites, while some TVA funds even went to improve local health services. The Civil Works Administration collaborated with the Public Health Service and the Federal Works Agency in efforts to control malaria, spotted fever and typhus.¹²

The most direct federal intervention in personal health care—central to the subsequent development of national health planning—occurred under the seemingly unlikely agency of the Farm Security Administration (FSA). Government-subsidized medical care for some three million farm families was an incidental by-product of this program, which was initially intended only to make farm loans available to families hovering on the brink of disaster and unable to obtain credit from any other source. Early in the operation of this rural rescue operation (which was the only alternative to relief for nearly a quarter of the nation's farmers), it became clear that half or more of those who defaulted on repayment did so because they had had to sell livestock—chickens, hogs or calves—in order to pay medical bills. By early 1937 FSA administrators realized that the effectiveness of their rehabilitation efforts depended on getting medical aid to their borrowers.¹³

Exploring ways to provide health care, along with feed, seed and tools, the FSA found that the best method was the grouping of families under a prepayment plan acceptable to local physicians on the basis of a uniform fee schedule geared to the low incomes of FSA borrowers. In a period when physicians in farm states often found themselves carrying thousands of dollars in uncollectable bills, many (but not all) state medical associations agreed to let their county societies participate in organizing FSA health plans. In 1939, despite organized medicine's longstanding and

otherwise unyielding opposition to prepayment and contract practice, the AMA effectively approved collaboration in FSA-subsidized medical plans by state and county medical societies.¹⁴

Organized medicine (the AMA and its affiliated state and local societies) was less tolerant of co-operative medical plans or low-cost prepayment experiments, whether organized by businesses or by physicians themselves. To combat what it perceived as dangerous deviations from accepted forms of practice, organized medicine used a variety of methods to obstruct the functioning of such ventures: expulsion from the local medical society (which often meant the loss of consulting rights as well as malpractice insurance); revocation of hospital privileges; suppression of reports indicating the inadequacy of prevailing forms of service and payment; and powerful propaganda, endlessly repeated, in its national organ, the *Journal of the American Medical Association*, as well as in state society journals. Morris Fishbein believed that it was *JAMA's* duty not only to reflect the opinions of physicians but also to "help to keep medical thinking in the right paths." To convince American doctors that compulsory health insurance was a great evil, *JAMA's* editorship even practiced deliberate deception, presenting *JAMA* columns criticizing the British system as if a British practitioner had written them.¹⁵

Some of these tactics were so outrageous that they inspired scholarly exposés. Oliver Garceau, a Harvard political scientist, wrote a masterful analysis, published in *Public Opinion Quarterly* in September 1940, under the title "Organized Medicine Enforces its 'Party Line.'"¹⁶ When the *New York State Journal of Medicine* responded to Garceau's charges that organized medicine was using a combination of the medical press, group sanctions, expulsions, boycott and its politicians to mold medical opinion, its language sounded exactly like that of Morris Fishbein (who often furnished ideas and prepared text for state journals).

Mr. Garceau is an instructor in government at Harvard and, like a bloodhound, follows the spoor and scent of this sinister organization (medicine, not Harvard) unerringly through twenty pages of swampy reading matter, all set about with fever trees, to its lair on page 428. Here, panting, he finds 'the essence of the process (of moulding the opinion of the nation's doctors) is that familiar combination of the pen, the sword and the old-fashioned politician.'

With Fishbeinesque sarcasm, the commentator observed that Garceau's conclusions would surprise "a great number of very earnest and sincere men who have spent their lives, day and night, healing the sick, comfort-

Chimney Surgery—By Hungerford



Drawn at the time of the grand jury indictment, this cartoon reflects the perception that the Roosevelt administration was using antitrust prosecution to force AMA acquiescence in a national health program. By reprinting it in 1941, alongside a *Washington Evening Star* caricature entitled "Can It Happen Here?" which showed Thurman Arnold jailing doctors in a cell next to the one where he had already locked up businessmen, the AMA implied that both groups were victims of a relentless federal drive for socialization.

Reprinted by permission of the American Medical Association and the Pittsburgh *Post-Gazette*.

ing the dying, encouraging the well to stay well in spite of sickness insurance and other discouragements!"¹⁷

Richard H. Shryock, a founder of the social history of American medicine, called his exposé "Freedom and Interference in Medicine" (*Annals of the American Academy of Political and Social Science*, November 1938). Although he opened by discussing historic movements that interfered with medical freedom from outside the profession (anti-dissection, antivivisection and anti-birth control; opposition to anesthesia in obstetrics; taboos on the discussion of venereal diseases), Shryock, like Garceau, was primarily concerned that leaders of organized medicine in the thirties were suppressing physician dissent over forms of service and payment.¹⁸

In the middle of this growing public debate, President Roosevelt's Interdepartmental Committee to Coordinate Health and Welfare Activities (IC, directed by Assistant Secretary of Treasury, Josephine Roche) and its subsidiary Technical Committee on Medical Care (chaired by Martha M. Eliot of the Children's Bureau) struggled to prepare a national health plan that would find some degree of support from organized medicine. In the spring of 1939, a few months after the Interdepartmental Committee presented the President with a plan for the nation's first comprehensive health program, the Justice Department began an antitrust investigation implicating the AMA, several affiliated societies and twenty-one individual physicians on charges of conspiring to coerce and restrain physicians and hospitals from engaging in group prepayment.

Before the end of December 1938, a grand jury brought indictments against all of these representatives of organized medicine. In January 1943, after more than four years of bitter litigation, the Supreme Court affirmed a judgment of guilty against the AMA and the District of Columbia Medical Society, requiring the two to pay fines of \$2500 and \$1500 respectively. Among many ironies of this first antitrust case against organized medicine were the fines, bare token payments compared to the more than half million dollars which the AMA estimated it had spent in legal costs. Another irony was that all individual defendants were exonerated in a judgment which rested on proven charges of conspiracy.

A final irony is the prolonged debate, continuing to the present, about the *real* purpose of this, the first antitrust action against organized medicine. Some contemporaries viewed it as a tactic in New Deal health reform strategy. According to the *Washington Post* of December 25, 1938, "A convincing case can be built up to support the theory that the extraordinary grand jury study was, to put it bluntly, propaganda looking forward to Congressional consideration of the proposed National Health Program."¹⁹ Many recent commentators, on the other hand, have downplayed this interpretation. Close attention to the sequence of events between 1937 and 1939 suggests that those nearest the scene may have been right.²⁰

I

While the administration was studying the nation's health needs and possible ways to meet them without incurring the wrath of organized medicine, Esther Everett Lape, the incisive Member-in-Charge of the American Foundation, was grooming a small group of progressive physicians to act as the spearhead of change in the forthcoming struggle for a national health program. She had selected her group, later called the Committee of Physicians for the Improvement of Medical Care, out of the Advisory Committee for her massive two-volume survey of medical opinion, *American Medicine: Expert Testimony Out of Court*, published in 1937. Lape's chosen doctors were mostly academicians, all AMA members in good standing, all persons of broad social awareness who felt disgruntled with the Association's obstruction of experiments with prepayment and group practice. Having worked together on *American Medicine*, this little band of thirteen had continued to meet under Lape's able tutelage, discussing the problems then occupying the President's Interdepartmental Committee. Although few if any of this "inner circle" realized it, Lape, long a close friend of Eleanor Roosevelt, was grooming them to make a personal presentation of the views of American medicine's progressive wing to the President of the United States.²¹

In April 1937, when Lape's *American Medicine* rolled off the presses, it gave the lie to Morris Fishbein's claim that American physicians had opposed the CCMC report "well-nigh unanimously." Lape's abundance of first-person physician-opinion proved beyond any doubt that the AMA did not speak for all; that many American physicians questioned the continuing value of solo, fee-for-service practice and recognized the need to re-structure health care in this country. In fact, Lape had created the Committee of Physicians to be the voice of these dissenters. By publication time, Lape's inner group, determined to circumvent the AMA in behalf of improved health services, had drafted a set of deliberately general "Principles and Proposals." This document acknowledged the government's responsibility for health and its obligation to subsidize medical education and medical research, as well as health care for the medically needy. As Lape and her Committee intended, their statement seemed sufficiently general and innocuous to attract support from many physicians, yet suggestive enough of differences within the profession to persuade the President that he might still hope for medical cooperation in health reform.²²

