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Social Welfare--An Emerging Doctrine of Statutory Entitlement

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SOCIAL WELFARE — AN EMERGING DOCTRINE OF STATUTORY ENTITLEMENT

I. Introduction

A great number of recent cases[1] have dealt with the constitutionality of durational residence requirements conditioning eligibility for financial assistance under various categorical assistance programs, most principal of which is the Aid to Families With Dependent Children Program [hereinafter AFDC]. The issues presented by these cases were two: first, whether exclusion of a welfare applicant for failure to satisfy a durational residence requirement violates the applicant's right of interstate travel; and, second, whether such an exclusion was a denial of equal protection of the laws under the fourteenth amendment.[2]

These cases raised in a concrete legal context what one authority has called "the foremost political and legal problem of our time: how can the modern service state meet social security demands consistently with individual freedom and social justice?"[3] In the practical sense, this problem presents two fundamental questions concerning our public welfare system: first, what is the nature of the welfare recipient's interest in the assistance he receives and, second, what conditions may be imposed by the legislature upon the welfare recipient's eligibility for public assistance to further the public interest. It is the purpose of this Note to explore these questions in terms of the existing legal structures and the developing case law.

In the solution of these questions both political and legal issues must be dealt with, and thus their solution is made extremely complex. Before any real analysis of the problems presented by our public welfare system can be made, it is necessary to distinguish between the political and legal issues which are part of the overall problem. The political issues deal with the *wisdom* of the policies that have been adopted to challenge the problems of poverty and the policies that ought to be adopted to deal more adequately and justly with these problems. The legal issues, on the other hand, deal with the extent of the legislature's

1 *See, e.g.,* Robertson v. Ott, 284 F. Supp. 735 (D. Mass. 1968); Waggoner v. Rosenn, 286 F. Supp. 275 (M.D. Pa. 1968); Thompson v. Shapiro, 270 F. Supp. 331, (D. Conn. 1967), *prob. juris. noted,* 389 U.S. 1032 (Jan. 15, 1968); Green v. Department of Public Welfare, 270 F. Supp. 173 (D. Del. 1967); Harrell v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967), *prob. juris. noted, sub nom.* Washington v. Harrell, 390 U.S. 940 (Mar. 4, 1968); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Pa. 1967), *prob. juris. noted,* 390 U.S. 940 (Mar. 4, 1968); Ramos v. Health & Social Serv. Bd., 276 F. Supp. 474 (E.D. Wis. 1967). Additional pending cases are listed in Brief for Center on Social Welfare Policy and Law as Amicus Curiae at 47, Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967).

2 The argument that a durational residence requirement violates the right of interstate travel is based principally on *Edwards v. California,* 314 U.S. 160 (1941), which held unconstitutional a statute making it a crime to knowingly transport an indigent into the state. The equal protection argument is that a durational residence requirement is not reasonably related to the purposes of public assistance, relying on the application of the reasonable relationship test stated in *McLaughin v. Florida,* 379 U.S. 184, 191 (1964). For further explanation of these fundamental issues, see generally Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs,* 54 CALIF. L. REV. 567 (1966) and Comment, *The Constitutionality of Residence Requirements For State Welfare Recipients,* 63 NW. U. L. REV. 351 (1968).

3 Cowan, *The Impact of Social Security on the Philosophy of Law: The Protection of Interests Based on Group Membership,* 11 RUTGERS L. REV. 688 (1957).

power to provide financial assistance to the needy; and, more specifically, they develop the limitations the law imposes on this power to include certain classes of the needy in a given welfare program, while excluding others, and, in general, to regulate eligibility for assistance.

Unfortunately, no clear distinction has been made by counsel in many of the recent cases between arguments going to the inadequacies of the present welfare system and arguments going to the nature of the legal rights and duties of the individual and his government under the presently existing programs.[4] However, this distinction between *wisdom* and *power* has been recognized by some of the recent judicial opinions[5] and has a firm basis in past decisions dealing with similar social legislation.[6]

On the basis of this distinction between the political issues and the legal issues that must arise in any consideration of our public welfare system, the functions of the legislative branch of government and the legal system are clear. The legislature's function, after considering all the relevant information and possible approaches, is to formulate policy and establish legal structures to deal with the problems of poverty; the legal system's function is to determine, in the various litigated situations which arise, whether the legislature has overstepped its legal power to establish, regulate and condition financial assistance to the needy. The wisdom of a particular statutory provision or the policy judgment which it represents are not legal issues, and arguments dealing with these must be addressed to the legislature rather than to the courts.[7]

It must be noted, however, that this distinction between the political and the legal does not mean that the courts are divorced from determining questions of policy in the area of welfare legislation. It is important to remember that the legislative policy which underlies our public welfare laws is of the highest relevance to the courts as a guide to the interpretation and enforcement of the various statutes.[8] As will be seen later, the purpose of a particular welfare statute — the underlying policy it expresses — is the basis of perhaps the most significant legal limit on the power of the legislature in the area of public welfare.[9]

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4 *See, e.g.*, Brief for Nat. Fed'n of Blind as Amicus Curiae at 43, Washington v. Harrell, *prob. juris. noted,* 390 U.S. 940 (Mar. 4, 1968) which concluded:

> There is no dearth of indications that perhaps no time in our history has rivaled the present for urgency to take all feasible steps to relieve the misery of the poor. The elimination of durational residence requirements in welfare legislation would be a milestone in that direction, and fortunately, it is as legally required as socially wise. The majority of judges in several lower courts have begun the laudable work. It is now for this court to complete it.

See also Brief for Appellees at 10-18, Reynolds v. Smith, *prob. juris. noted,* 390 U.S. 940 (Mar. 4, 1968); Brief for Appellee at 4-9, Shapiro v. Thompson, *prob. juris. noted,* 389 U.S. 1032 (Jan. 15, 1968).

5 *See, e.g.*, Smith v. Reynolds, 277 F. Supp. 65, 68 (E.D. Pa. 1967); Harrell v. Tobriner, 279 F. Supp. 22, 32 (D.D.C. 1967) (Holtzoff, J., dissenting); Thompson v. Shapiro, 270 F. Supp. 331, 338 (D. Conn. 1967) (Clarie, J., dissenting).

6 *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 611 (1960); Snell v. Wyman, 281 F. Supp. 853, 863 (S.D.N.Y. 1968), *aff'd,* 37 U.S.L.W. 3242 (Jan. 14, 1969).

7 *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955); Nebbia v. New York, 291 U.S. 502, 537 (1934).

8 *See* King v. Smith, 392 U.S. 309, 325-26 (1968).

9 *See* notes 128-47 *infra* and accompanying text.

II. The Statutory Foundation

Any study of the system of public welfare in the United States must begin with mention of the statutes which provide for financial assistance and other services to the needy, since there is no recognized common law or constitutional obligation upon the government to provide such assistance. Any obligation — legal, not moral — requiring the government to provide such assistance is imposed by statute.[10] Consequently, the fundamental legal questions presented by the public welfare system must be considered in the context of the statutory structure imposing these governmental obligations.

A. The Elizabethan Roots

The present American system of welfare legislation finds its roots in the early poor laws of England, generally referred to as the Elizabethan Poor Laws. The English poor laws began developing in the thirteenth century[11] and reached full development in 1601 with the passage of the Elizabethan Poor Laws,[12] and in 1662 with the passage of the Settlement Act.[13]

There were three essential principles of the Elizabethan Poor Laws[14] and, to a surprising degree, they have carried over into the present American system of public assistance.[15] The first principle was that of local responsibility. The parish, the basic unit of English local government, was entrusted with the responsibility of administering the system by obtaining the necessary funds through taxation of the members of the parish, determining the eligibility of persons for assistance, and distributing the funds to the needy.[16] The two remaining principles served to place limits on the parish's responsibility. The first of these was the principle of settlement and removal.[17] Under this principle, the parish had no responsibility to care for a needy person if he was not "settled" in the community, and this required a significant contact with the parish both in terms of time and economics. Furthermore, if a person became indigent while he was in a parish in which he did not have settlement, he was subject to removal to the parish in which he last had settlement.[18] The present-day analogue of settlement and removal is the durational residence requirement about which most

10 *See* County of Merrimack v. Town of Derry, 107 N.H. 212, 213, 219 A.2d 703, 705 (1966); Mansfield Gen. Hosp. v. Board of County Commr's, 170 Ohio St. 486, 488, 166 N.E.2d 244, 226 (1960); City of Champaign v. City of Champaign Township, 16 Ill. 2d 58, 60-61, 156 N.E.2d 543, 545 (1959); Collins v. State Bd. of Social Welfare, 248 Ia. 369, 375, 81 N.W.2d 4, 7 (1957).

11 The poor law system originated out of the shortage of labor caused by the Great Plague of 1348 which led to government control over the labor supply and prohibition of the giving of alms to able-bodied beggars in 1349 under the Ordinances of Labor. For further discussion of this development, *see* Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 174, 178-81 (1955).

12 *Id.* at 181.

13 For a full discussion of the historical development of this Act, see *id.* at 181-98.

14 *Id.* at 178.

15 *See* tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 296, 939 (1964); Riesenfeld, *supra* note 11, at 201-32.

