BYU Law Review

Volume 1985 | Issue 2 Article 1

5-1-1985

The Uncertain Quest for Welfare Rights

Richard A. Epstein

The Uncertain Quest For Welfare Rights

*Richard A. Epstein**

I. The Rise of Transfer Payments

The growth of government is an oft told tale, and nowhere is that growth more pronounced than in the expansion of government transfers of money, goods, and services to persons in need. These transfers rest on the presupposition that all individuals have a right to personal welfare. This asserted welfare right is typically defined as the right to receive "any form of assistance—monetary payment, good, or service—provided to an individual because of his or her need."[1] The definition does not resolve all concrete cases. It is often difficult to determine in individual cases whether a payment is a pure transfer payment, as opposed to compensation for services rendered, or a payment under a scheme of social insurance, in which the transferee has previously paid market value for the benefits received.

These questions of classification, while important, should not be allowed to conceal the historical trend. Today transfer payments encompass a large array of programs, including aid for dependent children, food stamps, medicaid, jobs, and housing allowances, and have become a staple of American life.[2] In the

---

* James Parker Hall Professor of Law, University of Chicago. This paper was originally delivered on January 17, 1985, as a speech at Brigham Young University, in celebration of the Bicentennial of the Constitution. It has been revised extensively for publication. I would like to thank Gary Bryner, Ronald Heiner, Jim Kearl, Jennifer Nedelsky, Cass Sunstein, and the late Jan Tumlir for their valuable and instructive comments on an earlier draft of this paper. I also benefited from a workshop discussion at the Woodrow Wilson School, Princeton University in February 1985. Sharon Epstein and Matthew Hamel provided able research assistance.

1. C. Wellman, Welfare Rights 30 (1982).

2. One marginal case is social security. When combined with a regressive tax structure, social security has both insurance and welfare components. As a result, including social security in this list of need-based benefits would be controversial, and for the purposes of the more general argument it is not critical whether it is included. This paper focuses on the justification for welfare rights, not on the classification of different programs. In general when I speak of transfer payments I mean those that are geared to need, and thus, for convenience, I exclude other types of transfer payments, such as crop subsidies, which are purportedly justified on other grounds, which I think are wholly insufficient in principle.

short run it is possible to detect decreases in the level of government transfer payments, as some of the Reagan administration's cuts since 1981 reflect. But the long-run growth of government transfer programs of all sizes and descriptions remains one of the major developments of the post-World War II period.[3] There is no hint that the recent cuts have returned transfer payments to their level when John F. Kennedy became president.

II. The Search for a Theory

Given the size of the national commitment, one might suppose that a strong and clear theory justifies the extensive system of transfer payments. But the truth is otherwise. The theoretical justification for the welfare rights behind transfer payments is still lacking. The obvious challenge to need-based transfer payments is that they are coercive actions whereby the government assumes the role of Robin Hood, taking from the rich and giving to the poor.[4] No one disputes that individuals are entitled to

---

3. For some indication of the growth in these programs, see C. Murray, Losing Ground 14 (1984):

> The period we will cover, 1950 to 1980, saw extraordinary changes in the nature of those transfers. Consider just the money, on just the core programs—federal social welfare expenditures in 1950 alongside 1980, using a constant, official definition and constant dollars as the basis for the comparison:
> - Health and medical costs in 1980 were six times their 1950 cost.
> - Public assistance costs in 1980 were thirteen times their 1950 costs.
> - Education costs in 1980 were twenty-four times their 1950 cost.
> - Social insurance costs in 1980 were twenty-seven times their 1950 cost.
> - Housing costs in 1980 were 129 times their 1950 costs.
>
> Overall, civilian social welfare costs increased by twenty times from 1950 to 1980, in constant dollars. During the same period, the United States population increased by half.

A similar tale is told in Gwartney & McCaleb, *Have Antipoverty Programs Increased Poverty?*, 5 Cato J. 1 (1985). One key point is that the percentage of the population below the poverty level decreased sharply in the years before the modern expansion of welfare programs began in 1965, and only slightly thereafter. *Id.* at 1-2.

Another recent measure of the growth of transfer payments suggests that the leval of transfer peyments as a percentage of personal income in the United States has increased from 3% to 14% over the past 30 years. Pechman & Mazur, *The Rich, the Poor, and the Taxes They Pay: An Update*, 77 Pub. Interest 28, 29 (1984).

4. *See* Chapman, *The bishops and the economy*, Chicago Tribune, Nov. 15, 1984, § 1, at 22, col. 4. Chapman says:

> But the bishops are not satisfied with trying to stimulate greater charity by their parishioners. They also insist that the government forcibly redistribute income from the affluent to the poor: "Society has a moral obligation . . . to ensure that no one among us is hungry, homeless, unemployed or otherwise denied what is necessary to live with dignity." They tolerate no dissent: "There can be *no legitimate disagreement* on the basic moral objective" (emphasis

make voluntary charitable contributions. But it is a different matter when some people try to fund their gifts with cash taken from their neighbor's pockets. Robin Hood was a bad man with good motives. By analogy, government welfare programs are bad institutions with good motives.

To overcome this simple objection, some theory must bridge the gap between giving property to those in need and taking it from others. This task is more formidable than it sounds because the gap must be closed without imperiling the rights structure that makes it possible for individuals and society, through the labor of individuals, to generate the wealth necessary to fund the desired transfer payments. The common law rests on a long tradition that speaks of rights to individual liberty, to private property, and to freedom of contract. Common law doctrines respond powerfully to demands for personal liberty and economic productivity.

The defenders of welfare rights must decide how to respond to a simple dilemma with respect to both personal liberty and private property. On the one hand they could argue that welfare rights are paramount to common law rights. But then they must explain why welfare payments are more important than prohibitions against murder, rape, and theft. I think this solution is too extreme for anyone to accept, for reasons that go both to its practical implementation and its basic coherence. On the transferor side, how could a system of taxation ever be implemented when basic property rights and personal liberties are left wholly insecure? On the transferee side, how can providing transfer payments improve the position of their recipients if these core common law prohibitions are not respected? It would be an odd system indeed that tolerated taxation for redistribution, but that provided welfare recipients with no protection, either for the money received or for the things it purchased, against criminal depredations. Redistribution on the basis of need presupposes some respect for the prior distribution of common law rights.

---

added).

Apparently they confuse Jesus Christ with Robin Hood. In his most dramatic statement of the Christian's charitable obligations, Jesus tells a rich young man to "sell what you possess and give to the poor" (Matthew 19:21). The bishops would tell the young man not only to sell what he has, but also to confiscate his neighbor's property and give it to the poor.

Id. (quote is from a bishop's pastoral letter).

