An Offer She Can't Refuse: When Fundamental Rights and Conditions on Government Benefits Collide

Marie A. Failinger

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AN OFFER SHE CAN'T REFUSE: WHEN FUNDAMENTAL RIGHTS AND CONDITIONS ON GOVERNMENT BENEFITS COLLIDE

MARIE A. FAILINGER†

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INTRODUCTION

As one of many troubling New Deal issues brought to the Supreme Court, the question of the limits on government's power to impose conditions on receipt of its benefits has received primarily technical attention. The Court, at first eagerly but recently more grudgingly, has invalidated benefit conditions on statutory grounds1 and has partially ameliorated such conditions by requiring due process protections such as written standards for benefits2 and rights to a hearing.3 However, the Court has rarely


Between 1976 and 1980, however, the Court overturned 19 of 24 successful lower court challenges to welfare rules. See, e.g., Califano v. Yamasaki, 442 U.S. 682 (1979) (due process does not require notice and oral hearing before recoupment of benefits); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (group does not have standing merely because dedicated to promoting access of poor to health services). The grudging response of the Burger Court to constitutional claims in welfare cases has been documented by at least one commentator. See Binion, The Disadvantaged Before the Burger Court: The Newest Unequal Protection, 4 Law & Pol'y Q. 37, 52-58 (1982).

2. See, e.g., White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (welfare recipients have right to eligibility determinations based on written standards); Baker-Chaput v. Cammert, 406 F. Supp. 1134 (D.N.H. 1976) (same).

3. See, e.g., White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (welfare recipients have right to written denial/termination, notice of rights to hearing, and pretermination hearing); Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973) (same); Goldberg v. Kelly, 397 U.S. 254 (1970) (AFDC recipients have right to due process hearing); accord, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (customer has right to hearing prior to curtailment of service). But see Mathews v. Eldridge, 424 U.S. 319 (1976) (due process provided by Social Security Administration sufficient; pretermination hearing not required).
elaborated a doctrine for distinguishing among such conditions, nor has it coherently articulated the values at stake in conditions statutes.

Two of the first major attempts to create a constitutional doctrine for judging benefits conditions in New Deal programs emerged in *Maher v. Roe* and *Harris v. McRae*, decided by the Court in 1977 and 1980. While *Maher* and *Harris* might have been distinguished on their facts from some of the earlier conditions cases because they involved a unique public debate about the moral and legal rights of pregnant women and fetuses, the Court has not chosen to distinguish them. In fact, the Court has employed parts of the *Maher/Harris* doctrine in other contexts, most recently in *Selective Service System v. Minnesota Public Interest Research Group* and *Bowen v. Roy*. *Selective Service System* is notable for its


7. Since the decision in *Roe v. Wade*, 410 U.S. 113 (1973), the federal courts have been faced with continuing abortion controversies over state procedural restrictions on abortions. See, e.g., *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (requirements that abortions be performed in hospitals, that fetal remains be disposed of and that there be a waiting period prior to abortion); *H.L. v. Matheson*, 450 U.S. 398 (1981) (requirement that parents be notified of pending abortions of minor); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (requirement that parents of minor consent prior to abortion); *Friendship Medical Center v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975); *Women's Health Servs. v. Maher*, 482 F. Supp. 725 (D. Conn. 1980) (requirement that life of mother be in jeopardy), *vacated and remanded*, 636 F.2d 23 (2d Cir. 1980).

8. 468 U.S. 841 (1984). In *Selective Service System*, an amendment to Title IV of the Higher Education Act of 1965 declared ineligible for Title IV assistance any person required to register under the Selective Service Act who failed to do so. *Id.* at 844 (citing Pub. L. No. 97-252, § 1113(2), 96 Stat. 718 (1982)). A regulation, issued thereunder, required that registrants attest to their compliance with, or exemption from, draft registration requirements in writing prior to receipt of college financial aid. *Id.* (citing 34 C.F.R. § 668.24(a) (1983)). Students who failed to register as required challenged the amendment, arguing unsuccessfully that § 113(2) constituted a bill of attainder in violation of U.S. Const. art. I, § 9, cl. 3, in that it punished non-registrant students as a class for past conduct without the protection of a trial. *Id.* at 846-47.

More importantly for this article, plaintiffs also claimed that the statute forced them to confess to the fact that they were not registered in the Selective Service System if they were in need of financial aid to attend college, thereby violating their privilege against self-incrimination as protected by the fifth amendment. *Id.* Although the district court found in favor of the non-registrants on both issues, the Supreme Court reversed. *Id.* at 859.

9. 106 S. Ct. 2147 (1986). In *Bowen*, Native Americans sued the secretaries
apparent expansion of the *Maher/Harris* doctrine,\(^\text{10}\) because it portends a major shift from the protection which the Court had

of the Pennsylvania Department of Public Welfare, the Department of Health and Human Services, and the Department of Agriculture. *Id.* at 2150. They sought to enjoin these departments from providing their daughter, Little Bird of the Snow, with a social security number and from using that number in connection with benefits she received under the aid to families with dependent children and food stamp programs. *Id.* Plaintiffs argued that provision or use of such a number would violate their religious beliefs by robbing their daughter of her spirit and her ability to protect herself against evil from the use of the number. *Id.* The Court split on whether the controversy was moot because the child had already been assigned a social security number. *Id.* at 2149. A plurality agreed that plaintiffs could not force the government not to use the number for her. *Id.* at 2153. A majority, however, appeared to believe that the government could not force plaintiffs to use the number in their applications and other communications with the welfare department. *Id.* at 2152.

Significantly, in part III of the plurality opinion, which follows the *Maher* argument, Justice Burger was joined only by Justices Powell and Rehnquist. *Id.* at 2149. Four Justices, including Justice O'Connor who wrote one of the concurring/dissenting opinions, repudiated this argument in several respects. *Id.* For a discussion of the plurality opinion, see infra notes 58-61 and accompanying text. For a discussion of Justice O'Connor's opinion; see infra notes 62-63 and accompanying text.

10. *Maher, Harris, Selective Service System* and cases following Sherbert v. Vernon, 374 U.S. 398 (1963), present somewhat different factual dilemmas. In *Maher and Harris*, government benefits were withdrawn because a woman was attempting to exercise her right to abort, in order to prevent, discourage or make it difficult for her to exercise that right. *See Harris*, 448 U.S. at 303; *Maher* 432 U.S. at 467. In *Sherbert* and its progeny, the government attempted to withdraw benefits despite the fact that such withdrawal would burden or prevent a person from exercising his right in a certain way, not in order to prevent such exercise. *See Sherbert*, 374 U.S. at 401. For a discussion of *Sherbert*, see infra notes 12 & 18 and accompanying text. For a discussion of cases following *Sherbert*, see infra note 11.

In the suspect classification cases (i.e., those that fall within a limited category of disadvantaged classes, such as that in *Harris*), the Court has distinguished prohibited from nondiscriminatory choices on precisely this basis. *See Harris*, 448 U.S. at 312-14. One can assume prohibited purpose if the legislation was chosen in whole or part because of adverse effect on the protected class rather than in spite of that effect. *See*, e.g., Personnel Admin. v. Feeney, 442 U.S. 256, 274, 279 (1979) (absolute lifetime employment preference to veterans upheld). Curiously, the Court in *Sherbert* appears to give more protection to the rights-exerciser when the state selects its course of action in spite of its adverse effect on the exercise of the right. *See Harris*, 448 U.S. at 297; *Maher*, 432 U.S. at 464; *see also Selective Seru. Sys.*, 448 U.S. at 862-66 (Marshall, J., dissenting).

*Selective Service System* is in some ways different from either of these lines of cases because the need for the individual to exercise his fundamental privilege against self-incrimination arises only because the government has withdrawn his benefits; but for that withdrawal, he probably would not have had to choose to exercise his right. However, as in the *Sherbert* line of cases, government chooses to withdraw benefits to discourage an unprotected activity, knowing that the consequence of that choice will be to compel the affected individual to choose between having the benefit and exercising his fundamental right as he would otherwise choose. *See* Alexander v. Trustees of Boston Univ., 766 F.2d 630, 632 (1st Cir. 1985) (draft registration certificate not *ultra vires* or violation of free exercise clause).
previously accorded recipients impeded in exercising fundamental constitutional rights by conditions imposed upon the receipt of their government benefits.\footnote{11See, e.g., Thomas v. Review Bd. Ind. Emp. Sec. Div., 450 U.S. 707 (1981) (person may not be compelled to choose between first amendment right and otherwise available public program); Branti v. Finkel, 445 U.S. 507 (1980) (same); Elrod v. Burns, 427 U.S. 347 (1976) (government may not force public employee to relinquish right of free association in order to keep job); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (restriction on right to non-emergency medical care based on durational residency requirement not permitted); Vlandis v. Kline, 412 U.S. 441 (1973) (state may not deny student right to prove residency); Perry v. Sinderman, 408 U.S. 593 (1972) (may not deny public employment on basis of constitutionally protected free speech rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (residency requirement for welfare benefits violates fundamental right to travel); Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification for unemployment benefits due to refusal to accept work in violation of religion imposes unconstitutional burden on free exercise of religion); Speiser v. Randall, 357 U.S. 513 (1958) (invalidating discriminatory denial of law exemption as limitation on free speech); see also Planned Parenthood Ass'n v. Kempiners, 700 F.2d 1115 (7th Cir. 1983) (act disqualifying all agencies that counsel or refer for abortion from grants imposes unconstitutional penalty); Valley Family Planning v. North Dakota, 489 F. Supp. 238 (D.N.D. 1980) (invalidating criminal statute preventing government funding for family planning by person or agency that performs, refers or encourages abortion; state cannot indirectly inhibit exercise of constitutional right nor require recipient to surrender right to obtain benefit); see also Waters v. Chaffin, 684 F.2d 833, 836 (11th Cir. 1982) (police captain cannot be demoted for off duty epithets); Owens v. Rush, 654 F.2d 1370 (10th Cir. 1981) (dismissal of undersheriff for assisting wife in pursuing sex discrimination claim constitutes penalty); Robinson v. Reed, 566 F.2d 911, 913 (5th Cir. 1978) (requirement to attend race relations seminar constitutes violation of right to privacy); Lewis v. Delaware State College, 455 F. Supp. 239, 249 (D. Del. 1978) (refusal to renew dorm director's contract because of her illegitimate child violates constitutional rights since it is well established that "conditions and qualifications upon governmental privileges and benefits that tend to inhibit constitutionally protected activity are invalid") (citing Sherbert v. Verner, 374 U.S. 398, 404 n.6, 405-06 (1963)); see generally Simpson, Abortion, Poverty and the Equal Protection of the Laws, 13 GA. L. REV. 505 (1979) (arguing that welfare scheme upheld in Maher violates equal protection).

The doctrine that government may not condition benefits on a requirement that one exercise his fundamental rights in a particular way has been applied in unusual settings. See, e.g., Gavett v. Alexander, 477 F. Supp. 1035, 1045 (D.D.C. 1979). In Gavett, the court invalidated a federal statute requiring those who wanted the "government benefit" of purchasing Army rifles at cost to exercise their freedom of association in a particular way—by joining the National Rifle Association. \textit{Id.} at 1051. The court held that requiring an individual to associate violated the fifth amendment. \textit{Id.} at 1049. In a footnote, the court noted that "the denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve that which it may not command directly." \textit{Id.} at 1045 n.22 (quoting Elrod v. Burns, 427 U.S. 347, 361 (1976)).

The courts have also generally prohibited government's exaction of fees before persons can exercise fundamental rights unless such fees were necessary to pay for a legitimate permit system. \textit{See}, e.g., Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981) (invalidating permit fee for religious solicitation in public airport), \textit{cert. denied}, 458 U.S. 1124 (1982); Bayside Enters. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978) (invalidating excessive license fee for adult en-
This article criticizes the *Maher/Harris* conditions doctrine on two levels. At the first level, it suggests that the *Maher/Harris* doctrine cannot justify the Court’s decisions to uphold government withdrawals of funding from rights-exercisers. Contrary to the Court’s claims, the doctrine fails to follow previous precedents on benefit conditions beginning with *Sherbert v. Verner*. In those cases, the Court zealously guarded the exercise of fundamental rights even when that exercise was indirectly jeopardized by the state’s conditions on receipt of public benefits. In this first section, definitional distinctions employed by the Court are discussed, such as what kind of recipient’s right is at stake; what “property” is; what it means for the government to “act”; what it means to “penalize” an individual; and what is an “obstacle” in the path of exercising a right. In addition, the article explores possible justifications for conditioning public benefits in general and applies them to the *Maher* and *Harris* cases, suggesting that these justifications, given the larger jurisprudence into which they fit, cannot explain *Maher* and *Harris*.

At the second level, after exposing and contrasting the definitional presuppositions of the Court in *Maher* and *Harris* with previous cases, the article suggests that the *Maher/Harris* doctrine is a failure because it uses utterly inadequate rights theory to resolve emerging issues of conflicting human need and conscience, issues which are mediated by government action. Specifically, the Court insists on viewing the relationship of citizen to government as based on liberty-rights theory and it assumes that the only possible outcomes when conflicts among individuals arise are victories or losses. This precludes satisfactory resolution of all parties’ compelling concerns in important government benefits cases such as the abortion funding cases. While this critique focuses on the abortion funding cases, the article is primarily concerned with the

tertainment business); see also Blasi, *Prior Restraints on Demonstrations*, 68 Mich. L. Rev. 1481, 1527-32 (1970) (prior restraints on demonstrations should be subject to strict constitutional scrutiny).

12. 374 U.S. 398 (1963). In *Sherbert*, the government withdrew benefits despite the fact that such withdrawal would prevent a person from exercising their constitutional rights in a certain way rather than to prevent such exercise. *Id.* at 401. For cases following *Sherbert*, see *supra* note 11.

implications of these decisions for all situations in which government conditions and fundamental rights potentially conflict.

With this critique, I hope to pave the way for discussion of a new framework for adjudicating the role of government when it acts as intervenor among citizens through public benefits choices. This framework, which the article refers to as the “counter-ethic of responsibility,” accords rights-talk an appropriate place. It goes farther, however, by insisting that government and its citizens may be called on even in legal forums to respond to individual needs within the human community.

The issue of abortion rights is among the most legally and ethically troubling of our time. Unless the traditional rights framework is discarded in favor of a new one, such as the counter-ethic, the prospect of reconciling the needs, hopes and values of those who categorically oppose abortion and those who support it (in some or all circumstances) seems particularly dim. Unless society can achieve significant reconciliation on this issue, and on the general question of government’s relationship to the individual in distributing benefits, the role of government in all social efforts to seek a more just and compassionate society becomes ambiguous and perhaps irrelevant.

I. THE MAHER/HARRIS CONDITIONS DOCTRINE: THE CASES AND THEIR SIGNIFICANCE

When the Maher/Harris conditions doctrine was first announced in Maher v. Roe, the Supreme Court opinion denying women a right to government funding for abortions was carefully written to suggest congruence with previous public benefit conditions/fundamental rights cases which the Court had decided.

14. The close division in public opinion on whether abortion should be allowed has been repeatedly noted. National Opinion Research Center surveys show that, between 1965 and 1980, support for legalizing abortion rose significantly. That increase was registered not only for more “acceptable” reasons such as protecting the mother’s health (change from 73% to 90%) or to prevent bearing of defective children (from 59% to 83%), but also simply for the mother’s convenience (from 15% to 47%) or because of social factors such as poverty of the family (from 22% to 52%) or the mother’s unmarried status (from 18% to 48%). The rapidity of the change was especially dramatic among Catholics. See generally F. JAFFE, B. LINDHEIM & P. LEE, ABORTION POLITICS 99-109 (1981) [hereinafter cited as F. JAFFE & B. LINDHEIM].

15. 432 U.S. at 469-79.

16. Id. at 474-75 & n.8. The Maher Court went to some length to distinguish the facts before it from those justifying the “penalty” analysis employed in earlier cases. Id. The Court refused to extend these earlier cases to hold that the mere refusal by the state to pay for a woman’s abortion in any way penalizes
such as Shapiro v. Thompson and Sherbert. In both Maher and Harris, which upheld states' right to withhold Medicaid benefits necessary for poor women to obtain abortions, the Court reiterated that a state may not punish those exercising their constitutional rights, including the right to decide to have an abortion. The Court suggested in footnotes that withdrawal of all Medicaid benefits to women who sought abortions might be a prohibited "penalty" for exercise of constitutional rights, but held that her decision to have an abortion. Id. The Court suggested, however, that a denial of welfare benefits to all women who had obtained abortions and were otherwise entitled to the benefits would justify use of such "penalty analysis." Id.

17. 394 U.S. 618 (1969). In Shapiro, indigent women successfully mounted an equal protection challenge to state statutes which required one year of residence in the state before the women were eligible for AFDC benefits. Id. at 630-31. Rejecting the state's proffered interests in planning, administration, prevention of fraud, encouragement of work, and saving money as justification for the regulation, the Court held that the durational residency requirement, the state's method of achieving those goals, was irrational because it was overbroad. Id. The Court further held that a state may not legitimately seek to "fence out" welfare recipients from its borders, regardless of the means it employs to do so. Id.

18. 374 U.S. 398. In Sherbert, a Seventh Day Adventist challenged a South Carolina statute which provided that persons must be available to work in order to receive unemployment benefits. Id. at 399-400. South Carolina construed this "availability" requirement to mandate that Sherbert accept Saturday work in violation of her religion. Id. at 401. The Court held that the requirement impermissibly infringed on her fundamental right to freely exercise her religion. Id. at 403-06. The Court was unwilling to extend its holding to all persons unemployed and unavailable due to religious convictions, but it did suggest that the interference with the fundamental right at stake, rather than the amount of "harm," was crucial to the decision. Id. at 408-10.

The Court has since reaffirmed Sherbert. See Thomas v. Review Bd., 450 U.S. 707 (1981). In Thomas, the Court held that an employee who refused to be transferred to the munitions-making part of employer's plant because of religious beliefs could not be denied unemployment benefits on the basis that he quit "without good cause." Id. at 709. More recently, the Court invalidated a Connecticut statute which required private employers to grant employees their individually designated Sabbaths as holidays. Since this statute was invalidated because it violated the establishment clause, it did not undermine Sherbert. See Estate of Donald E. Thornton v. Caldor, 472 U.S. 703 (1985).

19. Harris, 448 U.S. at 316-18; Maher, 432 U.S. at 473-76.

20. Harris, 448 U.S. at 317 n.19; Maher, 432 U.S. at 474-75 n.8. This is the Court's "unrelated benefits" distinction which the district court relied on to determine that the strict scrutiny test requiring a compelling state interest is not appropriate where a state required that parents transfer custody of their emotionally ill children to the Department of Social Services before they could be treated in a residential treatment facility. See Joyner v. Dumpson, 533 F. Supp. 233 (S.D.N.Y. 1982), rev'd, 712 F.2d 770 (2d Cir. 1983). The district court did, however, apply an intermediate level of scrutiny to the foster care law and determined that the transfer of custody requirement infringed upon the plaintiffs' exercise of their fundamental right to family integrity, yet served no important state interest justifying such infringement. 533 F. Supp. at 242. The court of appeals reversed, noting that, contrary to the contention of the district court, "a
withdrawal of the means to obtain the abortion itself was not punitive. 21 This "unrelated benefits" distinction between imposing a penalty and withholding benefits has been subsequently used to justify other government failures to fund means useful to the exercise of fundamental rights. 22

However, it was not until Selective Service System that the Court clearly retrenched even on its "unrelated benefits" distinction. 23 While it is unclear whether the elimination of the "unrelated benefits" distinction is a return to old doctrine or an elaboration of new theory, the Court's move is clearly significant for recipients of basic needs benefits who wish to exercise their fundamental rights.

Before discussion of the Maher/Harris conditions doctrine, a brief review of the facts and context of these cases may illuminate the concerns which the Supreme Court attempted to meet in Maher and Harris. The Maher decision was the culmination of widespread efforts by pro-choice advocates and the attorneys of poor women to extend to recipients of AFDC benefits the abor-

21. For further discussion of this proposition, see supra note 16.

22. See, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983). In Regan, the Court upheld denial of plaintiffs' tax exempt status because their activities violated tax regulations. Id. at 551. Justice Rehnquist, writing for the Court, distinguished Speiser v. Randall in which discriminatory denial of tax exemption to veterans who refused to sign a loyalty oath was found to be unconstitutional because the benefit withheld in Regan was directly related to first amendment activity. See id. at 545 (citing Speiser v. Randall, 357 U.S. 513, 518 (1958)). In Regan, Congress "merely" withdrew public support for exercise of the right by withdrawing the tax exemption; it did not deny a benefit to the group because they exercised their constitutional rights. See id. at 546-49; see also Bowen, 106 S. Ct. 2147 (government not required to further religious views of individual); cf. Maryland Pub. Interest Research Group v. Elkins, 565 F. 2d 864 (4th Cir. 1977) (university's reduction on use of student funds for litigation did not violate first amendment, as university had no duty to affirmatively protect that exercise), cert. denied, 435 U.S. 1008 (1978); Valencia v. Blue Hen Conference, 476 F. Supp. 809, 821 (D. Del. 1979) (state has no duty under free exercise clause to provide secular benefits to children attending non-public schools, although it may do so without violating establishment clause), aff'd mem., 615 F.2d 1355 (1980).

23. 468 U.S. at 841. For a discussion of Selective Service System, see supra notes 8 & 10 and accompanying text.
tion choice created by Roe v. Wade.24 In Maher and its companion cases, AFDC recipients challenged state statutes and regulations which prohibited payment for abortions under the Medicaid program.25 Essentially, those statutes and regulations gave welfare mothers with unwanted pregnancies several unpleasant choices. They could carry their children to term and receive the minimal extra per-child payment which state welfare programs would provide them;26 they could attempt to abort themselves;27 they could

24. 410 U.S. 113 (1973); see, e.g., Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974) (state statute excluding nontherapeutic abortions from reimbursement under payments program violated equal protection clause of fourteenth amendment); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974) (state policy precluding indigent pregnant women from receiving abortions paid for with public welfare funds unless abortion was necessary to save life or prevent damage to physical health, regardless of trimester, violated fourteenth amendment); Doe v. Westby, 983 F. Supp. 1143 (W.D.S.D. 1974) (denial of Medicaid benefits to women electing nontherapeutic abortions created classification violative of equal protection clause of fourteenth amendment), vacated and remanded, 420 U.S. 968 (1975), on remand, 402 F. Supp. 140 (1975), vacated and remanded, 433 U.S. 901 (1977); see also Maher, 432 U.S. at 484 (Brennan, J., dissenting) (citing additional cases in which AFDC recipients argued for abortion choice).

25. In Maher, Connecticut's regulation, which provided state Medicaid Funds only medically necessary abortions in the first trimester, was challenged on due process and equal protection grounds. 432 U.S. at 467. The district court upheld the plaintiffs' challenge on both bases, holding that the state violated equal protection by withholding subsidies from those who choose to terminate their pregnancies while providing them to those who choose to bear their children. Id. at 468. The district court further required that procedural standards for both abortion and childbirth payment be similar, invalidating prior authorization requirements and the rule requiring that a woman give her prior written consent to abortion. Id. at 469. On the same day that the Court decided Maher, the Court also held that states were not required to fund abortions under Title XIX of the Social Security Act. See Beal v. Doe, 432 U.S. 438, 446 (1977). The Court also held that a city's refusal to provide nontherapeutic abortion services for indigents at public hospitals under the same conditions as other hospital services did not violate the equal protection or due process clauses of the Constitution. See Poelker v. Doe, 432 U.S. 519 (1977).

26. In 1979, just prior to the Harris decision, AFDC grants for a family of four in fourteen midwestern and northeastern states (which traditionally have paid higher grants than other areas of the country) ranged from $350 in Illinois (about 74% of the federal poverty level) to $531 in Michigan. ILLINOIS RELIGIOUS COMM. ON WELFARE REFORM, THE CONTINUING ILLINOIS WELFARE SCANDAL 8 (1981). In 1981, the grant for a fourth person in the household ranged from $24.00 per month in Mississippi to $90.00 per month in California. CENTER ON SOCIAL WELFARE POLICY AND LAW, MEMORANDUM TO WELFARE SPECIALISTS 11 (January 5, 1981). As current examples, the per person payment for every child beyond the first is limited to a maximum of $60.00 in Indiana. IND. CODE § 12-1-7-3 (1984). In Minnesota, the payment is between $37 and $64, depending on the number of persons in the household. 12 MINN. CODE AGENCY R. § 2044(1)(c) (1984).

27. The Center for Disease Control found little increase in self-induced abortions after the Hyde Amendment, but found that welfare women in illegal states or states where funding has been cut off are obtaining them at later stages,
attempt to get a physician to perform an abortion for free;\textsuperscript{28} they could use AFDC money for an abortion instead of for rent or food;\textsuperscript{29} or they could borrow money from a friend or relative for an abortion, repaying it gradually from their subsistence benefits.\textsuperscript{30}

Plaintiff welfare mothers were initially successful in lower courts in obtaining rulings that state law prohibiting Medicaid payments, even for non-therapeutic abortions, violated their rights under \textit{Roe v. Wade}.\textsuperscript{31} Others won rulings that states were required, under Title XIX,\textsuperscript{32} to pay for medically necessary physician's services, defined by the courts to include abortions.\textsuperscript{33} In \textit{Maher} and \textit{Beal v. Doe},\textsuperscript{34} however, the Supreme Court rejected welfare mothers' statutory and constitutional claims to Medicaid-funded non-therapeutic abortions.\textsuperscript{35}

In \textit{Maher}, the Court made several observations about the right at stake, and the validity of the state's action affecting that right. First, the Court claimed that \textit{Roe v. Wade} did not recognize a fundamental affirmative right to \textit{have} an abortion, but only the right to be free from "governmental compulsion" when making

causing an increase in complications and death. \textit{See} F. \textsc{Jaffe} \& B. \textsc{Lindheim}, \textit{supra} note 14, at 144.

\textsuperscript{28} Prior to the Hyde Amendment, only about 85,000 abortions were provided nationwide by health facilities at reduced or no cost. \textit{Id}.

\textsuperscript{29} \textit{See id.} at 142. In the average state, at least as of 1979, an abortion would have cost about $285, or $44 more than the average total monthly welfare payment for an entire family. \textit{Id} at 143. In Mississippi, an abortion cost about four months' welfare payments; and in Texas, three months' benefits. \textit{Id}.

\textsuperscript{30} In only 13 states was the average abortion cost less than the monthly AFDC allotment. \textit{Id.} In cases in which hospital care was necessary, the average cost would be significantly higher—about $500. \textit{Id.}

\textsuperscript{31} For a discussion of the ramifications of this option, see \textit{infra} notes 146-48 and accompanying text.