16 Riesenfeld, *supra* note 11, at 178, quoting from 43 Eliz., ch. 2 (1601).

17 *Id.* at 178.

18 *See id.* at 181-98.

of the recent litigation is concerned.[19] The second of these limiting principles was the principle of primary family responsibility.[20] Under the Elizabethan Poor Laws, both the parents and the grandparents of the indigent person were held primarily responsible for the person's maintenance and were liable to the government for any assistance provided.[21] This characteristic endures in the present welfare system of the United States.[22]

The Elizabethan Poor Laws are relevant to the contemporary legal problems of public welfare for two reasons: first, they constitute the initial recognition by Anglo-American government of its responsibility to provide financial assistance to the needy,[23] and, second, their basic structure has served as the model for most American welfare statutes.[24] At least until very recently, the poor law system has endured and dominated most of the American responses to the problems of poverty. Its influence can easily be seen in the structure of most state categorical and general assistance welfare legislation[25] and in the fact that most of the recent litigation deals with the constitutionality of provisions that are based on Elizabethan concepts.

B. The Social Security Act

The Social Security Act of 1935[26] presents a fundamental change in the

19 The Social Security Act, 42 U.S.C. § 602(b) (1964) allows the states to set the following requirements:

> The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

The litigation arising from these requirements is listed in note 1 *supra*.

20 *See* Riesenfeld, *supra* note 11, at 178.

21 The poor laws of 1597-98 established a mutual duty of support between parents and legitimate children, which was extended to grandparents in 43 Eliz., ch. 2, § 7 (1601). *See id.* at 199.

22 See State v. Griffiths, 152 Conn. 48, 203 A.2d 144, 149 (1964), which upheld the constitutionality of a statute making grandparents of dependent children under AFDC liable for their support. *But see* Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), *vacated and remanded for clarification*, 380 U.S. 194 (1965) (holding that an adult child cannot be held liable for the institutional care provided his parent by the state).

23 In commenting on the significance of the Elizabethan Poor Laws, Professor tenBroek said:

> The central concept and great achievement of the Elizabethan poor law was the firm establishment of the principle of public responsibility to maintain the destitute. Through it, the final step was taken, permanently shifting a part of the burden to relieve economic distress from the ecclesiastical, private, and voluntary to the civil, public, and compulsory. The assumption of responsibility, moreover, was made by the nation and its application was nationwide. tenBroek, *supra* note 15, at 262.

24 *See id.* at 941.

25 For example, the welfare laws of Connecticut provide that the state's general support program is to be administered by the towns and financed through local tax revenue. *See* CONN. GEN. STAT. ANN. §§ 17-273 to -91 (Supp. 1968). CONN. GEN. STAT. ANN. §§ 17-320 to -26 (Supp. 1968) impose the primary responsibility for the support of destitute persons on their relatives. Connecticut repealed its settlement statutes in 1961. *See* 1961 Conn. Pub. Act 425, § 6.

26 See 42 U.S.C. §§ 301-1396g (1964), *as amended* (U.S.C.A. Supp. 1969), particularly Subchapters IV [Grants to States For Aid and Services to Needy Families With Children

American approach to the problems of poverty by bringing the federal government into an area heretofore dominated by the states.[27] While the Act deals primarily with the problems of old age and unemployment through the Old Age Assistance Program and the Unemployment Compensation Program, largely financed by beneficiary contributions during periods of employment, the Act also provides for grants-in-aid to the states to enable them to assist certain categories of needy persons on a non-contributory basis. Under these categorical assistance programs, such as AFDC, the responsibility for the administration of the program is entrusted to the states, while the cost of the programs are met by both state and federal contributions; the states are, however, required to meet minimum federal standards to participate.[28] Under the concept of categorical assistance, financial assistance, as well as other benefits, are provided to needy persons who fall into a specified category, the requirements of which are carefully defined by statute. For example, Subchapter IV of the Act, entitled "Grants To States For Aid and Services To Needy Families With Children," sets up the category "dependent children" and provides for the granting of federal funds to the states to aid needy children and their families who fall within this general category; additionally, these individuals must satisfy any other conditions — within limits set by the Act — the states choose to place on eligibility for assistance.[29] In this way, federal-state categorical assistance programs supplement the traditional poor relief or general assistance which is otherwise generally made available on the local level, and together, these programs provide for the eligible recipient at least the bare necessities required for his subsistence. However, while categorical assistance encompasses the purpose of general assistance — the maintenance of the needy — its purposes, as expressed by the Act, go beyond this and include enabling the poor to become independent and self-supporting.[30] It is with this expressed hope of eliminating the need for assistance that the Social Security Act significantly transcends its Elizabethan antecedents.

C. Recent Developments

More recently, greater emphasis has been placed on direct efforts to enable the welfare recipients to become self-sufficient, either by finding them suitable employment or by providing vocational training for those who are otherwise unemployable.[31] Underlying this development seems to be the notion that the

(AFDC), §§ 601-644]; V [Grants To States for Maternal and Child Welfare, §§ 701-29a]; X [Grants To States For Aid To The Blind, §§ 1201-06]; XIV [Grants To States For Aid To the Permanently and Totally Disabled, §§ 1351-55].

27 *See generally* Wedemeyer & Moore, *The American Welfare System,* 54 CALIF. L. REV. 326, 334 (1966).

28 42 U.S.C.A. §§ 602-04 (1964), *as amended* (Supp. 1969).

29 42 U.S.C.A. § 606(a) (1964), *as amended* (Supp. 1969).

30 *See* 42 U.S.C.A. § 601 (1964), *as amended* (Supp. 1969).

31 In 1968, Congress added Part C—Work Incentive Program for Recipients of Aid Under State Plans Approved Under Part A—to Subchapter IV of the Social Security Act (AFDC). The purpose of this addition is set forth in 42 U.S.C.A. § 630 (Supp. 1969):

> The purpose of this part is to require the establishment of a program utilizing all available manpower services, including those authorized under other provisions of law, under which individuals receiving aid to families with dependent children will be furnished incentives, opportunities, and necessary services in order for (1) the employment of such individuals in the regular economy, (2) the training of such

provision for residual financial assistance to needy persons is not sufficient to enable them to escape the grips of poverty, and that both work-training and pressure to enter the employment market are necessary.[32] This approach has led to a great proliferation in statutory programs to rehabilitate the poor.[33]

At the present time we are just beginning to realize the full dimensions of existing poverty in this nation and the problems it has created.[34] At the same time, it is evident that the nation has not settled on the approach that will be taken to eradicate the blight of poverty. Indeed, the only point that would receive widespread support is that a fundamentally new approach is needed; there is no general agreement on what that approach should be. Yet, while this search is taking place, the poor must be provided for within the framework of the existing statutory system. We cannot ask our legal system alone to remake the old system or to streamline the welfare system we have inherited largely from the seventeenth century. What we can ask of the legal system at this time, however, is an indication of the limitations that must be placed upon any public welfare system by our constitutional system of government.

III. The Nature of the Welfare Recipient's Interest

The major legal problem in the area of public welfare is the need to clarify the relationship between the individual welfare recipient's interest in the benefits he receives and the public's interest in establishing and maintaining the programs which transcend the interest of the individual indigent and concentrate on effectively dealing with poverty on a broad scale.[35] At the heart of this problem is the question of what conditions may be placed on the receipt of

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individuals for work in the regular economy, and (3) the participation of such individuals in special work projects, thus restoring the families of such individuals to independence and useful roles in their communities. It is expected that the individuals participating in the program established under this part will acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society and that the example of a working adult in these families will have beneficial effects upon the children in such families.

If an AFDC recipient refuses without good cause, to participate in an incentive program or to accept available employment, he will not be considered in determining the amount of benefits to be provided to the recipient family. 42 U.S.C.A. § 602(a)(19)(F) (Supp. 1969). *See also* Hausman, *The AFDC Amendments of 1967: Their Impact on the Capacity for Self Support and the Employability of AFDC Family Heads,* 19 LAB. L.J. 496 (1968).

32 This attitude is illustrated by the expressed purpose of the Economic Opportunity Act of 1964:

> Although the economic well-being and prosperity of the United States have progressed to a level surpassing any achieved in world history, and although these benefits are widely shared throughout the Nation, poverty continues to be the lot of a substantial number of our people. The United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society. It is, therefore, the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity. It is the purpose of this chapter to strengthen, supplement, and coordinate efforts in furtherance of that policy. 42 U.S.C. § 2701 (1964).

33 *See, e.g.,* The Manpower Development and Training Act of 1962, 42 U.S.C. §§ 2571-2620 (1964); and The Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701-2981 (1964).

34 *See generally* POVERTY AS A PUBLIC ISSUE (B. Seligman ed. 1965).

35 *See generally* Cowan, *supra* note 3; Reich, *The New Property,* 73 YALE L.J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 YALE L.J. 1245 (1965).

financial assistance by the needy to realize the broad goals of welfare that are dictated by the public interest. The answer to this question, in turn, demands a determination of the *nature* of the legal right of the individual indigent to assistance from the rest of the community, for it would seem logical that the nature of this interest must serve as one of the primary limitations on the conditions which can be imposed on any receipt of public assistance.

