THE RESURRECTION OF THE RIGHT-PRIVILEGE DISTINCTION? A CRITICAL LOOK AT *MAHER V. ROE* AND *BORDENKIRCHER V. HAYES*

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If the option to pursue a certain course of conduct is considered to be a constitutional right, it is axiomatic that the state may not, without considerable justification, pass a law directly penalizing or preventing a citizen from following that course. Hence, a state may not directly abolish a criminal defendant's right to a jury trial,[1] nor may it, following the Supreme Court's decision in *Roe v. Wade*,[2] impose a fine upon a woman who obtains an abortion. A far more difficult question—one which serves as the battleground for many of the controversial constitutional wars of the day—is the extent to which government may *indirectly* burden a constitutional right. A law is said to indirectly burden a right if it operates effectively to deny a desirable governmentally-provided privilege or benefit to an individual because that person has exercised a constitutional right. Two criteria have been developed to evaluate the constitutionality of a law imposing such an indirect burden: first, whether the right has been so adversely affected that it may be regarded as impinged upon by the law; and second, if there is actual impingement, whether the law is necessary to achieve a legitimate and compelling state purpose. The desire to curtail the exercise of a constitutional right is not a "compelling and legitimate" purpose.[3]

This note deals with what the author perceives as a definite shift in the Supreme Court's approach to direct and indirect burdens on constitutional rights, as reflected in two recent cases, *Maher v. Roe*[4] and *Bordenkircher v. Hayes*.[5] In *Maher* the Court reviewed the propriety of a state regulation which excluded non-therapeutic abortions from a Medicaid program that subsidized pregnancy and childbirth expenses. In *Hayes* the issue was whether a prosecutor could reindict a defendant

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1. Duncan v. Louisiana, 391 U.S. 145 (1968).
2. 410 U.S. 113 (1973).
3. *See* text accompanying notes 29-108 *infra*.
4. 432 U.S. 464 (1977).
5. 434 U.S. 357 (1978).

on a more severe charge for the express reason that the defendant refused to plead guilty to the present charge against him. These two cases involved widely differing constitutional rights. The opinions in those cases taken together, however, contain the latest significant pronouncements of the Court on the question of indirect burdens on rights, for both deal with the question of the extent to which the government, while not acting to directly prevent the exercise of a constitutional right, may penalize or discriminate against a citizen for having exercised that right. In both cases the Court seemed to move toward a standard of impingement that looks less to the substantive impact upon a right—whether the individual is deterred from exercising the right and disadvantaged if he does exercise it—and more to whether the burden placed upon the right takes the form of a penalty. In both cases the Court also indicated that a state policy could be justified by a governmental interest in having an individual forgo a constitutional right so long as the policy's purpose was not to directly prevent or penalize the exercise of the right.

The first part of this note examines the positions of the Court prior to *Maher* and *Hayes* regarding indirect burdens on rights. These two recent cases will then be analyzed in order to evaluate the new judicial gloss placed upon the questions of what constitutes an impingement upon a right, and what suffices as a legitimate countervailing state interest. Finally, the Court's new directions will be examined in terms of their utility as tools of constitutional interpretation and their implications for social policy.

I. Judicial Treatment of Unconstitutional Conditions Prior to *Maher v. Roe* and *Bordenkircher v. Hayes*

In our modern interdependent society, there are many benefits that federal, state and local governments provide to individuals or groups of citizens which might be classified as "privileges" in that citizens possess no unqualified right to receive them. Among these privileges, for example, are civil service jobs, welfare and unemployment benefits, the use of public facilities such as parks and libraries, and admission to public colleges and universities. While it is generally true that there is no right to receive a privilege, and a government may, if it chooses, distribute the privilege to no one at all,[6] constitutional questions are

6. In Palmer v. Thompson, 403 U.S. 217 (1971), the city of Jackson, Mississippi, closed all of its public swimming pools rather than operate them on a racially desegregated basis, as would have been required under a federal district court decision mandating the integration of the city's public facilities. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962). The Supreme Court held that where the effect of a law was not discriminatory, the Court could not examine the legislative motive behind the enactment. 403 U.S. at 225. Since the closing of a swimming pool to everyone was found to be constitutionally benign, the Court needed

raised by the manner in which the government chooses to distribute those privileges it does bestow. For example, a city need not provide its citizens with a public library. If the city does provide a library, however, it would be unconstitutional to limit its use to Baptists[7] or to Republicans[8] alone. On the other hand, a rule that would limit the use of the library to county residents would very likely pass constitutional muster.[9]

Those prerequisites which the government attaches to the privileges it distributes are referred to as *conditions*. Thus, in the prior example, the proposed requirements as to religion, political affiliation and residency are all conditions. This note concerns those cases where the government provides privileges contingent upon the recipient meeting a so-called *unconstitutional condition*[10]—one which requires the recipi-

to go no further. *See also* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

7. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits to Seventh Day Adventist because her religious beliefs precluded her from working on Saturdays).

8. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976) (political patronage dismissals); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (loyalty oath requirement for state employment).

9. *See* Vlandis v. Kline, 412 U.S. 441, 452-53 (1975) (residency requirement for lower tuition rate at state university).

10. A brief note as to terminology is in order at this point. Traditionally, commentators have referred to the doctrine of unconstitutional conditions: "Generally, the doctrine states that while a government, state or federal, may not be obligated to provide its citizens with a certain benefit or privilege, it may not grant the benefit or privilege on conditions requiring the recipient in some manner to relinquish his constitutional rights. Furthermore, it cannot withhold or cancel the benefit as a price for the assertion of such rights." Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 144 (1968) (footnote omitted). Thus, the doctrine of unconstitutional conditions is an approach courts have used (though not by name) to invalidate what is referred to in the text as an "unconstitutional condition." In order to provide a workable terminology, this note will refer to all conditions placed on privileges or benefits which require the forgoing of rights as "unconstitutional conditions," regardless of the terms used by a particular court in its analysis. An unconstitutional condition may be held to be valid (*e.g.*, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (requirement that federal employees refrain from active participation in partisan politics); *accord*, Elrod v. Burns, 427 U.S. 347, 368, 370-71 (1976) (political patronage dismissals)), or invalid (*e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967) (loyalty oath requirement for state employees); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits to Seventh Day Adventist because her religious beliefs precluded her from working on Saturdays)).

Use of the doctrine of unconstitutional conditions, which involves striking down an unconstitutional condition because it burdens a constitutional right (rather than because it violates equal protection or due process), will be referred to in the text as an "indirect violation" approach. This language seems to comport with the terminology used by the courts. *See* Sherbert v. Verner, 374 U.S. at 403-04; Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

For a general discussion of the unconstitutional condition problem, see Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Van Alstyne, *The Demise of the Right-Privilege Distinction in*

ent to forgo the exercise of a constitutional right in order to enjoy the desired privilege. Thus, the requirements that library users be Baptists or that they be Republicans would be unconstitutional conditions since they would require an individual to forgo, respectively, the right of free exercise of religion and the rights of free speech and association under the First Amendment.

A. The Right-Privilege Distinction

Early decisions dealing with unconstitutional conditions held that, implicit within the state's right not to distribute a particular privilege at all, was a lesser, unrestrained power to place conditions on a distributed privilege—even at the price of requiring an individual to forgo a constitutional right.[11] The classic rendition of this position was by Justice Holmes in an 1892 Massachusetts Supreme Court case, *McAuliffe v. Mayor of New Bedford*.[12] There, the court rejected a former policeman's contention that the city could not fire him from his job for disobeying a police regulation forbidding officers from taking part in political activities. Holmes stated: "[T]here is nothing in the constitution . . . to prevent the city from attaching obedience to this rule as a condition to the office of policeman . . . . The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[13] Essentially, Holmes created this syllogism in *McAuliffe*: there is no right to a governmentally-granted privilege; the power not to grant a privilege at all includes the lesser power to restrict or reduce the grant; therefore, a privilege may be granted on any condition—including the waiver of a constitutional right.

Three years later, the Massachusetts case of *Commonwealth v. Davis*[14] gave Holmes the opportunity to reaffirm the *McAuliffe* principle.[15] Davis, a preacher, was convicted of violating a Boston ordinance which forbade "making a public address upon the public grounds without a permit" issued by the mayor. Holmes concluded that the ordinance did

Constitutional Law, 81 HARV. L. REV. 1439 (1968) [hereinafter cited as Van Alstyne]; Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968). *See also* Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Oppenheim, *Unconstitutional Conditions and State Powers*, 26 MICH. L. REV. 176 (1927).

11. "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser." Davis v. Massachusetts, 167 U.S. 43, 48 (1897). *See also* Van Alstyne, *supra* note 10, at 1439-42; Note, *Another Look at Unconstitutional Conditions, supra* note 10.

12. 155 Mass. 216, 29 N.E. 517 (1892).

13. *Id.* at 220, 29 N.E. at 517.

14. 162 Mass. 510, 39 N.E. 113 (1895), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897).

15. 162 Mass. at 511, 39 N.E. at 113.

not violate rights of free speech, even though it allowed the mayor complete discretion in granting or refusing such permits:

> For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes.[16]

The thrust of Holmes' analysis, which came to be known as the "right-privilege distinction,"[17] was to draw a constitutional line between rights, such as religious freedom and political advocacy, and benefits granted by the government, such as civil service jobs and the use of public parks. The latter, being mere privileges, were unamenable to constitutional safeguards. Thus, no constitutional right was abridged when a citizen was denied, for any reason, a privilege provided by the government, even if the denial was precisely because the individual chose to exercise a constitutional right. The application of the right-privilege distinction logically entailed the validation of any unconstitutional condition attached to a privilege or benefit.[18]

The right-privilege distinction remained a viable instrument of constitutional interpretation until the late 1950s.[19] Its recitation alone often sufficed to shut the door upon any claim that government had wrongfully deprived a claimant of some government largess.[20] Thus, in *Hamilton v. Regents of the University of California*,[21] the Court unanimously rejected the claim of a group of Methodist university students that they should be excused from mandatory R.O.T.C. training on the basis of their religious beliefs. The Court indicated that while the Constitution guarantees the right to maintain and practice religious tenets, this does not prevent a state from making military training a condition for attending a public university and from excluding those who refuse to participate, even if the non-participation is religiously motivated.[22] Similarly, in *Adler v. Board of Education*,[23] the Court upheld the constitutionality of New York's Feinberg Law, which made membership in the Communist party a prima facie ground for dismissal of a public

16. *Id.*
17. Van Alstyne, *supra* note 10.
18. *Id.* at 1439-42; Note, *Another Look at Unconstitutional Conditions*, *supra* note 10.
19. *See* notes 29-43 and accompanying text *infra*.
20. *See, e.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952); Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951).
21. 293 U.S. 245 (1934).
22. *Id.* at 262.
23. 342 U.S. 485 (1952).

school teacher. The Court succinctly indicated that the law did not infringe First Amendment rights:

> It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the State . . . on their own terms. . . . If they do not choose to work on [terms set down by the state], they are at liberty to retain their beliefs and associations and go elsewhere.[24]

It is important to note that the right-privilege distinction was applied only to benefits provided substantially at state expense. Courts utilized a different line of constitutional theory, namely substantive due process, to closely scrutinize laws regulating privately-funded activities.[25] Those laws tending to abridge named as well as unnamed constitutional rights were struck down. This is illustrated by *Meyer v. Nebraska*[26] and *Pierce v. Society of Sisters*,[27] where the Court admonished that the power of the state to regulate private education was subject to due process limitations.[28] A distinction between essentially private activities in which rights were protected against abuses of government control, and publicly subsidized activities in which they were

24. *Id.* at 492.

25. Van Alstyne, *supra* note 10, at 1442-44.

26. 262 U.S. 390 (1923). *Meyer* invalidated a state law prohibiting the teaching of a foreign language in any school to a child who had not passed the eighth grade. This law was held by the Court to violate the right of teachers "to teach and the right of parents . . . to instruct their children." *Id.* at 400.

27. 268 U.S. 510 (1925). *Pierce*, relying on Meyer v. Nebraska, 262 U.S. at 390, held unconstitutional a law which required public school attendance, thereby preventing children from attending private schools instead.

28. "[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State." Meyer v. Nebraska, 262 U.S. at 399-400. *See also* Pierce v. Society of Sisters, 268 U.S. at 535. It is instructive to note the distinction made in *Hamilton* between that case and *Meyer* and *Pierce*: "There need be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training. The fact that they are able to pay their way in this university but not in any other institution in California is without significance upon any constitutional or other question here involved. California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education. Taken on the basis of the facts alleged in the petition, appellants' contentions amount to no more than an assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance.

Viewed in the light of our decisions that proposition must at once be put aside as untenable." 293 U.S. at 262 (citations omitted).

not, was necessary to prevent the right-privilege distinction from swallowing up all constitutional freedoms.

