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# Viewpoint

**Charles Fried**

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## Fast and Loose in the Welfare State

**F**RIEDRICH HAYEK's apocalyptic forecast in *The Road to Serfdom* had always seemed a bit exaggerated. Yet certain ominous voices in the populist/egalitarian chorus now openly proclaim a readiness to jettison a crucial aspect of personal liberty—liberty of choice in type and place of occupation—in order to prevent the disintegration of their favorite schemes. Arguments are now being discovered to justify requiring, in peace time, that free men and women convicted of no crime spend years of their lives at jobs and in places they do not choose, under the pain of financial penalties or of an outright bar on practicing the profession for which they have trained. Some of these partisans, going totally overboard, have proposed that *every* young person serve a period of years doing good works at the pleasure of the government or of some delegated nonprofit agency of good works.

The entering edge of the wedge is represented by proposals to cure the perceived maldistribution of physicians, although there already are incentive programs designed to deal with this maldistribution. The National Health Manpower and Training Act of 1976 allows forgiveness of student loans and assistance in setting up practice for those settling in underserved areas. Apparently because of the extravagant financial and other rewards available in attractive urban and suburban settings, this system of incentives has proven ineffective. So schemes have been proposed whereby all but the wealthiest medical students would be forced to accept assignment for a period of years in rural or central-city practices designated by some governmental authority. *Medi-*

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cal schools receive large quantities of federal monies to support the training of physicians; and since tuition payments (the loans to pay for these are the lever of the insufficient incentives in the 1976 act) cover only a fraction of the cost of educating a medical student, the proposal is that medical students be required to pay back a major share of this subsidy, unless they agree to practice for a time in areas of governmentally designated need.

While there may be a maldistribution of doctors in our society, it is much more questionable that there is a maldistribution of lawyers. It is true that poor people have difficulties litigating their claims. But then so do middle class people. Nevertheless, there is a vocal coterie of "public interest" lawyers, judges, and law professors who believe that what the poor need, above all, is not more money but more legal services. Alan Morrison, who heads the Litigation Group for Ralph Nader's Public Citizen organization, has proposed that it be a condition of admission to the bar (that is, of being free to practice the profession for which they have been trained) that law school graduates be required to spend a one-year public service internship handling cases for those who cannot command the time and attention of lawyers on the usual basis. Morrison adds that such a system might serve the additional function of improving the general professional competence of law graduates. But he is candid enough to admit that, "first and most important," the program would make lawyers available to clients and in situations where lawyers apparently do not otherwise wish to serve in large numbers. Second, he notes that "because the internship would be mandatory, salaries could be maintained at a

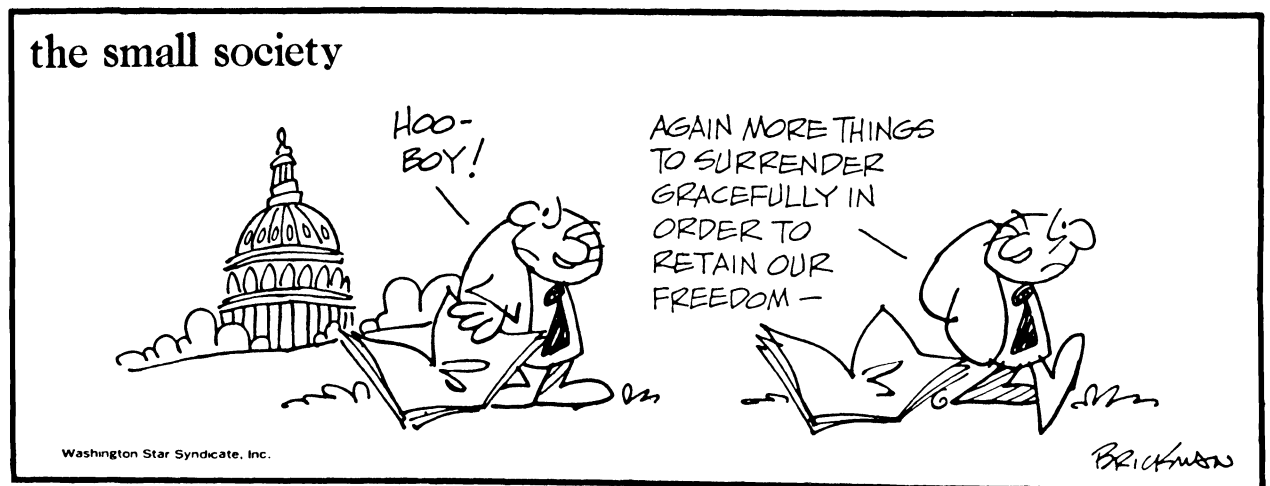
relatively low level. . . .” In other words, though there may be educational benefits, the motivating force behind the proposal is its ability to compel cheap labor in the service of what Ralph Nader’s organization believes to be the public good.

