Rights, Duties and Conditioning Welfare

Amir Paz-Fuchs

The relationship between rights and duties is complex. The political philosophy that was prominent in the first few decades of the welfare state was that one's rights are grounded in one's "social citizenship" and that they provide a strong reason to place a duty on the state. But this consensus, if indeed it existed, was short lived. To an increasing degree, parliaments, administrators and academics are advancing an alternative ideal. This ideal of "no rights without responsibilities" is nowhere more apparent than in contemporary welfare-to-work programs. The paper investigates this claim and suggests that welfare rights under current welfare-to-work programs are constructed as relying in a strong sense upon the fulfillment of duties. In other words, it is not only that the implementation and execution of the legal right depend on adherence to certain conditions. It is argued that the right itself is identifiable as contingent on meeting these conditions. The paper assesses the legal theories that suggest mechanisms to deal with the interplay between benefits, rights and duties.

This paper begins with a portrayal of the two prominent rights theories: the choice theory and the interest theory. Both are helpful in addressing a matter that is of relevance for understanding the nature of the duty of relief that the state holds towards welfare claimants. It will prove important to assess whether such a duty derives from a right to relief or is independent of such a right.

However, the choice and interest approaches, along with their assumption of a discrete existence of rights and duties as independent concepts, signify only the start of the trail insofar as the relationship of welfare rights and duties is concerned. Some authors have suggested a clear divide between the Poor Law's construction of duties owed to the indigent and the post-war agenda of welfare rights. Yet, as the second and third sections indicate, reforms of the past two decades have managed to change the character of welfare rights in a novel way that is increasingly represented as "contractual" in nature, and has perhaps even "changed the fundamental legal basis" of welfare rights. This change has led some authors to ask, somewhat dramatically, if the era of social justice is drawing to a close. Though this may not be the case, it is difficult to dispute that under these reforms behavioral requirements have become preconditions of eligibility and that such preconditions have changed the way we conceive of rights and duties in state welfare provision. The paper's final section offers an overview of the general approaches to the doctrine of illegitimate conditions.

1. In this paper, unless otherwise mentioned, I refer to legal rights when discussing rights. The applicability of the claims to non-legal rights requires further investigation.
A. The Theoretical Background

Some duties derive from, and are a consequence of, rights. My right to walk at leisure unimpeded in the city centre is the source of your duty not to stop me from doing so. My right to have the furniture that I paid for delivered to me is the reason the store has a duty to do so. So far this is familiar territory. But as Austin and Bentham have stated, and few have contested,4 rights are not the only source of duties. Following their terminology, we should distinguish between absolute duties, that have no correlative rights, and relative duties, which do.4 The theory of restricted correlativeity suggests, therefore, that every right is a basis for a duty, but only some duties imply a right.6 Further, while the duty is a ground for action, the rights serve as a ground for the duty.7 Therefore, by being closer to the acting agent, one identifies the duty that serves as a reason for an action before identifying if it is grounded in a right. So we may know that people have a duty not to burn the national flag or harm their dogs, but does this mean that others have a right that flags not be burnt or that dogs have a right not to be harshly treated? Not necessarily. We should be asking, therefore: if not all duties correlate with rights, what are the criteria for deciding that a specific duty is grounded in a right? And in relation to our present issue: assuming that it is not contested that, under the Poor Law or welfare state regime, one can identify a duty towards the poor, how may we deduce whether a right to welfare was the source of this duty? Two general approaches address this sort of question: the interest (or benefit) theory of rights and the choice (or will) theory of right.9

i) The Interest theory: A simple account of the interest theory holds that Jack has a right that Jill perform A, and hence Jill has a duty towards Jack to do A, if and only if Jill has a duty to do A and performance of A by Jill would benefit Jack. In response to critiques lodged against this formulation, interest theorists clarified that the benefit involved need not be actual, but may be intended by Jill. So if I have arranged for a delivery to be made at noon to my house but, falling behind schedule, I would prefer that it be delayed, this would not mean that I no longer have a right that the delivery be made at noon, despite the fact that this would no longer be beneficial to me.9 A benefit to me had been intended. Interest theorists

7. Ibid. at 180.
also addressed the issue of the nature of the right-holder, so that laws protecting the environment do not necessarily grant rights to beaches. Austin states that duties towards something other than a person and towards non-determinate person are absolute duties, i.e. duties that have no correlative rights.\(^\text{10}\) As we are interested here in duties towards, in Bentham’s terms, “assignable individuals,”\(^\text{11}\) we need not belabor this point. H.L.A. Hart raises a difficulty that is more general and more challenging for the interest theory than these two:

if to say that an individual has such a right means no more than that he is the intended beneficiary of a duty, then “a right” in this sense may be an unnecessary, and perhaps confusing, term in the description of the law; since all that can be said in a terminology of such rights can be and indeed is best said in the indispensable terminology of duty.\(^\text{12}\)

This critique suggests that, irrespective of its merits, the interest theory is not always helpful in identifying whether or not a right underlies a duty in general, and a duty to provide the material goods necessary for subsistence, in particular. It also illuminates the most formidable advantage of its rival theory: the choice theory of rights.

ii) The Choice Theory: According to this theory, a right is identified as the grounds for a duty not when the purported right-holder benefits from the duty, but rather when he or she has “control over the incidence of the duty.”\(^\text{13}\) Kelsen views the doctrine that “a legal right is a will recognized by the law” as more convincing because the “power which . . . is the essence of an individual’s right consists in the fact that the legal order attaches to the expression of the individual’s will that effect at which the will is directed.”\(^\text{14}\)

The advantages of this theory are clear: first, though some may object to the assertion that animals and inanimate objects are only owed duties and are not the bearers of rights, the choice theory has the advantage of justifying this exclusion on conceptual, as opposed to ideological, grounds: they cannot control the incidence of the duty. Moreover, both in law and in morals the fact that one benefits from a duty does not imply that one holds a right to the benefit. The examples of charity and mercy are helpful in this case. It is not only that “there is something indecent in making a claim to beneficence.”\(^\text{15}\) The fact that charity or mercy may not be demanded or imposed upon us seems like an important fact of their character. And this is highly related to the fact that to speak of a right to charity or to mercy seems like a misnomer. Hart, when discussing moral rights and duties, stresses that one’s promise to a friend to take care of the latter’s mother makes

\(^{10}\) Austin, supra note 5 at 161-62 (Lecture XII). But cf. Raz, supra note 6 at 178 who sees no conceptual problem in attributing rights to a dog, if the necessary conditions apply.

\(^{11}\) Bentham, supra note 5 at 188-89.


\(^{14}\) Kelsen, supra note 5 at 81.

the mother the beneficiary, but not the right-holder. In other words, the choice theory captures an intuition that escapes the interest theory: if a substantive degree of discretion is granted to the duty-holder as to the execution of the duty and, consequently, the beneficiary holds no power to enforce the duty, we are less inclined to speak of a right being held. Conversely, the more discretion granted to the putative right-holder at the expense of the duty-holder, the more we perceive the former as holding a right. However, the focus placed on discretion (or control over the duty) is not only an asset but also a serious challenge for the choice theory.

