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# IMPOVERISHED LIBERALISM: Does the New York Workfare Program Violate Human Rights?

*Anthony Bertelli\**

## I. INTRODUCTION

This article examines the New York Work Experience Program (hereinafter “WEP”)<sup>1</sup> instituted in anticipation of the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter “Welfare Reform”).<sup>2</sup> This initiative is the largest and oldest in the nation and the most extensive work program since the New Deal, expecting 4,000 to 5,000 welfare recipients to enter the workforce each month over the next few years.<sup>3</sup> Through the lens of contemporary individualist rights doctrine, I attempt to examine the titular question of whether the workfare scheme violates human rights. I conclude that WEP unjustly limits human rights to freedom and well-being and is morally invalid under the foundationalist framework of Alan Gewirth, but that the contractarian libertarianism of David Gauthier and Jan Narveson justifies a lesser package of state support than would Gewirth or current New York Law. Nonetheless, both syntheses illuminate problems with the current administration of WEP. It should be noted that these problems derive from WEP as it is currently administered, and are not inherent in the basic notions of welfare-to-work programs.

The individualist conception views rights as prior to duties. Consequently, there is no need to “earn” rights, as they vest in an individual by virtue of her being human. Alternatively, a collectivist

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<sup>1</sup> N.Y. SOC. SERV. LAW § 331 (McKinney 1998).

<sup>2</sup> PUB. HEALTH AND WELF. ACT 42 U.S.C.A. § 601, *et seq.* (West 1988).

<sup>3</sup> David L. Gregory, *Br(e)aking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L. J. 1, 14 (1997).

vision of rights conceives of a conjunction of rights and duties, where a person must fulfill duties to the community in order to have rights therein.<sup>4</sup> The individualist version of rights is the dominant paradigm in American law, and it is for this reason that I have chosen it as the framework for the analysis that follows. Regarding workfare and other means-tested social welfare programs not elaborated in the following pages, I argue that contractarian libertarianism is insufficient to evaluate WEP or any extant program. This is due to the resistance of libertarianism to any positive obligation on the part of the state toward individuals in fulfillment of claims to social and economic security.<sup>5</sup> Consequently, I endorse the theory of social security offered by Gewirth.

In the course of its analysis, this article contrasts two polar conceptions of the role of the state which replicate the division between the individualist rights theories noted above:

(1) the liberal position, associated here with Gewirth, in which government can rightly engage in positive assistance efforts, (this has been the backbone of poor relief efforts from the New Deal to the Great Society); and

(2) the rhetoric of Welfare Reform, including concepts of personal responsibility, the minimization of positive governmental assistance, and the rational economic choice associated with

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<sup>4</sup> For a collectivist theory, *see, e.g.*, R.H. TAWNEY, *THE ACQUISITIVE SOCIETY* (1920).

<sup>5</sup> The discussion presented in Parts II and III unpacks this assertion, though a caveat is appropriate at this point. The libertarian theory that is discussed in this article should not to be confused with the mixed rhetoric of its contemporary conservative political adherents. There seem to be two main variants of the latter: (1) a market theory asserting that though it may be unfortunate some individuals fall by the wayside, the concern is much less with the claims of those individuals than with the welfare of the economy in general; (2) a theory of personal responsibility suggesting that all (or at least most) individuals will indeed flourish if pushed to achieve, to work, while the provision of a safety net (as in the case of WEP) may be accepted for those truly unable to perform, for example, children and the mentally disabled. The theory used in this paper is far more akin to the denial of individual social and economic rights in (1) than to the more liberal version of libertarianism espoused in (2).

libertarianism.<sup>6</sup> The former liberal position is concerned with the moral decision to actively assist disadvantaged persons at the societal level, although it has certainly permitted unequal treatment of the poor through its oversimplified deserving/undeserving classification scheme.<sup>7</sup> Although the latter view may not appear to have similar moral concerns it does encompass complex issues. Central among these is the notion that the employment of self-interested rational choice decision making by individuals is actually moral choice, a position stated most deftly in the contemporary academy by Gauthier.<sup>8</sup> The Gauthierian argument leads to a type of libertarianism that, according to John Rawls:

[D]oes not combine liberty and equality in the way that liberalism does; it lacks the criterion of reciprocity and allows excessive social economic inequalities as judged by that criterion. In this case we do not have stability for the right reasons, which is always lacking in a purely formal constitutional regime.<sup>9</sup>

The Rawlsian, and as will be shown, Gewirthian, solution is the

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<sup>6</sup> See *supra* note 5. Libertarianism is alive and well in legal and philosophical discourse as a challenge to the welfare state and justification for Welfare Reform is evidenced by the recent articles in Symposium, *The Problems of Market Liberalism*, 15 SOC. PHIL. & POL'Y 1 (1998).

<sup>7</sup> The classification of the poor as deserving—those persons, like the blind, requiring relief due to conditions beyond their control—or undeserving—the able-bodied poor—has been a practice throughout both British and American social welfare history. See generally JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY, 1900-1994* (1994); KARL DE SCHWEINITZ, *ENGLAND'S ROAD TO SOCIAL SECURITY: FROM THE "STATUTE OF LABORERS" IN 1349 TO THE "BEVERIDGE REPORT" OF 1942* (1943).

<sup>8</sup> DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986). This argument dates to the eighteenth century as a challenge to the Kantian notion that solely rational actors lack "the predisposition to moral personality." IMMANUEL KANT, *RELIGION WITHIN THE BOUNDS OF REASON ALONE* § VI, ¶ 26 (1793).

<sup>9</sup> JOHN RAWLS, *POLITICAL LIBERALISM* lviii (1996).

creation of state institutions that produce stability in terms of equality, mutuality, and dignity through positive measures assisting the disadvantaged.<sup>10</sup> The libertarian solution involves no such institutions, but, rather, a network of private contractual arrangements.

John Rawls has described libertarianism as “an impoverished form of liberalism,” because it does not attend to concerns of social and economic inequality and conditions of non-mutuality in its expression of fundamental freedoms.<sup>11</sup> In this context, ‘liberalism’ denotes a belief in the ability of all individuals to enjoy the fundamental liberties, including wealth-building, association, speech, and the like. Rawls finds libertarianism impoverished in that its lack of positive state action to benefit the poor precludes that group from ever fully enjoying the liberties.<sup>12</sup> Workfare itself, as conditioned by Welfare Reform and exemplified by WEP, represents a case of impoverished liberalism, though not to the extent of the libertarian project. It attempts to achieve an ethos of personal responsibility among those who do not have the social, economic, intellectual, or emotional assets to achieve it. This is not to say that all workfare recipients are equally disadvantaged. The list is simply meant to generally characterize the types of deficiencies that workfare recipients encounter. However, the majority of welfare dependent individuals are not positioned for unsubsidized work at the present time, and no legislative edict can instantaneously change that reality.<sup>13</sup> Personal responsibility is a noble liberal goal. Indeed, it is the goal of both Welfare Reform and Gewirth’s social program. Nonetheless, workfare cannot achieve it without a more positive and informed program of assistance to participants. As will be shown, Contractarian Libertarianism cannot offer any suggestions toward this end, while Gewirth, and in several instances, the New York Courts, are instructive.

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<sup>10</sup> See *id.* at 1 (viii) - 1 (ix).

<sup>11</sup> See *id.* at 1 (viii).

<sup>12</sup> See *id.*

<sup>13</sup> See *infra* text accompanying note 49.

The workfare case provides a forum for conflict between these competing social ethics. This article attempts to address the most fractious issues of that debate while arguing for a more Gewirthian notion of personal responsibility. In Part I, the nature of workfare in New York as well as the case law developments limiting the program are introduced. Though most of the surveyed litigation occurred in New York City, the scope of the discussion is statewide. The moral philosophies of Gewirth, Gauthier, and Narveson are presented in Part II within the historical context of individualist human rights thinking. The discussion turns, in Part III, to the assessment of New York workfare given these theories, with some consequences for the theories themselves.

