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The Doctors' Right to Strike

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I CONSIDER IT A MELANCHOLY COMMENTARY on our times that your Society should find our topic for tonight of interest. My reaction is not meant to reflect any general condemnation of strikes in industrial struggles but arises from quite different considerations: First, a community should feel uneasy about its institutions when physicians even flirt with the idea of combining to suppress or to suspend their historic devotion to healing in order to achieve economic or political ends. Secondly, lawyers as well as doctors, and especially those on university faculties, should also feel uneasy about the prospect that our two professions may lack the skill to devise accommodations that would avoid war on the sick as an instrument of medical policy. I take it that episodes in Saskatchewan and elsewhere have given substance to such possibilities and have produced our agenda for tonight.

Since your invitation has made me melancholy, I may be justified in repaying you in kind with a tedious and dull talk. As I will soon demonstrate, I am well equipped for that purpose.

The regulation of the right to strike always reflects an attempt to balance the right of a group to pursue its own interest or its own view of the good life and the welfare of the general community. Where, as in the case of employees in a manufacturing plant, the strike problem has been a recurring one, the law's guidelines are relatively clear. In the case of doctors, the community fortunately has had practically no experience with so-called strikes. As a consequence, we do not have a body of law pinpointed to the problems resulting from organized pressure by doctors to achieve their ends. This is not to say that legal restraints would not be developed. On the contrary, as medical associations have learned, and as we will see in a moment, the law has enormous flexibility and especially so when a group supplying vital services disregards its own symbolic code.

Before turning to the law, it may be useful to say a word about doctors and about strikes.

It would be presumptuous for me to tell you about the social role or the historic traditions of doctors, even though such an effort might

involve a turnabout interesting to the psychiatrists among you. But I do want to fit doctors into the categories through which the law does, or at least rationalizes, its work. Some doctors are employees of industry, universities, the government, or nonprofit organizations. Since life has been defined as an underpaid occupation, such employee-doctors might be tempted to strike for more. If they were federal government employees, they would be violating a statute and would be subject to immediate discharge and other noncriminal sanctions. If they were state employees, they would frequently be violating similar statutes or judge-made rules. The law is more uncertain as to doctors and other personnel who are employees of nongovernmental entities, but some cases suggest that strikes by employees of not-for-profit hospitals are unlawful and enjoinable.[1] Although such strikes have not, of course, involved doctors, the restraints that they have imposed on hospital attendants, etc., would apply with even greater force to doctors who were employees of not-for-profit institutions, and, perhaps, of other institutions.

Object of Concern Is the Private Practitioner

I take it, however, that you are concerned not with strikes by employee-doctors but with strikes by doctors in private practice. The law divides such practitioners into two parts. First, the law recognizes that they are, of course, members of a noble and learned profession, generally devoted to the high ideals and the overriding commitment to the art and science of healing expressed in the memorable Hippocratic oath. Incidentally, it is of no particular importance if you no longer formally take that oath; the community will nevertheless hold you to its ideals because your functional responsibility and the power of self-regulation granted by the state presupposes those ideals. To the law, the practitioner is not only a member of a learned profession; he is also a business man or an independent contractor. As such, the doctor has to set prices, buy equipment, frequently meet a payroll, and do many other tedious things necessary to keep his enterprise afloat and to feed himself and his family.

Independent Contractors

Since practitioners are independent contractors and not employees, the social attitudes and the statutes which in general affirm and protect the right of employees to strike are not applicable, let alone controlling.[2] Indeed, since medical practitioners are not employees, purists might suggest that "strike" is applied to them is a misnomer, that the correct term is "boycott"—a term that usually suggests malignant rather than benign pressure. In any event, the doctor's role as a businessman makes him vulnerable to the law when he has been unduly—a lawyer's weasel-word—distracted from his primary commitment to the art of healing and when he combines with his colleagues to achieve business or political ends.

Definition of Strike Clarified

Having told you about yourselves, I want to add a word about the term "strike." A strike is usually considered a concerted and temporary withdrawal by employees of their services for the purpose of forcing or

[1] See generally, *Mount Sinai Hospital, Inc. v. Davis,* 188 N. Y. S. 2d 338 (Sup. Ct. N. Y. Co., Part I, 1959) 37 LC ¶ 65,493; *contra, Mount Sinai Hospital, Inc., v. Davis,* 190 N. Y. S. 2d 870 (Sup. Ct. N. Y. Co., Part I, 1959) 37 LC ¶ 65,695; see also *W. Pa. Hospital v. Lichliter,* 340 Pa. 382 (1941), 3 LC ¶ 60,292.

[2] See cases cited at footnote 1.

achieving an economic concession from an employer. If several employees carry out individual decisions tc quit an employer forever because he is a skin-flint or a John Bircher or a Communist, they are not striking, for two reasons. First, such employees have not combined; secondly, they don't expect to come back. An individual employee's right to quit is an important aspect of freedom—and that right, in time of peace at least, is in general included within the constitutional protection against involuntary servitude.