At this time, Eleanor Roosevelt invited Lape's group to luncheon at the White House, giving them an opportunity to discuss their ideas with the President. Roosevelt, finding their statement a potential foundation for action, suggested that they enlist supporters: "Now you want to get a body of medical opinion behind that, do you not?"²³ Stirred by this executive commission, the Committee of Physicians began to circulate their "Principles and Proposals" quietly but widely, acquiring the approving signature

of one prestigious physician after another. At the same time, the President, his hopes for a health program reawakened by the luncheon-talk, sent a copy of the statement to the Interdepartmental Committee for consideration in their work on a national health program.²⁴

Neither the President nor the Committee of Physicians faltered when a pirated copy of the statement, introduced by representatives of the New York State Medical Society, met a resounding defeat at the annual meeting in Atlantic City in June. Nor did the Committee of Physicians retreat in October, when a *JAMA* editorial attacked the personal integrity of two of its members (Hugh Cabot and Robert Osgood) and impugned the intelligence of some signers and the motives of others. Instead, the Committee of Physicians protested these slurs in a letter which *JAMA* declined to publish, as it did all statements from the Committee.²⁵

By autumn 1937 the Committee of Physicians had gathered 430 signatories, including many of America's outstanding physicians and surgeons. With exquisite timing to gain maximum public notice, the Committee released its text and the signers' names to the lay press in time for publication on Sunday, November 7th. The story made front-page news in major papers across the country. The *New York Times* called it a "revolt within the AMA." The Johns Hopkins medical historian, Henry Sigerist, welcomed the "Principals and Proposals" as a "medical declaration of independence." To some observers it appeared that the AMA was having the same sort of problems with the Committee of Physicians that the more conservative parent body, the American Federation of Labor, was having with the fledgling CIO.²⁶

While the AMA was attempting to solve its dissident problem in late 1937, another major challenge to its authority arose in the District of Columbia. Employees of the Federal Home Owners Loan Corporation (HOLC) established an experimental consumer cooperative called Group Health Association (GHA), designed to give prepaid low-cost care to Bank employees and their families, along the lines of the Standard Oil program maintained for employees in Baton Rouge, Louisiana. Even before opening on November 1, 1937, GHA had to contest charges that its \$40,000 federal starter grant was illegal; that it was an insurance business; and that it was a corporation engaged in the practice of medicine. Soon after it began to function, physicians on its staff found themselves threatened with loss of membership in the District Medical Society and with revocation of hospital privileges. Organized medicine's reaction to GHA was doubtless exacerbated by the intimation of federal "intrusion" into health care represented by the starter grant. Because the Home Owners Loan Corporation was a constituent agency of the Federal Home Loan Bank Board, GHA symbolized not only the forbidden combination of prepayment with group practice, but also the specter of federal control of medical practice.²⁷

Cost of Medical Care Too High, Dr. Cabot Says at A. M. A. Trial



Dr. Cabot Defends Group Medicine

Prominent Boston physician testified today that it is difficult for the average person to pay for adequate medical care.

Until the period immediately after World War I, when Morris Fishbein came to power in the AMA, Hugh Cabot (1872-1945) had been active in efforts to reform the AMA from within. By the late thirties he saw antitrust action as the only way to combat the Association's adamant resistance to change in forms of practice. Newly retired as head of a surgical section at the Mayo Clinic, Cabot was at work on his second book on medical economics (*The Patient's Dilemma: The Quest for Medical Security in America*, 1940) when the antitrust case opened. A spokesman for Physicians for the Improvement of Medical Care and a strong proponent of prepayment plans and group medicine, he soon organized the White Cross prepaid medical plan in the Boston area.

Clipping from an unnamed newspaper, hand-dated February 7, 1941, reproduced from the Hugh Cabot papers temporarily in the author's possession. With permission of his widow, the late Elizabeth Cabot McRoberts, and his son, Arthur Tracy Cabot, Jr.



Cartoon in the Washington (D. C.) *Evening Star*
July 27, 1939

Early in the trial, the AMA appeared to have won exemption from antitrust prosecution when Judge Proctor of the Federal District Court ruled that medicine is a profession, not a trade. In its "report" of the trial, the AMA reproduced these two cartoons, together with a number of editorials supporting Proctor's ruling. Averring that the D.C. Medical Society opposed Group Health only out of concern for the "close relation between patient and practitioner" and not at all out of "greed," the *Baltimore Sun* of July 27, 1939, criticized Thurman Arnold's attempt to apply antitrust law to the professions. By contrast, a *Washington Evening Star* editorial of the same date applauded Arnold's plan to appeal the Proctor ruling and expressed the hope of seeing "the technical issues of antitrust jurisdiction in the field of medical practice finally resolved."

Reprinted by permission of the American Medical Association, the *Baltimore Sun*, and *Washington Post*.

Oh, Most Upright Judge!



Cartoon in the Baltimore (Md.) Sun, July 27, 1939

The nation's press gave considerable attention to each successive instance of organized medicine's harassment of GHA. In May 1938 the *Yale Law Journal* found broad implications in these obstructive actions:

The public obviously has a vital interest in assuring a fair trial to organizations like the Group Health Association. But as long as medical societies can brandish the bludgeon of expulsion, free experimentation—long extolled by the medical profession itself as the very lifeblood of scientific progress—will be throttled.²⁸

Hugh Cabot, a member of the Committee of Physicians and author of *The Doctor's Bill*, a patient-oriented primer in medical economics published in 1935, was particularly outraged at organized medicine's attacks on GHA. Former Dean of the Michigan Medical School, a Mayo Clinic section head and a strong supporter of group practice, Cabot had declined the Directorship of GHA in February 1938; he had turned sixty-five and believed the Director "ought to have at least ten years of certain usefulness, barring lightning, tornadoes, Indians, and other acts of God." He urged GHA staff members to seek redress through civil suits against the District Society: a few court decisions awarding damages, he said, would "clear the atmosphere a good deal all over the country." On March 21, 1938, Cabot even suggested to the General Counsel of HOLC that GHA might sue the District Medical Society for conspiracy—except that that charge was too difficult to prove (or so he then imagined).²⁹

It was mid-February 1938 when the President's Interdepartmental Committee submitted a proposed comprehensive health program to serve as a basis for legislation. The IC listed five measures necessary to remedy deficiencies in existing health services: first, expansion of public health and maternal and child health services; second, expansion of hospital facilities; third, medical care for the medically needy; and fourth, insurance against loss of wages during illness. The fifth and most controversial recommendation envisioned a General Program of Medical Care to improve health services for the entire population and enable risk-sharing in medical costs. This proposal suggested possibilities of financing by general or special taxation, by specific insurance contributions from potential beneficiaries or by some combination of the two. Eligibility for federal grants-in-aid to participating states would require health care providers to meet certain standards of service.³⁰

It was not by coincidence that only three days after the Interdepartmental Committee transmitted this proposal to the President (and months after the Committee of Physicians had asked the right of reply to JAMA's editorial impugning their intelligence and integrity), the AMA Board of Trustees granted a hearing to seven members of the Committee at Asso-

ciation headquarters in Chicago. With Hugh Cabot acting as spokesman, the Committee presented four demands that revealed their concern for freedom of expression within organized medicine:

- that *JAMA* publish the Committee's reply to the *JAMA* editorial of October 16;
- that *JAMA* open its pages to reasonable and honest discussion of social and economic problems of medicine;
- that such discussion be kept "on a plane consonant with the dignity of the profession";
- that the Trustees give a prompt answer so that "we may determine our future."³¹

Although *JAMA* editor Morris Fishbein was not an AMA Trustee, he was present and active at the meeting. He insisted that *JAMA* had always been "an open forum," and he denied that it had been less than "reasonable and honest" under his editorship. He said that he could not possibly be expected to make room for all the manuscripts submitted to him—unless "the American Medical Association wishes to destroy its most valuable asset . . . for the notions of every nit wit that comes along." Hugh Cabot replied, "I hoped that we should be able to stay on a somewhat higher level. Does Dr. Fishbein still believe that the gentlemen who signed these Principles and Proposals are thoughtless and incapable of thought, as stated in the [*JAMA*] editorial?"³²

The Trustees were alternately hostile and conciliatory throughout this day-long meeting. Verbatim minutes suggest that they had agreed to meet with the Committee members largely because they hoped to learn whether this rebel band had encouraged presidential hopes for medical cooperation in a national health program. Despite repeated urging, Committee members steadfastly refused to specify what they might do next if the Trustees denied their demands; nor would they promise to clear all future statements with the Association before making them public.³³

In the months following this February meeting, Group Health Association continued to encounter opposition from the District of Columbia Medical Society. Although similar difficulties had marred and sometimes ended the existence of other prepaid groups, the GHA had a different destiny, dictated partly by its geographic location in the District (where commerce was subject to Congressional jurisdiction, and hence to antitrust law), partly by rampant popular and professional dissatisfaction with organized medicine in the late Depression.