## II. WHAT IS WORKFARE?

The idea of mandating that welfare recipients perform work activities in return for their benefits is not of recent creation. In 1967, the Work Incentive Program (hereinafter "WIN"), a close relative of workfare, permitted states to mandate that able-bodied recipients of Aid to Families with Dependent Children (hereinafter "AFDC") participate in the workplace.<sup>14</sup> As such, WIN was more regulatory than incentive-providing.

WIN used a stick-and-carrot approach. The stick was applied mostly to fathers on AFDC-UP [a cash assistance program for unemployed fathers] and children over the age of 16 who were neither in school nor working. They were mandated to register for WIN and could be dropped from AFDC if they declined to participate without good cause [as determined by welfare officials]. The carrot was in the form of work incentives . . . , promise of training and employment services, increased funding for care,

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<sup>14</sup> JOEL F. HANDLER & YEHESEKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 138-41 (1991).

and encouragement of mothers with school-age children to volunteer for WIN and receive training and other support services.<sup>15</sup>

WIN programs, unlike Welfare Reform, allowed for indefinite terms of welfare dependency, and throughout the next twenty-five years, sentiment grew for the curtailment of dependence spells.<sup>16</sup> President Clinton was elected in 1992 on the platform of making welfare a "second chance, not a way of life."<sup>17</sup> AFDC rules were relaxed for a 1993 experiment in Wisconsin that limited AFDC receipt spells to two years. The first year in full-time work or a state supported training program with full cash benefits, the second in full-time, private sector employment to avoid foregoing AFDC cash benefits, and subsequent years with only food stamps and partial housing vouchers where individuals remained eligible under AFDC guidelines.<sup>18</sup> This 'Wisconsin Experiment' provided the framework for federal Welfare Reform.<sup>19</sup> The genesis of contemporary workfare in New York was WEP, which predated the August 1996 passage of Welfare Reform by nearly two years.

### A. Wages and Cash Benefits

WEP mandated twenty-six hours of employment for the city by all welfare recipients physically able to work.<sup>20</sup> Common examples of this public employment are entry-level office assistance in public agencies and the maintenance of public property.<sup>21</sup> One major WEP initiative, New York City's Park Career Training Program (PACT), consists largely of janitorial and sanitation

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<sup>15</sup> *Id.* at 140-41 (emphasis added).

<sup>16</sup> See PATTERSON, *supra* note 7, at 225.

<sup>17</sup> *Id.*

<sup>18</sup> See *id.* at 240.

<sup>19</sup> See *id.*

<sup>20</sup> See N.Y. COMP. CODES R. & REGS. Tit. 18 § 385.13 (1995).

<sup>21</sup> See Gregory, *supra* note 3, at 14.

activities wherein participants maintain public park facilities.<sup>22</sup> In 1996, thirty-five hours of PACT work per week obtained for the worker a monthly cash benefit of \$352 and \$112 in food stamps and medical benefits.<sup>23</sup> These workers have helped the city clean up its parks in dramatic fashion, with some ninety percent determined by the city to be clean in 1996 where that figure was seventy-six percent in 1995.<sup>24</sup>

In contrast to the WIN programs mentioned above, single mothers receiving AFDC<sup>25</sup> were compulsorily involved in WEP beginning in April 1996.<sup>26</sup> An AFDC recipient working in mandated employment of at least twenty hours per week earned between \$.80 to \$1.50 per hour in cash and food stamps in addition to the AFDC cash benefit amount,<sup>27</sup> with some employment bringing no additional benefit.<sup>28</sup>

In 1997, a trial court held that a Department of Social Services<sup>29</sup> (DSS) policy of determining the required number of workfare hours for individual participants, without determining the appropriate wage rate, violated the New York State Constitution.<sup>30</sup> Alternatively, workers were entitled to be paid the prevailing wage of non-workfare employees at the same work site, for the number of hours worked, in a combined grant of cash and food stamps.<sup>31</sup> The Supreme Court Appellate Division later held that a statutory

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<sup>22</sup> *See id.*

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* at 14-15.

<sup>25</sup> The program became known as Temporary Assistance for Needy Families (TANF) after Welfare Reform.

<sup>26</sup> *See Gregory, supra* note 3, at 15.

<sup>27</sup> *See id.*

<sup>28</sup> *See Davila v. Hammons*, Index No. 407163/96 (N.Y. Sup. Ct., filed Sept. 21, 1998).

<sup>29</sup> New York City's welfare administration agency.

<sup>30</sup> *Brukhman v. Guiliani*, 662 N.Y.S.2d 914 (1997). The New York Constitution requires that state contractors and subcontractors performing work for the state receive payment equal to the prevailing wage for the type of work performed. N.Y. CONST. art. I, § 17.

<sup>31</sup> *Brukhman*, 662 N.Y.S. 2d at 914. *See also Enzian v. Wing*, 248 App. Div. 965, 670 N.Y.S.2d 283 (N.Y. App. Div. 4<sup>th</sup> Dept. 1998).



enactment of the federal minimum wage as the workfare wage,<sup>32</sup> regardless of the type of work performed, rendered the trial court decision moot.<sup>33</sup>

## B. Work Hours Requirements

Consistent with the provisions of Welfare Reform, the amount of workfare participation by Temporary Assistance to Needy Families (TANF)—the fixed term successor to AFDC under Welfare Reform—recipients is to reach thirty hours weekly by January 2000.<sup>34</sup> Welfare Reform has increased the magnitude of participation in workfare programs for both TANF mothers and adult recipients of cash assistance. Currently, 25% of all welfare recipients must participate, with that proportion increasing to 50% in 2002 for both groups.<sup>35</sup>

An important consequence of WEP has been the attrition rate of student welfare recipients from higher education. For example, by June 1996, the enrollment of welfare recipients in the City University of New York system had declined by 18.5%.<sup>36</sup> Mayor Rudolph Giuliani claimed that work should trump education in the schedules of welfare recipients in that it restores a sense of dignity lost through dependence on entitlement programs.<sup>37</sup> However, courts have chipped away the Mayor's stringent position. In 1996, a trial judge enjoined DSS from placing welfare recipients into workfare programs without first evaluating whether their job prospects would be better enhanced through education.<sup>38</sup> Moreover, work requirements were

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<sup>32</sup> See N.Y. SOC. SERV. LAW § 336-c(2)(b) (McKinney 1998).

<sup>33</sup> See *Bruckman v. Guiliani*, 678 N.Y.S.2d 45, 47 (N.Y. App. Div. 1<sup>st</sup> Dept. 1998).

<sup>34</sup> 42 U.S.C.A. § 607.

<sup>35</sup> See *id.*

<sup>36</sup> See Karen Arneson, *Workfare Rules Cause Enrollment to Fall, CUNY Says*, N.Y. TIMES, June 1, 1996, at A1.

<sup>37</sup> See David Firestone, *Praising the Wonders of Workfare, Guiliani Finds a Campaign Theme*, N.Y. TIMES, Mar. 20, 1997, at B3.

<sup>38</sup> Gregory, *supra* note 3, at 17. An additional preliminary injunction was recently issued requiring that for each college student participating in WEP, the city conduct a full assessment of the recipient's "educational background, work history, and

declared unlawful where they place undue time burdens on those workfare participants enrolled in educational programs.<sup>39</sup>

The burdens of WEP placements have created hardships for secondary students as well. In May 1998, attorneys for a class of New York City high school students participating in WEP won an important judgment regarding the scheduling of workfare activities.<sup>40</sup> A trial court issued a preliminary injunction against DSS for assigning students to work activities that did not prevent them from missing classes, but rendered the completion of homework assignments and adequate sleep effectively impossible.<sup>41</sup>

### C. Work Conditions

Workfare Testimony in the case of *Capers v. Guiliani*, which challenges the health and safety of the workfare environment in New York City, illuminates the less than dignified conditions under which PACT participants work:

On June 18th . . . we came across two dead cats and two dead dogs . . . They had been dumped by the side of the road. Because I had no gloves, I had to pick them up with my bare hands. The animals had been run over by automobiles and were oozing blood and entrails. When I picked up the animals to throw them

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supportive services needs and develop for each recipient an employment plan based on the assessment and, to the extent possible, the preferences of the recipient.” Welfare Law Center, *Further Relief in NYC Assessment and Training Workfare Case* (visited November 25, 1998) <[http://www.welfarelaw.org/webbul/998-WEB.htm#Further Relief in NYC Assessment and Training](http://www.welfarelaw.org/webbul/998-WEB.htm#Further%20Relief%20in%20NYC%20Assessment%20and%20Training)>. *citing* Davila v. Hammons, No. 407163/96 (Sup.Ct. N.Y.Co., filed September 21, 1998).