Alternatively, defenders of welfare rights could admit the primacy of common law rights, and argue that the system has enough "give" to admit welfare rights. This solution seems more promising. But I hope to show that it does not yield the desired result. In the end the principles of political obligation make it difficult to reconcile traditional common law rights with welfare rights that many desire to engraft on those common law rights. This is true whether the argument relies upon deontological theories of individual rights, on consequentialist theories of social utility, or on any of their major variants and combinations.

This is not to say that claims based upon need do not have some special status. However, I think the once common view that treated help for the needy as an "imperfect obligation"[5] uneasily captures the proper position. Caring for the poor and needy is not simply another consumption choice, on a par with the preference for chocolate over vanilla ice cream. If it were, any explanation for the substantial charitable, religious, and relief effort observed over the centuries would be incomprehensible.

The traditional common law view on entitlements reflects the distinction between legal and imperfect obligations. It treats legal obligations as enforceable by the government, but regards imperfect obligations as the subject of charity, to be enforced by an uneasy mix of private conscience and social sanction. There is no legal cause of action for the want of benevolence. The nub of the argument to support this division of labor turns on the question of costs. Common law rights can be enforced at acceptable costs while welfare rights cannot. One can assume that the moral case for making some welfare payments is compelling, yet the moral case for the legal enforcement is not, once the transaction, incentive, and political costs are identified and weighed. This paper first addresses the asymmetry between common law rights and welfare rights in order to explain why welfare rights are properly included in the class of imperfect obligations. The paper then addresses whether any standard of social welfare is in principle sufficient to account for legal protection of welfare rights, and concludes that no standard is equal to the task.

---

5. This view, for example, was held by Joseph Story. *See, e.g.*, Story, *Natural Law*, in ENCYCLOPEDIA AMERICANA (F. Lieber ed. 1836), *reprinted in* J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 313 app. (1971).

The question of welfare rights is not just a question of first principles. Thus, the final section of this paper reexamines the status of welfare rights on the assumption that we do not write on a blank slate. The inquiry is transformed into a rough mix of principles and pragmatics. We must consider what concession theory must make to take into account that government has rarely observed the limitations upon its power that a sound common law theory of obligations would suggest. The persistent pattern of deviation from proper legal principles offers the best grounds for a qualified defense of welfare rights. All too often government has been the oppressor of the poor and the needy. The problem of undoing past errors necessarily brings to the fore the "second best" issues that are always the hardest to answer. In fashioning the appropriate strategy, the danger always exists that groups insistent upon turning state power to private advantage will take over control of the government. It is therefore necessary to develop the simplest strategies for reform to limit the abuse that is so often the byproduct of untrammelled discretion. On balance no approach will provide the universal solvent. Still I believe the best overall strategy is to attack head on the direct economic restraints upon the creation of wealth and then reduce the level of transfer payments as this process continues.

III. Welfare Rights: The Case from First Principles

As a general matter of political theory, the strongest defense for welfare rights would assume that they are a necessary component of any just society, and as such are entitled to equal dignity with the usual array of property, contract, and tort rights traditionally defended by the common law. A closer look at the principles of legal control, however, indicates that the case for welfare rights cannot be established on first principles alone.

A. Rights and Their Correlative Duties

A right is like one pole on a magnet. As the north pole must have its south pole, so any right has a correlative duty. Deciding whether to recognize welfare rights in principle requires a complete specification of all individual rights and their correlative duties. Conferring enforceable rights upon certain individuals imposes correlative duties upon others, which must be defined and enforced.

The importance of correlative duties rests not only upon the elegance of legal theory, but also upon two fixed facts of the external world: scarcity and self-interest. These two facts are intimately related, as scarcity gives birth to self-interest. In combination, the two drive evolutionary biology and through it ordinary human interaction.[6] A world without scarcity is like a game of poker with free chips: all bets are off. Any social choice becomes acceptable because it is always possible to satisfy one person without inconveniencing or incurring the wrath of another. Without scarcity, it is *always* possible to make someone better off without making someone else worse off. Who could oppose welfare rights in such a world?

Self-interest is a feature of our common humanity often ignored in analyses of welfare rights.[7] Yet only when self-interest is taken into account does the assignment of entitlements become critical and the possibility of sacrifice real. Why be egoistical if one has nothing to gain, which is the case in the absence of conflict for food, land, or affections? Ignore scarcity, and our imagination alone guides both present and future. Recognize scarcity, and the entire enterprise of normative theory becomes a responsible effort to define the permissible scope for self-interest when some claims must go unsatisfied.

Scarcity cuts across generations and cultures. Some historical writers are wary of general accounts of human nature because of the contingent and nonrepetitive nature of historical events.[8] This point is well taken when the question is how a Caesar, Napoleon, or Hitler influences the course of international affairs. But it has far less force when the question is what consequences follow when, in the day-to-day operation of a society, one set of laws and institutions are adopted in preference to another. History may be contingent in the sense that no logically

---

6. For the connection, see, *e.g.*, Hirshleifer, *Economics from a Biological Viewpoint*, 20 J. LAW & ECON. 1 (1977).

7. *See, e.g.*, C. WELLMAN, *supra* note 1, and Peffer, *A Defense of Rights to Well-Being*, 8 PHIL. & PUB. AFFAIRS 65 (1978), where the point is not even mentioned when extensive claims for welfare rights are made. Political and moral philosophy flounders without some descriptive theory about how individuals will behave in response to the incentive structures that legal rights create. "Ought implies can" is an old statement of moral philosophy that must be remembered in this context.

8. For an example of such thinking in the legal setting, see Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981). For my antihistoricist views about legal doctrine in general, see Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1980).

necessary truths drive human behavior. But it is not contingent in the sense that no regularities govern human interactions. The comparative study of legal institutions speaks more eloquently of the similarities across cultures and ages than it does of the subtle doctrinal differences separating them.[9] The Romans' discussions of fine points of contract and tort law are understandable and relevant to the thinking of lawyers today. Neither Roman society, modern society, nor any other society could make sense of legal rules that fail to recognize crimes, torts, and contracts.

Similarly, the analysis of individual behavior and the importance of incentives based upon personal gain and loss, reputation, and affection are a constant across time. Transactions with strangers are different from those within an immediate or extended family. To ignore certain universal tendencies is to insist not on a careful historical analysis of the relevant social forces, but on a form of perpetual ad hocery that destroys understanding. One might always argue that the theoretical truths of one day are irrelevant to the next. But until the proposition is concretely demonstrated it invites armchair skepticism and not historical understanding. The arguments that follow trace out the universal implications of scarcity and self-interest, and identify certain powerful tendencies which all societies must tame to survive and flourish.