At the spring 1938 meeting of the American College of Physicians, retiring president James Howard Means, a member of both the AMA and the Committee of Physicians, publicly repudiated current medical standpatism in a speech which the *New York Times* reported under the headline



MR. THURMAN ARNOLD, ASSISTANT U. S. DISTRICT ATTORNEY GENERAL

In 1940 the United States Circuit Court of Appeals reversed the Proctor ruling that medicine is a profession, declaring instead that it is a trade, liable to prosecution under the Sherman Act. In its 1941 "report" of the trial then still in progress, the AMA reproduced this miscaptioned photograph of Assistant Attorney General Arnold, together with the JAMA editorial of March 23, 1940, discussing press opinion about the Appeals Court ruling. Directly above Arnold's picture in the AMA compilation is Morris Fishbein's editorial warning that an Idaho editorial criticizing the exclusion of osteopaths and chiropractors from hospital privileges would, if heeded, break down "established order in the field of medicine" and open the hospitals "to every half-educated medical pretender and charlatan."

Reprinted by permission of the American Medical Association.

“Nation’s Doctors Called to Revolt.”³⁴ On May 4, addressing the harassed members of GHA in Washington, Hugh Cabot stressed both the economic and the medical advantages of group practice. He attacked the notion that physicians alone should dictate the social and economic conditions of health care: “In these fields they are, at best, inexpert and perchance prejudicial witnesses. They cannot therefore be relied upon as experts and they ought not to aspire to that distinction.” The AMA, Cabot observed, was beginning to have all the attributes of a political organization, “and when we voice our fear of the control of medical practice by politicians we ought, I think, to specify which kind of politicians we mean.”

What organized medicine appears to be asking is that it shall, as a body, be given control of the changes which are to be made, as time goes on, in the methods of offering medical care to the American people. This is, of course, pure fascism of the Italian type.³⁵

Although Cabot and GHA officials had distributed advance copies of Cabot’s full text to the press, it was perhaps inevitable—in the face of events in Europe in May 1938—that reporters should have a field day with the phrase “pure fascism” applied to the AMA.³⁶

Cabot returned to work at the Mayo Clinic to find a mound of letters asking for copies of his speech. He also returned with a high opinion of the health care offered by GHA and with rising anger at the District of Columbia Medical Society for refusing consultation with GHA doctors and for expelling one of its staff physicians because of his participation in the group. On May 23 Cabot wrote to the Department of Justice, describing tactics the District Society was using to drive GHA out of business. The implications of the case caught the attention of Assistant Attorney General Thurman Arnold, a young firebrand whom Roosevelt had recruited from the Yale Law School to re-focus long dormant antitrust laws on abuses of power which appeared to work against the public interest.³⁷

Within a day of receiving Cabot’s letter, Justice Department officials indicated to GHA their willingness to investigate its difficulties with the District Medical Society. To build a broad base for a sweeping action, Justice asked to hear from anyone who favored group practice and opposed the methods which organized medicine was using to obstruct its development. Cabot passed this suggestion along to Walter Alvarez and other trusted colleagues.³⁸

Thurman Arnold immediately began issuing press releases about the prospective investigation, releases which AMA officials uneasily recognized as being “peculiarly timed” with Association activities. The first release appeared just two weeks before the annual Association meeting. It announced plans for an inquiry into complaints that the AMA and the

District Medical Society had conspired in violation of antitrust laws during the course of their opposition to group health plans. Although much of the popular press was anti-New Deal at this time, public interest was immediate and intense. The AMA promptly sent someone to Washington to inquire about the origins of the investigation, but Justice officials would say only that the inquiry had begun with an informal complaint from a source the Department refused to disclose.³⁹

At their annual meeting in San Francisco in mid-June, AMA members heard Josephine Roche, chair of the Interdepartmental Committee, gently command them to present constructive ideas for medical relief at a National Health Conference to take place in July. The AMA used the occasion of its San Francisco meeting to deny that it was a monopoly and to denounce attempts to treat it as such—thus indicating, as Arnold later observed, that the Association had mistaken the charge of illegal restraints and coercions for that of illegal monopoly.⁴⁰

While ominous sounds continued to emanate from Justice, the Administration unveiled its five-point health program at the National Health Conference. For three hot days in Washington in mid-July 1938, 175 delegates, representing twenty million Americans in professional, labor, farm and consumer groups, publicly voiced complaints about existing health care and enthusiasm for the Administration plan.⁴¹

Emerging from the Conference understandably shaken, the AMA asked to confer with the administration's Interdepartmental Committee on the Sunday following.⁴² In contrast to the "evolutionary" pace which the Association had always demanded in altering the structure of health services, it agreed at once to support four of the five recommendations of the National Health Program—on the condition that the Interdepartmental Committee abandon the General Program of Medical Care. (This last provision, the AMA insisted, was unacceptable because it would open the door to universal compulsory health insurance.) Despite the AMA's newfound openness to such previously unacceptable provisions as cash indemnity in illness and medical need as a legitimate category in apportioning federal-state aid, the Interdepartmental Committee refused to accept the AMA's terms.⁴³

On July 31 Thurman Arnold released a long, discursive announcement, widely reprinted in the press, explaining specific illegalities that Justice's preliminary investigation had uncovered. In order to obtain the "necessary cooperation" and to give the prosecution a "proper setting," Arnold explained that the offending Medical Society members were not guilty of "moral turpitude"; rather, he said, they were like a reckless driver, a person of "distinction and good-will who is in a hurry to meet his legitimate engagements." Unhappily for the doctors under investigation, character did not count in antitrust cases until it was too late; that is, the character of the defendants would affect only the type of sentence, not the

fact of prosecution. According to Arnold, these introductory observations were necessary "to create an atmosphere which leaves the door open to a constructive proposal at any stage of the litigation."

In a second significant passage, Arnold said that the importance of medical economics for this suit made it appropriate for him to consider the nation's health problem at large. He produced data showing that illness in America bore an inverse relation to income; that a number of maternal and infant deaths could be prevented by placing medical care within financial range of the entire population. Yet he assured readers that the Sherman Act was not a method of directing or planning the future: the Justice Department was not attempting to solve problems of medical economics, but only to insure that monopoly practices were not used to prevent "illuminating experiments in this field." Arnold explicitly invited constructive suggestions from the AMA: "In the event that voluntary cooperation results in constructive proposals going beyond the elimination of illegal practices, the department will adhere to its previously announced policy of submitting such proposals to the court as the basis for a consent decree."⁴⁴

Within a month the AMA sent another delegation to confer with the Interdepartmental Committee. Again the Association agreed to support all the rest of the National Health Program, on condition that the government drop the General Medical Program. Again the Interdepartmental Committee refused.⁴⁵

At this point Arnold began to line up witnesses to appear before a grand jury. Although the AMA had intimidated several of the Justice Department's prospects, two of the strongest remained ready to testify: Hugh Cabot, just retired from the Mayo Clinic, and Michael Marks Davis, then head of the Committee on Research in Medical Economics.⁴⁶ Arnold originally scheduled the grand jury to open on September 19. When the AMA called a Special Session of the House of Delegates for September 16, Arnold in turn notified witnesses that the grand jury would be postponed.⁴⁷

When the AMA Special Session convened, Trustee Arthur Booth told the delegates that they had come together only to register official Association views on the National Health Program before Congress met again in early 1939. Even the published record of this session, however, suggests a high level of preoccupation with impending grand jury action. The Association had not yet received any official notice of action by Justice; yet investigators had already appeared at AMA headquarters where they had "consulted some correspondence." Booth assured the delegates that the Association welcomed investigation, for its actions had always been "in the interest of the public welfare, and for advancing the standards and quality of medical service for the American people."⁴⁸

On October 1 the Justice Department made two direct public attacks on organized medicine. Addressing the Missouri Bar Association in St.

