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The Right to an Adequate Income and Employment: A Reply to Professor Bernstein

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THE MENTALLY RETARDED CITIZEN AND THE LAW

Sponsored by The President's Committee on Mental Retardation

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Reaction Comment

DAVID CHAMBERS

BERNSTEIN'S PAPER advances no constitutional arguments for requiring the government to ensure economic security for retarded citizens. His omission is justifi-

[5]K. Kaplansky, Integrated and Sheltered Workshops for the Retarded, Oct. 1-6, 1972 (paper delivered at 5th International Congress on Mental Retardation, Montreal).

[6]41 U.S.C. §§ 46-48(c) (Supp. I 1971).

[7]15 U.S.C. § 636 (Supp. II 1972), *as amended* 15 U.S.C.A. § 636 (Supp. 1973).

[8]Vocational Rehabilitation Act of 1968, Pub. L. No. 90-391, §§ 7(a), (b), (d), 10, 82 Stat. 299; Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701 *et seq.* (Supp. 1974) (originally enacted as Act of Sept. 26, 1973, Pub. L. No. 93-112, 87 Stat. 355, and repealed the Vocational Rehabilitation Act of 1968).

ed not merely by the alternative focus he has chosen, but also by the absence of any sound or vendible constitutional arguments to advance. There remain, however, important roles for attorneys.

THE MISSING CONSTITUTIONAL RIGHT TO MINIMUM SUBSISTENCE

With the magnanimity that a body without power can afford, the United Nations, in its Universal Declaration of Human Rights, has declared for individuals in all nations a right to a "standard of living adequate for . . . health and well-being" and a right "to work, to free choice of employment, and to just and favorable conditions of employment."[1] The United States has a Constitution with force but no comparable provisions. As originally adopted, the Constitution and Bill of Rights contained express protection for the economic interests of slaveholders and owners of other property but ignored the economic interests of others, mentally retarded or otherwise. Congress was authorized from the outset to "provide for the . . . general Welfare,"[2] but in 1789 few persons expected that Congress would distribute money or create job programs for persons in need and fewer yet would have believed that Congress had a constitutional obligation to do so.[3] Amendments adopted since the Civil War have ended slavery and authorized a graduated income tax, but have done little more for the economic interests of the citizen with modest income. The local governments and states within the United States assumed early on the function that England's Parliament had long imposed on its counties of providing relief for the worthy poor.[4] To date, however, no state court has held that its state constitution imposes an obligation on the legislature, enforceable by the courts, to guarantee a minimally decent standard of living or even an opportunity to work.

Despite the United States Constitution's silence, no great leap of imagination is required to devise arguments that either the state or federal government or both must ensure minimal levels of economic security to its citizens. It can, for example, be argued that ensuring a minimal level of subsistence is essential to the enjoyment of other rights explicitly guaranteed by the Constitution, such as the exercise of religion or free speech, although there is a textual difficulty here since these enumerated rights are defined only in terms of a right to be free from interference with speech or religion, not in terms of an obligation to foster speech or religion. It also can be argued that Congress' power to provide for the general welfare has become an obligation to do so as it has taken over more and more of the functions formerly performed solely by states. Finally, it can be argued that the equal protection clause of the

[1] United Nations' Declaration of Human Rights §§ 23-25, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).
[2] U.S. CONST. art. I, § 8.
[3] *See* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1923). *See also* R. BROWN, CHARLES BEARD AND THE CONSTITUTION (1956).
[4] D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 3-29 (1971).

fourteenth amendment (and its counterpart in the due process clause of the fifth) creates a governmental obligation to ensure access to the important elements of survival so long as others in the society have such access.

So far as I can find, no litigant in any case argued before the United States Supreme Court has advanced these arguments, though they have been discussed in the legal literature.[5] Litigants may have avoided such arguments because they believed them specious. Given the ardor and commitment of attorneys in the welfare rights movement of the last decade, however, it is more likely that they resisted these arguments and used narrower ones because they realized that the Court would have rejected broader ones.