Judge Marvin Frankel (who recently resigned his federal judgeship in the Southern District of New York to enter private practice) has found some of the same needs Morrison found and has proposed an even more radical solution. Frankel recognizes that large corporations and wealthy individuals can command the time, energy, and ingenuity of lawyers in a way that smaller businesses or ordinary persons cannot. Therefore he would simply socialize the whole legal profession. Under his proposal, prospective clients would obtain lawyers from a government agency, which would ration them out according to the urgency and merits of the client’s case and reimburse them under a uniform salary schedule. Frankel is not clear whether law practice outside of this government monopoly should be forbidden, but at the least he claims there should be powerful deterrents to such legal free-booting—for instance, denial of the tax deductibility of legal fees paid to bootleg lawyers. (This last is but a detail in a scheme clearly intended to make government employment, distribution, and allocation of all lawyers the norm.)

And, finally, a wide array of public personages—senators, media pundits such as Eric Sevareid, and professional moralizers—have thought it would be a very good thing to go far beyond compelling professionals with scarce talents to serve somebody’s conception of the public good. They propose that we revive the

draft, generalizing it so that one’s “obligation to the community” could be discharged by a period of public service. A number of Pentagon and congressional armed services personalities have been quick to jump on this bandwagon, recognizing that even the fevered imagination of reformers would be unlikely to provide a year’s useful—or even supposedly useful—employment for *every* man and woman reaching the age of eighteen. Consequently, a fair number of these young persons would in fact enter the military, thus reducing the budgetary pressure of the present voluntary army. In this way, older citizens would get the defense establishment they desire at somebody else’s expense; reformers and activists would have a huge pool of unwilling manpower at their command; and ideologues could proclaim the principle that every citizen owes not only his fair share of tax revenues but a fair measure of his person, life, and liberty—to be given in community service as defined in congressional legislation, implemented in agency regulations, and administered by the vast horde of not-for-profit public interest organizations that would surely jump on this bandwagon.

The principal point is this: in a free society a person may go where he wishes and, so long as he harms no one (a fortiori where he serves in a useful way as do doctors and lawyers), may do as he pleases with whom he pleases. It is the very essence of a tyranny for a government to assert a general power over its citizenry, directing where they shall live, what work they shall do, with whom they shall associate. If liberalism stands for nothing else it affirms that each person owns himself—whatever other property may be accorded to him—



and that no one's *person* (at least) belongs to another, not even to every other, that is, not even to the community as a whole. These are axioms so basic, so deeply ingrained in Western society, that it is almost embarrassing to have to repeat them. Yet the quality of public debate today makes it plain that many American politicians and many more intellectuals have cut quite loose from these fundamental moorings. How has this come about?

I start with academic lawyers, because I know them best and because for generations they have rationalized what their former students have practiced in the political arena. Academic lawyers are trained to pose embarrassing questions designed to show that no principle is so fundamental, no case so clear, that a seemingly slight variation in the facts will not put it into doubt. Do I say that a free man in a free society may go where he pleases and engage in what harmless pursuit he wills? The academic lawyers respond: But what if he has not the fare in his pocket or the wherewithal to facilitate his favorite pastime? He is not free, then, is he? And do we not pay him, put money in his pocket, make him free for *social* purposes, for the good of the community? So why can we not restrict and direct his choices directly in the name of that same good?

That is how the argument goes. It starts by eliding the distinction between coercion and lack of opportunity and ends by justifying whatever coercion government proposes. So it is no surprise that someone who sees no differences between ordering another where to go and simply failing to make it possible for that person to go wherever he pleases will not long hesitate to propose solutions for social problems that involve directing people how and where to live their lives.

Now it is said that doctors and lawyers are a scarce resource—and have we not learned in the regulation of utilities and businesses affected with a public interest that scarcity is a predicate for regulation? Here again one is left almost speechless by the moral obtuseness that treats people as public utilities and cannot see the threat to liberty implicit in equating men and women with trolley lines or electric companies. To be sure there are arguments about the wisdom or morality of much regulation of business and property, but a sensible person knows when an argument or a doubt is being

pushed too far. And it is just my point that those intellectuals who follow their own arguments to the point of contemplating the socialization of *people* have quite simply taken leave of their common sense.