\textsuperscript{32} For a list and discussion of such decisions, see cases cited \textit{supra} note 22; \textit{see also} F. \textsc{Jaffe} \& B. \textsc{Lindheim}, \textit{supra} note 14, at 129-36.


\textsuperscript{34} 432 U.S. 438 (1977).

\textsuperscript{35} \textit{Maher}, 432 U.S. at 474; \textit{Beal}, 432 U.S. at 445. \textit{The Beal} Court noted: "Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a state to refuse to fund \textit{unnecessary}—though perhaps desirable—medical services." 432 U.S. at 444-45.
"'certain kinds of important decisions,'" such as the decision to abort. The Court held that government "compulsion" occurs when the state puts obstacles in the path of abortion, and that the state's withholding of Medicaid benefits was not such an obstacle. In the Court's view, the state did not create the condition, i.e., indigency, which prohibited the indigent woman from obtaining an abortion. Therefore, the Court reasoned, the state had not created any obstacle which it was obliged to remove. The state's "encouragement of [the] alternative activity" of childbirth by removing the indigent woman's financial means to get an abortion was not considered a penalty like those in Shapiro and other cases which invalidated public benefit conditions interfering with the exercise of fundamental rights.

Harris v. McRae followed the lead of Maher and Beal.

36. Maher, 432 U.S. at 473 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 & nn.24, 26 (1977)). The Maher Court then went on to note: As Whalen makes clear, the right in Roe v. Wade can be understood only by considering both the woman's interest and the nature of the state's interference with it. Roe did not declare an unqualified "constitutional right to abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

Id. at 473-74 (citing Whalen v. Roe, 429 U.S. 589, 599-600 & nn.24, 26 (1977)).

37. Id. at 473.

38. Id. at 474. The Court noted that:

The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in Roe.

Id. (footnote omitted).

39. Id. at 474-75 n.8. For a discussion of the circumstances under which the Court would apply "penalty" analysis, see supra notes 16 & 21 and accompanying text.

40. 448 U.S. 297 (1980).

41. While the Harris Court continued to use the "obstacle" test of Maher, the Court also drew on Mobile v. Bolden for the proposition that a state statute or regulation must impinge on a liberty interest protected by the Constitution before strict scrutiny is appropriate. Id. at 312 (citing Mobile v. Bolden, 446
although both the statutory and constitutional questions were somewhat different. 42 In Harris, welfare mothers challenged the Hyde Amendment, 43 an appropriations act rider which prohibited the use of federal funds to pay for any abortions unless they were caused by reported rape or incest, or by pregnancy which would endanger the life of the mother. 44 The Hyde Amendment withdrew Medicaid funding for abortions from a significant class of women not excluded by the Maher and Beal cases: those whose abortions were medically necessary, including those who would suffer significant, permanent physical or mental damage should they carry their fetuses to term. 45


42. In Beal, plaintiffs challenged Pennsylvania's requirement that a woman desiring an abortion must present a medical necessity certificate. 432 U.S. at 442. Plaintiffs argued this was essentially an additional condition of eligibility for provision of a physician's services, a mandatory Title XIX service, and that this requirement contravened the purposes and explicit mandatory language of Title XIX. Id. The Court held that states were free to set some conditions on even mandatory services and that Title XIX covered only “medically necessary” physician's services. Id. at 444-45.

In Maher, plaintiffs challenged a similar Connecticut statute which limited state Medicaid benefits for first trimester abortions to those which are medically necessary. 432 U.S. at 466. The Connecticut statute likewise required the performing hospital or clinic to submit a certificate of necessity from the patient's physician. Id. The Court, relying on Beal, concluded that a state participating in the joint federal-state Medicaid program is not required by the Constitution to pay for nontherapeutic abortions when it pays for childbirth. Id. at 480 (citing Beal v. Doe, 432 U.S. at 438). For a further discussion of Maher, see supra notes 35-39 and accompanying text.

In Harris, plaintiffs' statutory argument was that the Hyde Amendment, withdrawing federal funding from abortions other than for pregnancies resulting from rape, incest, or those threatening the mother's life, did not obviate the state's duty to provide “medically necessary” services with its own funding. Harris, 448 U.S. at 307-08. Plaintiffs in Harris used equal protection and due process arguments which failed in Maher. See 448 U.S. at 312-18, 321-26; Maher, 432 U.S. at 469-80. Additionally, the Harris plaintiffs claimed that the Hyde Amendment violated the establishment and free exercise clauses of the first amendment by establishing a religious view of life which precluded other women who wanted abortions from obtaining them in violation of their rights of conscience. 448 U.S. at 318-19 (citing the Hyde Amendment, Pub. L. No. 96-86, § 118, 93 Stat. 962) (1980)). Plaintiffs' establishment clause claims failed and their free exercise claims were dismissed for lack of standing. Id. at 319-22.


44. For the history and language changes in the Hyde Amendment, see Harris, 448 U.S. at 302-03.

45. Harris, 448 U.S. 297 at 339-40 (Marshall, J., dissenting). The Hyde Amendment exerted a statistically significant effect on abortions, even given the fact that approximately 133,000 Medicaid-eligible women who wanted abortions prior to the Hyde Amendment were unable to attain them because of state re-
In *Harris*, the Court used the *Maher* argument that the federal government had not placed obstacles in the path of exercise of the right to decide for an abortion, this time focusing on the concept of “impingement” on a fundamental right.46 Reasoning that the government was not responsible for creating the poverty which prevented these women from realizing their choices, the Court further suggested that the government had not impinged on their rights because AFDC mothers had the same choice they would have had if there were no Medicaid program at all.47 The Court claimed that recognition of the right to choose does not imply that the government must make the means available for the woman to exercise the choice made.48

In *Selective Service System,*49 in which plaintiffs challenged the requirement that college students must attest that they had registered for the draft as a condition of receiving federal educational assistance, the Court went a step further.50 As in the *Maher* and

strictions. See F. Jaffe & B. Lindheim, supra note 14, at 142-43. Within 19 months after the Hyde Amendment regulations became effective, the number of publicly funded abortions fell by about 99%. *Id.* It was expected that if all states adopted Hyde restrictions, government-financed abortions for the poor would fall to fewer than 3000 per year, with approximately 80% of those being for women whose lives were endangered by their pregnancy. *Id.*

46. *Harris*, 448 U.S. at 312-17.

47. *Id.* at 318. The Court analogized *Harris* to the decisions in *Griswold v. Connecticut* and *Pierce v. Society of Sisters,* arguing that the government was not required to ensure that all persons have the means to obtain contraceptives or go to private schools just because government may not prohibit the use of contraceptives or the sending of children to private schools. *Id.* (citing *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Pierce v. Society of Sisters,* 268 U.S. 518 (1925)).

48. 448 U.S. at 318. Indeed, the Court noted: “To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services.” *Id.*

49. 468 U.S. 841. For a discussion of the facts in *Selective Service System,* see supra note 8.

50. 468 U.S. at 858. The Court found that § 1113 of the Defense Authorization Act of 1983, conditioning assistance on draft registration, did not violate the Fifth Amendment. *Id.* at 859. However, most of its opinion focused on the bill of attainer claim made by the students. *Id.* at 852-59. The Court held that § 1113 was not a bill of attainder because it did not impose a “punishment” historically associated with bills of attainder, such as bars to employment, imprisonment, banishment, or confiscation of property. *Id.* at 852-53. Thus, as in the abortion cases, the Court distinguished between an affirmative prohibition or sanction imposed by government and the mere withdrawal of a benefit. *See id.* The Court also held that the statute served nonpunitive goals of “encouraging” students to register, and fairly distributing limited government resources to those who were worthy because of their willingness to meet their obligation of defending their country. *Id.* at 849-50. The majority chose to ignore the
Harris cases, the plaintiffs, recipients of public educational benefits, wished to exercise a fundamental right which was controversial and carried much public stigma: the privilege against self-incrimination.\textsuperscript{51} Plaintiffs argued that by being forced to register late for the draft or lose their school loans, they would be admitting their guilt to the crime of nontimely registration.\textsuperscript{52} Moreover, the parallel with the Maher/Harris "unrelated benefits" distinction was clear. In each case, a recipient of public benefits\textsuperscript{53} was presented with the choice of keeping his benefits and waiving his fundamental right,\textsuperscript{54} or waiving the benefits and exercising the right.\textsuperscript{55} Moreover, in both the Maher hypothetical and in Selective

either/or choice which the statute imposed upon the student, suggesting that students were not "compelled" to confess to a criminal act. \textit{Id.} at 856-57. Thus, according to the majority, they were not forced to waive their fundamental right not to incriminate themselves. \textit{Id.} at 857. The students were not required to confess their untimely registration to college officials, which, if done willfully, amounted to a felony; all they had to do was forego applying for financial aid. \textit{Id.} at 856. Nor were they required to confess to the crime of nonregistration if they registered late with the Selective Service System. \textit{Id.} at 857. According to the majority, school forms did not require disclosure of the date the student registered, and the individual plaintiffs had not attempted to register and determine whether the Government would grant them immunity for disclosing their late registration. \textit{Id.} The Court thus reasoned that § 1113 did not force college students to acknowledge their late registration. \textit{Id.} at 858. But see 468 U.S. at 862-63 (Marshall, J., dissenting) (late registration does create hazard of incrimination because, by registering late, student has "confessed" to three items of evidence needed to prove the crime: birthdate, late registration, and knowledge of the duty to register); \textit{see also} Garrity v. New Jersey, 385 U.S. 493 (1967) (invalidating condition requiring police officer to testify and give up privilege against self-incrimination or be fired); Spevak v. Klein, 385 U.S. 511 (1967) (disbarment cannot be used as penalty for invoking privilege against self-incrimination); G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1448-57 (10th ed. 1980) (citing additional relevant cases).

\textsuperscript{51} 468 U.S. at 856. In Maher and Harris, plaintiffs wished to exercise their fundamental right to decide to have an abortion. \textit{See} Harris, 448 U.S. at 303; Maher, 432 U.S. at 467.

\textsuperscript{52} 448 U.S. at 856.

\textsuperscript{53} In Maher and Harris, the public benefit was receipt of welfare payments. \textit{See} Harris, 448 U.S. at 300-01; Maher, 432 U.S. at 466. In Selective Service System, the public benefit was educational loans and grants. \textit{See} 468 U.S. at 849.

\textsuperscript{54} For the fundamental rights implicated in Maher, Harris and Selective Service System, see supra notes 50-51 and accompanying text.

\textsuperscript{55} It is not clear that the Court in Selective Service System realized the parallel with the abortion funding case. The Court does not specifically refer to the Maher and Harris footnotes, citing Harris only for the proposition that the statute must meet the "rational basis" test. \textit{Selective Service System}, 468 U.S. at 859 n.17 (citing \textit{Harris}, 448 U.S. at 322-24). Yet the parallel with Maher/Harris is clear. \textit{See} Harris, 448 U.S. at 317 n.19; Maher, 432 U.S. at 474 n.8. Recall that in those footnotes, the Court claimed that if a state denied general medicaid benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, strict scrutiny might be appropriate under either the penalty analysis or the analysis it has applied in its previous abortion decisions. \textit{Id.}
Service System, the behavior which the government attempted to compel\textsuperscript{56} was wholly unrelated to the type of benefit withheld or the purpose of the benefit. However, in Selective Service System, the Court held that the government could force a student to incriminate himself as a condition of obtaining benefits, using many of the same arguments found in Maher and Harris.\textsuperscript{57} By doing so, the Court essentially abrogated the Maher footnote's implication of protection against government removal of unrelated benefits to compel waiver of a fundamental right.

Bowen also follows Maher and Harris in two important respects. First, the plurality affirms that government is not affirmatively responsible for assisting a government-dependent citizen in exercising his or her fundamental rights, at least in the free exercise area.\textsuperscript{58} Second, the plurality opinion distinguishes between conditions on public benefits and compulsion generated by penal sanctions.\textsuperscript{59} Bowen is significant precisely because of the plurality's emphatic distinction between the denial of benefits and the use of penal sanctions which affect exercise of fundamental rights. As the plurality suggests, "government regulation that indirectly and incidentally calls for a choice between securing a government benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."\textsuperscript{60} In fact, the plurality points out that the "nature" of the burden may make a difference in the government's burden of justification.\textsuperscript{61}

On the penalty/denial of benefits distinction, Justice O'Connor's concurring/dissenting opinion strikes the hardest. She argues that constitutional restraints on government must be the same, whether the government acts to provide or withdraw benefits, or to exact penalties.\textsuperscript{62} In claiming that traditional first

\textsuperscript{56} In Maher and Harris, the government hypothetically attempted to compel the women to bear children. See Harris, 448 U.S. at 317 n.19; Maher, 432 U.S. at 474 n.8. In Selective Service System, the government attempted to compel students to register for the draft. See Selective Serv. Sys., 468 U.S. at 844.

\textsuperscript{57} See id. at 858-59; Harris, 448 U.S. at 315-17; Maher, 432 U.S. at 476-77.

\textsuperscript{58} 106 S. Ct. at 2153-54. As previously noted, only Justices Powell and Rehnquist concurred in this part (Part III) of the Court's opinion. For a further discussion of Bowen, see supra note 9.

\textsuperscript{59} 106 S. Ct. at 2154-55.

\textsuperscript{60} Id. at 2155.

\textsuperscript{61} Id. at 2156.

\textsuperscript{62} Id. at 2168 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor concurred with Parts I and II of Chief Justice Burger's opinion but she disagreed with Part III, the plurality opinion.
amendment heightened scrutiny should be applied to the government's justifications for the Social Security number rule, O'Connor's opinion notes that the Constitution "places express limits upon governmental actions limiting the freedoms of that society's members. The rise of the welfare state is not the fall of the Free Exercise Clause." 63

Selective Service System and Bowen suggest that Maher and Harris are not anomalies, but rather the beginning of a new doctrinal stance by the Court on the relationship between exercise of fundamental constitutional rights and provision of public benefits. Indeed, it is yet difficult to tell whether the Maher/Harris line of cases is cut from new cloth, or whether it is a reprise to the days prior to the unconstitutional conditions doctrine 64 or the old right/privilege doctrine which was repudiated by the Court in the early 1960's. 65 Yet the doctrine potentially affects the ability of anyone who receives public benefits to exercise his or her fundamental rights, particularly if he or she is dependent on government for livelihood or life necessities. Adoption of the Maher/Harris rationale could sanction withholding of many types of governmental benefits: medical benefits to those exercising sexual privacy rights, educational benefits to those exercising

63. Id. at 2169 (O'Connor, J., concurring in part and dissenting in part).
64. The Court held in the 1920's that government could not condition the receipt of benefits, even those which were mere privileges, on the recipient's agreement not to assert fundamental rights. See L. Tribe, American Constitutional Law 510 (1978). Yet, the Court distinguished some public employment positions which were considered privileges, arguing that public employees could choose to work elsewhere if they did not like restrictions on their employment which implicated fundamental rights. See Wieman v. Updegraff, 344 U.S. 183, 185 (1952); Adler v. Board of Educ., 342 U.S. 485, 492 (1952). In later years, however, the Court invalidated loyalty oath requirements and restrictions on organizations to which public employees could belong. See L. Tribe, supra, at 510 (discussion of "unconstitutional conditions" doctrine). See generally J. Nowak, R. Rotunda, J. Young, Constitutional Law 960-65 (2d ed. 1983) (denial of public employment on basis of political affiliation violates first amendment).
65. The right/privilege distinction resulted in the denial of due process protections, particularly to persons whose public benefits were not a matter of contract or right, but instead a matter of governmental largesse. See L. Tribe, supra note 64, at 514-55. However, as early as 1960, the Court rejected the distinction between "earned rights" and "gratuities," even while it found that recipients had no "property right" in Social Security in the sense that deprivation of expected benefits would violate the fifth amendment's due process clause. See Flemming v. Nestor, 363 U.S. 603, 609-10; see also Richardson v. Belcher, 404 U.S. 78 (1971) (reduction in disability benefits pursuant to provision in Social Security Act was not violative of Constitution). The right/privilege distinction was essentially abandoned in Goldberg v. Kelly, 397 U.S. 254 (1970), when the Court adopted Charles Reich's notion of a public benefit which was properly the subject of a recipient's expectation. See Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255-56 (1965).
political or associational rights, or welfare benefits to those exercising religious beliefs.

The *Maher/Harris* doctrine raises a compelling issue central to evolving American legal and political doctrine: what responsibility does government have to ensure that its citizens are able to exercise the rights which government has recognized as fundamental? The *Maher* and *Harris* decisions provide one answer to this question in cases where exercise of these rights is impeded solely because of the rights-exercisers' poverty, and where the public has taken responsibility to provide them with financial assistance. The *Maher/Harris* answer proceeds from traditionalist norms, which hold that government's primary duty is not to interfere with the free action and freely acquired property of individual rights-exercisers, norms which recognize neither property rights in government benefits nor positive rights of citizens to compel the state to act.

II. The *Maher/Harris* Conditions Doctrine—Definitional Assumptions

Is the *Maher/Harris* doctrine a viable one for adjudicating the rights of benefit recipients against government when they exercise fundamental liberties? One can first test the doctrine by exploring its definitional assumptions. In its distinction between punitive and withholding action by the state, the Court presupposes several things, none of which may be sufficient to justify that distinction. First, the Court assumes that the fundamental rights which recipients would exercise are essentially liberty-rights, not claim-rights. That is, recipients have only the right to choose and implement their decision free from government interference or compulsion. They may not claim that government has the duty to assist in implementing their choice. Second, the Court assumes that government benefits are not always "property" in all senses, perhaps based on when and how they are acquired or from whom they are acquired. Third, the Court assumes that there is an inherent difference between state "action" punishing a rights-exerciser and action withholding benefits to prevent, or respond to his or her actions. Finally, the Court

66. *Harris*, 448 U.S. at 317 n.19; *Maher*, 432 U.S. at 474 n.8. For a discussion of this distinction, see supra notes 16, 21 & 55 and accompanying text.
67. See 448 U.S. at 316; 432 U.S. at 473-74.
68. See 448 U.S. at 317-18; 432 U.S. at 473-74.
69. See 448 U.S. at 317 n.19; 432 U.S. at 474 n.8. For a discussion concern-
assumes that the Constitution does not prohibit the state’s action unless it has the legally relevant effect of placing an obstacle in the path of exercise of rights, much as one might place an obstacle in the road in front of a car.70

A. Claim Rights or Liberty Rights?

The Maher/Harris distinction between punishing a rights-exerciser and withholding benefits from him is clearly rooted in the philosophical, and perhaps pragmatic, distinction between liberty rights and positive claim-rights on the state.71 Just as it makes sense for the father to say to his child, “I won’t stop you from smoking, but I’m not going to pay for you to ruin your lungs,” it initially seems plausible that government should be able to choose not to subsidize abortions even if it may not prevent them or punish women for having them. In essence, recognition of choice is recognition of the woman’s liberty-right to abortion, her right to act free of restraint if she is able on her own power to take advantage of her right. By contrast, if the woman has a positive claim-right, then the government has a duty to assist her in exercising that right.

When considering rights whose exercise depends on one’s

70. See 448 U.S. at 316; 432 U.S. at 474.

71. There is a theoretical distinction between negative and positive rights, and liberty and claim-rights, although it is not clear that this distinction makes a difference in the government benefit cases. Wesley Hohfeld, an American legal theorist, distinguished between claim-rights, which he defined as rights which carry a duty in someone else to do or refrain from doing something, and liberty-rights, which give one the “right” to do what he wishes, but do not impose a duty on someone else to aid one in the exercise of that right. See Becker, Individual Rights, in And Justice for All, 201-20 (T. Regan, D. VanDeVeer ed. 1982). Negative rights are claim-rights to which duties of noninterference or restraint from action attach, positive rights are those to which duties of affirmative action attach. Id. at 202. Therefore, it is perhaps most accurate to suggest that the right to have an abortion is a negative claim-right, in that government has a legal duty not to interfere with one’s action in deciding to abort and implementing that decision. It is not a positive claim-right because one has no right to state affirmative action in implementing that decision, according to Maher and Harris. See 448 U.S. at 316-18; 432 U.S. at 473-74. However, at least one commentator argues that the right to have an abortion is actually a liberty-right, as no one, including the government, has a duty on the other side. See Becker, supra, at 201-02; see also Childress, Negative and Positive Rights, 10 Hastings Center Rep. 19 (Feb. 1980); Stich, The Many Rights to Health and Health Care, Rights and Responsibilities in Modern Medicine 15-30 (Series on Ethics, Humanism, and Medicine No. 2, 1981) (discussing whether the right to health care is a liberty or claim-right). This article generally uses the term “liberty right” to include negative claim-rights types of rights. For a cogent criticism of the dichotomy, see Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363, 1392-94 (1984).
having the means to exercise them (e.g., to obtain a safe abortion) as opposed to those rights which a person in her "natural" state can exercise, (e.g., to speak), it is not clear that American jurisprudence would recognize these former "dependent" rights as strong liberty-rights rather than strong positive claim-rights. Before this article deals with how definition of terms suggest the Court's position on the rights at issue in the Maher/Harris doctrine, it attempts to illustrate this ambiguity in the following discussion.

Proponents of a positive, fundamental claim-right would argue that government must act to ensure that people may exercise their fundamental rights in the ways they choose, even if cost is involved. In the strongest version of this claim-right, government would have the duty to fund a trip for a welfare mother who wants to exercise her constitutional right to association by attending a welfare rights convention in Acapulco. Government could also be called on to finance a pilgrimage to the Holy Land or to Mecca for a poor person whose religion calls for such a ritual; or asked to provide printing presses for one who wishes but can't afford to exercise his right to freedom of the press; or even called on to pay for postage for the grievant who wants to petition the government for redress.

While requiring the state to provide significant financial assistance to ensure that these rights can be exercised may seem uncontrollable,\(^{72}\) it is far from clear that we never impose duties

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\(^{72}\) Perhaps the most common argument leveled against any positive claim-rights (hereafter, claim-rights) against the state, particularly when they involve government duties to provide financial assistance, is that there is simply no way to measure the extent of those rights. See, e.g., Committee for Pub. Educ. & Religious Liberty v. Nyquist, 350 F. Supp. 655, 669 (S.D.N.Y. 1972), modified, 413 U.S. 756 (1973) (challenge to New York statute relating to aid to public schools). However, many have argued that a claim right such as the right to the means to life is susceptible even to scientific measurement. See, e.g., A. Šen, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 24-38 (1981) (arguing that poverty and the right to the means of life may be defined by the minimum needs which are necessary to prevent starvation). Moreover, through its poverty guidelines, the federal government has regularly come up with means of measuring the relative level of need in the United States. See, e.g., 45 C.F.R. § 1060.2-2 (1984) (Community Services Administration poverty guidelines). While many claim-rights involving affirmative action by the state may be difficult to measure, this claim-right is not. Nor need a claim-right to subsistence necessarily implicate issues of equality, even if inequalities are perpetuated under the guise of enabling us to meet such demands for subsistence. Cf. Los, The Concept of Justice and Welfare Rights, 1982 J. OF SOC. WELFARE L. 4 (discussing theories of "justice" and "equality" in social welfare context); see also Rosen, Basic Needs and Justice, Mind 88, 88-94 (Jan. 1977) (right to basic needs not right to increasing standard of need).
of assistance on government for rights-exercisers. For instance, one can make a good case for requiring government to provide minimal police protection which would enable a religious sect to evangelize door to door, or allow peace protestors to march on the capitol without bodily abuse. Given the relatively small cost of enabling the exercise of such rights, the importance of the right, and the probability that expenditure would allow the recipient to exercise a fundamental right he would not otherwise be able to exercise, it is not implausible for a legislature, or even a court, to require positive state action. For example, if it cost the government only $100 to ensure that everyone who wished to vote and needed transportation was able to go to the polls, few would be willing on principled grounds to suggest that government had no obligation to provide transportation. Yet, this is very much the case which appeared in abortion funding for the poor: the state’s total financial expenditures for abortion were minimal in comparison to the asserted importance of the abortion right to poor women, and in consideration of the likelihood that the availability of government funding would determine whether most poor women could exercise that right.

A staunch liberty-right proponent would conversely argue that government has no obligation whatsoever to act in a way that makes possible a person’s ability to exercise her fundamental rights. The consequence of the extreme liberty-right position is clear: if we do not posit some obligation on government to act so that exercise of one’s right is at least possible, those rights are illusory. We cannot imagine, much less condone, a democratic government taking no steps to prevent, for example, lynch mobs from waylaying citizens’ groups on their way to Washington to present their grievances; or sheriffs from jailing blacks who belong to the NAACP; or violence to itinerant Jehovah’s Witnesses; or doctors from performing forced abortions. We would expect government to act responsibly to safeguard such constitutionally protected activities at least by giving us a private, civil cause of action against the wrongdoers. Similarly, it is difficult to think of a democratic government refusing to maintain courts; requiring civil or criminal litigants to fund their own judges; pay for an enforcer to compel attendance of witnesses; and barter for the time of witnesses and jurors so the defendant could exercise his right of cross-examination, as these rights are protected by the fifth and sixth amendments.

In the government benefits context, the liberty-right position
apparently presumes that only those rights which inhere in one’s humanness can be “fundamental.” This position would suggest that a fundamental right must not only be important to one’s daily life, but it must also be a right which a human being is naturally capable of exercising on her own unless she is prevented from doing so. For example, the right to speak or to procreate would clearly be fundamental. By this definition, a state does not disparage fundamental rights unless it actively interferes with the “natural,” non-supported actions of human beings. Therefore, under this theory, denial of a fundamental right by failure to financially empower a person to exercise it is a non-sequitur.

Such a position is belied by our law and experience. Many rights considered “fundamental” in American jurisprudence cannot be exercised by people alone in a “state of nature” because they require a community of cooperation,73 or that money be spent.74 Moreover, many fundamental criminal rights (speedy trial, confrontation of witnesses, compulsory process, and assistance of counsel) require affirmative government expenditure to make them available at all. Thus, it is not clear that the liberty-right position, however philosophically appealing, can be squared with the jurisprudence of fundamental constitutional rights.

If all fundamental rights are not “state-of-nature” rights, it is not clear why the fundamental rights involved in public benefit cases, such as the right of privacy in abortion cases, must be judged by whether a “natural” act is interrupted rather than whether a valued act is not supported by the state. Furthermore, if fundamental rights are defined as those rights important to one’s ability to be fully human, then, logically, government should be required to remove, rather than simply refrain from placing, obstacles in the path of exercise of these rights. To do otherwise would be to impede the individual’s path to full human development.