The Supreme Court is simply not ready to declare a right to economic security, in the form of either grants or jobs, for all Americans or even for retarded Americans. Attorneys raising issues bearing on access to minimum security have generally cast the issues under the equal protection clause as narrow claims that two groups, equally needy, are being accorded unequal treatment under some governmental benefit program. Even in this narrow setting, the Court's attitude toward the judiciary's role in ensuring economic security for persons with low incomes can best be described as ambivalent. In one of the most important equal protection cases, *Dandridge v. Williams*,[6] for example, the Court upheld Maryland welfare legislation that granted to large families a lesser portion of their needs than it granted to small families. Acknowledging that the legislation involved "the most basic needs of impoverished human beings," the Court nonetheless could find no constitutional basis for applying a different standard to cases involving subsistence from the one it applied in equal protection cases involving purely commercial regulations; the discrimination, to be upheld, must merely be rationally related to the service of any imaginable legitimate government purpose. According to the justices, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."[7]

The Court has explicitly reaffirmed its position in *Dandridge* in more recent cases involving cash benefits and access to decent housing,[8] but it has not uniformly rejected equal protection claims involving access to economic security. Perhaps irritated by Congress' motives, the Court, in 1973, struck down the exclusion from eligibility for food stamps of groups that included any person not related to at least one other within the group ("hippie communes" were on Congress' mind). The Court labeled the exclusion utterly irrational, although it was in fact no more irrational than the legislation upheld in the Maryland case three years before.[9] On the same day in 1973, the Court invalidated another statutory exclusion from the food stamp program, spinning a novel, potentially far-reaching, rationale under the due process clause:[10]

[5] For parts of these arguments, see Michaelman, *On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7 (1969); G. Vlastos, The Human Right to Economic Assistance, Aug. 1969 (unpublished paper presented at Estes Park, Colorado). For an attack on them see Winter, *Poverty, Economic Equality and the Equal Protection Clause,* 1972 SUP. CT. REV. 41.

[6] 397 U.S. 471 (1970).

[7] *Id.* at 487.

[8] Jefferson v. Hackney, 406 U.S. 535 (1972); James v. Valtierra, 402 U.S. 137 (1971).

[9] United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

[10] United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973). The exclusion is found in 7 U.S.C.A. § 2014 (b) (Supp. 1973).

The exclusion of the group (any household which includes a person eighteen or older who is claimed as a dependent by someone not a member of that household) was said to create a conclusive presumption that the members were not in need, without providing individuals within the group a chance to prove that they were indeed needy. Again, the case could just as easily have been analyzed under the equal protection clause and an opposite result reached under *Dandridge* (that is, even though the exclusion denied aid to some who were needy, it was a rational rough-and-ready tool for identifying many who were not.[11]

These recent decisions may indicate a reversal of field for the Court and foreshadow a period in which the Court will force more equitable distribution of government benefits. I doubt it, however. The Court's inconsistent concern for compelling equal treatment within programs that governments have already created hardly presages an era in which courts will try to force governments to create new benefits or opportunities where no program currently exists for anyone.

Why has the Court taken this constricted stand? It cannot be due alone to the absence of specific propelling language in the Constitution itself, for the Court has frequently found constitutional interests without explicit language. Consider, for example, the Burger Court's decisions regarding abortions or regarding denials of rights to aliens.[12] It appears that the Court's refusal to act is based in part on the fact that some justices lack genuine concern for the indignities suffered by persons of low income.[13]

For all the justices, whatever their level of concern, reluctance to act is probably reinforced by their perception, a perception that should give pause even to the most aggressive judicial activist, that no single judicial decision or group of decisions can resolve the issues. The justices can, with a flick of their robes, eliminate formal barriers to abortion or employment by aliens, but a direct holding, however unlikely, that all persons are entitled as of right to sufficient income or resources to subsist would place courts in an unwinnable struggle to force appropriations by state legislatures and Congress (and into the middle of struggles between the legislatures and the Congress). It would also require a constitutionalized and presumably organic definition of subsistence, a notion that would, if the line were drawn above the point of preventing literal starvation, involve as subjective a judgment as obscenity. Even a limited holding according added weight to the individual's interest in subsistence in equal protection cases would force the courts into repeated assessments of the acceptability of the justifications states would offer for restrictions and into the thicket of alternative mechanisms governments may claim to be using to achieve rough equality — tax laws, cash grants, in-kind programs, employment placement programs.[14]

[11] *Id.* at 522 (Rehnquist, J., dissenting).

[12] Roe v. Wade, 410 U.S. 113 (1973) (abortion); Graham v. Richardson, 403 U.S. 365 (1971) (aliens).