<sup>39</sup> Hesthag v. Hammons, 660 N.Y.S.2d 602, 603 (1996).

<sup>40</sup> Matthews v. Barrios-Paoli, 676 N.Y.S.2d 757 (1998). Workfare requirements for students ages eighteen and nineteen are to consist of educational activities and such work that is consistent with the participant’s “employability plan.” N.Y. SOC. SERV. LAW § 336-a(4)(b) (McKinney 1998). An employability plan is a means for welfare caseworkers to assess the abilities and aspirations of program participants. *See supra* text accompanying note 38.

<sup>41</sup> Matthews, 676 N.Y.S.2d at 758-63.

into the garbage truck, the guts splattered on my shoes and pants. My co-worker vomited and the supervisor in the van said nothing. (Anastacio Serrano)

[We] have no access to a toilet either in the parking lot or out on the highway. If we need to urinate or move our bowels, we have to squat behind a tree or bush or ask one of our co-workers to hold up a plastic bag to shield us from the passing cars. (Tamika Capers)<sup>42</sup>

A preliminary injunction was entered against the city requiring adequate training, equipment, and safety measures as well as sanitary facilities and drinking water for WEP participants.<sup>43</sup> This order was vacated as moot by the Supreme Court Appellate Division<sup>44</sup> in light of the state legislature's subsequent classification of WEP participants as public employees<sup>45</sup> for purposes of the Public Employee Health and Safety Act.<sup>46</sup> This re-classification provides WEP participants access to all complaint and inspection procedures applicable to New York State employees. The court required that the claimants exercise the grievance procedure provided by the Act before any claim would be heard at law.<sup>47</sup>

#### D. Preparedness for Unsubsidized Work

The central policy principle of WIN, WEP, and all work requirement laws is that workfare participants "will be furnished work activities and employment opportunities, and necessary services in order to secure unsubsidized employment that will assist

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<sup>42</sup> Welfare Law Center, *Oozing blood and entrails, vomit and no bathrooms: Workfare working conditions in New York City* (visited November 21, 1998) <[http://www.welfarelaw.org/workfare\\_abuse.html](http://www.welfarelaw.org/workfare_abuse.html)>.

<sup>43</sup> *Capers v. Guiliani*, 677 N.Y.S.2d 353, 354 (N.Y. App. Div.1st Dept. 1998).

<sup>44</sup> *See id.* at 356.

<sup>45</sup> *See* N.Y. SOC. SERV. LAW § 330(5) (McKinney 1998).

<sup>46</sup> *See* N.Y. LAB. LAW § 27-a (McKinney 1998).

<sup>47</sup> *See* *Guiliani*, 677 N.Y.S.2d at 355.

participants to achieve economic independence."<sup>48</sup> It is the cornerstone of personal responsibility. This is unlikely to unfold into reality given the characteristics of program participants. Evidence shows that:

Most welfare recipients are capable of performing low-skill, entry-level jobs. Even in cities where unemployment rates are low, the jobless rate for those seeking entry-level jobs may be twice that of other workers. For example, one study found that anywhere from four to nine workers are in search of entry-level jobs for every entry-level job opening. There is also a geographic gulf between urban centers, where welfare recipients are concentrated, and suburban areas, where higher-wage jobs are often located. Companies, therefore, need local county welfare agencies to help find job applicants, aid new workers with child care, provide employment counseling, and help transport employees to their jobs. It is estimated that only thirty percent of welfare recipients can make the transition to private sector positions with minimal support, while another forty percent could only be hired after extensive pre-employment counseling and training. Over thirty percent of welfare recipients, however, will never be able to work because of criminal records, drug addiction, or psychological problems.<sup>49</sup>

Given the skill level of the workfare population and the characteristics of the entry-level labor market, it appears that

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<sup>48</sup> N.Y. SOC. SERV. LAW § 331 (McKinney 1998) (referring to the policy goal of WEP); *see also* 42 U.S.C.A. § 601 (West Supp. 1998) (citing policy goals of WIN).

<sup>49</sup> Gregory, *supra* note 3, at 18-19 (citations omitted); *see also* Paul R. Blackley, *Spatial Mismatch in Urban Labor Markets: Evidence from Large U.S. Metropolitan Areas*, 71 SOC. SCI. Q. 39 (1990); Gary T. Burtless, *Welfare Recipients' Job Skills and Employment Prospects*, 7 FUTURE OF CHILDREN 39 (1997).

workfare has little chance of providing work experience that will lead to unsubsidized employment. As will be shown in Part III, the probability that workfare will restore dignity to participants is effectively nugatory. In the following section, I turn to the philosophical dialogue on social and economic rights to establish a framework for an analysis of WEP.

## II. CONTEMPORARY THOUGHT ON SOCIAL AND ECONOMIC HUMAN RIGHTS

The technical conception of rights is important as an initial matter. Wesley Hohfeld identified two types of relationships between the object of a right, *x*, and the respondent of a right, *y*, that are relevant to the principal discussion.<sup>50</sup>

*x* has a *liberty* to do *A*—when *x* has no duty towards *y* to do *A*, and *y* has a ‘no-right’ not to interfere with *x* in *x*’s doing *A*.

*claim-right*: *x* claims *A* from *y*—and *y* has a duty towards *x* to do *A*. The claim-right allows for positive correlative duties.<sup>51</sup>

Negative rights “set absolute ‘side constraints’ on actions in that their correlative duties require refraining from actions that interfere with persons’ freedom.”<sup>52</sup> Positive rights require, as correlative duties, active assistance on the part of respondents, including the state.<sup>53</sup>

The libertarianism that will be discussed conceives only of negative liberty rights. Alternatively, Alan Gewirth’s foundationalist human rights approach requires the enforcement of both positive and

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<sup>50</sup> WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1964).

<sup>51</sup> *ENCYCLOPEDIA OF ETHICS* 1106-07 (Lawrence Becker ed., 1992).

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

negative rights. Following a brief introduction to the historical debate regarding human rights, Gewirth's argument<sup>54</sup> is juxtaposed with the contractarian libertarianism of David Gauthier<sup>55</sup> and Jan Narveson.<sup>56</sup>

### A. Introduction to Current Debate on Social and Economic Human Rights

There is a long history of discourse on the question of social and economic rights which cannot possibly be adequately considered here. By way of brief introduction, the dichotomy of social and economic rights (e.g., social insurance) as separate from political and civil rights (e.g., rights to the franchise or a fair trial) emerged in the late-nineteenth century, the zenith of economic liberalism. Natural, or human rights language was a part of the revolutionary struggles of England in 1688 and France in 1789.<sup>57</sup> By the late-1800s, there was a different flavor to the rights debate:

In a world of feudal and mercantilist economic constraints and political dominance of a traditional aristocracy of birth, universal natural rights were a powerful weapon of the rising bourgeoisie. Initially, arguments based on natural liberty were used to free the process of capital accumulation from traditional restraints and to justify social and political mobility, but once bourgeois political power was established, arguments of natural liberty came to be used

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<sup>54</sup> See ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* (1996) [hereinafter "GEWIRTH I"]. The technical argument for the Principle of Generic Consistency first appeared in ALAN GEWIRTH, *REASON AND MORALITY* (1978) [hereinafter "GEWIRTH II"].

<sup>55</sup> See GAUTHIER, *supra* note 8.

<sup>56</sup> See JAN NARVESON, *THE LIBERTARIAN IDEA* (1988).