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Surely, it is argued, the case of the doctor is special. Not only are doctors a scarce resource, but in their case (unlike that of lawyers) a lot of public money has been spent for training, and so they owe a portion of time to that same public. Once again, rather than play the game of distinction and analogy, I ask those who use this dreadful sophism to consider its implications. Who in this society has *not* been trained and nurtured in part by public funds? Do we then all belong to the state? May it command the lives of any of us whenever the regime of free choice begins to seem too costly, too inconvenient, as one pursues some "moral equivalent of war" on cancer, or illiteracy, or slum housing, or billboards, or smoking, or impure air, or junk food?

Now I agree that, in the last analysis, the arguments of the academic apologists are not what will precipitate us into the slough of compulsion. It is the politicians who will do that, which means it is the forces making personal compulsion politically attractive that need to be identified. In general the forces are fueled by money and power. The resort to personal compulsion is a last resort when politicians fear that the public will not pay the cost of programs pushed on behalf of abstract principles or, more likely, on behalf of some client group.

Consider again the suggestion that every young lawyer be forced to serve for a year at less than market wages. This is after all just the most recent version of an earlier suggestion that law schools assess all students a fee for support of public interest research groups. Now it is surely no accident that those who made their reputations organizing public inter-

est law should see in that activity a universal panacea to the society's ills. And if it appears that not enough recruits are lining up to enlist in one's crusade, one turns to coercion. But why are they not lining up? Not because there are not enough lawyers—indeed, many lawyers find it hard to obtain employment and thousands leave the practice every year or never enter it after graduating from law school. So the bodies are there, but the pay and conditions of work seem unattractive, even compared to alternatives outside the profession. Presumably, if society believed that the service the Naderites envisage were indeed essential, it could offer (from tax revenues) salaries to attract persons to it, but obviously no one believes that the public would be willing to tax itself towards this end. Thus, though Marvin Frankel is convinced that universal equal access to legal counsel is essential, the voters and taxpayers in our democracy probably are not—at least not enough to pay for it.

The political thrust for conscription of doctors is similar but its environment much more complex. Although reasonable salaries could probably attract young lawyers to any interesting, useful line of legal work, doctors seem to be able to create lucrative practices in the same overserved desirable locations almost ad lib. The reason, of course, is that doctors (far more even than lawyers) have operated for generations as a conspiracy in restraint of trade, systematically resisting institutions like pre-paid health plans, interstate licensing, consumer control of hospital and insurance boards, provision of basic services by nurses or paraprofessionals. Until recently government has been totally compliant. Now when it is apparent that the dream of equal access cannot be achieved at anything less than staggering cost, the reflex of the health care ideologues has not been to reexamine the dream to see if anyone really wants its fulfillment enough to pay his share. Nor yet is it their reflex to break the monopoly power of the medical profession in order to allow organized groups of consumers—such as employers, labor unions, fraternal groups—to shop around for the level of care their members desire, delivered at competitive prices. No, such a strategy might show that different people really do differ in their preferences for health care (when faced with the true costs and real alternatives), and this would

undermine the plausibility of arguing for one level of health care for everyone. And so while ten and twenty years ago politicians failed to work for a competitive regime in health care out of fear of the medical profession's political power, today that same failure may perhaps be traced to the threat that a free market spells to the very plausibility of egalitarian slogans.

But, financing apart, obviously any *Gleichschaltung* (or bringing into line) of all parts of health care provision would require massive doses of compulsion at every level. Doctors could not be allowed to set their fees. And if they cannot set their fees they cannot demand more money for working in places and at specialties that seem less desirable to them. So compulsory assignments would again be the inevitable resort of planners who can neither persuade nor pay workers to go along with their schemes. Indeed, since we are a larger, richer, more ornery nation than Great Britain (for example), I doubt that a private practice option could be kept within limits here. Patients would have to be forced to accept their medical care solely from the single national provider. Healing acts between consenting adults would have to be made illegal, unless approved by the government.

The menace is real. Egalitarian ideals, together with an understandable reluctance to pay or to ask one's supporters to pay the cost of these ideals, make the temptation to resort to conscription—to personal compulsion—almost irresistible. It starts with the doctors, goes on to the lawyers, and eventually gets to all young people so that the rest of us can have an army without really paying for it. Then perhaps we would conscript teachers, and finally we would find that everybody is so useful, or so unique, or so much affected with a public

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interest, that we all may be drafted into the service of the state. Which only demonstrates once again that whoever finds arguments to justify the loss of his fellow citizen's liberty is destined to lose his own. ■