[13] For the prime example of insensitivity to the dignity of poor persons, see the Court's opinion in the case permitting the states to condition receipt of welfare benefits on recipient's willingness to permit visits into their homes to inspect for eligibility and for need for services. The Court there revived the old view of welfare as charity. Wyman v. James, 400 U.S. 309 (1971).

[14] For an example of a social scientist who advocates an employment strategy, see Packer, *Employment Guarantees Should Replace the Welfare System,* CHALLENGE, at 21 March-April 1974. The National Welfare Rights Organization has, on the other hand, consistently advocated a cash strategy for almost all support except for medical care. For a general review of strategies, see Jencks,

Thus, although neither prior case law nor the language of the Constitution compels or precludes the Court's finding a constitutionally based right to subsistence, courts probably would be wise to avoid declaring such a right until the time comes when they can draw upon a view widely accepted by the public of a specific approach to the elimination of gross inequalities of income. A struggle with legislatures today to force vindication of the right ("All right, Congress, we enjoin further expenditures on the National Guard until you provide for persons of low income") would certainly fail and would possibly erode the Court's powers in a variety of other areas. The foreseeability of a debilitating struggle thus not only makes the Court's reluctance understandable, it also probably vindicates it. The fact, however, that courts are ill-equipped to compel the assurance of adequate income should be viewed as redoubling Congress' duty to provide assurance — not as releasing Congress from any obligation to concern itself.

MORE PROMISING ROLES FOR COURTS AND LAWYERS IN ADVANCING THE ECONOMIC INTERESTS OF MENTALLY RETARDED CITIZENS

Even though economic security for America's retarded citizens is quite unlikely to be corrected through broad constitutional litigation, there remains much for attorneys to do. First, within a narrowly limited range, courts may be ready to use the Constitution to invalidate some state practices affecting the economic interests of the retarded. They may, for example, use the Constitution to put an end to forced uncompensated labor by residents of institutions.[15] They may aid long-term economic security of retarded persons through favorable holdings in right to education cases and in cases seeking to improve the quality of life at custodial institutions and to block unnecessary commitments to them.[16] They may also, if mental retardation is eventually held to be a suspect classification in equal protection cases, invalidate economic legislation openly discriminating against retarded persons as a named class.[17] These possible court actions are discussed elsewhere in this volume and some are already being pursued by attorneys.

Other actions lawyers might take turn largely on the degree of retardation of the person or persons being represented. The problems of economic security for the borderline or mildly retarded citizen who holds a job in the regular economy are likely to be the same as those of millions of other low-income Americans: The

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The Poverty of Welfare: Alternative Approaches to Income Maintenance, 1 WORKING PAPERS FOR A NEW SOCIETY, Winter 1974, at 5.

PAPERS FOR A NEW SOCIETY, Winter 1974, at 5.

[15] Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973). *See also* Friedman, Chapter 18 of this volume.

[16] *See* in this volume Herr, Chapter 9; Halpern, Chapter 13; Strauss, Chapter 15.

[17] *See* in this volume Gilhool, Chapter 7; Burt, Chapter 14. One discrimination that may or may not be benign is the provision of the minimum wage legislation that permits a lower minimum to be set for retarded persons. 29 U.S.C. § 214(d) (1970).

retarded person often works full time, year-round and still does not earn enough to sustain himself and his family at a decent income level. Take out a pencil and paper yourself and add up what you would consider the cost of a decent minimum level of subsistence for an urban family of four for a year. Include housing, utilities, food, transportation, clothing, entertainment, and so forth. (You may find it easier perhaps to break costs down by the week or month.) Have you jotted down your figures? Most persons who work out such a minimum budget arrive at a figure of at least $6,000, not including provision for taxes.[18] Now recall that a family head working full time at $2.20 per hour (which is the current minimum wage), will earn only $4,400 in a year. Many working borderline retarded persons earn substantially less. As it does for other poor Americans, the current federal public assistance system provides no cash benefits to retarded individuals unless they are totally disabled or part of a needy family unit including children and only one parent.[19] The single retarded person not totally disabled but not earning enough to sustain himself at a decent level can receive no federal funds. He may receive food stamps and, in some states, Medicaid benefits, but these often fail to erase his income deficit.