B. Indirect Violation of Right Analysis of Unconstitutional Conditions

Soon after *Adler*, the right-privilege distinction began to crumble; it eventually fell. Beginning in 1952 with *Wieman v. Updegraff*,[29] and followed by *Shelton v. Tucker*[30] and *Sherbert v. Verner*,[31] the Warren Court fashioned a response to Holmes' *McAuliffe* syllogism.[32] The response was that while there is no right to a governmental privilege, conditioning the privilege upon the waiver of a constitutional right violates that particular right.[33]

For example, in *Sherbert v. Verner*,[34] the petitioner, a Seventh Day Adventist, was denied unemployment insurance benefits because she refused, on religious grounds, to work on Saturdays. The unemployment board had held the petitioner's refusal to be a failure without good cause to make herself available for work. The Supreme Court ruled that the board's policy violated the petitioner's right to free exercise of religion. The Court squarely rejected the board's claim that "unemployment compensation benefits are not [a] 'right' but . . . a 'privilege,' "[35] and therefore not constitutionally protected: "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."[36] The Court found that the board's policy placed "the same kind" of burden upon the petitioner's free exercise of her religion as would a fine imposed on Saturday worship.[37] Such an infringement upon freedom of religion, said the Court, could be justified only by a compelling state interest.[38] Since no such interest was shown, the policy was found to be unconstitutional.[39]

Five years later, in *Keyishian v. Board of Regents*,[40] the Court, in a five to four decision, struck what was probably the death blow to the right-privilege distinction. Reexamining New York's Feinberg Law, it

29. 344 U.S. 183 (1952).
30. 364 U.S. 479 (1960).
31. 374 U.S. 398 (1963).
32. *See* text accompanying note 13 *supra*.
33. Van Alstyne, *supra* note 10, at 1445-46; Note, *Another Look at Unconstitutional Conditions*, *supra* note 10, at 144. This doctrine of unconstitutional conditions has roots extending further back than the Warren Court era. *See* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 594 (1926).
34. 374 U.S. 398 (1963).
35. *Id.* at 404.
36. *Id.*
37. *Id.*
38. *Id.* at 406.
39. *Id.* at 407.
40. 385 U.S. 589 (1967).

found the law to be unconstitutional, thus effectively overruling *Adler*. Under case law prior to *Keyishian*, a citizen's membership in the Communist Party was found to be constitutionally protected, so long as membership was not coupled with a specific intent to further an unlawful end.[41] Therefore, held the Court, New York's law making Party membership alone an absolute bar to the privilege of teaching burdened both protected and unprotected conduct.[42] Since the state could, through a more narrowly drafted statute, achieve the legitimate end of barring those Communists who intended illegal acts without burdening protected First Amendment conduct, the Feinberg Law was held overbroad and thus unconstitutional.[43]

The key to the Court's shift from decisions like *Hamilton* and *Adler* to those such as *Sherbert* and *Keyishian* was the equation of an indirect burden[44] upon a freedom, in the form of an unconstitutional condition, with a direct sanction placed upon the exercise of a constitutional right.[45] In order to justify placing an indirect burden upon a right, the Court held that the state must demonstrate the same strong or "compelling" interest necessary to justify a direct burden upon that right.[46] This indirect violation of right doctrine has been applied most often in cases involving freedoms of speech and religion.[47] But it has been used in other types of cases as well.

For example, in *United States v. Jackson*,[48] the doctrine was applied by the Court in striking down a provision of the Federal Kidnapping Act concerning the death penalty. Under the statute, capital punishment could be imposed only "if the verdict of the jury shall so recommend. . . ."[49] This had the practical effect of exposing to the risk of a capital verdict solely those defendants who elected a jury trial.

41. Noto v. United States, 367 U.S. 290, 298-99 (1961); Scales v. United States, 367 U.S. 203, 228-29 (1961). The *Adler* Court did not dispute the petitioners' right to be Communists, but held that this right did not prevent the state from dismissing them from their jobs for exercising the right. 342 U.S. at 492.

42. 385 U.S. at 599-600, 609.

43. *Id.* at 609-10.

44. Strictly speaking, a non-direct burden upon a right may occasionally exist other than where a condition is placed upon a privilege. *See, e.g.*, White v. Davis, 13 Cal. 3d 757, 767, 533 P.2d 222, 228-29, 120 Cal. Rptr. 94, 101 (1975) (police discouraging the exercise of First Amendment rights by use of informants on a university campus). Such burdens are beyond the scope of this note.

45. Keyishian v. Board of Regents, 385 U.S. at 605-06; Sherbert v. Verner, 374 U.S. at 404.

46. Sherbert v. Verner, 374 U.S. 398, 406 (1963). *Accord*, Dunn v. Blumstein, 405 U.S. 330, 338-39 (1972).

47. Perry v. Sindermann, 408 U.S. 593, 597 (1972); Note, *Another Look at Unconstitutional Conditions, supra* note 10, at 152.

48. 390 U.S. 570 (1968).

49. 18 U.S.C. § 1201(a)(1) (1964). The statute was amended in 1972 to remove the death penalty provision.

The statute provided no procedure for imposing a death sentence on a defendant who pleaded guilty or was tried before a judge. The Court held that this scheme constituted an invalid unconstitutional condition which infringed upon the defendant's Fifth Amendment right to plead not guilty and Sixth Amendment right to demand a jury trial. The law needlessly deterred and penalized the exercise of these rights by conditioning the benefit of a non-capital sentence upon waiver of a jury trial.[50] The Court also indicated that any purported interest of the government in discouraging defendants seeking jury trials would not be recognized as legitimate.[51] Nor did the Court accept the argument that the measure be seen as an effort to mitigate the severity of the death penalty with "the incidental effect" of inducing defendants not to demand jury trials.[52]

Jackson taken together with cases such as *Keyishian* and *Sherbert* suggest a distinct two-step approach to evaluating an unconstitutional condition as an indirect violation of a right. First, the court must determine whether the right is actually impinged upon by the law. If it is, the court must find a sufficiently compelling state interest to justify the impingement before the law will be upheld.

The threshold question is whether the challenged law so adversely affects a right as to burden or impinge upon it. The Supreme Court has used two tests to determine whether a right is burdened: (1) does the law discourage the exercise of a constitutional right?,[53] and (2) if an individual does exercise the right, does the law impose a detriment upon him for doing so?[54] Any state policy meeting one of these standards will likely meet the other, and the Court seems to discuss the two almost interchangeably.[55]

Assuming that the questioned policy is found to impinge upon a right, the next issue is whether there is a state interest which justifies such a burden. Although the language in various cases is not always consistent, there seem to be three basic requirements which must be met before a law found to burden a right will pass constitutional muster. First, the governmental interest behind the law must be a legiti-

50. 390 U.S. at 582-83.

51. "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." *Id.* at 581.

52. "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary [to the achievement of a legitimate state end] and therefore excessive." *Id.* at 582.

53. *See* United States v. Jackson, 390 U.S. 570, 581-83 (1968); Keyishian v. Board of Regents, 385 U.S. at 604, 609; Sherbert v. Verner, 374 U.S. at 404-05.

54. *See* United States v. Jackson, 390 U.S. at 581-83; Keyishian v. Board of Regents, 385 U.S. at 607; Sherbert v. Verner, 374 U.S. at 406.

55. *See* United States v. Jackson, 390 U.S. 570, 581; Sherbert v. Verner, 374 U.S. at 405-06.

mate end of government. Under this requirement, the purpose of the law must not be merely to discourage the exercise of constitutional rights.[56] Second, the state interest must be compelling.[57] Finally, assuming such an interest is present, the burden imposed upon the right must be necessary to achieve that end. There must be no alternative which would achieve the legitimate purpose without burdening the right.[58] Nor may the law burden the right more than is necessary in order to accomplish the desired end.[59]

The indirect violation of right approach thus provided protection against governmental imposition of unconstitutional conditions, protection that had been denied by the right-privilege distinction. In subsequent cases, the Court developed, through application of the due process and equal protection clauses, two other approaches that similarly limited the state's power to provide privileges in such a way as to discriminate against citizens exercising rights.

C. Due Process

In *North Carolina v. Pearce*,[60] the Supreme Court used the due process clause of the Fourteenth Amendment to strike down a perceived unconstitutional condition which penalized the exercise of a state-created right. The question in *Pearce* was whether a criminal defendant who had successfully attacked his first conviction by appeal could be given a longer sentence by a judge upon his reconviction for the same offense in a second trial. The Court held that while there was no federal constitutional right to an appeal, if a state did in fact grant such a right, it would be a violation of due process to penalize a de-

56. United States v. Jackson, 390 U.S. at 581. *Cf.* Procunier v. Martinez, 416 U.S. 396, 411 (1974); United States v. O'Brien, 391 U.S. 367, 377 (1968).

57. Sherbert v. Verner, 374 U.S. at 406. Later cases indicate that the compelling state interest test is always appropriate in indirect burden cases. Dunn v. Blumstein, 405 U.S. 330, 338-39 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Reliance upon this test has not provided an absolute bar to government privileges conditioned on a waiver of rights. In United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), the Court upheld the Hatch Act's restrictions on the political activities of federal employees. The Court apparently used the compelling state interest test, even though it did not expressly state the applicable standard: "Such decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in *the best interest of the country, indeed essential*, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited." *Id.* at 557 (emphasis added). It should be noted that an interest in avoiding political civil service entanglement is legitimate, and is distinguishable from a mere desire to suppress speech or political association. *See* note 56 *supra*.

58. *See* United States v. Jackson, 390 U.S. 570, 582; Sherbert v. Verner, 374 U.S. 398, 407.

59. *See* Keyishian v. Board of Regents, 385 U.S. at 608-10.

60. 395 U.S. 711 (1969).

fendant who chose to exercise that right.[61] Thus, the state could not condition the privilege of receiving a less-than-maximum prison sentence upon the waiver of a state-created right of appeal.[62]

Although the Court in *Pearce* stopped short of holding that a second sentence after retrial could never be greater than the defendant's original sentence, it held that the state was prohibited from passing an increased sentence based on "vindictiveness against a defendant for having successfully attacked his first conviction. . . ."[63] The Court further restricted the ability of a judge to impose a more severe sentence after retrial, even where provable vindictiveness is absent:

> [S]ince the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[64]

An indirect violation approach such as that utilized in *Jackson* was inappropriate in *Pearce* since there is no federal constitutional right to appeal a criminal conviction.[65] Nevertheless, by holding that a state violates due process by penalizing the exercise of its own state-created right of appeal, the net analysis is essentially the same as that in *Jackson*. The power of the state to impose a higher sentence upon a reconvicted defendant is circumscribed by the due process clause because the unchecked freedom of the state to use this power vindictively would serve to penalize and deter the exercise of the state-provided right of appeal. It might just as well be said, in indirect violation terms, that this power impinges the right to appeal (by detering and penalizing it), and its exercise must be limited to instances where the state interest in a higher sentence is legitimate and compelling.[66]

While any purported interest of the state in discouraging and penalizing criminal appeals is not legitimate, the interest of the state in

61. 395 U.S. at 723-24.

62. *Id.* For discussions of unconstitutional condition theory in the criminal justice system, see Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965); Note, *Another Look at Unconstitutional Conditions*, *supra* note 10 at 159 *et seq.*

63. 395 U.S. at 725.

64. *Id.* at 725-26 (footnote omitted).

65. *Id.* at 724.

66. *See* text accompanying notes 56-59 *supra*.

imposing a longer sentence is legitimate and most compelling when the increase is based on certain conduct engaged in by the defendant after the first sentencing. Information regarding post-sentence conduct may demonstrate that the defendant is more incorrigible than originally thought. Likewise, the deterrent or "chilling" effect on the right of appeal is appreciably reduced if convicted criminal defendants contemplating appeal are assured that a higher sentence may be imposed upon reconviction only if it is expressly based on post-sentencing conduct.[67] By requiring such affirmative findings, the *Pearce* Court effectively limited a state's ability to impose higher sentences on reconviction. It thereby made any impingement upon the right of appeal minimal, and confined the exercise of the power to impose a higher sentence to instances where the state's interest is legitimate and strong.

The scope of the *Pearce* due process approach was more closely defined in two later cases involving state-created criminal procedural rights. In *Chaffin v. Stynchcombe*,[68] the petitioner had been convicted of robbery and sentenced by a jury to fifteen years imprisonment. He successfully appealed, was retried and convicted, and this time sentenced by a *jury* to life imprisonment. The Supreme Court rejected the defendant's claim that *Pearce* barred the higher sentence. First, since the second jury was unaware of the prior sentence and appeal, there could be no claim that the higher sentence was the product of vindictiveness toward a defendant for exercising his right of appeal.[69] Second, the Court concluded that the policy of allowing a second jury, ignorant of the first sentence and appeal, to impose a higher second sentence did not create a sigificant deterrent to would-be criminal appellants.[70] Therefore, since vindictiveness was not the motivating force behind the increased sentence and the state had not burdened the right to appeal through deterrence, the Court held that there had been no violation of due process.

Blackledge v. Perry[71] involved a North Carolina right to a trial de novo in superior court for any defendant convicted of a misdemeanor in district court. When the petitioner filed a notice of appeal following his conviction in district court for a misdemeanor, he was indicted for a felony based on the same conduct. He pled guilty to the indictment in superior court and was sentenced to a term of five to seven years in prison, as compared with his original district court sentence of six

67. *See* note 64 and accompanying text *supra*. The requirement that the reasons for imposing a higher second sentence affirmatively appear and be based on conduct occurring after the original sentencing also serves as a prophylactic device to guard against hidden vindictiveness. Chaffin v. Stynchcombe, 412 U.S. 17, 35 (1973) (Stewart, J., dissenting).

68. 412 U.S. 17 (1973).