It seems most plausible to say that our jurisprudence recognizes some need to require governmental response to preserve fundamental rights which are neither pure liberty nor pure positive claim rights. Apparently, government has some affirmative responsibility to provide both tangible and intangible benefits to enable its citizens to exercise such rights. But under current no-

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73. For example, the right of association requires that there be others with whom to associate.
74. For example, the right of interstate travel would require expenditure of funds.
tions of rights theory, government may delineate what rights will be protected and what benefits may be provided. It may even require citizens to do or refrain from doing certain things in exchange for such benefits. In this intermediate position, however, rights theorists must concern themselves with the impact of benefit conditions upon citizens’ ability to exercise those freedoms which comprise the quid pro quo for their compact with organized society: freedom to raise a family, pursue a calling, to organize, and to speak and think. The concern about benefit conditions is not only for those individuals directly affected, but also for the continued viability of the state itself, which depends on the initiative, imagination and support of its citizens.

How such concern can engender legal rules for judging benefit conditions is, however, a problem. One view would prohibit government action which has the effect of significantly influencing the citizen’s decision whether and how to exercise these most crucial rights. That position, espoused by abortion funding advocates, makes no distinction between punitive state action, such as jailing or capital punishment, and rewarding action, such as payment of money. It is only concerned with whether citizens can make free choices and implement those choices as they desire. In another view, adopted by the Supreme Court in the abortion funding cases, the form of government action, the form of the benefit conferred, and the initial position of the potential rights-exerciser all determine whether government has acted unconstitutionally. The Maher/Harris conditions doctrine further posits that, except in extreme cases, the impact of government action on the actual ability of the citizen to exercise her rights is not relevant in testing the legality of the action.

In testing the validity of the Maher/Harris view, some definitional presuppositions must be acknowledged. First, the Court presumes that the penalty/withholding distinction encompasses public benefits but not personal property, without clearly distinguishing between the two. Second, the Court presumes that there is, in the abortion cases, a real difference between penalizing a citizen and withholding a benefit from him, even though the basis for that presumption is unclear. After exploring these def-

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75. See Harris, 448 U.S. 297; Maher, 432 U.S. 464; Beal, 432 U.S. 438. For a discussion of these cases, see supra notes 25-48 and accompanying text.
76. See Harris, 448 U.S. at 314-15, Maher, 432 U.S. at 474.
77. See Harris, 448 U.S. at 316-17; Maher, 432 U.S. at 473-74.
78. See Harris, 448 U.S. at 317 n.19; Maher, 432 U.S. at 474 n.8. For a dis-
initial premises, the article will discuss the bases for conditioning benefits, and what valid purposes might legitimize such conditions.

B. Is a Government Benefit Really Property?

The Maher/Harris doctrine and its predecessors have usually been applied in cases involving monetary or in-kind transfers from the government treasury to individual citizens or their service providers. Thus, welfare and Medicaid are considered “benefits” in the sense that tangible property is being conveyed from a donor to a donee. It is not clear why we should think of a benefit in this way, since the word suggests merely that the recipient derives some value, use or advantage from it.

To take a crucial example, why isn’t a person’s private “property” a government benefit? Many have suggested that property is merely a form of benefit bestowed by government since the government provides protection for the property-holder against theft or intrusion by others, and protection for the holder’s dominion, control and use of such property. If the government will protect the use of a privately owned car as against any other attempted user, why isn’t that government-confined benefit subject to the Maher/Harris doctrine? That is, Maher/Harris would seem to justify the government’s withholding of protection for private property, when the owner speaks against politicians in office or when she has an abortion, if the government wishes to discourage exercise of those rights. Would the Court find government’s withholding of police protection unobjectionable if a mob of Pro-life activists forcibly took a privately owned car because of the owner’s political positions? If not, why should the government be able to withhold welfare benefits because a woman exercises her right to have an abortion?

The natural law objection to viewing “private property” as a “government benefit” seems unpersuasive. An advocate of natural law might argue that “private property” is not conferred by government as a benefit because it is not created by government, but rather, is a God-given due, or a natural reward, because its owner has mixed her labor with it, or has discovered it, or has

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cussion of the Maher and Harris Courts’ views on this subject, see supra notes 37-39 & 46-98 and accompanying text.

asserted her will over it.80 Excluding Divine intervention, however, these theories simply limit the kinds of property that might be considered “private”. Under the labor theory, an auto worker may have “property” in the car he makes but not in his paycheck, except as a sort of exchange of goods. Similarly, most real property, not the subject of discovery, assertion of will, or labor, loses this “natural law” protection and becomes simply another form of public benefit. While one might include the right to dispose of property as a natural law right, thus accounting for ownership of land by inheritance or gift,81 such a theory cannot adequately account for all of the law-sanctioned acquisitions of private property which our legal system recognizes today.

Even if the argument that there is no difference between one’s “private property” (home, car, bank account) and one’s “public property” (welfare, Medicaid, social services) seems intuitively wrong, it is still unclear why anything which benefits an individual because of government action or even inaction is not to be treated as a public benefit, subject to Maher/Harris rules. For instance, if the free market is the “natural” way of accumulating property, then manufacturers who benefit from tariffs and import quotas and homeowners who receive low-interest government-backed mortgage loans must admit that these benefits can be withheld to discourage them from exercising fundamental rights. Indeed, both consumers who receive better products for their money because government regulates food production and drug manufacture, and financiers who aren’t swindled in the sale of securities because of government regulation, must be the recipients of the same government largesse and should logically be subject to the same rules as the Medicaid recipient. In each of these cases, the public treasury pays a price to put its citizens in a better position than they would have “naturally” been in without it, even if that price is only the cost of its own bureaucracy.

Finally, even if a “benefit” is defined in the most narrow way, as a transfer of cash or immediate in-kind benefit directly from government to an individual, it is far from clear that indigent benefit-holders will be treated equally with other benefit-holders under Maher and Harris, even if theoretically, they should be. If the doctrine is applied consistently, government should be

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81. For a discussion of ways in which inherited or gift property may be justified under natural law theories, see R. NOZICK, ANARCHY, STATE, AND UTOPIA 150-82 (1974).
equally guilty or innocent if it withdraws a welfare check, a PIC subsidy, a solar energy credit, or an oil lease from an individual because she has attempted to exercise her right to free speech or to obtain an abortion. Yet, it is not clear that the Court will apply the doctrine with a neutral hand. The Court has generally treated supposedly "earned" or middle class benefits such as Social Security and unemployment benefits similarly to welfare benefits for purposes of some protections, such as due process. Yet, conditions imposed in benefit programs thought to be "earned," even if they are not, have often been seen as very different from those in programs thought to be "charity." What would be the Court's response if the federal government withdrew a PIC subsidy so that a recipient could not afford to attend the Scientology church meeting, or withdrew veteran's benefits in order to prevent a Vietnam veteran from organizing friends to file an Agent Orange suit?

If private property, like welfare, is a public benefit, then perhaps the Court would make some other distinction between property acquired from government and that acquired from private parties to justify the Maher/Harris doctrine. However, that would seriously depart from modern precedent. Beginning with Goldberg v. Kelly, the Court has recognized certain government-provided benefits, such as welfare benefits, as a species of property, commonly referred to as entitlements. At least for proce-


83. See, e.g., Richardson v. Belcher, 404 U.S. 78, 96 n.10 (1971) (Marshall, J., dissenting) (worker who is forced to pay social security tax on earnings has contract interest in benefits); Flemming v. Nestor, 363 U.S. 603, 622-23 (1960) (Black, J., dissenting) (right to social security benefits is "earned" in some sense even though not a property right).

84. As Professor Appleton notes, the plaintiffs in Harris were being deprived of something which was theirs—not property, but their health—a deprivation which should be considered sufficiently grave to constitute a penalty. See Appleton, supra note 41, at 733. Professor Appleton believes the Maher plaintiffs paid other prices but that the "negative right/positive right model" resolves the "health-penalty" problem. Id. at 737.


86. See Reich, supra note 45, in which this terminology was popularized. Significantly, Justice O'Connor's opinion in Bowen reiterates the entitlement concept in rejecting the penalty/conditions distinction. See 106 S. Ct. at 2164-68.
dural due process purposes, the Court has refused to provide different levels of protection for entitlements and privately acquired property. Congress has similarly recognized the property nature of such benefits by creating open-ended budgets for such programs, and by requiring that states pay benefits to all persons who are financially and categorically eligible, regardless of the cost.

Alternatively, the Court may not be distinguishing government benefits from property on the basis of their sources, but only distinguishing among different kinds of government benefits, some “earned” and others “unearned.” This theory would suggest that those legitimately claiming that they expended effort for their benefits or provided consideration of some sort in performance of a “benefit contract” made with government remain entitled to argue that government is punishing them if it withholds their benefits when they exercise fundamental rights. By contrast, those who receive mere “charity” benefits without consideration are not being punished if the government withholds benefits for exercise of rights. Such a doctrine would have serious implications. First, insofar as property is necessary to provide security to the individual, this doctrine would abrogate such security for most government benefit recipients. Since most bene-


88. See 42 U.S.C. § 602a(10)(A) (1982) (state plan must provide all individuals with opportunity to apply for aid to families with dependent children); 45 C.F.R. § 233.10(a)(1) (1984) (state may specify groups that will be included in program); id. § 233.10(B)(1) (1984) (compliance with state plan provisions is prerequisite to federal financial participation).

89. If indeed the state has contracted with a citizen, the Contract Clause, U.S. Const. art. 1, § 10, cl. 1, may provide somewhat greater protection for that person, at least as to later modifications of her right to benefits. See, e.g., United States Trust Co. v. New Jersey, 431 U.S. 1, 29-31 (1977) (repeal of New Jersey and New York joint convenant limiting the ability of Port Authority of those states to subsidize rail passenger transportation from revenues and reserves held unconstitutional under Contract Clause when neither necessary nor reasonable under circumstances).
fits are not technically "earned," these recipients would be unable to plan use of such benefits even for basic necessities, causing potential economic chaos for them and those who meet their needs. Moreover, as the Social Security cases dramatically point out, the problem of judicially defining appropriate "consideration" or distinguishing between "earned" and "unearned" benefit programs is a thorny one. How does one apply the "earned-unearned" distinction to a subsidy program that pays farmers not to plant certain crops as against a welfare program which requires recipients to work off assistance? Third, even if benefits are otherwise like private property, the Court's *Maher/Harris* test may presume that there is some difference between government's action in taking away one's already acquired property and refusing to extend previously promised property to one who does not control or possess it. The former is apparently impermissible; the latter is not.

Yet, the Court makes no mention of any basis on which it could decide that some property is already acquired and belongs to an individual, as opposed to something which he or she does not yet possess, own or control. A Medicaid recipient may legitimately argue that he was given a property right in Medicaid benefits when eligibility was determined. Although that right is subject to his continuing financial and medical eligibility for the program, it does not become his property at the moment medical services are rendered. Like a contract right or a bank account, the right given was the right of payment for medical expenses whenever appropriate, subject only to the condition that the right be exercised to obtain medically necessary services, just as the contract right is given subject only to its terms. If the state may later revoke a "part" of that intangible right because it will be used for constitutionally protected purposes of which the government does not approve, then, logically, the government may confiscate "part" of an individual's bank account to prevent it from being used to finance a libertarian candidate, a trip to Washington, or even an abortion. A fourth option is to suggest that the Court is looking at the type of benefit at a different level of generality than


91. See *Maher*, 432 U.S. at 472-74.
those who claim they are being penalized for the exercise of their rights. The welfare mother who cannot obtain an abortion after Maher and Harris would argue that government has taken away "part" of her Medicaid right, just as the libertarian saver would argue that the government took away "part" of his bank account. The easy answer to the welfare mother is that Medicaid is different in kind from a reduction in a bank account because Medicaid is a bundle of services, each discrete. Government has not taken away "part" of the mother's Medicaid right, but only refused to extend to her the right of payment for abortions while continuing to provide her with a right to payment for hospital care, a right to payment for nursing assistance, a right to receive dental services, etc. Since the state can initially refuse to provide such a service for any reason unrelated to the exercise of her rights, the welfare mother has not lost anything if the state refuses to provide that service in order to prevent the exercise of those rights.92

Admittedly, Medicaid itself is structured so that states, with federal money, provide a discrete number of services to indigents, some of which can be given and taken away prospectively at the state's discretion.93 Thus, there is some difference between reduction of a bank account by X dollars and discontinuation of a discrete Medicaid service. Yet, three problems with this argument remain. First, not all government welfare programs are broken down into such separate services: AFDC and Food Stamps, for example, are lump sum benefits paid monthly and therefore could not be refused on this basis.94 Second, the overriding pol-

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92. See Harris, 448 U.S. at 316-18; Maher, 432 U.S. at 474.
93. For a list of mandatory and optional services provided by states, see 42 U.S.C. § 1396a(a)(10) (1982). For lists of mandatory and optional groups covered by Medicaid, see 42 U.S.C. § 1396d(a)(1)-(18).
94. While this argument might be used to justify denial of benefits for future months as discrete benefits, both programs are apparently constructed under the assumption that applicants remain eligible until their situation changes. For instance, applicants need not file separate monthly applications, but must report changes affecting their eligibility for continued receipt of benefits. See 42 U.S.C. § 602(a)(14)(A) (1982 & Supp. 1986). This statute provides:

(a) Contents

A State plan for aid and services to needy families with children must . . .:

(14) with respect to families; in the categories of recent work history or earned income cases (and at the option of the State with respect to families, other categories) provide that (A) the State agency will require each family to which it furnishes aid to families with dependent children (or to which it would provide such aid but for paragraph (22) or (32)) to report, as a condition to the continued receipt of such aid (or to continuing to be deemed to be a recipient of such aid), each month to the State agency on—
icy of the Medicaid program is that, within any single category of services (e.g., nursing home care), the physician's judgment that particular forms of treatment are medically necessary is essentially inviolate.95 It is true that states are increasingly able to intrude into that process.96 Yet, within each category of medical assistance, such as nursing home services, the paramount and, ostensibly, exclusive criterion for review is whether given the alternatives, the treatment is medically necessary. Third, abortion procedures fall within the discrete category of physician's services, which are not only highly protected from state review, but are also mandatory services for state Medicaid programs.97 Unlike ophthalmological, prosthetic, or home health care services, the state must provide these services as the indigent recipient needs them.98 Thus, prohibiting physicians from being paid for performing abortions is not the same as eliminating a type of service, but instead is more analogous to telling physicians they will not be paid if they prescribe Treatment A rather than Treatment B for some disease.

Moreover, the "level of generality" argument will not explain

(i) the income received, family composition, and other relevant circumstances during the prior month; and
(ii) the income and resources it expects to receive, or any changes in circumstances affecting continued eligibility or benefit amount, that it expects to occur, in that month (or in future months);
except that (with the prior approval of the Secretary in recent work history and earned income cases) the State may select categories of recipients who may report at specified less frequent intervals upon a determination that to require individuals in such categories to report monthly would result in unwarranted expenditures for administration of this paragraph.

Id.


96. For example, the requirement of prior approval gives the agency some veto power over a doctor's services. Prior approval is normally used with optional services, e.g., dentures, wheelchairs, eyeglasses, cosmetic surgery, or expensive treatment modalities. It is authorized by 42 U.S.C. § 1396a(a)(30) (1982). Some courts have also sanctioned limits on determination of medical necessity so long as they are reasonable and defined. See, e.g., Rush v. Parham, 625 F.2d 1150, 1155-56 (5th Cir. 1980) (physician required to operate within such reasonable limitations as state may impose); Doe v. Busbee, 471 F. Supp. 1326, 1330-31 (N.D. Ga. 1979) (state medical plan required to provide to "eligible persons" certain services as minimum). Conditions must also be nondiscriminatory. Curtis v. Taylor, 625 F.2d 645 (5th Cir.) (state may not discriminate on basis of kind of medical condition occasioning medical necessity, modified on other grounds, 648 F.2d 946 (5th Cir. 1980). Rush v. Parham, it should be noted, still puts the primary duty of choice on the physician. See 625 F.2d at 1156.


98. Id.
the Court's decision in *Selective Service System*, which is not analogous in that way to the abortion payment cases. In *Selective Service System*, the government did not withhold educational benefits solely because they were going to be used for purposes contrary to federal policy. Nor could government argue that it had only withheld part of, or even a separate type, of educational benefit. If it is impermissible for government to take away one's already-acquired property in response to his exercise of a fundamental right, then *Selective Service System* must be explained in one of four ways. The first three have been previously suggested: either the educational benefits which plaintiffs sought were not "property" because they were not earned or not received from private sources; or arguably, because these benefits were not yet acquired, as they were not yet "received" or controlled by the students. One might also argue that plaintiff students had no property right because they had not yet been declared eligible for benefits through the application process. This latter option does not seem helpful. As *Maher* and *Harris* suggest, it is not simply the determination of eligibility which creates an entitlement. The *Maher* and *Harris* plaintiffs were both financially and categorically eligible for benefits, and they had been determined eligible by the welfare department and even by the physician whose responsibility it was to determine "medical necessity." Yet, their property rights were not recognized.

The *Maher/Harris* doctrine suggests that the Court may be abandoning the concept of entitlements and reviving the right/privilege distinction rejected in *Flemming v. Nestor* and throughout the Court's welfare benefit cases. That is, the Court may be suggesting in *Maher* and *Harris* that when government creates expectations that a citizen will have the use of public funds for a stated purpose because he meets certain eligibility guidelines, those expectations create no property right, or at best, a revocable right. That would be an ultra-positivist view of property, one which suggests that federal or state statutory law at the

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100. See id. at 842. For a discussion of *Selective Service System*, see supra notes 8, 10, 49 & 50-57 and accompanying text.
102. *Harris*, 448 U.S. at 304; *Maher*, 432 U.S. at 467.
103. 363 U.S. 603 (1960). In *Flemming*, the social security benefits of an alien who was deported for having been a member of the Communist Party were terminated pursuant to a provision of the Act. *Id.* at 605-06. The Court refused to characterize those benefits as accrued property rights and held that termination of those benefits under the Act did not offend due process. *Id.* at 608.
time one makes a property claim controls whether the benefit is property without regard to even implicit understandings, or justified reliance on created expectations.\textsuperscript{104}

\section*{C. Punishment vs. Withholding Benefits: Viewing Government Action}

Assuming the Court has not changed its definition of benefits as property, can the \textit{Maher/Harris} conditions doctrine rest solely on a distinction between punitive action and withholding action by government? To test this hypothesis, it is helpful to stand \textit{Maher} and \textit{Harris} on their heads. Imagine that “Bob” and “Ann” decide to exercise their constitutionally protected right to bear children. If Ann conceives, they will bear their third child, contrary to legislative policy against increased population as represented in programs educating people regarding birth control. Government can take a number of actions to respond to this decision:

a) it can take away their liberty by putting them in jail;
b) it can impose a financial disincentive, such as a fine or tax which comes directly from already-acquired property (excluding government benefits here);
c) it can impose a physically intrusive disincentive, such as flogging; a stigmatic penalty, such as publishing their names with derogatory remarks in the newspaper; or an indirect disincentive which has a significant effect on their decision, such as blacklisting them from government-related employment, requesting that people not sell homes to them, discouraging their children’s school teachers from giving them attention, etc.;
d) if they are poor, it can provide a “poverty disincentive” in the

\textsuperscript{104} The positivist view of property was suggested in Board of Regents v. Roth, in which a non-tenured teacher whose contract was not renewed was found not to have a property interest in continued employment. See 408 U.S. 564, 578 (1972). But even \textit{Roth} did not go so far as to argue that only explicit statutory language could create a property right; and, in another case which was handed down the same day, the Court reiterated that property rights could arise from mere rules or mutual understandings. See Perry v. Sinderman, 408 U.S. 593, 601 (1972) (citing \textit{Roth} at 577). However, the positivist approach survives in Justice Rehnquist’s discussions concerning how due process should be determined when the property right is created by government. See Arnett v. Kennedy, 416 U.S. 134 (1974). Justice Rehnquist argues that the state may dictate due process protection for any property which it confers. As he puts it, the litigant must “take the bitter with the sweet.” 416 U.S. at 154-55. Recently, a majority of the Court rejected this approach. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). \textit{But see Bowen}, 106 S. Ct. at 2164-69 (O’Connor, J., concurring in part and dissenting part) (“government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means”).
form of no payment for childbirth expenses for Ann or her baby should she choose to have it; or a financial disincentive, such as withholding all welfare benefits;
e) it can "reward" them by providing a direct financial incentive to not procreate, such as a tax break, a direct monetary payment, or some in-kind services; or, it can provide incentives, such as encouraging their employers to give them a better job;
f) finally, it can provide a combination of incentives and disincentives, such as no medical care for Ann or her baby if she chooses to have it; but all medical care for her, including contraception and abortions, if she chooses not to have it . . . that is, the *Maher* footnote in reverse.105

The *Maher/Harris* doctrine suggests that jailing Ann and Bob, imposing a direct financial disincentive such as a tax, or the nonfinancial direct disincentives listed in (c) above would clearly be unconstitutional.106 Moreover, each of the Justices in *Maher* and *Harris* would apparently allow the state to provide a financial incentive to Ann and Bob for giving up their right to procreate since the state may legitimately encourage "an alternative activity consonant with legislative policy."107 So long as the financial incentive does not harm those who opted against it, either in theoretical or in real terms, both the majority and the dissent in *Maher* and *Harris* would appear to be in agreement thus far.108 The options which are troublesome are imposition of the "poverty financial disincentive," such as the refusal to extend benefits or the withdrawal of benefits necessary for the safe exercise of that right of choice, or, a combination of poverty disincentives with incentives for those who make the opposite choice. These are the options which as Justice Brennan put it, "make . . . an offer that the

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105. See *Maher*, 432 U.S. at 474-75 n.8. For a discussion of the *Maher* footnote, see supra note 55 and accompanying text.

106. See 448 U.S. at 316-17 & 317 n.19; 432 U.S. at 474 & 474 n.8. This is so because such actions would influence the procreation decision through the imposition of obstacles that were not in existence prior to regulation. See id.

107. See *Harris*, 448 U.S. at 315 (citing *Maher*, 432 U.S. at 475-76). "[A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category." *Harris*, 448 U.S. at 316. As in the abortion funding cases, the Supreme Court would no doubt consider constitutional the state’s provision of a financial incentive to give up the right to procreate since such financial constraints are the product of government restriction on access to procreation, but rather of the parents’ indigency.

108. See *Harris*, 448 U.S. at 315-18; id. at 329-37 (Brennan, J., dissenting); id. at 337-48 (Marshall, J., dissenting); id. at 348-49 (Blackmun, J., dissenting); id. at 349-57 (Stevens, J., dissenting); *Maher*, 432 U.S. at 474-76; id. at 482-90 (Brennan, J., dissenting).
indigent woman cannot afford to refuse."109 Yet these are options which the majority characterizes not as "direct state interference with a protected activity" but as "state encouragement of an alternative activity."110

What distinguishes the poverty disincentive/incentible choice from other impermissible state choices? Four interrelated claims are made at this point. First, the government's choice to withdraw a benefit, or even its refusal not to grant a benefit in the first place, is not the equivalent of action and therefore cannot be judged in the way we judge moral acts. This argument assumes that there is no real difference between government's failure to extend benefits where no such benefits are sought, its choice to deny benefits where they are sought, and its choice to eliminate already extended benefits. Second, even if the government's choice is an "action," it is not blameworthy because it does not have the requisite effect: there is no abstract effect on exercise, the action does not make the rights-exerciser "worse off" than before, it is not the same kind of effect as a criminal penalty, or it occurs before, rather than after, the exercise has occurred. A variation on this theme is the Court's "obstacle" test. This test allows state withdrawals which do not create an obstacle to exercise since they do not result in the inability to exercise the rights.111

Finally, one might argue that the state's decision is not blameworthy simply because there was no affirmative state duty to act in the first place. Thus, removal of a previously granted gratuity is the moral equivalent of nonaction.

1. Is Withholding Benefits Non-Action?

Without explicitly so arguing, the Maher/Harris cases appeal to the fundamental distinction between legal and moral responsi-

109. Harris, 448 U.S. at 333-34 (Brennan, J., dissenting). Justice Brennan noted:

It matters not that in this instance the Government has used the carrot rather than the stick. What is critical is the realization that as a practical matter, many poverty-stricken women will choose to carry their pregnancy to term simply because the Government provides funds for the associated medical services, even though these same women would have chosen to have an abortion if the Government had also paid for that option, or indeed if the Government had stayed out of the picture altogether and had defrayed the costs of neither procedure.

Id. at 334 (Brennan, J., dissenting).

110. Id. at 315.

111. See id. at 312-17; 432 U.S. at 474. This is so because their impact upon the exercise of rights is indirect. There are other alternatives available to ensure exercise or there is lack of intent to affect exercise.
ibility for one's action and one's failure to act. The difference between imposing a penalty and withholding a benefit may be analogous to the difference in responsibility we ascribe to the person who affirmatively acts or gets involved in a situation, versus the responsibility of the passive person who sits on the sidelines and awaits an outcome. Legal examples abound: absent statutes, those who sit and watch another drowning,\textsuperscript{112} or fail to aid a stranger who is bleeding to death,\textsuperscript{113} or doctors who do not answer the call of one who is dying and might be saved are not held legally responsible,\textsuperscript{114} while those who assist but do so negligently are subject to liability.\textsuperscript{115} Restaurants or shops are not required to open their doors to the general public, but once they do so, they are responsible for nondiscriminatory treatment of their customers.\textsuperscript{116} Those who abuse family members are generally treated much more harshly than those who neglect their children or spouses. Although government is not obligated to provide certain benefits, if it affirmatively acts to do so, it takes on clear responsibilities, such as fairness and equal treatment in the administration of those benefits.\textsuperscript{117} In the abortion funding cases

\textsuperscript{112} See, e.g., Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) (failure of dependent to respond to deceased's outcries immaterial); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959) (defendant under no legal obligation to rescue person in peril).


\textsuperscript{114} See, e.g., Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901) (physician not liable for refusing to respond to call, even if no other physician is available); Randolph's Adm'r v. Snyder, 139 Ky. 112, 159 S.W. 562 (1910) (physician not liable in tort for refusing to visit when sent for, even though contract existed between physician and plaintiff).

\textsuperscript{115} See, e.g., Le Juene Road Hospital v. Watson, 171 So. 2d 202 (Fla. App. 1965) (once hospital admits patient, it must not unreasonably discharge patient against his will); Nelson v. Schultz, 170 Misc. 681, 11 N.Y.S.2d 184 (Sup. Ct. 1939) (property owner who undertakes removal of snow and ice must do so in reasonable and prudent manner); \textit{Restatement (Second) of Torts} § 324 at 139 (1965) (one who takes charge of another must act reasonably and not injure person in worse position than when actor took charge).