Hart, the most prominent advocate of the choice theory, argues that an important feature of rights as understood under the choice theory is the right-holder’s ability to waive the duty and release from obligation. However, in numerous cases we do, in fact, recognize rights that do not include the right-holder’s power to waive the correlative duty. Kant talks about inalienable rights, which one “cannot give up even if he wishes to.” Indeed, these are often occasions where the rights under consideration are the most valuable for the right-holder’s interest. So valuable, in fact, that we are not willing to grant even the right-holder the power to waive the duty. It is true that we do not, in these cases, grant the duty-holder the discretion whether he will supply the goods or not. But discretion is not a zero-sum phenomenon. We normally argue that children have not only a right, but also a duty, to receive education. And yet, this duty does not require altering our conclusion that a right to education is, in fact, a right. Similarly, an employee cannot release her employer from certain duties through the employment contract. The paradox is, therefore, that according to the choice theory, strengthening rights in a manner that lessens control over them would supposedly move them “outside the genus of rights.”

Another critique of the choice theory addresses the way the theory places rights within the social context. It may be suggested that, if the interest theory relies too much on social facts, the choice theory seems to ignore the impact that rights have on policy and legislation. According to the choice theory, the existence of a right


19. The Employment Rights Act (U.K.), 1996, c. 18 [*E.R.A.*], and the Trade Union and Labour Relations (Consolidation) Act (U.K.), 1992, c. 52 [*T.U.R.C.A.*] are two key statutes guaranteeing a “floor of rights” from which “any provision in an agreement is void in so far as it purports to” derogate from the rights granted under the relevant acts. See *E.R.A.* s. 203(1); *T.U.R.C.A.*, s. 288. See also Bowmaker Ltd v Tabor, [1941] 2 All E.R. 72 at 76 (C.A.).


seems to depend on legalistic grounds such as the ability to waive the duty. Interestingly, Hart senses this difficulty and indicates that there is a problem in applying the choice theory to constitutionally recognized fundamental rights. He ends his essay with an extraordinary caveat, according to which “instead of a general analytical and explanatory theory covering the whole field of legal rights I have provided a general theory . . . which is satisfactory only at one level—the level of the lawyer concerned with the working of ‘ordinary’ [private APF] law.” Other choice theorists followed this qualification.

But, more importantly for present purposes, Hart insisted that the right to welfare is comprehensible within the choice theory. Now, undoubtedly, if recognized as a right, it should be seen as a fundamental, constitutional right against the state. Hart makes an effort to avert this difficulty with what he admits to be a problematic suggestion: that the right to welfare is identifiable under the choice theory since an individual may demand it or, though entitled, decide not to demand it. But, of course, this rejoinder would be equally applicable to other fundamental rights (e.g., speech, religion, equality) as well. The problem for Hart lies elsewhere, to wit—in the choice theory’s inability to take due account of the role that fundamental rights have in practical reasoning. Rights are not recognized or denied because the individual has a certain power (e.g., to waive the duty), but rather because it is deemed just that she hold the right. The power to control the incidence of the duty derives from the assertion that the right exists, not vice-versa.

iii) Interest Theory and Choice Theory the Synergy: Where does this analysis lead? Neither the interest theory nor the choice theory manages to fully explain the concept of legal rights in a manner that would allow one to extract a clear criterion for distinguishing absolute duties from relative duties. Though it is not my purpose to offer here a full-fledged list of criteria, a synthesis that focuses only on the stronger points of both theories would allow moving to questions of analysis and implementation: the interest theory provides the substantive element, while the factors focused on by the choice theory provide helpful evidentiary indication. This hierarchy incorporates fundamental, constitutional rights into the structure that, as Hart conceded, does not agree naturally with the choice theory.

The ability to waive the duty is indeed, in many cases, an important attribute of a right, a consequence of it. So much so, in fact, that such power serves as evidence for the existence of a right. The converse, however, as we saw, is not true. Control over the incidence of the duty is a sufficient, but not a necessary, condition of a right. Indeed, courts often decide whether a right exists (by ascertaining who

22. Hart, supra note 12 at 201.
23. E.g., Nigel Simmonds, “Rights at the Cutting Edge” in A Debate Over Rights, supra note 4 at 141-44; see also Nicholas Bamforth, “Hohfeldian Rights and Public Law” in Kramer, Rights, Wrongs and Responsibilities, supra note 4 at 1.
24. I use “condition” here very loosely since, as indicated, control over the duty is actually a consequence of a right and therefore cannot logically be its condition. Kramer states that one’s competency to waive enforcement is neither a sufficient nor a necessary condition of holding a right. However, his only example of such a case (the right to be betrayed) is not only bizarre, but also far from convincing. See Kramer, Rights Wrongs and Responsibilities, supra note 4 at 98. For a critique see Hillel Steiner, “Working Rights” in A Debate Over Rights, supra note 4 at 296.
the statute is to benefit) primarily in order to decide whether the putative right-holder has control over the duty, not the other way around.\textsuperscript{25} In such cases the courts stated that a right is recognized if the reason for the duty was that it would protect the interests of the plaintiff. This position is parallel to the formulation offered by the interest theory.\textsuperscript{26} Legislation that incidentally benefits individuals for reasons other than their own interest will not be seen as conferring rights. So if a right to education were explained solely by its contribution to the GNP, children would not hold a right to education at all.

This, however, leaves intact some of the critiques highlighted earlier. The main thrust of the interest theory’s analysis of rights and duties suggests a strong relation between legal analysis and social and ideological facts as well as a danger that rights-discourse would be supplanted with a construction that views rights as dependent on duties. This threat is arguably realized in the novel construction of contractual rights.

**B. Rights, Reciprocity and Collective Interests**

The claim that the idea of contractual rights is “novel” should be immediately qualified. Rousseau insisted that justice could be achieved only by uniting rights and duties.\textsuperscript{27} Similarly, John Finnis mentions that in certain African tribal regimes, “right” and “duty” are terms covered by a single word, normally translated as “ought” or “due.” Finnis explains that this phenomenon has its cultural source in the approach that emphasizes “duty and obligation, rather than the nuance of modern Western society, with a stress on rights.”\textsuperscript{28} So, instead of claiming that the ideas themselves are in any way novel, it would be more accurate to state that it is their prominence in modern, Western legal and political thought that deserves investigation. Where, then, lies the explanation for the rise of this agenda? In social, political and philosophical discourse, the influence of conservative communitarian scholars has been acknowledged.\textsuperscript{29}

Communitarians have been advancing the claim that “rights presume responsibilities” for over a decade.\textsuperscript{30} In addition, communitarian theory places a strong emphasis on reciprocity.\textsuperscript{31} Indeed, communitarian arguments that focus on social and cultural “problems” have been incorporated in suggestions for welfare reform.