69. *Id.* at 26.

70. *Id.* at 33-34.

71. 417 U.S. 21 (1974).

months. The Supreme Court found the prosecutor's action in obtaining the felony indictment subject to the two defects which were fatal to the state policy in *Pearce*: the higher superior court charge may have reflected a vindictive intent to punish the defendant for exercising his right to appeal the district court conviction, and the prosecutor's unrestrained power to "up the ante" was likely to have a chilling effect on the exercise of the right.[72] Accordingly, the felony conviction was overturned.

The due process analysis in *Pearce, Chaffin* and *Perry* has the effect of protecting state-created criminal procedural rights from indirect burdens in much the same way as an indirect violation approach protects federal constitutional rights. This is because the due process clause of the Fourteenth Amendment forbids the state from depriving an individual of "life, liberty or property"[73] within a procedural framework which deters or penalizes the exercise of state-created rights. The state may not act vindictively to increase a defendant's sentence because he has exercised a right, since this clearly constitutes a penalty. Nor may the state grant prosecutors or judges an unlimited power to impose higher charges or sentences on defendants who have invoked state-created rights, since such discretion may not only mask a vindictive motive, but may also serve to deter criminal defendants contemplating the exercise of that right. As noted earlier, in an indirect violation analysis the test for whether a federal right has been impinged is whether the exercise of that right has been penalized or deterred.[74] Hence, the same type of burden which impinges a federal right under an indirect violation of right approach violates due process when imposed upon a state-created criminal procedure right.

D. Equal Protection

A third manner in which the Court has approached unconstitutional condition questions has been through application of the equal protection clause of the Fourteenth Amendment. Under current equal protection analysis, a law which creates a classification impinging a fundamental right or interest will be subject to "strict scrutiny," and may be justified only if it serves a compelling state interest. A classification which neither infringes a fundamental right or interest nor creates a "suspect classification" will pass constitutional muster if it is rationally related to a legitimate state purpose.[75] The problems raised

72. *Id.* at 28.

73. U.S. CONST. amend. XIV, § 1.

74. *See* text accompanying notes 53-55 *supra*.

75. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 469-70 (1977); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Shapiro v. Thompson, 394 U.S. 618, 627-34 (1969). *See generally* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of*

by the infringement of a fundamental interest or the creation of a suspect classification are beyond the scope of this note. What is involved here is the equal protection of fundamental rights.

Prior to *Maher v. Roe*,[76] the right to travel was virtually the only fundamental right considered by the Supreme Court in an equal protection context.[77] The first of these right to travel cases was *Shapiro v. Thompson*,[78] where the issue was whether a state could make one year of residency a prerequisite for welfare benefits. The effect of the requirement, noted the Court, was to create two classes of indigents "indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction."[79] The Court held that the law unfavorably discriminated against new residents in a way which burdened the right to travel interstate and to make a new home, an implied constitutional right recognized in earlier cases as fundamental.[80] The Court reviewed the regulation under the compelling state interest standard.[81] Finding no such interest present, the requirement was ruled unconstitutional. Citing *Jackson*, the opinion stressed that a purported purpose of deterring the migration of indigents was not legitimate since this was no more than an interest in discouraging citizens from asserting constitutional rights.[82] Nor could the state justify the requirement on the basis of a desire to reduce welfare costs. Fiscal interests alone, said the Court, cannot justify "an otherwise invidious classification."[83]

The Court relied upon similar analysis in *Memorial Hospital v. Maricopa County*,[84] which involved an Arizona statute requiring an indigent to be a county resident for twelve months to qualify for free non-emergency medical care. The Court found the statute violative of equal protection. The Court clarified *Shapiro* as to the impact upon a fundamental right required in order to constitute an impingement: "The Court [in *Shapiro*] spoke of the requisite impact in two ways. First, we considered whether the waiting period would deter migration. . . . Second, the Court considered the extent to which the resi-

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Evolving Doctrine on a Changing Court: A Model for a Newer Equal Proteciton, 86 HARV. L. REV. 1 (1972).

76. 432 U.S. 464 (1977).

77. Gunther, *supra* note 75, at 8.

78. 394 U.S. 618 (1969).

79. *Id.* at 627.

80. *Id.* at 629-32, relying on, *e.g.*, United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941); The Passenger Cases, 48 U.S. (7 How.) 283 (1849).

81. 394 U.S. at 634.

82. *Id.* at 631.

83. *Id.* at 633.

84. 415 U.S. 250 (1974). *See also* Dunn v. Blumstein, 405 U.S. 330 (1972) (one year residency requirement for voting held unconstitutional).

dence requirement served to penalize the exercise of the right to travel."[85] The Court concluded that Arizona's residency requirement for indigent medical care impinged upon the right to travel in both respects, by discouraging indigents with serious illnesses from migrating and penalizing those indigents who did migrate.[86] Therefore, as in *Shapiro*, the statute was subjected to strict scrutiny, found to be unsupported by any compelling state interest, and declared unconstitutional.[87]

The use of equal protection to safeguard the federal right of interestate travel from the imposition of an unconstitutional condition raises two questions, both noted by Justice Harlan in his *Shapiro* dissent.[88] First, if interstate travel is a fundamental constitutional right, why utilize an equal protection analysis at all; why not strike down the residency requirements in cases such as *Shapiro* and *Memorial Hospital* as indirect violations of the right to travel itself?[89] Second, is the indirect violation of an implied constitutional right the proper subject of a compelling state interest test?[90]

The first question has never been satisfactorily answered by the Court. If the reason that residency requirements are approached through equal protection analysis rather than indirect violation analysis is that the right to travel is a "weaker" right, since it is implied rather than explicit in the Constitution,[91] then *Shapiro* renders any distinction between the two approaches unimportant. Under the equal protection approach, an indirect burden upon a fundamental right automatically yields two classes: one receiving a privilege and one denied it, the basis of classification being the exercise of the right.[92] If the discrimination sufficiently penalizes or deters the exercise of the right, then strict scrutiny is invoked and a legitimate and compelling state interest served by the law must be shown.[93] The result would be the same were the implied right protected under the indirect violation approach followed in the *Keyishian-Sherbert-Jackson* line of cases.

85. *Id.* at 257 (emphasis omitted).

86. *Id.* at 257-62.

87. *Id.* at 262-70.

88. 394 U.S. at 655.

89. *Id.* at 659 (Harlan, J., dissenting). *See* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 418 (1977); Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution*, 44 N.Y.U. L. REV. 989, 1002-03 (1969).

90. 394 U.S. at 661, 676 (Harlan, J., dissenting).

91. *See id. But see* Maher v. Roe, 432 U.S. 464 (1977): "The Court's premise is that only an equal protection claim is presented here. Claims of interference with enjoyment of fundamental rights have, however, occupied a rather protean position in our constitutional jurisprudence." *Id.* at 484 (Brennan, J., dissenting).

92. Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

93. *Id.* at 634; *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 256-57 (1974).

Under this approach, if the indirect burden upon the right, that is the discriminatory allotment of the privilege, sufficiently deters and penalizes its exercise, then the right is impinged and a legitimate and compelling state interest must be shown.[94] Hence, implied rights are granted the same constitutional protection as express rights, with one difference: express rights are protected against indirect infringement by indirect violation analysis, while implied rights are protected by equal protection analysis. In practice, this difference is one of form, not substance.

The second question raised by Harlan's dissent concerns what he feared was the potential for a limitless extension of equal protection strict scrutiny analysis through the use of the fundamental rights and interests concept.[95] Rather than subject those laws which indirectly burdened an implicit fundamental right to the rigorous compelling state interest standard, he would have balanced the interests of the state against the burden placed upon the particular right.[96] In applying this balance in *Shapiro*, Harlan indicated that the fact that the burden was indirect rather than direct weighed more heavily in favor of validating the state policy.[97] Moreover, Harlan stated, a state had a legitimate interest in discouraging individuals from travelling to a state in order to collect welfare benefits.[98] To support his position, Harlan offered the example of a state wishing to establish "unusually generous welfare programs." In this case, the state should be permitted to utilize the unconstitutional condition of a residency requirement to prevent its grant of a benefit from becoming too economically burdensome for the state.[99] These issues—the relative weakness of implied rights, the proper standard to be applied in the case of an indirect, as opposed to direct, burden on a right and the legitimacy of a state interest in indi-

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94. *See* text accompanying notes 53-59 *supra*.

95. "I think [requiring a compelling state interest to be shown where a fundamental right or interest is involved] particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights. This Court has repeatedly held, for example, that the traditional equal protection standard is applicable to statutory classifications affecting such fundamental matters as the right to pursue a particular occupation, the right to receive greater or smaller wages or to work more or less hours, and the right to inherit property. Rights such as these are in principle indistinguishable from those involved here, and to extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'superlegislature.'" 394 U.S. at 661 (Harlan, J., dissenting).

96. In *Shapiro*, Justice Harlan felt the proper inquiry was "whether the governmental interests served by residence requirements outweigh the burden imposed on the right to travel." *Id.* at 674. "I believe that the balance definitely favors constitutionality," he concluded. *Id.* at 676.

97. *Id.* at 676.

98. *Id.* at 672.

99. *Id.* at 674-75.

rectly discouraging the exercise of implied rights—go to the heart of *Maher v. Roe*[100] and will be further discussed later in this note.[101]

E. Summary

Before an examination of *Maher v. Roe*[102] and *Bordenkircher v. Hayes*,[103] it would be helpful to summarize the Supreme Court's position on unconstitutional conditions just prior to *Maher*. Although a purported unconstitutional condition could be approached through one of three avenues—as an indirect violation of a right, a violation of due process or a denial of equal protection—the net analysis is virtually identical. The Court first examines whether the questioned policy has a sufficient impact upon the right, by penalizing and deterring its exercise, so as to constitute an impingement. If the right is burdened, the state must show that the impingement is necessary to achieve a legitimate and compelling interest. If the state fails to so justify the law, it will be held unconstitutional.

Since at least 1963 the Court has openly acknowledged that the right-privilege distinction no longer governs its approach to unconstitutional conditions.[104] Instead, government policies conditioning enjoyment of a privilege upon the waiver of a constitutional right are subjected to the rigorous examination set forth above.[105]

The main basis for judicial hostility toward unconstitutional conditions is that a government should not be allowed to do indirectly what it may not do directly—prevent the exercise of constitutional rights.[106] This idea becomes increasingly persuasive in an age where an ever expanding bounty of governmentally granted privileges and bene-

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100. 432 U.S. 464 (1977).

101. *See* text accompanying notes 235-45 *infra*.

102. 432 U.S. 464 (1977).

103. 434 U.S. 357 (1978).

104. *See* Sherbert v. Verner, 374 U.S. 398 (1963). Perhaps the retreat is first explicit in Speiser v. Randall, 357 U.S. 513 (1958).

105. By 1972 in Perry v. Sindermann, 408 U.S. 593, the Supreme Court was able to cite almost twenty cases in support of the following statement: "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' . . . Such interference with constitutional rights is impermissible." *Id.* at 597.

106. *See, e.g.*, Perry v. Sindermann, 408 U.S. at 597 (1972); Sherbert v. Verner, 374 U.S. at 405 (1963); Speiser v. Randall, 357 U.S. 513 (1958); Van Alstyne, *supra* note 10, at 1445-46.

fits are dispersed to a significant percentage of the populace.[107] In the pre-welfare state era of Justice Holmes, civil servant positions and other government benefits were scarce. Conditions placed upon such largess affected only a small number of beneficiaries, who were perceived as receiving an exceptional gratuity. Today, however, few citizens have never taken advantage of some government privilege such as a job, welfare, unemployment compensation or state-subsidized higher education. To allow modern governments to exact, as the price of obtaining these benefits, the waiver of constitutional rights would be to allow government a substantial power to buy up unpopular rights.

As government has responded to meet society's needs through the wholesale granting of state-funded privileges, popular and legal conceptions have correspondingly changed. The in-state student whose qualifications entitle him or her to enroll in a state college, or the laid-off factory worker applying for unemployment benefits do not perceive themselves as receiving charity bestowed by a bountiful state. Rather, these privileges are viewed as a form of entitlement[108] to be granted nonarbitrarily to thsoe who attain the requisite status. Psychologically, as well as practically, it made little difference to Adell Sherbert whether she was deprived of unemployment benefits she was otherwise entitled to for attending Saturday worship or was forced to pay a penal fine in the same amount for her Sabbath observance. That which Holmes viewed as mere privilege evolved over sixty-five years into a common form of possession worthy of constitutional protection. Viewing the problem from a more contemporary perspective, the Warren Court finally granted this protection.

II. The *Maher v. Roe* and *Bordenkircher v. Hayes* Decisions

A. *Maher v. Roe*

Maher v. Roe[109] involved a Connecticut welfare regulation[110] lim-

107. *See* Van Alstyne *supra* note 10, at 1461-64; Note, *Unconstitutional Conditions, supra* note 10, at 1596.

108. The term "property" has been used with regard to such government privileges as civil service jobs and welfare benefits. Perry v. Sindermann, 408 U.S. at 601; Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Van Alstyne, *supra* note 10, at 1461-66.

109. 432 U.S. 464 (1977).