A medical practitioner may, if he wishes, also quit his profession to become a piccolo player or a lotus eater. But when he combines with others to withdraw medical services in order to achieve a political or an economic end, the fact of combination makes an important difference. The reason is plain: If a significant number of businesses agree to withhold their goods or services, there is an obvious threat to the interests of consumers, that is, all of us. Thus, if Ford and General Motors should agree to stop selling cars to the government until it raises the prices it will pay for cars, or until it stops regimenting businessmen, the auto companies would violate the law. And if doctors combine for similar purposes, that, is, if they combine as businessmen do, they are likely, as I suggested, to be treated like businessmen.

Legal Weapons

The law has several weapons for this purpose. On the national level there is, of course, the Sherman Anti-Trust Act, a criminal statute. The Supreme Court, as some of you know, held that the American Medical Association had violated that statute when it sought to prevent group medicine on a prepayment basis in the District of Columbia by threatening to expel participating doctors from medical societies and by depriving them of contacts with other doctors and of hospital facilities.[3] It is true that the *A. M. A.* case arose in the District of Columbia and that, as a result, the government was not required to prove an effect on interstate commerce. It is also true that the Court refused to rule whether the practice of medicine is a "trade" under the Sherman Act, and that the Court in another case has recognized that ethical considerations in the relationship between doctor and patient differentiate that relationship from ordinary commercial ones.[4] But the Court's approach underscores the risk that doctors who look to the market place for models of economic or political warfare will get short shrift when they invoke their ethical traditions as a basis for a special exemption from the law governing the market place.

There are similar antitrust laws on the state level—laws which dispense with any necessity to prove an effect on interstate commerce. And there is in addition a historic policy against restraint of trade, whose roots go back to the English law of pre-colonial times. A few years ago a California court invoked that policy in ruling that the practice of medicine was a trade for some regulatory purposes.[5]

Although the law has a broad range of weapons, I do not mean to suggest that one of them would necessarily be applied to anything that might be called a doctors' strike. Indeed, our topic is so vague that I am somewhat uncomfortable about discussing it, except in equally vague terms. My

[3] *American Medical Association v. United States*, 317 U. S. 519 (1943), 6 LC ¶ 51,153.
[4] *United States v. Oregon State Medical Society*, 343 U. S. 326, 336 (1952).
[5] *Tatkin v. Superior Court*, 160 Cal. A. 2d 745, 326 P. 2d 201 (1958).

discomfort would probably be reduced by particulars about the length of a so-called strike, the number of doctors involved, the impact on the supply of medical services, the purposes behind it.

I will not, however, try to state the particulars of a hypothetical case. I hope, moreover, that the law will not be confronted with concrete cases. You and your colleagues may someday be faced with the responsibility for bringing about or avoiding such a confrontation. May I suggest some factors relevant to the discharge of that responsibility?

Each of you, individually, has considerable influence as influence is measured in our society. As a group, you have a powerful and effective voice. Nevertheless, you may fail to prevent legislation that most of you may, in good conscience, consider bad for medicine. As to any particular social arrangement, you may be right. But if you are asked to withdraw your services in protest, there are three points that deserve attention. First, the early opposition and the subsequent about-face by organized medicine with respect to voluntary medical insurance and group practice should produce doubts that you have special competence to pass ultimate judgment on social arrangements that are dominantly fiscal in character, even though they may have a special impact on medical practice. Secondly, the purest motives and objectives are unlikely to prevent legal condemnation of a combination to withdraw medical services from the community.

Most Important Aspect to Be Considered

The final consideration, which is the most important one, is that compliance by minorities with constitutional legislation distasteful to them is the price that must be paid for an orderly democratic society. Accordingly, a concerted medical boycott in protest against enacted legislation or impending legislation would raise questions not wholly unlike those raised by Governor Barnett's defiance of the law in Mississippi. Medical care ranks along with law and order as a central value of our society. The impact of conduct on such values is always a critical factor in the law's response to new situations. And the high place of medical service in our scheme of values increases the vulnerability of a concerted medical boycott to legal sanctions. Perhaps that justifiable, if obvious, appeal to your vanity will make the big stick of the law seem more palatable to you.

[The End]

CANCER DEATH RATE RISES

The nation's second worst killer, cancer, resulted in life insurance payments of more than $700,000,000 last year to families of American policyholders who died from the disease, the Institute of Life Insurance reports. The death rate has risen steadily for many years and another record was set in 1962. Cancer now causes almost two out of every ten deaths among ordinary life insurance policyholders. The cancer death rate has risen about six times faster than the toll from heart disease during the past two decades, although heart disease is still the number one killer in the nation.

A factor in the rising death rate has been the medical advances against other diseases that enable many people to live to older ages, at which they become more susceptible to cancer.