As noted above, there is no affirmative legal obligation on the part of either the state or the federal government to come to the assistance of the poor.[36] Whatever obligation exists has been created by statute, and, as a consequence, the determination of the individual indigent's interest in financial assistance must be made in terms of the statutes on which it is based.

A. The Traditional Approach

The traditional legal approach to the interest of the individual in government largesse, such as pensions and poor relief, has been to categorize whatever he was entitled to receive under a statutory program as a "gratuity" to which he had no "vested right" and which could be granted, withheld or conditioned at the complete discretion of the legislature.[37] Under this approach, since the recipient had no inherent right to the benefits provided by statute, he was not in a position to challenge the conditions imposed on his eligibility by the statute.[38] In other words, if a person's claim against the government was contractual in nature, such as an annuity policy, he was held to possess a vested property interest in the benefits he was entitled to receive under the statute;[39] if there was no contractual relation, as in the case of government pensions or poor relief, the benefit under the statute was held to be a gift or gratuity, whose enjoyment was subject to the broad discretion of the legislature.[40]

Although the "vested right-gratuity" approach has been followed in several relatively recent state court decisions,[41] it has been abandoned, for all practical purposes, as a device relevant to the determination of individual rights under our present-day welfare laws.[42] This movement away from the use of property law concepts of "vested right" and "gratuity" to determine the nature of legal rights in the area of public welfare can only be seen as a positive development, for the "label approach" was completely unsuited to cover the many complex factors which must be considered in such a determination. The point is that the welfare recipient's interest in the financial assistance he receives, whatever it may finally

36 *See* note 10 *supra* and accompanying text.
37 *See* Lynch v. United States, 292 U.S. 571 (1934); Frisbie v. United States, 157 U.S. 160 (1895); Pennie v. Reis, 132 U.S. 464 (1889). *See also* notes 83-106 *infra* and accompanying text.
38 Frisbie v. United States, 257 U.S. 160, 166 (1895).
39 *See* Lynch v. United States, 292 U.S. 559, 576 (1934).
40 Frisbie v. United States, 257 U.S. 160, 166 (1895).
41 *See, e.g.*, Mary Lamming Mem. Hosp. v. Clay County, 170 Nebr. 61, 101 N.W.2d 510 (1960); People *ex rel.* Heydenreich v. Lyons, 374 Ill. 557, 20 N.E.2d 46 (1940); Williams v. Shapiro, 4 Conn. Cir. 499, 234 A.2d 144 (1964).
42 *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963); Snell v. Wyman, 281 F. Supp. 853, 863 n.19, *aff'd per curiam*, 37 U.S.L.W 3242 (Jan. 14, 1969).

be, is not merely another form of property.[43] Although in certain respects public assistance can be seen as bearing a strong analogy to property, it is radically different in form. Whatever right there is to welfare, it is a right to demand from government the economic necessities of life; this is far different from a demand that government not deprive a person of his possessions without just cause or adequate compensation.

B. The Conflicting Interests In Public Welfare

The great difficulty in approaching the legal problems of public welfare is that there is no available body of legal concepts which can be employed to adequately deal with the problems. And yet, as the poor of this nation are more fully brought into our legal processes,[44] the courts, as evidenced by issues that they already have faced, will be confronted with increasingly perplexing legal questions.[45] We must, therefore, come to some understanding of the conflicting interests involved in public assistance before we can arrive at a workable framework within which the legal questions can be adequately handled.

Our legal system is quite familiar with the tension between what might be termed the individual interest and the social interest, and has been very effective in maintaining a balance between them.[46] The individual interest manifests itself in a demand made by an individual that he have the greatest possible freedom of activity and that the government protect that activity from outside interference.[47] The social interest, on the other hand, demands that this free activity be restrained in certain respects for the public good.[48] For example, we can point to limitations imposed on individual activity by the criminal and civil law, limitations placed on the use of property by nuisance and zoning law, and limitations placed on economic activity by anti-trust and security legislation. The tension between these interests is expressed in conflict: the individual demands that government refrain from acting so as to leave him the maximum of free activity, while society demands, through the government, that personal activity not go against the public interest.[49]

In the area of public welfare, or more generally, in any area where the government is extending positive benefits to certain individuals, the relation-

43 See Reich, *The New Property, supra* note 35, where Professor Reich develops the thesis that government largess, including welfare benefits, has the same function in preserving personal independence and privacy as does private property.

44 *See generally* Greenawalt, *OEO Legal Services For the Poor: An Anniversary Appraisal,* 12 N.Y.L.F. 62 (1966).

45 See, *e.g.*, the discussion of durational residence requirements in text accompanying notes 134-47 *infra;* discussion of the substitute parent rule in text accompanying notes 148-54 *infra;* and the imposition of repayment obligations on welfare recipients, discussed in text accompanying notes 58-72 *infra.*

46 One commentator has expressed this balancing notion well:

> Individual and social interests have been fairly well integrated in the legal process as jural opposites. The familiar balancing tendency of the law in action, recognized since ancient times, is able to handle the process in accordance with biparty practice made standard by the Romans. In other words, since individual and social interests are taken in the main to conflict, they can be assigned to one side or the other of the lawsuit. Cowan, *supra* note 3, at 690.

47 *See id.* at 689.

48 *See id.*

49 *See generally id.* at 690.

ship between the interests of the individual and society is quite different.[50] In these situations, the individual's demand against the government is not the negative demand to be left unrestrained in his activities, but a positive demand that the government provide him with an affirmative service; in the case of a welfare recipient, the demand is for a sufficiently secure economic base so as to provide him with at least the bare necessities of life.[51] The corresponding social interests in such a situation are very complex and must be examined in light of the social goals the legislature set out to achieve when enacting the particular statutory program under which assistance is made available. For example, AFDC was enacted:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.[52]

As can be seen from this provision, the purposes of AFDC are many. While, on the first level, the program is geared to meeting the obligation the government has acknowledged in behalf of society to provide assistance to those who are unable to care for themselves, there are other purposes that transcend the individual indigent's need for public assistance. On the second level, the government provides financial assistance to dependent children and the parent and relative with whom they are living, not merely to provide them with the necessities of life, but "to maintain and strengthen family life" and to help indigent persons "to attain or retain capability for the maximum self-support and personal independence." In fact, from one point of view, it seems that the financial assistance provided to the poor under the various programs is not the goal of these programs, but a device, a means, to achieve the ultimate goal of the program — the strengthening of family life and the attainment of self-support — to the greatest possible extent for a particular class of persons. While the attainment of these goals would be to the benefit of the individual recipient, they are goals that go beyond the individual and reflect the ultimate social interest in having as many persons as possible escape the hardships of abject poverty and become contributing members of the economy.

This demand by individuals against the whole of society for positive, affirmative public services that are both in their interest and in the public interest, has been called a "social security interest" to distinguish it from more familiar demands on the legal system.[53] This terminology will be used in developing the legal issues present in the public welfare area.

50 Professor Cowan further observes: "The present job [incorporation of social security interests into the legal process] is further complicated by the fact that the newer security demands appear to differ in *kind* from any interest heretofore secured by law. . . ." *Id.* at 688.

51 *See id.* at 689.

52 42 U.S.C. § 601 (1964).

53 *See* Cowan, *supra* note 3, at 689.

The interests of the individual and society that come together in the social security interest are not, at first glance, in conflict. The individual indigent desires to be provided with the necessities of life; society desires to provide him with these necessities. However, while the individual indigent and society want essentially the same thing, they seek it for different reasons. The difference is in what society ultimately hopes to accomplish for the public good by assisting the indigent. Society is going beyond maintenance of the poor as a goal and is using public welfare as a device to achieve further goals. It is here that the individual indigent's interest and the social interest come into conflict.[54] The individual wants to receive financial assistance and at the same time maintain the maximum of personal freedom, while the government, in behalf of society, exerts pressure on the individual by imposing conditions on the receipt of financial assistance with the hopes of influencing, encouraging, or perhaps even coercing the individual into acting in the public interest. His freedom of choice is thereby reduced and the familiar conflict between personal freedom and the public interest becomes apparent. The difficulty is in isolating the legal issues which arise from this conflict and in understanding how they should be handled by the legal system.

C. Group Aspects of the Individual's Interest

Further insight can be gained into the nature of an indigent person's interest in public assistance by noting that it is essentially a group interest, rather than an individual interest.[55] This can be demonstrated by the manner in which the public welfare system functions. A needy person is eligible for assistance if he satisfies all the conditions for eligibility imposed by the statute. These conditions, however, define a class of persons who are eligible, and, thus, it is by being a member of this class that a person becomes eligible for assistance. For example, a needy child is eligible for benefits under AFDC as a "dependent child" if he meets the strict requirements of that category, as defined in Subchapter IV of the Social Security Act.[56] In other words, the right to financial

54 Professor Reich has stated: "In the regulation of government largess, achievement of specific policy goals may undermine the independence of the individual. Where such conflicts exist, a simplistic notion of the public interest may unwittingly destroy some values." Reich, *The New Property, supra* note 35, at 774.