Louis, Thurman Arnold explained that long neglect of the antitrust laws had led American physicians to think it their peculiar privilege to enforce their views against contract practice by simple and direct forms of boycott and coercion—a misconception which the Justice Department was working to correct in advance of prosecution. The same day, speaking on “Monopoly and Medical Care” before the Woman’s Trade Union League in New York, one of Arnold’s special assistants reiterated that, unless the AMA came to Justice with a proposed consent decree, the Department would have no alternative to grand jury proceedings.⁴⁹

AMA officials did not feel able to compromise further. Cheered on by press criticism of “New Deal medical bluff” on the part of “zealots” in the Justice Department (and by friends like H. L. Mencken, who urged Fishbein to defy “these New Deal goons”), the Association stood fast. The Justice Department remained equally unyielding.⁵⁰

On October 17 a grand jury of twenty-three males (including six salesmen, a brewer, a cab driver, a hotel manager, a bank teller and a Negro messenger) began hearing testimony from the government’s lead witness, Hugh Cabot. Although prevented by the secrecy rule from discussing his actual testimony, Cabot relaxed after his full day on the stand by regaling a delighted press corps with his views about group practice, prepayment and salaried physicians. True to his reputation as a “schismatic” (the late Nathan Sinai called Cabot “the Martin Luther of American medicine”), he reminded reporters that he had told the National Health Conference in July that medical practice in some parts of the nation was “medieval.”⁵¹

On October 25, while grand jury proceedings continued in Washington, Morris Fishbein attempted a jest before an audience of three thousand at the annual *New York Herald-Tribune* Forum: “Members of the jury, I do not rise in defense of the American Medical Association as a monopoly.” Fishbein earnestly contended that group practice costs more than private practice for the 85 percent of diseases which he said the ordinary doctor could easily handle with his little black bag. Insisting that the AMA had never been guilty of a “rigid or standpat attitude,” he predicted that the AMA would reach agreement with the Interdepartmental Committee when they met again on October 31.⁵²

Fishbein was too optimistic. The AMA brought no new concessions, and the Interdepartmental Committee again refused to abandon the General Program of Medical Care.⁵³

On November 10 Justice once more explained its policy on consent decrees: “the Department will always reject consent decrees which merely eliminate unlawful conduct. . . . The only consent decrees which the Department is willing to consider during the pendency of a criminal case,” it explained, “are those containing provisions for affirmative public benefits which could not be secured by the criminal proceeding alone.”⁵⁴

The AMA and the District of Columbia Medical Society had apparently hoped to meet this requirement on October 6, by publicly announcing plans for a "Mutual Health Service," a producers' cooperative which would reserve to the Medical Society the right to limit members' incomes and benefits.⁵⁵ Such a plan evidently failed to offer what the Justice Department deemed adequate "public benefits," for Arnold's team of lawyers now moved into high gear. They served the AMA with a subpoena requiring it to produce every Association document back to 1930, pertaining to any of the following experiments in low-cost or prepaid health care:

Illinois Social Hygiene League;
Public Health Institute, Chicago;
United Medical Service, Chicago;
Civic Medical Center, Chicago;
Milwaukee Medical Center;
Trinity Hospital, Little Rock;
Ross-Loos Medical Group, Los Angeles;
Community Hospital, Elk City, Oklahoma.

By pleading that the subpoena constituted an "unreasonable and oppressive burden," AMA lawyers managed to have part of it quashed. What remained required the Association to produce all correspondence and other documents dating from January 1932, pertaining to relations between the AMA, the District Medical Society, and GHA; to any requirement or proposal of the AMA that hospital staff members belong to local AMA branches; and to instances where hospitals failed to gain approval for internship training because they had staff members who were not in good standing with the local medical society.⁵⁶

From the information which this sweep yielded, Arnold's lawyers drafted a tighter subpoena on November 20, requiring the AMA to surrender all materials prepared between January 1935 and November 20, 1938, "containing statements with respect to any action or policy taken or adopted or considered or proposed to be taken or adopted by or on behalf of the A.M.A. or of any medical society or association affiliated with the A.M.A., or of any hospital, in opposition to group medical practice or to the provision of medical care on a periodic prepayment basis."⁵⁷

AMA counsel again protested a fishing expedition, this time without success. Working with the wealth of evidence produced by the second subpoena, Arnold and his staff had no difficulty securing an indictment by December 20. Although the *St. Louis Globe-Democrat* found the indictment "preposterous" and the *New York Daily Mirror* labelled Arnold's tactics "a brutal combination of the Star Chamber and Nazi bureaucracy," the press gradually shifted toward the side of the government as the case

made its way to the Supreme Court, where it ended in convictions and fines in 1943.⁵⁸

II

What were the results of this singular episode in American legal and medical history? Both sides, claiming that a fair trial was impossible in what each perceived as an atmosphere of adverse publicity, nonetheless claimed victory. The AMA's retrospective claim that no one really "won" the suit should be weighed in conjunction with the AMA's decision—by a standing vote of the House of Delegates—to appeal the Federal District Court judgment of guilty, rendered in April 1941. Morris Fishbein was probably closer to the truth when he suggested, at the time of the case, that it served mainly "to convict the AMA in the eyes of the people as being a predatory, antisocial monopoly."⁵⁹

It is possible that public doubts about the social integrity of the profession, raised by prolonged adverse publicity between 1938 and 1943, contributed to the eventual erosion of public trust in medicine's scientific integrity as well.⁶⁰ This erosion appears to have become especially marked in the troubled area of cancer research and treatment. Within a decade of the Supreme Court decision, a committee of the Senate requested a study of cancer research organizations that would concentrate especially on "the operation of voluntary cooperative prepaid medical plans" offering cancer treatment, and "the resistance, if any, that each insurer has experienced from any individuals, organizations, corporations, associations, or combines, in their attempts to offer protection to those who are afflicted with the disease cancer."⁶¹

For GHA, the problem of exclusion from hospitals in the District began to vanish with the original indictment, even before the case went to trial. Daniel Borden, President of the District Medical Society during the trial, later recalled that, as a result of the antitrust charge, "there was a rod held over the profession" and the AMA changed their "Bible" (the code of ethics) to "eliminate any problem relative to the Sherman Act." Looking back at the trial thirty years later, Borden thought that it had marked "the beginning of what might be termed 'government influence' which has gone on . . . to Medicare." Reminiscing in 1959, Warren Magee, a lawyer for the defense, and Theodore Wiprud, Executive Director and Secretary of the District Medical Society in 1938, recalled that, after the trial, the Society had stopped attempting to influence forms of medical practice.⁶²

This last result was what Thurman Arnold had always publicly claimed was the purpose of the suit: "There should be free and fair competition," he said in 1938, "between newer forms of organization for medical service and older types of practice without the use of organized coercion on either side. If the newer forms of organization should result

in inferior standards of therapy, as is feared by their medical opponents, that fact can be revealed only by experiment.” In 1944, U.S. Assistant Attorney General Wendell Berge (a self-confessed member of “the small group of willful men” who instituted the antitrust case) explained that the Justice Department saw the case in terms of the centuries-long common law tradition which holds that the maintenance of health is “one of the great tasks of society.” In this view, Berge told the American Urological Association, the physician is a social instrument doing work of a “public character.” Thus, to the Justice Department, the question was not one of “private practice versus socialized medicine” (“For practice is never private and all medicine has a social function”), but “merely of a fair field and no favors between two rival plans for bringing doctors and patients together.” Berge reminded his physician audience that, when Congress originally chartered the D.C. Medical Society, it had refused to grant the group economic power over its members: Congress intended the Society for scientific and educational advantage only, and—explicitly—for ‘no other purpose’ whatever.⁶³

The Justice Department’s victory gave Group Health Association freedom to develop at last (“in a wartime economy rather than in a depressed one,” as its recent historians state), and develop it did. By the end of World War II, GHA had more than 8000 members; by 1970, 75,000; by 1985, 144,000. The court decision also inspired many medical societies to form their own prepayment plans, some of them forerunners of the “Blue” plans of today. It suggested possible legal safeguards to the founders of such experiments as Kaiser Permanente, Group Health Cooperative of Puget Sound, Health Insurance Plan of Greater New York—and Boston Health Associates, which Hugh Cabot was organizing even as the antitrust case moved through the courts. Looking back in 1966, Thurman Arnold observed that, without this decision establishing that physicians cannot boycott organized medical care of any sort, “the AMA would be in the same position with respect to the doctors as Jimmy Hoffa was with respect to the teamsters.”⁶⁴