\textsuperscript{117} See, e.g., Sherbert, 374 U.S. at 404-06 (unemployment compensation); Speiser v. Randall, 357 U.S. 513, 526 (1958) (tax exemption); Westberry v. Fisher, 297 F. Supp. 1109, 1115 (D. Me. 1969) (aid to families with dependent children); L. Tribe, \textit{supra} note 64, at 1006-07, 1102 (discussing equal voting opportunity and equal access to state court review).
then, the decision by government not to provide funding benefits is equivalent to non-action or a passive decision, which does not make government responsible for the consequences of the decision.

But such an analysis is problematical. First, what government has done in the *Maher* and *Harris* cases can scarcely be termed "non-action" in any scientific or practical sense of that word. Even if *Maher* and *Harris* are thought of as cases where the state refused to extend a previously nonexistent benefit, government has not, like the man on the bank watching a child drown, made a choice for passivity. Government has acted in the sense that it has *made a decision*, a process which involves collective discussion, introduction of bills, lobbying, deliberation and voting. Since "property" rights stand or fall on this process, it is facile to argue that the state has not acted.

In addition, as in the abortion situation, if a woman has already been extended a "right" to medical care by the government with no significant limitations on that care, withdrawal of such services by the political process, even to a limited extent, does not constitute non-action. For example, if a city reduces its fire prevention budget, or a state repeals its day care services program, it cannot be said that government has not acted. Could a state in that situation say to the recipients of such services, "the government did not really act toward you because it only withdrew a benefit, your fire protection, but left you police, sanitation, and highway services?" Could it say, "even though we took away your day care, we did not act because we left you mental health counseling and handyman services which you did not have in the beginning?" Or if a state provided a worker with $100 per week in unemployment benefits to be used at his discretion so long as he met all the conditions to qualify for unemployment insurance, and then cut that amount back to $50 per week without changing the underlying eligibility conditions, can the state argue that the cutback is equivalent to non-action that eliminates state responsibility?

Yet, that is precisely what is at stake in *Harris*.118 It is clear that, prior to the Hyde Amendment, women who sought abortions for medically necessary reasons were theoretically eligible

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118. In *Harris*, the legislation abrogated a right to certain medically necessary physician's services which had been an integral part of the Medicaid program. In *Maher*, one could argue that the abortions sought were not covered by Medicaid in the first place since they were, by definition, non-therapeutic and hence not medically necessary.
under the federal statute.\footnote{119} Between \textit{Roe v. Wade}\footnote{120} and \textit{Maher}, most state Medicaid programs routinely covered abortion.\footnote{121} Though some states refused to pay for "medically necessary" abortions, the case law predominantly held these refusals to be illegal under the Social Security Act.\footnote{122} Moreover, after \textit{Maher}, women in many states obtained payment for medically necessary abortions; in other states, women received both state and federally funded Medicaid abortions even if not therapeutically indicated.\footnote{123} In a very real sense, then, the Hyde Amendment involved government action rather than non-action because it was a withdrawal of already extended benefits rather than a decision in the first instance not to provide them.\footnote{124} The fact that a previ-

119. The Hyde Amendment, originally passed in September 1976 to prohibit federal funding of abortions except where the mother's life was endangered, was immediately enjoined by U.S. District Court Judge John F. Dooling. Hyde's second amendment banning all abortion funding was introduced June 17, 1977, just a week before \textit{Maher} was decided, and was adopted on December 7, 1977 after modification to allow payment for abortions if the mother's health would be severely impaired. \textit{See} F. \textit{Jaffe} \& B. \textit{Lindheim}, \textit{supra} note 14, at 128-92.


121. In 1977, approximately 295,000 women were obtaining Medicaid abortions, constituting 1/4 of all abortions performed. \textit{F. Jaffe} \& B. \textit{Lindheim}, \textit{supra} note 14, at 128.

122. Thirteen states between 1973 and 1975 had limited Medicaid abortion funding, but most statutes and regulations were invalidated by federal courts. \textit{See id.} at 132-35. By the end of 1979, 40 states restricted Medicaid abortions, including 25 which did so through executive or administrative decree. \textit{Id.} At least 12 states were ordered by the Court to provide funding for medically necessary abortions, and 3 ordered to pay if there was federal reimbursement. \textit{Id.} At least one state, Missouri, did not provide assistance even after being ordered to do so by the federal court. \textit{Id.}

123. In McRae \textit{v. Califano}, the first remand of the \textit{Harris} case, the district court found that federal funds paid for between 250,000 and 300,000 abortions, principally under Medicaid, between \textit{Roe v. Wade} and the Supreme Court's vacatur of the \textit{Harris} Court's preliminary injunctions. McRae \textit{v. Califano}, 491 F. Supp. 630, 639 (E.D.N.Y.), \textit{rev'd}, 448 U.S. 297 (1980). Moreover, the district court noted that between 1970 and 1975, Medicaid funded almost half of the 112,029 abortions performed in municipal hospitals for New York city residents and approximately 1/2 of the 293,713 abortions performed for New York residents in non-municipal hospitals. 491 F. Supp. at 639.

124. Similarly, in \textit{Selective Service System}, the government withdrew previously granted benefits, not only from students who otherwise would have been entitled to them, but also from students who had already begun to receive them. This is not the same as refusing to provide educational assistance benefits initially. \textit{See} 468 U.S. at 841 (Marshall, J., dissenting). In \textit{Bowen}, this withdrawal of benefits was even more explicit. The Government, which had been providing Little Bird of the Snows with AFDC, medical, and Food Stamp benefits under its self-provided Social Security numbers, terminated these benefits to the child when the parents refused to furnish the agency with the child's number. \textit{Bowen}, 106 S. Ct. at 2148.
ous status quo was restored does not nullify the "action" of the state.

2. Penalties and Withdrawals: An Effects Test

The second distinction between the "poverty disincentives" and other actions by government in the childbirth example may be in their effects on our hypothetical couple's ability to decide whether or not to exercise their right to bear children. As the Court made clear in *Maher* and *Harris*, that distinction will not be based on the actual effect on the recipient of the government's decision to impose a jail term or fine, or merely to provide positive or negative financial incentives.\(^{125}\) If actual effect is measured, it is not at all clear that even for most people, loss of subsistence payments or medical care is less harsh than being jailed for any period of time. Moreover, the subsidiary effects of the government's financial action on government-dependent citizens may be much more long-lasting and telling than the effect of a criminal fine or even a jail sentence, even considering the stigmatic harm which must naturally attend these "punishments." If government punishes exercise of a fundamental right by withdrawing welfare benefits, the withdrawal may result in loss of a home, break-up of a family, mental illness, and, conceivably, starvation. The effects of withdrawing abortion funding are concededly mixed: the blessing of another child may well be outweighed by the child's detrimental impact on a family's life. The responsibility of raising a child may drastically affect the mother's chances for future employment and career growth, and thus her entire

125. See *Harris*, 448 U.S. at 325-26; *Maher*, 432 U.S. at 473-74. The Court has concerned itself with actual effect where the criminal rights of indigents are concerned. The Court has protected criminal defendants by requiring not only that states eliminate financial barriers to court access, but also that states provide the financial means for indigent criminal defendants to exercise certain fundamental rights. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (absent intelligent waiver, person may not be imprisoned for any offense without representation of counsel at trial); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (state must provide indigents with free transcript of preliminary hearing); *Long v. District Court*, 385 U.S. 192 (1966) (state must pay for transcripts necessary for appeals by indigents); *Douglas v. California*, 372 U.S. 353 (1963) (states must provide financial means for indigents to exercise right to counsel on criminal appeals); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (states must provide financial means for indigents to exercise right to counsel in felony trial).

Indeed, the Court has recognized that imprisoned defendants have a fundamental right of access to the courts which requires the state to provide counsel, law libraries, assistance with preparation of legal papers or other substitutes. See *Bounds v. Smith*, 430 U.S. 817 (1977); see also *Payne v. Superior Court*, 17 Cal. 3d 908, 914-19, 558 P.2d 565, 570-73, 132 Cal. Rptr. 405, 410-13 (1976) (right of access to court for imprisoned civil defendant).
economic situation for the duration of her life, not to mention adding psychological, physical, and social stresses. Studies suggest that placing such a child for adoption may diminish, but does not eliminate, such stresses. The current inadequacy of this solution is attested to by evidence that many pregnant women prefer committing suicide to bearing and giving up unwanted children for adoption.

The Court seems to distinguish between penalties and withdrawal of benefits by questioning whether the rights-exerciser is any "worse off" than she was before the government responded to the potential or actual exercise of rights by restricting benefits. If the rights-exerciser is worse off because of government action, then the Court may call that action a penalty. If the plaintiff's legal challenge were to "alternative activity" (incentive (e) in the Ann and Bob hypothetical), the Court would be on firmer ground making this distinction. If Ann decides to bear a child and the government, to discourage that action, offers $1,000 to people who forego having any more children, it has some argument that Ann is not in any worse position than she was previously. Her position is not as good as it would have been had the government given $1,000 to everyone regardless of their childbearing proclivities. In that sense, Ann may complain that the government is influencing her choice to bear a child and treating her unequally.

126. Indeed, the McRae v. Califano trial court made extensive findings about the impact of unwanted pregnancy on mental health, both for those who had existing problems and others who were not mentally ill but were under significant stress. McRae v. Califano, 491 F. Supp. 630, 674-76 (E.D.N.Y.), rev'd, 448 U.S. 297 (1980). The evidence also indicated that children whose mothers were denied abortions showed higher incidences of physical and mental illness, more emotional and social problems (especially boys), more educational problems, earlier marriages and a greater incidence of welfare recipients than "wanted" children, 491 F. Supp. at 677-78. Physical problems such as cardiovascular disease, gastrointestinal disease, ulcerative colitis, renal hypertension, multiple sclerosis, tuberculosis, diabetes, and even cancer have been exacerbated by pregnancy. See NISWANDER, Abortion Practice in the United States: A Medical Viewpoint, in ABORTION, SOCIETY AND THE LAW 199, 202-10 (D. Walbert and J. Butler ed. 1973).


By contrast, most studies show that whatever their moral complications, women do not suffer severe psychiatric or emotional problems from abortions unless they are forced to abort by someone else or it is against the woman's religious convictions. FLECK, A Psychiatrist's View on Abortion, in ABORTION, SOCIETY AND THE LAW 174 (D. Walbert and J. Butler ed. 1973); SCHWARTZ, Abortion on Request: The Psychiatric Implications, in ABORTION, SOCIETY AND THE LAW 134, 144-52, 183-87 (D. Walbert and J. Butler ed. 1973).
But in other senses, she is no worse off than she was before the government's incentive program.

However, if the criterion of being "worse off" is equated with prohibited state punishment but not with withholding or withdrawal of benefits, this "worse off" argument is problematic. In a withholding situation where no benefits have ever been extended, there is a sense in which Ann can say she is no worse off, but it is limited to the sense that she did not have that benefit or opportunity before the government decided to withhold it from her. The form that state action or inaction takes (e.g., imprisonment or withholding benefits) does not determine whether Ann is better or worse off. For what it means to be "worse off" is itself a matter of debate. Chuck Colson may well feel that he is better off psychologically, morally and financially for the government's having thrown him in jail. Ann may become worse off even if there is only a financial incentive and no disincentive for child bearing, because she may erroneously calculate that she can make money to pay her rent and become happy by not having a child. Even the government's withholding of or refusal to extend childbirth benefits after Ann requests them might make her "worse off" because it might create unexpected anxiety, disappointment, resentment and injury to her sense of equality. In addition, if the government states, in denying her benefits, "you have done a bad thing by getting pregnant," the effects may be unforeseeably deleterious. Others may stigmatize Ann as a disloyal American or immoral person in the same way that withholding Social Security benefits from ex-Communist Nestor stigmatized him beyond the mere loss of money.128 The Court concedes that stigmatic harm, not just financial loss, is real harm, whether in the context of segregated schooling or loss of one's reputation.129

Moreover, as has previously been pointed out, the potential recipients in the benefits cases were not being affected merely by a "withholding" of benefits, that is, a government decision not to provide previously non-existing benefits. In the abortion funding cases, Medicaid services, at least for therapeutic abortions, were

128. For discussion of the holding in Flemming, see supra note 103.

theoretically available in most states before the Hyde Amendment. The Hyde Amendment withdrew benefits; it did not withhold them. Thus, many women were worse off because they had fewer options after the Hyde Amendment and similar state statutes were passed. The same is true of restrictions on public benefit programs such as those for education benefits in Selective Service System,130 or for welfare benefits in Bowen.131 Yet, despite the fact that previously granted benefits were taken away, the Court approved the state's action in those cases.

Nor can criminal penalties validly be distinguished from withholding or withdrawing government benefits solely because they involve different deprivations. Even acknowledging that throwing a rights-exerciser in jail is in a sense different from dealing him a financial blow (since loss of liberty is arguably the most devastating, intrusive effect the state can have on a person's life), for our purposes, that does not necessarily distinguish a criminal proscription from the withholding of a government benefit. Many criminal proscriptions and "punishments" by the government are merely financial.132 It is unclear how fining a person differs in effect from taking away previously available benefits with monetary value unless one understands the fine, but not withdrawal of benefits, to take away "property." Indeed, if Ann and Bob are wealthy, their loss from a fine for having children is not comparable to the loss of medical benefits, even if only childbirth benefits, to an indigent Ann and Bob.

However, criminal penalties of all kinds, including financial penalties, may arguably be different because of their indirect or nontangible effects. One might argue that to make an act criminal is not only to discourage it but to condemn it in most ardent terms as an anti-social act; to refuse to pay for an act is a milder, more indirect judgment on its utility. Yet, both are negative judgments on such an activity with significant consequences. It seems

130. See 468 U.S. 841. For a discussion of Selective Service System, see supra notes 8, 10 & 49-57 and accompanying text.
131. See 106 S. Ct. at 2168. For a discussion of Bowen, see supra notes 9 & 58-65 and accompanying text.
132. For instance, tax penalties and federal crimes for which only fines are payable do not result in imprisonment. See, e.g., 18 U.S.C. § 243 (1982) (fine for exclusion of jurors on account of race or color); id. § 244 (fine for discrimination against persons wearing uniform of armed forces); id. § 291 (fine for purchase of claims for fees by court officials); id. § 432 (fine for making contracts with members of Congress). By contrast, federal law imposes a prison term for improper use of the name or character of Smokey the Bear and Woodsy Owl for profit. See id. §§ 711, 711a.
curious that if we precisely guard the activity as a fundamental constitutional right, we can condemn its exercise mildly and indirectly but not strongly, particularly when the indirect, “mild” condemnation may have a more devastating real impact than the direct one. While it may seem appropriate to withdraw benefits when a person engages in unprotected anti-social activity, e.g., distribution of child pornography films, it seems anomalous to argue that exercise of a protected right is so anti-social that we may use legal means to prevent it by making the rights-exerciser worse off than before the attempted exercise. Surely if an activity is so highly protected we must see some utility in it, if only on an abstract level. While near-obscenity may not be important, the right of speech is; while abortion may be counter-productive to social aims, the right of privacy is not.

Finally, the difference in effect between penalties and withdrawing benefits might, for purposes of the effects test, be in the timing. That is, a state penalty is proscribed precisely because it occurs after the right is exercised, for example, when an individual is sent to jail for advocating the overthrow of government. At that point, the penalty serves no purpose except to punish a person, not for a fault or offense but for a protected action: exercise of his constitutional right. It does not serve to deter a socially obnoxious action since that action has already occurred. By contrast, witholding or withdrawing benefits occurs prior to the exercise of the constitutional right: however otherwise blameworthy such withdrawal may be, it at least prevents socially obnoxious behavior from occurring and may therefore be justified.

First, as has been argued, this position raises the problem of claiming that exercise of one’s fundamental right is socially obnoxious in itself. Second, if that behavior, however obnoxious, is protected as a fundamental right, the timing of the state’s action should not alter the balance between the right and the state’s interest. If the state interest must be compelling to overcome a fundamental right, it should be so after the exercise as well as before. Third, the Court has traditionally made the opposite judgment in the free speech and free press areas when prior restraints by government are compared to criminal sanctions. It has held that prior restraint is more odious precisely because it does not give the rights-exerciser any choice between exercising the right (and perhaps facing a later sanction) and not exercising the right.133

133. See, e.g., Lovell v. Griffin, 303 U.S. 444, 451 (1938) (ordinance prohibiting distribution of literature invalid); Near v. Minnesota, 283 U.S. 697, 713-17
Similarly, action of the state, such as a funding denial, which effectively prevents an indigent woman from choosing a non life-threatening abortion, should be more suspect than action which allows her a choice between abortion with potential punishment or a live birth with no punishment.

3. Penalties vs. Withdrawing Benefits: The Obstacle Test

If the effect of state action on the opportunity for exercise of a right is not the Court's concern in Harris and Maher, one might turn to the Court's discussion about what it means to place obstacles in the path of exercise of such rights. By an "obstacle," the Court apparently means that state's action essentially must be the primary "cause" of the individual's inability to exercise her right to have an abortion. The action need not entirely block exercise of the right to be condemned; the Court specifically uses the term "unduly burdensome interference" to isolate those actions considered improper. But, apparently, there must be some significant causal connection. What the Court means by "cause" can be graphically illustrated: a woman proceeds to her doctor's office to have an abortion, only to be prevented or significantly slowed by a state law that, for example, requires her to

(1931) (statute prohibiting publication of defamatory newspaper unconstitutionally as prior restraint on press); see also New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (government failed to meet burden of showing justification for prior restraint).

134. See Harris, 448 U.S. at 316; Maher, 432 U.S. at 474. Other commentators have emphasized the "direct interference" aspect of the Court's discussion in Maher and Harris. See, e.g., Note, Indigent Women and Abortion: Limitation of the Right of Privacy in Maher v. Roe, 13 Tulsa L.J. 287, 299 (1977). As the note points out, Justice Powell's "direct interference" test was previously rejected by the Court in Singleton v. Wulff. Id. (citing Singleton v. Wulff, 428 U.S. 107, 118-28 (1976)). While it is unclear whether the "obstacle" test differs significantly from the "direct interference" test, the "obstacle" test seems to invalidate only government interference with individual choice which is more intrusive than the "direct interference" test appears to require. But see Murillo v. Bambrick, 681 F.2d 989, 903 (3d Cir.), cert. denied, 459 U.S. 1017 (1982). In Murillo, the court of appeals found that a $50 direct filing fee does not significantly interfere with the right to get a divorce which the Supreme Court had protected in Boddie v. Connecticut, 461 U.S. 151, 103 S.Ct. 1106 (1983). This direct interference or impingement test has been used to validate an agency decision to restrict sterilization as a family planning service to persons over twenty-one. See Peck v. Califano, 454 F. Supp. 484, 487 (D. Utah 1977).

135. See Maher, 432 U.S. at 479; Cf. West Side Women's Serv. v. City of Cleveland, 573 F. Supp. 504, 517 (N.D. Ohio 1983) (holding that zoning ordinance banning abortion clinic in certain area constituted substantial burden on exercise of right to abortion); accord Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 336 (5th Cir. 1981) (denial of license for abortion clinic places "significant burden on a woman's abortion decision").
have the operation in a hospital or to wait twenty-four hours after her physician’s visit before aborting. The state has placed an obstacle in her path. In an analogous situation, the indigent woman in Harris or Maher whose benefits are withheld may claim that as she proceeded to the physician’s office with her Medicaid card, the state law stopped her at the cashier’s office. But the Court’s test is a clever one: it is not then the state, but the physician or the woman herself who is placing the obstacle. The state has not prevented (as primary cause) the abortion but only discouraged the physician who expects payment. In effect, the woman’s physician or her own indigency become the intervening obstacles to, or the cause of, her inability to obtain an abortion.

The obstacle test seems to rest on the notion that withholding welfare benefits only indirectly impacts upon a woman’s ability to exercise her right because she can always find other means of exercising it. One must ask, however, what it really means to place obstacles in the path of the exercise of rights. If one analyzes the preferred end—that people be able to exercise such rights—then the government’s action affects that ability. If the question is whether, and to what extent, each of these choice-influencing actions affects the ability of people to exercise their rights, the penalty/withholding benefits distinction is of questionable validity where government-dependent citizens are concerned. It is not intuitively obvious that a person will be more deterred from exercising a fundamental right by the threat of a fine or jail term than by the loss of subsistence benefits or the loss of the financial means to exercise the right. If a woman has no money to pay for an abortion, her only alternative to live birth is a self-induced abortion. If abortion is a crime, she merely takes a risk that she will suffer punishment if she has an abortion. Given the practice under criminal statutes prior to Roe v. Wade, it is far from clear that the risk of criminal prosecution would significantly deter, or create an absolute obstacle to exercise. Moreover, the “indirectness” of the impact was not a significant factor

136. See Altman, Abortion and the Indigent, 11 J. Soc. Phil. 5, 6-8 (1980) (arguing that withdrawal of funding cannot be considered cause of woman’s inability to obtain abortion).

137. See id. at 7-8. Altman argues that mere action to influence the woman’s choice on abortion cannot be condemned as unconstitutional and that when such action includes withholding assistance, it cannot be termed coercive. Id.

138. It is this loss of financial means to exercise the right that is at the heart of the abortion cases.

139. 410 U.S. 113. For a discussion of Roe v. Wade, see supra notes 24 & 31 and accompanying text.
in Sherbert,140 and other cases involving withdrawal of benefits where fundamental rights are exercised.

As a practical matter, Justice Powell's assumption in Maher that the state has not deprived a woman of her rights because "she continues as before to be dependent on private sources for the service she desires"141 is generally unsupportable. Privately funded abortions for indigents are not widely available.142 Reliance upon an "underground" of family and friends to meet basic needs or expenses, if the government programs do not, is not a viable alternative for many welfare recipients. For them the cost of abortion will come from subsistence benefits such as AFDC. Since many AFDC payment levels amount to less than half of the minimal standard of living in the United States,143 rights-exercisers will necessarily place themselves further below the poverty line by choosing abortion. The means used to exercise their rights will be money which government-dependent citizens were provided to buy their children's shoes, pay their rent, or buy their food.144 Such benefits do not include slack for unexpected ex-

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140. 374 U.S. 398 at 403-04. The Sherbert Court specifically suggested that the indirectness of impact on exercise was only the beginning of the inquiry into whether there was a burden on exercise of rights. Id. The Court likened discouragement caused by withdrawal of benefits to imprisonment and fines in its impact. Id. at 404 n.5. In Bowen, most members of the Court apparently agreed with Sherbert in this respect. The majority opinion stated that "[a] governmental burden on religious liberty is not insulated from review simply because it is indirect . . . ." 106 S. Ct. at 2155-56.

141. Maher, 432 U.S. at 474. Justice Powell continued: "The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." Id.

142. Private charity for health services generally declined in the years just before the Maher and Harris cases from 2.9 percent in 1960 to 1.1 percent in 1975. See F. Jaffe & B. Lindheim, supra note 14, at 143-44. With respect to abortion, health facilities performed about 85,000 at no or reduced cost to indigents before the Hyde Amendment. Id.; see also McRae v. Califano, 491 F. Supp. 630, 660 (E.D.N.Y.) (citing additional facts and figures), rev'd. 448 U.S. 297 (1980).


144. For a general discussion of state delineations of basic needs, see Characteristics, supra note 143. Basic needs reflect the state's judgment about the minimum amount of money needed to assure economic security. See Gardenia v. Norton, 425 F. Supp. 922, 926 (D. Conn. 1976). If grants are not spent for these
penses such as car repairs or evictions, much less for abortions.\textsuperscript{145} The damage which unexpected expenses cause goes beyond the temporary loss of income for a month; it begins a chain reaction with devastating consequences. The woman who must pay for an abortion cannot then pay the heat bill, and, as a result, her children may become ill. She then might stay home and lose her part-time job. Of course, she would then be unable to pay the rent, perhaps be evicted with sick children, and the cycle would continue to spiral downward, a typical scenario in a below-poverty level family.

Ironically, forcing indigent women to seek money elsewhere for a need such as abortion creates the very dilemma that the Court seeks to avoid by banning criminal sanctions which infringe on fundamental rights. The Court does not allow a state to require a person to choose between exercising a fundamental right and committing a crime, or foregoing a fundamental right to stay within the law. Yet the Court's \textit{Maher/Harris} doctrine may force the welfare recipient who wants to exercise her right to abortion to commit the crime of welfare fraud. If she gets money for her abortion from a friend or family member, she is normally required to report it to the welfare department as income.\textsuperscript{146} In most states, that money is assumed available to meet other subsistence needs, such as food and clothing, even if it is not actually available for that purpose.\textsuperscript{147} The woman's public assistance award is reduced commensurately—her $200 abortion costs her $200 in AFDC benefits meant to go for rent or food. If a recipient fails to report the income, she can be criminally prosecuted

\textsuperscript{145} Some states provide assistance for a limited number of enumerated special needs. \textit{Compare} Massachusetts (medical transportation, infant help, funeral and burial expenses, school clothing allowance) and Minnesota (home repairs, appliances, special diets and furniture) \textit{with} Missouri, Oklahoma, Texas and others (no special needs) \textit{and} Characteristics, \textit{supra} note 143, at 70-71.

States also have broad discretion to choose to participate in the Emergency Assistance Program and define eligibility for aid. \textit{See} Quern v. Mandley, 436 U.S. 725, 734 (1978). The trend since 1967 has been to eliminate or reduce special needs provisions. \textit{See} Memorandum, "\textit{What is AFDC}?", Center on Social Welfare Policy and Law, June 1977, at 9.

\textsuperscript{146} \textit{See}, e.g., \textit{42} U.S.C. \textsection 602(a)(13)-(14) (1982) (reporting income is condition to receipt of aid); Minn. Stat. \textsection 256.73(6) (1984 & Supp. 1986) (recipient must complete income reports requested by local welfare department); \textit{see also} Minn. Code Agency R. \textsection 9500.0010 (excluding as income only loans that are obtained under conditions that preclude their use for current living costs).

\textsuperscript{147} \textit{See}, e.g., \textit{42} U.S.C. \textsection 602(a)(7) (1982) (providing that all income not specifically disregarded must be applied to determine family's need and therefore its welfare payment); Minn. Stat. \textsection 256.73(6) (1984 & Supp. 1986) (same).
for welfare fraud.148

Furthermore, as illustrated by the abortion cases, in deciding whether an obstacle is created, the Court has never asked whether the rights-exerciser has actual alternatives which ameliorate the impact of the state’s decision not to assist her. Rather, the test employed by the Court has been whether the restriction has made it unduly burdensome for the woman to make and exercise her choice,149 and whether it has intruded into the physician-patient sanctuary where such choices are made.150 There is no obvious reason why the Court should decide whether alternatives exist for avoiding the burden of the state’s action in this case, when it did not do so in cases involving regulation of abortion clinic procedures, waiting periods, disclosure forms and other less burdensome state actions.

