

Mercer Law Review

Volume 44
Number 2 *Leads Edition - Making a Case for
Constitutional Entitlements*

Article 3

3-1993

The Poverty of Academic Rhetoric

Frederick Mark Gedicks

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Constitutional Law Commons](#)

Recommended Citation

Frederick Mark Gedicks, *The Poverty of Academic Rhetoric*, 44 Mercer L. Rev. 543 (1993).

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

The Poverty of Academic Rhetoric

by Frederick Mark Gedicks*

Erwin Chemerinsky puts forth the unlikely proposition that now is the time to develop a revitalized argument for a constitutional right to subsistence-level entitlements.¹ While not detailing the actual content of such an argument, he outlines what he believes to be the necessary steps of the argument, leaving for another day the task of actually defining and defending those steps. In Chemerinsky's view, the argument would entail recognition that (i) [p]overty and the plight of the poor are serious social problems; (ii) the government has a responsibility to provide individuals with the essentials that are necessary for survival; (iii) the government can successfully provide people with what is needed for subsistence; (iv) voluntary government programs will be inherently inadequate; (v) the Constitution creates affirmative government duties; (vi) food, shelter, and medical care are among those duties which government is obligated to provide; and (vii) it is the judicial role to declare and enforce such rights.²

Chemerinsky's paper is difficult for me to respond to because I endorse his goal of alleviating the desperate situation of poor people in the United States. Nevertheless, I am troubled by the manner in which he purports to go about the task he has set. How one describes "the poor" and their situation, and constructs solutions to that situation, inevitably privileges certain conceptions of the world over others, and I am not sure that Chemerinsky's conceptions are ones that I want to live with.

* Professor of Law, Brigham Young University. University of Southern California (J.D., 1980). My thinking in this paper owes much to the experience of teaching a new, required first-year course at BYU which surveys professional and ethical obligations to represent poor people as well as several substantive areas of particular concern to such people. I am indebted to my students in this class for any worthwhile insights I may have stumbled onto in this paper. In addition, Hal Lewis supplied helpful comments on an earlier draft.

1. Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 *MERCER L. REV.* 525 (1993).

2. *Id.* at 526-27.

Chemerinsky argues that, despite the antipathy of the current Supreme Court to individual rights claims, legal scholars ought to be elaborating the empirical and theoretical premises for a constitutional argument for minimum entitlements in millennial anticipation of a more compassionate (read liberal) Supreme Court.³ This bothers me in several respects. First, it puts legal scholarship at center stage in the battle to improve the social situation of poor people, which may not be to their advantage. Second, Chemerinsky's argument threatens to eclipse the very people he proposes to help, abstracting them and their humanity out of existence. Finally, Chemerinsky's argument betrays a deep disconnection between legal academics and the lives of other Americans.

I.

One of my more conservative students once offered his opinion that the worst thing about judicial activism is that it politically disables voters, habituating those who favor change and reform to placing their faith in elite practitioners of law rather than participating in grass-roots politics. I didn't accept this student's implicit differentiation between law and politics (and still don't), but even so, it is certainly true that the practice of judicial politics differs in substantial and important ways from the practice of elective politics.

Perhaps the greatest difference is that elective politics is accessible to a much broader range of people than is judicial politics. Most people can participate in the former at some level, whereas only lawyers—and probably only certain kinds of lawyers—can practice the latter. As a result, the practice of grassroots politics is significantly informed by ordinary people, in particular those most directly affected by the policies one is trying to reform or overthrow, whereas judicial politics is substantially (excessively?) informed by legal academics and other lawyers. When it comes to the politics of poverty, few law professors have personally experienced the conditions they are trying to alleviate.