However effectively the antitrust case cleared the way for what Arnold called “illuminating experiments,” it had a wholly different effect on national health planning. Although there is no evidence that Arnold intended the case to bring the medical profession under the yoke of civil service, as AMA officials implied, the timing of Arnold’s actions in the summer and fall of 1938 did seem to suggest a connection with Administration plans.⁶⁵ President Roosevelt, moreover, did not seem displeased that threats of impending antitrust action on a separate matter appeared to influence AMA negotiations on the proposed National Health Program. After the Delegates’ Special Session of September 1938, when the AMA continued to oppose the general program of medical care even in the face of subpoenas bound to reveal evidence that was both humiliating and

incriminating, Roosevelt apparently sensed their intransigence as an insuperable obstacle. Increasingly preoccupied with the war in Europe, he drew back from his plan, allowing Senator Wagner of New York to introduce a legislative version in February 1939. At Senate hearings in the spring of 1939 liberal labor spokesmen and the Committee of Physicians supported the Wagner Bill in principle and offered to help perfect it in detail. The AMA House of Delegates unanimously condemned it, and the AMA raised dues to meet "certain contingencies that have arisen." Subsequently, the political action arm of the AMA bombarded the public with 25 million leaflets describing the "excessive cost" and "socialistic" and "dictatorial" tendencies of the proposed program. Morris Fishbein again displayed his genius at slanting the facts: "A little sickness," he said, "is not too great a price to pay for maintaining democracy in times like these." In a public statement shortly before Christmas 1939, President Roosevelt indicated that he had abandoned the effort for a national health program and would settle for the construction of fifty hospitals in the neediest parts of the nation.⁶⁶

From the perspective of cooperation by organized medicine in reorganizing health services, the antitrust case had a pervasively deleterious effect. For years afterward, AMA officials continued to use the trial as a focus for re-building physician solidarity which had been sorely weakened by economic distress in the drought and depression thirties. Throughout five years of litigation, *JAMA* devoted large chunks of space to the case, always characterizing it as Morris Fishbein had done in one of his earliest published responses: as a persecution rather than a prosecution.⁶⁷ Most practitioners lived far from Washington and they read no periodicals other than *JAMA* on the politics and economics of medicine. A study by the Michigan State Medical Society in 1934 documented *JAMA*'s powerful and exclusive hold on its readers: 89 percent of the physicians surveyed read *JAMA*; 70 percent read a state society journal; fewer than 30 percent read any other type of literature.⁶⁸ Week by week, *JAMA* reminded American doctors of the suit, always intimating that the critical issue was the right of the state to control the practice of medicine. While many journalists applauded the final decision as a step toward free competition in health care, there were indications that the AMA had persuaded others to its own position. According to the *Los Angeles Times*, "There is some reason to suspect that the suit was genuinely inspired by the desire of New Dealers to socialize medicine and regiment it under government control, a desire which the AMA has unflinchingly opposed."⁶⁹

So powerful did this myth become that surviving defendants (and their lawyers) continued to insist many years later that, had the medical organizations chosen to avert a criminal trial by negotiating a consent decree—that is, by presenting acceptable plans for low-cost prepaid health care,

they would have subordinated the practice of medicine forever to meddling supervision by the judicial arm of government.⁷⁰

Thus weighted with a burden it was never intended to carry, the antitrust case has left the American public with a mixed legacy. Because of it we enjoy increased access to prepaid medical care by groups which represent "not only economic devices but also organizational adjustments to functional specialism."⁷¹ But it has also hardened the medical establishment in its opposition to national health planning, unfairly associated since 1938 with judicial coercion and criminal prosecution.

Notes

This paper is a product of research funded by National Library of Medicine Grant Number LM02097. For comments on a shorter version presented at the American Association for the History of Medicine in 1979, I am grateful to Ronald L. Numbers, Barbara Rosenkrantz, Sheldon Hochheiser, Arthur Visel tear, Dan Fox, Dan Weiss, Leslie Falk and Caroline Hannaway.

1. Robert S. McElvaine, ed., *Down and Out in the Great Depression: Letters from the Forgotten Man* (Chapel Hill, 1983), 18; William F. Leuchtenburg, "The Great Depression," in C. Vann Woodward, ed., *The Comparative Approach to American History* (New York, 1968), 297.

2. Odin Anderson, *Health Services in the United States: A Growth Enterprise Since 1875* (Ann Arbor, Michigan, 1985), 94-95.

3. Anderson, *Health Services*, 96-98.

4. For a study of this earlier period, see Alan I. Marcus, "Disease Prevention in America: From a Local to a National Outlook, 1880-1910," *Bulletin of the History of Medicine* 53 (Summer 1979), 184-203.

5. "The Report of the Committee on the Costs of Medical Care," editorial, *Journal of the American Medical Association* 99 (December 10, 1932), 2034-35. Hereafter cited as *JAMA*. For a subtle study of American ambivalence toward government intervention, see Barry D. Karl, *The Uneasy State: The United States from 1915 to 1945* (Chicago, 1983).

6. I. S. Falk, "Medical Care in the USA—1932-1972. Problems, Proposals and Programs from the Committee on the Costs of Medical Care to the Committee for National Health Insurance," *Milbank Memorial Fund Quarterly* 51 (Winter 1973), 4.

7. Anderson, *Health Services*, 128.

8. *Ibid*, *Health Services*, 112.

9. Falk, "Medical Care in the USA", 5.

10. John M. Carmody, "The Federal Works Agency and Public Health," *American Journal of Public Health* 30 (August 1940), 887-894; Roy Lubove, "The New Deal and National Health," *Current History* 45 (August 1963), 77-86, 117.

11. Carmody, "The Federal Works Agency," 894.

12. Lubove, "The New Deal," 80.

13. R. C. Williams, "The Medical Care Program for Farm Security Administration Borrowers," *Law and Contemporary Problems* 6 (Autumn 1939), 583-594. See also the recently published article by Michael R. Grey, "Poverty, Politics and Health. The Farm Security Administration Medical Care Program, 1935-1945," *Journal of History of Medicine and Allied Sciences* 44 (July 1989), 320-350. Grey traces the roles of the CCMC's Final Report and the Public Health Service's activist stance in the development of FSA medical programs; and of the FSA's influence, in turn, on health care reforms of recent decades, including the multiplication of HMO's. He attributes the decline of FSA health programs largely to physician-resistance, but does not explore *JAMA's* role in stimulating that resistance.

14. Williams, "The Medical Care Program," 583-585; Lubove, "The New Deal," 80. George Rosen "Contract or Lodge Practice and Its Influence on Medical Attitudes Toward Health Insurance," *American Journal of Public Health* 67 (April 1977), 374-378.

15. Oliver Garceau, "Organized Medicine Enforces Its 'Party Line,'" *Public Opinion Quarterly* 4 (September 1940), 412-414.

16. *Ibid.*, 408-428.

17. "What's in a Name?" editorial, *New York State Journal of Medicine* 40 (December 1, 1940), 1695-1696. This unsigned editorial bears unmistakable marks of the Fishbein influence; "bloodhound" was Fishbein's favorite pejorative for the muckrakers of organized medicine.

18. Richard H. Shryock, "Freedom and Interference in Medicine," *Annals of the American Academy of Political and Social Science* 200 (November 1938), 32-59.

19. Quoted in Arthur G. Peterson, *The Legal History of Group Health Association of Washington, D.C.* (Washington, D.C., 1947), 17.

20. In preparing this interpretation of events between 1937 and 1939 I have relied on the following secondary works: James G. Burrow, *AMA: Voice of American Medicine* (Baltimore, 1963); Arthur J. Altmeyer, *The Formative Years of Social Security* (orig., 1966; Madison, 1968); Elton Rayack, *Professional Power and American Medicine: The Economics of the American Medical Association* (Cleveland, 1967); Richard Harris, *A Sacred Trust* (orig., 1966; New York, 1969 Penguin Book); Daniel Hirshfield, *The Lost Reform: The Campaign for Compulsory Health Insurance in the United States from 1932 to 1943* (Cambridge, Mass., 1970); Rosemary Stevens, *American Medicine and the Public Interest* (New Haven, 1971); "The American Medical Association: Power, Purpose, and Politics in Organized Medicine," *Yale Law Journal* 63 (May 1954), 938-1022.