<sup>57</sup> Indeed, the debate following the French Revolution among such noted figures as EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1790); THOMAS PAINE, *RIGHTS OF MAN* (1791), JEREMY BENTHAM, *ANARCHICAL FALLACIES* (1791), and MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF MAN* (1790) was central to the development of modern rights thought.

principally to prevent the rise, and even the protection, of lower classes . . . [Since] large portions of the political center and right no longer denied the idea of human rights, . . . they attacked only one category or set of these rights—namely, social and economic rights.<sup>58</sup>

The twentieth century has seen its share of arguments against the existence of social and economic rights.<sup>59</sup> In one well-known position, made in response to the 1948 Universal Declaration of Human Rights, Maurice Cranston developed the following “tests for the authenticity of any human right:” (1) practicability—it must be feasible to give everyone the right; (2) universality—it must be a right for all with a correlative duty for all; (3) paramount importance—rights must not be confused with ideals, i.e., there is no right to pleasure, while there is a right to rescue.<sup>60</sup> However, Cranston’s tests fail to separate the question of the moral justification of social and economic rights from that of their practicability. Gewirth, for example, would assert that such rights are justified even where they are not presently practicable.<sup>61</sup>

A fundamental problem with the discussion of rights until the late twentieth century was that all rights doctrine was essentially intuitionistic, i.e., moral knowledge is apprehended directly through a non-rational process. John Rawls explained that “while the complexity of . . . moral facts requires a number of distinct principles, there is no single standard that accounts for them or assigns them their weights . . . we are simply to strike a balance by intuition, by

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<sup>58</sup> JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 30 (1989).

<sup>59</sup> See, e.g., Maurice Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 43-53 (D.D. Raphael ed., 1967); John O. Nelson, *Against Human Rights*, 65 *PHILOSOPHY* 341 (1990).

<sup>60</sup> See Cranston, *supra* note 59, at 48-50. It is interesting to note the existence of a positive duty on behalf of individuals even in this anti-human rights framework as a contrast to the legal debate over “good samaritan” provisions in tort.

<sup>61</sup> See GEWIRTH I, *supra* note 54, at 62-64. This follows from the Kantian notion that ‘ought implies can.’

what seems to us most nearly right.”<sup>62</sup> Theorists such as St. Thomas Aquinas and John Locke appealed to the first principles of natural law as a rationale for moral rules, but the lack of explanation of such principles runs afoul of the twentieth century tradition of analytic philosophy. Supplication to higher law became highly questionable, and the theoretical issue turned to whether moral values could be generated from non-moral interests.<sup>63</sup> The most important first step away from intuitionism was Rawls’ contractarian treatise, *A Theory of Justice*.

Rawls took the idea of the social contract in Locke, Rousseau, and Kant to a more abstract level—“the principles of justice for the basic structure of society are the object of the agreement.”<sup>64</sup> To elicit those principles, Rawls made a famous assumption about the “original position”—his analogue to the state of nature—in which the rules of society are chosen: choice is made behind a “veil of ignorance.”<sup>65</sup> No one knows his own position in society, his abilities, psychological predilections, or even conceptions of the good.<sup>66</sup> Since the rules that are chosen will regulate all further agreements to be made in society, the original position must be free from the exertion of bias from natural or social contingencies upon the outcome.<sup>67</sup> Rawls termed this manner of perceiving the principles of justice, “justice as fairness.”<sup>68</sup>

Choice of principles in the Rawlsian synthesis occurs in a purely hypothetical social milieu. Though assumed away by Rawls, each of us is born with a set of social and biological characteristics which are highly influential upon our future agency.<sup>69</sup> Rawls accepted this unrealistic scenario for the choice of principles because of its inherent fairness and the freedom of its actors.<sup>70</sup> In any future

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<sup>62</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 34 (1971).

<sup>63</sup> See NARVESON, *supra* note 56, at 148-49.

<sup>64</sup> RAWLS, *supra* note 62, at 11.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See id.*

<sup>68</sup> *See id.* at 11-12.

<sup>69</sup> *See id.* at 13.

<sup>70</sup> *See id.*



agreements, all parties would acknowledge that the rules of just action to which they adhere are those that would have been decided in a perfectly free and equal setting.<sup>71</sup> The fairness of the original position provides the basis for accepting the rules.<sup>72</sup> Therefore, in the original position, individuals desire a set of "primary goods," i.e., rights and liberties, powers and opportunities, income and wealth, and self-respect, which form the subject of bargaining.<sup>73</sup> The principles of justice would provide an allocation of these primary goods in the hypothetical primordial scenario, and would describe basic human rights afterward.<sup>74</sup> An examination of the resultant principles is omitted here as my concern is with the conclusions of later efforts.<sup>75</sup>

Analytic philosophy did not calmly accept the veil of ignorance. Alternative efforts both within and without the contractarian tradition blossomed in the wake of Rawls' seminal work.<sup>76</sup> The deontological<sup>77</sup> theories that are the basis of my principal

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<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* at 62. An important Rawlsian line of scholarship, that of basic rights, is derived from this theory of primary goods. For example, Henry Shue has argued that "[b]asic rights . . . are everyone's minimum reasonable demands on the rest of humanity. They are the rational basis for justified demands the denial of which no self-respecting person can reasonably be expected to accept . . . rights are basic . . . only if enjoyment of them is essential to the enjoyment of all other rights." HENRY SHUE, BASIC RIGHTS 19 (1996). This argument for human rights to a minimal allotment of primary goods is to be methodologically (though not necessarily substantively) distinguished from that of Gewirth, which is not derived through Rawls' contractarian method.

<sup>74</sup> See RAWLS, *supra* note 62, at 62.

<sup>75</sup> See RAWLS, *supra* note 62 at ch. II.

<sup>76</sup> Rawls himself retooled his theory. RAWLS, *supra* note 9. Other important treatments not discussed here include JÜRGEN HABERMAS, LEGITIMATION CRISIS (1975) (justice can be defined in an ideal speech situation); RICHARD BRANDT, A THEORY OF THE GOOD AND THE RIGHT (1979) (cognitive psychotherapy allows rational critiques of desires which helps to unpack the nature of justice).

<sup>77</sup> These theories take rights and duties as the basis of morality. Conversely, teleological arguments judge acts solely on the basis of their consequences, i.e., no claim to the goodness of an act can be made without knowledge of the fundamental aim of the act. For modern examples of teleological arguments, see ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981); see generally

analysis are the foundationalist argument of Gewirth, and the contractarian libertarianism<sup>78</sup> of Gauthier and Narveson. Both are

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MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1984).

<sup>78</sup> Perhaps the most influential libertarian argument is that of ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). His "entitlement theory of justice," centering on property rights, stands in opposition to Rawls' characterization of individuals' initial endowments of social and physical attributes as morally arbitrary. Nozick's entitlements to justly acquired property are enforced by a "minimal state," which exists simply to enforce such rights and administer justice via policing and judicial dispute resolution. The minimal state cannot engage in wealth redistribution, e.g., transfer payments, or in the enforcement of anything less than natural property rights. Rawls elucidates the point:

There is in general no uniform public law that applies equally to all persons, but rather a network of private agreements; this network represents the procedures the dominant protection agency (the state) has agreed to use with its clients, as it were, and these procedures may differ from client to client depending on the bargain each was in a position to make with the dominant agency. No one can be compelled to enter into such an agreement and everyone always has the option of becoming an independent: we have the choice of being one of the state's clients, just as we do in the case of other associations. While the [Nozickian] libertarian view makes important use of the notion of agreement, it is not a *social* contract theory at all; for social contract theory envisages the original compact as establishing a system of common public law which defines and regulates political authority and applies to everyone as a citizen. Both political authority and citizenship are to be understood through the conception of the social contract itself.

Rawls, *supra* note 9, at 265. Though similar policy conclusions in the Gauthier-Narveson framework will be considered, I will not discuss Nozick's logic as it falls without the contractarian tradition.

anti-intuitionist, though Gauthier works within the contractarian tradition, while Gewirth developed his theory as an alternative to contractarianism.