I do not wish to overstate grassroots access to the political system by ordinary people, or denigrate the contribution of those legal scholars who have personally experienced poverty. The most important factor determining access to any part of American politics today is money. Whether it be used to organize interest groups or to retain lobbyists or appellate advocates, money helps—a lot. Those who represent poor people in elective and judicial politics rarely have the funds necessary to grease the skids of access in either venue. The disadvantages in being unable to retain lobbyists and legal counsel are obvious, but money also helps in or-

3. *Id.* at 526.

ganizing grassroots campaigns so that they can be effective. Poor people are perpetually handicapped by lack of funds to organize themselves into a cohesive force in elective politics, as Chemerinsky points out.⁴

Nevertheless, even if grassroots activism is assumed to be no more effective, or perhaps even marginally less effective, than advocacy before judicial bodies, there are still powerful reasons to prefer it to the latter. First, those likely to know best what poor people need are poor people, and it is far more plausible to expect that this knowledge will be accurately and adequately communicated to grassroots organizations than to lawyers and law professors. As Gerald López has argued so eloquently, lawyers are ill-equipped and poorly trained to comprehend the marginal, tenuous existence of poor people, and thus to provide the kinds of professional assistance that will make a lasting difference in their lives.⁵ Even fewer lawyers are able to hear—in contrast to assuming—what their poor clients really want and need.⁶

Second, it is unlikely that advocacy for poor people through the judiciary will ever make any significant difference in the condition of the poor in the United States, and may even divert attention from the grassroots activism that has the greater chance of working permanent change. Supreme Court politics can be powerful, as the recent death of Justice Marshall should remind us. But even Justice Marshall's crowning triumph as a practicing lawyer, *Brown v. Board of Education*,⁷ was far less successful as law than it was as rhetoric. It was years before the Court could be confident that Congress and the executive branch had the political will to enforce *Brown's* principles against Southern apartheid.⁸ A strong political consensus on the need to dismantle de facto segregation—as opposed to its de jure version—never did develop, and the Court in fact blunted the force of the principles it articulated in *Brown* when it applied them in the North.⁹ Some have described the importance of *Brown* not to be its force

4. *Id.* at 532-33.

5. Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989).

6. See, e.g., JACK L. SAMMONS, *LAWYER PROFESSIONALISM* 14-19 (1988) (arguing that a lawyer's client is entitled to "meaningful participation" in his or her representation, which often requires that the lawyer obey client directions and pursue resolutions to client problems which the lawyer judges are not in the client's best interests).

7. 347 U.S. 483 (1954).

8. Cf. *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) (segregation ordered to be dismantled with all deliberate speed).

9. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (to prove a law with discriminatory racial effects unconstitutional under the equal protection clause, a plaintiff must show that the discriminatory effects were intended); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 201-03 (1973) (in the absence of de jure racial segregation, a plaintiff must show not only that such segregation exists, but also that it was brought about by intentional state action). See also GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* 517-18 (2d ed. 1991) (suggesting that application of broad

as law, which has been exaggerated, but rather its effect as political rhetoric. "Separate but equal is inherently unequal"¹⁰ became an energizing battle cry for political organization and activism in the black community (and eventually in the white community as well) which made the grass-roots civil rights movement of Martin Luther King, Jr. both possible and powerful.¹¹

Poverty law advocates have won several notable victories in the Supreme Court¹² but, regrettably, none of these decisions has succeeded in coalescing political will à la *Brown* around a commitment to improve the condition of poor people. The judicial wars of attrition over abortion and affirmative action during the last twenty years counsel skepticism about the capability of even a liberal Supreme Court significantly to alleviate the condition of poor people in the absence of a political consensus to do so. Building this consensus is critical to improving the condition of poor people, yet it is clear that the consensus, if it is to be built at all, will not be constructed by the Supreme Court. I question the point of articulating a constitutional argument for minimum entitlements, even in the long run.

In sum, a strategy of seeking constitutional recognition for a right to minimum entitlements is likely to suffer from two serious deficiencies: it will reflect the perception of academic elites of what poor people need, which may not correspond to the perception of their situation held by poor people themselves, and it gives no thought to molding the political consensus necessary to make the right meaningful.

II.