For understanding contemporary viewpoints I have used Daniel L. Borden, M.D., "The Trial of the American Medical Association, District of Columbia Medical Association, Washington Academy of Surgery, Harris County Medical Society and Twenty Defendants: Personal Impressions," *Transactions Southern Surgical Association* 54 (1942), 398-410; Esther Everett Lape, ed., *American Medicine: Expert Testimony Out of Court*, (2 vols., New York, 1937); James Rorty, *American Medicine Mobilizes* (New York, 1939); John A. Kingsbury, *Health in Handcuffs: The National Health Crisis and What Can Be Done* (New York, 1939); Oliver Garceau, *The Political Life of the American Medical Association* (Cambridge, Mass., 1941); *The United States of America, Appellants, vs. The American Medical Association, A Corporation: The Medical Society of the District of Columbia, a Corporation; The Harris County Medical Society, An Association et al., Appellees* (A Reprint of the Official Documents with a Condensation of the Trial) (Chicago, 1941); "Medical Care," *Law and Contemporary Problems* (Duke University School of Law) 6 (Autumn 1939), 495-678; William Hard, "Medicine and Monopoly," *Survey Graphic* 27 (December 1938), 606-609, 631-635. I am greatly indebted to Dr. Peter Olch for calling my attention to two extremely helpful sources from the Oral History Collection of the National Library of Medicine: (1) a transcribed interview by Dr. Olch, June 2, 1968, with Dr. Daniel L. Borden, President of the District of Columbia Medical Society at the time of the trial; and (2) a conversation about the trial, recorded December 29, 1959, between Theodore Wiprud, Executive Director and Secretary of the District of Columbia Medical Society from 1938 to 1962, and Warren Magee, a lawyer for the defense. Peter Hirtle, curator of modern manuscripts at the National Library of Medicine, directed me to recent materials concerning Group Health Association.

21. For a brief article about Lape and her role in the effort to improve health care, see Patricia Spain Ward, "In Recognition of Esther Everett Lape," *Women and Health* 5 (Summer 1980), 1-3. Hugh Cabot's voluminous correspondence with Lape between 1935 and 1938, temporarily in my possession, beautifully illuminates the formation and evolution of the Committee of Physicians, as well as its difficulties with the AMA. All Cabot correspondence cited below is in this collection, unless otherwise specified. Joseph P. Lash, *Eleanor and Franklin: The Story of Their Relationship, Based on Eleanor Roosevelt's Private Papers* (New York, 1971), 260-261, describes the beginnings of Eleanor Roosevelt's friendship with Esther Lape.

22. Fishbein misrepresented physician response to the CCMC report in his December 10, 1932, *JAMA* editorial condemning it, 2034. In *American Medicine*, Lape combined analysis of the nation's health care difficulties with excerpts from replies to her open-ended inquiry to 2200 physicians. These 1500 pages, filled with opinion based on her correspondents' direct experience, showed beyond doubt that, AMA demurrers notwithstanding, Americans were not getting proper health care and American physicians were not satisfied with the status quo.

23. The statement attributed to the President by Dr. Robert Osgood appears at p. 4 of typescript minutes of the meeting which took place at AMA headquarters in Chicago, February 17, 1938, between the Board of Trustees and seven members of the Committee of Physicians. I am grateful to the late Morris Fishbein for furnishing me with a copy of the 54-page transcript of this meeting; it constitutes an invaluable source for understanding the relationship between the Administration, the AMA and the Committee of Physicians, not-

withstanding that several pages are missing and the transcript occasionally interrupted by such notations as "off record" or "Here the reporter was asked not to take the statement."

24. Lash, *Eleanor and Franklin*, 465-467.

25. The editorial, in *JAMA* 109 (October 16, 1937), 1280-1281, was deliberately mistitled "The American Foundation Proposals for Medical Care" to convey the erroneous impression that the Principles and Proposals were the creation of the Foundation, not of a group of leading physicians. Minutes of the meeting between AMA Board of Trustees and Committee of Physicians, 2-3, 7-9, and 13-17. With *JAMA* closed to them, the Committee found their major medical forum in the *New England Journal of Medicine* (*passim*, 1937). Because the popular press was always ready to print their statements, there is an enormous lay literature concerning their activities. *Time*, November 15, 1937, ran an article about federal medical activities, the GHA and the Committee of Physicians; entitled "Cheap Doctoring," it featured pictures of the medical brothers Cabot (Richard Clarke and Hugh) with the caption "The A.M.A. sputtered and scolded lamentable."

26. See, for example, the Baltimore Sunday *Sun* and the *New York Times*, both for November 7, 1937. The Sigerist quotation, from an article he contributed to *The New Masses*, appears in a compilation of his contributions in the popular press, located at The Johns Hopkins Institute of the History of Medicine in Baltimore. On January 30, 1939, Sigerist himself was the subject of a *Time* cover story interweaving information about his teaching and research in the social history of medicine with reports of ongoing efforts to reform health care despite AMA opposition. The Committee of Physicians/CIO analogy appears in the text of a paper James Rorty delivered at the 1938 annual meeting of the American Association for Social Security. Rorty's typescript, in Hugh Cabot's papers, bears the title "Some Economic Opposition to Health Insurance."

27. Edward D. Berkowitz and Wendy Wolff, *Group Health Association: A Portrait of a Health Maintenance Organization* (Philadelphia, 1988), 20-47.

28. Quoted in Shryock, "Freedom and Interference in Medicine," 54-55.

29. Carbon of Hugh Cabot's letter to his brother, Richard Clarke Cabot, urging legal action by GHA staff doctors, dated January 24, 1938. Hugh was mistaken in believing that the courts could be counted on to award damages in such cases. For several instances in which courts had held that expulsion from medical societies, resulting in denial of hospital privileges and loss of income, did not constitute deprivation of property rights, see "The American Medical Association: Power, Purpose, and Politics," 1019, n. 685. The suggestion of suing on charges of conspiracy appears in Hugh's letter to Horace Russell, General Counsel of HOLC, March 21, 1938.

30. Hirschfield, *The Lost Reform*, Appendix B, 178, gives an abstract of National Health Program recommendations as they stood at the time of the National Health Conference in July 1938. Rorty, *American Medicine Mobilizes*, Appendix, 312-319, gives a fuller version, based on the one presented by the Interdepartmental Committee to the President in February.

31. Typescript minutes of the meeting between AMA Board of Trustees and the Committee of Physicians, February 17, 1938, 3. On February 7, in response to Russell Cecil's notice that Cabot had been "elected" to meet with the Trustees, Cabot drafted a battle plan: he wanted to emphasize the Committee of Physicians' desire to improve medicine's "offering of service to the American people" and to insist on freedom of speech for physicians. For a contemporary historian's perception of free expression as the crux of the dispute, see Shryock, "Freedom and Interference in Medicine," 53-57. *JAMA* 110 (March 12, 1938), 141B did belatedly publish the Committee of Physicians' rejoinder.

32. Typescript minutes, February 17, 1938, 15 and 51-52. When Lape asked Cabot in a letter of February 22 what "constitutional" reason there was for Fishbein to attend the Trustees' meeting with the Committee, Cabot replied (February 25) that there was none: "he owns the Board of Trustees and makes no bones about it."

33. Typescript minutes, February 17, 1938, 11, 19, 22, 38, and 54. Cabot gave Lape his impressions of the meeting in letters of February 18 and 25. When one of the Committee of Physicians reported thinking the Trustees were "really very cordial, almost too cordial," Cabot suggested the man needed to see an "ophthalmologist if not a psychiatrist." Although one or two Trustees "oozed lubricants," Cabot sensed a "very fundamental hostility." The typescript minutes support his impression.

34. Rorty, *American Medicine Mobilizes*, 55-56, 83, 213-214. The *New York Times* article, April 7, 1938, bore the by-line of William L. Laurence; the sub-headline read "Means of Harvard Asks Them to Fight 'Politics' of AMA."

35. All passages are quoted from Cabot's text, which appeared in the *New York Times*, May 8, 1938. The copy of this talk in Cabot's papers is titled "Group Practice as a Method for Providing Health Service." The analogy between fascism and the tactics of organized medicine occurred to Cabot at least as early as November 25, 1937, when he wrote about it to Philip King Brown, a California colleague and fellow dissenter from AMA policies.

36. W. C. Kirkpatrick, President of GHA, wrote Cabot on April 26, 1938, asking an advance copy for press distribution. Cabot, who had already filled a request by Waldemar Kaempffert of the *New York Times*, wrote Kirkpatrick that, despite these precautions, "I do not hope to avoid being misquoted for, in a long experience, I have never been able to encompass this." Although the *New York Times* published a comprehensive write-up of the speech on May 6 (21:1), the first headline read: ASSAILS 'FASCISM' IN MEDICAL FIELD.

