

Correspondence

Medical Licensing: Reply to Annas, *et al.*

Dear Editors:

Annas's editorial, MLN 8(5):20 (October 1980), and letters by Fish and Hershey, MLN 8(6):2 (December 1980), disagree with our proposal to abolish medical licensing. *The Case Against Medical Licensing*, MLN 8(5): 13 (October 1980). They fail, however, to refute our arguments and present no coherent defense of licensing.

Our critics concede many of our major points. Annas implicitly concedes that medical licensing is a violation of individual rights (but argues that rights are not absolute). Fish concedes that licensing restricts individual freedom (but argues that freedom must be subordinated to majority vote). Hershey cites his own articles criticizing licensing (but argues that its abolition "at this time" is impractical).

Neither Annas nor Fish seem to understand the concept of individual rights. Annas assumes that individual rights can be balanced against "group rights." In reality, as we stated in the article, "the group" (or the society or the majority) is merely a number of individuals, not a collectivist super-organism. Thus, there is no such thing as "group rights." To claim that individual rights can be overridden by the group is to claim that some individuals have a right to violate the rights of others. But all men possess rights, by their very nature. No one man has the right to violate the rights of another, and nothing is changed when he finds ten, or ten million, others who would join him in that violation. Morality is not a matter of numbers.

Like Annas, Fish seems to accept the collectivist premise that the group is some sort of higher entity to which mere individuals must be sacrificed. The totalitarian implications of that principle should not be taken lightly. "The power base," he writes, "must be an educated electorate choosing for itself the standards by which it wishes to create a better life." Well, the German electorate in the 1930's was educated, and the "better life" it chose was Nazism. The majority has no right to use the power of the state to enforce its version of "the better life" on anyone.

Fish seems to equate individual freedom with anarchy. But this is not a valid concept of freedom. There is no "freedom" to injure, rob, or enslave others. Laws prohibiting the violation of individual rights do not represent a restriction on freedom, properly de-

finied. But freedom is infringed by laws, such as licensing, which prohibit voluntary interactions based upon mutual consent. As we wrote, "the issue is whether a man has the right to act on his own judgment . . . if his action violates no one else's rights and he knowingly assumes the risks involved."

Annas attempts to justify licensing by what could be called "the argument from emergency." He argues that when people are sick, they may be unable to make rational estimates of a doctor's qualifications and that they lack sufficient time to shop around. This argument is a red herring: it is irrelevant to 99 percent of the cases in which medical treatment is sought. Rational judgments are made routinely by patients suffering from all sorts of ailments, from the common cold to cancer. It is true that during certain acute emergencies (*e.g.*, heart attack) there is no time to shop around. But a suitable doctor or hospital should be chosen *before* an emergency strikes. Can Annas maintain that licensing is needed to keep hospitals from staffing their emergency rooms with incompetents and quacks?

Fish proclaims his "faith" in the government's ability to set rational licensing standards, but he does not say how this could be done. He even admits that (after a century of licensing) the government "has failed to do so." He disregards entirely our argument that setting rational standards is impossible: the stricter the standards, the lower will be the supply of doctors; there is no rational or just way to make this trade-off.

Hershey's claim — without licensing, "opportunists" would exploit the poor and the elderly — ignores our careful discussion of patient protection mechanisms in a free market.

Finally, we take sharp exception to Annas's attack on one of the authors we quoted: novelist-philosopher Ayn Rand. This attack was both uncalled for and grossly distorted. Ayn Rand is an advocate of individual rights and, therefore, of *laissez-faire* capitalism. She is not a "conservative," but rather, in her own words, a "radical for capitalism."

The editorial's suggestion that Ayn Rand's fictional heroes represent the sort of people who are a burden on society is preposterous and insulting. Ayn Rand's novels celebrate the productive achievements of those creative geniuses who move society forward. It is the Howard Roarks and Dagny Taggarts who have carried the rest of man-

kind on their shoulders throughout history. This, in fact, is a key theme in Ayn Rand's major novels, *THE FOUNTAINHEAD* and *ATLAS SHRUGGED*. We recommend that your subscribers read these books and see for themselves who depends on whom, and why freedom is indispensable to man's survival and well-being.

Harry Binswanger, Ph.D.
Edwin A. Locke, Ph.D.
Arthur S. Mode, M.D.

Attorney Fish responds:

Do Drs. Binswanger, Locke, and Mode disagree with Professors Fish, Annas, and Hershey in principle or in the definition of the word "rights?" Those of us who have studied, practiced, and taught law, government, and the democratic process see the inevitability of conflicting interests. We consider them to be comparative rights. If they are such, then the resolution of the conflict in favor of one interest to the exclusion of another is merely a balancing of unequally weighted social values. If the philosophers say that the loser in the conflict has no "right," the result is the same, only the terminology is different.

We believe that rights do not exist in a vacuum; they have meaning only vis-à-vis others. If there are "others," we recognize their rights as well. In the arena of a social value contest, some will lose and some will prevail, but someone must make that choice and enforce that decision. This is the role of the law. The philosophers appear to be hostile to criticism and they block out the rationale of respectful disagreement. The second paragraph of my earlier letter refers to isolation and quarantine of a patient with a communicable disease. As lawyers, we consider the patient's right to ambulate as being temporarily, justifiably, and reasonably restricted, because the rights of the healthy are generally accepted by society as being of greater social value. Perhaps the authors make peace with the turmoil of democracy by merely saying that the patient in that setting does not have the "right" to move about freely. If so, then we agree in concept, although not in terminology.

The authors postulate the absence of a freedom to injure. But there is a

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