55 The idea has been articulated by commentator Cowan:

> Social security interests are somewhat like individual interests also: they are asserted against the entire social group through the agency or mediation of government. On the other hand they differ from individual interests in this: though individuals benefit, they benefit not as individuals, but as members of social groups. Whereas social interests purport to serve the whole of society, social security interests serve only certain subgroups in the population. Cowan, *supra* note 3, at 689.

56 This statutory group is defined as follows:

> (a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, its equivalent, or regularly attending a course of vocational or technical training designed to fit him for gainful employment; 42 U.S.C.A. § 606(a) (Supp. 1969).

assistance under a given statutory program is a right that inheres in membership in a group that is defined by the statute, and not in the individual simply as a person. A social security interest, therefore, serves only a group of similarly-situated individuals and represents a group claim against the rest of society.

D. The Legal Issues

From this notion that the right to public assistance is a right that derives from membership in a group which is entitled to assistance under a statute, the concrete legal issues begin to emerge in perspective. Most of the cases that have been brought have challenged the conditions imposed by statute either to acquire or maintain eligibility for assistance as denying constitutionally protected rights or as creating invidious classifications contrary to the equal protection clause.[57] In other words, the majority of the cases have dealt with the nature of the limitations on the legislature's ability to condition the receipt of assistance in the public interest — or what the legislature felt was in the public interest.

The issue of what a welfare recipient has a right to receive, once he is eligible for assistance, has been raised only indirectly. Nevertheless, there are serious questions as to what restrictions the government may place on available financial assistance which go to the very heart of the individual indigent's interest in public assistance.

E. Repayment Obligations and the Nature of the Interest

In *Snell v. Wyman*,[58] the Supreme Court affirmed per curiam the decision of a three-judge district court that held constitutional certain New York statutes[59] which imposed an obligation upon welfare recipients to repay the cost of the benefits they have received through liens on their real property, actual or potential recoveries for personal injuries, and the assignment of the recipient's interest in insurance policies.[60] These welfare laws and the complementary administrative regulations were challenged on several grounds. First, it was charged that they denied due process under the fourteenth amendment in that they were arbitrary, oppressive and irrational in defeating the stated objective of the welfare program of seeking to make welfare recipients productive and self-supporting.[61] In response to this, the court held that the challenged statutes possessed sufficient rationality to satisfy due process.[62] The court felt that to rule otherwise would amount to judging the wisdom of the legislature, a task which is outside the power of the judiciary.[63] The second major argument was that the repayment obligation constituted a denial of equal protection, in that the state maintained other welfare programs without seeking repayment and that the repayment obligation discriminates between those who have property and those

57 See the decisions enumerated in note 1 *supra*.
58 37 U.S.L.W. 3242 (Jan. 14, 1969).
59 N.Y. Social Welfare Law §§ 104, 104a, 105, 360 (McKinney 1966).
60 281 F. Supp. 853, 866 (S.D.N.Y. 1968).
61 *Id.* at 861.
62 *Id.* at 863.
63 *Id.*

who do not.[64] The court dismissed these arguments as frivolous[65] and noted that "[i]t would be difficult to conceive of a more pertinent criterion for welfare assistance" that the possession of money or property.[66] The third argument was that the statutes imposing the repayment obligation were inconsistent with the Social Security Act, thereby violating the supremacy clause of the Constitution.[67] The court held that since "the statutes plaintiffs attack reach only to property already owned or to acquisitions which have more or less the character of "windfalls" — at least in the sense that such acquisitions do not result from purposeful efforts to 'attain or retain capability for self-support or self-care,' "[68] there could be no inconsistency with the purposes of the federal provisions. Furthermore, the federal statutes provide that the periodic grants to the states are to be reduced by the federal government's pro rata share of the funds recovered from welfare recipients.[69]

It is important to note that under the welfare regulations of the City of New York, "No referral [for recovery purposes] shall be made if the newly acquired assets consist solely of income from employment,"[70] and, thus, no recovery could be sought out of the wages or salary of a recipient or out of property acquired with such earnings.[71] The district court opinion relied on this fact in holding that the New York repayment obligation did not contradict the underlying policy of the Social Security Act of encouraging recipients to become self-supporting.[72] This reliance, in turn, is enough to raise a serious doubt as to whether a repayment obligation imposed upon the earnings of a welfare recipient would be consistent with the purpose of the federal program.

Regardless of the fact that the full extent of the state's power to require repayment is still in doubt, *Snell v. Wyman* did hold that the state has the constitutional power to impose upon welfare recipients the obligation to repay the cost of the assistance they have received out of certain types of assets. The state is able to restrict the granting of public assistance so that the assistance takes on many of the characteristics of an advancement or loan, which matures into an obligation whenever the recipient is financially able to repay.[73] Consistent with this is the fact that the state is given the general power under the federal AFDC

64 *Id.* at 865.
65 *Id.* at 865-66.
66 *Id.* at 866 n.23.
67 *Id.* at 867-69.
68 *Id.* at 867-68.
69 *Id.* at 868. *See* 42 U.S.C. §§ 603(b)(2), 1353(b)(2) (1964). Judge Kaufman, in dissent, argued that while the states have the power to recover public assistance expenditures from recipients, the New York statutes and regulations were not precise enough to protect "the freedom to achieve 'self-support and personal independence'" which is "within the compass of 'liberty' secured by the Fourteenth Amendment against undue restraint." Snell v. Wyman, 281 F. Supp. 853, 869-71 (1968).
70 Snell v. Wyman, 281 F. Supp. 853, 860 n.12 (S.D.N.Y. 1968), quoting from Policies Governing the Administration of Public Assistance, City of New York Department of Welfare, § 189 (reissued August 1, 1963).
71 *Id.* at 860.
72 *Id.* at 867-68.
73 Other lower court decisions have recognized this "repayment" theory on governmental benefits. *See, e.g.*, Lalic v. Chicago, B & Q R.R., 263 F. Supp. 987 (N.D. Ill. 1967); Francis v. Harris, 100 N.J. Super. 313, 241 A.2d 844 (1968). Beck v. Buena Park Hotel Corp., 30 Ill. 2d 343, 196 N.E.2d 686 (1964); Newland v. Child, 254 P.2d 1066 (Idaho 1953); Dimke v. Finke, 209 Minn. 29, 295 N.W. 75 (1940).

statutes to supervise the use of assistance payments when the recipient is unable to properly manage his financial affairs.[74]

Furthermore, although not expressly mentioned by the Court, the holding in *Snell* apparently allows the state to require the execution of liens and the assignment of interests as valid conditions for *maintaining* eligibility for assistance, since, under the New York regulations, "refusal by the applicant to assign shall constitute ineligibility for public assistance."[75] Thus, *Snell v. Wyman* stands as an indication of the very broad power the states apparently have to determine exactly what a welfare recipient is to receive and the terms and conditions under which these benefits, once received, are to be enjoyed.

F. The Entitlement Theory

It is in the context of this broad state power that the plea for the recognition of a "vested right" in the welfare recipient to public assistance must be considered.[76] The essential notion here is that in order to achieve a balance between the personal freedom and independence of the individual recipient and the public interest, the benefits provided under our welfare system must rest on a more secure foundation.[77] This notion has led to what is known as the theory of entitlement:

> The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right. To the greatest degree possible, public welfare should rest upon a comprehensive concept of actual need spelled out in objectively defined eligibility that assures a maximum degree of security and independence.
>
> [The concept of entitlement] means that the individual's rights, whatever they may be, should be known to him and enforceable through law.[78]

The theory of entitlement is based, first of all, on the view that the institution of private property, or more particularly, the economic security which it provides the individual, is the foundation of human dignity and personal freedom under our system of government.[79] At the same time, the theory of entitlement

74 *See* 42 U.S.C.A. § 606(b)(2) (Supp. 1969).

75 New York Dept. of Social Services Reg. § 18-369.2 quoted in Snell v. Wyman, 281 F. Supp. 853, 856 n.4 (S.D.N.Y. 1968).

76 *See generally* Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154-55 (1958); Reich, *The New Property*, *supra* note 35, at 785, 786 & n.233; Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, *supra* note 35, at 1255-56; tenBroek & Wilson, *Public Assistance and Social Insurance — A Normative Evaluation*, 1 U.C.L.A. L. REV. 237 (1954).

77 Government largess, like all wealth, must necessarily be regulated in the public interest. But regulation must take account of the dangers of dependence, and the need for a property base for civil liberties. Rightly conceived, the public interest is no justification for the erosion of freedom that has resulted from the present system of government largess. Reich, *The New Property*, *supra* note 35, at 777.

78 Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, *supra* note 35, at 1256.