37. During his thirty-six hours in Washington, Cabot conferred with GHA staff and officials, had lunch with Josephine Roche, chair of the Interdepartmental Committee, and met with President Roosevelt, through arrangements made by Esther Everett Lape (interview with Lape at her home, May 17, 1977). Cabot may have written his letter to Arnold in longhand: I have not found a copy among his papers, although they do contain Arnold's reply, dated June 3, which refers to Cabot's of May 23. For fuller descriptions of Arnold's antitrust leadership, see Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, 1966), 420-439; and the Introduction by Gene M. Gressley, ed., to *Voltaire and the Cowboy: The Letters of Thurman Arnold* (Boulder, Colorado, 1977), especially 46-51. I am grateful to Gene Gressley, Director of the Archive of Contemporary History, University of Wyoming, Laramie, for providing me with a copy of a letter Arnold wrote Cabot on March 12, 1940. Arnold stated that the current "victory [of Justice's Circuit Court appeal] would not have been possible without your cooperation. Every one in the Antitrust Division appreciates what you personally have done." When Cabot died in August 1945, Arnold (along with Eleanor Roosevelt, J. Robert Oppenheimer, Charles Kettering, and Igor Sikorsky) sponsored a memorial fund to share U.S.-British penicillin technology with Russia; see Patricia Spain Ward, "Antibiotics and International Relations at the Close of World War II," in John Parascandola, ed., *The History of Antibiotics: A Symposium* (Madison, 1980), 103.

38. W. C. Kirkpatrick, President of GHA, to Cabot, May 26, 1938; Cabot to Alvarez, June 8, 1938 (carbon marked as being sent also to Walter Boothby and Edward L. Young, Jr.). The District Medical Society was notoriously conservative in every respect; because of this mindset, Washington area medical schools were slow to get clinical full-time (Dan Weiss to the author, May 1979). As late as 1944 the Society continued to refuse membership to blacks, thus denying AMA membership to several hundred District doctors. For a contemporary comparison between the Society's tactics against black doctors and those it used against GHA staff, see M. O. Bousfield, "An Account of Physicians of Color in the United States," *Bulletin of the History of Medicine* 17 (January 1945), 69.

39. The initial press release from Justice was reported in the *Washington Evening Star* of June 1, 1938. See also "The Story of the Indictment," *JAMA*, January 7, 1939, p. 53, reprinted at p. 30 of the AMA compilation cited at note 20, above. Full accounts of press coverage throughout the case appear in Peterson, *The Legal History of Group Health Association*; and Michael Marks Davis, "The A.M.A. Case," *Survey Graphic* 32 (April 1943), 117-119, 143-144. On the use of publicity as coercion by New Deal administrators, see Stanley Kelley, Jr., *Professional Public Relations and Political Power* (Baltimore, 1966), 14-15.

40. "The Story of the Indictment."

41. *Proceedings of the National Health Conference* (Washington, 1938).

42. Altmeyer, *The Formative Years of Social Security*, 95-96, placed the first negotiation immediately after the National Health Conference; Hirshfield, *The Lost Reform*, 124-127, 137, dates this session somewhat later, apparently on the basis of an interview with Altmeyer in 1965.

43. Among the works cited in note 20 above, see Altmeyer, *The Formative Years of Social Security*, 96; Hirshfield, *The Lost Reform*, 124-125; Burrow, *AMA*, 246-247; and Rayack, *Professional Power and American Medicine*, 177. Although the disputed recommendation did not call for any form of compulsion, the AMA subsequently behaved as though it did, using with great success all the arguments Ronald L. Numbers describes for an earlier period in his *Almost Persuaded: American Physicians and Compulsory Health Insurance, 1912-1920* (Baltimore, 1978).

44. This passage and those in the following paragraphs are taken from Arnold's text, which was published in many places including *JAMA* 111 (August 6, 1938), 537-539. The lead editorial in this same issue of *JAMA* ("The Department of Justice Intervenes in Medical Care," 534), stated the view that Arnold was offering the AMA an "opportunity to avoid trial by agreeing to consent decrees which will assure the cooperation of the Association in the operation of cooperative clinics." For Arnold's view of the public use of the consent decree, see Gressley, ed., *Voltaire and the Cowboy*, 280.

45. Hirshfield, *The Lost Reform*, 124-25.

46. Cabot, who had spent August cruising out of reach of mail, refers to his summons to testify in various letters he wrote in early September, among them several to Elizabeth

Cole Amory, whom he later married. I am greatly indebted to her for permission to use this correspondence at her home in Wellesley, Massachusetts. For Arnold's account of AMA intimidation of witnesses and of government officials, see Gressley, ed., *Voltaire and the Cowboy*, 382-383.

47. Cabot to Elizabeth Cole Amory, undated segment with contents indicating that it was written between September 11 and 15. As late as September 12, in a letter to Raymond B. Allen (carbon), Cabot expressed doubt that the AMA would use the forthcoming Special Session to "announce that they have gone on to an undiluted diet of crow and propose to behave like men." He was afraid the delegates might not have "enough gray matter to see the point" and would again "tell the American people that they are of the Lord Anointed, that they are a special group set aside for holy consideration, and that the Government can go to hell."

48. *JAMA* 111 (September 24, 1938), 1196-1197, reprinted Booth's statement about the investigation as well as his revelation that the AMA had been re-classified for Social Security tax purposes as a "business league" and would henceforth have to pay "considerable tax covering all its employees" unless Association lawyers could get it re-classified as a scientific and educational organization. According to *Morris Fishbein, M.D.: An Autobiography* (Garden City, New York, 1969), 215, it was at this same time that Bureau of Internal Revenue agents "arrived to make special studies" of his own income tax returns and those of other AMA officials. On Franklin Delano Roosevelt's use of the IRS against political enemies, see David Burnham, *A Law Unto Itself: Power, Politics, and the IRS* (New York, 1989), 228-236; the secret examination of tax information for the White House did not become illegal until 1976, after Watergate.

49. Significantly, the AMA considered both of these speeches important enough to include them in "The Story of the Indictment," p. xxxii in the compilation cited at note 20 above.

50. Peterson, *The Legal History of Group Health Association*, 6-8. According to Gressley, ed., *Voltaire and the Cowboy*, 50, President Roosevelt was "highly amused" at Arnold's indictment of the AMA. Arnold, who found the Mencken letter to Fishbein in the course of grand jury proceedings, described it in a letter to Professor Carl Bode, July 9, 1963; see Gressley, ed., *Voltaire and The Cowboy*, 452-454.

51. The description of the grand jury appeared in the *New York Times*, October 18, 1938. The AMA compilation, "The Story of the Indictment," reprinted examples of Cabot's conversation with reporters outside the jury room (xx-xxi). The quality of Cabot's testimony is suggested by the verbatim transcript of the case when it reached the U.S. District Court for the District of Columbia in February 1941. See *JAMA* 116 (February 22, 1941), 714-727 for Henry Lewin's direct examination of Cabot on behalf of the government. Rorty, *American Medicine Mobilizes*, 36, uses the word "schismatic" in connection with Cabot's contribution at the National Health Conference. Nathan Sinai suggested the Reformation analogy in a letter to the writer, March 12, 1977.

52. Fishbein was one of six speakers at a panel entitled "Shall We Break with Tradition in Health Care?" published as *Report of the Eighth Annual New York Herald Tribune Forum on Current Problems: "America Facing Tomorrow's World"* (1938). See 66-70 for Fishbein's insidious suggestion that "Perhaps it is significant that the great democracies of the world have been the last to succumb to the lure of socialized medicine and that those nations which drifted into Fascism were among the first to adopt such systems of medical care." Fishbein was the only opponent of change on this panel, which included Josephine Roche ("Report on the National Health Conference," 56-58); W. C. Kirkpatrick ("The Washington Experiment," 59-62); David H. McAlpin Pyle ("The Associated Hospital Service of New York," 63-64); Esther Everett Lape ("Report on Research Among 5000 Doctors," 71-74); and Richard C. Cabot ("Co-Operative Group Medicine," 75-78).

53. Hirshfield, *The Lost Reform*, 126-127, interprets the resumption of negotiations at this time wholly in terms of AMA fears that the National Health Program would be adopted in unabridged form.