### B. The Principle of Generic Consistency and the Community of Rights

Gewirth avoids all hypotheticals regarding the original position by focusing fundamentally on the action of rational agents—persons accepting deductive and inductive logic, including empirical conclusions. His approach is foundationalist<sup>79</sup> in that it begins with a generic practical truth for all individuals—‘I do x in pursuit of end E’—and reasons toward general moral principles.<sup>80</sup> Action is common to all classes of moral judgment made by rational actors, and furthermore, there are certain stable, “generic” components of all human action.<sup>81</sup> For Gewirth, action is both (1) the product of unforced choice, i.e., it is voluntary and free, and (2) performed for some subjectively “good” reason, i.e., it is worth pursuing in the mind of the individual doing the act.<sup>82</sup> Consequently, each individual must regard as inherently good the voluntariness and freedom required for her action.<sup>83</sup> Similarly, the increase in purpose-fulfillment resulting from the achievement of any goal is a generic feature of action that all must perceive as good.<sup>84</sup> Generic purpose-fulfillment encompasses three notions of well-being: (1) basic—the necessary preconditions of action, (2) non-subtractive—the ability to retain what one has and finds subjectively good, and (3) additive—the ability to increase purpose-fulfillment and capacity for action.<sup>85</sup>

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<sup>79</sup> Foundationalism in philosophy denotes an appeal to a fundamental grounding for theory, as Gewirth provides by starting with a base claim that all individuals must accept. This is to be contrasted with the nonfoundationalism of some analytic philosophy, such as the later work of Ludwig Wittgenstein, and post-modernism.

<sup>80</sup> See Jan Narveson, *Alan Gewirth's foundationalism and the Well-Being State*, 31 J. VALUE INQUIRY 485, 485 (1997).

<sup>81</sup> See GEWIRTH II, *supra* note 54, at 89-90.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 51-53.

<sup>85</sup> See *id.*

Every agent must agree that these things are good because all agents participate in purposive action—acts toward the fulfillment of subjectively good purposes.<sup>86</sup> To deny human rights to freedom and any of the three types of well-being is to contradict one's compulsory belief that these things are necessary for action.<sup>87</sup> Thus, rights to freedom and well-being are, for Gewirth, generic rights. Rights to all other subjects are stipulations upon freedom and well-being.

Moral action involves the calculus of the interests of at least one person other than the individual making the calculation. Gewirth's argument has henceforth rested upon the prudential calculations of the interests of a single individual. Human rights as a moral concept must satisfy the conditions:

*universality*—what is right for an individual must be right for all similarly situated persons,

*equality*—human rights for all persons must be fulfilled, and

*dignity*—a person is a prospective purposive agent who attaches worth (purposiveness) to her actions.<sup>88</sup>

Having met the conditions of equality and dignity in the proof discussed above, Gewirth combines universality with the requirement of correlative duties present in the notion of claim-rights to elicit his supreme moral principle, the "principle of generic consistency" (PGC): "I ought at least to refrain from intervening with the freedom and well-being of any prospective purposive agent," or put differently, "[a]ct in accord with the generic rights of your recipients as well as yourself."<sup>89</sup>

Some generic claim-rights entail positive correlative duties. The enforcement of those duties must, in many cases, fall upon the state as respondent of the rights.<sup>90</sup> The argument for state

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<sup>86</sup> *See id.*

<sup>87</sup> *See* GEWIRTH I, *supra* note 54, at 14.

<sup>88</sup> *See* GEWIRTH II, *supra* note 54, at 135.

<sup>89</sup> *Id.*

<sup>90</sup> *See* GEWIRTH I, *supra* note 54, at 60-62.

involvement proceeds in the following way. Since these rights are morally necessary, their correlative duties must also be necessary.<sup>91</sup> Where individuals cannot perform the duties, the state must do so.<sup>92</sup> This is exemplified in state agencies from police departments to child welfare bureaus which assist individuals in achieving rights that they cannot independently realize. The reasons for the inability of individuals to realize rights range from collective action problems to spatial mismatch to cognitive deficiencies. In this sense, the state can be called the “community of rights”—“a society whose government actively seeks to help fulfill the needs of its members, especially those who are most vulnerable, for the freedom and well-being that are the necessary goods of human agency, when persons cannot attain this fulfillment by their own efforts.”<sup>93</sup>

### C. Morals by Agreement and Contractarian Libertarianism

In contrast, Gauthier retains Rawls’ contractarian methodology, but incorporates the framework of rational choice theory to circumvent the problems surrounding the original position. There are no assumptions made with regard to the distribution of resources among actors; bargains rest “upon no false ideological appeals to the natural masterliness of masters or the natural slavishness of slaves.”<sup>94</sup> For Gauthier, a single principle describes rational behavior in any cooperative interaction; the principle of “minimax relative concession” holds that “in any co-operative interaction, the rational joint strategy[—the strategy for all agents in common—]is determined by a bargain among the co-operators in which each advances his maximal claim and then offers a concession

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<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *Id.* at 5.

<sup>94</sup> GAUTHIER, *supra* note 8, at 190. Gewirth points out that though realism about the societal distribution of power is crucial, there is no reason for a rational master to bargain with his slaves in the first place. Without entering into cooperative behavior, Gauthier’s masters need not accept the moral constraint of minimax relative concession. GEWIRTH I, *supra* note 54, at 11-12, n.9.

no greater in relative magnitude than the minimax concession.”<sup>95</sup> This means that bargaining proceeds with each party offering the outcome that would give him the greatest utility and then conceding to an outcome that deprives him of the least utility possible relative to the interests of the remaining parties. This is Gauthier’s supreme moral principle by virtue of its impartiality; it avoids the placement of the interests of one person in a higher relative position than those of any other.<sup>96</sup> With this principle as a constraint on all human cooperation, people develop a “disposition to cooperate.”<sup>97</sup> Consequently, constrained maximizers of utility will rationally make deals with other constrained maximizers which they would not form with persons not operating under the constraint of minimax relative concession.<sup>98</sup> In the latter case, constrained maximizers would be hurt in bargains with non-constrained persons, and would choose no bargain over a harmful one.<sup>99</sup> If one wants to enter a bargain, one must develop the disposition to cooperate of the constrained maximizer.<sup>100</sup>

Unlike Rawls, Gauthier does not propose to determine rights (or justice) as the outcome of an agreement among constrained maximizers. Instead, “[r]ights provide the starting point for, and not the outcome of, agreement.”<sup>101</sup> For Gauthier, “[t]he moral claims that each of us make on others, and that are expressed in our rights, depend neither on our affections for each other, nor on our rational or purposive capacities, as if these commanded inherent respect, but on our actual or potential partnership in activities that bring mutual benefit.”<sup>102</sup> Gewirthian generic rights were derived from our status as prospective purposive agents,<sup>103</sup> while Gauthier maintains that we are fundamentally prospective cooperators. Our rights come from the

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<sup>95</sup> GAUTHIER, *supra* note 8, at 145.

<sup>96</sup> *See id.* at 125-6.

<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *Id.* at 222.

<sup>102</sup> *Id.*

<sup>103</sup> *See supra* text accompanying notes 80-93.

so-called Lockean Proviso—a person has property in whatever she uses her labor to remove from nature, “at least where there is enough and as good left in common for others.”<sup>104</sup> In other words, the proviso commands us not to take advantage of others and suggests that there are rights to person—one owns oneself and, consequently one’s labor—and property justly acquired through the mixing of one’s labor with that property or its voluntary transfer by its just owner. Only negative individual rights to security of person and property need be guaranteed by the minimal state,<sup>105</sup> not the positive rights to well-being embraced by Gewirth. Distributions of well-being are to be the subject of human cooperation.

The Gauthierian libertarian would not disagree that there are necessary goods, nor, even, that such necessary goals include the concepts of freedom and well-being identified by Gewirth. The Gauthierian libertarian, however, would quibble with the notion that a showing of necessity is sufficient to justify the conversion of said necessary goals into the subjects of claim-rights, thereby excluding them from cooperative arrangements. Given Gauthierian bargaining over these necessary goods, “we need a demonstration that rights are worth their price, that their costs to the rational individual are outweighed by their benefits in the way of rights.”<sup>106</sup> This cost-benefit analysis must be performed by everyone, in the libertarian view, such that no one ends up worse off in any effort to improve the lot of others.<sup>107</sup> In the language of economics, Gauthier’s constrained maximization ensures that all social bargains, including those over the provision of necessary goods, are Pareto efficient.<sup>108</sup> Once again, the minimal state is not in the welfare business, but exists primarily

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<sup>104</sup> JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 17 (Thomas Peardon ed., Liberal Arts Press 1952) (1690).