\textsuperscript{26} Raz, supra note 6 at 166. Also in Alan Gewirth, The Community of Rights (Chicago, IL: University of Chicago Press, 1996) at 8-12.
\textsuperscript{27} J.J. Rousseau, The Social Contract (Hertfordshire: Wordsworth Ware, 1998) at II.vi; see ch. 3.A.3.
\textsuperscript{28} Max Gluckman, cited in Finnis, supra note 21 at 209.
Lawrence Mead, for example, argues that civic virtue and civic behavior can be achieved also through the welfare system of rights and obligations. Amongst important obligations he names the duty to support one's family, to stay in school and to learn English. And Frank Field, while discussing "the breakdown of a contract" within the analysis of welfare reform, declares that "all societies require a shared ideology, containing an agreed moral framework."

This claim is part of a larger argument in favor of reciprocity. In fact, Field, like other progressive welfare reformers, identified a problem that is separate from that of fiscal and moral issues already mentioned. It is a "legitimacy crisis," the dropping support and political legitimacy for income provision. Saving the system, it is argued, can be done only if the tax paying public can identify with the people whom they are supporting. And this objective entails enhancing reciprocity and strict work requirements. This argument, however, seems to rely more on intuition than on empirical data. In fact, it has been shown that such requirements encourage a perception of "us and them" and undermine "a principle of citizenship, which is that everybody should be treated on an inclusive, equal basis."

Making rights conditional upon duties, however problematic, is not an uncommon legal phenomenon. But linking rights to responsibilities through a "vague sense of reciprocity" allows institutions to set conditions on rights that are unjust and thus constitutes a further threat to the role rights should hold in practical reasoning. Hence, social and economic rights may be demanded and received under a communitarian paradigm, but they may also be conditioned on the duty to refrain from asocial behavior or to exhibit an appropriate attitude. Thus, Hillel Steiner (though not a communitarian) asserts that we find it absurd that a person may request leniency on account of him being an orphan after killing his parents because "the set of entitlements should reflect the requirement that persons be held responsible for the adverse consequences of their own actions."

But if the phrase "set of entitlements" is to indicate the total array of rights (Steiner uses rights and entitlements interchangeably in his essay) that the individual is endowed with, this would seem an untenable statement. It would be a harsh position to take if one were to say, even about a person who has committed such a heinous crime, that he has thus waived his rights to counsel, to due process, to freedom of speech and so forth. More tenable, then, would be to claim that particular

33. Ibid. at 242-43. Also, see similarly E. Wynne, Social Security (Boulder, CO: Westview Press, 1980) at 142.
34. Frank Field, Making Welfare Work (London: Institute of Community Studies, 1995) at 26. Field, former Minister of Welfare Reform, was described as the "most forceful advocate of the moral dimension to social citizenship in recent years": Harris, supra note 2 at 29.
36. Standing, supra note 17 at 326.
37. Etzioni, supra note 30 at 145.
entitlements, more germane to the act itself, may be affected. Thus, what may be considered is that the individual’s active role in bringing about his orphanhood may mitigate (though, I would argue, not necessarily nullify) his entitlement to leniency. But it should be noted that though the decision maker may consider the individual’s responsibility, the right to request leniency (if such a right exists) should not be impacted. And herein lies the flaw in Steiner’s argument. It is quite peculiar that Steiner, as a choice theorist, suggested leniency as an entitlement that may be affected. For leniency, as an act that cannot be demanded or waived at will, does not figure in a choice theorist’s conceptualization of rights (and for good reason) and thus does not support the general claim that responsibility has an impact on entitlements. It is thus submitted that precisely because there is no right to (extra-legal) leniency, the decision maker may reasonably take into account, inter alia, a person’s behavior and responsibility.

This discussion brings us back to the jurisprudential analysis that ended the previous section. It has been suggested that the interest theory as presented by Raz and MacCormick leads to a situation whereby “rights become illusory” since rights would “extend only to the point where our actions ceased to make a contribution to the collective project.” Since the interest theory offers a better understanding of the concept of rights, and since we shall soon turn to inspect precisely similar charges that convey a sense of diluted rights, it is of import to investigate whether this critique points to a key explanation. Nigel Simmonds points out that under Raz’s scheme, a right is an interest that justifies holding others to a duty, and that conclusion is reached only “if not counteracted by conflicting considerations.” MacCormick, similarly, is understood to offer a concept of a right that serves as a place holder for forms of protection, but those should be “balanced against countervailing considerations, so that the protections that finally result are the outcome of this calculus of conflicting interest.” In short, it is argued by choice theorists that rights under the interest theory cannot be entrusted with the task of protecting the individual’s sphere of autonomy against desirable social goals because these goals are incorporated in the right itself.

If accepted, this is a serious charge. I would suggest, however, that even if the interest theory grants the interest of other people (or society in general) a role in grounding rights, this does not require that “the rights or the interests of right-holders play no strategic role in moral and political affairs.” Such a claim ignores a necessary separation between two phases of investigation. In the first phase rights are recognized and acknowledged. At this phase, rights are seen as legal rules that exclude certain considerations that would have been relevant were we required to make a “particularistic” decision, that is a decision that has no regard for the legal

40. Steiner, supra note 24 at 233.
42. Raz, supra note 6 at 171.
43. Simmonds, supra note 23 at 160, criticizing MacCormick, supra note 20.
44. Raz, supra note 16 at 52, n. 55.
45. Chan, supra note 41 at 29.
rule. As Fredrick Schauer shows, rules are not subject to “continuous malleability.” They create a temporal gap between the moment of crafting and the moment of applying rights to a particular situation, thus “resisting current efforts to mould them to the needs of the instant.” Recognition of a certain right changes the balance of reasons (absent the right). Thus, once the right to privacy is recognized, it would not be helpful to argue, or even to prove, that crime would be reduced if cameras were placed in every person’s home. Of course, this does not mean that rights prevail all things considered. Such a conclusion would require viewing all rights as absolute. This cannot be true, if only because rights conflict amongst themselves (consider the right to free speech and the right not to be defamed).

Rights do, however, place restrictions on measures that can be taken. This is done at the second stage. At this stage the right is given its proper weight and value in the particular context. Different cases will be affected by particular rights in different ways. Though the right may seem to take account of collective interests yet again, their place in the analysis is now distinct. Once recognized, rights have an a-contextual force that may pull towards decisions where “no other political aim is served and some political aim is diserved thereby.” It is true that the (first stage) process of recognizing rights also takes into account social goals, but this would not render the second stage analysis superfluous. For if it were found that the public interest would be served by recognizing an individual right to freedom of religion, the particular balance that should be reached when this freedom is confronted with a collective interest in, say, public order, is not predefined. The right now stands on its own, somewhat oblivious to its parentage.