Within this framework, the following proposition becomes a working first principle: No legal or political theory of rights is acceptable if it fails to generate rights and duties consistent with the limited resources that must be generated to satisfy them. As a necessary corollary, levels of production cannot be regarded as constant, independent of the scheme for distributing the goods produced. Yet this error is committed whenever the question over welfare rights is stated, "Who should get what from a stock of existing goods?"[10]

B. The Right to Life: What Correlative Duty?

We can now pay closer attention to the theory of welfare

---

9. With reference to the Roman Law, I have discussed some of these points at length in Epstein, *supra* note 8.

10. *See, e.g.*, Peffer, *supra* note 7, at 69 (relying upon McCloskey, *Rights*, 15 PHIL. Q. 115 (1965)). The error is also apparent in the position of the bishops, attacked by Chapman, *supra* note 4.

rights. Many of those who defend welfare rights begin by presenting a categorical right to life that suppresses the question of correlative duties. An instructive passage by McCloskey reads as follows:

> My right to life is not a right against anyone. It is *my* right and by virtue of it, it is normally permissible for me to sustain my life in the face of obstacles. It does give rise to rights against others *in the sense* that others have or may come to have duties to refrain from killing me, but it is essentially a right of mine, not an infinite list of claims, hypothetical and actual, against an infinite number of actual, potential, and as yet non-existent human beings.[11]

The above argument is the entering wedge for welfare rights. Once a categorical right to life is stipulated, denying any person the items needed to vindicate that right is difficult. If one has a right to life, he has a right to be supported in time of need—a welfare right. But from the vantage point of correlative duties and their costs, a powerful distinction exists between the narrower common law right to life and the broader right to life McCloskey envisioned. At common law the correlative duties are ones of nonintervention. Under the broader welfare rights, the correlative duties are ones of affirmative support. The distinction between these two concepts is critical.[12]

Envisioning a world in which each person has a duty not to kill or maim his neighbor is easy. In principle, all persons can comply with the commands of the law, wholly without regard to their initial wealth or natural endowments. As each person can keep his own, but cannot take from another, all persons and things are governed by a unique, well-defined, and complete set of rights and duties.

Voluntary transfers do nothing to upset the balance. Persons only undertake obligations they think they have a fair chance of discharging, and when they do not undertake the obligation, the other party must bear his own loss and obtains no legal entitlements against the world at large. In this legal universe, the government's role is to enforce these contract and property rights. But that role is bounded, as no one is placed at

---

11. McCloskey, *supra* note 10, at 118.

12. It is critical in speaking about other areas as well. Freedom of speech is a constitutional virtue, but the correlative duty is noninterference by government. The freedom does not confer the right to a subsidy from government funds, raised by taxes on others who may disagree with the message of the speech so subsidized.

risk of being subject to affirmative obligations to some other undefined person in the original position. Before public force can be brought to bear against any individual, he must *act*, be it by aggression, misrepresentation, or promise. This act requirement serves as a filter that reduces the number of situations for which legal redress is appropriate. The transaction costs of this world are not trivial, but they are clearly bounded.

Conceiving of a world in which each person has in the original position an obligation to preserve or support the life of his neighbor is more difficult. At a theoretical level, individual obligations will systematically and necessarily conflict with each other. Moreover, no one can guarantee that all the obligations imposed can be simultaneously discharged from the available resources. If the burdens upon the fortunate are miscalculated, the obligations created could exceed, in the aggregate, the productive resources available to satisfy those obligations. The stability of the original position is not guaranteed as it is in the common law universe.

Furthermore, the minimum level of enforcement activity required of the legal system can be very high. No act requirement exists to serve as a threshold of individual aggression or individual promises that must be crossed before government power is invoked. The transaction costs of this system are enormous, because government must intervene before any person deviates from an appropriate course of conduct. The system falls of its own weight, for rights and duties cannot be brought into equilibrium, theoretically or practically.

The radical disparity between these two visions of the right to life is not overcome by treating categorical rights to life as only prima facie, to be overcome in proper strong circumstances.[13] The notion of prima facie rights is congenial to the common law system in which the correlative duty to the right to life is the duty not to harm. Consent aside, persons forfeit their rights to be free of interference when they interfere with the like rights of others. Self-defense is one example.[14] The use of force justifies the victim or those who come to his aid in using force against the aggressor.

In sharp contrast, one cannot overcome the presumption

---

13. *See, e.g.*, Peffer, *supra* note 7, at 75-76.

14. I have talked about the limitations on self-defense in Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 410-20 (1975).

generated by the broader conception of the right to life solely by looking at the aggressive conduct of its bearer. Transfer payments are not tied to past conduct. Instead the entire debate, with or without the presumption, still can be resolved only by resorting to some undefined calculation of relative need. The ordinary *pairing up* between victim and wrongdoer so congenial to the common law[15] has no place in a world with a general right to life. Without the obvious correlative duty, there is no particular target, no single obvious neighbor, who must satisfy any particular person's needs. Of necessity, the comparative equities to resources must be more broadly based. I may be entitled to take something from somebody, but it may not be from you. Private takings are suppressed only for the violence they invite, but government takings are put in their place to benefit those not allowed to take for themselves.

Any system of welfare rights thus demands elaborate and expensive pooling arrangements for allocating resources. Yet aggregating individuals into common pools must not be allowed to obscure the central point. Someone must still take from someone else, even if third parties mediate the transfers. The accounts must be still be balanced, just as, in principle, any budget must be balanced. The shift from private lawsuit to government action obscures the linkage between rights and correlative duties, but it does not eliminate the problem correlative duties create.

All of this is not to say that a theory of negative rights is not complex. As McCloskey notes,[16] complexity is guaranteed because negative rights must run to and against all persons, both present and future. Yet that is not an objection to the common law view. In fact all rights against killing and maiming assume the form of negative rights. Consequently, what looks like the undisputed core of the right to life dissolves into a network of bilateral relations.

An example from legal theory explains this web of negative rights. Legal theorists often distinguish between rights in personam and rights in rem. Translated literally, this might mean

---

15. Indeed, much of my own writing on the law of torts uses the system of presumptions to give successive approximation to the proper legal position of the parties in a common law universe. *See* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

16. *See* McCloskey, *supra* note 10.

that certain rights, such as contract rights, are good only against individuals while other rights, such as property rights, are good only against things. Yet the Latin shorthand should not obscure the frequently made point that, whatever their pedigree, all rights are against persons.[17] Once this is recognized, the key distinction between rights in rem and rights in personam lies in the mode of creation. Rights in rem are, as lawyers are wont to say, "good against the world" because they refer to property rights that owners acquire, by first possession or by grant from a prior owner. Rights in personam typically are against a defined person or persons with whom the owner of the property right has contracted. Only the owner, not the rest of the world, has a duty to convey the land sold. The rest of the world has only a negative duty not to obstruct the conveyance.