110. CONN. WELF. DEP'T., PUBLIC ASSISTANCE PROGRAM MANUAL § 275 (1975), providing in relevant part:

> The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met:
> 1. In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity.
> 2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy. . . .

iting state Medicaid benefits for first and second trimester abortions to those found to be medically necessary to protect the physical and psychological well-being of the mother. The federal district court for Connecticut had ruled that the equal protection clause barred the state from excluding nontherapeutic abortions from a welfare program which funded medical expenses incidental to pregnancy and childbirth.[111] The court's decision was based upon its reading of the *Roe v. Wade*[112] holding "that encompassed within a woman's constitutional right of personal privacy is the unfettered right to terminate a pregnancy through an abortion . . . during the first trimester . . . ."[113] Connecticut's program, in favoring indigent women selecting childbirth over those electing abortion, infringed this fundamental right in the same manner as the residency requirements in *Shapiro* and *Maricopa County* abridged the right to travel.[114] Applying strict scrutiny, the Court struck down the statute.[115]

In June, 1977, the Supreme Court reversed this decision by a six to three vote, with Justices Brennan, Marshall and Blackmun dissenting.[116] Speaking for the majority, Justice Powell agreed that a state, in dispensing public benefits, is required under the equal protection clause to justify differential treatment within its programs.[117] The district court had erred, however, in concluding that Connecticut's policy impinged upon a "fundamental right to abortion," requiring strict scrutiny of the law.[118] Rather the Court drew a carefully phrased

3. The written request for the abortion is submitted by the patient, and in the case of a minor, from the parent or guardian.

. . . .

4. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

111. Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975) (three-judge district court decision).

112. 410 U.S. 113 (1973).

113. 408 F. Supp. at 663.

114. *See* text accompanying notes 75-87 *supra*.

115. The state's asserted interest in fiscal economy was found to be "wholly chimerical" since it would cost the state more to fund a childbirth than to pay for a welfare recipient's abortion. 408 F. Supp. at 664. The state was also foreclosed from defending its policy on the basis of a moral objection to abortion: "To sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right." *Id.* The Court concluded that the state had failed to justify the classification on the basis of any compelling state interest or even any rational relationship and that the regulation was, therefore, unconstitutional. *Id.*

116. Maher v. Roe, 432 U.S. 464 (1977). In the companion case of Beal v. Doe, 432 U.S. 438 (1977) the Court held that the Medicaid regulation involved in *Maher* did not conflict with Title XIX (Medicaid) of the Social Security Act, 42 U.S.C. §§ 1396-1396i (Supp. V 1970).

117. 432 U.S. at 470.

118. *Id.* at 470-71.

distinction between an "unqualified right" and a right only to be free from affirmative government interference:

> *Roe* did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.[119]

Thus defined, the right to select an abortion was not infringed because there was no affirmative government interference, even though the classification utilized by the regulation would, the Court admitted, influence women to forgo their right to an abortion[120] in order to gain an advantage granted only to those who choose childbirth.[121]

The Court distinguished *Shapiro* and *Maricopa County* on the ground that the regulations in those cases "penalized" the right to travel in a manner not present in *Maher*:

> Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.[122]

The Court also distinguished *Sherbert v. Verner*[123] on the basis that the establishment and freedom of religion clauses imposed a "governmental obligation of neturality" as to a citizen's choices, not present in the case of the right to an abortion.[124] Presumably, what the Court meant is that under the First Amendment a citizen's choice of religious belief is an "unqualified" right which is infringed by discrimination in favor of one religion over another. In contrast, since the right to choose an abortion is not "unqualified," the state may, in providing privileges such as medicaid, discriminate against women who select abortions so long as the discrimination places no additional "obstacles . . . in the pregnant woman's path to an abortion"[125] and does not take the *form* of a penalty.

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119. *Id.* at 473-74.

120. *Id.* at 474. "As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the State had provided funds for neither procedure." *Id.* at 482-83 (Brennan, J., dissenting).

121. *Id.* at 474.

122. *Id.* at 474 n.8.

123. 374 U.S. 398 (1963). *See* text accompanying notes 34-39 *supra*.

124. *Id.*

125. *Id.* at 474.

Also distinguishable, the Court noted, are cases involving the criminal justice system. In those cases the citizen is forced by the state to participate, and, therefore, the state is constitutionally obligated to compensate for a defendant's indigency by providing him with the full range of options in defending himself.[126] Where abortions are involved, however, the state neither forces citizens to participate in the abortion-childbirth choice, nor does it monopolize the means to obtain abortions.

To support the distinction between an unqualified right and a right to be free of affirmative state interference, the Court relied on *Meyer v. Nebraska*[127] and *Pierce v. Society of Sisters*.[128] In these cases, decided over forty years prior to *Maher*, the Court had struck down laws prohibiting the teaching of German to children and banning private education. In *Roe v. Wade*[129] the cases were cited as providing historical "roots" for the type of personal liberty which the Court found to be protected by the Fourteenth Amendment.[130] But in *Maher* the Court emphasized that *Meyer* and *Peirce* had defined "the liberty of parents. . . to direct the. . . education of (their) children" exclusively in terms of a right to provide privately subsidized learning free from unreasonable state control.[131] Neither case, said the Court, "denied to a State the policy choice of encouraging the preferred course of action. Indeed, in *Meyer* the Court was careful to state that the power of the State 'to prescribe a curriculum' that included English and excluded German in its free public schools 'is not questioned.' "[132]

Having thus rejected the need for strict scrutiny, the *Maher* Court next considered whether the regulation met the less exacting standard of being " 'rationally related' to a 'constitutionally permissible' purpose."[133] The Court held that "encouraging normal childbirth" is a "strong and legitimate interest"[134] and that "[t]he subsidizing of costs incidental to childbirth is a rational means" of achieving that end.[135] Thus the exclusion of nontherapeutic abortions from the Connecticut Medicaid program was ruled to be constitutionally permissible, despite the state's discrimination in favor of women selecting childbirth over those women choosing abortion.

The majority, however, did not consider whether the regulation

126. *Id.* at 471 n.6.
127. 262 U.S. 390 (1923).
128. 268 U.S. 510 (1925).
129. 410 U.S. 113 (1973).
130. *Id.* at 152.
131. 432 U.S. at 476-77 (citing Pierce, 268 U.S. at 534-35).
132. *Id.* (citing Meyer, 262 U.S. at 402).
133. 432 U.S. at 478.
134. *Id.*
135. *Id.* at 479.

placed an indirect burden upon the constitutional right defined in *Roe v. Wade*. Such use of an indirect violation approach did not elude the dissenters. Justice Brennan, joined by Justices Blackmun and Marshall, quickly dismissesd the majority's equal protection approach and attacked the statute as an indirect violation of the abortion right:

> The Court's premise is that only an equal protection claim is presented here. Claims of interference with enjoyment of fundamental rights have, however, occupied a rather protean position in our constitutional jurisprudence. Whether or not the Court's analysis may reasonably proceed under the Equal Protection Clause, the Court plainly errs in ignoring, as it does, the unanswerable argument of appellees, and the holding of the District Court, that the regulation unconstitutionally impinges upon their claim of privacy derived from the Due Process Clause.[136]

Brennan rejected the distinction between affirmative government interference with the right to select abortion and state encouragement of childbirth through discriminatory funding. In either case, a constitutional right was infringed. Such infringement could be justified only by a compelling state interest.[137] Connecticut's policy of funding childbirth but not abortion served to "discourag[e] significantly the exercise of a fundamental constitutional right" by imposing financial pressures on indigent women to forego abortions they might otherwise choose to have.[138] Justice Brennan found the questioned regulation indistinguishable in principle from those found invalid in *Shapiro v. Thompson*,[139] *Sherbert v. Verner*[140] and *Memorial Hospital v. Maricopa County*,[141] where state financial benefits had been granted or withheld in such a manner as to coerce would-be recipients to forgo constitutional rights.[142]

Brennan also disagreed with the majority's acceptance of "encouraging normal childbirth" as a legitimate state concern. *Roe v. Wade* had stated that " '[w]ith respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability' occurring at about the end of the second trimester."[143] The state should not be allowed to assert a concern for the potential life of the fetus in the first or second trimester in order to justify interfering with the mother's

136. *Id.* at 484 (Brennan, J., dissenting). The district court did not utilize an indirect violation approach, as this quotation seems to suggest. That court held that since the abortion right was impinged, equal protection required that the regulation be subjected to the compelling state interest standard. Roe v. Norton, 408 F. Supp. at 663-64.

137. 432 U.S. at 485-89.

138. *Id.* at 489.

139. 394 U.S. 618 (1969).

140. 374 U.S. 398 (1963).

141. 415 U.S. 250 (1974).

142. 432 U.S. at 487-89.

143. *Id.* at 490 (citing Roe v. Wade, 410 U.S. at 163).

abortion decision during this period.[144]

Justice Blackmun was more terse in his evaluation of the Court's action. He too believed that the majority had unjustifiably validated an unconstitutional condition: "The Court today, by its decisions in these cases, allows the States, . . . to accomplish indirectly what the Court in *Roe v. Wade* and *Doe v. Bolton*—by a substantial majority and with some emphasis, I had thought—said they could not do directly."[145]

Thus, in *Maher*, the Court utilized a narrow reading of the abortion right in the context of an equal protection analysis to avoid striking down the Connecticut regulation as an invalid unconstitutional condition. Six months later, it again confronted a state policy which arguably deterred and penalized the exercise of constitutional rights. The Court, in *Bordenkircher v. Hayes*,[146] further narrowed the constitutional prohibition against unconstitutional conditions placed upon privileges.

B. *Bordenkircher v. Hayes*

At issue in *Bordenkircher* was whether a Kentucky district attorney had acted improperly in reindicting a criminal defendant on a more severe charge expressly because the defendant had refused to plead guilty and forgo his right to a jury trial. The defendant, Hayes, was originally indicted for uttering a forged instrument, an offense punishable under Kentucky law by two to ten years' imprisonment. During a plea-bargaining meeting with Hayes and his attorney, the prosecutor offered to recommend a sentence of five years if Hayes would plead guilty to the offense as charged. If he did not do so, the prosecutor threatened to have him reindicted as a habitual offender on the basis of his two prior felony convictions—a charge which carried a mandatory life sentence upon conviction. Hayes refused to plead guilty and the prosecutor carried out his threat; Hayes was tried and convicted of the higher charge and given a life sentence.[147]

The Sixth Circuit Court of Appeals, relying on *North Carolina v.*

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144. *Id.* at 489-90.

145. Beal v. Doe, 432 U.S. 438, 462 (1977) (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.) (dissent also applied to Maher v. Roe, 432 U.S. 464 (1977), and Poelker v. Doe, 432 U.S. 519 (1977)).

Justice Marshall also dissented separately. Beal v. Doe, 432 U.S. 438, 454. He restated his longstanding criticism of the two-tier equal protection model (*see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting)) and argued in favor of an approach which would weigh "the importance of the governmental benefits denied [to the class discriminated against], the character of the class, and the asserted state interests." 432 U.S. at 458 (quoting Massachussets Bd. of Retirement v. Murgia, 427 U.S. 307, 322 (1976) (Marshall, J., dissenting)).

146. 434 U.S. 357 (1978).

147. *Id.* at 358-59.

Pearce[148] and *Blackledge v. Perry*,[149] held that the prosecutor's actions violated due process.[150] *Pearce* and *Perry*, stated the court, barred the government from acting out of vindictiveness toward a defendant for "insisting upon his constitutional right to stand trial."[151] Here, a vindictive motive for the higher reindictment was openly admitted by the prosecutor.[152] Accordingly, the appellate court ordered that Hayes' conviction as a habitual offender be reversed.

The Supreme Court reversed by a five to four vote, holding that Kentucky had not deprived Hayes of liberty without due process. The majority, per Justice Stewart, conceded that the prosecutor's actions had the practical effect of deterring the defendant from asserting his rights to plead not guilty and have a jury trial,[153] and that he had suffered an increased penalty solely because he had chosen to exercise those rights.[154] Yet the Court distinguished *Pearce* and *Perry* by emphasizing that in those cases the state had "unilaterally impos[ed] . . . a penalty upon a defendant" for exercising a right,[155] whereas the stepped-up indictment against Hayes was incidental to a bilateral bargaining process:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . , and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.[156]

The Court also indicated that the state's interest in persuading a defendant not to assert his right to trial is a permissible one: "It follows that by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."[157]

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148. 395 U.S. 711 (1969). *See* notes 60-67 and accompanying text *supra*.

149. 417 U.S. 21 (1974). *See* notes 71 & 72 and accompanying text *supra*.

150. Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976).

151. *Id.* at 45.

152. The prosecutor stated in open court that he intentionally sought the higher reindictment because Hayes insisted upon a trial. *Id.* at 43 n.2.

153. "[C]onfronting a defendant with the risk of more punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights. . . .' " *Id.* at 364 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

154. "[T]he course of conduct engaged in by the prosecutor in this case . . . openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution . . . ." 547 F.2d at 365.

155. *Id.* at 362.

156. *Id.* at 363 (citations omitted).

157. *Id.* at 364.