This is, it should be acknowledged, a narrow escape from a serious charge. For though it is possible to insist on this strict separation between the two stages, Simmond’s argument could, at the very least, be understood to proclaim that interest theory jurisprudence is much more vulnerable to a diluted idea of rights, one that has more room for incorporating the common good at distinct stages (such as identification and balancing). Simmonds is right to point out that under the interest theory’s own “terms of engagement,” a significant degree of “semantic autonomy” is compromised if identifying the right-holder depends on the purpose supposedly served by the law. Such a procedure would necessitate “an unavoidable embrace of a conception of the ‘good’. This is not an insignificant cost to pay in any sort of analysis, especially if one thinks that the criterion for identifying a concept should ideally be independent of the criteria for assessing its goodness or badness. But the moral and social weight attached to rights, their “familiar role in ordinary thinking,”

47. Ibid. at 81-84.
50. Simmonds, supra note 23 at 197. Kramer states that “one scarcely should be surprised by the general fact that we have to interpret each norm before we can decide who (if anyone) holds right under it”: Kramer, supra note 4 at 85.
51. Steiner, supra note 24 at 293.
52. Ibid. at 236-37; Raz similarly emphasizes the importance of following “the usage of writers on law, politics and morality who typically use the term”: Joseph Raz, “On the Nature of Rights” (1984) 93 Mind 194.
requires that an account of collective interests be taken both in the first (identification) and in the second (balancing) stages.

However, as argued above, the moral autonomy enjoyed by the choice theory, which Simmonds favors, comes with a price-tag of its own. The beneficial detachment, or value neutrality, of the choice theory is possible only by tying the substantive question (who is a right-holder?) to a procedural question (who may enforce a right?). Such a prerequisite seems far more problematic than the one confronting the interest theory. The worlds of substantive rights and procedural enforcement are governed by two different sets of values. One cannot tie the former so rigidly to the latter and still avoid problematic conclusions. And yet, following Simmonds’ arguments, we should be aware of the possible social, legal and political implications of working within the interest theory. We are now in a position to understand how this insight is manifested insofar as welfare rights and welfare reform are concerned.

C. Constructing Welfare Rights as Conditional

Both proponents and opponents of welfare reform accept that recognizing a legal right to welfare would limit the conditions that may be attached to welfare benefits.\(^5\) Thus, when the American administration of welfare relief sought to reduce expenses on welfare relief by enhancing its “deterrent effect,” it was suggested that waiting periods be extended to create a backlog to discourage applicants from applying; that welfare centers be consolidated into smaller offices; and that new applicants be routinely required to frequent the employment agency. These procedures, it was clear, could be implemented only if the present system would be “more selective in offering welfare as a right.”\(^6\) This insight should not be dismissed as mere policy jargon. Indeed, Lucy Williams rightly links the power to attach conditions to benefits with (lack of) a right to AFDC payments that was expressed unequivocally in federal law. To permit behavioral conditions on eligibility, she explains, the United States Department of Health and Human Services had to waive the entitlement provisions under 42 U.S.C. §1315.\(^5\) And later she argues correctly that “the importance of the PRWORA [Personal Responsibility and Work Reconciliation Act 1996 APF] is its repudiation of the concept of entitlement in welfare jurisprudence.”\(^5\) Notwithstanding their important policy and doctrinal implications, these claims also rest on a sound jurisprudential base. Steiner states that the job of rights is
to demarcate domains—spheres of practical choice within which the choices made by designated individuals (and groups) must not be subject to interference—and to specify

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those demarcations without reference to the content of the choices to be made within those spheres. It thus requires no very extended argument to show that rights, so conceived, amount to normative allocations of freedom.  

Rights function as a form of legal immunity that bears on government’s ability to attach conditions and thus to limit access to them. Advocates of current programs repeatedly make the (mistaken, as we shall see) assertion that recognizing such a right would forbid attaching any conditions to benefits at all. A more detailed discussion of the conditions that may be placed on benefits that are not rights will be offered in the following section. The current section outlines the manner in which welfare interests are constructed as conditional upon fulfillment of duties, and suggests that certain problematic policies are a direct consequence of this construction.

A couple of potential confusions need to be avoided. First, it might be thought that underlying the argument just described lies an agenda for a universal, unconditional basic income grant. This need not be the case. Conditions for eligibility that refer to one’s immutable status (such as age or disability), analysis of which falls beyond the ambit of this paper, may be placed without giving rise to the issue of precluding entitlements on behavior (though, of course, this does not mean that they are less problematic). Second, a critique of the rights-responsibility fusion may be seen as identical to the claim that the right to welfare is an absolute right. Now, very few rights can be claimed to be of absolute value, and it is certainly not maintained here that the right to receive welfare benefits is one of them. The two possible confusions are linked, it seems, as some writers refer to a lack of behavioral preconditions to eligibility as a sign that a right is an absolute right. By this standard, of course, almost all rights (that are not burdened by behavioral conditions) are absolute, and welfare rights would (currently) be in a small minority. We investigate here, therefore, how modern welfare reform managed to infuse behavioral requirements as conditions that are independent of and precedent to welfare claims.

**Linking Duties to Rights**

It is widely acknowledged that the new welfare-to-work regime represents a “fundamental change in the balance between rights and obligations in the provision of assistance.” Alan Gewirth suggests that “positive rights require personal

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57. Steiner, supra note 24 at 238. Hart views rights as “legally protected choices” and tends to regard constitutional rights as primarily creating immunities: Hart, supra note 12 at 197.

58. Freedom from torture and freedom of thought are two examples. For a discussion regarding the illusory quality of absoluteness see Glendon, supra note 38 at 18-46.


responsibility on the part of the would-be recipients of help.” Anthony Giddens follows in similar vein, envisaging no less than “a redefinition of rights and responsibilities.” Giddens condemns “old style democracy” for treating rights as “unconditional claims” and asserts that “unemployment benefits should carry the obligation to search for work, for example.” Giddens is sensitive to the charge that welfare rights have been singled out in this construction, and makes clear that as “an ethical principle “no rights without responsibilities” must apply not only to welfare recipients, but to everyone . . . otherwise the precept will be held to apply only to the poor or to the needy.”

However, it would be interesting to see how the argument that there are “no rights without responsibilities” would truly be relevant to individuals who are not poor or needy. In non-legal discourse, one may understand the notion that “rights presume responsibilities” to resemble the idea of noblesse oblige, that inordinate privilege, wealth or power should motivate an urge to “repay” society. But this is not the meaning usually attributed to the doctrine of “rights and responsibilities.”

It seems that there is good reason that neither Giddens nor Gewirth supply us with a parallel example involving a more established right (e.g., speech, privacy, political participation) that is contingent upon fulfillment of duties. It is difficult to conjure up such a sentence. “Freedom of religion should carry the obligation to . . .” what? One cannot finish this clause by stating something along the lines of “avoid harm to others.” Such a claim would simply state the limits of the right, not the behavioral conditions for eligibility. We do not say that one has a right to free speech only if she refrains from drug abuse any more than we say that one loses his right to property if he lies on his tax statement. Contrariwise, established rights were declared inalienable, natural, sacred and equally deriving from one’s personhood. If Giddens claims that a different construction for all rights is warranted it would be a dramatic suggestion indeed, a “reformulation of the social contract.”