The complex structure of rights in rem does not, however, impose correlative duties that are expensive to enforce. Only in the infrequent case when these rights are violated does ordinary legal action ensue. The right in rem is important because it establishes a framework in which social governance is possible. In a world with large numbers of self-interested individuals, each with separate goals and ambitions, systems of property rights grow up because actual, even tacit, consent is not a foundation for social obligations. The classical common law right in rem is a way to organize human interaction by easily observable rules when voluntary contract is impossible.

IV. The Social Criteria For Welfare Payments

A. The Benefits and Burdens of Welfare Rights

Enough has been said to indicate the powerful disparity between welfare rights and ordinary common law rights against interference by force or fraud. It is now necessary to determine whether a system of welfare rights can be engrafted upon the system of common law protections that are indispensable for any organized society.

---

17. See W. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning 67-75 (1919) for his discussion of "paucital" and "multital" relations, designed to capture the distinction between rights in personam and rights in rem. The weakness in Hohfeld's argument was that he did not understand the substantive reasons why a complete legal system must have rights of both property and contract that are created in very different ways.

1. Piercing the government veil

In a world of scarcity, all rights have correlative duties. Moreover, these duties always run against other individuals. This point may seem at first to be modest: an objection to the metaphysics of abstract entities that has brought so much of traditional philosophy into disrepute. But in practice the failure to grasp its centrality has often led political theory astray.

Writers are tempted to speak of aggregates while suppressing reference to the individuals that compose them. It is very common in ordinary discussion to speak of the obligations of corporations to the public at large, their shareholders, or their customers. In the heat of political campaigns one hears that "corporations do not pay their fair share of taxes," or that "corporations are made the whipping boys for failed social programs." Yet in each case the corporation stands for some group of individuals who have elaborate obligations to each other under a network of contracts. Therefore, to support the claim that corporations do not pay their fair share of taxes one must show, by some independent social standard that has nothing to do with corporations, that the individual shareholders who benefit from certain tax regimes escape their fair share of taxes, directly or indirectly.

The same linguistic clarity is required in speaking about the public at large or the government. It is a convenient, but misleading, shorthand to say that government funds welfare rights. What is necessarily meant is that certain individuals invested with state power tax from some and pay to others. Saying that funding welfare rights does not fall on individuals violates the scarcity assumption. A system of welfare payments without taxation is the social equivalent of a perpetual motion machine.

Yet to speak of taxes only scratches the surface of the problem. Most individuals are simultaneously benefited and burdened by welfare programs. They must contribute to programs from which they are, in principle, eligible for benefits. As everyone is on both sides of the transaction, it is tempting to say that legal rights and duties related to welfare programs are a giant wash. Empirically this claim is very odd because, if true, it renders unintelligible any political defense of or attack on welfare programs. Analytically the claim is also incorrect. People are not indifferent to transfer programs because the rights and duties they create are *not of equal value* to all participants. Some gain more than they lose, and others lose more than they gain. Gain-

ers will tend to support the program, and losers will tend to oppose it.

Two reasons explain why benefits and burdens are not of equal value. First, all individuals do not bear the same percentage of the obligation that they bear of the right. As a result, when rights and duties are netted out, each person may have some residual benefit or burden. Ninety percent of a $1000 burden is not offset by ten percent of the parallel benefit, and the net $800 ($900 - $100) transfer exceeds the outright confiscation and transfer of a $500 item. The ability of these non-pro rata transactions to implicitly redistribute wealth lies at the heart of concern with the law of both corporations and government. Implicit redistribution bears heavily on the theory of welfare rights.[18]

Second, the benefits conferred may not take the same form as the costs imposed. Cash may be taken and in kind benefits may be returned. In kind benefits have different values to parties who receive them under a uniform scheme. Parties who value the benefits in excess of the cost will be net winners. Parties who do not will be net losers. The net transfer may be disguised, because everyone is both a transferee and a transferor, but viewed as a comprehensive plan, the net shifts are real. The social security system has a formal equality of benefits and burdens, but net benefits, which depend heavily upon age, introduce a massive wealth transfer from the younger to the older generation.

Two further elements must be introduced to make sense of transfer programs. The first is the idea of the baseline or original position. The second is the tripartite distinction among positive sum games, negative sum games, and zero sum games.

2. *The baseline for fair exchange*

In order to determine who wins, who loses, and by what amount, through government action, the point of departure for the process must be known. Finding the first yardstick lies behind the account that Locke, for example, gives to natural rights of person and property. Without knowing the haseline it is very

---

18. For an exhaustive account of the problems with non-pro rata government programs, see R. EPSTEIN, TAKINGS: PRIVATE PROPERTY UNDER THE POWER OF EMINENT DOMAIN (1985) (note especially chapters 14-18) [hereinafter cited as TAKINGS]; *see also* Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOODE HALL LJ. 433 (1982).

difficult to determine how much compensation, if any, is owed when new rights are created and old ones are destroyed or limited. Without knowing what people have as of right, determining what they have gained or lost through government action is impossible.

Within the common law system, two premises dominate: the belief in self-ownership and the proposition that ownership in external things is acquired by first possession. Together these premises establish a uniform baseline from which subsequent calculations can be made. One problem with this theory is that even though there is a gap between "is" and "ought," no natural necessity requires an assignment of rights to close that gap. This objection is, in one sense, so strong that it precludes all normative argument about rights,[19] including welfare rights.

The point here is critical. If one could argue, for example, that all mankind owned the fruits of the earth in common, then redistributive taxation would lose much of its sting. The system of taxation would no longer be designed to take from some to give to others. Instead it would only *return* to people at large those things they owned in the first instance. To take a line from Finnis: "For in establishing a scheme of redistributive taxation, etc., the State need be doing no more than crystallize and enforce duties that the property-holder *already* had."[20]

Yet here the argument depends critically upon two assumptions. First, some or all original entitlements were held in common by, or at least for the benefit of, all present and future generations. Second, taxation in fact only returns to the common pool compensation to the public for what individuals bave taken from it. Once it is conceded that no necessary truth exists in the common law rules of self-ownership and first possession, then the inquiry turns from the past to the future. The important question becomes what system of rights will promote the welfare of all individuals present and future?

On this score one clear utilitarian weakness of collective ownership is that it creates serious problems for managing resources. If individual talents are still individually owned, then claims of redistribution only run to the value of natural resources, whose value in their original condition is very small

19. For an elaboration, see Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

20. J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 187 (1980) (emphasis in original).

compared to the privately owned labor used to develop them. The pool available for redistribution, even to people in need, is small. On the other hand, if talents are not individually owned, but are held in some kind of Rawlsian common pool, then the scope for permissible redistribution becomes much greater because all resources are necessarily collectively owned.[21]

Nonetheless, any system that places either natural things or human talents in the common pool has serious utilitarian disadvantages. The collective ownership structure necessarily created by such a system makes determining who has control over the rights in question very difficult. If some collectivity can control common goods by taxation, then it can regulate the use and disposition of those goods as well by whatever devices it has at its command. Since no single person has clear title to any particular resource, individual efforts to sell property necessarily will be thwarted. The net effect is that any effort to equalize endowments of overall talents will materially shrink the overall level of wealth and satisfaction those talents can create.