One might also argue that a state action “creates an obstacle” to exercise of a fundamental right when the intent and effect of the action is to prevent exercise.151 If that were the Court’s

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148. See, e.g., Minn. Stat. § 256.98 (1984) (punishing as theft intentional concealment of material fact in attempt to obtain greater assistance than that to which recipient is entitled); 6 Minn. Code Agency R. § 9500.0270 (1983) (providing for recovery of fraudulently obtained welfare benefits).

149. See Appleton, supra note 41, at 726-27. The author notes that only an unduly burdensome interference by the state has warranted a more exacting standard of review by the Court. All other types of state interference with the freedom to decide to terminate a pregnancy have been examined under the rational relation test. Id.

150. See, e.g., Roe v. Wade, 410 U.S. at 163-64 (physician and patient must be free in early stages of pregnancy to consult and decide whether pregnancy should be terminated).

151. For example, in Selective Service System, the intent of Congress not to punish students but to encourage them to register was crucial to the Court’s determination that the educational conditions statute was not punishment within the meaning of the bill of attainder clause. 468 U.S. at 854-55.

In Bowen, the plurality also suggested as much when it argued that the Social Security number requirement was not an attempt “to discriminate invidiously or any covert suppression of particular religious beliefs” and that it was not “suggesting antagonism by Congress toward religion generally” and is “facially neutral.” 106 S. Ct. at 2155-57. While the religious antagonism issue is particularly significant in free exercise claims, because of the establishment clause’s claimed requirement of neutrality in favoring or disfavoring religion, it is not clear that this plurality would apply the intent requirement only to free exercise cases. But see Gross v. City of Miami Beach, 721 F.2d 729, 736 (11th Cir. 1983) (arguing that in religious conduct cases, the relevant question is not whether there is an imposition of a criminal penalty or denial of a benefit, but whether the government action focuses on the protected conduct itself), cert. denied. 105 U.S. 108 (1984). For a discussion of Selective Service System, see supra notes 8, 10 & 49-57 and accompanying text.

The plurality in Bowen also attempts to distinguish Sherbert and its progeny in a curious way. The plurality suggested that these cases involved an attempt to discriminate against religion because, in Sherbert and Thomas at least, the state
standard, then it would be compelled to reverse its decisions in the Sherbert line of cases along with those in the Maher line. In those cases where the state has acted for reasons unrelated to the fundamental right endangered, and merely because of circumstances the stated action endangered that right, we would expect to see no protection provided to the benefit recipient. In Sherbert, for example, the “availability for work” requirement was applied across the board to every unemployment benefit action, regardless of religious affiliation, and it was merely coincidental that the only work available in the Sherberts’ hometown happened to include Saturday shifts. If the state’s motives determined whether an obstacle was created, the state would be blameless for infringing on a Sabbatarian’s right to rest on the Sabbath because the state did not set out to achieve that result. In fact, the state’s motive in Sherbert was deemed irrelevant. By contrast, if the state’s motive determined whether obstacles were placed in the path of exercise in the abortion funding cases, the Maher/Harris Court would be compelled to find that the government was placing obstacles in the path of a woman’s fundamental right to choose. The unambiguous legislative intent of both the Hyde Amendment and state statutes was to prevent as many indigent women as possible from choosing to exercise their abortion

had provided for an exemption for those who quit or refused work with “good cause.” 106 S. Ct. at 2156. Since the state did not include religious hardship as good cause, the plurality argues, it must have intended to discriminate against religion. Id. By contrast, since the statute in Bowen exempted no one from the requirement, it cannot be deemed discriminatory. Id. at 2156-57. Since Sherbert and Thomas explicitly did not rest on the state’s discriminatory intent, this distinction seems ironic. For a discussion of Sherbert and Thomas in this regard, see supra note 18 and accompanying text.

Moreover, it seems odd to suggest that a good cause exemption must be discriminatory for failing to include religious hardship, unless all other types of hardship are protected by the statute. Indeed, many otherwise “good” causes for terminating employment, such as family responsibilities, have not been considered “good” for purposes of receiving unemployment benefits. See, e.g., Kantor v. Honeywell, 286 Minn. 29, 175 N.W.2d 188 (1970); 81 C.J.S Social Security and Public Welfare § 230 (1977).

152. 374 U.S. 398 (1963). For further discussion of Sherbert, see supra notes 10, 12 & 18 and accompanying text.

153. Sherbert, 374 U.S. at 419-20 (Harlan, J., dissenting); see also Note, supra note 134, at 300 (discussing application of “direct interference” test).

154. See 374 U.S. at 405. But see Mobile v. Bolden, 446 U.S. 55, 62 (1980) (discriminatory motive is necessary element of fifteenth amendment violation). Of course, one can also argue that Sherbert reached the right result for the wrong reason because plaintiffs should have won under the establishment or equal protection clauses since the state statute specifically protected Sunday worshippers from having to violate their Sabbath if work was resumed on Sunday due to national emergency. See Sherbert, 374 U.S. at 406.

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rights.\textsuperscript{155}


Finally, the \textit{Maher/Harris} defender may argue that it does not matter a great deal whether the state has "acted" in some practical sense or what the effect of the state's action has been. The state simply cannot be said to be interfering with or affecting exercise of a right in a blameworthy way when it withholds or withdraws a benefit which enables that exercise when the state was not required to provide such benefit in the first place. Or, in the language used previously in this article and which the Court accepts, the state has no duty to provide (and the recipient no claim-right to receive) Medicaid benefits which enable exercise of the abortion right, whereas the state has a duty to not physically restrain exercise of the abortion right (a liberty-right not to be restrained). That is, the reasoning about penalties and obstacles is evidence of the Court's acceptance of two liberty-rights notions: first, that the state has no, or few, affirmative duties to its citizens and second, that in areas in which it has no such duties, any subsequent affirmative assistance which the state provides can be revoked for any reason whatsoever.

As has been partly suggested, these definitional assumptions of the Court are not only inherently flawed but inadequate to explain the differences in the Court's holding in the \textit{Sherbert} line of cases and in the \textit{Maher/Harris} cases. Yet the Court in \textit{Maher} argued that the \textit{Maher/Harris} doctrine was consistent with the conditions cases following \textit{Sherbert}.\textsuperscript{156} To substantiate its assertion, the Court would be forced to claim in each case that the right involved, if any, was a liberty-right such as to exercise one's religion, to travel, or to have an abortion. In each of these cases, the Court would have to recognize the benefit at issue as the same kind—either as non-property, unearned property, or government-acquired property—since the benefits at issue were all welfare-related benefits. In fact, in the \textit{Shapiro/Sherbert} line, the proof of actual effect on exercise is considerably more remote than in \textit{Maher/Harris}.\textsuperscript{157} In each, the state or federal government clearly


\textsuperscript{156} See Maher, 432 U.S. at 474-75 & 475 n.8.

\textsuperscript{157} See Note, supra note 134, at 300-01.
acted to withdraw previously acquired benefits\textsuperscript{158} which had an actual effect on the exercise of the recipient's rights. In each, the rights-exerciser was "worse off" for the withdrawal of benefits. At least the plaintiff in Sherbert could collect welfare benefits if unemployment compensation was unavailable. But the Harris plaintiffs had nowhere else to turn to prevent the physical or emotional harm caused by an unwanted pregnancy. In all cases, benefits were withheld prior to exercise of the recipients' rights; all recipients could be said to have private alternatives (if any did) to the benefits the state was withdrawing, which would enable them to exercise their rights.

In summary, if the Court had neutrally decided these cases based on the criteria previously discussed, it would have been compelled either to decide all of the cases the same way or to deny the claims of Thompson,\textsuperscript{159} Sherbert\textsuperscript{160} and their successors, and uphold the claims of Roe\textsuperscript{161} and McRae.\textsuperscript{162}

This article has previously discussed, by example, the argument that a government has no affirmative duties for which there are claim rights toward its citizens. I will not attempt to argue that the state has the specific duty to provide basic needs for which there is a corresponding right to welfare. But it is suggested that it is important to reflect a moment on the analogy being implicitly drawn between an individual's duty (or lack thereof) to assist other people in securing their rights and the state's duty. Earlier in this article, it was noted that liberal traditions commonly accept the notion that a person's failure to assist another in exercising his or her right is less blameworthy than a direct interference with the exercise, if it is morally wrong at all.\textsuperscript{163} Furthermore, if a person begins to assist another gratuit-

\textsuperscript{158} For a discussion regarding rights to welfare, see Michelman, \textit{Foreword: On Protecting the Poor Through the Fourteenth Amendment}, 83 HARV. L. REV. 7, 13-18, 35-39 (1969). For a further discussion of Michelman, see \textit{infra} note 216.

\textsuperscript{159} See Shapiro, 394 U.S. at 618. For a discussion of Shapiro, see \textit{supra} note 17.

\textsuperscript{160} Sherbert, 374 U.S. at 398. For a discussion of Sherbert, see \textit{supra} notes 10, 12 & 18.

\textsuperscript{161} Maher, 432 U.S. at 464. For the facts of Maher, see \textit{supra} note 25 and accompanying text.

\textsuperscript{162} Harris, 448 U.S. at 297. For the facts of Harris, see \textit{supra} note 42 and accompanying text.

\textsuperscript{163} See \textit{supra} notes 112-16 and accompanying text. By contrast, some have argued that if one person has a right, all others, not just the "losers" in the rights battle, are morally required to take steps to defend these rights, even to the point of violent revolution. See Hawk, \textit{Must We Do What Rights Require?}, 17 J. VALUE INQUIRY 241 (1983). This argument may result from the intuitive perception that responsibility to others is at least equally as important as rights and it
tously, his or her subsequent withdrawal of help is not wrong unless there was some expectation or reliance created that the help would continue. Withdrawing help is essentially a failure to act, as much as if there had never been help initially. Some then conclude that if government provides a benefit which it has no duty to provide, it may withdraw that benefit without compunction; withdrawal, like initial failure to provide, is tantamount to non-action.

However, the reasons for which the common law has chosen not to impose affirmative duties of assistance on private individuals may not be transferable to government. If one argues that individuals have no legal duty to secure the rights of others, because they are autonomous beings whose first responsibility is to themselves, the analogy fails. It is illogical to say that democratic government has the right, much less the duty, to take care of its own needs first and, like an individual, is an entity whose right to free choice of action is paramount to the claim-rights or needs of its citizens. To be concerned that the state will be used as a means rather than an end if it is not granted the power to decide whether to act affirmatively, and its existence therefore denigrated, is ludicrous given the explicit and implicit purposes of democratic government to act affirmatively in securing the welfare of others.

If one argues that we do not impose on individuals an affirmative duty to help, as a matter of efficiency and practical enforcement, the analogy is again not firm. We might argue that imposition of affirmative duties on individuals is not realistic. We won’t be able to decide when someone has broken the duty, we won’t be able to enforce the duty against all who have broken it, and we can’t in hindsight judge whether a person could reasonably foresee that he would breach the duty or cause himself harm if he fulfilled it. For instance, we might argue that a “duty to rescue” statute is unworkable because an individual will not be able to predict whether harm will come to himself if he follows the statute. We won’t be able to tell how much he has to do to rescue an individual and we won’t be able to catch people who don’t fulfill their duties. Similarly, if we impose a duty that those more fortunate must individually support the poor, we will not know when that duty has been fulfilled or when imposition of the duty

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clearly constricts rather than frees others in the community to seek their own ends under liberalism’s autonomy theory.
will harm the duty-bound.\textsuperscript{164} Perhaps as importantly, we usually can't expect to make a rule which is definite enough for people to follow and which can be enforced given the resources available for sanctioning violators.

Yet, none of these arguments legitimately carries over to government. To a large extent, government has the ability to predict what will happen to itself or to its citizens' lives if it fulfills affirmative duties. It has the power to define those duties in a way that they are possible to meet. One could argue that choices about the funding and eligibility requirements of public benefits are the exercise of those predictive powers in such a way as to prevent substantial harm to governmental or societal functioning. Moreover, there are ways to quantify and define affirmative obligations to assist the exercise of certain fundamental rights, particularly the right to choose whether or not to have a child. Finally, the enforcement problems are insignificant. If government has breached its affirmative duties, there are well-established ways of discovering that and making government comply. Battles over the political question doctrine exception and the eleventh amendment are not about whether government has complied or should be made to comply with its duties, but about whether the courts are the appropriate vehicle for ensuring compliance.

Thus, even if \textit{Maher} and \textit{Harris} are right in suggesting that requiring the government not to withdraw benefits necessary for the poor to exercise fundamental rights is equivalent to requiring government to supply such benefits as an affirmative duty, the real question is not whether government has affirmative duties toward government-dependent citizens, but what those duties are, and who should decide what they are. Once the government has undertaken to assist, as in the welfare cases, the crucial question becomes not what the affirmative duties of government are but whether the reasons it gives for imposing conditions on assistance recipients are just.

\textsuperscript{164} For example, an individual who had a duty to support the poor might be concerned about how much of his paycheck would have to be spent to help starving children in Ethiopia. And what would constitute harm to the more fortunate? Not being able to educate their children at expensive schools or only being unable to educate their children at all? Not being able to buy jogging shoes or not being able to buy any shoes? What about not being able to buy a color television? Would settling for black and white television be a harm? Is even no television a harm given that children are starving? What if one can afford to buy food, but not the natural health foods one prefers? As one can see, the list of possibilities is endless and imposition of such duties would be anathema to American capitalist values.
III. JUSTIFICATIONS FOR CONDITIONING BENEFITS

If these preliminary observations expose some flaws in the Maher/Harris test, perhaps one can justify the results in Maher and Harris by looking more broadly at the basis upon which a state might legitimately condition a public benefit. This article uses the term "legitimately" to reflect some consensus, at least in theory, that the government may not place just any conditions on benefits. Why should a state wish to condition benefits at all? If the state has determined that there is some social responsibility to provide such benefits to those in financial straits, or that provision of these benefits would serve a social function, then no purpose would appear to be served by imposing further requirements for receipt of these benefits.

A. TYPES OF CONDITIONS ON PUBLIC BENEFITS

At this juncture, it might be helpful to distinguish between the types of conditions imposed on receipt of benefits. Generally, such conditions may be classified as either status conditions or responsibility conditions. The AFDC program, for example, does not provide monetary benefits to everyone who requests them. Rather, in keeping with the purpose of the program to provide a stable environment for children deprived of parental support, the program creates eligibility requirements based on a person's family, income and resource status. If, for instance, a woman with one child and an income of less than $363 per month is deserted by her husband, she is prima facie eligible for AFDC in Indiana. It is thus the woman's status as a person with a specified income level (financial eligibility) and family situation (categorical eligibility) which make her eligible for benefits, and not primarily the effort she makes to get such benefits (a responsibil-

165. For example, government could not legitimately force a person to cut off his hand in order to collect welfare payments, or to give up her children to collect Medicaid.

166. A third type of condition may be termed a benefit condition. That is, even if one meets the status of indigency, the type and amount of benefits he will receive is limited by the purpose for which the state implemented the program, just as his status was defined by that purpose. Thus, theoretically, if the AFDC program is to provide minimal financial support for broken families, the state conditions or restricts the benefits it will offer to those which provide such support: it provides benefits for food, clothing, shelter, medical care, etc.


168. See id. § 602; Characteristics, supra note 143.

169. See Characteristics, supra note 143, at 89-93, 335.
ity condition).\textsuperscript{170}

In most cases, the fundamental rights problem we are studying does not arise with status conditions, since clashes between recipients' exercise of their rights and state withdrawals of benefits usually involve the recipients' past or future activity, not their current status or situations. Invidious status requirements are most often judged under the "suspect class" branch of the equal protection doctrine.\textsuperscript{171} For example, the Court has invalidated worker's compensation classifications which unfairly excluded children of an insured worker based on their illegitimate status while providing benefits to his legitimate children.\textsuperscript{172} Occasionally, the Court has invalidated these conditions using the "irrebuttal presumption" doctrine of the due process clause.\textsuperscript{173} For instance, in United States Department of Agriculture \textit{v.} Moreno,\textsuperscript{174} and United States Department of Agriculture \textit{v.} Murry,\textsuperscript{175} the Supreme Court invalidated Food Stamp status conditions which excluded households with unrelated members and households containing tax dependents of a non-eligible individual.\textsuperscript{176} On some occasions, however, a status condition can be directly tied to the exer-

\textsuperscript{170} There are, however, some responsibility conditions attached to an AFDC grant, although in the 1970's, they did not play a major part in the administration of the AFDC program.

\textsuperscript{171} See, e.g., Ambach \textit{v.} Norwich, 441 U.S. 68 (1979) (New York statute forbidding permanent certification as public school teacher of any non-citizen unless person has manifested intention to become citizen did not violate the equal protection clause); Graham \textit{v.} Richardson, 403 U.S. 365 (1971) (state statute denying welfare benefits to non-citizens violates equal protection clause since classification is inherently suspect and demands strict judicial scrutiny).

\textsuperscript{172} See, e.g., Levy \textit{v.} Louisiana, 391 U.S. 68 (1968) (state statute disallowing recovery by illegitimate children for wrongful death of mother contravenes equal protection clause since status of child has no relation to nature of wrong inflicted upon mother).

\textsuperscript{173} See, e.g., Cleveland Bd. of Educ. \textit{v.} LaFleur, 414 U.S. 632 (1974) (requirement that public school teachers take mandatory, non-paid leave of absence upon reaching particular stage of pregnancy violates due process clause of fourteenth amendment since requirement established irrebuttable presumption of physical incompetency).

\textsuperscript{174} 413 U.S. 528 (1973).

\textsuperscript{175} 413 U.S. 508 (1973).

\textsuperscript{176} In \textit{Moreno}, the Court invalidated a federal statute aimed at hippie communes which disqualified households containing any non-relatives from food stamps, finding that the classification of the "unrelated person" provision was "wholly without rational basis," and thus invalid under the due process clause of the fifth amendment. \textit{Moreno}, 413 U.S. at 538.

In \textit{Murry}, the Court held that Congress could not exclude from food stamps persons who were taken as tax deductions by a noneligible person, regardless of their actual need for support. \textit{Murry}, 413 U.S. at 514. The Court concluded that whether a parent took a tax deduction for a child was not a rational measure of the need of the household in which the child was living. \textit{Id}. 

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exercise of a fundamental right. In *Memorial Hospital v. Maricopa County*,\(^7\) for instance, the "status" required as a condition of eligibility was that of residence for one year.\(^8\) Yet, that "status" was dependent on whether recipients exercised a fundamental right, i.e., the right to travel from state to state.\(^9\)

Responsibility conditions, by contrast, are those which require the recipient to act, or more occasionally, refrain from acting, in a particular way to receive benefits. For example, in order to be eligible for AFDC, a mother must not only continue to hold an eligible financial and marital status as of the date of application, but she also must take some affirmative steps to remain eligible. For instance, she must enter the AFDC work program\(^10\) unless, in some circumstances, she has small children.\(^11\) She must cooperate in obtaining support from the children's father\(^12\) and she must report changes in her situation.\(^13\) An unemployed

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178. Id. at 252. The Court found that the duration residence requirement created an invidious classification that "impinge[ed] on the right to interstate travel by denying . . . basic necessities," i.e., non-emergency medical care. Id. at 269. Finding no compelling state interest, the Court concluded that the requirement could not be sustained under the equal protection clause. Id.
179. Id. The line between status conditions and responsibility conditions is admittedly often hazy. For instance, in *Shapiro v. Maricopa County*, one might as easily say that the one-year residency requirement was a responsibility condition for welfare recipients either not to travel (a direct conflict with their rights), or, if they did travel, to get a job for a year to support themselves (indirectly conflicting with their rights). See *Maricopa County*, 415 U.S. at 250; Shapiro, 394 U.S. at 618. Similarly, one is hard-pressed to categorize the abortion funding cases: is the abortion ban better characterized as a status condition—pregnant women who will bear their children (who are eligible) vs. pregnant women who will abort their children (who are ineligible), or a responsibility condition—to remain eligible for all Medicaid benefits, one must agree not to abort except for the stated reasons?
180. See 42 U.S.C. § 602(a)(19) (1982). The statute requires that, as a condition of eligibility for AFDC benefits, persons must register for manpower services, training, employment, and other employment-related activities. Id.
181. See id. § 602(a)(19)(A)(v).
182. See id. § 602(a)(26)(B). The statute requires a recipient of AFDC benefits to cooperate with the state in obtaining support payments for a child with respect to whom such aid is claimed. Id.
183. See id. § 602(a)(14). This provision requires recipients to report their income and living conditions, as well as any anticipated changes therein, as a condition of continued receipt of aid. Id.; see also 6 MINN. CODE AGENCY R. § 9500.0050(9) (1983) (requirement of reporting all changes in status within ten days of change).

In addition, since 1981, recipients are required to make a monthly report of their living situation, even if they have properly reported changes or lost their benefits. See 42 U.S.C. § 602(a)(13), (14) (1982). The *Bowen* requirement of furnishing a social security number is also such a condition. See 106 S. Ct. at 2147.
worker must accept offered work\textsuperscript{184} and be available to work to receive unemployment compensation.\textsuperscript{185} In terms of prohibitions on action, in some states, AFDC recipients may not quit a job without good cause.\textsuperscript{186} Indeed, at one time, they could not in some states have sexual relations.\textsuperscript{187} In addition, they cannot spend their AFDC checks for "frivolous" purposes without losing control over them.\textsuperscript{188} Similarly, a Medicaid recipient cannot give away a resource,\textsuperscript{189} especially a residence which later may be subjected to a probate lien for services rendered.\textsuperscript{190}

Naturally, because responsibility conditions usually impose action requirements on recipients, it is more likely that a recipient's action in exercising fundamental rights will conflict with those conditions and such exercise will then be discouraged.\textsuperscript{191}

\textsuperscript{184} See, e.g., Ind. Code § 22-4-14-3 (1984) (requirement to accept offered employment).

\textsuperscript{185} See, e.g., Sherbert, 374 U.S. at 400 n.3. The statute in dispute in Sherbert required, as a condition of receipt of unemployment benefits, that an unemployed worker be able and available to work and to accept suitable work when offered. Id.

\textsuperscript{186} See, e.g., Stanton v. Price, 178 Ind. App. 685, 383 N.E.2d 1091 (1978). In Stanton, the state had denied AFDC benefits to a recipient who had quit her job in order to obtain a nursing degree. Id. at 686, 383 N.E.2d at 1092. The recipient, however, had a child under six years of age and therefore was exempt from the federal work requirement. Id. at 689, 383 N.E.2d at 1094. The court found that the state regulation conflicted with federal law and was, therefore, invalid under the supremacy clause. Id. at 691, 383 N.E.2d at 1095. For discussion of exemption from the federal work requirement, see supra note 127.

\textsuperscript{187} See, e.g., King v. Smith, 392 U.S. 309 (1968) (invalidating Alabama regulation which denied AFDC benefits to children of mother who has sex with "able-bodied man" or "substitute father" on grounds that such regulation defines parent in manner inconsistent with federal law); see also Van Lare v. Hurley, 421 U.S. 338 (1975) (more recent version of "substitute father" requirements); Lewis v. Martin, 397 U.S. 552 (1970) (same).

\textsuperscript{188} The federal statute and most state laws provide that when the parent does not spend the AFDC check according to the purposes for which it was given, the state may pay it to a third party (protective payee) for the children's benefit.


\textsuperscript{190} See, e.g., Ind. Code § 12-5-3-3(6) (1984) (prohibiting transfer of assets for purpose of meeting eligibility requirements for medical assistance for aged).

\textsuperscript{191} See, e.g., Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980). In Van Ooteghem, a county assistant treasurer was required to work during certain hours which would prevent him from discussing gay rights with the county commissioners. Id. at 490. In order to retain his benefit, i.e., his job, he was required to be at work during those hours; in order to exercise his free speech rights, he would necessarily have to absent himself during those hours because they were the only times at which the commissioners met. Id. Van Ooteghem was dismissed after refusing to agree to a work schedule which would have prevented
For instance, in *Sherbert*, the plaintiff-Sabbatarian was excluded from benefits by a responsibility condition that she accept a job involving work on Saturday, a condition which would cause her to violate her religious beliefs about work on her Sabbath.192

These distinctions help us decide how closely to scrutinize conditions on benefits. Status conditions are most often imposed for economic purposes directly connected with the goals and limitations of the program. Although we recognize that intact families as well as broken families may need assistance in obtaining the capacity for independence and self support, if government cannot afford to subsidize everyone, it creates the "status" of "dependent child . . . deprived of parental support" as an eligibility criterion. The reason a single parent is eligible for AFDC only if she makes less than $375 per month is that we arguably cannot afford to provide such benefits to all single-parent families who might "need" them in some sense.193

Responsibility conditions, by contrast, often serve not a fiscal but another state purpose, such as a moral purpose. Admittedly, many responsibility requirements, such as AFDC requirements that recipients cooperate in obtaining support and seeking employment, are clearly meant to reduce the state's fiscal liability by generating other funds to support the recipient or getting her off of benefit rolls. However, many of these requirements, most notably the work requirements, are also designed to prevent recipients from falling into a government dependent lifestyle, which is considered morally and economically abhorrent, and to teach conforming social skills necessary for them to "mainstream" themselves into the dominant economy. Responsibility conditions may also be used not only to influence the behavior of the recipient who is on assistance, but to discourage those who are

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193. Similarly, the Supreme Court has accepted the state's argument that benefit conditions are directly related to the state's legitimate fiscal concerns and are therefore beyond challenge regardless of their impact. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535 (1972) (sustaining disparities in grants between Social Security Programs for the aging, blind and those for AFDC recipients); *Dandridge v. Williams*, 397 U.S. 471 (1970) (sustaining AFDC grant maximums). *But see Shea v. Vialpando*, 416 U.S. 251 (1974) (invalidating state imposed ceiling on amount AFDC recipient could deduct from income as employment related expense).
not being assisted from coming on to public rolls.\textsuperscript{194}

Because responsibility conditions more often implement considerations unrelated to objective need or resources, they are the most troubling of the conditions imposed on recipients, simply because they embody moral or social judgments which are most likely to clash with recipients' autonomy. I do not here argue that the state’s interest in a recipient’s right to, and use of, benefits may only be economical. Yet, the more conditions on benefits influence recipients’ future behavior rather than limiting benefits by status factors such as need, the more it is likely the state will compel a behavior at odds with a highly protected behavior of choice, such as bearing children or free speech. \textit{Maher} and \textit{Harris} involved just such responsibility conditions. \textit{Maher} and \textit{Harris} were not denied benefits on the basis of their situations, but on what they did and what they intended to do. The abortion funding proscriptions warn women that it is their duty not to become pregnant, or if they do, to bear their children. If they refuse, the state will remove at least one choice of medical care for their conditions.