As an example that shows how this paradigm is being implemented in realms other than welfare provision, it has been judicially suggested that prisoners should lose their right to vote because committing a crime is tantamount to violating “civic responsibility . . . which safeguards the social contract.” This conclusion rejects the need for a rational link between the act and the punishment and thus rests on a general paradigm that sees rights as contingent upon fulfillment of obligations. It resonates with Steiner’s suggestion, discussed above, that one’s entitlements should reflect her actions. It also employs the concept of the social contract in a manner that restricts, rather than expands, access to entitlements. However, for rea-

61. Gewirth, supra note 26 at 42 [emphasis added]. Gewirth explains how the unfairness of receiving “something for nothing” supports a duty to work at 223, 231-35. This position is somewhat softened elsewhere in the book at 121.
63. Ibid. at 65-66.
65. Rosanvallon, supra note 35 at 28.
sions explained in the following section, conditions on rights unrelated to the benefit may “curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness.” Requirements of germanness and equality are circumvented when the contract mechanism is “being used increasingly in the regulation of social relations between citizens and the state.”

As is well known, behavioral conditions existed in post-Poor Law programs prior to recent reforms. But the British “actively seeking work” criterion lapsed after less than a decade, and that the conditions placed on benefits in the United States in 1967 required further legislation to overcome administrative uncase about enforcement. Indeed, the Special Task Force to the Secretary of Health, Education and Welfare wrote in 1971: “It is not even clear that anyone other than the mother has the legal or moral right to make that decision [whether or not to accept a job offer—APF] or that anyone other than the mother can make the decision that is best for her and her children.” Arguably, the reservation from such conditions was attributed to serious regard for equal citizenship and welfare rights. Since rights, if taken seriously, limit the conditions that may be placed between the individual and the interest that the right serves, efforts to instantiate harsh conditions had to be quickly abandoned.

Welfare reforms since 1980, however, do not encounter similar obstacles. Years of small austerity measures and changes in program eligibility have made a cumulative impact that shifted the post-war emphasis on universal entitlement towards an adoption of reciprocity as the unifying, central principle of social welfare and have transformed welfare rights (and perhaps social rights in general) to “negotiated claims.” Governments have been “trying to reconstruct social exchange on an increasingly individualistic basis, implementing a contractual reciprocity on a territorial level, and leaving aside universal rights.” When announcing the new Jobseeker’s Allowance policy, the British government stressed the link between the right to benefits and claimants’ responsibilities, and stated that the latter would take concrete form in the obligation to take up work. Emphasis was placed on fulfillment of duties as a precondition to welfare rights while the government “reformulated welfare as mutual individual responsibility.” This curtailment of the social citizenship ideal is detected both in American and in British welfare reform,

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67. Hirst, supra note 66.
68. Vincent-Jones, supra note 59 at 319.
69. Cited in Gewirth, supra note 26 at 128, n. 27.
73. Freedon, supra note 31 at 49. The Labour Commission on Social Justice rejected the idea of an unconditional basic income and preferred a model that offered an “ethic of mutuality” that had at its centre a “balancing of rights and responsibilities”: Social Justice Strategies for National Renewal (London: Vintage, 1994) at 232; Peter Dwyer, Welfare Rights and Responsibilities (Bristol: Policy Press, 2000) at 5-8; Harris, supra note 2 at 28.
has led social security law scholars to ask if the welfare state should be seen as merely a phase in the evolution of social policy, and one which is nearing conclusion. 75 Stuart White identifies the contractual paradigm as the dominant theme in both American and British welfare reform:

\[\text{... access to welfare benefits is one side of a contract between citizen and community which has its reverse side various responsibilities that the individual citizen is obliged to meet; as a condition of eligibility for welfare benefits, the state may legitimately enforce these responsibilities, which centrally include the responsibility to work.}\]

White realizes that welfare contractualism violates the traditional understanding that rights “have the quality of unconditionality”77, where “unconditionality” implies that access to the rights is not conditional upon fulfillment of responsibilities. Though he avoids the implications of this new construction in the ensuing discussion, it is important to note that this construction is not only theoretically striking, but that it also affects the conditions that may be legitimately placed on benefits.

**The Consequences of Conditionality**

It has been argued that this construction of welfare rights as conditional has led welfare debates to be conducted and decided as matters of policy78 or politics79 rather than rights. However, these realms are not usually seen to exclude consideration of rights. On the contrary, principles establishing rights “may be among the fundamental principles governing all political action.”80 So what seems to underlie this concern is that debates over welfare reform are held without granting weight to considerations that should emanate from rights such as the right to welfare and the right to work.81 This is done, I suggest, by embracing a “more discursive view of rights ... rather than by appeal to fixed principles.”82 Hence, welfare rights do not figure as an independent consideration that should have an effect on policy decisions, but rather as a reflection of the policy, or philosophy, already established. Welfare rights reflect the balance of interests instead of having a significant impact on this balance. For example, it has been argued that the “entitlement on which the right is based falls within a calculation of reciprocity and compensation. Thus, the disabled veteran or the war widow can be said to have a claim on society since

75. Harris, supra note 2 at 3.
77. Ibid. 509.
80. Raz, supra note 6 at 217. Also, Ronald Dworkin, “Rights as Trumps” in Waldron, supra note 16 at 153.
81. This is also made clear by the fact that the most important decisions protecting recipients have centered on the violation of other established rights, such as freedom of religion (Sherbert v. Verner 374 U.S. 398 (1963) [Sherbert]) or freedom of movement (Shapiro v. Thompson 394 U.S. 618 (1969)).
82. Cox, supra note 70 at 10.
they have, in fact, given something for it." They may be implied here, then, that a needs-based claim (due to disability or poverty) would be weakened if nothing would have been given in return.

Ronald Dworkin views this "balancing" model as "indeffensible" since it "threatens to destroy the concept of individual rights." The European Court of Justice reached a very similar conclusion. The ECJ stated that British legislation that made the right to paid annual leave conditional upon 13 weeks of employment with the same employer amounts to an impermissible precondition on access to the right:

although they are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, by prescribing the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed, Member States are not entitled to make the existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever.

The contractual discourse manages to create a unique "is-ought" reposement, namely: "if this is what policy makers have decided to demand from beneficiaries, it is doubtless what ought to be demanded from them. This is, ex hypothesis, what their welfare rights entail." Instead of operating in an a-contextual, rule-like mode, welfare rights operate in a "variable, contextual, particularistic manner." This position, if left unchallenged, would leave the use of rights "conceptually redundant." It has been suggested that this reconfiguration of rights reflects on the concept of social citizenship itself, which is comparably changed "from status to contract" and, more ominously, that once rights "lose their unconditional quality, the door is open not just for the invisible hand of the market... but above all for the visible hand of rulers who tell people what to do when."