79 "[T]he only dependable foundation of personal liberty is the economic security of private property." W. LIPPMANN, THE METHOD OF FREEDOM 101 (1934) quoted in Reich, *The New Property*, *supra* note 35, at 773.

is, in reality, founded on the fact that private property, in the traditional sense, is being replaced by the largesse of government as a principal source of economic security for the individual.[80] The problem is that this source of economic security is none too secure, in that government largesse is granted or withheld largely with an eye to the public interest alone, and with little regard for the functions it has to insure an economic foundation for the independence, dignity and freedom that are the great blessings of this nation.[81]

The theory of entitlement, therefore, embodies a concrete, precise position as to the kind of balance that must exist between the interest of the welfare recipient to financial assistance and the public interest, so that the fundamental values of our political system may be enjoyed by the less-affluent. While the appeal of entitlement undoubtedly contains elements that reach the fundamental policy of our welfare system and, thus, are directed to the legislature rather than to the courts, the central idea of entitlement — the recognition of definite and enforceable legal rights in the welfare recipient correlative to the obligation government has assumed to provide assistance to the needy — constitutes an appeal to which only our legal system can respond.[82]

G. Conditions for Eligibility — The Major Issue

The broad issue facing the courts in public welfare cases that deal with substantive, rather than procedural, rights can thus be stated in simple terms: What are the enforceable legal rights of an indigent person under our present welfare system? Given the fact that the welfare system is based on statute, the rights of the indigent person are, of course, initially determined by statute. The statutes determine who has a right to welfare benefits by defining the class of persons eligible and delineate what the eligible recipient has a right to receive by providing for the nature of the benefits to be made available. Clearly then, in facing the question of what legal rights an individual has to public assistance, the courts are not called upon to create or recognize a right that exists apart from the statutes, but are faced with the difficult and unappealing task of deciding whether the statutory determinations made by the legislature are constitutionally permissible.

From the *Snell* decision, it appears that there is no constitutional limitation on the types of benefits that may be made available and the manner in which such benefits may be regulated. Consequently, the legislature may provide for monetary assistance without attached strings, or it may treat assistance as a loan or advancement, as is done in New York, by attaching liens on the welfare recipient's property, with the government assuming the position of a creditor. Likewise, it seems that the legislature, in its discretion, may regulate the use of monetary assistance after it is in the recipient's hands, but the full extent of the government's power in this area is impossible to determine at this time. Thus,

80 *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues, supra* note 35, at 1255.
81 *See* Reich, *The New Property, supra* note 35, at 774.
82 *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues, supra* note 35, at 1256.

the question of what the welfare recipient is entitled to receive once he is eligible for assistance is not a significant legal issue.

The only remaining issue is the question of the nature and extent of constitutional limitations on the legislature's power to creat conditions of eligibility for public assistance in such a way that persons are included or excluded from the eligible class of recipients for public policy reasons. What follows then is a detailed consideration of the existing legal doctrines which must be used to determine the constitutional validity of eligibility requirements for public welfare.

IV. Conditions Upon Eligibility

A. The Unconstitutional Conditions Test

Unconstitutional conditions cannot be attached to the receipt of benefits in such a way that the recipient of the benefit is forced to choose between the benefit and the relinquishment of a constitutional right.[83] This is what is meant by the unconstitutional conditions test. At the outset, this test must be clearly differentiated, however, from the doctrine of unconstitutional conditions.

Basically, the unconstitutional conditions doctrine is the theory that the right to withhold encompasses the right to offer on any terms.[84] To begin with, "rights" and "privileges" must be distinguished. While rights are guaranteed and carefully protected, privileges, since they are mere governmental gratuities, can be conditioned almost without limitation, or not granted at all. In theory then, the benevolent government granting privileges may attach any desired conditions to one's eligibility for their receipt.[85]

The right-privilege dichotomy and the unconstitutional conditions doctrine drawn from it has been traced historically to early cases upholding the power of the state to grant or deny permission to a foreign corporation to do business locally.[86] Initially, it had been held that a state could prevent a foreign corporation from transacting business within its boundaries unless the corporation were willing to agree to certain conditions.[87] The theory was that the corporation did not have a right to do business within the state; it was merely being granted a privilege. The state's power to withhold this privilege altogether was neces-

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83 *See* Speiser v. Randall, 357 U.S. 513, 518 (1958) and text accompanying notes 107-09 *infra.*

84 *See* French, *Unconstitutional Conditions: An Analysis,* 50 GEO. L.J. 234 (1961). An adequate judicial statement of the doctrine can be found in *United States v. Cook:*

> [C]ongress in shaping the form of its bounty may impose conditions and limitations on its acquisition and enjoyment by the beneficiaries which it could not impose on the use and enjoyment by them of a vested right. 257 U.S. 523, 527 (1922).

85 *See* Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 COLUM. L. REV. 321 (1935); Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1595 (1960); Wilcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 CORNELL L.Q. 12 (1955); French, *supra* note 84.

86 *See* G. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 132-47 (1918).

87 *See* Doyle v. Continental Ins. Co., 94 U.S. 535, 542 (1877), holding that a state could compel a foreign corporation to forego removal of lawsuits to the federal courts as a precondition to transacting business within the state. This decision, however, was overruled in *Terral v. Burke Constr. Co.,* 257 U.S. 529 (1922).

sarily thought to include the right to extend the privilege upon any conditions which the state chose to attach.[88]

The logic of the doctrine of unconstitutional conditions, however, proved difficult to defend.[89] Supposedly, it was based on the proposition that a whole equals the sum of its parts: the whole being the power to deny a privilege and the parts being the powers to impose conditions on the granting of a privilege.[90] The fallacy behind the assumption that this "greater" ought always to include such a "lesser" has now been demonstrated with persuasive analysis by many writers and commentators.[91] What is more important, however, is that the case law has gradually abandoned the doctrine of unconstitutional conditions and the more recent Supreme Court decisions — to be discussed below — have refused to even consider arguments based on the old right-privilege distinction.

Frost & Frost Trucking Co. v. Railroad Commission of California,[92] decided in 1926, represents the first major breakthrough in this area. In holding that California could not prohibit the use of its highways to foreign contract carrier trucking companies who refused to assume the status and duties of common carriers, the Supreme Court, without expressly repudiating the right-privilege argument, said:

> It is not necessary to challenge the proposition that, as a general rule, the state, having the power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.[93]

More recent cases, however, have consistently rejected the unconstitutional conditions doctrine by expressly refusing to recognize right-privilege arguments. In *Schware v. Board of Bar Examiners,*[94] the New Mexico Board of Bar Examiners attempted to justify their refusal to permit a former member of the Communist Party to take the state bar examination on the ground that he was morally unfit. Holding that this justification for the Board's denial contravened the due process clause of the fourteenth amendment, the Supreme Court, in a mere footnote, rejected the argument that the privilege of practicing law in a state could be so conditioned:

> We need not enter into a discussion whether the practice of law is a "right" or "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons.[95]

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88 Packard v. Banta, 264 U.S. 140, 144 (1924); Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

89 For an argument showing the inadequacy of the doctrine, see Hale, *supra* note 85, at 321-22.

90 For a thorough treatment of this argument, see French, *supra* note 84, at 237.

91 *See, e.g.,* Powell, *The Right to Work for the State,* 16 COLUM. L. REV. 99, 110-11 (1916).

92 271 U.S. 583 (1926).

93 *Id.* at 593-94.

94 353 U.S. 232 (1957). *See also* Konigsberg v. State Bar, 353 U.S. 252 (1957).

95 353 U.S. at 239 n.5.

The unconstitutional conditions doctrine was similarly rejected in *Speiser v. Randall*,[96] a case which involved the constitutional validity of a provision in the California Constitution which afforded tax exemptions to veterans. This provision provided that the applicants subscribe to oaths that they did not advocate the overthrow of the federal or state government by force, violence or other unlawful means, or advocate the support of a foreign government against the United States in the event of hostilities. The Court held this provision tantamount to a denial of free speech and, therefore, struck it down as unconstitutional.[97] Once again the unconstitutional conditions doctrine was advanced without success. Flatly rejecting the argument by the State that the exemption was a privilege which could be conditioned by the requirement of such an oath, the Court declared:

> The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech. This contention did not prevail before the California courts, which recognized that conditions imposed upon the granting of privileges or gratuities must be "reasonable."[98]

Even *Fleming v. Nestor*,[99] a controversial five-four opinion which held constitutional a social security statute terminating the old age benefits of aliens deported for illegal entry, commission of a crime, or subversive activity, refused to accept the unconstitutional conditions doctrine. Conceding that Congress could not exercise its power to modify the statutory scheme of social security free of all constitutional restraint, the Court said, "It is hardly profitable to engage in conceptualizations regarding 'earned rights' and 'gratuities.' "[100]

When *Sherbert v. Verner*[101] was decided a few years later, there was little doubt that the doctrine of unconstitutional conditions lacked all vitality and that the right-privilege distinction was virtually useless. Mrs. Sherbert was a Seventh Day Adventist who was unable to obtain employment because she could not work on Saturday. Upon being denied unemployment compensation by South Carolina on the grounds that she had failed without good cause to accept suitable work, she claimed that her constitutional right to the free exercise of religion had been abridged. It was held that the woman's disqualification for unemployment benefits because of her refusal to accept work on Saturday contrary to her religious beliefs was unconstitutional,[102] and once more the persistent unconstitutional conditions doctrine was rejected. This time, however, the Court made it quite clear that the doctrine would continue to receive little acknowledgment:

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege."

96 357 U.S. 513 (1958).
97 *Id.* at 527-28.
98 *Id.* at 518.
99 363 U.S. 603 (1960).
100 *Id.* at 610.
101 374 U.S. 398 (1963).
102 *Id.* at 406.