In sharp contrast, the common law private property system has powerful utilitarian virtues. The common law system sets the stage for positive sum transactions by endowing all individuals with a set of well-defined rights they can then exploit by use or by transfer to others.[22] The rule of first possession thereby benefits those people who are *not* able to obtain natural resources out of their unowned condition. In addition to their own labor, they have enhanced opportunities for exchange to offset the losses created by failure to obtain original acquisition. The question is whether the value of these opportunities for contracting equal or exceed the value of the right to claim natural resources, which have all been taken by others. The answer is, to

---

21. See J. RAWLS, A THEORY OF JUSTICE (1971), in which the constant theme is that natural differences in talent are morally arbitrary. Thus Rawls notes: "Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view." *Id.* at 72. The arbitrary factors include both natural and social contingencies, and "the cumulative effect of prior distributions of natural assets—that is, natural talents and abilities." *Id.* Even if this system of natural liberties is enhanced by a system of equal access to opportunity, Rawls still believes it is imperfect, for "even if it works to perfection in eliminating the influence of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents." *Id.* at 73-74. It is the effort to overcome the natural distribution that creates the common pool of human talents and its attendant political difficulties.

22. *See, e.g.*, Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321 (1985).

some extent, speculative, but it seems highly likely that the gains to the later generation exceed their costs. A system of well-defined private rights increases the resource base, which redounds to the benefit of latecomers as well as early risers. Emigrants often abandon property in corrupt societies to pay for the opportunity to work in freer societies. They make the judgment, with their feet, that a system of private rights benefits latecomers by offering enhanced opportunities to dispose of labor.

3. Positive, negative and zero sum games

How can a system of welfare rights be engrafted onto this common law structure? In part it is done by arguing that it is permissible for rights to conflict.[23] But once contradiction is admitted into the system, how is it to be resolved? At this point the defense of welfare rights depends upon some more powerful theory that coordinates the two sets of rights.

One convenient way to analyze departure from the common law baseline is to resort to game theory and social choice models. A "game" is a set of moves, as defined by the rules, that each player makes with a set of endowments from a given initial condition. It could be the moves in a game of chess or it could be the prices at which goods or services are offered for sale in the market.[24] A positive sum game is one in which the total utility, or wealth, of the separate players is increased when the game runs its course. A negative sum game is one in which the total utility, or wealth, of the separate players is decreased. A zero sum game is one in which the total utility, or wealth, is constant, even if the size of some or all players' shares change.

The distinction between these three types of games is critical for understanding the theory of rights. It suggests that only those collective moves that result in positive sum games should be allowed to vary baseline common law rights. The most obvious illustration of a collective move that should be allowed is government taxation or regulation to provide collective goods that market action could not generate because of transactional

---

23. *See* C. WELLMAN, *supra* note 1, at 111-12.

24. As an illustration see, *e.g.*, Roth, *The Evolution of the Labor Market for Medical Interns and Residents: A Case Study in Game Theory*, 92 J. POL. ECON. 991 (1984).

difficulties. Forming government to control internal, and combat external, aggression best illustrates a positive sum game.[25]

The analogies can go further. They can cover public roads and a system of courts. Since all persons benefit from these institutions, taxation that requires all persons to pay their pro rata share is wholly appropriate. This is true even if, as the endless battles over government contracts show, enormous care must be taken to control corruption. Other government initiatives, such as some restrictions on monopoly behavior, are also plausible under this view, given the economic models that point to the real possibility of social loss from voluntary contractual restrictions upon competitive behavior.

If welfare rights are not meant to displace rules that govern theft, murder, and contract generally, then the strongest argument for their social creation is that they generate positive overall utility or wealth, which rich and poor alike can share. The absolute nature of the original common law entitlements is replaced by a rule that says the rights so created may be removed, hut only if rights of equal or greater value are given in their place.

Arguments that welfare rights fall into this mold are often made. They are attractive because they blunt the charge of theft, not by asserting that welfare restores rights to some original common ownership, but hy assuring compensation is paid to the putative victims of the government programs. In effect the argument is that welfare rights are acceptable because they are Pareto superior, leaving all parties better off than they would be in a world in which welfare rights are banished.[26] Nonetheless, such arguments fail on economic grounds.

B. Welfare Rights as a Negative Sum Game

Wellman, in his book on welfare rights, offers a defense that takes this form. In defending Aid to Families with Dependent Children (AFDC), Wellman argues that it is a positive sum game in which all players end up with some share of the social gain.

---

25. I develop this theme at great length in connection with the eminent domain clause, in TAKINGS, *supra* note 18; *see also* Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984).

26. For a review of Pareto superiority and Kaldor-Hicks (hypothetical compensation) tests, see Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649 (1984).

> No elaborate argument is needed to show that it is much much better for these individuals to have nourishing food rather than nothing or very little to eat, decent housing rather than unheated and unsanitary shelter, if any, etc. The primary utilitarian case for making it a duty to pay AFDC is the tremendous good achieved for the recipients by the payments of the welfare agency. . . .
>
> In addition to the direct benefits for the individual recipients, a program of acts paying AFDC probably indirectly benefits our society as a whole by helping to solve some of our most serious social problems.
>
> . . . Giving aid to dependent children will help solve the problem of underconsumption. Our society is prone to economic stagnation, recession, and even depression because the goods and services we produce are not purchased in sufficient quantities. Although dependent children desperately need many of these goods and services, their need cannot be translated into economic demand unless they have some source of income. Financial aid to dependent children is an efficient way of putting purchasing power where it will be used to stimulate our economy, maintain production, and reduce unemployment.[27]

Wellman also makes parallel arguments for undereducation and ill health.[28]

The central point of the argument is that welfare rights under the AFDC program are, at least as to groups, Pareto superior to a pure common law world. Stated otherwise, hoth payors and recipients of AFDC benefits are better off by the operation of the program, even if transferees get a larger fraction of the gain than transferors. At the very least the argument is overgeneral. It may explain why the optimal level of welfare payments is not zero, but it does not provide any reason why there should be an upper bound on transfer payments, or how that bound might be determined. If one billion dollars in transfer payments feeds the hungry and stimulates the economy, then two billion should be even more beneficial. In the extreme, therefore, why not devote the entire budget to welfare expenditures?