It is noted that this modification also bears on the possibility of external (judicial or other) review. Richard Epstein suggests, and proceeds to deny, that the logical conclusion of a contractual construction of welfare programs is that they are beyond review. Epstein's suggestion, however, is more convincing than his rebuttal. If benefits are understood simply as a contract between the state and (some of) its citizens, how can any external criteria be relevant? The state offers the benefits, and the potential beneficiary may accept or reject them, along with the conditions attached. And, indeed, Mead candidly states that

both states and recipients... need not accept the grants, but neither may they demand

83. Rosanvallon, supra note 35 at 79.
84. Dworkin, supra note 21 at 199 [emphasis added]. See also page 92.
86. Harel, supra note 49 at 111.
88. Handler, supra note 60 at 203.
them without conditions... This strong constitutional position has meant that requirements like work tests are difficult to challenge in court.\textsuperscript{91} What we lack, therefore, is a substantive baseline. Market-based negotiations amongst members of the community require only a thin baseline which would not permit enforcing contractual terms that are, for example, illegal, immoral or exploitative to an inordinate degree.\textsuperscript{92} But, a social contract that settles for such a baseline leads to problematic consequences insofar as impoverished members of the community are concerned. Rawls was aware of this problem and sought to remedy it by offering a baseline of substantive equality from which negotiations begin. Gauthier’s conceptualization of a thin baseline,\textsuperscript{93} and Buchanan’s affirmation that there is “no necessary basis for any initial agreement” prior to the assignment of rights, both rely on market-based procedures for the construction of morality and rights. From this outset it is natural to conclude that one’s entitlement corresponds to her contribution. Moreover, the market-based paradigm would morally permit that those with extensive economic resources may purchase exemptions from social obligations.\textsuperscript{94} It is submitted here that adherence to a traditional conceptualization of rights that derives from values that are unrelated to behavior would yield a different set of conditions than those exhibited in current welfare-to-work programs.

D. Conditioning Rights: A General Perspective

It has been shown that the construction of welfare rights as conditional is not without practical implications. Amongst these implications are the severe conditions that are sometimes placed on welfare benefits, in a manner that affect many rights, in addition to the right to welfare. It is important, therefore, to inquire to what extent other rights of welfare claimants may be limited when claimants apply for benefits. This section considers some of the efforts to map a theory of “illegitimate conditions”\textsuperscript{95} insofar as they relate to conditions placed on welfare benefits through welfare-to-work programs. The vast breadth of situations that a doctrine of illegitimate conditions covers could “literally suggest a unifying theory cutting across all of constitutional law.”\textsuperscript{96}

In effect, all rights that are not absolute may be limited upon implementation. Thus, Justice Holmes cleverly asserted that a policeman’s discharge for political

\begin{thebibliography}{99}
\bibitem{91} Mead, \textit{supra} note 32 at 170, n. 71.
\bibitem{94} Cox, \textit{supra} note 70 at 12.
\bibitem{95} The terminology is my own. In American jurisprudence the doctrine is termed “unconstitutional conditions”.
\end{thebibliography}
speech was justified on the grounds that, though he “may have a constitutional right to talk politics . . . he has no constitutional right to be a policeman.” But the shrewdness cannot obscure the conclusion that, justified or not, the plaintiff was sanctioned for exercising his right to free speech. Hence, an absolute right to free speech, for example, would not allow such sanction, regardless of the plaintiff’s right (or lack thereof) to be a policeman. So we find that even the “classic,” unconditional rights (i.e. not subject to behavioral preconditions), may be conditioned, or limited, when conflicting with other social interests. We may say that the general formulation may be stated as follows:

X is entitled to a benefit (B) subject to condition (C) that relates to his right (R).

The previous section, then, dealt with the weakening of B from a supposed fundamental right (to welfare) to a conditional benefit. And so, the more that B is perceived as conditional the fewer conditions placed upon it are subject to review insofar as the benefit is concerned. And yet, what of the other half of the formulation, the unconditional, uncontroversial right (R)? While the entitlement to welfare benefits in itself may permit, arguendo, a wide array of conditions, requiring the claimant to declare that she does not intend to overthrow the government by unlawful means or to forsake her day of rest may prove to be an illegitimate restriction on the right to free speech or to freedom of religion, respectively. To make matters clear, we should distinguish the situation under investigation from several similar, but distinct, legal dilemmas.

First, we find the situation where X is entitled to enjoy a right (R1) subject to the condition (C) that relates to another right (R2) that he is normally entitled to. Thus, we may imagine a situation in which the right to vote is subjected to a loyalty oath. This situation is distinct from the one under discussion because the doctrine of illegitimate conditions is concerned with areas where a government is permitted to act but is not required to do so. Contrariwise, in this case, it would be necessary to place under scrutiny both the fact that the right to vote is subject to a condition and the fact that a loyalty oath is demanded. Indeed, if welfare rights are seen as fundamental legal rights, a similar analysis would have to take place in this case as well. However, if, as in our original formulation, the right R1 is actually a discretionary benefit B, a different range of considerations apply.

Second, it should be emphasized that when considering conditions (Cs) placed on rights, we are dealing with behavioral conditions. In other words, these are conditions where the individual has a choice whether to act in one way or another. So while X’s right (to free speech, to freedom of religion) is under threat, X may

99. Sherbert, supra note 81.
102. Sullivan, supra note 100 at 1426.
refuse to relinquish the right and thus (if the condition is legal) to forego the benefit related to it. Contrariwise, a benefit granted only to members of a certain race, sex or nationality may be considered by certain accounts to be “conditional” and presumably a violation of an individual’s right to equality and dignity.\textsuperscript{103} In sum, antidiscrimination doctrine is concerned with who you are; unconstitutional conditions doctrine is concerned with what you do.\textsuperscript{104} And so, matters concerning the immutable status of individuals, and distinct from their choices, do not figure in the analysis presented here. One may argue that the decisions that welfare claimants are required to make are choices “between the rock and the whirlpool.”\textsuperscript{105} For the purpose of the following analysis, however, the physical possibility of making a choice should be a sufficient reason to examine the condition placed on the benefit within the general schema. Indeed, “a choice between evils, however undesirable, is not by itself coercive.”\textsuperscript{106}

I begin by explaining why the two original attempts to propose a theory for a doctrine of illegitimate conditions, along with a more contemporary approach, contain fundamental flaws that render them inapplicable in any context. I refer to these three as the Greater/Lesser approach, the Direct/Indirect distinction and the Threat/Offer distinction. I then move to discuss the strengths and weaknesses of three other approaches that, though perhaps not compelling in all realms of law, may be utilized when considering the conditioning of welfare benefits. These are the Germaneness requirement, the argument from Equality and the Fundamental Rights consideration.

i) The Greater/Lesser approach: This view is associated with Justice Holmes’ proposition according to which “even in the law the whole generally includes its parts.”\textsuperscript{107} This statement conveys the notion that if a state has “absolute arbitrary power”\textsuperscript{108} to withhold a social program in toto, it stands to reason that it can implement the program under conditions as it sees fit. And, if the alternative to the conditioned program is no program at all, thus making the conditioned-program situation Pareto superior—how can one claim an infringement of rights?\textsuperscript{109} The only limits on such conditions would be similar to those which relate to regular contracts such as adherence to the rule of law and to public policy.