I recently put to one of my classes a hypothetical based upon the proposed revision to ABA Model Rule 6.1, which specifies that a lawyer practicing in accordance with the highest ideals of the profession should perform at least fifty hours of pro bono work per year.¹³ I asked the class

readings of *Brown* to Northern and Western states made the collapse of political support for desegregation inevitable).

10. See 347 U.S. at 495.

11. See, e.g., Steve Bachman, *Lawyers, Law and Social Change*, 13 NYU REV. L. & SOC. CHANGE 1, 17-21 (1985).

12. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (revocation of welfare benefits without notice and hearing deprives recipient of due process of law); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one-year residency requirement for receipt of welfare benefits unconstitutionally burdens the right to travel interstate).

13. GILLERS & SIMON, REGULATION OF LAWYERS 234 (1992). The current version of Rule 6.1 simply states that "a lawyer should render public interest legal service." *Id.* The text of the revised rule, as it is proposed to be presented to the ABA House of Delegates at the 1993 mid-year meeting, provides in pertinent part that

whether the aspirational standard of Rule 6.1 should be made a mandatory one the violation of which would subject a lawyer to discipline. The class divided itself into two groups. The greater number of students argued that government enforcement of the standard, either directly or through bar associations, would be ineffective and inefficient, that representation of poor people was best handled by "the private sector" on a voluntary basis. A smaller group argued in response that it was precisely the dismal record of the private sector in voluntarily providing legal services to those unable to pay for them which justified imposing government sanctions for failure to live up to the standards of the profession.

What I found interesting about the discussion—and, to be candid, about the way I had been used to thinking about this question—was that students in both groups failed to appreciate the extent to which their respective positions called for some personal commitment. A lawyer who sincerely believes that the private sector can deliver adequate legal services to poor people without government regulation and enforcement must take upon himself or herself the obligation to deliver personally a portion of such services. To paraphrase the old comic strip, we have met the private sector, and it is us. Similarly, a lawyer who genuinely believes that the private sector has failed, and that specification and enforcement of a pro bono standard is the necessary alternative, should be prepared to pay personally the substantial cost in increased taxes or increased bar association dues and decreased professional freedom that an effective enforcement mechanism would entail. "We the People" is us, too.

Too often we gravitate towards responses to public policy problems not only because we find them ideologically congenial, but also because they entail no personal dislocation.¹⁴ "Government" plays the role in the delib-

[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means

As the text of the revision implies, compliance with Rule 6.1 will remain voluntary.

14. I was amused by the reported "dilemma" of the entertainment industry over Colorado's recent passage of a constitutional amendment prohibiting protective legislation keyed to sexual orientation. Apparently Hollywood felt morally obliged to boycott the state, but was reluctant to disrupt Christmas skiing vacations in Aspen. (One of the ironies of this episode was the palpable relief with which a few stars announced that they had long before planned vacations in that bastion of gay and lesbian tolerance, Utah, and so they would not be taking a position on the propriety of a Colorado boycott.) Of course, Hollywood's aversion to personal sacrifice is only a highly visible instance of a very common hypocrisy.

erations of too many liberals that "privatization" plays in the lives of too many conservatives: both are abstractions that blind one to personal obligation.¹⁵ I suggest that a constitutional argument for minimum entitlements is a similar, blinding abstraction. "The poor" do not need "rights" or "entitlements" so much as Maria needs a place to live so that she can keep herself presentable at work, or John needs medical attention so that he rather than a stranger can raise Joey and Martha, or Sonja needs food to feed herself and her baby.