An endless expansion of welfare rights is only a dream because other factors, not mentioned by Wellman, account for the

---

27. *See* C. WELLMAN, *supra* note 1, at 65.
28. *Id.* at 65-66.

nonlinear relationship between overall social welfare and transfer payments. Wellman has demonstrated only that recipients of benefits are better off than they were before. However, to justify welfare payments as Pareto improvements, one must show a connection between the payments and aggregate levels of social welfare. To show that connection, one must demonstrate that the *payors'* indirect benefits exceed their direct costs.

The argument becomes more tenuous when we look at the asserted relationship between underconsumption and social ills. By definition, any welfare benefit is a transfer payment. The benefit may increase the purchasing power of the persons who receive it, but this gain is offset by a loss in the purchasing power of the persons taxed to fund the transfer payments. Simple transfer payments do not increase or decrease consumption. If underconsumption is a problem without welfare rights, then it remains a problem with welfare rights.

Wellman's basic point might be saved by noting that the poor have a greater tendency to consume at the margin than the rich. But the welfare implications of the point remain problematic because increased consumption is purchased at the expense of reduced overall levels of saving and investment. This reduction in turn reduces levels of production and consumption in the next generation, with its own welfare recipients. The empirical tradeoff between investment and consumption does not change the basic point: *ex nihilo nihil.* No system of transfer payments can increase the amount of basic resources.

Thus far my criticisms of Wellman treat welfare payments as a zero sum game. I have assumed benefits to recipients are exactly balanced by costs to payors. However, this conclusion is overly optimistic. At least as to wealth, transfer payments more likely create a negative sum game.

First, administrative costs of the welfare system do not benefit recipients. Taxes must be collected and benefits must be paid out. Both of these undertakings are very expensive. Any resort to a system of progressive taxation implies higher marginal tax rates. Higher marginal tax rates create stronger incentives to conceal income from taxing authorities. Government officials must then take more powerful countermeasures. Furthermore, any system of transfer payments requires some determination of eligibility and benefit levels. The net worth of current recipients must somehow be assessed to operate the program, even under a negative income tax program. These

problems could be minimized by a well-run government operation and by clear statutes. However, government operations are seldom efficient and statutes are almost never clear. Even if government were efficient and statutes clear, the costs of transfer programs would not be reduced to, or even close to, zero.

Second, social and political processes used to establish and administer these benefit programs produce some side effects. The point is a familiar application of the general theory of rent-seeking behavior.[29] An economic rent is a surplus payment above "the amount that a factor must earn in its present use to prevent it from transferring to another use."[30] A person who earns $1000 per day as an athlete may only have an income of $100 as a laborer. The $900 represents the rents accrued from the difference between working as an athlete and working as a laborer. Rent seeking involves efforts to tax away some portion of that gain, in the hope that the tax will not alter the original pattern of production of the party taxed. Nonetheless, the process always generates resource losses. The effort to obtain funds for transfer payments consumes resources and stimulates the owner of the asset to expend real resources to protect the rents he now enjoys. No matter who wins the struggle, resources are diverted from the production to the transfer of wealth. This is a negative sum game.

Transfer payments to those in need are not immune from the rent-seeking dynamic. Wellman notes that it is possible to enact a system of welfare rights definite in form and specific in content.[31] True enough, but how are these statutory figures established? Within the political process, expected net taxpayers, as a group, will spend real resources to oppose welfare programs; expected net recipients will spend real resources to support them. No matter which side wins, the expenses on both sides come out of the social pie. As the theory of rent seeking predicts, the political game has a distinctly negative character.

Finally, social losses arise even after the system is in place because individual actors respond, in their production and consumption, to the incentives the welfare system creates.[32] At the

---

29. *See generally* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock eds. 1980) [hereinafter cited as RENT-SEEKING SOCIETY]. I have explored the process in constitutional discourse in Epstein, *supra* note 25.

30. R. LIPSEY & P. STEINER, ECONOMICS 346 (6th ed. 1981).

31. *See* C. WELLMAN, *supra* note 1, at 33-34.

32. Here the rent-seeking literature is of great importance. *See generally* RENT-

extreme, high welfare benefits will induce large numbers of individuals to forego gainful activities because they are better off receiving welfare benefits.[33] Low welfare benefits will have similar effects, but of smaller magnitude. Humane efforts to raise benefit levels, therefore, face a dilemma. In an effort to improve the lot of the very needy who now receive benefits, others are induced to enter the system, even at the cost of earning less by their own endeavors. If benefits are increased, the expected number of persons receiving benefits will increase because there is no way to keep marginal wage earners out of the welfare system once benefits are raised.

The consequences extend from patterns of consumption to patterns of production. The departure of able persons from the labor markets to the welfare markets reduces the tax base of the nation, and thereby increases the tax burden on those left in the market. Accordingly, tax rates have to rise to meet the new demands, which in turn makes marginal producers into marginal recipients, thereby initiating another round in the cycle. One great problem in running a welfare program, therefore, is finding the stable stopping place, a problem ignored by Wellman and those who make similar arguments.

In this regard the old categorical programs, which provided benefits for the blind and those in similar situations, had a certain commendable rigidity. It was highly unlikely that anyone would court blindness to obtain welfare benefits. The newer rules have precisely the opposite effect. The loose eligibility standards based on need create a substantial moral hazard that potential recipients will reduce production, a social cost, to obtain direct payments, a private gain. In short, the political dynamics of welfare payments make it difficult to confine them to a relatively limited role, even if such were ideal. Some limited measure of welfare support may meet the strict requirements of a sound social welfare program. But a government-sponsored program, once introduced, likely will grow beyond those narrow limits.[34]

SEEKING SOCIETY, *supra* note 29.

33. One piece of evidence on this point notes that with the increase in welfare programs today, the number of persons whose earnings are enough to keep themselves above the poverty line has declined with the increase in levels of welfare expenditures. The poverty totals have continued downward, but only at about the same rate of decline as before the massive increases in expenditures beginning in the Johnson years. For a discussion of this "latent" poverty, see C. MURRAY, *supra* note 3, at 64-65.

34. See generally TAKINGS, *supra* note 18, ch. 19 for a discussion of the problem, and

C. Utility and Risk Aversion: An Escape from the Negative Sum Game?

A claim of either Pareto optimality or simple wealth maximization likely cannot support a welfare system, when measured at the time the system is introduced. It may, however, be possible to save the system of welfare rights for two reasons. The first speaks of the difference between utility and wealth.[35] The second addresses the time at which the choices about welfare rights are made.

On the first point, it could well be that while total wealth is diminished, utility gains to the poor may exceed utility losses to the rich. If this were the case, the welfare system could be saved. The theory is that gains to the truly needy, measured by the utility of avoiding starvation or worse, are so great they offset the losses suffered by others.