<sup>105</sup> See *supra* note 78.

<sup>106</sup> Narveson, *supra* note 80, at 490.

<sup>107</sup> See *id.*

<sup>108</sup> See CHRISTOPHER PASS, BRYAN LOWES, LESLIE DAVIS, & SIDNEY KRONISH, THE HARPERCOLLINS DICTIONARY OF ECONOMICS 385-87 (1991).

to uphold cooperative agreements.<sup>109</sup> Thus, in Narveson's words:

We will not, then, forsake violin lessons for our gifted children in order to . . . supply jobs to inner-city residents. All those folks will just have to do the best that they can, which is what negative rights leave them free to do anyway. Such rights would also leave any who may want to help them free to do that, too.<sup>110</sup>

Positive rights to well-being are required by Gewirth, lest prospective purposive agents contradict themselves.<sup>111</sup> Narveson urges that contradiction is not enforcement enough, but that cost-benefit analysis and bargaining is required.<sup>112</sup>

In sum, the Rawlsian revolution in social contractarian thought produced various responses from both advocates of positive rights and libertarians. Having explained the social ethical frameworks of Gewirth and Gauthier, I turn, in the following Part, to an application of their principles to the case of workfare in New York.

### III. WORKFARE CONSIDERED

Beginning with the libertarian position, Gauthier and Narveson would only require that individuals' security of person and justly held property not be violated by the state through workfare. Indeed, the state should not provide workfare as an attempt to develop the productive agency of welfare dependents, as it is a positive obligation. However, once the program begins, the state may

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<sup>109</sup> The function of the state includes such things as police protection, because bargaining over, say, goods cannot occur if those goods may be taken by a nonparty to the bargain.

<sup>110</sup> NARVESON, *supra* note 80, at 493.

<sup>111</sup> The PGC is derived from a foundational truth which no individual can deny. GEWIRTH II, *supra* note 54, at 135.

<sup>112</sup> See NARVESON, *supra* note 80, at 492-93.



not violate the liberties in the Lockean Proviso in its administration. A morally unjustified program cannot provide the state an excuse to deprive persons of fundamental liberty of person and property.

A serious question arises when one considers the bargaining rights of welfare dependents to negotiate a job preparedness program—the libertarian’s “insurance”— with employers. It is quite simple for libertarians to argue against the creation of workfare programs through the logic that “one who was contracting for general social arrangements could not be understood to consent to arrangements requiring us to pay costs for *unnecessary* benefits.”<sup>113</sup> That argument suggests, first, that the parties most interested (welfare dependents) in the subject of the compulsory program (work skills) would contract for the private provision of insurance, a form of contractual agreement, against deficient work skills according to the principle of minimax relative concession. This insurance may take the form of internship programs, skills workshops, and the like, provided by employers in the private sector as well as the public sector, to the extent that the latter relies on labor supply to fill its positions. The incentive for employers to provide such insurance is entirely driven by their demand for labor. Job types most needed by employers will be over represented in training at any given time. This form of insurance is the only possible solution consistent with contractarian libertarianism.

Presumably, this insurance would provide for sufficient training such that the covered welfare dependents could use temporary assistance, i.e., TANF, to give themselves the ability to end their dependent status.<sup>114</sup> However, Gewirth’s criticism of Gauthier sounds quite noticeable alarm: Why would employers enter into an agreement with these poor employees at all?<sup>115</sup> Welfare dependents have been empirically demonstrated to be crushingly

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<sup>113</sup> NARVESON, *supra* note 56, at 247 (emphasis original).

<sup>114</sup> Note that TANF is not consistent with the libertarian project, as it represents a positive duty imposed on the state. I mention it here as a legal reality that any insurance bargain in the contemporary American setting would be required to acknowledge.

<sup>115</sup> See GEWIRTH I, *supra* note 54.

deficient in work skills, spatially mismatched from job locations, etc.<sup>116</sup> Because of their unequal bargaining power, minimax relative concession would force the welfare dependents to concede much more than the employers, assuming that they surmount the gigantic practical obstacle of organization to even advance their maximal claim.<sup>117</sup> Second, as a practical alternative to such bargaining, libertarianism would propose charity, as people are free to choose to contribute to a program which prepares individuals for work. Given that society is in substantial agreement about what is “for people’s good” (in this case, personal responsibility through unsubsidized employment) charitable support of others is a nonenforceable moral duty that we urge through “the duty to approve of those who do contribute to the causes in question, even if one doesn’t do so oneself.”<sup>118</sup> However, the temporary nature of public assistance under Welfare Reform mandates that dependent persons must prepare for work in the near future. Charity, even with Narveson’s weak negative enforcement mechanism, is not correspondingly necessary and consequently inadequate.

In sum, libertarians cannot argue for a palatable workfare strategy after the program has been created. Since charity is insufficient to restore persons to the position in which they might bargain for insurance,<sup>119</sup> work opportunity, and so forth, the only

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<sup>116</sup> See *supra* text accompanying note 49.

<sup>117</sup> The incentives on the part of employers would determine the result. For example, in a tight labor market, employers might hire these workers at low wages and make their operations more labor intensive because it is cost effective to do so. Their only alternative would be to increase wages to attract those holding jobs elsewhere. However, legal realities, such as the minimum wage, block this type of bargain, and make the deal impossible. When the realities of the welfare state are not assumed away, contractarian libertarianism and its deification of the private bargain cannot provide useful solutions to the dilemmas of public assistance. See *supra* note 114 for another example of the inadequacy of bargaining given the constraints of the welfare state.

<sup>118</sup> NARVESON, *supra* note 56, at 264.

<sup>119</sup> Private expenditures are vital to the mixed (public and private) system of social welfare in the U.S., but such efforts generally assist the working class and not the poor. In 1977, for example, the federal government spent \$52 billion on programs for the poor while private philanthropy added only \$3.7 billion. PATTERSON,

tenable claim is against the *de novo* creation of the workfare program, or any other social welfare program.<sup>120</sup> The only argument concerns the negotiation of a type of insurance, which forms the basis for employment in the most demanded job classifications. However, the likelihood of the bargain ever occurring is diminutive because of the power imbalance between employers and the poor.

A recent line of thought known as postlibertarianism<sup>121</sup> is directed toward the preoccupation of libertarian thought to justify minimal government intrusion into capitalist markets:

Postlibertarianism means abandoning *defenses* of the intrinsic justice of laissez-faire capitalism, the better to investigate whether the systemic *consequences* of interfering with capitalism are severe enough to justify laissez-faire. Any sound case for laissez-faire is likely to build on postlibertarian research, for the conviction that laissez-faire is intrinsically just rests upon unsound philosophical assumptions.<sup>122</sup>

In other words, postlibertarianism urges that the project shift from an insistence that Lockean liberties be enforced by the minimal state to an empirical analysis of the consequences of meddling with that framework through the creation of the programs of the welfare state.

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*supra* note 7, at 200.

<sup>120</sup> It may be argued that a harsh workfare program, among other efforts, has the effect of discouraging welfare application as part of a larger effort to dismantle the welfare state. However, the very existence of the program, a positive measure of state assistance, violates the principles of libertarianism and the minimal state. The state is to stay out of the social welfare business. Social and economic support is to be provided, if at all, through private agreements. *See supra* note 78.

<sup>121</sup> This is a product of the later writings of Austrian economists; *see generally*, ISRAEL KIRZNER, *DISCOVERY AND THE CAPITALIST PROCESS* (1985) (particularly the essay entitled "The Perils of Regulation: A Market-Process Approach"); FRIEDRICH HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (1988).