\textbf{B. What Can Justify the Conditioning of Benefits?}

In addition to introducing a disturbing new doctrine testing the legitimacy of responsibility conditions, \textit{Maher} and \textit{Harris} muddy the precedential waters considerably. Since these cases do not purport to overrule \textit{Sherbert} or subsequent cases, one must seriously question whether the Court is taking new directions or whether the abortion funding cases are an aberration. As previously noted, in most of the cases in which public benefits conditions even indirectly infringed on fundamental rights (e.g., the rights to travel, association, free speech, and free exercise of religion), the Court has granted at least limited protection for the rights involved.\textsuperscript{195} \textit{Maher} and \textit{Harris} are the major cases to depart

\textsuperscript{194} See \textit{Shapiro}, 394 U.S. at 618. If one views \textit{Shapiro} as a “responsibility conditions” case, then the major purpose of the requirement that new residents support themselves for a year was to defer travel by people into the state. \textit{Id.} at 631-32. It appears that the 1981 monthly reporting requirement has similarly acted as a deterrent to those eligible for AFDC. See U.S.C. § 602(a)(13) & (14) (1982). For discussion of these provisions, see supra note 146 and accompanying text.

\textsuperscript{195} See, e.g., \textit{Maricopa County}, 415 U.S. at 250 (medical care residency requirements; right to travel); \textit{Shapiro}, 394 U.S. at 618 (residency requirement for welfare benefits; fundamental right to travel); \textit{Sherbert}, 374 U.S. at 398 (unemployment benefits, free exercise of religion); \textit{Speiser} v. Randall, 357 U.S. 513 (1958) (exemption; free expression). But see \textit{Boddie} v. Connecticut, 401 U.S. 371 (1971). In \textit{Boddie}, welfare recipients challenged a state procedure which
from this pattern. A look at the theories which justify responsibility conditions on benefits may disclose a way of reconciling these cases.

At least three theories might justify the state’s action in imposing responsibility conditions on benefits. First, one might employ a strong majoritarian argument which suggests that if the proposed condition is legitimately processed through proper legislative channels, it is per se justified. Second, (what one might call the “rights vs. rights” argument), one could contend that benefits like other rights must be conditioned in some cases in order not to infringe on the rights of other citizens. Finally, as already indi-

required the litigant to pay court fees and costs for service of process prior to bringing an action for divorce. Id. at 372. In invalidating this requirement, the Court stopped short of declaring a fundamental right to dissolve a marriage as part of the protected right of privacy but it did affirm the centrality of the marriage relationship in American life. Id. at 376. Moreover, the Court failed to directly recognize a constitutional right of access to the courts which it later did recognize, particularly for prisoners. See, e.g., Bounds v. Smith, 430 U.S. 817, 821-22 (1977) (prisoner’s constitutional right of access to courts requires prison authorities to assist inmates in preparation of legal papers by providing prison-

ers with adequate law libraries or assistance from persons trained in law); see also Payne v. Superior Court, 17 Cal. 3d 908, 914-19, 555 P.2d 565, 570-73, 132 Cal. Rptr. 405, 410-13 (1976) (indigent prisoner’s right to appointed counsel in civil suit may not be abridged absent compelling state interest).

In Boddie, unlike the previous cases, the state had in essence taken away the “means” of getting a divorce by prohibiting access to the courts by indigents since no other means were available for exercising this choice. The Court relied on the monopoly on means held by the state in invalidating the filing fee for indigents. 401 U.S. at 372-76.

196. See Selective Serv. Sys., 468 U.S. at 841 (sustaining requirement that students must have registered with Selective Service in order to be eligible for federal educational loans); Dandridge v. Williams, 397 U.S. 471 (1970) (sustaining AFDC grant maximum regardless of size of family); see also Wyman v. James, 400 U.S. 309 (1971). In Wyman, an AFDC recipient challenged a New York State law which required that a home visit be made upon the initial application for benefits, and allowed caseworkers to require subsequent home visits as a condition to continuing aid. Id. at 313-14. James’ challenge to the statute and implementing regulations, on the basis that they violated her fourth amendment right against searches of her home without a warrant upon probable cause, was rejected by the Court. Id. at 318. The Court reasoned that welfare recipients could not equate the home visit with a fourth amendment search because it was not done by a criminal officer and it was not for the primary purpose of aiding in a criminal proceeding. Id. at 317-18. Ironically, the Court equated criminal evidence which the caseworker might in fact seek and discover with evidence discovered by any ordinary citizen. Id. at 323. The Court also held that it was reasonable for the state to require such a home visit, within the meaning of the fourth amendment, because of the purposes of the statute, so long as the investigation was conducted at reasonable hours and without forcible entry or reprehensible conduct. Id. at 320-21. Moreover, as in the abortion cases and in Selective Service System, the Court pointed out that the recipient had a choice: she could choose to forego welfare benefits and avoid the intrusion into her home which might uncover evidence of a crime. 400 U.S. at 317-18, 325.
cated, one might debate whether the harm caused to the exercise of a fundamental right is outweighed by state interests other than protection of individual rights. At least the majoritarian and "rights vs. rights" arguments are, under current case law, insufficient to justify conditioning benefits in a way that infringes on fundamental rights.

1. The Majoritarian Argument

Given the thoroughness of its exposition elsewhere, this article will only quickly address the significance of the majoritarian argument. In the simplistic version of this argument, the people decide who will be the repository of their funds and how those funds will be distributed. Government must then obey all directions, and recipients must comply with any conditions the people put on distribution of their money—the pre-unconstitutional conditions theory writ large. Courts have no business questioning those directions or invalidating those conditions.

Is the majoritarian argument any more valid in the public benefits context than it is with any other governmental action which potentially infringes on rights? Some writers have suggested that the public fisc is uniquely entrusted to legislative deliberation since the people explicitly and consistently have delegated that power to Congress.197 Thus, any Congressional action related to fiscal expenditures is automatically entitled to more deference by the judiciary, the rights-protecting arm of government. Aside from historical judicial acquiescence,198 there seems to be no inherent reason why Congress' distribution of benefits differs from any other legislative action which affects a person's relationship with his or her government. This is particularly true when such responsibility conditions are not imposed to save money or to attempt to fairly distribute money—two cases in which legislative expertise might be said to be significantly greater. When other legislative action affecting one individual's financial situation, e.g., a tax or fine, intersects with that individual's exercise of a fundamental right, the courts have not bowed to the majoritarian argument. Rather, judges have construed their role as protectors of such rights as against the majority.

Furthermore, the majoritarian argument does little to clarify how the abortion funding cases might be distinguished from the

198. Hardy, supra note 197, at 489.
Court’s previous holdings regarding infringement of fundamental rights. The sole relevant procedural difference between those cases protecting and those not protecting fundamental rights appears to be that in Harris, an enactment of Congress was challenged; in the other benefits/rights cases, state statutes were the subject of dispute.199 Were this the only relevant distinction, then clearly Maher should have been decided in favor of the recipients whose fundamental rights not to bear children were significantly affected by the state’s action withdrawing or limiting benefits.200

2. The Rights vs. Rights Argument

A second potential justification for the Maher/Harris conditions doctrine, which could set it apart from the Court’s decisions in cases such as Sherbert, might be based on the difference in the rights involved in the government’s decision to fund or not fund abortion. In an attempt to distinguish the Sherbert line, one might argue the following with respect to Roe, McRae, and other public benefits recipients facing responsibility conditions: a) their right has been ill-defined; it is merely a right to decide, not to the means necessary to carry out the decision. Their right to decide, and to be free from government interference in that decision, is paramount to all other rights and side constraints involved; b) their right to decide, or to implement their decision is a “side right” or an unenumerated right, not as protected as other fundamental rights; c) others’ right of conscience, which includes a right not to pay tax money for morally repugnant activities, is paramount to the public benefits recipient’s right to, inter alia, obtain an abortion—presuming a right to abortion exists. On this view, based on elemental rights theory, one’s right to free action is limited only by another’s right to free action. Only in this case, the rights to have an abortion without intrusion into the decision-making process, and to implement that decision, are limited by

199. See Harris, 448 U.S. at 311. At issue in Harris was the constitutionality of a provision of the Hyde Amendment. Id. at 302-03. For a discussion of the Harris case, see supra notes 41-48 and accompanying text.

200. Similarly, Wyman v. James, 400 U.S. 309 (1971) and Dandridge v. Williams, 397 U.S. 471 (1970) would have to be decided in favor of the recipient if the majoritarian difference which made a difference in outcome is whether Congress or the state passed the law. Dandridge is most closely analogous to Maher because it involves the choice whether to bear children. Compare Maher, 432 U.S. at 464 (challenge to statute regulating funding of abortions) with Dandridge, 397 U.S. at 471 (challenge to statute regulating size of AFDC grant regardless of size of family).
others' right not to provide money to finance such abortions; d) their right to have an abortion, without help, outweighs others' rights (e.g., the fetus' right to life), but the right to abortion with help from the government does not. There is a strong state interest in fetal life which, when added to the fetus' right, counters, not their right to decide to abort, but their right to implement the decision—at least with government help.

a. The Nature and Importance of the Right at Stake

One of the ways to resolve the conflict in the cases involving fundamental rights versus benefit conditions is to suggest that the fundamental right involved in the abortion funding cases and their progeny is sufficiently different than those in the Sherbert cases to command a different result. Indeed, the Court has certainly employed, if not wholly relied upon, this approach to reconcile the cases. Perhaps the right in Maher and Harris, for example, is not a right to abortion, but a right to choose an abortion. Perhaps it is not subject to as much protection because it is merely a sub-right of the right of privacy, rather than a sub-right of more important fundamental rights such as speech, association, and religion. Perhaps one could distinguish the cases on the basis of the source of the right, that is, whether it is explicitly protected in the Constitution or whether it is merely penumbral. Another argument is that rights which facilitate the preservation and growth of democratic government receive more judicial protection than those which are merely personal to the individual. That is, even fundamental rights may not all be equal.

(1) Defining the Right: The "Duty" of Privacy

In Maher and Harris, the Court emphatically announced that lower courts were confused about the right recognized in Roe v. Wade. As the court in Maher reiterated or recast it, the right which emanated from the penumbral right of privacy was to make ""certain kinds of important decisions' free from government compulsion . . . Roe did not declare an unqualified 'constitutional right to an abortion' . . . but protect[ed] the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.""201 Note that this is a different issue than the

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201. 432 U.S. at 473-74; cf. Bumpus v. Clark, 681 F.2d 679, 685 (9th Cir. 1982) (holding that closure of nursing home did not violate rights of privacy or to be left alone).
one posed by the liberty claim rights argument. Here, the Court intimates not only that the state’s duty is not to interfere with the liberty-right of the woman, but also that its duty is not to interfere with the woman’s decision (as opposed to the implementation of that decision).

However, in the other cases striking down waiting requirements, consent forms, and even fetal protection provisions, the Court has suggested that it is not just the decision, but the implementation of the decision, which is protected by the due process clause. In Maher and Harris, however, the Court’s clear focus is on the different nature of this right, a species of Justice Brandeis’ right to be let alone. If the right is to be let alone, the argument suggests, it would be as improper to require a government to pay for an abortion as to permit government to prevent one. Either action interferes with the right to be let alone in making the decision.

Is there in fact something different about the right to privacy which would justify the different result in this case? Surely, on some level, one could not say that these state benefit conditions interfere with the right to decide to obtain an abortion in the same sense that physical coercion by the state would interfere with the recipient’s decision process. If, while the woman and perhaps her partner sit in the living room contemplating her choices, the state sends the police to convince or threaten her to choose the “right” option, that action would be more directly intrusive to a privacy right than denial of benefits. However, none

202. For a discussion of the liberty claim rights argument, see supra notes 71-72 & 158 and accompanying text.
203. See, e.g., Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (holding that no legitimate state interest was furthered by arbitrary and inflexible waiting period).
204. See, e.g., id. at 439-40 (finding unconstitutional requirement that minor under age 15 receive parental consent prior to physician performing abortion); Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (invalidating requirement that woman seeking abortion during first twelve weeks of pregnancy obtain written consent of spouse); cf. Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476 (1983) (holding constitutional statute requiring consent from parent or judge so long as mature minor not required to obtain consent); H.L. v. Mathe- son, 450 U.S. 398 (1981) (sustaining constitutionality of state statute which required physician performing abortion on minor to notify parents).
206. See Griswold v. Connecticut, 381 U.S. 479, 510 (1965) (Black, J., dissenting); Hardy, supra note 197, at 485-86.
of the state's real potential actions—even criminal punishment—are so intrusive; they are merely more or less effective in deter-
ring the action. The state's abortion funding denials provide the
most effective deterrent. They restrict the woman's range of
options to three: to bear her child, find a charitable doctor or
friend, or perform an abortion herself. Such restrictions are so
severe as to preclude any reasonable choice or, as Justice Brennan
puts it, the state makes the woman an offer she can't refuse.207 It
is clear that the Maher and Harris statutes are not less coercive but
rather more coercive than statutes in the cases punishing the
rights exerciser. Surely, more promising choices awaited the trav-
eler in Shapiro, who could stay in state A and receive welfare bene-
fits at a lower level than in state B, or emigrate to State B and
make do on odd jobs, food stamps, begging, shelters, theft, living
off relatives, etc., for a year. Surely the Sabbatarian in Sherbert,
who could move to another community where Saturday work was
not required, get assistance from her church, find a non-factory
job with different hours, even go on welfare, was less deterred
from exercising her right than Roe and McRae.

Is it correct to say that a right of abortion must be a right of
decision, a sub-species of the right to be let alone? At the most
elemental level, such a right does resemble other privacy rights.
If nothing else, the cases tackling the problem of minors having
abortions without their parents' permission,208 and women
choosing abortion who do not wish to notify their spouses,209
suggest that a key motivation for choosing abortion is to conceal
the fact of one's pregnancy from individuals or a society which
will not accept the consequences of that pregnancy. Whether the
woman's concern is the stigma of unwed parenthood or the rejec-
tion of a partner, certainly the desire to keep a secret is often cen-

207. See Harris, 448 U.S. at 333-34 (Brennan, J., dissenting). For
the quoted word of Justice Brennan on this point, see supra note 109 and accompa-
nying text.

208. For cases dealing with minors and the abortion decision, see supra
note 204.

209. For Planned Parenthood v. Danforth, 428 U.S. 52 (1976); see also Wynn
v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978) (statutory requirement of spousal
and parental consent held unconstitutional); Doe v. Zimmerman, 405 F. Supp.
534 (M.D. Pa. 1975) (statute provision requiring husband's consent before abor-
tion held unconstitutional); Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973)
(statute requiring that physician obtain spousal or parental consent held uncon-
Utah 1973) (invalidating state statute providing for father's consent); Jones v.
Smith, 278 So. 2d 339 (Fla. Dist. Ct. App. 1973) (same), cert. denied, 415 U.S. 958
tral to the abortion decision. Charles Fried has argued that the right of privacy is essentially the right to control information about one's life—to give up that information as a token of trust to one whom the person loves or with whom she wishes to cement a trusting relationship and to withhold that information from those to whom one does not care to form such intimate, vulnerable relationships.210

With abortion, however, as with many other subspecies of privacy right, there must inevitably be a non-private dimension. Even if we posit the right to be a "liberal" one—that is, belonging alone to one autonomous person—we must still recognize its impact beyond that person's life. While certain forms of intimacy may be shielded from all view, often their consequences spill over into the public space and the state takes some responsibility for those consequences. So in Pierce v. Society of Sisters211 and Meyer v. Nebraska,212 often cited as the first privacy cases, the Supreme Court painstakingly refuted the notion that the State had no place in the "private" upbringing of young children. Despite the Court's invalidation of statutes which prevented the teaching of certain subjects, areas said to be within the domain of parental concern and control, the Court made clear that the state's need for capable citizens gave it the right to make significant decisions about the content of children's education.213 Similarly, in Griswold v. Connecticut, where the right of privacy in sexual matters was first recognized, the Court merely tempered rather than prohibited any state control over contraception.214 The state could not totally prohibit contraception because of the serious intrusion into the most intimate matters of human life, but it could regulate the distribution of contraceptives for public health and safety reasons.215 Even in the abortion context, the Court has not remained true to the argument that the state is precluded from entering into the abortion decision-making or implementation processes because of the privacy right. In sanctioning protective procedure requirements such as performance of abortions by physicians,216 mandatory notification requirements for minors,217

211. 268 U.S. 510 (1925).
212. 262 U.S. 390 (1923).
213. See Pierce, 268 U.S. at 534-35; Meyer, 262 U.S. at 401.
215. Id. at 486.
216. See Akron v. Akron Center for Reproductive Health, 462 U.S. 416
mandatory consent\textsuperscript{218} and even pathology report requirements,\textsuperscript{219} the Court has merely required that the state’s action not unduly burden the woman’s right to decide and to implement her decision. Therefore, it seems somewhat inconsistent, to say the least, for the Court to suggest that the woman’s right is to secrecy or to be let alone, a right that precludes proposed state action which would enlarge a woman’s options.

In the same vein, if the right of privacy is the right of control over information about oneself and over one’s actions, it would mock that notion to suggest that the right of privacy necessarily entails the duty of privacy. Admittedly, state interests, including moral interests, may sometimes justify imposing a duty of privacy where there is also a right. For instance, the state may prohibit sexual intercourse in public on the grounds that it corrupts youth, demeans family intimacy, constitutes a safety or health hazard, or a number of other reasons. However, it is not clear that a state could similarly prohibit all matters that are protected as private from happening in a public manner and place if the rights-owners chose to waive their rights of control. For instance, while the state arguably might not be able to require parents to teach their children about contraception, it does not follow that the state may force parents to keep the subject private.

If the woman seeking an abortion agrees to breach the secrecy to which she is entitled by enlisting the state’s help in implementing her decision, it is far from clear that the state will be transgressing her privacy rights if it assists her. Nor does the woman’s willingness to make her decision a partially public matter suggest that she has waived the other aspects of her privacy, including the right to a decision with which the state does not interfere and the right to implement that decision without undue burdens being placed in her way. Few would suggest that a non-indigent woman who used a public facility for her abortion but

\textsuperscript{218} (1983) (holding unconstitutional statutory provision relating to second trimester abortions); Connecticut v. Menillo, 423 U.S. 9 (1975) (sustaining unconstitutionality of criminal abortion statute as applied to non-physician performing abortion).

\textsuperscript{217} For cases involving mandatory notification requirements for minors, see supra note 209.

\textsuperscript{219} See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 65-67 (1976) (sustaining constitutionality of requirement that woman undergoing abortion certify her consent to procedure in writing and “that her consent is informed and freely given and is not the result of coercion”).

\textsuperscript{219} See Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476 (1983) (sustaining state requirement that pathologist examine and make report on tissue removed during abortion).
was able to pay for it herself would thereby open her actions up to otherwise prohibited state interference in her choice. Nor would a woman bearing a child, by seeking state funding for childbirth, agree to give the state the right to decide that she should not bear it, or control over the question as to how she should bear it (e.g., by natural childbirth or caesarian section), or whether she should give her child up for adoption.

Furthermore, it is not always true that the right which such a woman exercises is more private than other fundamental rights, notably the right to association. In fact, many court battles over that right concern the right of an individual to disclose his associations, rather than whether he will be allowed to associate in the first place.\textsuperscript{220} Just as Fried centers the privacy right on control of information about oneself,\textsuperscript{221} one can argue that it is the control over one’s speech which is important in the exercise of that fundamental right. The privilege against self-incrimination is a right to protect one’s body and control one’s thoughts against coerced disclosure by the state; the right of free association is the right of control over the decision of with whom one joins; the right to free exercise of religion is the right to control one’s conscience.

If the right of privacy, defined by the Court to include the right to abort, is not unique because of the rights-exerciser’s interest in controlling the action or in its non-public nature, can it be said that the effect of state interference with the right to privacy causes less actual harm than interference with these other rights? Certainly, on an everyday level, only scholars and politicians would argue that a state’s decision to ban or to regulate one’s speech, one’s ability to move freely within the country, or one’s ability to make acquaintance is more intrusive than the state’s decision to regulate reproductive choices which arise from marital or other sexual relationships. Such relationships are central to human beings’ basic needs for affection, for love, for being accepted for what they are and trusting others; indeed, for creating new generations. The spectre of a policeman standing in a women’s bedroom, dictating whether or not she should have a child, must loom larger for all of us than the prospect of being carried off for verbal attacks against the government. Even using


\textsuperscript{221} See Fried, supra note 210.
a milder example, few would imagine that government could regulate the time, place and manner of intimate relations in the same way it has been given free rein by the Court to regulate speech.\textsuperscript{222} One does not imagine that such action would be long studied to determine whether its effect was sufficiently "chilling" to warrant protection from the majoritarian processes.

(2) Defining the Right: Is Privacy Merely a Liberty-Right?

An honest attempt to justify the Court's doctrine might reveal that what is not at stake is mere privacy; that when a woman becomes pregnant, the vessel for nascent life, her choices are no longer completely private in their consequences. In fact they may affect not only the fetus, but her partner, her family, even those adoptive parents who are waiting for children of their own, and others in a very different way than her prior sexual decisions have affected anyone. The woman's interest at stake may be, and has been by feminists, appropriately recast as a liberty interest—the right to do with her body and her life as she wishes, unconstrained by the state or any person. Indeed, such an interest, renamed autonomy, is the darling right of the liberal state.

A Maher/Harris supporter must be quick to point out the potential paradox which a positive claim-rights advocate confronts when the interest is recast in this manner. How can the right to liberty be anything more than a liberty right? That is, except for the argument that the right to liberty entails a duty in the government not to interfere with what one chooses to do, it seems paradoxical to argue that if one holds a liberty right, government is under an affirmative duty to assist one in exercising that right. To be at liberty is to be free from government interference—one way or the other, or so Maher/Harris would suggest.

The liberal notion of personal autonomy has, however, not ruled out the possibility that the state may be duty-bound to assist in ensuring that one is both free and able to stretch to the limits of one's imagination and powers. Indeed, as early as \textit{Brown v. Board of Education},\textsuperscript{223} the Court has remarked how essential direct state assistance in providing equal education must be to the creation of a truly autonomous citizen.\textsuperscript{224} Other cases, particularly

\begin{itemize}
  \item \textsuperscript{222} See, e.g., Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) (sustaining constitutionality of state statute prohibiting parades or processions upon public streets without license since city must be able to regulate time, place and manner of such parades for public convenience).
  \item \textsuperscript{223} 347 U.S. 483 (1954).
  \item \textsuperscript{224} Id. at 493.
\end{itemize}
those involving education and institutionalized persons, have hinted at the existence of a positive state duty to provide assistance to ensure individual autonomy especially where a person may be completely deprived of the means to become a real citizen\textsuperscript{225} or where the state has undertaken some guardian’s role over the individual\textsuperscript{226}.

Similarly, in the abortion funding cases, the woman’s interest at issue is not only freedom from being used as a vessel for another person for nine months; it is the constraint of responsibility for a child which will last a good portion of her adult life. While a woman is not necessarily a ward of the state, an indigent woman, who depends on the state for her very livelihood, can be said to be in the same precarious position as the school child in Brown or the institutionalized person. Unless the state steps in, each is condemned to severe limitation of life choices. That is particularly so in Harris, where the woman is condemned to serious short or long-term health problems by continuing to carry her child. In short, the right to liberty is not indisputably a liberty-right.

(3) Protecting the Right: The Functions of Privacy and Liberty

Is interference with the right to privacy less blameworthy than interference with other fundamental rights in some other relevant way than its effect on our daily lives? A “new” right, the right of privacy has been extruded from the penumbral recesses

\textsuperscript{225} See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973). In rejecting the equal protection challenge to Texas’ method of funding public schools, the Court stated that it could not be fairly alleged that “the [Texas] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.” Id. at 37; see also Plyler v. Doe, 457 U.S. 202, 221-23 (1982). In Plyler, the Court considered whether a Texas statute denying school district funds for the education of children not legally admitted into the United States violated the equal protection clause. Id. at 205. In determining that the statute denied the class of children equal protection, the Plyler Court stated that “education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our nation when select groups are denied the means to absorb the values and skills upon which our social order rests.” Id. at 221.

\textsuperscript{226} See, e.g., Youngberg v. Romeo, 457 U.S. 307, 317-19 (1982) (involuntarily committed person had liberty interest in safety, freedom from restraint and adequate training); Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977) (prisoner entitled to psychological or psychiatric treatment if physician finds such treatment necessary under circumstances); Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972) (holding that class of non-criminal children incarcerated by court had right to treatment).
of the Constitution,\footnote{227} from clauses such as the ninth amendment\footnote{228} which have lost their intended meanings, and from notions of “natural justice” which Justice Black decried as merely “personal preferences” of “civilized standards of conduct.”\footnote{229} Black and others have argued persistently that privacy, while important, is not protected against government intrusion.\footnote{230} Perhaps privacy, as a penumbral right, is less entitled to protection than other rights which are explicitly protected. A variation on this theme is that the fundamental rights are crucial because they enable democratic government to exist.\footnote{231} A privacy right, or even a liberty right as delineated, is not such a crucial functional right and therefore not as protected.

Perhaps the explicit/penumbral distinction in the present context may only suggest that the courts protect explicit rights more because they know what it is they are supposed to protect, whereas with penumbral rights, the courts are always in the dark and must therefore always exercise more deference to majoritarian choices. Yet, as the last twenty years have demonstrated, demarcation of even explicit rights, such as free speech and the right to peaceably assemble, has been fraught with ambiguity. We have learned that the Constitution protects those who wear armbands\footnote{232} or obscene jackets\footnote{233} or those who refuse to wear flags,\footnote{234} but not others who wear their hair long.\footnote{235} We

\footnote{227} See Griswold, 381 U.S. at 484-85 (finding that specific guarantees in Bill of Rights have “penumbras” creating various zones of privacy).

\footnote{228} Id. at 484. See generally, C. Black, On Reading and Using the Ninth Amendment in Essays in Honor of Eugene Rostow (1985).

\footnote{229} Griswold, 381 U.S. at 513 (Black, J., dissenting).

\footnote{230} Id. at 508-10 (Black, J., dissenting); see also Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 8-10 (1971) (criticizing Griswold and Justice Douglas’ derivation of “new constitutional right” of privacy).

\footnote{231} See J. Ely, Democracy and Distrust 74 (1980).


\footnote{233} See Cohen v. California, 403 U.S. 15 (1971) (absent compelling reason, state may not, consistent with first and fourteenth amendments, make simple public display of obscene word a criminal offense).