The falsehood of this approach, however, lies in its tendency to equate factual situations with legal concepts. In other words, though the whole may include its parts in law as well, the “whole” and the “parts” of legal power (regulation, sanctions) are often different from the whole and the parts of the substance matter to which the legal power is applied (the workplace, provision of housing, criminal

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\textsuperscript{104} Lynn Baker, “The Prices of Rights” (1989) 75 Cornell L. Rev. 1185 at 1189.
\textsuperscript{105} Frost & Frost Trucking Co. v. Railroad Commission of California, 271 U.S. 583 (1926) at 593 [Frost].
\textsuperscript{106} Sullivan, supra note 100 at 1436.
\textsuperscript{107} Western Union Telegraph Co v. Kansas, 216 U.S. 1 at 53 (1910); see also Davis v. Massachusetts, 167 U.S. 43 (1897).
\textsuperscript{108} Western Union Telegraph, supra note 107 at 54.
\end{flushleft}
law). Though the state’s decision to withhold (or withdraw) a privilege has a greater impact on a larger number of people (the “substance matter”), the scope of the legal power it uses is actually smaller.\footnote{Thomas Powell, “The Right to Work for the State” (1916) 16 Colum. L. Rev. 99; J. French “Unconstitutional Conditions” (1962) 50 Geo. L. Rev. 234 at 236-37; Kenneth Simons, “Offers, Threats and Unconstitutional Conditions” (1989) 26 San Diego L. Rev. 289 at 293; Robert Goodin, “Support With Strings” (2004) 21 J. Applied Phil. 297 at 299.} When the state refrains completely from acting in certain areas (such as social security, welfare, medical aid) and avoids even the regulation of the sphere, the decision will presumably affect a significant population. On the other hand, the more the state regulates the more legal power it actually uses. This is because focused actions have an impact on values that are not touched by omission. Thus, we may not deduce from the state’s power not to engage in public employment the right to exclude certain groups from public employment, as only the latter gives rise to issues of equal protection of the law.\footnote{Powell, supra note 110 at 108-10.} And an employer’s right to lay off employees in times of financial difficulty has no bearing on her ability to let employees retain their job on condition that wages be cut below minimum wage requirements.\footnote{John Garvey, “The Powers and the Duties of Government” (1989) 26 San Diego L. Rev. 209.} In these cases the putative “lesser” power has an impact on fundamental values that the supposed “greater” power does not. It is, therefore, a different power that seeks independent justification.\footnote{Note, “Unconstitutional Conditions” (1960) 73 Harv. L. Rev. 1595 at 1609; Alexander, supra note 100 at 178.}

ii) The Direct/Indirect distinction: If the previous approach would tend to affirm most conditions placed on benefits, the Direct/Indirect distinction would, if accepted, lead to striking down most of them. The premise of the argument is that if the state is not permitted to directly violate an individual’s right, it may not condition a valuable benefit on the requirement that a person would act in a manner that would have the same effect. “It is inconceivable,” the United States Supreme Court stated, “that guarantees embedded in the Constitution of the United States may be manipulated out of existence.”\footnote{Supra note 105 at 593-94.} And indeed, if we are not willing to accept criminal sanctions laid upon church goers for abiding their faith, what reason would we have for condemning a more tacit approach, whereby people proclaiming to forego their habits would be offered financial incentives, or people refusing to do so would have their welfare benefits reduced? But it is only the extreme nature of this example that suggests that the theory as a whole seems an attractive one.

A liberal society is highly suspicious of government efforts to criminalize acts that the government would prefer that individuals not undertake. But as the modern welfare state is routinely involved in a wide range of areas, it is evident that it may advance certain values according to a preferable set of priorities. These two assertions create the valuable gap between what the government views as the right way to act and between an individual’s right to act in a manner that she sees fit. Therefore, a decision by the Ministry of Culture to promote classical music by offering scholarships to talented young rap artists who are willing to abandon their musical preference and focus on Bach may be problematic to some, but it is distinct
from legislating against rap artists. though it is true that the indirectness of the sanction does not legitimize a condition, the distinction between a direct prohibition and an indirect incentive (or disincentive) is still an important one.

iii) the threat/offer distinction: this approach suggests that a proposal that would worsen a person’s condition if she declines to accept it should be categorized as a threat, and therefore forbidden; while a proposal that may improve the person’s condition if accepted is an offer, and therefore permissible. an offer is a positive governmental act because it widens the range of choices open to an individual, while a threat narrows her range of choices. but one must ask: improving or worsening an individual’s range of choices in relation to what? kenneth simons, for example, suggests a baseline test that is based on the action the government would have taken if it had not been permitted to attach the condition to the offer. giving the example of welfare benefits and work requirements, he states:

   a work requirement that served as an eligibility condition on government welfare benefits would be considered a pure threat under the unmodified test, unless the government considered the condition so critical that government would drop the welfare program entirely rather than drop the condition.

the idea to defer to government’s sine qua nons is unacceptable, however. a criterion for a normative baseline cannot be that the government would otherwise abolish a program altogether. the fact that a government would abolish slavery only on the condition that former slaves wear tags so as to enable government to keep track of them does not mean that one should accept the baseline of slavery and move on from there. a public housing program to poor couples only on condition that they marry is similarly problematic, even if the government adds that it would prefer abolishing the program altogether than condoning cohabitation in sin.

iv) the germaneness requirement: why does a fee for a marriage license seem legitimate? presumably, it is because the requirement is so closely related to the benefit. is it possible, then, to deduce a general rule, namely: the closer the relationship between the condition and the benefit the better? this is the rationale behind the germaneness requirement. like the direct/indirect approach, this requirement also stems from the fear that rights will be “manipulated out of existence.” in comparison, however, the germaneness requirement proposes a legislative check that is more attuned to the context and particularities of public (as distinct from criminal) law. the flexible nature of public law in thus manifested in the formulation: “the more germane a condition to a benefit, the more deferential the review; nongermane conditions, in contrast . . . trigger closer scrutiny.” two rationales support this approach: a check on the legislative process and a check on state

116. see, e.g., simons, supra note 110.
117. kreimer, supra note 115.
118. simons, supra note 110 at 312.
119. ibid. at 292.
120. interestingly, goodin notes that traditional social contract theorists (hobbes, locke and grotius) justified slavery in very similar terms. see goodin, supra note 110 at 299.
121. sullivan, supra note 100 at 1457.
power. As a check on legislative process, the Germaneness condition limits irresponsible (and corrupt) “logrolling” and strategic voting—the practice of trading votes that leads to seemingly irrational conditions, unrelated to the benefits. As a check on state power, the Germaneness requirement limits the range of legitimate conditions that may be attached to benefits and thus controls the range of potential encroachments on fundamental rights. Furthermore, unlike the dichotomous Threat/Offer distinction, the Germaneness requirement does not offer a mechanical test, but rather a rule of thumb, a warning flag that may raise suspicion under certain circumstances. Thus, the implication of the theory is not that German conditions are inherently benign, but rather that they are less likely to be malign.

v) The Argument from Equality: It may be worth rehearsing that a condition that disqualifies persons based on an their immutable characteristic, as opposed to presenting a choice of action, is related to the present discussion by name only. They are more naturally discussed within the confines of equality and discrimination in the strict sense. Conditions investigated here presume the existence of a choice open before the individual to act in one way or another. What, then, could be the place of equality in this analysis? Kathleen Sullivan, for example, states that all conditions “necessarily discriminate facially between those who do and those who do not comply with the condition.” In effect, equality meets the illegitimate conditions doctrine at two intersections: the first concerns the distribution of the right and the second concerns the distribution of the benefit.