<sup>122</sup> Jeffrey Friedman, *After Libertarianism: Rejoinder to Narveson, McCloskey, Flew, and Machan*, 6 *CRITICAL REV.* 113, 113 (1992) (emphasis in original).

The assertion is that it is now time to test libertarianism against real data.

Postlibertarianism cannot solve the problem addressed in this article. Even in the event that postlibertarian empirical research were to demonstrate that interference in the labor market through programs such as workfare is unwise, libertarians would be in no better position to assess the state of an existing workfare program than without that evidence. One such empirical conclusion might be that insurance-based workfare fills labor demand as previously noted. First, such a conclusion would have to assume that bargaining is possible. To require employers to bargain would be an interference with their liberty which cannot be tolerated in the libertarian synthesis. Second, internal critiques of any extant employment programs could only take the form of an insistence that the government get out of the business of employment assistance as soon as possible to make room for private bargains, which is no improvement over theoretical assertions unless the tenet of unforced bargaining is dispelled. A naïve version of this consequentialist approach is employed by Narveson in his suggestion that Gewirth's programs could not endure a cost-benefit analysis.<sup>123</sup> If a program fails the cost-benefit analysis, libertarianism only allows for its destruction. Empirical proof or not, there can be no adjustment, only abandonment, because no private bargain would be reached for any positive assistance package between that characterizing the program being assessed and no program at all.<sup>124</sup> There is no incentive for individuals to enter an agreement that harms them; given a set of programs that fail a cost-benefit analysis or no program, the only Pareto-optimal outcome is to choose no program. Once the program is eradicated, libertarianism would not allow for the creation of another government program to take its place. At its essence, the problem is simply that the existence of the welfare state is anathema to libertarian philosophy, and as such, cannot be comprehended in terms of its principles.

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<sup>123</sup> See *supra* notes 110-112 and accompanying text.

<sup>124</sup> This is not to say that no social welfare program would pass the cost-benefit analysis. The purpose of postlibertarianism is to objectively do the analysis and urge that those programs which fail be terminated.

Gewirth, in contrast, has briefly spoken directly to the problems of workfare in relation to his moral philosophy. First, the policy rationale for WEP<sup>125</sup> is similar to his assertion that although “[t]he principle of human rights requires that welfare dependents be supported, . . . it requires also that strenuous efforts be made to remove the morally unjustified conditions that generate the need for [welfare] dependence.”<sup>126</sup> Workfare moves toward this goal by satisfying:

(1) the mutuality requirement of human rights—recipients contribute to society through their work or develop the skills in job training to so contribute—and

(2) by making welfare recipients autonomous.<sup>127</sup> However, Gewirth notes that many welfare recipients have lived their lives in debilitating poverty, and likely do not “have the emotional and intellectual abilities . . . needed to take advantage of the opportunities they may be offered.”<sup>128</sup> Thus, the equality condition is not met. Second, the prohibitive cost of child care may make workfare unduly burdensome for welfare mothers.<sup>129</sup> Third, “[w]hatever be the handicaps with which they enter the work situation, workfare to be justified requires, on the part of those who offer and control it, an attitude of support, cooperation, and respect, such as is required by the positive human rights in general.”<sup>130</sup> Finally, the nature of the mandated work must not be mere toil.<sup>131</sup> Gewirth’s “principle of human rights [the PGC] requires that welfare recipients . . . be given realistic hope that they can develop their abilities of productive agency so that they are not forced to work at the lowest levels of their competence, but instead are enabled to come as close as their latent

<sup>125</sup> N.Y. Soc. Serv. Law § 331 (McKinney 1998).

<sup>126</sup> GEWIRTH I, *supra* note 54, at 127.

<sup>127</sup> *See id.*

<sup>128</sup> *Id.* at 128-29.

<sup>129</sup> *See id.* For a detailed discussion of this problem, see Nancy Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare as We Know It or Governmental Child Abuse?*, 25 HASTINGS CONST. L.Q. 357 (1998). *See also infra* text accompanying notes 136-137.

<sup>130</sup> GEWIRTH I, *supra* note 54, at 130.

<sup>131</sup> *See id.*

abilities permit to the creative mode of work.”<sup>132</sup> The creative mode of work generally places emphasis on:

[I]ts valuable product, as in “work of art” or “master work,” rather than on the arduous process. But the process of work itself is also very different from the depressive mode [i.e., toil, drudgery, stressful, and deadening. Its process] is not only instrumental to the fulfillment of needs but is itself a need, for in its overcoming of obstacles it is “a liberating activity,” a “positive, creative activity,” so that it is intrinsically satisfying to the worker. Such work makes use of persons’ higher mental faculties; it is taken on freely and gladly and the worker has a justified sense of personal responsibility and achievement, for it is a form of “self-realization.”<sup>133</sup>

Placement of individuals in the PACT program exemplifies the problem of inattention to the creative mode of work, and the Gewirthian ethic in general. In analyzing the program, Gewirth might begin by noting that it fulfills the requirement of mutuality in

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<sup>132</sup> *Id.* at 131. This position is to be distinguished from the psychological literature on the effects of unemployment. For example, one study found that in general, the unemployed and those individuals dissatisfied with their employment displayed poorer psychological well-being than those satisfied with their jobs and students on a range of measures. Anthony Winefield et al., *The Psychological Impact Of Unemployment And Unsatisfactory Employment In Young Men And Women: Longitudinal And Cross-Sectional Data*, 82 BRIT. J. PSYCHOL. 473 (1991). The determination of the work as ‘mere toil’ is one to be made by all individuals in society, consistent with the Principle of Generic Consistency, not merely the individual doing the work. One may be more satisfied with drudgery than the absence of work, but the rest of society morally owes the promise of more fulfilling employment to that individual. Consequently, a social program such as WEP must avoid tasks that do not comport with an individual’s capacity for creative work. This must be decided *ad hoc*. For these reasons, the psychological literature in this area is not germane to the principal analysis.

<sup>133</sup> *Id.* (quoting Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in THE MARX-ENGELS READER 74 (Robert C. Tucker ed., 1978)).

that these services do provide a benefit to society in the form of cleaner parks. Nonetheless, the work provided by PACT is “mere toil,” and cannot be seen as the acquisition of a skill, or any other means of preparing PACT participants for productive agency. The narratives *Capers v. Guiliani* demonstrate that PACT participants are not treated with the respect that Gewirth mandates.<sup>134</sup> Instead, they work in unnecessarily squalid conditions, under supervision imbued with an air of punishment that contradicts the rehabilitative purpose underlying workfare.<sup>135</sup>

To the extent that these conditions place persons in danger of physical harm, even libertarians must balk, for the security of person that must be provided as one of the negative liberties is being violated by the state. While Gewirth notes a violation of a right derived from well-being, this argument asserts that the Lockean liberty of personal security is abridged. Consequently, the libertarian remedy need not require the state to make positive safety improvements to workfare jobs. Eliminating the entire workfare program would be preferred to costly measures toward the improvement of safety because the latter remedy is a positive step. The safety problem, then, provides more force to propel the libertarian polemic against the positive welfare state.

The low wages paid in conjunction with WEP place constraints on participants that should not exist when, as Gewirth requires, the state cooperates with these persons. In the case of mothers who must work, workfare devalues the contribution that they make in terms of household production, e.g., child rearing, housekeeping, by insisting that the only compensable work is performed in the labor market. Low wages make it virtually impossible to hire child care services that provide for adequate child

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<sup>134</sup> See *supra* text accompanying note 130. For purposes of this philosophical discussion, the evidentiary value of these statements is irrelevant. Because of the subjective elements of Gewirth’s synthesis mentioned above, it matters only that this is how WEP is perceived by its participants and that society owes them better conditions. See also *supra* text accompanying notes 87-89.

<sup>135</sup> See GEWIRTH I, *supra* note 54, at 130.

care while mothers are at their workfare assignments.<sup>136</sup> Even assuming that WEP prepares these mothers for unsubsidized employment, and further, that such employment will provide sufficient financial resources for the procurement of child care, these mothers, at the present moment, are placed in an untenable position. The difficulty of the above assumptions makes the situation all the more precarious. WEP does not cooperate with or support these mothers in their quest for productive agency. It treats them with a lack of dignity<sup>137</sup> in that it does not value their household production. For Gewirth, it is a clear violation of human rights.