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[103]

It seems clear that the unconstitutional conditions doctrine is no longer a proper argument to be used to uphold the constitutional validity of conditions which the state attaches to benefits. The durational residence requirement test cases have dismissed it as irrelevant.[104] It has been exposed as logically flimsy by scholars who urged its abandonment,[105] and ignored, if not repudiated, by the Supreme Court. More importantly, the traditional unconstitutional conditions analysis blurs total comprehension of the significance of the issues in a given case for the simple reason that it is too superficial to be adequate.[106]

However, what has been described as the unconstitutional conditions *test* has survived the unconstitutional conditions *doctrine*. Rightly ignoring the antiquated right-privilege distinction, the test prevents the state from attaching conditions to a benefit which, by their application, force a recipient to forego a constitutional right. Both the *Speiser* and *Sherbert* decisions are primary examples.

In *Speiser,* the state effectively limited the tax-exempt beneficiary's right of free speech by the exercise of its taxing power. This, the Court said, imposed an unconstitutional condition regardless of the nature of the tax benefit: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[107] *Sherbert* was even more explicit in applying the unconstitutional conditions test. Relying upon *Speiser,* it emphasized that conditions upon public benefits could not be sustained if the conditions operated to inhibit or deter the exercise of first amendment rights.[108] Conditioning Mrs. Sherbert's availability for unemployment compensation upon her willingness to violate a principle of her religion would unjustly penalize her for freely practicing her religion.[109]

The attack on durational residence requirements has heavily relied upon the unconstitutional conditions test.[110] The inapplicability of the unconstitutional conditions doctrine only adds strength to those challenging the AFDC residence requirements who rely upon cases like *Speiser* and *Sherbert.* The argument is made that if a tax exemption in *Speiser* could not be denied by forcing the recipient to choose between the exemption and his right to speak freely, and if unemployment compensation in *Sherbert* could not be denied by forcing the recipient to choose between the compensation and her freedom of religious conviction, then, a state cannot deny AFDC benefits under residence requirements by forcing

103 *Id.* at 404. A listing at 404 n.6 enumerates several examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity.
104 *See, e.g.,* Harrell v. Tobriner, 279 F. Supp. 22, 28 (D.D.C. 1967).
105 *See* Powell, *supra* note 91, at 110-11.
106 *See* French, *supra* note 84, at 244-46, where the author discusses the critical problem of focus in this area.
107 357 U.S. at 518.
108 374 U.S. at 405.
109 *Id.* at 405-06.
110 *See generally* Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs,* 54 CALIF. L. REV. 567 (1966).

a recipient to choose between the benefits and the right to travel freely interstate. Arguendo, it does not matter that first amendment rights were involved in *Speiser* and *Sherbert*. The same dilemma between accepting a benefit or relinquishing a constitutional right is present and the constitutional right to travel from one state to another and to settle where one pleases does occupy a fundamental position. Moreover, the right to travel interstate is closely related to the first amendment rights of free speech and association.

Relying on *Edwards v. California*,[111] which held that the imposition of criminal sanctions on those who transported indigent persons into California prevented non-resident indigents from coming into the state and constituted an unconstitutional limitation on the right to travel freely between the states,[112] the "travel" argument urges that durational residence requirements for AFDC eligibility constitute a similar proscription on the same right.[113] The argument need not fail if it is not proven conclusively that residence tests adversely affect interstate movement for all purposes, since the unconstitutional conditions test will not permit a single indigent migrant to be punished by making him ineligible for AFDC because he has exercised his right to travel.[114] If residence requirements either discourage the right to travel or punish the exercise of the right to travel, the unconstitutional conditions test may render them invalid.

Nevertheless, for several reasons, the travel argument is not a particularly strong basis for striking down durational residence requirements.[115] First, the right to travel is not absolute and both the federal and state governments have been held able to condition the right.[116] Secondly, the *Edwards* case is clearly distinguishable. It involved a criminal statute which imposed a direct and permanent prohibition upon bringing indigent persons into the state. The durational residence requirements are civil, non-prohibitory as regards entrance and settlement in a state, and any interference which they may have with the right to travel is, at most, an indirect discouragement that is temporary. In addition, as the Supreme Court explicitly pointed out, all that was determined by *Edwards* was the propriety of an attempt by a state to prohibit transportation of indigent non-residents and the question of relief to newcomers was not involved.[117]

111 314 U.S. 160 (1941).
112 *Id.* at 177.
113 *Id.*
114 See notes 108-09 *supra* and accompanying text.
115 This was emphasized by Judge Holtzoff in denying the original application for the convening of the three-judge district court in *Harrell v. Tobriner*, 269 F. Supp. 920, 921 (D.D.C. 1967): "The suggestion that such a residence requirement interferes with the freedom of travel guaranteed by due process of law is too far-fetched and remote to justify extended discussion." For an analysis of the travel argument's weaknesses, *see* Comment, *The Constitutionality of Residence Requirements for State Welfare Recipients*, 63 NW. L. REV. 351, 369-72 (1968); Comment, *Constitutional Law: State Residence Requirements for Welfare Aid Held Unconstitutional*, 52 MINN. L. REV. 561, 569 (1967); and Note, *Analysis of Welfare Residence Requirements in Light of Recent Decisions*, 29 U. PITT. L. REV. 138, 143-48 (1967).
116 *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 15-16 (1965); New York v. O'Neill, 359 U.S. 1, 7-8 (1959); Korematsu v. United States, 323 U.S. 214 (1944); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).
117 The Supreme Court stated:

> [W]e are not now called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent non-residents into its territory. The nature and extent of its obligation to afford relief to newcomers is not here involved. 314 U.S. at 174.

Thirdly, though the right to travel does occupy a fundamental position[118] and has been thought to be closely related to first amendment rights of free speech and association,[119] these latter rights have been held to have a "preferred position."[120] There may appear to be an indirect analogy between the "chilling effect" which the threat of prosecution had on free speech in *Dombrowski v. Pfister*[121] and the discouragement which the threat to withhold welfare has on travel in the durational residence requirement cases.[122] But, in fact, argument from *Dombrowski* is hardly proper, for that case established a test for federal courts to determine jurisdiction in free speech cases,[123] and its application has been limited to the right of expression under the first amendment.[124] Finally, there is little evidence[125] that durational residence requirements for welfare interfere with interstate travel and settlement to a greater extent than valid residence requirements might in other areas. Residence requirements conditioning voting rights, for instance, were upheld as constitutional without any finding that they interfered with interstate migration.[126] Significantly then, most of the three-judge district courts which heard the AFDC residence requirement test cases decided them on the grounds that durational residence requirements violated the equal protection clause, and in doing so they applied, not an unconstitutional conditions test, but the reasonable relationship test.[127]

B. The Reasonable Relationship Test

Any legislative classification must be reasonably related to the purpose of the statute in order to pass as constitutional under the equal protection or due

118 *See, e.g.,* United States v. Guest, 383 U.S. 745, 757 (1966); Edwards v. California, 314 U.S. 160, 177-81 (1940) (Douglas, J., concurring); Crandall v. Nevada, 73 (6 Wall) 35, 48-49 (1867); Passenger Cases, 48 (7 How) 282, 492 (1849).

119 United States v. Guest, 383 U.S. 745, 769-70 (1966); Aptheker v. Secretary of State, 300 U.S. 500, 517 (1964); Kent v. Dulles, 357 U.S. 116, 125-27 (1958). For a further elaboration on this point, see CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 192-93 (1956).

120 The preferred position of the first amendment rights is well established. *See, e.g.,* Ashton v. Kentucky, 384 U.S. 195, 200 (1966); Marsh v. Alabama, 326 U.S. 501, 509 (1946).

121 380 U.S. 479 (1965).

122 *Dombrowski v. Pfister* deals with the jurisdiction of the federal courts. It is essentially an abstention case, holding that the federal courts can reach a determination of the constitutionality of state statutes regulating expression before any criminal prosecution is initiated by the state, because the right of expression is so fragile and sensitive that its exercise would be effectively prevented or discouraged by the mere threat of criminal prosecution. The importance of the right is too great to allow its exercise to be interfered with by prolonged criminal proceedings, or worse, by harassment in the form of threats to prosecute.

123 *See, e.g.,* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Zwickler v. Koota, 389 U.S. 241 (1967).

124 *See* Heard v. Rizzo, 281 F. Supp. 720, 728 (E.D. Pa. 1968) (holding *Dombrowski v. Pfister* not applicable where non-freedom of expression rights are involved).

125 *See generally* articles cited in note 145 *infra.*

126 *See* Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam,* 380 U.S. 125 (1965).