\footnote{234} See, e.g., Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983) (holding that black policeman’s dismissal for removing flag from uniform as means of protesting discriminatory policies of department violated officer’s first and fourteenth amendment rights).

have learned that those who sit quietly in public libraries are "speaking" and assembling in a protected manner,236 but those who sleep quietly in public parks are not.237 Yet, there is some superficial glamour to this ambiguity as applied to "privacy" in general. For instance, it is difficult to demarcate the constitutional circle protecting family integrity, which is continually being revised in education, in child abuse and neglect, and even in sexual privacy matters such as the minor's abortion cases.238

Despite that fact, the matter at issue in the abortion cases, the right to procreate, is fairly explicitly defined and has received extremely strong protection in cases where government has interfered with an individual's procreative control, such as in forced sterilization239 and contraceptive prohibition cases.240 In the context of the government benefit denial cases, it is surely true that the contours of a woman's decision whether or not to bear a child are better made out than the limits of the right to travel which was protected in the Shapiro case, or the right to free association, especially as it has operated to selectively nullify political patronage system practices.241 Unlike those cases, protection of the right to choose to bear or not to bear a child has only limited consequences for the state even if the state is forced to provide affirmative protection. Pregnancy can be terminated in only one

236. See Brown v. Louisiana, 383 U.S. 131 (1966) (reversing "breach of peace" conviction of blacks who refused to leave public library as part of peaceful demonstration).

237. See Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (holding that regulation which prevented protesters from sleeping in "symbolic tents" in federal park was reasonable restriction on expression); see also Tushnet, supra note 71, at 1370 (discussing Brown and Clark cases).

238. For a list of minor's abortion cases, see supra note 204.


of two ways: by birth, or by either spontaneous or induced abortion, each of the latter having finite financial consequences for the state as well as finite consequences for the state’s social system. If we aid in the exercise of abortion, we know that it will cost only about two hundred dollars.242 By contrast, if the state must aid in the exercise of one’s right to travel or associate, the costs to government, as this article suggests in the Acapulcan welfare convention example, are unlimited. Clearly, too, if the right at issue is the explicitly protected right of liberty, the “penumbra” rationale for not protecting the woman’s right fails.

What of the argument that privacy or even liberty rights are less protected because they are less central to preservation of democratic processes of government? John Hart Ely can be said to give coherence to this argument when he suggests that our constitutional structure, indeed those values which have the tradition of “fundamentality” behind them, are explainable as representation-reinforcing values.243 Such fundamental rights not only prevent us from being captured by those whom we elect to serve us, but also prevent systematic disadvantage to a minority because of hostility or prejudice.244 Indeed, the right to privacy is given short shrift by Ely, perhaps because he does not see it as a strong case for his thesis.245

Yet, it is unclear what it is about the bundle of rights we call privacy that would lead to the conclusion that such a right is an “extra” or “side” right that has little to do with our place as citizens in a democratic government. While these problems cannot be discussed here at length, it seems strange to protect rights which allow everyone to be involved in the process of governing themselves, of creating the strictures as well as the benefits which affect their lives, while denying protection to the exercise of those

242. McRae v. Califano, 491 F. Supp. 630, 659 (E.D.N.Y. 1980), rev’d sub nom., Harris v. McRae, 448 U.S. 297 (1980). Justice Marshall noted in Maher that the cost of an abortion was estimated at less than $200, approximately the cost of one month’s AFDC benefits to the born child. Maher, 492 U.S. at 455 n.1 (Marshall, J., dissenting). There seems to be little debate that such costs are less than the cost to the state of a woman’s carrying a child to term and the costs of bearing that child. See, e.g., Development, Doe v. Beal: Abortion, Medicaid, and Equal Protection, 62 Va. L. Rev. 811, 831 (1976) (Medicaid care incident to abortion less expensive than care incident to full-term pregnancy) [hereinafter cited as Development].


244. Id. at 175-79.

245. Ely skims this privacy concern, probably because it cannot neatly fit within his argument. See id. at 96-97. See also Michelman, supra note 158, at 670-77 (engaging in critique of Ely).
"rights" fundamental to the shape of one's personal life. Indeed, as Hannah Arendt has forcefully argued, the conditions of family life, of choosing to bear and raise children, of obtaining the means to survive, of educating and loving, are the necessary pre-processes of politics, and the exercise of political rights. Exercise of these private rights provides the safe home, the darkness, in which people are nurtured to become good citizens and to which they retreat to rest after acting as good citizens.

In the abortion cases, we can, with little vision, understand the effects of failing to scrupulously protect a woman's decision to bear a child. Childbirth is not only a discomforting procedure; it brings with it some of the most serious responsibilities and intrusions into one's life freedoms that any relationship does. For women, it has meant serious curtailment of professional advancement, periods of personal incapacity and ill health, and primary responsibility, indeed in some cases, total responsibility for the well-being of the child. There seems to be little question that the economic and power differentials between women and men in today's society stem directly from the woman's traditional role as caregiver. Moreover, women have been disfavored because this tradition is used to justify discrimination in non-caregiver economic, political and social settings.

If we recognize the real importance of these rights of privacy and liberty which allow for nurture and comfort, it seems flippant to suggest that they need be less protected than the rights which depend on those rights—the rights to give speeches, to join groups, or to petition for redress. Even the worst cynic, if unwilling to go so far, will recognize the sanctity of an individual's mind and body against state intrusion; a recognition which has limited forms of torture, search, questioning, and administered "treatment" in our constitutional history in the name of individual integrity. Rather than denigrating the rights to privacy and liberty as "penumbral" or "unnecessary to government" and

246. See H. ARENDT, THE HUMAN CONDITION, 45-46, 64-68, 71-72 (1958); H. ARENDT, THE CRISIS IN EDUCATION, IN BETWEEN PAST AND FUTURE, 185-87 (1961) [hereinafter cited as CRISIS IN EDUCATION].

247. See CRISIS IN EDUCATION, supra note 246, at 185-87; H. ARENDT, REFLECTIONS ON LITTLE ROCK, VI DISSERT 45, 55 (1959).


249. As many have argued, what can be more analogous than a pregnant woman's decisions about what she is willing to let happen to her body—a recognition of personal integrity which is in itself no denigration of the serious competing claims of fetus and/or state?
therefore peripheral, it seems more honest to recognize these claims for what they are: central to the liberal rights tradition of what it is to be human and to make decisions for oneself. In fact, they are central to the liberal understanding of government because protection of these rights ensures the pre-conditions for democracy as we know it. It seems more appropriate to give these claims their due in the liberal rights tradition and then to suggest that there are stronger claims to counter the woman’s claims of liberty or privacy.

If the options of redefining the right and of lessening the importance of that right are then unconvincing justification for the outcome in Maher and Harris, one must turn to other options previously suggested. One option is that there is a strong individual right with which the abortion right interferes so long as it rests on the assistance of government. That strong right may be either the taxpayer’s right or the fetus’ right.

b. Rights Against Rights

It is not clear that much will be gained here by reiterating the arguments regarding the fetus’ right to life. If one believes that the fetus is a person, or the moral equivalent of a person, it seems implausible to deny the fetus a constitutional right not to have his life taken by an act of state on utilitarian or economic grounds (e.g., arguing inability to afford for the fetus to have such a right) if we do not deny others such a right. To say that one is a human being but, unlike other human beings, he is not entitled to be protected in the one quality (life) indisputably required for humanness, is to rediscover the twisted constitutional magic that made a black person a human being but not a person for purposes of the Constitution. To say that the fetus is not a

250. Indeed, a liberty-right proponent might even claim that recognition by government of a positive right, e.g., to abortion or to welfare, presents an inherent conflict with the liberty rights of those who have the resources to meet that right. See Sher, Government Funding of Elective Abortions, Rights and Responsibilities in Modern Medicine 221 (Series on Ethics, Humanism, and Medicine No. 2, 1981) (arguing that on utilitarian principles, government funding of abortions is proper, but on moral grounds, it may respect anti-abortionists’ principles).

251. See, e.g., Stith, The World as Reality, as Resource, and as Pretense, 20 AM. J. JURIS. 141 (1975) (arguing that refusal to recognize fetal life is pretense, endangering value of human life after birth).

252. For an argument that such a distinction is mere pretense, see id. at 436; see also Drinan, The Inviolability of the Right to Be Born, in ABORTION, SOCIETY AND THE LAW 123-37 (D. Walbert, J. Butler ed. 1973).

human being may or may not suggest the opposite conclusion, namely, that it has no "right" to be born.

However, as we must often candidly admit, even to say that one is a human being and entitled to life by the Constitution, is not to say one is entitled to life under any and all circumstances. As Judith Jarvis Thomson's famous example of the violinist hooked up to an unwilling participant's kidneys suggests, we often do not even require others to be inconvenienced to save a life.\textsuperscript{254} Government policies regarding the death penalty and the government's poor funding for nutrition, child health programs, and treatment of diseases similarly attest to the fact that some values are placed higher than life itself by our jurisprudence.\textsuperscript{255} The "right to life" suggests merely that extraordinary care and attention will be provided the person whose life is threatened against majoritarian decisions which would threaten it. It may well be unfortunate, even with the careful attention given the fetus' right to life in \textit{Roe v. Wade}, that the Court seems to have denied that its right outweighs the woman's right. Yet, if one is precluded from arguing fetus' rights are greater than women's rights, it is troubling to allow the opposite conclusion in the abortion funding cases. This is particularly true because the social, economic, and even medical arguments on the women's side are so much stronger in these cases.\textsuperscript{256}

Even if the balance sheet read "state interest in fetus' life plus fetus' right to life vs. women's right," the government interest in the fetus would not appear to be appreciably different in either case,\textsuperscript{257} despite Maher's suggestion to the contrary.\textsuperscript{258} If the fetus is a person or person-like, then the government's re-


\textsuperscript{256} For a lengthy discussion of socioeconomic and medical arguments in favor of abortion, see McRae v. Califano, 491 F. Supp. 630, 668-89 (E.D.N.Y.), rev'd sub nom., Harris v. McRae, 448 U.S. 297 (1980); see also Harris, 448 U.S. at 351-52 (Stevens, J., dissenting) (arguing that Roe v. Wade explicitly held that a woman's interest in avoiding serious health problems outweighs fetus' right to life).

\textsuperscript{257} If abortion is somehow murder, Professor Sher has argued, then the statement that government should not finance murder (indigent women's abortions) is likely to gain no more adherents than the statement that government should not permit any murders (all women's abortions). Sher, supra note 250, at 224. Moreover, he argues that even if abortion is morally questionable, it is unclear why the burden of proof should fall on those who believe it is permissible rather than those who believe it is not, or why it should be legalized but not financed. Id.

\textsuperscript{258} See Maher, 432 U.S. at 478.
responsibility for civil rights would suggest that the government protect that life, whether it is threatened by termination by women using private funds or by women assisted by government benefits. Of course, one might respond that we have always differentiated between threats to one’s important rights made solely by private persons, and threats made by private persons with the assistance of government. Blacks for years were the targets of racial discrimination in all areas of social life while the Supreme Court muddled around trying to define what would be sufficient state action to engage the protection of the fourteenth amendment.250 Even if the distinction between the strictly private and the quasi-public violator were valid in some cases, however, it is difficult to imagine the Court sanctioning a law which would prohibit the taking of a human life by government or using funds provided by government, but permit such taking by private persons. Yet, that is the only way to reconcile Roe v. Wade and the abortion funding cases, that is, if it is still possible after Roe v. Wade to argue that the fetus is a person or even that government has an interest in the fetus as a person.

Indeed, in reviewing the other fundamental rights benefit cases, one is hard pressed to find a comparable situation if one takes seriously the idea of a fetal right to life. In none of these cases was the state’s condition on benefits which “penalized” an individual’s fundamental right backed up by something as strong as a right to life. Thus, this would be the clearest argument for distinguishing Maher and Harris from the Court’s other cases involving the withholding of benefits—the state did not have the right to life on its side! However, once Roe v. Wade removes this “right to life” argument from the state’s side of the balance, other explanations appear to be bleak attempts to justify the Court’s turn in Maher and Harris.

Even if there is no fetal right to life to outweigh the woman’s right, there may arguably be a taxpayer’s right of conscience which outweighs the woman’s right to seek and obtain an abortion. Under this theorem, the taxpayer’s right of conscience, including her right not to have hard-earned money used to kill an

innocent life (according to her moral, though not legally recognized, estimation) is paramount to the woman’s right to obtain an abortion, if any such right exists. This appears to be an attractive theory, particularly if one subscribes to property notions that one may give what she has under the conditions which she chooses, subject only to some constraint by the state. To force the taxpayer to give what is hers for an end which she hates, is to force her to do what she hates. What more invasive action can the state undertake than to force her to do what she conscientiously believes is among the worst sins?

Unfortunately, such an argument can only be made if one is willing to accept its consequences. If a person can withhold her tax money so it does not go to killing a fetus on religious or ethical grounds, then surely a person can withhold her money so that it does not go to killing people in a war, or by the CIA, or in the electric chair. Thus far, neither our courts nor our legislatures have been willing to protect this result. Indeed, one cannot distinguish the abortion cases from other taxpayer resistance cases by arguing that the security of a nation is a paramount value which justifies forcing people to contribute to war, or the CIA, but not to other morally repugnant purposes. Those who have withheld their taxes designated for “lesser” purposes than national security, such as the Amish’ decision in United States v. Lee to withhold Social Security taxes, have been similarly routed. As the Lee Court notes, its key concern is the tax system which:

could not function if denominations were allowed to challenge the tax system because tax payments were


261. See, e.g., Lull v. Commissioner, 602 F.2d 1166 (4th Cir. 1979) (taxpayers not entitled to deductions for military expenditures on grounds of religious objections to war and first amendment’s protection of these beliefs), cert. denied, 444 U.S. 1014 (1980); Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969) (taxpayers denied refund for percentage of tax used to finance Vietnam war), cert. denied, 397 U.S. 1036 (1970); see also SHER, supra note 250, at 225-26 (arguing that most tax-sponsored government policies encounter substantial principled opposition). But see Hardy, supra 197, at 506-08 (discussing taxpayer right of conscience).

262. 455 U.S. 252 (1982).
spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.263

Surely the pro-life person’s argument that his conscience right is more important than tax integrity, unlike that of others who oppose state-sponsored murder, is a tenuous one.

Similarly, the taxpayer rights rationale cannot be used to explain the conflicts in the decisions of the public benefits withholding cases. The particular issue which precipitated the legislation in Shapiro, Sherbert or Elrod v. Burns264 may not have held the same moral importance to those who passed the legislation as the abortion issue was for Hyde Amendment sponsors. Yet, it is far from clear that those legislative burdens on people’s abilities to travel, to exercise religious beliefs, or to freely associate were imposed merely for financial reasons. Quite plausibly, legislators in those cases held strong moral and possibly even religious convictions about the entitlement of an out-of-state welfare recipient to aid, or the right of a Sabbatarian as against all others to demand a day of rest at taxpayer’s expense, or the duty of a public employee to be loyal rather than true to his conscience. Indeed, if the taxpayer conscience rule must be extended by Maher and Harris to cover these cases, then the Lee Court is quite right in suggesting that our entire tax system would become a mishmash of personal predilection.265

3. Rights Against Government Interests

Of course, the problem posed in the abortion funding cases is not the problem in Lee, for Lee only covers individual refusal to pay tax money, which is not the problem of government withholding of funding.266 Individuals cannot realistically suggest that their tax money goes to a particular purpose, since there is clearly no way to earmark such funds. One taxpayer’s actual money may go to school lunches or Supreme Court salaries; hence, there is justification for the tax system argument which the Court makes.

263. Id. at 260 (citations omitted).
265. See Lee, 455 U.S. at 260. For the relevant language from Lee, see supra text accompanying note 263.
266. See Lee, 455 U.S. at 254-55.
in *Lee.*267 By contrast, in the abortion funding cases, individual taxpayers who did not want their tax money appropriated for abortion became numerous enough to constitute a majority. Through the majoritarian process they created a collective value: the value of fetal life which is protected at least in the way the majority can protect it, by financially discouraging women from taking that life. And so we return to the majoritarian process, this time to ask what state interests may justify the majority’s imposition of its moral or religious values upon the individual.

One might, of course, impose a purely utilitarian calculus on the rights vs. rights question, i.e., whether the aggregate rights (happiness) of the taxpayer majority outweigh the rights (happiness) of pregnant indigent women. Yet, it would be difficult to determine whether the happiness created by the rights of roughly 327,000 indigent women to have abortions outweighs that created by the rights of 100 million citizens not to have their money used for these abortions against their collective conscience.268 Such a utilitarian model would prevent the use of a right as a “trump card” to be pulled out against the “rules,” that is, the decision made by the majority.269 However, the traditional constitutional model allows us to do more than count rights on either side. We can find a legitimate state interest, one which belongs to the people collectively. Since we deal with a recognized fundamental right, if it is compelling, it will prevail.270

In a variation of a previous theme, the important state interest may be in protecting the civil rights of taxpayers, with govern-

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267. See id. at 258-60.
268. Unlike a decision to aggregate and protect the similar right of many people, this calculation requires an evaluation of the importance of a particular right as against another right. This latter step may arguably denigrate the importance of the right and of the person. Cf. Failinger and May, *Litigating Against Poverty: Legal Services and Group Representation,* 45 Ohio St. L.J. 1, 22-27 (1985) (discussing equal opportunity and equal access to legal residences).
270. It is particularly interesting that the *Bowen* Court, logically following *Maher and Harris,* argued that the level of scrutiny levelled at the government’s claim will depend on whether there is a governmental compulsion, rather than merely a condition on benefits. 106 S. Ct. at 2155. In the case of conditions, which are not constitutionally suspect government actions, the plurality only required that the government show that the requirement “is a reasonable means of promoting a legitimate public interest.” *Id.* The O’Connor opinion, by contrast, argued that such government action is to be scrutinized like a penalty, so that the appropriate test—strict scrutiny—must be applied since the free exercise clause is at issue. *Id.* at 216. However, the O’Connor opinion found that the prevention of welfare fraud is a compelling state interest, thus putting the emphasis on the nature of the state’s interest and not on the nature of the state’s action. See id. at 2166.
ment ensuring to the extent possible that rights of conscience are not infringed at the expense of rights to privacy. That state interest in civil rights may be even stronger than the individuals' rights combined. In fact, the abortion funding cases are better than most for arguing a state interest in protection of conscience because state's interest in a right of conscience is not infringed by a person who has an abortion with private funds. The state interest is defined as an interest in protecting taxpayers' right not to participate, by use of their money, in the abortion decision. Thus, withholding tax funds from abortion can protect the right of conscience without the government having to make abortion illegal. However, such reasoning suggests that government's responsibility to protect rights of conscience against payment of tax would be triggered only when those holding a particular "conscience right" constituted a majority. If 49% of the people believed funding for war or abortion to be immoral, their "rights" would not have to be protected by the state, but if 51% of them so believed, their rights would have to be protected. Such a proposition takes the notion of rights, which we have perceived as countering majoritarian interests, and stands it on its head.

Furthermore, if we look at the government's responsibility as protecting the civil rights of conscience of a majority, then we must again judge the conscience rights which went into creating the other benefit-withholding statutes which we have considered, e.g., statutes withholding welfare benefits for non-residents, or unemployment for people unwilling to take jobs on their Sabbaths. The practical problem of determining whether such prohibitions were passed to protect conscience rights is enormous. Furthermore, we would be required to determine which conscience rights are entitled to protection. Suppose a large minority of persons had a conscientious belief that only the strong were morally entitled to life, and therefore opposed welfare benefits altogether. Yet, suppose further, that because they had to rely on other coalitions with different points of view to pass legislation, they were only able to pass a one-year residency requirement as in Shapiro.271 Would these rights of conscience still be entitled to respect? If so, how much? Or if a majority felt that people should eat out of garbage cans for a year to strengthen their moral fibre, is this a claim which should be taken seriously by the state which serves them?

271. See Shapiro, 394 U.S. at 630-31. For a discussion of Shapiro, see supra note 17.
Finally, the state may assert a moral interest of its own in the preservation of fetal life, different from its interest in protecting citizens' conscience or even the fetus' civil rights.²⁷² That is, rather than refusing to fund abortions, or Sabbaths, or welfare travelers on the basis that it must protect taxpayer conscience rights, the state representing the community would determine that it has certain moral responsibilities which counterweigh the interest, even the right, of any individual to free exercise of religion, abortions, or travel. Quite properly, civil libertarians are concerned that moral claims may be used by a homogeneous majority to stifle the diversity which individuals bring to our society, and to invade their autonomy and thus denigrate their personhood. Yet, there is nothing in rights-parlance which would prevent moral considerations by the state from triumphing over even a strong right by an individual, unless we are willing to consider that right absolute.

In this context, perhaps the abortion funding penalty/withholding benefits distinction can be justified on a rights/moral claim model. The state has the moral obligation not to cause an abortion to take place.²⁷³ If the state provides the means for an abortion, then it has caused the abortion, particularly where the mode of provision is direct reimbursement for specific services to physicians.²⁷⁴ If, in addition to denying abortion funding, the state also removes all penalties on abortion, then the state can keep peace with itself; it has not violated its obligation not to cause an abortion to take place, but it has also not violated the woman's right to decide.

By contrast, if the state has an affirmative moral duty to stop

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²⁷² Indeed, the Maher and Harris opinions have both been lauded and criticized precisely because of the claimed moral judgments that they validate. For example, President Carter once commented that the government should not act to make opportunities such as abortion "exactly equal, particularly when there is a moral factor involved." Note, supra note 134, at 287, 302. Professor Perry has argued that taking the position in Maher and Harris that the government may act based on moral objections to abortion is inconsistent with the Court's holding in Roe v. Wade. See Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 STAN. L. REV. 1113, 117-18 (1980) (citing Harris, 448 U.S. 297 (1980); Maher, 432 U.S. 464 (1977); Roe v. Wade, 410 U.S. 113 (1973)).

²⁷³ But see discussion supra note 297 and accompanying text; see also T. BENDITT, RIGHTS 66-67 (1982) (questioning whether a state can have more rights than an individual in the state of nature).

²⁷⁴ By contrast, apparently, if the state gives every woman $500 and says, "you may do what you want with the money, even if it is used for aborting your child; we just don't want to hear about it," then the state cannot be said to have caused the abortion.
an abortion which counterweighs the woman’s right, one would think that this moral duty should have triumphed in Roe v. Wade because it was compelling. If the state’s only moral duty is not to cause an abortion to take place, the niggardly way of meeting that duty is not to contribute financially to abortions. The more effective way is to remove social and financial obstacles which make the bearing of another child an onerous burden for young, indigent, unmarried and minority women.275 The state can thus prevent more abortions than the Maher and Harris cases ever could.

Nor can other liberal tradition concerns about rights be used to support Maher and Harris. By subsidizing a woman’s abortion, unlike subsidizing one’s religious or associational or travel preferences, the state has not thereby created a condition of inequality with other citizens. If we subsidize Catholics to go to Rome, for instance, Protestants might have good cause to complain about the relative deprivation as to themselves. By contrast, given the current Medicaid financing scheme, if we subsidize one woman’s abortion, we will not automatically elevate her concerns above those of the woman who chooses childbirth, or even the woman who chooses abortion but has to pay for it. Similarly, affirmative protection of a right to abortion does not infringe on another’s rights, in the way that, for example, subsidizing Hari Krishnas’ peripatetic work might expand on the privacy infringements their practice creates. Except for the taxpayer conscience and the fetus-rights issues, one cannot legitimately say that she has been harmed by another person’s having had an abortion, except speculatively—the child who was not born might have supported her, or married her, or contributed taxes to ease her own burden.

A final possible justification for the difference in the bene-

275. It is generally conceded that the state’s other economic or practical interests, such as saving money and safeguarding the pregnant woman’s health, simply do not justify any abortion-related restrictions or refusals to fund abortion services. See, e.g., Development, supra note 242, at 831-32, 835. Apparently, this is so even where such restrictions are not totally irrational. See id. at 826-28.

Even if government has a rational interest in increasing its population by prohibiting abortions (again, as suggested by Maher), that interest would extend to all pregnancies, whether they are potentially to be terminated by an individual using private funds or one using public funds. If the interest is solely in having more citizens, however, one would surely argue that there are more rational and effective ways to meet that goal than refusing to permit or fund abortions and thus abrogating the woman’s important right to decide about bearing a child. If one says that the state’s interest is served by excluding funding for abortions but not by criminalizing abortions, one must fall back on the penalty/withholding benefits distinction previously discussed in order to make sense of this proposition—i.e., that somehow, criminal prohibitions interfere less with the woman’s right than does withholding benefits.
fits/rights cases is that the sum of the recipients’ explicit rights and their “background” interests is more significant in Shapiro and Sherbert than in Maher and Harris. In a way, this is merely a variation on the argument that some fundamental rights are more important than others, an argument which does not track the government benefit cases discussed in this article. However, the “add-on” argument also suggests that in reviewing a case involving recognized fundamental rights, the Supreme Court properly surveys the case for other strong, perhaps widely recognized, additional interests of the recipient which support the notion that the government should act, even affirmatively, so as not to burden the core fundamental right.276 In the Shapiro and Sherbert line of cases, for example, the significant rights to travel and to exercise one’s religious beliefs were entwined with the rights-exerciser’s strong interest in subsistence benefits, in medical care, in welfare, or in unemployment benefits.277 That strong interest, while not rising to the level of a “right” in constitutional terms, gave sufficient weight to the rights-exerciser’s case that the Court closely scrutinized the impact of the government’s action in revoking benefits.

However, the burden of Harris for this rights-plus theory is heavy. In Maher, this theory could be used to argue that a woman’s right to decide for a non-therapeutic abortion, plus her background interest in state subsidization of that abortion, were not in the same league with the right to travel or the right to free exercise of religion coupled with the recipient’s strong interest in subsistence benefits. Harris complicates the matter by adding the woman’s significant interest in her health to the calculus. It is difficult to show that the recipients’ rights plus interests, in the right to travel and free exercise cases, outweigh the recipients’ rights plus interests in Harris, or that the woman’s abortion plus other interests are less weighty compared to the state’s interests. Unless one defines a person’s strong interest in surviving extremely

276. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99, 124-26 (1973) (Marshall, J., dissenting); L. Tribe, supra note 64, at 1127-28. Professor Michelman has argued that this “rights-plus” practice by the Court allows us to justifiably say there is a right to welfare, or at least minimum protection against economic hazard. See Michelman, supra note 158, at 659-65; see also Jones, The Right to Health Care and the State, 33 Phil. Q. 279 (1983) (arguing health care should be funded at least on the same basis and for the same reasons as police and fire protection). But see Appleton, supra note 41, at 753-57 (arguing that Maher and Harris finally refute Michelman’s thesis).