The latter portion of the majority opinion was expressly attacked by Justice Powell. In his dissent, Powell reiterated the prior holdings of *Jackson* and *Pearce*:

> We have stated in unequivocal terms, in discussing *United States v. Jackson* . . . and *North Carolina v. Pearce* . . . , that "Jackson and Pearce are clear and subsequent cases have not dulled their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.' "[158]

Justice Blackmun, in a dissenting opinion joined by Justices Brennan and Marshall, indicated that he was not convinced by the majority's distinction between the prosecutorial vindictiveness in *Pearce* and *Perry* and the reindictment of Hayes because of his unwillingness to plead guilty. Since the prosecutor's admitted purpose in obtaining the new indictment was to discourage the exercise of the right to trial, this action, in Justice Blackmun's view, violated due process:

> I . . . do not understand why, as in *Pearce*, due process does not require that the prosecution justify its action on some basis other than discouraging respondent from the exercise of his right to a trial.
>
> . . . I perceive little difference between vindictiveness after what the Court describes . . . as the exercise of a "legal right to attack his original conviction," and vindictiveness in the " 'give-and-take negotiation common in plea bargaining.' " Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness. The Due Process Clause should protect an accused against it, however it asserts itself.[159]

By utilizing a due process analysis, the Court in *Hayes*, as in *Maher*, avoided the issue of unconstitutional conditions. This was accomplished by emphasizing that any unpleasant price placed upon Hayes' exercise of constitutional rights came about as part of a bilateral bargaining process, and was therefore not a product of vindictiveness.[160] The next section of this note analyzes the validity of these two

158. *Id.* at 372 (Powell, J., dissenting) (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32 n.20 (1973)).

159. *Id.* at 367-68 (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.) (quoting from the majority opinion at 362).

160. By emphasizing "vindictiveness," the Court seemed to indicate that the questions involved in *Hayes* were essentially those of procedural fairness under the due process clause of the Fourteenth Amendment. The rights to plead not guilty and to demand a jury trial, however, are encompassed within the guarantees of the Fifth and Sixth Amendments. *See* United States v. Jackson, 390 U.S. 570, 581 (1968). These rights have been made applicable to the states through the Fourteenth Amendment's due process clause. Duncan v. Louisiana, 391 U.S. 145 (1968).

Thus *Hayes* is distinguishable from cases like North Carolina v. Pearce, 395 U.S. 711 (1969), and Blackledge v. Perry, 417 U.S. 21 (1974), which involved purely state-created rights. In *Pearce* and *Perry*, defendants exercising such rights were entitled to protection

decisions, focusing on the Court's treatment of the nature of the penalty involved, its distinction between qualified and unqualified rights, and the state purposes underlying the policies in both cases.

III. Analysis

A. *Maher v. Roe* and *Bordenkircher v. Hayes* Compared

The results and analyses utilized in *Maher* and *Hayes* are strikingly parallel. In both cases the Court was confronted with theoretical unconstitutional conditions: in *Maher*, the privilege of subsidized medical treatment was conditioned on the forgoing of the right to choose an abortion; in *Hayes*, the privilege of prosecutorial leniency was conditioned on the defendant's waiving the right to plead not guilty and have a jury trial. In both situations, the citizen was subjected to significant pressure to give up the right in order to take advantage of the privilege.

1. Impingement

In *Maher* and *Hayes* the majority opinions acknowledged that there was present both (1) deterrence from the exercise of the right;[161] and (2) disadvantage suffered solely because of a decision to exercise the right.[162] In prior unconstitutional condition cases the presence of these two factors had resulted in a finding of impingement of a right. Yet in *Maher* and *Hayes* no impingement was found to exist.

In *Maher* the Court held that the right to abortion had not been infringed because (1) this right is not an unqualified constitutional right but only a right to be free of unduly burdensome interference by the state;[163] and (2) in the case of such a limited right, infringement is present only if (a) the law affirmatively imposes an obstacle to the exercise of the right;[164] or (b) the law is sufficiently analogous to a criminal fine penalizing the exercise of the right.[165] Since the Connecticut Medicaid regulation, in denying to indigent women choosing abortion an advantage enjoyed by indigent women giving birth, neither imposed an affirmative obstacle nor constituted such a penalty, there was no infringement present.

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from "vindictiveness" only on the basis of procedural fairness. They possessed no federal rights of appeal or trial de novo. Hayes, on the other hand, possessed federal constitutional rights both to procedural fairness and to a jury trial in order to determine his guilt. Therefore, the Court should have examined not only whether Hayes' rights had been violated by unfair "vindictiveness," but also whether his federal rights to plead not guilty and to a jury trial had been impinged.

161. *See* notes 120, 153 and accompanying text *supra.*

162. *See* notes 121, 154 and accompanying text *supra.*

163. *See* note 119 and accompanying text *supra.*

164. *Id.*

165. *See* note 122 and accompanying text *supra.*

Similarly, in *Hayes*, deterrence of those seeking to exercise constitutional rights and the comparative disadvantage suffered by those who do exercise these rights were held to be insufficient factors to constitute an infringement of these rights or to violate due process. The majority opinion reaches this conclusion by apparently equating a constitutional violation with either (a) affirmative prevention of the defendant's Fifth and Sixth Amendment rights to jury trial; or (b) the unilateral imposition of a penalty upon a defendant exercising these rights.[166] The prosecutor's action of reindicting Hayes did not prevent the defendant from obtaining a jury trial. Any disadvantage suffered by Hayes because of his assertion of his rights to plead not guilty and go before a jury came about not as a result of any unilateral decision by the prosecutor to punish Hayes for exercising these rights, but as part of a bargaining process in which Hayes participated. Therefore, the reindictment was constitutional.

2. Legitimate State Interest

A second important similarity of the *Maher* and *Hayes* opinions is that both accept as legitimate and worthy of judicial weight, state purposes of dissuading the exercise of constitutional rights. The *Maher* opinion refers to a legitimate state interest in encouraging normal childbirth over abortion.[167] *Hayes* refers to the constitutionally legitimate interest of the prosecutor to persuade the defendant to forgo his right to plead not guilty.[168]

The *Maher* and *Hayes* decisions produced similar alignments within the Court, with the exception of Justice Powell, who wrote the *Maher* opinion and dissented in *Hayes*.[169] Presumably he took seriously the distinction articulated in his *Maher* opinion, that in cases in which the state places a citizen in a dilemma by virtue of a governmental monopoly in which participation is compelled, the government must enable the citizen to exercise his or her full range of constitutional options.[170] The criminal justice system is such a state-created monopoly. On the other hand, since the state does not create or "monopolize" the dilemma of pregnancy, apparently state neutrality as to constitutional options in that situation is not thought by Justice Powell to be required.

In the remainder of this section this note will examine the three important issues that these two cases pose with regard to the future treatment of unconstitutional condition problems: (1) whether the Burger Court is creating a new and higher threshold for determining when

166. *See* notes 155, 156 and accompanying text *supra*.
167. *See* note 134 and accompanying text *supra*.
168. *See* note 157 and accompanying text *supra*.
169. *See* note 153 and accompanying text *supra*.
170. *See* note 126 and accompanying text *supra*.

a right has been impinged by an indirect burden and whether this new standard is proper; (2) whether the *Maher* Court was correct in distinguishing between an "unqualified right" and a right to be free from affirmative government interference and whether this distinction is desirable; (3) whether the government should be able to justify its policies by putting forth a state interest in dissuading the exercise of fundamental rights. These issues will be discussed in turn.

B. Impingement—Penalty and Deterrence?

The common thread in cases involving indirect burdens is that the citizens involved are not affirmatively prevented from, or compelled by law to forgo, exercising a right. Instead, the claim is made that a right has been violated because an individual is denied a desired benefit or privilege for having exercised this right.[171] Such a claim poses a threshhold question: at what point does the state, by the act of withholding a benefit or privilege, impinge upon a constitutional right?

According to *Maher* and *Hayes*, the answer appears to be that an indirect burden exists only when the state policy denying a privilege or benefit penalizes the exercise of the right. Translated, this means that unless a policy takes a conceptual form of a penalty upon a right, no impingement exists. The Court did not deny that the policies in question placed comparative hardships upon citizens exercising rights vis-à-vis similarly situated citizens not doing so,[172] but rather implied that it was the manner by which such hardships were imposed that was constitutionally significant.[173] This emphasis upon the manner rather than upon the magnitude of comparative hardship shows that what is meant by "penalty" in *Maher* and *Hayes* is the *form* of a penalty, not the *effect* of a penalty.

Both *Maher* and *Hayes* indicated that deterrence was not a factor to be weighed in determining whether a right has been impinged. Conceding that deterrence was a by-product of the state policies involved, the Court nevertheless did not deem this relevant to the outcome in either case.[174]

This is a questionable result, because past authority, including the very cases cited by these opinions, does not support such a standard.

171. *See* note 44 *supra*.

172. *See* notes 121, 154 and accompanying text *supra*.

173. In *Maher* the Court distinguished *Shapiro* and *Maricopa County* on the grounds that in those cases the state policies involved were "sufficiently analogous to a criminal fine" upon the right to travel to be considered a "penalty" upon it. 432 U.S. 464, 474 n.8. In *Hayes*, the Court made a similar distinction between the state's unconstitutionally acting to "penalize" the exercise of a right and "the give-and-take" of plea bargaining, [where] there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." 434 U.S. 357, 363.

174. *See* notes 120, 153 and accompanying text *supra*.

Instead, impingement upon a right has previously been measured in terms of the extent to which the policy (1) deters the exercise of the right, and (2) has the *effect* of a penalty by causing comparative disadvantage and hardship to individuals exercising the right.

Maricopa County, Jackson and *Pearce* all indicated that deterrence is a factor in determining if impingement is present.[175] The only case that could be read as supporting the abandonment of this factor was *Chaffin*. There the Court did state that "the Constitution [does not] forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[176] This does not mean, however, that deterrence will not be weighed in deciding whether a right has been infringed. Later in the opinion, the Court stressed that the amount of deterrent effect upon a defendant contemplating an appeal is minimal where, at worst, upon retrial he would risk a higher sentence at the hands of a jury who is unaware of his first conviction and appeal, and therefore is unable to deliberately penalize the appeal.[177] "While it may not be wholly unrealistic for a convicted defendant to anticipate the occurrence of each of these events [necessary to receive a higher sentence], we cannot agree with petitioner that such *speculative* prospects interfere with the right to make a free choice whether to appeal."[178] *Chaffin* may indicate that deterrence alone is not sufficient to constitute an infringement of a right. But it does not hold, as does *Hayes*, that deterrence is insufficient when it is founded upon a *realistic* assessment that the government will deliber-

175. That deterrence was previously considered to be a separate factor in weighing if a right was infringed is borne out in *Maricopa County*. There the Court stated the test for deciding if there was sufficient impact upon the right to travel to find infringement and invoke the compelling state interest test: [In *Shapiro*] [t]he Court spoke of the requisite impact in two ways. First, we considered whether the waiting period would deter migration: "An indigent who desires to migrate. . .will doubtless hesitate if he knows he must risk making the move without the possibility of falling back on state welfare assistance. . ." 415 U.S. at 257 (citing *Shapiro*, 394 U.S. at 629). Likewise the Court in *Jackson* emphasized that the statute in question was found unconstitutional because it had "the inevitable effect. . .[of discouraging] assertion of the Fifth Amendment right not to plead guilty and [of deterring] exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581. The *Pearce* Court, in ruling that a higher sentence upon reconviction after appeal was permissible only for explicitly stated reasons relating to events after the first sentencing also stressed the factor of deterrence: "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U.S. at 725.

176. 412 U.S. at 30 (cited in Bordenkircher v. Hayes, 434 U.S. at 363).

177. "The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence. It has been conceded in this case that the jury was not informed of the prior sentence." 412 U.S. at 26. *See also id.* at 29-35.

178. *Id.* at 34-35. (emphasis added)

ately increase one's penalty based upon the exercise of a right.[179] Thus the Court's disregard of the fact that the state policies examined in *Maher* and *Hayes* discouraged the assertion of constitutional rights may be seen as an innovation.

A more amorphous question is whether there is any precedent for the Court's holdings in *Maher* and *Hayes* that the exercise of a right may not be deemed penalized in instances where this exercise admittedly leads to the suffering of hardship or disadvantage. While the term "penalty" has not been previously defined with precision by the Supreme Court, in *Maricopa County* the Court cited with approval an analysis of *Shapiro* by Judge Coffin:[180] "using 'penalty' in what appears to be the right context, *i.e.*, not in the sense of a criminal or civil sanction, plaintiffs and others in their class can truly be said to suffer 'disadvantage, loss or hardship due to some action.'"[181] This conclusion is consistent with the reasoning of *Shapiro* and *Maricopa County*, cases which go to great lengths to evaluate the hardship which the residency requirements placed upon citizens exercising their right to travel. Neither case, on the other hand, discusses how such requirements are in form "analogous to a criminal fine,"[182] as the Court in *Maher* stated.

The distinction that *Maher* seeks to make is, presumably, that only when the state withholds a privilege unrelated to a particular right does it impermissibly punish one for exercising the right.[183] Such was the

179. "We reiterate that we are dealing here only with the case in which jury sentencing is utilized for legitimate purposes and not as a means of punishing or penalizing the assertion of protected rights. *Jackson* and *Pearce* are clear and subsequent cases have not dulled their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" *Id.* at 32-33 n.20 (citing Shapiro v. Thompson, 394 U.S. 618, 631 (1969)).

180. 415 U.S. 250, 257 n.10.