127 *See, e.g.,* Green v. Department of Public Welfare, 270 F. Supp. 173, 178 (D. Del. 1967); Smith v. Reynolds, 277 F. Supp. 65, 68 (E.D. Pa. 1967). Thompson v. Shapiro, 270 F. Supp. 331, 336 (D. Conn. 1967), holding Connecticut's one-year residence requirement in violation of both the equal protection clause and the right to travel, is probably the lone exception.

process clauses of the Constitution. This requirement was expressed long ago in *Gulf, Colorado and Santa Fe Railway v. Ellis*:[128]

> [The attempted classification] . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.[129]

The reasonable relationship test, as it has been consistently adhered to by the courts, poses the question "whether the classifications drawn in a statute are reasonable in the light of its purpose."[130] The decisions of *Schware* and *Nestor* both demonstrate the application of the reasonable relationship test. In *Schware*, the test was framed in the following manner:

> A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicants fitness or capacity to practice law.[131]

The Court then decided that, since the appellant's alleged membership in the Communist Party many years before did not justify an inference that he had a bad moral character when he applied to take the bar examination, there was no reasonable relationship between his possible membership in the Party in the past and his qualification for present fitness to take the examination.[132]

Though radically different, both factually and in its outcome, *Nestor* also started with the premise that a condition attached to a governmental benefit had to have a reasonable relationship with the benefit's purpose to be valid. In finding such a reasonable relationship the Court said:

> The fact of a beneficiary's residence abroad — in the case of a deportee, a presumably permanent residence — can be of obvious relevance to the question of eligibility. One benefit which may be thought to accrue to the economy from the Social Security system is the increased over-all national purchasing power resulting from taxation of productive elements of the economy to provide payments to the retired and disabled, who might otherwise be destitute or nearly so, and who would generally spend a comparatively large percentage of their benefit payments. This advantage would be lost as to payments made to one residing abroad.[133]

Regardless of the extension which the Court had to make to find a relationship that could be said to be reasonably connected to one of the major purposes of the social security system, the analysis shows the Court's concern with this test.

The most persuasive attack on durational residence requirements has relied

128 165 U.S. 150 (1897).
129 *Id.* at 155.
130 McLaughlin v. Florida, 379 U.S. 184, 191 (1964). For other examples where this test has been applied to classifications within statutes, see Loving v. Virginia, 388 U.S. 1, 11 (1967); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); Carrington v. Rash, 380 U.S. 89, 93 (1965); Morey v. Dowd, 354 U.S. 457, 465-66 (1957); Truax v. Raich, 239 U.S. 33, 42 (1915).
131 353 U.S. at 239.
132 *Id.* at 238-39.
133 363 U.S. at 612.

upon the reasonable relationship test.[134] Those who argue that one-year residence requirements violate the equal protection clause claim that such a waiting period has no reasonable relation to the purposes of AFDC. Given the express statutory purposes of AFDC legislation — namely public assistance to those in need, the maintenance and strengthening of family life, and the achievement of self-support and self-care[135]— the contention is made that it is difficult to see how withholding aid until an applicant has lived in a state for twelve months is consistent. In fact, the denial of aid until a year had passed could usually be expected to compound the evils which public assistance in this area is designed to alleviate.[136]

None of the purposes advanced by the states who were called upon to defend their durational residence requirements have satisfied the reasonable relationship test.[137] Purposes suggested have included: (a) prevention of the migration of paupers;[138] (b) protection of the state's fisc;[139] (c) provision for an objective test of bona fide residence;[140] and (d) administrative convenience.[141]

The first two alleged justifications — prevention of the migration of paupers and protection of the state fisc — are really two sides of the same coin. Neither, however, is acceptable. The equal protection clause requires that a state not discriminate against any of its residents on the basis of their economic condition.[142] In addition, the *Edwards* case, which rejected California's argument that it had to protect itself from the influx of paupers who were flooding the state during the Great Depression, forecloses the argument that a residence requirement is reasonable, in relation to the purposes of AFDC, because a state has a right to protect its fisc.[143] It is doubtful that any state today can claim that the threat to its purse, due to a vast immigration of welfare-seeking indigents, is as great as the threat to the financial stability of California during the 1930's.[144]

134 *See* cases cited in note 127 *supra.*

135 *See* note 52 *supra* and accompanying text.

136 Judge Fahy, in *Harrell v. Tobriner,* 279 F. Supp. 22, 27 (D.D.C. 1967), relying upon the findings of the President's Commission on Law Enforcement and Administration of Justice, as detailed in *The Challenge of Crime in a Free Society,* in an emotional acceptance of this view declared:

> Indeed, the denial of assistance for an entire year to otherwise qualified recipients may only erode values which the statute tries to promote. The spread over a year's time of the evils which public assistance seeks to combat may mean that aid, when it becomes available, will be too late: Too late to prevent the separation of a family into foster homes or Junior Villages; too late to heal sickness due to malnutrition or exposure; too late to help a boy from succumbing to crime.

137 *See* cases cited in notes 138-41 *infra. But see* Waggoner v. Rosenn, 286 F. Supp. 275 (M.D. Pa. 1968), where the three-judge court, in refusing to substitute their judgment for that of the legislature, upheld the one-year residence requirement on the basis that it "cannot be condemned as so lacking in rational justification as to offend due process." *Id.* at 278.

138 *See, e.g.,* Harrell v. Tobriner, 279 F. Supp. 22, 28 (D.D.C. 1967).

139 *See, e.g.,* Thompson v. Shapiro, 270 F. Supp. 331, 336-37 (D. Conn. 1967).

140 *See, e.g.,* Green v. Department of Public Welfare, 270 F. Supp. 173, 177-78 (D. Del. 1967).

141 *See, e.g.,* Smith v. Reynolds, 277 F. Supp. 65, 68 (E.D. Pa. 1967).

142 Three decisions are frequently cited for this proposition: Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966) (holding as unconstitutional Virginia's poll tax which conditioned the right to vote on payment of a fee); Douglas v. California, 372 U.S. 353, 356-57 (1963) (holding as unconstitutional the denial of an attorney to an indigent on his first appeal); and Griffin v. Illinois, 351 U.S. 12, 17 (1956) (holding as unconstitutional the denial of a transcript of trial proceedings to an indigent).

143 314 U.S. at 173-74.

144 In New York, however, problem of indigent in-migration is approaching serious proportions. In New York City alone it is estimated that ⅛ of the population of eight million people are on welfare. *See* TIME, Nov. 1, 1968, at 23.

In fact, many recent studies show that few people migrate for welfare.[145]

The second two purposes alleged to justify durational residence requirements — provision for an objective test of bona fide residence and administrative efficiency — have been similarly rejected as not reasonably related to the purpose of AFDC.[146] It may be contended that a one-year waiting period avoids payments tainted with fraud or based upon insufficient information. But whatever "efficiency" arguments may be legitimately advanced to support a waiting period for all applicants, regardless of the required length of residence, they cannot reasonably be used to support a provision denying benefits to all needy and otherwise eligible applicants who have resided in the state less than one year while benefits are granted to applicants similarly-situated who have resided in the state for more than one year. As the Supreme Court has held in analogous situations, "constitutional deprivations may not be justified by some remote administrative benefit to the state."[147] On the basis of this analysis, it is clear that the classifications made by durational residence requirements have been consistently held to violate the equal protection clause because they lack any legitimate purpose consistent with the purposes of AFDC.

C. The Statutory Construction Test

Another method of testing a challenge made to the conditions which are attached to benefits is the statutory construction test. This test determines the validity of a statute by deciding whether or not it conforms with the legislative intent or present legislative purpose behind the statute. Such a test can serve as a valuable "escape valve," particularly where the consequences of a decision based upon the earlier discussed tests might be undesirable or dangerously unpredictable.

The recent decision of *King v. Smith*[148] illustrates this. At issue was the validity of Alabama's so-called "substitute father" regulation which denied AFDC payments to otherwise eligible children if their mother "cohabited" with a man who was not obligated by Alabama law to support the children. The three-judge district court which heard the case had held that this "substitute father" regulation, denying aid to needy dependent children because of the immoral conduct of their mother, was an arbitrary and unreasonable classification, depriving the children of equal protection rights under the fourteenth amendment.[149] In affirming this decision, the Supreme Court avoided the reasonable

145 These studies indicate that people move instead for a complex of reasons, the most common relating to promises of employment and the presence of relatives in the state of in-migration. *See, e.g.*, J. LANSING, THE GEOGRAPHICAL MOBILITY OF LABOR (1963).

146 *See, e.g.*, Green v. Department of Public Welfare, 270 F. Supp. 173, 177-78 (D. Del. 1967); Smith v. Reynolds, 277 F. Supp. 65, 68 (E.D. Pa. 1967).

147 Carrington v. Rash, 380 U.S. 89, 96 (1965) (holding the administrative difficulties in determining the bona fide residence of servicemen did not justify denying them the right to vote). *See also* Harmon v. Forssenius, 380 U.S. 528, 542 (1965) (holding that administrative benefit did not justify requiring payment of a poll tax or filing of a certificate of residence as proof of bona fide residence).

148 392 U.S. 309 (1968).

149 277 F. Supp. 31, 41 (M.D. Ala. 1967). The court argued:

> The Alabama regulation directs that Aid to Dependent Children financial assistance not to be given to a class of children who meet the statutory eligibility requirements and that this financial assistance be denied for an arbitrary reason —

relationship test entirely, and, instead, chose to resort to the statutory construction test.[150] Tracing the history of AFDC legislation from its origin, the Court made three important conclusions: first, that Congress had not made the state's alleged interest in discouraging illicit sex a legitimate justification for disqualifying a child's eligibility for AFDC;[151] second, that the paramount goal of AFDC was the protection of dependent children;[152] and finally, that Alabama, in that its "substitute father" regulation defined the term "parent" in a manner inconsistent with § 406(a) of the Social Security Act, breached its federally-imposed obligation to furnish AFDC to all eligible individuals.[153] No finding of unconstitutionality was, therefore, necessary.[154] Clearly in this case, however, the Alabama regulation in question looked to the moral conduct of the mother in determining the eligibility of the children. Moreover, it appears possible that the reasonable relationship test could have been used to strike down the regulation.[155] But the Court shied away from deciding what type of behavior of a parent, if any, should preclude the receipt of aid by his children, and, instead, rested its decision on its construction of the federal and state statutes.