It is through personal encounter with people in need that one discovers most strongly and dramatically the obligation to help them. This is a theme of the work of the French philosopher Emmanuel Levinas, who described this encounter as a dialectical event which

happens to a subject who does not assume it, who is not able to do anything about it, but which nevertheless is before him in a certain way, this is the relation with the Other, the face-to-face with the Other, the encounter of a countenance which simultaneously reveals and conceals the Other.¹⁶

I believe that it is by providing necessities to people who need them, and not by arguing abstractions, that we most effectively carry out this obligation. As Levinas himself states, the encounter with the Other is not, in the end, phenomenological, but temporal,¹⁷ taking place in a context informed and created by human relationships.¹⁸

I do not wish to understate the potential effectiveness of collective action, including class action and constitutional litigation, on behalf of the

15. Cf. Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991) (arguing that conceptions of poor people as undeserving and of their situations as hopeless function as excuses for doing nothing to help them).

16. EMMANUEL LEVINAS, *LE TEMPS ET L'AUTRE* 67 (Fata Morgana 2d ed., 1979) (my translation). An English translation of *LE TEMPS ET L'AUTRE* is included in *TIME AND THE OTHER [AND OTHER ESSAYS]* 29-94 (Duchesne University Press, Richard A. Cohen trans. 1987).

17. LEVINAS, *supra* note 16, at 67 ("It is evident in any case that it [i.e., the encounter with the Other] is not phenomenological to the end.") (my translation). *id.* at 68-69 (my translation):

The relation with the future, the presence of the future in the present seems again to take place in the face-to-face with the Other. The situation of face-to-face would be the performance of time; the encroachment of the present on the future is not the doing of a subject by itself, but an intersubjective relation. The condition of time is in the rapport among human beings or in their history.

18. *Id.* at 8 (emphasis in original) (my translation):

"Time and the Other" presents time not as an ontological horizon of the *being of a being*, but as the mode of *beyond being*, as a relation of the "thought" of the Other and—through diverse images of sociality facing the countenance of the other person: eroticism, paternity, responsibility for one's neighbor—as a relation of the Wholly Other, to the Transcendent, to the Infinite."

Id.

poor as a group.¹⁹ Abstractions, after all, can be useful and powerful; that's why we use them. Language is itself an abstraction. It would have been confusing and cumbersome (and, perhaps worst of all, boring) for me to have kept repeating, instead of "poor people," "people who need the 'necessities of life'"—itself another abstraction. But abstractions have their costs. They seduce us into thinking they represent more than they can, that by knowing the abstraction, we can know the person(s) it is supposed to represent.²⁰ By pursuing an intellectual and academic response to the situation of "the poor," rather than an individual response to the needs of people situated in a relationship with us, we dilute the force of the obligation to help other people, and rob them of their humanity. The greatest loss is, perhaps, that of the opportunity to know those whom we might help.

III.

Chemerinsky seems aware of the need to break through abstraction in order to build a consensus about how to help poor people. He speaks of the psychological invisibility of the poor, and links the short-lived political support of Lyndon Johnson's "War on Poverty" to dramatizations by Michael Harrington and Edward R. Murrow, among others, of the plight of poor people in the United States.²¹ "If there ever will be a right to minimum entitlements," he argues, "it will happen only after people are made to see that poverty is an enormously serious social problem and to feel a need for action."²² Elsewhere he argues that "[a]n ethos of caring must be professed and take hold."²³

How are we to make this happen? Chemerinsky makes earnest references to John Rawls, social contract philosophy, and (even) self-interest.²⁴ These references would be almost funny if they did not illustrate so perfectly the extent to which academics are out of touch with the lives of

19. See generally Marie A. Failing & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1 (1984) (arguing the generally greater cost-effectiveness of group over individual representation).

20. Cf. Louis Menand, *What Are Universities For?*, HARPER'S MAG., Dec. 1991, at 47, 56 (criticizing literature professors for creating the "false impression" that "unhappiness whose amelioration lies in real-world political action is being meaningfully addressed by classroom debates about the representation of "the Other" in the work of Herman Melville"). See also *id.* at 55 (criticizing the academic mentality which assumes that "devoting fewer class hours to male authors might be counted a blow against discrimination in the workplace").

21. Chemerinsky, *supra* note 1, at 528-32.

22. *Id.* at 528-29.

23. *Id.* at 530.