54. The AMA included this statement in its "Story of the Indictment," xxxiii.

55. According to Rorty, *American Medicine Mobilizes*, 69-70, the Medical Society had set a maximum benefit for Mutual Health Service members at \$450 per family per year. Membership was limited to the low-income group, excluding middle- and upper-class persons from this alternative to fee-for-service health care. According to William Hard, "Medicine and Monopoly," 634-635, this plan had been incubating for two years, but was not pressed toward realization until late 1938. Although it had not yet begun operating when Hard wrote his article, he found the prospect of its implementation "not far from constituting a local medical revolution. For importance it completely eclipses the outcome of Mr. Arnold's grand jury proceedings, whatever that outcome may be." Hard compares composition and provisions of the two plans.

56. "Judge Proctor Overrules Motion to Quash Second Subpoena," *JAMA*, December 10, 1938, 2217, reprinted at p. xxi. For Arnold's use of the request subpoena as a psychological device, see Gressley, ed., *Voltaire and the Cowboy*, 283. For brief accounts of the Illinois Social Hygiene League and the Public Health Institute, see Thomas Neville Bonner, *Medicine in Chicago, 1850-1950: A Chapter in the Social and Scientific Development of a City* (Madison, Wisconsin, 1957), 212-214. For a more detailed study, showing how organized medicine used expulsion to enforce its opposition to "contract" or "corporate" practice, see Conrad Seipp, "Organized Medicine and the Public Health Institute of Chicago," *Bulletin of the History of Medicine* 62 (Fall 1988), 429-449. On the United Medical Service and the Civic Medical Center, see James Rorty, "Attack on Group Medicine," *Nation* 143 (July 4, 1936), 15-17. See Rorty's "Medical Misalliance," *Nation* 146 (June 11, 1938), 668, for information about the Milwaukee Medical Center. On the Ross-Loos Clinic, see Mary Ross, "The Case of the Ross-Loos Clinic" *Survey-Graphic* 24 (June 1935), 300-304. Michael A. Shadid described his struggle with organized medicine over the Elk City, Oklahoma, project in his *A Doctor for the People: The Autobiography of the Founder of America's First Cooperative Hospital* (New York, 1939).

57. "Judge Proctor Overrules Motion to Quash." The quotation marks enclose *JAMA's* resumé of the revised subpoena; the wording seems intended to show what horrendous demands the Association was forced to meet.

58. See American Medical Association v. United States, 317 *U.S. Reports* 519 (1943). The treasury of self-incriminating documents the defendants were compelled to yield can be found in the testimony presented in the U.S. District Court for the District of Columbia in 1941 [27 *F. Supp.* 752 (D.C.D.C.1939)], published in *JAMA* beginning at 116 (February 15, 1941), 602-630 and continuing through subsequent issues. The AMA reprinted all of it in its compilation, 1-528.

59. Borden interview and Magee-Wiprud tape, 21. For evidence that the AMA did not feel it had "won" in 1941 but still hoped to do so, see the AMA compilation of trial documents, 531-532. Fishbein repeated this observation in his *Autobiography* (note 48), 215.

60. John C. Burnham, "American Medicine's Golden Age: What Happened to It?" *Science* 215 (March 19, 1982), 1474-1479. In a more recent work, *How Superstition Won and Science Lost: Popularizing Science and Health in the United States* (New Brunswick and London, 1987), 249, Burnham discusses the unfortunate effects of the AMA's withdrawal, after the thirties, from popular health education in favor of concentration on the socioeconomic aspects of health care. An early example of AMA preoccupation with medical politics at the expense of medical information for its practitioner-readers is *JAMA's* (Morris Fishbein's) rejection of a comparative study of cancer therapies based on massive Mayo Clinic records and presented at the AMA section on Urology in 1938 (Hugh Cabot, "Neoplasms of the Testis: A Study of the Results of Orchidectomy With and Without Irradiation"); the unsigned rejection later to Cabot from "Editor Journal American Medical Association" is dated July 26, 1938, just as AMA officials were attempting to negotiate away the administration's proposed General Program of Medical Care and Arnold was accelerating Justice Department pressure on the AMA.

61. The Fitzgerald Report, reprinted from *Congressional Record Appendix*, August 3, 1953. For an exploration of the effects of growing public scepticism about the medical profession during a mid-century cancer controversy, see Patricia Spain Ward, "'Who Will Bell the Cat?' Andrew C. Ivy and Krebszen," *Bulletin of the History of Medicine* 58 (Spring 1984), 28-52. For a brief review of recent antitrust actions against organized medicine, growing out of its attempts to eliminate the practice of chiropractic, see Walter I. Wardell, "Chiropractors: Evolution to Acceptance," in Norman Gevitz, ed., *Other Healers: Unorthodox Medicine in America* (Baltimore, 1988), 178-182.

62. Berkowitz and Wolff, *Group Health Association*, 46, 54. Borden interview, 15, and Magee-Wiprud tape.

63. Arnold is quoted in Hard "Medicine and Monopoly," 632; Wendell Berge, "Justice and the Future of Medicine," *Public Health Reports* 60 (January 5, 1945), 1-16. That Berge was invited to deliver this address at the annual meeting of the American Urological Association (June 21, 1944, in St. Louis) bespeaks Hugh Cabot's continuing influence in the Association (of which he was President in 1911), despite his ostracism by organized medicine.

64. Davis, "The A.M.A. Case," 143; see Berkowitz and Wolff, *The Group Health Association*, 178, for a table of participants in GHA from 1937 to 1985. Similar litigation occurred in connection with the Group Health Cooperative of Puget Sound in 1949; with a new group in San Diego in 1954; and with the Health Insurance Plan (HIP) of Greater New York, also in the fifties. Elton Rayack, *Professional Power and American Medicine* (note 20), 182-191, and Rosemary Stevens, *American Medicine and the Public Interest*, 307. Rayack considers the AMA's court defeat "a crucial victory for the 'independent' insurance

plans." Gressley, ed., *Voltaire and the Cowboy*, 462. Writing in 1988, Seipp, "Public Health Institute of Chicago," observes that we do not yet have an adequate history of the harassment which local medical societies inflicted on early cooperative health plans.

65. Arnold's correspondence indicates that he never expected the AMA to go along with the Wagner Bill and that he was trying, as he said publicly, to free the distribution of health care: see Gressley, *Voltaire and the Cowboy*, 382-383. However, Berkowitz and Wolff, *Group Health Association*, 51-53, confirms that the activities of the Department of Justice were deliberately timed to harass the AMA and, further, that GHA officials "communicated constantly" with the White House and with Josephine Roche, chair of the Interdepartmental Committee. On the other hand, the President's physician, Ross McIntire, reportedly kept the AMA informed of White House developments concerning the national health program.

66. Paul DeKruif, *Life Among the Doctors* (New York, 1949), 13-14, describes a conversation with the President in December 1939 which indicated to DeKruif (1) that Roosevelt was "back of the Government's prosecution (really shadow-boxing) of the American Medical Association in that minor fracas" and (2) that Roosevelt believed AMA opposition "made plans for Government medicine hopeless."

67. J. Joseph Huthmacher, *Senator Robert F. Wagner and the Rise of Urban Liberalism* (New York, 1968), 264-267. This first Wagner health bill died in committee. It was followed by a succession of similarly ill-fated measures.

68. The effect of the case in strengthening organized medicine's lines of resistance is discussed in Harris, *A Sacred Trust*, and Kingsbury, *Health in Handcuffs*, 25-26 and 179-182, respectively, and in Davis, "The A.M.A. Case," 119. Davis buttresses this point with examples from the medical press. According to the *Kentucky Medical Journal*, "This decision should intensify tenfold the opposition of the profession to any form of regimentation of medical service"—including medical care controlled by "government corporation or by mutual societies." James Howard Means, *Doctors, People, and Government* (Boston, 1953), 173-174, commented on this "persecution complex" among AMA officials and its role in organized medicine's resistance to change in methods of organizing health care.

69. Garceau, "Organized Medicine Enforces its 'Party Line,'" 413.

70. Quoted in Davis, "The A.M.A. Case," 117. This article is devoted almost entirely to press commentary throughout the long course of litigation. Peterson, *The Legal History of Group Health Association*, also contains many examples of press commentary, both popular and medical. Borden interview and Magee-Wiprud tape; writing in 1941 Dr. Borden, "The Trial of the American Medical Association," 410, saw the case as a signal that "there will be a determined and continued effort to exert some kind of controlling influence over the policy and destiny of our profession. If the verdict at this trial is sustained through the higher courts, the Government is equipped with a weapon of intimidation that cannot be denied."

71. The phrasing is from Rosemary Stevens, *American Medicine and the Public Interest*, 188.