D. Moral and Economic Considerations

The new emphasis in conditions attached to welfare benefits is on rehabilitation,[156] and the big battle ahead is over what so-called rehabilitative conditions are legally permissible. Though these rehabilitative conditions are largely economic in that they are geared to getting recipients off the welfare rolls and on to payrolls, there has been a good deal of literature lately expressing a disdain for the attempts of legislatures and welfare officials to impose moral codes upon welfare recipients under the guise of economic rehabilitation.[157]

One of the classic examples illustrating the conditioning of welfare benefits by a moral code is *Wilkie v. O'Connor*.[158] Wilkie was a rather eccentric individual who insisted that he had a right to sleep under an old barn, in a nest of rags, access to which was possible only by crawling upon his hands and knees. On hearing of Wilkie's peculiar sleeping habits, the Commissioner of Public Welfare discontinued his old age assistance checks. An appeal that the old age

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the alleged sexual behavior of the mother; such a reason is wholly unrelated to the purpose of the Aid to Dependent Children statutes. *Id.* at 39.

150 392 U.S. at 312-13.

151 *Id.* at 325-27.

152 *Id.* at 325.

153 *Id.* at 333.

154 *Id.* at 313.

155 Justice Douglas, who concurred in the majority opinion, did resort to a constitutional test. He thought that the decision should have been based upon the grounds that the immorality of the mother had no rational connection with the needs of the children. *Id.* at 335.

156 *See, e.g.*, Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479, 480-81, 492-97 (1966); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443, 449-60 (1966); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, *supra* note 35, at 1246-57; Reich, *The New Property*, *supra* note 35, at 747-58; and Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1355-60 (1963).

157 Moral codes, in the context of moral conditions attached to welfare benefits, refer to the moral value judgments made by the legislature, *i.e.*, that welfare recipients should not misbehave sexually or, perhaps, that welfare recipients should work for a living like everyone else.

158 261 App. Div. 373, 25 N.Y.S.2d 617 (1941).

assistance should not be withheld was denied and Wilkie's argument that he had a right to live as he pleased while being supported by public charity was rejected in these words:

> One would admire his independence were he not so dependent, but he has no right to defy the standards and conventions of civilized society while being supported at public expense. This is true even though some of those conventions may be somewhat artificial.[159]

The court went on to add:

> It may possibly be true, as he says, that his health it not threatened by the way he lives. After all he should not demand that the public, at its expense, allow him to experiment with a manner of living which is likely to endanger his health so that he will become a still greater expense to the public.[160]

Actually, the court's rationale was based upon both a moral judgment and an economic consideration. And while it may seem appalling for the court to have denied Wilkie his old age assistance checks because he dared defy the social niceties of sleeping in a bed (the moral consideration), the fact that his unorthodox sleeping habits could so endanger his health that the state might well have been called upon to pay any resulting medical bills (the economic consideration) makes the decision much more palatable.

The same might be said of conditions attached to any welfare benefits. There is, for instance, more relevance in making the inability to work a precondition to AFDC benefits than there is in making good moral character a prerequisite for eligibility. Since the ultimate purpose of AFDC is really to help families who require temporary assistance to become self-supporting and independent, it is difficult to attack the validity of any conditions imposed which foster employment or employability of a parent with children on AFDC.[161]

Consider, though, the validity of a condition which requires a single-parent-mother who is unemployed and able to work, or unemployable but able to be trained, to work or take vocational training.[162] For the legislature to require her to take work or work training in order to become or remain eligible for AFDC involves, on its part, both a moral judgment and an economic consideration. The moral judgment is that single-parent-mothers ought to support their children by working rather than remaining at home to care for them.[163] The funda-

159 *Id.* at 375, 25 N.Y.S.2d at 619.

160 *Id.*

161 Today every state which accepts federal AFDC matching funds must guarantee the cooperation of its welfare department and public employment offices in seeking employment for AFDC parents, promise that it will terminate AFDC aid to parents who refuse without good cause to accept employment, and use its existing vocational education centers to make unemployable parents employable. 75 Stat. 75 (1961), as amended, 42 U.S.C. § 607 (1964).

162 *See, e.g.*, Stacy v. Ashland Co. Dep't of Public Welfare, 159 N.W.2d 630, 635 (Wis. 1968) (holding that the Wisconsin Welfare Department could require a divorced mother of two, trained as a nurse's aide under the Economic Opportunity Act, to accept employment outside the home as a condition to receiving AFDC benefits, without frustrating and preventing the fulfillment of the welfare program).

163 The 1967 amendments to the Social Security Act, making day care available to mothers with dependent children, are based upon the assumption that AFDC mothers have been outside of the labor force too long and that if adequate day care facilities are made

mental economic consideration is that the ultimate purpose of AFDC is to financially help the families receiving aid until they can become self-supporting and independent.[164]

The unconstitutional conditions test and the statutory construction test do not apply in determining the validity of this condition. No choice is required between AFDC or the loss of a constitutional right and there is no state statute in the hypothetical which conflicts with a federal statute. The validity of the condition must, therefore, be judged by the reasonable relationship test. If this test were to be applied taking into account the economic consideration involved, the court would most likely find the condition of employment or training to be valid. Yet by considering the implicit moral judgment there might be some doubt as to the validity of the condition. Since most of the current rehabilitative conditions attached to welfare benefits have both economic and moral overtones,[165] the application of the reasonable relationship test would be especially difficult to apply.[166] A court facing the economic and moral conflict in this type of situation would be forced to balance the individual interest involved against the public interest. The mother's interest as an individual is in choosing whether to work and support her children, or to stay home and have the state support them. The state's interest is in making the mother productive and self-supporting instead of dependent upon welfare. Viewed in this context it is likely that the court, in applying the reasonable relationship test, would uphold the validity of the condition and strike the balance in favor of the public interest.

V. Conclusion

Any attempt to determine the nature of the legal rights of the needy to public assistance must overcome many apparent obstacles before the precise legal issues become clear. Initially, a distinction must be made between the issues inherent in public welfare which the legal system is competent to handle and the issues that can be resolved only by the legislature — a distinction between issues of constitutional power and the wisdom of policy and adequacy of statutory structures. Secondly, it must be recognized that whatever right exists to public assistance, the context in which the right arises is fundamentally different from our more traditional legal rights. However, once it is grasped that the legal issues arise out of a conflict between the interest of the individual indigent person in receiving public assistance with a minimum of interference with his personal freedom, and the public interest, with its concern in both assisting the individual needy person and in reducing the overall level of poverty in the nation, the legal issues can be set out with some precision and constructively discussed.

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available, they can, through training and other services, be able to care for themselves and their families. *See* 1968 Manpower Report of the President 124.

164 *See* note 52 *supra* and accompanying text.

165 See the discussion regarding the imposition of moral standards on the poor in Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues, supra* note 35, at 1245-47.

166 One author has commented that "[r]ationality is not something that the courts can easily determine." O'Neil, *supra* note 156, at 468 (1966). He then lists a number of criteria to help the courts, but admits that these criteria will probably make an application of the reasonable relationship test even more difficult. *See id.* at 463-77.

Since any right to public welfare assistance must be traced to a statute which the legislature was under no legal compulsion to enact, the nature of the assistance that is made available is largely a matter of legislative discretion, and not subject to close judicial scrutiny. Consequently, the critical legal issue, and the issue which has been the subject of a major portion of the recent litigation, is the question of what conditions may constitutionally be imposed on eligibility for public assistance. It is apparent from the decisions that there are three possible tests which may be used to determine the validity of eligibility conditions for public welfare: first, the unconstitutional conditions test, which requires that the conditions placed on eligibility for public assistance must not force a person to choose between the assistance and the free exercise of a constitutionally protected right; second, the reasonable relationship test, which requires that the conditions placed on eligibility for assistance be reasonably related to the purpose of the statute under which the assistance is made available; and, third, the statutory construction test, which requires that state welfare statutes must be consistent with the purposes of the controlling federal statute.

These three tests constitute a portion of what might be termed the doctrine of statutory entitlement, which was succinctly expressed by the district court in *King v. Smith:*

> [A]id to Dependent Childen financial assistance is a statutory entitlement under both the laws of Alabama and the Federal Social Security Act, and where the child meets the statutory eligibility requirements he has a *right* to receive financial benefits under the program.[167] (Emphasis added.)

Thus, a needy person has an enforceable right to financial assistance from the government when he meets the statutory eligibility requirements of the welfare program to which he applies. These eligibility requirements, in turn, are the appropriate subject matter for judicial scrutiny via the application of the three tests outlined in this Note.

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167 277 F. Supp. 31, 38 (M.D. Ala. 1967), *aff'd,* 392 U.S. 309 (1968).