181. Cole v. Housing Authority, 435 F.2d 807, 811 (1st Cir. 1970) (two-year residency requirement for admission to federally funded low cost housing held violative of equal protection).

182. In *Shapiro v. Thompson* the Court states: "All citizens [should] be free to travel throughout . . . our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." 394 U.S. 618, 629. The use of the terms "burden" and "restrict" would indicate that it is actual hardship and disadvantage that concern the Court, not the form the disadvantage takes.

Likewise in *Memorial Hospital v. Maricopa County* the Court discusses the detrimental effect a residency requirement for receiving free non-emergency medical attention may have upon an indigent immigrant's health. 415 U.S. 250, 259-61.

183. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.

"If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State penalizes the woman's decision to have an abortion by refusing to pay for it. *Sha-*

case in *Shapiro* where the state withheld the unrelated privilege of welfare from citizens who had exercised their right to travel. In *Maher*, however, Connecticut had not withheld any unrelated privileges from women exercising their right to have an abortion. It merely chose not to subsidize the exercise of the abortion right, thus withholding the enabling privilege, while at the same time providing the enabling privilege for the alternative of childbearing. The Court reasoned that no penalty was present when disadvantage was attached to the exercise of a right in this form, through discrimination in providing means to exercise it.

This framework has been expressly rejected in a line of decisions involving the First Amendment rights of unpopular speakers to use public forums such as streets and parks. The Supreme Court has repeatedly held that a municipality cannot discriminate in providing the forum for some speakers and withholding it from others. For instance, a city may not use the broad discretion of a license-issuing practice to selectively deny use of a public park to disfavored speech makers.[184] Nor may it deny use of a municipally-owned theater for a controversial play.[185] In these cases the Court has reasoned that discrimination in providing forums for speakers whose message falls within the First Amendment is, in essence, impermissible censorship. Yet the Court in *Maher* did not rely upon this type of analysis.

In sum, the *Maher* distinction between unrelated privileges and enabling privileges lacks support from the *Shapiro* and *Maricopa* decisions. In those cases the Court similarly addressed laws which placed unconstitutional conditions upon the receipt of welfare benefits. The language of these two cases emphasizes comparative hardship and deterrence in determining whether the discriminatory grant of a privilege constitutes an impingement.

Furthermore, the logic of *Maher*'s distinction runs contrary to First Amendment decisions prohibiting discrimination in providing *the means* to exercise the right of free speech.

This does not, however, address the Court's argument that the abortion right as defined by *Roe v. Wade* does not extend beyond the option of a woman to seek an abortion at private expense.[186] That argument goes to the question of the special nature of the abortion right.

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piro and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers." Maher v. Roe, 432 U.S. at 474-75 n.8.

184. Niemotko v. Maryland, 340 U.S. 268 (1951). *See also, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965) (statute allowing "unbridled discretion" of city officials to allow or disallow street assemblies and parades struck down as an unconstitutional infringement of First Amendment rights).

185. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

186. Maher v. Roe, 432 U.S. at 473-77.

The present section is intended to deal only with the standard of impingement in indirect burden analyses. For this reason, discussion of the abortion right issue is reserved for the next section of this note. No such deferral is dictated in fully analyzing the penalty concept in *Hayes*. The Court's justification in that case rests entirely upon what constitutes an impinging penalty, not upon any claim that the rights involved in *Hayes* were unusually narrow.

In *Hayes*, the Court distinguished between the state policies in *Jackson* and *Perry* which were found to unconstitutionally penalize rights, and the plea bargaining situation examined in *Hayes*. In the former cases the disadvantage placed upon the defendant for exercising his rights was unilaterally imposed upon him by statute, or by decisions in which the defendant or his counsel did not participate. In contrast, the disadvantage suffered by Hayes for electing a jury trial came about through a bilateral bargaining process.[187] As in *Maher* the emphasis is on the form the disadvantage suffered for exercising a right takes rather than the weight and reality of disadvantage. Unlike *Maher*, however, there is no question of the state being obligated to supply a defendant an enabling privilege so that he may exercise his rights to plead not guilty and demand a jury trial.[188] Furthermore, an increased sentence based upon the exercise of these rights is, under prior case law, the type of hardship which may serve as an infringing penalty and which must be justified by a strong legitimate interest to be held constitutional.[189]

The underlying issue in *Hayes* is this: given that it is generally an infringement for the state to place a hardship upon a defendant for exercising rights by way of an increased prison sentence, may the state impose this identical hardship upon a defendant, if the decision to do so is arrived at by prosecutorial discretion in a bargaining process?

Thus posed, the question virtually answers itself. If, as *Jackson* holds, unilateral state action increasing a defendant's punishment must be justified by a strong state interest, then a deliberate decision by a state agent achieving an identical result should not avoid the necessity of having to be so justified merely because it is cloaked by a bargaining process. Otherwise, a prosecutor could easily transform any decision to punish a defendant for exercising a trial or appeal right into a constitu-

187. "In [*Pearce* and *Perry*] the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power.' " 434 U.S. at 362 (citing with approval Parker v. North Carolina, 397 U.S. 790, 809 (1969)).

188. A lenient prison sentence for a given criminal conduct is not the means to exercise Fifth and Sixth Amendment rights, unlike the case of Medicaid and abortion. *See* note 183 and accompanying text *supra*.

189. *Cf.* United States v. Jackson, 390 U.S. 570 (1968).

tionally permissible action merely by doing a bit of "bargaining" with a defendant before the defendant fully exercises the right.

The contrary conclusion reached by the *Hayes* majority, however, leads to the anomalous result that no penalty is involved where the very sanction suffered by the uncooperative defendant is the deliberate imposition by the state of an increased sentence for the express reason that the defendant refused to waive constitutional rights. The illogic of this viewpoint was assailed in the dissent of Justice Blackmun:

> I perceive little difference between vindictiveness after what the Court describes . . . as the exercise of a "legal right to attack his original conviction," and vindictiveness in the "give-and-take negotiation common in plea bargaining." Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness. The Due Process Clause should protect an accused against it, however it asserts itself.[190]

Except for the fact that in *Hayes* the increased sentence was the result of personal discretion and a bilateral bargaining process rather than the operation of law, the situation is indistinguishable from that of *Jackson*. In *Jackson*, the defendant was expressly guaranteed by statute that he would escape the death penalty if he waived a jury trial. If anything, the situation in *Hayes* should be considered a greater infringement of rights because there the prosecutor expressly conditioned the lighter sentence upon a waiver of any trial before jury or judge.

The *Hayes* result, by allowing a state to accomplish through the discretion of its agents that which it is constitutionally prohibited from doing by statute, is no more than an elevation of form over substance.[191] As Justice Douglas stated in his concurring opinion in *Furman v. Georgia*:[192]

> A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.[193]

In conclusion, the standard for determining impingement of a right by an indirect burden utilized by the Burger Court in *Maher* and *Hayes* represents a significant break with precedent. Prior indirect burden cases found impingement if the conditions set by the state on a

190. 434 U.S. at 367-68 (Blackmun, J., dissenting).

191. This has been repeatedly denounced. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Donaldson v. United States, 400 U.S. 517, 531-36 (1971).

192. 408 U.S. 238 (1972) (death penalty ruled unconstitutional as applied).

193. *Id.* at 256 (Douglas J., concurring).

privilege significantly deterred the exercise of the right or served to penalize the right by visiting comparative hardship on exercisers of the right vis-à-vis non-exercisers. These two recent decisions appear to have discarded the deterrence prong and have narrowly construed the test of penalty to refer only to instances where hardship comes about through a mechanism which satisfies some conceptual form of penalty. The effect of such a narrowly defined standard is, of course, to remove many of the teeth of indirect burden analysis and/or provide the Court with virtually free-floating discretion in determining these cases.

In the next section, this note will discuss a second weakness of *Maher*, namely, its narrowed interpretation of the scope of the abortion right.

C. The *Maher* Distinction Between Qualified and Unqualified Rights

In *Maher v. Roe*, Justice Powell, writing for the majority, states that the abortion right defined in *Roe v. Wade*[194] is not an unqualified constitutional right but rather one which protects a woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.[195] As a qualified right, it imposes no obligation of neutrality upon the state in distributing an enabling privilege.[196] The opinion implied in a footnote that such an obligation of neutrality might exist as to the distribution of an unrelated privilege, such as general welfare benefits to a woman who had chosen to have an abortion. Denial of this latter type of privilege would constitute a penalty on the exercise of the abortion right, and *Shapiro v. Thompson*[197] and *Memorial Hospital v. Maricopa County*[198] would control.[199]

The effect of drawing such a distinction between qualified and unqualified rights is that a state is thereby allowed to discriminate in the distribution of an enabling benefit. Perceiving the *Roe v. Wade* right as that of a pregnant woman to choose between childbirth or abortion, the qualified nature of this right permits the government to distribute funds in a non-neutral manner, that is, to those women favoring childbirth.[200] In contrast, recognizing the right of free speech, for example, as an unqualified right, such discrimination would be impermissible; if the government provided the enabling privilege of a forum for speech in general, it could not do so discriminatorily so as to favor one choice of

194. 410 U.S. 113 (1973).
195. 432 U.S. at 473-74.
196. *Id. See* notes 119-21 and accompanying text *supra*.
197. 394 U.S. 618 (1969).
198. 415 U.S. 250 (1974).
199. 432 U.S. at 474 n.8. *See* notes 122 and 183 and accompanying text *supra*.
200. *See* Maher v. Roe, 432 U.S. at 469 n.5.

speech over another.[201] This constricted view of the scope of the abortion right is, of course, critical to the *Maher* result.

In analyzing the validity of this unqualified right distinction it would be appropriate to begin with the two rather venerable cases that Justice Powell cites in its support: *Meyer v. Nebraska*[202] and *Pierce v. Society of Sisters*.[203] Both cases were decided in the mid-1920's under a judicial philosophy favoring the broad use of the substantive due process theory to scrutinize legislation. In essence, this theory was that a judicially recognized liberty could "not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[204] Protected rights not explicit in the Constitution were deemed by the Court to be implicit in the term "liberty" of the Fourteenth Amendment's due process clause and included the economic freedoms to work and to contract.[205] The significance of the *Meyer* and *Pierce* decisions was that they added a non-economic, civil liberty component to the already existing economic liberties.

In *Meyer* the Court ruled unconstitutional a Nebraska statute which made it a misdemeanor to teach a foreign language in a public or private school to any pre-eighth grade child. The admitted purpose of the legislation was "to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals."[206] This prohibition was found to interfere with the freedom "to acquire useful knowledge" and to "bring up [one's] children."[207] The Court held this infringement to be unjustified since the motive of fostering "a homogeneous people" was not a legitimate end.[208] In *Pierce* the issue was whether the state of Oregon could require all children to attend public school, thus foreclosing the option of parents to send their children to private schools. Applying a similar line of reasoning, the Court held that the law unreasonably interfered with the liberty set out in *Meyer* of parents "to direct the upbringing and education" of their children.[209]

201. *See* notes 184-85 and accompanying text *supra*.

Similarly, if the state provides a benefit which aids religious exercise the aid may not favor one religion over another. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 449-50 (1971) (conscientious objector exemption from military service); Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970) (property tax exemption for religious organizations).

202. 262 U.S. 390 (1923).

203. 268 U.S. 510 (1925).

204. Meyer v. Nebraska, 262 U.S. at 399-400.

205. *Id.* at 399. *See, e.g.*, Adams v. Tanner, 244 U.S. 590 (1917); Lochner v. New York, 198 U.S. 45 (1905).

206. 262 U.S. at 401.

207. *Id.* at 399-401.

208. *Id.* at 402-03.

209. 268 U.S. at 534-35.

The Supreme Court has strongly renounced the use of substantive due process to protect economic freedoms.[210] On the other hand, *Meyer* and *Pierce*, which added protection to personal rights, stand as viable precedents today. Modern decisions have read the two cases as indicating support for the recognition of personal freedoms not expressly mentioned in the Constitution but which are nevertheless "implicit in the concept of ordered liberty" and constitutionally protected.[211] Thus *Roe v. Wade* had utilized the two cases as supporting "a right of personal privacy, or a guarantee of certain areas or zones of privacy [which] does exist under the Constitution."[212]

In the *Maher v. Roe* opinion, *Meyer* and *Pierce* are cited in support of the proposition that the presence of an abortion right as an implied liberty does not insure protection against the disfavored treatment of women seeking an abortion when the state distributes the enabling privilege of Medicaid.

> [Neither *Meyer* nor *Pierce*] denied to a State the policy choice of encouraging the preferred course of action. Indeed, in *Meyer* the Court was careful to state that the power of the State "to prescribe a curriculum" that included English and excluded German in its free public schools "is not questioned."[213]

This interpretation of *Meyer* and *Pierce*—as allowing the state, in bestowing educational benefits, to discriminate against the exercise of implied liberties—is most likely historically correct.[214] It is consistent with such pre-1952 cases as *Davis v. Massachusetts*,[215] which held that a city may discriminate against an unpopular preacher in granting the privilege to use a public park as a forum, *Hamilton v. Board of Regents*,[216] which held that a state may grant the privilege of a university education, in such a way as to discriminate against Methodists practicing their religious tenet of pacifism, and *In re Summers*,[217] in which the Court decided that the state of Illinois might properly refuse a religious

210. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Nebbia v. New York, 291 U.S. 502 (1934).

211. Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

212. 410 U.S. at 152.

213. 432 U.S. at 476-77.

214. *But see* Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), in which the Court held that a public school rule prohibiting students from wearing black armbands to protest the Vietnam War violated the right of free speech. Meyer v. Nebraska, 262 U.S. 390 (1923) was relied on extensively in *Tinker* as supporting the conclusion that the state could not determine *public* school policy on the basis of the illegitimate motive of fostering "a homogeneous people." 393 U.S. at 506-07, 511-12 (emphasis added).

215. 167 U.S. 43 (1897).

216. 293 U.S. 245 (1934).

217. 325 U.S. 561 (1945).

pacifist admission to the state bar for reasons of his beliefs. Indeed, by so interpreting *Meyer* and *Pierce* in *Maher v. Roe*, Justice Powell seems to have resurrected the right-privilege distinction recognized in this line of cases.

There is, however, nothing in the right-privilege distinction concept to support the fine-tuned distinction between qualified and unqualified rights made in *Maher*. As previously discussed,[218] the right-privilege distinction applied to any government benefit and recognized no distinction between enabling privileges[219] and unrelated privileges.[220] Nor did the right-privilege distinction apply only to Fourteenth Amendment liberty interests as *Maher* implies. It imposed no obligation of neutrality on the governmental distribution of privileges even when discrimination was present against unpopular speakers and disfavored religious minorities whose conduct came within the express protections of the First Amendment.

Thus, the dicta appropriated by Justice Powell from the *Meyer* and *Pierce* decisions does not represent any considered assessment by those Courts that liberties protected under the Fourteenth Amendment should only restrain state interference with private activity. Rather, if such a concept is to be found in the language of *Meyer* and *Pierce* it amounts to no more than a restatement of the right-privilege distinction's application that government may, without restriction, place unconstitutional conditions on the granting of a privilege.

The *Maher* opinion further reasoned that a more far-reaching treatment of the *Meyer-Pierce* liberty of parental upbringing would lead to the problematic conclusion that state decisions to fund public but not private education or choices as to school curriculum would be subjected to a compelling state interest test.

> Yet, were we to accept appellees' argument, an indigent parent could challenge the state policy of favoring public rather than private schools, or of preferring instruction in English rather than German, on grounds identical in principle to those advanced here. We think it abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education.[221]

In fact the unseemliness of the proposition that state choices in these situations require extraordinary justification suggests, by itself, that strong interests are present for allowing states to resolve these questions in a relatively unhampered manner. A state's decision to

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218. *See* notes 11-28 and accompanying text *supra*.

219. *See, e.g.*, Davis v. Massachusetts, 167 U.S. 43 (1897).

220. *See, e.g.*, *In re* Summers, 325 U.S. 561 (1945); Hamilton v. Board of Regents, 293 U.S. 245 (1934).

221. 432 U.S. at 477.

fund only public education, or to provide some curriculum subjects rather than others, is dictated by (1) its interest in providing certain minimal educational needs of its citizens, and (2) finite resources of money, teachers and classroom space. A constitutional mandate requiring that allotments to public education be matched by state subsidies to private education, or that public schools provide a curriculum in all desired subjects would, of course, avoid infringing the right of parents to direct the education of their children. At the same time, however, it would place an impossible financial burden upon a state's educational efforts, and frustrate the compelling interest a state has in making an education freely available to its children.

In the view of this author, it seems appropriate in the case of public outlays for education, and analogous situations where the non-neutral distribution of privileges with respect to affected rights would create an impossible state burden, that a somewhat modified compelling interest standard be used—one which allows the government to make the practical decisions which it must make, but which also recognizes that unconstitutional conditions placed upon privileges do serve to burden and chill the exercise of constitutionally protected rights. The compelling state interest test should be deemed fulfilled if there is (1) a compelling state interest in granting a privilege, and this interest by its nature necessitates that choices be made in the nature of an unconstitutional condition, and (2) a choice based upon constitutionally legitimate grounds, not upon a governmental desire to discourage or disfavor the exercise of the discriminated-against constitutional rights.

Under this analysis, suppose the *Meyer-Pierce* liberty *were* recognized as "unqualified," thereby imposing an obligation of neutrality on a state in alloting the enabling privilege of educational resources. No constitutional straitjacket would be entailed so as to obligate the state to fund private education if it chose to fund public schooling or to fund every desired foreign language if it provided instruction in any. For example, a school's choice to teach French rather than German may be said to impinge somewhat upon the liberty of any parents who wish their children to learn German. Such an impingement could be justified, however, by a compelling state interest in providing education to its children, which interest, in order to be achieved, necessitates that some curriculum choices be sacrificed, and by the fact that the choice was based on a constitutionally legitimate motive, such as higher student demand, or greater social utility of French. But a decision made on the basis of a desire to discourage the learning of German or to retard the development of German culture should not receive constitutional protection. This framework, in which the compelling interest test is confronted and passed, seems far preferable to that suggested by *Maher* as to the scope of the *Meyer-Pierce* liberty. If this liberty offered no protection in the public school sector, as Justice Powell sug-

gests, a law prohibiting the teaching of a foreign language in any public grammar or high school, enacted for the purpose of "inhibiting training and education of the immature in foreign tongues and ideals" in order to foster "a homogeneous people" would not be constitutionally suspect.[222] Such a result, while perhaps acceptable in 1923 to the *Meyer* Court which was locked into the right-privilege distinction, is highly questionable in 1977.[223] In sum, there is nothing in the *Meyer* and *Pierce* decisions nor in the logical implications of the liberties they define to justify the unqualified right distinction made in *Maher*. Furthermore, if the unqualified right distinction in *Maher v. Roe* is thus based upon a myopic view of a discredited doctrine, it is perhaps to be viewed with some suspicion.

Contrasting the situation of state choice in public education with the situation in *Maher*, there is no simliar cost-effective reason for the state to fund childbirth but not abortions. Hospitals are not classrooms where one single operation is most efficiently provided to thirty patients simultaneously, and there is no strong reason why any choice must be made by the state.

A better analogy may be drawn to *Sherbert v. Verner*[224] and *Shapiro v. Thompson*.[225] In *Maher*, as in *Sherbert* and *Shapiro*, any cost savings arose from cutting a relatively small segment of the population out of a general distribution of benefits. The non-funding of elective abortions created a specific exception to a Medicaid budget which included funds for childbirth as well as a broad spectrum of other medi-

222. Since the act of electing to not teach German, under Justice Powell's view, "is not questioned," the motives of the legislators is not to be scrutinized. This result is dictated by Palmer v. Thompson, 403 U.S. 217 (1971), in which, despite strong evidence that public swimming pools were closed in order to avoid their racial integration, that conduct was held constitutional (*see* note 6 *supra*). Since the state action on its face impinged no right, it required no justification by a legitimate state interest.

The argument set forth in the text would hold that a withholding of curriculum should be dictated by proper state motives. Where the motive for such action is to encourage the forgoing of the right to pursue desired subjects of knowledge, the policy should be struck. Education involves constitutional interests not found in the case of swimming pools. *Cf.* Minarcini v. Strongsville City School Dist., 541 F.2d 577 (1976) (removal of book from school library held unconstitutional "[i]n the absence of any explanation which is neutral in First Amendment terms." *Id.* at 582).

223. Norwood v. Harrison, 413 U.S. 455 (1973) is not apposite. (*See* Maher, 432 U.S. at 477). *Norwood* dealt specifically with a class action suit to enjoin a state from loaning state-owned textbooks to children in racially segregated schools. The Court held that the Fourteenth Amendment forbade any significant grant of state aid to schools which discriminate on the basis of race. 413 U.S. at 466-67. Private schools which did not discriminate might continue to receive textbook loans. *Id.* at 471. This holding—that states may not aid private education if such aid directly furthers racial discrimination—is hardly strong support for the proposition that state discretion with regard to public educational policy is unbounded.

224. 374 U.S. 398 (1963).

225. 394 U.S. 618 (1969).

cal services, just as the recent immigrant in *Shapiro* and the Saturday worshipper in *Sherbert* found themselves singled out, solely on the basis of exercising a right, from widely dispersed programs of benefits. It was precisely to prevent government from making those citizens who exercised a constitutional right the narrow exception to a general policy granting privileges and benefits that provided the motive for a prohibition of unconstitutional conditions.[226] Yet, this point is entirely missed by the *Maher* opinion.

Maher, by its conceptualization of the abortion right as "qualified," creates an unjustified exception to the rule that unconstitutional conditions placed on a privilege impinge upon the affected right. It fails to address the underlying concerns that triggered close judicial scrutiny of such conditions. Government should not be allowed to use its manipulative power to grant privileges in order to buy off the exercise of rights or to discriminate against those exercisng unpopular rights. When the government does grant a privilege to which is attached an unconstitutional condition, the condition should be justified by a strong interest other than a dislike for the exercise of a right.

There may be some situations where requiring the government to equally benefit all constitutionally permissible options is too burdensome and would frustrate a strong and legitimate interest in making some grant. This is particularly true in the case of such enabling benefits as education outlays. Here the unconstitutional conditions rationale would be satisfied by requiring a strong governmental purpose behind the privilege grant which necessitates choice, and requiring that the choice made be on the basis of some legitimate grounds. The shortcoming of the unqualified right distinction is that it allows government to discriminate unjustifiably against disfavored rights.

Although the *Maher* and *Hayes* decisions arrive at their respective results through different analyses, both achieve a similar end-product—a refusal to find a constitutional violation in the case of an unconstitutional condition. *Maher* does this by narrowly construing the right involved. The abortion right is held not to extend to governmental distributions which would enable the right to be exercised. Hence, there is no penalty present when there is discrimination against the abortion right in this arena. *Maher* leaves open the question of what other rights are to be similarly construed. The *Hayes* Court does not in any way constrict the rights to plead not guilty and elect a jury trial. Instead, as discussed earlier, *Hayes* narrowly construed the term "penalty" in order to find no impingement or vindictiveness present—even where a defendant suffers an increased punishment expressly for asserting these rights.

The unqualified right distinction made in *Maher* to avoid the find-

226. *See* notes 106-108 and accompanying text *supra*.

ing of an unconstitutional condition is justified neither by logic nor precedent. As indicated in Part I, the application of the right-privilege distinction so as to permit government unqualified discretion to distribute privileges in such a way as to discriminate against unpopular constitutional rights has been thoroughly discredited. The nature of the statute examined in *Maher* presented no reason for the Court to deviate from its standard approach to unconstitutional conditions. Such conditions should be allowed to stand only when they promote strong, legitimate state interests. The next section examines treatment of the state interest issue in *Maher* and *Hayes*.

D. The State Purposes Behind the Policies in *Maher* and *Hayes*

In both *Maher* and *Hayes*, the majority opinions either ignore or gloss over the holdings of *Jackson, Shapiro, Pearce* and *Chaffin* that "if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'"[227] The *Maher* opinion merely states that the state has "a strong and legitimate interest in encouraging normal childbirth."[228] In *Hayes*, the Court is more direct: "this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty."[229]

The *Maher* opinion relied on language in *Roe v. Wade*[230] indicating a recognizable interest of the state in the potential life of the fetus.

> *Roe* itself explicitly acknowledged the State's strong interest in protecting the potential life of the fetus. That interest exists throughout the pregnancy, "grow[ing] in substantiality as the woman approaches term." . . . Because the pregnant woman carries a potential human being, she "cannot be isolated in her privacy. . . . [Her] privacy is no longer sole and any right of privacy she possesses must be measured accordingly."[231]

Because of its interest in protecting the fetus, the state, *Maher* indicates, may correspondingly have a legitimate preference for childbirth over abortion, and on the basis of this interest, implement policy "encourag-

227. Bordenkircher v. Hayes, 434 U.S. at 372 (Powell, J., dissenting); Chaffin v. Stynchcombe, 412 U.S. 17, 32 n.20 (1973); North Carolina v. Pearce, 395 U.S. 711, 724 (1969); Shapiro v. Thompson, 394 U.S. 618, 631 (1969); United States v. Jackson, 390 U.S. 570, 581 (1968).

228. 432 U.S. at 478 quoting Beal v. Doe, 432 U.S. 438, 446 (1977). It should, perhaps, be emphasized that what is at issue in *Maher* is not the purpose for Medicaid funding for childbirth generally, but rather, the purpose for the discriminatory classification between women desiring childbirth and those choosing abortion. 432 U.S. at 470. *See* Shapiro v. Thompson, 394 U.S. at 634; United States v. Jackson, 390 U.S. at 582.

229. 434 U.S. at 364.

230. 410 U.S. 113 (1973).

231. 432 U.S. at 478 (citations omitted).

ing the preferred course of action."[232] In other words, the state may encourage women to choose childbirth and thus forgo abortion.

This approach is not consistent with the holding of *Roe v. Wade* that the interest of the state in the fetus is recognized as compelling only after the beginning of the third trimester of pregnancy.[233] Until this state interest is compelling, it may not, under *Roe*, justify interference with the constitutional right of the pregnant woman to choose abortion.[234] Stripped of the opinion's sophistical treatment of the scope of the abortion right and interpretation as to what amounts to a penalty thereon, the *Maher* Court is asserting the somewhat illogical proposition that a state interest in childbirth, found in *Roe v. Wade* to be insufficient to justify actions to *prevent* the exercise of the abortion right, is nevertheless sufficient to justify a discrimination made for the *purpose of discouraging* its exercise. Beyond mere logical difficulties, however, is the rather radical proposition that any state action might find constitutional justification in a purpose of discouraging the exercise of a right.