The point can be fortified by relying upon the universal, or at least frequent, level of risk aversion—individuals are willing to pay real income to avoid future uncertainty.[36] A system with a welfare component compresses the distribution of incomes that emerges over time. Thus, while transfer payments may reduce total wealth, the utility of that wealth may increase. This would leave a net benefit to society, even if all members of society do not share equally the gain from transfer payments. The utility gains to recipients exceed the utility losses to payors, even as the wealth losses to payors exceed the wealth gains to recipients.

If one started behind the veil of ignorance, or in other words, in a world in which persons knew of the general rules of human and social interaction, but not of their own position in

---

the way in which voluntary charity is better able to cope with the incessant pressures to increase the size and scope of welfare programs.

35. The relation between utility and wealth may be stated as follows. Suppose each of ten persons filled his own basket with $20 worth of goods at the market. The total wealth would equal $200. Yet if someone took the baskets and assigned them to different persons, wealth would remain constant but utility would be diminished as much of the consumer surplus would be removed. In principle, if transaction costs were zero the baskets could all be reassigned to their original owners. But once transaction costs are positive, the levels of utility are reduced by the level of these costs, and could easily drop below $200, as when all persons value what they now have less than the $20 they paid to get it.

36. See J. RAWLS, *supra* note 21, at 153 where Rawls offers his justification for the maximin solution: choose that set of possible outcomes with the highest minimum value, without regard to the probability of its occurrence or the gains foregone from other choices. At root only risk aversion (and a very strong form of risk aversion at that) can justify this choice.

that world,[37] then one would not know whether he would be a winner or a loser in the welfare payment system. Accordingly, a system with welfare payments might have some presumptive attraction. The person behind the veil would be willing to surrender some measure of his liberty to obtain greater personal security.

However, this veil condition is often not satisfied, given that political lines are usually well drawn when welfare programs are before the legislature; in real settings most people know whether they will gain or lose. However, even if people were ignorant of who will gain and who will lose, the consequences are not clear. The risk aversion argument would be decisive if wealth levels could be held constant once welfare rights were introduced. But they cannot.

As a result, the case for a system of welfare rights depends upon the relative magnitude of different factors. How intense is the preference to avoid risk? Some individuals may prefer a fixed payment of forty cents to an even chance of getting a dollar. Others may require only twenty-five cents. Clearly if individuals require only twenty-five cents, there would be more reason to support a welfare system than if individuals require forty cents. Yet it becomes progressively more difficult to make any sense of the situation if the levels of risk aversion are not constant across the population. Levels of risk aversion are, of course, not constant for the same reason that human height is not constant. All distributions have positive variances. Thus, even behind the veil of ignorance, we face a problem: Do we follow the lead of the most cautious, the least cautious, or the median person?

---

37. The expression "veil of ignorance" is of course from J. RAWLS, *supra* note 21, at 136-42. The theory is that persons stripped of special knowledge will only be able to advance their personal welfare by advancing the general welfare. On Rawls, see generally READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE (N. Daniels ed. 1975).

The essay by Frank Michelman, *Constitutional Welfare Rights and* A Theory of Justice, in READING RAWLS, *supra*, at 319, and his earlier article upon which it was based, Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973), attempt to erect an argument that the Constitution, and in particular the due process and equal protection clauses of the fourteenth amendment create welfare rights. But the text of the fourteenth amendment itself seems far more congenial to the protection of rights against interference at common law. Historically there is little reason to think that an amendment passed at the height of the laissez-faire era should be read as a mandate for extensive government welfare programs.

Furthermore, one needs to compare the gains from risk aversion to the administrative and allocative losses that are introduced. If the loss in wealth is large enough, even the poorest in society may be worse off than they would have been in a system in which they received no benefits at all. Here again the empirical evidence is not conclusive, but some of it is quite disturbing. It suggests that the large increases in transfer payments over the past thirty or so years have produced little if any benefit to society.[38] With these disquieting points raised, comparison becomes very difficult. For some very risk-averse persons the gains in security will outweigh the losses in wealth. For other less risk-averse persons losses in wealth will outweigh the gains in security. For any risk-preferring persons the social institutions have a double whammy, as they have a smaller share of a smaller pie. Thus, while risk aversion drives the case for welfare rights, it is only one determinant of overall utility. It is not strong enough to dominate the other factors that influence production.

Finally, private organizations can discharge welfare functions. The family is, in effect, a system of coinsurance in which the more able members take care of their less fortunate relatives. Friendly societies and religious groups have somewhat weaker bonds but work from a broader base. Yet the strength of families and voluntary associations is eroded if it is commonly known that tax revenues are available to pick up the slack. It would be an irresponsible generalization to assume that mutual assistance within families and voluntary associations ceases once welfare rights are established. That has not happened, nor should it happen as long as families and voluntary associations can more efficiently provide support. But even if these alternative institutions are not destroyed, their role is unmistakably weakened by welfare benefits. The greater the welfare benefits, the lower the reliance upon other forms of assistance. To some extent, therefore, transfer payments made through the political process are undone by a reduction of those made outside of it. The same can be said of charitable transfers for the benefit of the poor and the needy.[39]

In short, as a matter of principle, the case for welfare rights

---

38. See, *e.g.*, C. MURRAY, *supra* note 3, and Gwartney & McCaleb, *supra* note 3, which gather much of the data in an easily understood form.

39. Roberts, *A Positive Model of Private Charity and Public Transfers*, 92 J. POL. ECON. 136 (1984).

suffers from at least two difficulties. First, there is the question of how they can he reconciled, if at all, with the system of common law rights that no one wishes to displace in its entirety. Second, if that displacement is to come it must rest upon some measure of social welfare. Any Pareto optimal claim will fail because the transfer payments will tend to leave the parties who are compelled to make transfers under the tax laws worse off tban they were before. Any simple wealth maximization claim is doubtful because the wealth gains to the poor will most likely be smaller tban the losses to the rich. Finally, any test of aggregate social utility is, at best, problematic even if interpersonal comparisons of utility can be made. It is necessary to balance heavy imponderables to determine whether the security, if any, obtained by forced transfers exceeds tbe associated costs, both administrative and productive, required to obtain that security.

Even if all these burdens are overcome, the payoff for a theory of welfare rights is quite low. At best the proof generates only an existence theorem that states tbat under some circumstances some welfare rights may be justified by one criterion of social welfare. It does nothing, however, to justify the vast proliferation of programs of cash and in kind transfer payments presently in place. No categorical or a priori reason blocks this inquiry, or rules out the possibility of a second tier of welfare rights in an otherwise common law world. However, economic theory does suggest that the odds are not promising for making a case for welfare rights on first principles.