The lawyer's principal arena in seeking redress of these income imbalances will be the Congress. Bernstein has set forth some of the principal reasons why this nation, through its legislatures, should ensure an adequate level of income for all persons who work, without regard to what price their labor can command on the open market. His arguments are not of the sort that courts are likely to translate into constitutional doctrine. They are broad moral judgments that lawyers and others will need to prod Congress to act upon.

Until Congress acts, attorneys will be needed to secure the statutory benefits already available to lower income mentally retarded persons which state and federal agencies refuse to advertise and to secure procedural protections that the states begrudgingly extend.[20] The problem of inadequate awareness of available rights is acute for all persons of low incomes, but special efforts by lawyers tailored to inform retarded persons are probably called for.[21]

For the mentally retarded person who lives in the community, but who can work only in a sheltered setting, the lawyer's tasks will be compounded by further legal problems, some of which will be more traditional. Ferris, in his reaction comment, has outlined some of the problems encountered by persons working in special workshops. Lawyers can, for example, help draft articles of incorporation and grant applications, try to influence the development of regulations (or, if necessary, legislation) to shift the model of the workshop from a treatment center headed by a mental retardation specialist to a business venture headed by businessmen, and generally serve as legal advisers to a very specialized commercial enterprise.

[18] For a summary of surveys of public opinion on the income needed to "make do," see Rainwater, *Economic Inequality: A Proposal,* 1 WORKING PAPERS FOR A NEW SOCIETY, Spring 1973, at 50.

[19] 42 U.S.C. §§ 606(a) & 1381 (1970).

[20] *See, e.g.,* Bell & Norvel, *Texas Welfare Appeals: The Hidden Rights,* 46 TEXAS L. REV. 223, 245 (1967).

[21] A particularly useful, if somewhat dated, publication is U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, PUB. NO. (OS) 72-26 MENTAL RETARDATION FINANCIAL ASSISTANCE PROGRAMS OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (1971).

Lawyers also need to reach out and get to know well the mentally retarded population they are serving and the people who are already serving them. The latter group should include established business organizations like the chambers of commerce, the Small Business Administration, and labor unions.

For the retarded person who lives in the community but cannot obtain full employment, some public assistance benefits may be currently available. This citizen's economic security is likely to turn not merely on the extent of available cash assistance, but increasingly important as the level of retardation becomes more profound, on the quality of "in-kind income" available to him: housing, guardianship services, counseling services, and so forth. The lawyer's work in ensuring economic security thus shifts to the effort to secure adequate services, humanely provided, to persons who need them. The shift will be nearly total for attorneys working with individuals who live year-round in residential treatment centres and require long-term care and custody. For many of these persons, in-kind services will wholly replace earned or granted cash benefits as the basis for their material security, and arguments based on the right to habilitation or the right to be free of injurious treatment will be arguments for economic security in transmuted form.

We are in controversial territory when discussing economic security for severely and profoundly retarded persons, no matter where they live. For many of them, true security in the sense of reliable lasting freedom from the high probability of privation may be possible only at the cost of denying them all power to make important decisions for themselves. Such denial of free choice will also extend to many retarded persons living in the community with guardians. Disguised in the form of questions of fact about an individual's capacities will be questions of value about the right of individuals, if they wish, to make choices for themselves even when their choices may be viewed as grossly unwise by some external criteria. Economic security, like poverty, is best viewed as a relative concept. It is a nonabsolute measure of the overall quality of a person's material life through time, as viewed either by the person himself or by someone else making political judgments about its quality. It is not merely the sum of the calories poured into his body and the watertightness of the roof over his head.

Some retarded persons will feel secure only if they know that others will take care of them always. Others will feel secure only if permitted power to make some choices. Where choice is at issue, traditional civil liberties issues discussed elsewhere in this volume become important.

The civil liberties aspects of economic well-being are important. The point in this brief discussion is that for the increasing numbers of retarded persons who work in the free economy, these and other constitutional issues will be of far less importance than the gross disparity of incomes between the richest and poorest Americans, a disparity which the courts, even with the vaunted equal protection clause, will not reduce. Where the economic problems of mentally retarded citizens are different from those of low-income persons generally, they will still rarely be of constitutional dimensions. Lawyers who want to help need to get to know well those professionals like Milton Ferris who need legal help.