The wage structure of WEP also creates inequities for those who have temporarily fallen upon hard times and must depend upon public benefits. In *Enzian v. Wing*,<sup>138</sup> the petitioner's workfare assignment was that of a "clerical aide entitled only to minimum wage" in which he was to perform data entry for the local court clerk's office.<sup>139</sup> However, his employer "discovered that he had knowledge of software and programming and directed him to design database systems and other software tools" while earning only minimum wage.<sup>140</sup> Though the court ruled that the petitioner be paid a wage comparable to those employees who do such computer programming, as noted in Part I, this decision was mooted when the legislature established the minimum wage as the workfare wage.<sup>141</sup> Clearly, the state ran roughshod over the petitioner's dignity and behaved opportunistically, violating equality and mutuality, when presented with one who could do sophisticated work at a fraction of the cost. Gewirth's insistence upon support and cooperation require that the state use the petitioner's skills to prepare him for a job that approaches the creative mode of work. For the petitioner, a

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<sup>136</sup> Some jurisdictions, i.e., Wisconsin, have taken the child care issue into consideration when drafting their welfare reform measures. New York has not. PATTERSON, *supra* note 7, at 221-23.

<sup>137</sup> See *supra* text accompanying notes 80 - 89.

<sup>138</sup> See *Enzian v. Wing*, 248 App. Div. 965.

<sup>139</sup> See *id.* at 284.

<sup>140</sup> See *id.*

<sup>141</sup> See N.Y. SOC. SERV. LAW §336-c(2)(b) (McKinney 1998).



reasonable ultimate placement would be an advanced position in the computer field. The *Enzian* Trial Court upheld Gewirthian dignity, while the Legislature stripped it away once again. Given the legislative edict, the Supreme Court Appellate Division in *Bruckman v. Guiliani* found itself without the power to make a moral choice.

Similar concerns are raised by the WEP assignments that made it effectively impossible for students receiving public assistance to procure a college education.<sup>142</sup> As an initial matter, Gewirth's framework allows any purpose that is perceived by an agent as good to be the basis for purposiveness. Therefore, workfare must not channel persons into jobs that currently have high employment rates without inquiring into the desire and ability of program participants to do such work in popular quick attachment to work initiatives.<sup>143</sup> Recall that this is precisely what the libertarian insurance scheme would do. The implication is that if a higher education is appropriate for the individual, e.g., she has the mental and emotional capability to complete the program, and she desires that training over other job options, then she should be allowed to give that education her best effort, unencumbered by weighty workfare hours requirements. The New York courts have responded to this concern, enjoining welfare officials to make such individual evaluations when determining WEP placements.<sup>144</sup> Mayor Guiliani's comments, noted in Part I, regarding the restoration of dignity through work, fail to capture the individualistic character of human dignity. At least for the present, the courts have defined dignity in a manner closer to that envisioned by Gewirth.

#### IV. CONCLUSION

This article has discussed two themes with regard to social thought. First, libertarianism, even in the contractarian version

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<sup>142</sup> See *supra* notes 36-40.

<sup>143</sup> One such job is the certified nurse assistant. See Frances Riemer, *Quick attachments to the workforce: An ethnographic analysis of a transition from welfare to low-wage jobs*, 21 SOC. WORK RES. 225 (1997).

<sup>144</sup> *Davila v. Hammons*, Index No. 407163/96 (N.Y. Sup. Ct. Sept. 21, 1998).

propounded by Gauthier and Narveson, is a theoretical framework for a highly idealized world. It can propose alternatives to the welfare state, but offers precious little guidance with regard to the moral optimization of programs which have been established. It can blame the creators of such programs for imposing positive duties upon the state, though it cannot, without contradicting its tenets, offer any suggestions to present welfare administrators for aligning their functions with the principles of libertarianism except that all social welfare programs be eradicated. This is not the fault of libertarians, but of their theory. Consequently, pure libertarianism is only applicable to those individuals who have lived in a free market society since the beginning of time, quite probably a nullity in present society. Contractarianism allows Gauthier and Narveson the opportunity to insist that persons can bargain their way out of unjust situations, but cannot bring them to terms with the severe bargaining inequity that history has engendered among the various groups in society. Given that, it is not my position to assail Gauthier's philosophical project, for it indeed adds to the void left by the insufficiency of the Rawlsian veil in its attempt to infuse contractarian bargaining with rational actors. I am essentially critical of Narveson's policy implications which I find entirely ineffective, and even preposterous, given the reality of the welfare state in which the people of the United States live.<sup>145</sup>

Second, I have provided evidence that Gewirth's synthesis does embrace the reality of the welfare state. Though all programs that he would justify would certainly be costly, and would undoubtedly face criticism in the contemporary American political landscape far overshadowing that of Narveson,<sup>146</sup> the critical point is that Gewirth can make observations that assist welfare administrators and lawmakers in improving the moral quality of social programs. Furthermore, Gewirth is keenly aware of the Kantian notion that 'ought implies can.' His social ethic may be politically infeasible in the current political climate, but it establishes a long-run aspirational

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<sup>145</sup> Narveson is Canadian, and I would maintain that his society embodies even more characteristics of the positive welfare state than my own.

<sup>146</sup> See generally NARVESON, *supra* note 80.

framework for social welfare policy. Narveson's cost-benefit critique entirely misconstrues this fundamental idea of social ethics. More fundamentally, it is not Narveson's misconception that is the only problem, but rather the urging of libertarianism to eradicate the welfare state that provides a irreconcilable social ethic.

It is important to recognize that Gewirth agrees with the purpose of workfare, though with little of its practice in New York. That workfare may ideally reduce welfare dependency and the size of the social safety net over time by attending to the dignity of individual recipients stands in striking contrast to the libertarian implication that welfare programs violate taxpayers' rights to property and should be terminated immediately. In the United States, and the majority of Western societies, the latter statement borders on absurdity.<sup>147</sup>

Workfare in New York, as has been shown, is an importunate issue that is far from moral soundness. Gewirth's framework uncovers numerous human rights violations. Even libertarians would sound alarm over the treatment of some participants in their work assignments. This analysis, I believe, identifies some clear directions in which workfare reform might proceed for the betterment of all involved. First, steps should be taken to eliminate the drudgery in and increase the safety of workfare assignments. The courts have a chance to make such a moral decision in *Capers v. Guiliani*, which is currently on appeal. Second, caseworkers must conduct individual assessments into the abilities and employment inclinations of workfare participants. In *Matthews v. Barrios-Paoli*, the court directed that "employability plans" for participants of ages eighteen and nineteen be conducted in a way that moves closer to this goal. In the court's words:

Instead of making use of this statutory mandate [that employability plans be created] in a way that will teach, mentor and assist these young people—a

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<sup>147</sup> Of course, libertarians would argue that my statement identifies a fundamental problem of these societies.

statutory mandate that includes requiring their participation in the development of an employment plan, requires the use of support services assistance with educational scholarships and loans—the defendants [DSS] failed to create any plan and claim the right not to develop a plan for a year by which time it might be moot, but has more to do with emptying trash cans than furthering the learning experience. This might be an apt use of the current technological expression ‘garbage in, garbage out.’<sup>148</sup>

Third, proper payment for work completed must be established, by means of the Constitutional requirement of prevailing wage payment, to comport with human dignity and mutuality. The legislature mandated minimum wage payment after the *Enzian* court made the correct moral determination. Minimum wage for all workfare participants intrudes upon dignitary rights. Fourth, mothers participating in workfare must be availed of free or affordable child care. This is not presently an issue before the New York courts or legislature.

Given the evidence presented here, the human rights record of the New York courts is quite good, while the legislature has performed inadequately. The constitutional framework of separation of powers precludes the courts from resolving all of the current human rights abrogations in the New York workfare program. The onus is on the legislature to take the appropriate measures. This is its moral imperative.

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<sup>148</sup> 676 N.Y.S.2d at 764.