V. Social Imperfections as a Source of Welfare Rights

The arguments from first principles all assume that the world is well organized from its inception and that the only question is whether the system of welfare rights fits into this harmonious scheme. The assumption that social arrangements are well ordered is, however, false. Even in the best of times, the world of practical politics is very untidy. Legislatures and courts have grown weary and suspicious of the simple entitlements to liberty and property and have routinely created welfare and other rights. The statute books brim with legislation limiting the power of individuals to enter into contracts to dispose of their capital or labor. The need to protect the incompetent from their own foolishness may justify some of these statutes, but far too often the statutes are a response to very powerful interest groups that understand all too well how to reap supracompeti-

tive profits by erecting legal barriers to entry against their rivals. In some instances the rich erect these barriers against the rich, as with the restrictions imposed upon the business transactions of banks and insurance companies, or with various forms of regulation of transportation, trucks, and airlines. In other cases, however, the restrictions are directed against the poor, as with minimum wage legislation and many of the modern mandatory collective bargaining programs.

In essence the argument here adopts and refines a theory of "social causation" to the case for welfare rights. The gist of the argument is that since individuals in need often have need through no fault of their own, the fault lies with society at large. The child who needs food and the sick who need medical attention are often not to blame for their condition, and hence society is responsible. As a general argument, the theory fails to take into account the tight restrictions on a theory of causation. The victim's blamelessness does not mean that society is at fault. Some insolvent third party—for example, a neglectful or addicted parent or an unchecked aggressor—could be responsible. Or maybe no one is responsible for the loss, if, for example, it comes from a birth defect or lightning. In any event, simple proof that an innocent plaintiff has a need never establishes that a given defendant is responsible. Lack of contributory negligence does not state a good cause of action.

If personal losses are attributable to third parties or natural events, it follows that the party who suffered the loss has no claim on the government. No causal linkage exists between one individual's harm and the conduct of other persons who must answer for that harm through taxation. Nonetheless, once legal and institutional barriers to trade are taken into account, the theory of causal intervention gains force. The government, or those who control its apparatus, has conspired to interfere with the prospective advantage of others by the use of public force. The private wrong of interfering with prospective advantage is an old one, but even so it supplies a theory of causation that works in both the private and the public sphere.[40]

This is not the place for an extended critique of various

40. See, *e.g.*, Keeble v. Hickeringill, 11 East 574, 103 Eng. Rep. 1127, 1128 (K.B. 1809), and its discussion of a hypothetical case of a schoolmaster who loses his pupils when a rival blocks the way to his school with guns. *See also* Tarleton v. M'Gawley, 1 Peake 270, 170 Eng. Rep. 153 (K.B. 1793). For a collection of materials, see R. EPSTEIN, C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 1344-54 (4th ed. 1984).

schemes of public regulation and the specific harms they work on the parties they restrain. It is enough to say the schemes restrain trade. For our purposes the central point is this: *The more entrenched a network of restrictive practices against the poor, the stronger the case for welfare rights to protect the poor from victimization.* The problem is now one of "second best." If welfare rights have, at best, a precarious status in a perfect world, it does not follow that they have no place in an imperfect world. When political forces make eliminating legal barriers to gainful labor impossible, compensating those deprived of, or limited in, the opportunity to earn their daily bread becomes credible.

In principle, one could say to the poor youth who wants to work: "We believe there is no sound case for welfare rights, but as a people we can do nothing to repeal the minimum wage laws—to take but one example—even though they increase unemployment. Therefore, you must bear the brunt of these laws, because one deviation from principle can never justify another. Two wrongs do not make a right."

Yet this argument cannot be accepted in this naked form. In a perfect world, the relationship between two wrongs never arises because the first wrong is always instantly corrected. But in a world of friction and intrigue, introducing a second wrong may be a proper, if risky, alternative given that the original wrong remains unredressed. Ideally we would be burdened with neither, but if the second wrong tends to offset the first wrong, then we may be better off with both together. The statute books may list welfare rights under one head and labor regulations under another. Law schools may teach them separately. But as a matter of political theory the two areas are inextricably connected.

One powerful justification for taking a hard line against welfare rights is that persons are already endowed with a set of common law rights that allow them to fend for themselves. Though those common law rights are abridged by collective social action, no compensation is provided for those victimized by the social action. Yet once some form of collective action upsets the original balance, maintaining the hard line that precludes all other forms of collective action is unattractive. This is true even though an inescapably bad fit exists between the wrong and the remedy. Although a system of economic restrictions may be supported only by some, a system of taxation usually imposes the costs of welfare rights upon all, even those who had no role in

passing the restrictive legislation. Schematically understood, the system of welfare rights makes *A* pay in part for wrongs of *B* in order to ensure that *C* is compensated for the losses inflicted by improper economic restrictions to which *A* is hostile or indifferent. But overpayment by *A* may be the only way to ensure part payment by *B*, so the tradeoff between them is as uneasy as any we might be called upon to make.

It does not follow, however, that no rough guidelines exist for action. The first course of action is to repeal the restrictions on capital and labor to weaken the case, and the need, for welfare benefits. Yet even if the restrictive laws, such as the minimum wage law, were repealed tomorrow, their effects would linger. Any restrictive law powerfully influences the willingness and ability of parties to acquire skills or a trade. Repealing the law does not instantly correct the reduction in the formation of human capital that stems from past enforcement of that law. The bad effects will survive the law's demise. Simple repeal of past legislation does not return us to the same economic and social position that would have existed had the legislation never been passed.

Thus, the proper program for welfare rights is an unhappy combination of high principle and muddling through. We should undo restrictions on production, moderate the size and scope of the welfare obligation, and recognize the imperfect congruence between the remedies proposed and the wrongs redressed. Given our heritage of legislative error, it seems foolish to assert that the cleansing of the social order should begin with the welfare system now in place. Once the minimum wage, to revert to my stock example, is gone, the relative attraction of working, say for teenagers, will increase and the attractiveness of welfare systems will decrease—even if benefit levels remain constant. As the number of persons dependent upon welfare is reduced, the tax burdens should fall as well. Furthermore, the process can be hastened as many restrictions on capital and labor wear out over time. For example, inflation repeals by degrees a minimum wage for a fixed dollar amount. As the restrictions are relaxed and more individuals rejoin the labor force, the welfare problem becomes more manageable.

However, at present I think it is fair to say that this approach of relaxing restrictions on capital and labor could not garner the necessary support from the political process. But the questions are capable of reasoned argument, and reasoned argu-

ment might influence, in some way, the future course of collective action. There is, rightly, an enormous diffusion of power in any democratic society, so that any program of change will meet with strong resistance. Yet even small changes on so important an issue can have dramatic social consequences.

VI. Conclusion

We are now in a position to assess why welfare rights have always proved vexing and troublesome. The combination of the ideal and the real explains why the foundations of welfare rights are neither necessarily secure nor necessarily unsound. The purist arguments that tug against recognizing welfare rights are always at war with the historical and time bound arguments for creating, or at least preserving, welfare rights. The quest for welfare rights is therefore uncertain, and for good and sufficient reason will remain so.