277. For discussion of this line of cases, see supra notes 17-18 and accompanying text.
literally, a woman who stands to lose her health in significant measure as in *Harris* would seem to have *at least* the same level of interest as a woman in a *Sherbert* case who is going to suffer an inadequate diet, or slum housing, or even sloppy medical care due to state withdrawal of basic benefits.

Even if the above arguments regarding the Court's definitional assumptions or apparent bases for justifying imposition of responsibility conditions in *Maher* and *Harris* are rebuttable, the author hopes they have at least demonstrated the troubling results which occur when rights-talk is applied to a situation like the abortion funding cases. In these cases, as in many cases involving government benefits and fundamental rights, so much is at stake for so many in terms of personal values, freedom, and even the right to a healthy life. Whether the critique is centered on the Court's description of the woman's right or the state's action, or whether it goes to the balance which the Court strikes between individual rights and state interests, rights-talk must eventually result in disastrous decisions in such cases. Either the government or conscience-stricken taxpayers or fetuses win, and indigent women lose; or poor women triumph over serious concerns about the sanctity of life. It is now appropriate to turn to the task of describing some of these previously illustrated flaws in rights-talk.

### IV. SOME PROBLEMS WITH RIGHTS-TALK

As the preceding discussion has illustrated, traditional common law rights-talk is simply an inadequate framework to resolve collisions between government policy and human belief, particularly in life-and-death matters. This article will only briefly touch on some of the reasons for this. First, rights language depends on certain factual-legal questions which must be answered by reference to a specific, shared moral universe, one which does not currently exist. This is particularly so since the use of rights language, indeed its very weight, must be justified with reference to a system of values. Second, rights presuppose duties; but rights of "subsistence recipience," those "rights" on which all other rights really hang for government-dependent citizens, generally do not have presupposed duties,\(^\text{278}\) at least in the American legal tradition. In addition, rights at the common law or by constitutional

\(^{278}\) See, e.g., *Sen,* supra note 72, at 352 (arguing for a right to basic needs); *see also infra* note 286 (discussion of the right of recipience as a metaright or entitlement).
history have served allocative or protective functions, not the mediating functions they are called on to serve in the government benefits cases at issue. Moreover, rights-talk has generally been employed in settings which are abstracted from time and place concerns. Rights-talkers have rarely recognized how individual rights-holders and their opponents are embedded in a community which by its nature suggests members' responsibility for each other. Finally, the rights framework presupposes an adversarial process, and a win or lose outcome. Where government-held resources are to be allocated, when sharply divided beliefs of conscience and the very means of life and of life-opportunity are at stake, such conflict-based rights talk is surely inapposite.

As a lawyer, not a philosopher, permit me to suggest that the recognition of legal rights, whether at common law or through statutory or constitutional development, has followed a much different course than philosophical rights discourse. Not only does the law recognize certain kinds of rights, such as powers or immunities, which cannot be explained as products of reason, but what we mean by a "right" may be several different kinds of rights at once. Commonly, legal rights are not derived, but rather acknowledged by courts, legislatures and even by lay people, much as one might acknowledge a coming storm from gathering clouds of precedential progression, public opinion, and reasoned thought. Indeed, legal rights depend for their survival on the increasing confluence of these sources. Those rights which have emerged or survived in our century, e.g., rights to racial equality or personal privacy, are dependent on the deepening concord of such sources. Other rights proposed for legal status, such as the right not to be put to death by the state, or the right to welfare, have been drowned in the dissonance of different groups,

279. See Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg, the Court concluded that the death penalty does not per se violate the eighth and fourteenth amendments. Id. at 168-69. The Gregg Court found that the eighth amendment's prohibition against "cruel and unusual punishment" should be interpreted in light of the "evolving standards of decency that mark the progress of a maturing society." Id. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). The Court further noted that this standard of decency may be construed, in part, through legislative measures adopted by the people's representatives, and at least 35 states had adopted death penalty statutes. Id. at 178-80.

280. See, e.g., San Antonio Indep. School Dist., 411 U.S. at 32 (social importance of education is not critical factor in determining whether state statute is subject to strict scrutiny); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (rejecting argument that tenant's right to leased premises is fundamental for purposes of equal protection clause); see also Dandridge v. Williams, 397 U.S. 471 (1970) (statute placing absolute limit on amount of welfare regardless of need or family size did not violate equal protection clause); infra note 290 (citing cases in which courts
social beliefs, and actions.

The abortion controversy only illustrates the dissonance that emerges from conflicting, deeply held religious and moral understandings about the nature of life and priorities of human beings’ responsibility for themselves and others, a dissonance that cannot be removed by rights-talk. The debate over the legal status of the fetus, like debates over euthanasia and test-tube children, represents more than an admission that science or even rational thought has failed us in its attempt to provide definitive answers to questions about what constitutes a human life. It is an acknowledgement that, in a pluralistic society, neither science, law nor philosophy are currently able to create an acceptable moral meeting-place for persons whose moral universes clash or are even mutually exclusive. Rights theory developed into law cannot exist in such an atmosphere of dissonance; rather, court-made or legislatively created “rights” become merely skillful arguments, often backed by gingerly wielded enforcement power. So we see the inconsistencies in the abortion debate: the recognition of the right to abortion in Roe v. Wade and the withdrawal of the means to exercise that right in Maher and Harris; the initial protection of the doctor-patient relationship, and its erosion through state regulations on abortion disclosures and procedures; the constitutional amendment struggles; the one-issue politics; the “make-an-example” cases involving women who “kill” aborted fetuses, and variant regulatory procedures for doctors who do so. Even common grounds on which liberals and conservatives have traditionally met to form some consensus, such as the right to human autonomy, disappear in such a debate. If there can be no common ground, then there can be no stable right or a non-right to government benefits, or even to abortion.

Ironically, this very cacophony of values and beliefs, which makes it almost impossible for courts in benefits cases to recog-

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281. See Jaffe, supra note 19, at 113, 122.
282. Compare Thornburgh v. Amer. College of Obstetricians, 106 S. Ct. 2169, 2183-84 (1986) (Pa. abortion statute proviso requiring presence of second physician during abortion performed when viability is possible held unconstitutional since it failed to provide medical exception for situation where mother’s health was endangered by delay in second physician’s arrival) with Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476, 485-86 (1983) (Mo. statute requiring presence of second physician in similar circumstances held constitutional since proviso contained implicit exception for situations when second physician arrived late).
nize any enduring rights at any level of concreteness, also justifies the necessity for rights in liberal theory. In order for each to be truly autonomous, to be "separate, independent selves," as liberal theory would hold, we need a rights framework that does not choose among competing purposes and ends, a so-called neutral framework of rights.283 Such a neutral framework would allow each citizen to choose his own values, each being tolerant of others' values. The types of rights employed toward that end are primarily procedural in nature, with the appearance of neutrality: rights such as equal treatment, due process of law and freedom of expression.284

As this article has striven to illustrate, with the discussions of rights vs. rights and rights vs. government interests, the decision to employ rights-talk in government benefits cases reflects an impoverished understanding of the dynamics involved. It is not only that the decision to employ rights-talk is value-laden, e.g., we must decide whether our reason for using rights is instrumental, perhaps for utilitarian goals.285 It is also true that the way in which we fill the empty shell of the rights balance with meaning sufficient to allow a legal decision is dependent on non-neutral choices. If we argue that the woman's right is to autonomy—whether it be termed privacy or liberty—we cannot avoid the fact that such a "neutral" right will interfere with the life of another, or at least with potential life. Similarly, recognition of a taxpayer's "neutral" right of conscience or the fetus' "neutral" right to survival will not tolerate similar recognition of the mother's "neutral" rights of autonomy. While one can imagine the possibility of mutual toleration of such rights where there is government or individual invasion of another's "rights-turf," where the proposed right of one person is to affirmative action in choosing allocation of a benefit, irreconcilable conflict exists.

Second, the "right of recipience," the term coined to suggest that agreement exists on whether people are entitled to have their basic needs met, illustrates the awkwardness with which rights

283. See Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Tushnet, supra note 71, at 1375-77.

284. Even the attempt to neutralize the types of rights which are necessary for the liberal state is subject to discussion. Certain liberals support social and economic rights, whereas others support a market economy on the theory that redistribution of property interferes with individual autonomy. See Sandel, Morality and the Liberal Ideal, The New Republic 16 (May 7, 1984).

285. In such a situation we might indeed "add" rights on either side of the balance to decide the government benefits condition case.
language is used.\textsuperscript{286} Surely, such a right must be a claim-right: the idea that one merely has a "liberty" or "power" right to have one's needs met is absurd. Yet, a claim-right usually entails a duty, e.g., if one has the right to own land, others have the duty not to interfere with that ownership, the law defining what the duty entails as well as the right. Even the more nebulous rights, the so-called "human rights," such as dignity, have gained some enforceable substance by international custom and convention. International agreements against genocide\textsuperscript{287} or statements against the use of torture,\textsuperscript{288} for example, suggest a core of agreed content for such rights.

By contrast, the ("legal") "right of recipience" is said to exist despite the lack of a corresponding legally enforceable duty in government or in individuals to provide for those who have such a right.\textsuperscript{289} Courts in this country have emphatically and consistently turned away claims by poor people that they have a constitutional or common law right to food, clothing or shelter.\textsuperscript{290} They have reasoned that while the government's decision to fulfill their

\textsuperscript{286} The "right of recipience" has variously been characterized as an abstract background right which provides a justification for political decisions of a society abstractly but does not provide a justification for a particular political decision; a metaright to have policies which genuinely pursue the objective of making the right to basic needs possible; or an entitlement, which is based on the rules of the system which distributes goods. See Sen, The Right Not To be Hungry, in 2 Contemporary Philosophy, A New Survey, 343-47 (G. Floistad ed. 1982).


\textsuperscript{288} See, e.g., Declaration of the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 9, 1975, in J. Sweeney & C. Oliver, supra note 287, at 151-53, Universal Declaration of Human Rights Article 5, in J. Sweeney & C. Oliver, supra note 287, at 61; International Covenant on Civil and Political Rights, Article 7, in J. Sweeney & C. Oliver, supra note 287, at 68. Interestingly, the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights recognize the right to "an adequate standard of living." J. Sweeney & C. Oliver, supra note 287, at 64, 90.

\textsuperscript{289} See Sen, supra note 286, at 352. But see Bendorf, supra note 273, at 73-80.

\textsuperscript{290} See Simson, supra note 11, at 507-08; see also Caton v. Barry, 500 F. Supp. 45, 48-52 (D.D.C. 1980) (Constitution does not guarantee safe or habitable housing; plaintiff did, however, have entitlement to minimal shelter that could not be terminated without due process); Black v. Beam, 419 F. Supp. 599, 606-07 (S.D.N.Y. 1976) (no constitutionally mandated obligation of state to provide plaintiffs with welfare or housing benefits, or to insure given type of family life); Bastardo v. Warren, 332 F. Supp. 501, 503 (W.D. Wis. 1971) (no right to minimum wage).
basic needs is not exactly largesse after Goldberg v. Kelly,\(^\text{291}\) it is not a necessary result of a government duty under some higher law or precedent. Similarly, a brief survey of various state and federal government public benefits programs, particularly since 1980, will belie any argument that the other branches of government are willing to be bound by such a mandatory duty. If there is not a legally enforceable right of recipience, then it is difficult as an abstract matter to understand how the poor have any fundamental claim-rights, even negative ones. If indeed a poor person has no right to the means to live, the value of her right to prevent government interference with her life-right is minimal. If government has the power to impose any responsibility condition on her means of survival, how then can she ever exercise any right as trump against government?\(^\text{292}\) Indeed, how can one suggest that a poor person, as against government, has a right to decide whether to procreate (or a right to engage in any human activity deemed fundamental) if she invariably needs at least some beneficence, however indirect, to exercise any such right and she may not claim such beneficence from government?\(^\text{293}\)

Perhaps the preceding discussion has also illustrated the poverty of rights-talk in compelling human dilemmas, such as the abortion problem, because of its apparently deliberate separation from the concrete case and the specific level of discourse, and because of its failure to recognize that rights-holders are embedded in a community which claims moral response on their part. Professor Tushnet has made the first point clearly. Because of the level of abstraction at which meaning is poured into a "right", or at which a right is recognized, it is almost impossible to determine whether that right will be protected at law in a given situation.\(^\text{294}\) Whether we denominate the woman’s right as one of privacy or liberty, we have not solved the abortion funding dilemma. Indeed, depending on how we line up both abstract factors such as the state’s interest (in population or in protection of fetal life) and concrete factors such as the state of the woman’s health, the right appears to shift. Rights-talk abstracts real situations, apparently for the sole purpose that like cases be treated or that logical processes be applied to the solution of the particular problem—


\(^{292}\) For a further discussion of the utilitarian model’s utilization of a "trump card," see supra note 269 and accompanying text.

\(^{293}\) See H. Shue, Basic Rights 22-34 (1980).

\(^{294}\) See Tushnet, supra note 71, at 1375-82. Tushnet criticizes this tendency on the basis of fundamental indeterminacy. Id.
even though no cases are alike, and even though no logic in the world can decide whether a fetus is a life which we ought to protect.

By labeling proposed liberties of action as rights, rights-talk also lends credence to the liberal notion that every man is an island, that a human being’s life can be lifted from the community in which he finds himself and be dissected. Once a person obtains a right, we do not normally ask whether other obligations she may owe, or relationships she may have, transform the propriety of her exercise of that right. Rights theory does not consider the idea of a communal right, one which belongs to an entire group of people by virtue of their relationships with each other and simultaneously to each individual as a member of the group.295 Rights-theory posits that an individual is severable from the life she shares with others.

Additionally, the government benefits/fundamental rights cases are inept vehicles for rights terminology, terminology which has traditionally been employed either to allocate and protect scarce goods available or to protect against the encroachment of government. Where the question of “rights” comes up in procreative or other fundamental rights decisions which turn on the availability of government funding, neither the allocative nor the protective function of “rights” is involved. In the Maher/Harris cases, the issue is not allocative: the question is not how a scarce medical resource should be divided among those who want abortions and those who want other medical care. We do not decide these cases by an allocation that gives a right to the resource to A rather than B. Nor is the abortion funding debate about whether dollars should go to Jane Doe for “related basic needs” through the AFDC program, or should stay in the taxpayer’s pocket, rather than go to Mary Smith for abortion services. The conscience-stricken taxpayer objects to medical care for Mary Smith even though the taxpayer will be (resource-wise) poorer for her objection because he will subsidize Mary Smith’s child through AFDC. Moreover, Jane Doe will, if anything, have fewer resources to draw on if Mary Smith is denied an abortion because the AFDC benefits which Mary’s child will soon be receiving may pressure the legislature to reduce the benefit levels for Jane and other recipients.

295. See, e.g., Lynd, COMMUNAL RIGHTS, 62 TEX. L. REV. 1417, 1419-23, 1438-41 (1984) (communal rights, unlike individual rights, belong to community as a whole and may not be given up by individual or current majority).
The use of the term “right” as a protection against government encroachment, the so-called liberty right, is similarly inapposite where government-dependent citizens are concerned. Such persons do not and cannot seek the shelter of some private, insulated realm from which government is excluded. They are, without choice, members of a larger community. Their claim is that government should accomplish (for them particularly) those purposes for which government was created, to fill the terrible voids in the “general welfare” that the “state of nature” created. The right they claim is the right to be governed, a positive claim right. Their demand is precisely a demand that government act as government, not a claim that government has overreached. Similarly, the claim of abortion-funding foes is that government act as government to enforce a moral stance, not that it has no business involving itself in pregnant women’s, fetus’ or taxpayers’ lives. In such a context, verbs used in rights-talk—government is “violating,” “intruding” or “infringing on” rights—are inapposite.

Nor is the term “right” in its protective sense a useful concept in public benefit cases prior to *Maher* and *Harris*, as evidenced by the difficulty the Court has with suggesting that the right of a Sabbatarian to worship must be protected by forcing the government to give her unemployment benefits. There is no prospect of the anonymous raid, the constriction of free action, which comes to mind when we discuss the right of an accused to be protected against a warrantless search of his home, or the right of a married couple to be protected against intrusion into their procreative choices. What is not at stake is protection against the massivity and arbitrariness of collective power, or prophylaxis for the adage, “absolute power corrupts absolutely.” What is at stake is empowerment of the individual through government action to choose meaningfully and to act freely in certain protected realms of human life.

Moreover, the structural dynamic in the government benefits cases discussed does not parallel that of a rights structure in relationships among people, or even between people and the state. In the individual rights against rights model, one person is the winner and another the loser: he who wins obtains the right, he who loses, the duty; even if it is a duty to refrain from interfering with exercise of that right. Similarly, when an individual or group of people win rights against the state, only they and the state are directly impacted, only their actions and the states’ are directly

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governed by the outcome of that decision. By contrast, it may be more appropriate to argue that in the fundamental rights/government benefits controversy, government stands as a neutral third party whose actions but not “rights” are affected by the outcome of the controversy. For instance, if the abortion funding controversy can be recognized as a rights vs. rights problem, the right of a fetus to life or a taxpayer to conscientious tax dodging versus the right of a woman to obtain an abortion, the government does not “win” or “lose” anything, but merely rechannels benefits in a different direction. By contrast, in liberty rights cases, e.g., the fourth amendment rights, the state actually loses some power or potential it previously had available.

Even if the question is not purely rights vs. rights but state interests against individual rights, it is difficult in many of the fundamental rights/government benefits cases to come up with an interest of the state qua state. One can imagine the state as a corporate entity having an interest in ensuring that its coffers are not depleted, and therefore requiring a Sabbatarian to take any available work and relinquish unemployment benefits, even if such work must be done on Saturday. One can similarly envision a state having an “interest” in administrative convenience, security, organization, of an optimal population size. It is difficult, however, to imagine this entity called the state having a moral interest. It is the people, after all, who control the state who have consciences—who feel impelled to call or even to compel others to moral behavior, as in the abortion cases. Thus, these cases are exposed as the 51% rights cases in which government acts not for itself, but as either conduit or mediator for effectuating the conscience rights of the majority as against others who have “lost” the political battle.

The mere fact that rights-talk inevitably suggests a winner and loser causes even more problems in the public benefits/fundamental rights context. Such use of rights-talk incorporates a view of human responsibility which cannot resolve the deep-seated conflicts which occur between those who act on conscience. As Professors Churchill, Siman and others have pointed out, rights-talk allows rights-holders to view their rights as pieces of property-things to which they are entitled, things which they may morally claim must be fulfilled before any other person’s competing interests and concerns are met. Indeed, rights-lan-

296. See Churchill and Siman, Abortion and the Rhetoric of Individual Rights, 12 Hastings Center Rep. 9, 11 (Feb. 1982). The authors suggest that rights are
guage has more and more assumed an egocentric morality in the common vernacular. Such language, as currently used, presumes that self-preservation and self-aggrandizement are normatively superior and may be morally limited only to the extent others' rights are significantly affected by one's own actions. Rights-language assumes the necessity of protecting one's self from others, individually or collectively, because of a distrust for their concern about one's needs, individuality or autonomy. Whether such rights have tangible or intangible foci, e.g., the right to property or the right to free speech respectively, they serve to improve the position of the rights-holder at the expense of those whose interests or competing rights are insufficiently important to merit a "rights" designation.

This dynamic of battle, this market-like struggle to prevail for one's own interests which rights-talk conjures up, simply will not fit the government benefits cases comfortably. There is no abstract, neutrally valued, logical way to resolve the tragedy of souls and lives that the abortion controversy has become. A new framework is not only desirable, it is necessary.

V. Conclusion

Legal rights-talk suggests a language and structure of realism for law, an ordering of human relationships based on a recognition of human weakness and the failure of human aspiration to guide much behavior. To the extent that rights are needed to guard against human frailties, such as those of greed, selfishness, and power-lust, legal rights-talk is useful, particularly since rights serve certain protective or allocative functions. Legal rights-talk, however, ignores a whole world of ethical choices which must inform both the political and the legal debate about distribution of government-held resources, particularly in the abortion funding cases.

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297. By contrast, the purpose of rights as conceived in liberal political theory is to prevent individuals from being conflated by a mere utilitarian calculus, and to allow them to be respected as independent, choice-capable persons. See Cassell, *The Refusal to Sterilize Elizabeth Stanley is Not Paternalism, Rights and Responsibilities in Modern Medicine* 148-50 (1981); Sandel, *supra* note 284, at 15.


Dispute resolution founded on rights ignores a counter-tradition of human response based on the importance of the other, which recognizes that each of us is intimately tied with the history and action of others. In that history, assertion of rights is a disruptive rather than a conciliatory force. Carol Gilligan has partially described this ethic centered in women's experience, elucidating how it is used to make moral decisions.\textsuperscript{300} Contrary to a rights ethic, the counter-ethic of responsibility assumes that one's needs and wants are subordinate to the needs and wants of those with whom one has relationships, that one places herself not first (by asserting rights) but, if necessary, last (by taking on responsibilities). Even the dynamic of this counter-ethic is diametrically opposed to that of rights-talk. One does not solve a problem of conflicting human needs and wants by abstracting those needs and wants into principles which are measured against each other with one factor gaining precedence through logic, analogy, or even power. A person using counter-ethical methods for deciding would be concerned, not with which principles predominate, but with care for the web of human relationships which are at stake, such as the abortion problem.\textsuperscript{301}

One example which Gilligan uses clearly illustrates the poverty of rights-talk as it responds to affirmative human need.\textsuperscript{302} She gives the Kohlberg moral choice example\textsuperscript{303} to a twelve year old boy and girl: a man has a dying wife who needs a drug which he cannot afford to give her. The question she poses to them is: should the man steal the drug from the pharmacist? The legal answer, which the boy gives, abstracts the individual needs which are conflicting by framing the problem as whether the woman's right to life predominates over the pharmacist's right to property. Unconfused by legal precedent, the boy answers with perfect lawyerly logic that the right to life "beats" the right to property, so the man should steal the drug.

The girl, who represents the counter-ethic, recognizes the question not to be an abstract but a concrete one, and the dynamic of her response depends on the recognition that the human relationships involved are what is worth saving, not the


\textsuperscript{301} See, e.g., id. at 51-63 (discussion of case studies illustrating women's focus on protecting relationships).

\textsuperscript{302} See id. at 24-39.

\textsuperscript{303} See id. at 27-36.
principle of property or the principle of life. If the man steals the drug, he may go to prison and be separated from the wife who needs his support. Their relationship with the druggist will be severed as well. If he does not steal the drug, he and his wife will be torn apart by death and by his selfishness. The girl’s solution is not a principled one, nor one limited by the rights framework of the question: she would have the man go to the druggist and convince him to give the wife the drug she needs to live. The man’s and wife’s relationship are preserved; the druggist’s relationship with the couple is preserved. Her solution, while not “enforceable” in the sense that rights are, is, as a realistic matter, as likely to be successful in real life as the boy’s.

Such a counter-ethic is not just a moral decision-making framework but may usefully provide a new framework for legal analysis which is not rights-based. The dynamic of such a framework, rather than recognizing and responding to demand, struggle, acquisition, and consolidation of power, is one of responsiveness, settlement, giving up, and sharing. It is traditionally liberal in its recognition of the worth of the individual. Yet, it recognizes the concurrence of human responsibility and human want, the need for communion rather than rights battles among individuals, and between the individual and the larger community. Nor is it foreign to already developed notions of individual prerogative under the Constitution; the seeds of such a counter-ethic already inform basic legal principles in many respects.

The problems of defining and justifying a counter-ethic that would replace a rights-based ethic are difficult ones which deserve more than a few pages of reflection. Yet, a legal framework based on the counter-ethic would provide a very different result in the abortion funding cases. As this article has suggested, the rights-based perspective which currently informs both the political and legal debate on government funding for abortion has hopelessly failed to provide any happy, or even just, resolution. When the question is posed to as which right—the right to conscience, the right to life, or the right to autonomy and control of one’s body and destiny—is paramount, the question is only superficially soluble. Additionally, the rights framework provides an appropriate excuse for advocates on either side to ignore fundamental needs at stake: only rarely does one see a pro-life advocate even recognize that there is some responsibility to care for an unwanted child or her mother whose situation is worsened by the child’s birth, much less actively take any responsibility for them. Pro-
choice advocates are equally guilty of ignoring the effects on the fetus of the actions of those who abort (i.e., they could campaign for preservation of a viable aborted fetus). As importantly, rarely do pro-choice advocates recognize any responsibility for the third persons affected by the decision: putative fathers, those who cannot have children except by adoption, family members whose lives may be changed in a myriad of ways by the decision to abort, or even community members who see in abortion a discouraging rejection of community moral values about life-taking.

Similarly, the Court and the commentators have rarely conjoined discussions of the rights at stake and state or individual responsibilities inherent in such a decision. The strongest “duty” which the Court has posited for the state, in Roe v. Wade, is the duty not to interfere. By contrast, not once has the Court suggested that the state which decided that unwanted children were to come into the world by its funding denials has any subsequent duty to those children or mothers to care for their needs. The Harris decision suggests that the state need not make reparations or even provide medical care to the poor woman whose health is significantly worsened or whose life is endangered by the state’s refusal to provide abortion funding. While this refusal to impose responsibility is egalitarian—neither does the state have to aid women who choose childbirth nor care for their young, despite the state’s pro-birth policy—it deepens the despair caused by existing wealth inequalities in tragic, unnecessary ways. Nor has the Court posited any duty by the mother of responsible decision-making created by the freedom which the Constitution gives her.

If we reinterpret basic source law in accordance with this counter-ethic of responsibility, the discussion shifts from “rights-talk” to focus on the responsibilities of the parties to decide whether or not to provide funding which will affect the exercise of a fundamental human concern. If indigent mothers are asked not only what they want for themselves but whether they have acted responsibly toward others affected, and if those others affected, collectively or individually, are asked whether they have acted responsibly toward this woman and her unborn child, solutions which represent an instinctively appropriate compromise seem possible. For the woman’s part, on one extreme, those who wish to abort simply because the fetus has interfered with their life plans must, with great difficulty, justify their decisions, whether or

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304. In fact, the Court has held that there is no constitutional obligation to provide medical care for any indigents. See Maher, 432 U.S. at 469.
not they need government assistance to carry out their decision. By contrast, women who will inevitably suffer serious physical or emotional injury or death unless they can abort may legitimately argue that they have considered their responsibilities to others against their own lives. They may also claim responsible action by the state in ensuring their ability to abort, whether through non-interference, regulation, or direct funding. In the cases between these extremes, mutual responsibility by both parties may eliminate the need and desire to choose abortion. The mother will not be economically or socially forced to the choice; nor will the state or its citizens be forced to subsidize what they philosophically or morally reject.