24. *Id.* at 529.

ordinary Americans. *A Theory of Justice*²⁵ is elegant as philosophy, but wholly unpersuasive as political rhetoric. No person without a graduate degree (and not many with one) will be persuaded by the "veil of ignorance"²⁶ to part with their "hard-earned money"²⁷ to help poor people. The reason is simple: outside of the academy, no one in the United States takes Rawls as an authoritative text. Or, to put things a bit more candidly, in deciding how to live their lives, most Americans couldn't care less what Rawls has to say, however elegantly he may say it.²⁸

Americans do care, however, what the Bible says. For example, in the class discussion I referred to earlier, none of my students—literally, not one—was willing to make the argument that there is no ethical obligation to represent those people who cannot afford a lawyer. They divided over the better way to discharge this obligation, but the existence of the obligation itself was never in question. I believe this is largely due to the fact that most of them are committed to a Christian tradition whose authoritative texts repeatedly emphasize the paramount importance of service to those in need, of doing for others, especially the poor, what they cannot do for themselves.²⁹ What Jesus and the prophets of the Mormon tradition say to these students, and to me, matters to us in a way that Rawls never will.

Moreover, in the contemporary United States, religious organizations are among those most committed to meeting the needs of poor people through actual encounter with them. Anyone who has spent time in a soup kitchen, or an immigration law clinic, or a volunteer employment agency—three common ways in which religious organizations seek to

25. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

26. RAWLS, *supra* note 25, at 136-42.

27. See Chemerinsky, *supra* note 1, at 529.

28. It's also true that ordinary Americans don't much care what Emmanuel Levinas has to say about "the Other" or anything else. There is a considerable difference, however, between the use of authority in a text addressed to other academics, which is how I cite Levinas, *see supra* notes 16-18 and accompanying text, and use of authority to persuade people outside the academy, which is how Chemerinsky proposes to use Rawls, *see Chemerinsky, supra* note 1, at 529-30. I fault Chemerinsky, then, not for taking Rawls as persuasive in academic contexts, but rather for his benighted belief that Rawls would be rhetorically effective in contemporary American politics.

29. See, e.g., *Matthew* 25:35-36, 40 (King James) ("For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in: / Naked, and ye clothed me: I was sick, and ye visited me: I was in prison, and ye came unto me. / Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."); *Luke* 10:25-37 (King James) (the parable of the Good Samaritan); *THE BOOK OF MORMON, Mosiah* 4:16 (The Church of Jesus Christ of Latter-Day Saints, 1981) (1st English ed. 1830) ("ye yourselves will succor those that stand in need of your succor; ye will administer of your substance unto him that standeth in need; and ye will not suffer that the beggar putteth up his petition to you in vain, and turn him out to perish").

serve people in contemporary life—can place faces with names, children with families, people with their hopes and their fears. For such people, loving one's neighbor as oneself is a way of living, not an abstraction. That religious people so often fail to live up to this ideal in their encounters with others does not place in question the power and authority of the ideal in their lives.

I have brought religion into this argument not so much to advocate the recasting of minimum entitlements arguments in religious language, although that could certainly be done, as to emphasize the thinness and sterility of the academic rhetoric of obligation in contrast to the richness and power of religious rhetoric. It is a measure of the contrast that even today politicians seek their most elevated and moving metaphors in religion rather than philosophy. The impotence of academic language in the lives of most Americans is a function, I believe, of the profound disconnection of those who employ it from the lives of those they seek to help. Advocating political strategies like constitutional litigation, which privilege this kind of talk by putting academics in the forefront, only perpetuates and reinforces this isolation. If academics really wish to do the thing that will change the situation of poor people in the United States—creating a political consensus to help them—then academics must experience more directly life as it is lived and understood by ordinary Americans. This cannot happen through law review articles or judicial opinions, but only through personal encounter. Professor Chemerinsky's paper suggests to me that academics do not yet appreciate the importance of seeking this experience.