First, one may argue that all conditions on a certain right are discriminatory, in the sense that they violate the equal distribution of the right (or the sanction) amongst members of the society. So denying food stamps to striking workers discriminates against workers who are in need and thus cannot afford to strike without the benefit of a safety net. Access to the right to strike, then, is not distributed equally.

This approach, however, is not unproblematic. When dealing with benefits that have an important economic value, the argument that conditioning rights indirectly discriminates between those who “have” and those who “have not” draws the line of economic means. This argument has not gone well with the courts. It is difficult for the judiciary to quash social programs that, due to background economic inequality, will lead to different people being treated differently. If taken ad absurdum,

122. Ibid. 1469-73.
123. Cf. ibid. at 1476.
124. For such conditions see Baker, supra note 104 at 1189.
125. Ibid. 1490-99.
127. Barry, supra note 64 at 152-53.
129. For two exceptions in the United States see Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) [poll tax struck down] and McDonald v. Board of Election Commissioners, 394 U.S. 802 at 807 (1969), where the Court stated in dictum that “a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race.”
130. Baker, supra note 104 at 1219.
such an extreme proposition would demand that all public, and some private, commodities be distributed free of charge, thus creating not only a legal obligation for free education and health care but also the basis for the argument that an individual’s unique financial power to publish a newspaper is a violation of the distribution of free speech; and that one’s capacity to travel abroad while others cannot leave their own city should be analyzed in terms of distribution of the right to travel. But, despite the fact that such an argument should be employed cautiously, the extreme examples should not obscure the danger of creating a “constitutional caste” of poor individuals who sell fundamental rights, such as marriage and bodily integrity, while these rights are enjoyed by more affluent members.

The second perspective observes the impetus of equality while focusing on the equal right to enjoy the benefit. Even without categorizing the benefit as a right, it may be argued that once the government decided to grant the benefit, it created a new baseline, and distinctions between beneficiaries should be strictly monitored. This approach seems more promising, since the relevant individuals share a common economic background. Therefore, the purported distinction between members of this group is not based on their different economic situation but on other features, such as marital status, that are more controversial when suggested as relevantly distinguishing between individuals. So the state may be understood to be saying, in essence, that all impoverished individuals are entitled to benefits, apart from those cohabiting without marriage, for example. One may then argue that a public policy that distinguishes between recipients of benefit on such a basis violates the obligation not to promote any particular comprehensive doctrine.

vi) Consideration of Fundamental Rights: This argument focuses directly on the fact that through the employment of illegitimate conditions, fundamental rights are put at risk. It has been proposed that constitutional rights are similar to any other valuable commodity and should be allowed to be sold if an individual finds that it would improve her condition. However, several authors have countered that fundamental rights are inalienable and cannot be sold away. The basis for this argument varies, and includes the paternalistic attitude not to trust people’s assessment of long-term risks; an argument from personhood according to which some things are not for sale; and a law and economic analysis that states that inalienability amends market failures that result from transaction costs or collective action problems.

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131. Sullivan, supra note 100 at 1497-99. See Justice Marshall’s emphatic dissent in Harris v. McRae, 448 U.S. 297 (1980) at 338 where the challenged legislation was described as “the product of an effort to deny the poor the constitutional right recognized in Roe v. Wade.”


134. Frost, supra note 105 at 594.


137. Michael Walzer, Spheres of Justice (Oxford: Blackwell, 1983) at 100-03.

Kathleen Sullivan presents a persuasive reply to each of these grounds for inalienability. In short, paternalism and personhood seem ironic bases for rights that purport to advance and protect choices, since they are strategies that advance an objective that would limit personal choice. Efficiency is an ideological collective value, which when used to justify autonomy rights, seems to reverse means and ends. But when she deals with what she finds as the most persuasive rationale for inalienability, that of distributive justice, Sullivan delivers the most damning critique to the project in general. When relating to the doctrine of illegitimate conditions, the theory of inalienability, she argues, asks the wrong question. Illegitimate conditions problems do not investigate whether a fundamental right is alienable in general, but rather whether it may be relinquished to the government. So what is required is “not a general theory of blocked exchanges, but a particularized theory for determining when to block surrender of preferred constitutional liberties to government.”

Though theories of inalienable rights may not be satisfactory in general, they are important reminders that illegitimate conditions formulations may have an adverse impact on fundamental rights despite the fact that they managed to sift through the safeguards presented above. In such cases, courts have focused directly on the suppression of fundamental rights using traditional constitutional law approaches. And, indeed, it is important to allow a theory investigating the structure of illegitimate conditions to also inquire directly what impact they have on fundamental rights.

We find, then, that the argument from equality, the germaneness requirement and the consideration of fundamental rights all offer useful platforms for the analysis of illegitimate conditions. More importantly, their flexibility and ideological basis suggest that they are promising tools for the development of a more contextual theory that concerns the conditioning of welfare benefits.

Conclusion

This paper sought to show that the relationship between rights and duties, though complex and changing, cannot be used in a manner that detracts from the place that rights hold in social debates and legal decisions. The strengths and weaknesses of the interest and choice theories offered a useful starting point for the investigation. As even Hart accepted, the flaws of the choice theory bar it from serving as a general platform for the analysis of rights and duties. And yet, its critiques of the interest theory remain. Noteworthy amongst these critiques is the fear that, first, turning to collective interests when deciding what rights exist and, second, incorporating the idea of duties in the definition of rights both bring rights and duties too close together, thus threatening the independency of rights and undermining the place

139. Sullivan, supra note 100 at 1486-90.
140. A similar argument is advanced by Richard Epstein in his “Foreword”, supra note 93 at 12-13.
141. Sullivan, supra note 100 at 1489.
that rights should have in practical reasoning. This, it was stressed in the first two sections, is not a necessary character of the interest theory, but may well be an explanation for the current popularity of the idea that there are “no rights without responsibilities.”

The following sections investigated the foundations and implications of the claim. The third section served as a bridge between the first two sections and the concluding section. On the one hand, it continued the jurisprudential emphasis, introducing the idea that increased conditionality could curtail rights in a manner that has the potential to deprive them of their effectiveness, both in the process of considering a proper social policy and at the stage of judicial review. On the other hand, it delved into the doctrinal by showing how contemporary welfare-to-work programs increasingly construct welfare rights on the fulfillment of duties. The emphasis on reciprocity as a governing ideal in current reforms provided an opportunity to introduce a wide array of obligations as preconditions for welfare claims. The fact that the same obligations were not accepted in the “classical” era of the welfare state suggests that we are witnessing a break with the tradition that held that X’s rights entail that only someone else, and not X, is under a duty. The final section then investigated the ideas that inform the doctrine of illegitimate conditions towards a theory that befits the context of welfare-to-work programs.

All four sections of this paper, then, have one overarching idea in common: the threat that the paradigm underlying current social policy poses to the rights of claimants.

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143. Kramer, supra note 4 at 43.