In examining a second interest put forth to justify the discrimination upheld in *Maher*, namely fiscal savings, it would be appropriate to reconsider one of the points made by Justice Harlan in his *Shapiro v. Thompson* dissent.[235] He argued that a rule requiring a state to eliminate any unconstitutional conditions from a benefit grant might prove so burdensome that it would cause a state to refrain from granting benefits it would otherwise provide on the basis of laudable motives.

Justice Harlan utilized the example of a state wishing to provide an extremely generous welfare program to its indigent residents. He reasoned that the state should be permitted to utilize a residency requirement to keep the cost of this program within manageable bounds, that is, to prevent a mass influx of poor from less charitable states, immigrating for the purpose of obtaining these benefits.[236] The majority opinion in *Shapiro*, by requiring a compelling state interest to justify the unconstitutional condition of a residency requirement,[237] and by holding that fiscal interest alone could not constitute such an interest,[238] would seem to lock the state into a choice of providing either an overly burdensome program or one no more attractive than its neighbors'—with obvious results. Justice Harlan's solution was to utilize a less stringent balancing test rather than the compelling state interest

232. *Id.* at 477.
233. 410 U.S. at 163.
234. *Id.* at 163-64; Maher v. Roe, 432 U.S. at 489-90 (Brennan, J., dissenting).
235. 394 U.S. 618, 655 (1969).
236. *Id.* at 674-76 (Harlan, J., dissenting).
237. *Id.* at 634.
238. *Id.* at 633.

test in evaluating an indirect burden upon the right to travel.[239] Such a less exacting standard was justified in cases involving non-explicit rights, since, because of the number and diversity of these rights, extension of the "compelling interest rule to all cases in which such rights are affected would go far toward making this Court a 'super-legislature.' "[240] In balancing the state interests in favor of the residency requirement against the resulting burden on the right to travel, Harlan would have discounted the burden due to its indirect nature[241] weighed against the state's interest, among others, in discouraging those who would travel to a state in order to collect welfare benefits.[242]

Harlan's suggestion that a compelling state interest test is improper for non-explicit rights has not been followed by the Court. Several of these rights have been deemed fundamental and subject to interference only when a compelling interest is present.[243]

While Harlan recognized as legitimate a state's interest in keeping out indigents, recognition of this interest is not critical to an evaluation of the problem posed by his example. The two cognizable interests involved are a desire to provide indigent residents with a highly competitive welfare level as compared with that provided by other states, and a desire to keep the overall costs of this benefit program within bounds. These two interests, taken together with economic and social realities, dictate that the state has a corollary interest in shielding its treasury vaults from incoming poor. Only the first two, *real* interests of the state, should be weighed in determining if the state has justified its impingement on the travel right. Thus, the thrust of Justice Harlan's example is to be understood not as challenging the majority's failure to allow for a legitimate state interest in discouraging indigents to exercise their right of travel, but rather, as being critical of the *Shapiro* opinion for not adequately permitting the fulfillment of state interests necessitating choice.

Justice Harlan's concern that over-rigorous judicial scrutiny of unconstitutional conditions may fiscally overburden a state's proposed extension of a benefit program is reflected in the logic of the *Maher* decision.[244] Harlan's suggestion was to utilize a balancing, rather than compelling interest, test to evaluate these conditions indirectly burdening the exercise of rights. The *Maher* Court seems willing to leave intact a compelling state interest requirement if the affected right is

239. *See* note 96 *supra*.

240. 394 U.S. at 661 (Harlan, J., dissenting).

241. *Id.* at 676 (Harlan, J., dissenting).

242. *Id.* at 672 (Harlan, J., dissenting).

243. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262 (1974) (travel); Roe v. Wade, 410 U.S. 113, 155, 163 (1972) (abortion); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (contraception).

244. *See* notes 221-23 and accompanying text *supra*.

unrelated to the benefit conferred, reasoning that in such cases the condition acts as a penalty. But, if it is an enabling benefit, as in the case of financing German in public schools or providing Medicaid for abortion, the condition may be justified by no more than a purported state interest in a citizen's forgoing the exercise of the involved right, and in the fiscal savings which almost invariably results from cutting any group out of a benefit grant.[245]

Maher clearly goes too far in solving this "problem." To say that government may have a legitimate interest in citizens forgoing their rights drastically depreciates the value that those rights should have in a constitutional system. Government should not be permitted to deliberately shape its welfare programs for the purpose of rewarding those willing to forgo unpopular rights.

In the prior section, discussing Justice Powell's school curriculum hypothetical in *Maher*, this note suggested that the distinguishing feature of such a case lay not in the nature of the right involved nor in the classification of the privilege extended as enabling or unrelated. Rather, what differentiated curriculum choice from traditional unconstitutional condition cases was that the state interest behind the privilege advanced was one which necessitated choice to be achieved. Justice Harlan's generous welfare program example is similarly a case where the state interest involved cannot practically be achieved without a choice being made which cuts out a class of citizens on the basis of their exercise of a constitutional right, that is, unless the state is able to impose the unconstitutional condition of a residency requirement, its end of providing a high welfare grant may be too expensive to be feasible. The proper distinction to be made is between unconstitutional conditions imposed in situations where *the reason for the granting of the privilege is a legitimate state interest necessitating choice* and situations where this is not the case. In the later type of situation there is no reason not to apply a standard unconstitutional condition analysis and strike the condition unless there is a compelling legitimate reason for the discrimination.

The remaining question is what type of test should govern a case where the interest in granting a privilege would be frustrated if a state were not permitted to utilize an unconstitutional condition to limit the grant. Actually, this is an open question, the Supreme Court having never faced such a case, but it is, of course, the problem presented by the hypotheticals of Justice Powell in *Maher* and Justice Harlan in his *Shapiro* dissent. The argument could be made that Justice Harlan's balancing test should be appropriate in such circumstances. It is better,

245. "Our cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds," 432 U.S. at 479. *See also id.* at 481 (Burger, J., concurring).

perhaps, for a state to grant a privilege discriminatorily than not at all. Such a tolerance of unconstitutional conditions, however, does not adequately take into consideration the adverse impact that these conditions may have upon the exercise of rights. First, under the standard analysis an unconstitutional condition will not receive constitutional scrutiny at all unless the relative detriment or the deterrent effect upon citizens seeking to exercise a right is meaningful. Second, the practical result of many unconstitutional conditions has been effectively to foreclose the exercise of rights to that segment of citizenry subject to the conditional grant. Since the adverse effect of an unconstitutional condition upon the exercise of a right will very likely be substantial, albeit indirect, the compelling interest standard seems most appropriate.

For instance, in Justice Harlan's example, a state's interest in experimenting with a generous welfare program does not appear to justify the imposition of a one year residency requirement. The effect of the unconstitutional condition will be, practically, to deny poor persons the freedom to migrate to that state. If, on the other hand, the state maintains a welfare subsidy relatively equivalent to that of its neighbors, it has no reason to fear a massive influx of indigents or to impose a prohibitive residency requirement. Hence the interest in welfare experimentation is not so compelling as to justify the burden upon the right of travel. In the case of educational curriculum, the state's interest in educating the young is compelling and would, of course, outweigh the impinging effect that curriculum choice has upon the right defined in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. In sum, the compelling state interest test should be appropriate in any unconstitutional condition case. The condition should be allowed to stand only if there is a compelling interest for granting the privilege that would be frustrated if the condition did not limit the expense of the grant, or if there is a compelling interest for the discrimination.

The facts of *Maher* give no indication that funding a Medicaid program that discriminated against women wishing abortion would be significantly less expensive to a state than providing a program free of discrimination. In fact, the district court was convinced that a nondiscriminatory program might be less expensive overall.

> This [fiscal] interest is wholly chimerical because abortion is the least expensive medical response to a pregnancy. . . . Furthermore, the birth of a child to a welfare mother increases the burden on the state's welfare coffers because the newly-born indigent child will, in all likelihood, qualify for state welfare assistance. The state's assertion that it saves money when it declines to pay the cost of a welfare mother's abortion is simply contrary to undisputed facts.[246]

246. Roe v. Norton, 408 F. Supp. at 664; Maher v. Roe, 432 U.S. at 490 (Brennan, J., dissenting).

Since the exclusion of elective abortion from Connecticut's program burdened the abortion right without achieving any demonstrable legitimate state purpose, (beyond, perhaps, marginal savings attributable to an invidious classification), the regulation in *Maher* should have been struck down.

In *Hayes* the Court takes one step beyond *Maher* by expressly stating what *Maher* implied: it classified as "constitutionally legitimate" a state's interest in persuading a citizen "to forgo" the exercise of a right.[247] This language is only dicta, since by holding that the prosecutor's action failed to impinge upon any right of Hayes,[248] the Court eliminated the need for state justification.

A proper analysis would have first admitted that under the standards of *Jackson* and *Pearce* constitutional rights were in fact infringed by the prosecutor's actions in *Hayes*. It would have then been necessary for the Court to examine whether a compelling state interest existed either for plea bargaining in general, or at least for the particular practice of reindictment utilized in the case of *Hayes*. The privilege involved in *Hayes* was of a somewhat different type then the Medicaid benefits in *Maher* in that a state does not incur an economic cost in providing the privilege of a lenient sentence. Hence, no contention could be made that the interest in granting the privilege necessitated choice. What should have been subject to more probing scrutiny was the interest of the state in its discrimination; its offering Hayes a severe sentence if he did not waive his rights versus a lighter one if he was willing to do so.

The Court's assertion in both *Maher* and *Hayes* that the policies involved were justified by legitimate state interests in citizens forgoing rights is a substantial and unwarranted departure from precedent. The government should never be permitted to act solely on the basis of its dislike for any constitutionally protected right. The seed of a doctrine that would recognize such interests can only be described as constitutionally hazardous. It deserves to be reexamined and discarded.

IV. The Implications of *Maher* and *Hayes*

The practical effect of a continued movement of the Court in the directions set out in *Maher* and *Hayes* will be to set back much of the progress made in the last two and a half decades against unconstitutional conditions. Faithful adherence to a standard of impingement which considered whether a condition served to deter the exercise of

247. *See* note 157 and accompanying text *supra*.
248. *See* notes 155-56 and accompanying text *supra*.

rights, and whether it caused relative hardship to those exercising them, would, of course, reach every unconstitutional condition which significantly disfavored a right. In *Maher* and *Hayes* the Court showed a willingness to back away from such a standard, indicating that real substantive impact upon a right was not co-extensive with a finding of impingement. In both *Maher* and *Hayes* the government had made the waiver of constitutional rights the price for privileges of great importance to the potential recipients. In neither case was this action found to burden any constitutional guarantee so as to require some meaningful justification for the condition.

The unqualified right distinction made in *Maher*, is, in essence, a partial resurrection of the right-privilege distinction. A woman has a right to choose an abortion but a state may discriminate against the exercise of this right in distributing privileges—so long as the discrimination is not so "analogous to a criminal fine" as to constitute a "penalty." Utilizing this distinction the Court might create a class for rights deemed to have a limited scope. Such rights would receive the same protection as other rights when exercised at private expense, but would be only narrowly guarded against infringement by unconstitutional conditions on privileges. The Court has yet to categorize which rights should fall into this class, or indicate whether the concept will be used extensively beyond abortion cases. *Maher* alone might lead one to conclude that the "penalty" concept is important only where rights which are not unqualified are involved. Such rights are protected only against unconstitutional conditions which are penalties. On the other hand, an unqualified right might be held infringed whenever a state substantially discriminates against a citizen exercising it.

The *Hayes* decision dispells such a notion, however. It indicates that the narrowed penalty concept, relegated to a footnote in *Maher*, may become of paramount importance in unconstitutional condition cases, effectively superseding the unqualified right distinction that the *Maher* decision seems to turn on. The *Hayes* Court did not indicate that the Fifth and Sixth Amendment rights to plead not guilty and have a jury trial, or the Fourteenth Amendment's guarantee of due process were in any way limited or qualified rights. Yet by use of the penalty concept these rights were held not to be impinged by a condition which visited severe disadvantage on one utilizing them. The *Hayes* analysis thus seems to be more applicable to unconstitutional condition questions affecting rights in general than does that in *Maher*.

The question remains as to which rights will be examined under this emerging standard. Cases involving First Amendment freedoms may be immune from a *Maher-Hayes* analysis since the establishment clause expressly proscribes government discrimination in matters of re-

ligion,[249] and because of the emphasis past cases have placed upon government neutrality in matters of politics and speech.[250] This note suggests that conditions discouraging and adversely discriminating against citizens exercising First Amendment rights will probably continue to receive rigorous scrutiny and require strong justification regardless of the form such conditions take.[251] Other rights, however, seem destined for more narrow unconstitutional condition protection.

The idea of penalty whch runs through *Maher* and *Hayes* is an amorphous one. In *Maher* the condition attached to Medicaid was not a penalty because the privilege involved was an enabling privilege, rather than an unrelated privilege. In *Hayes* the condition placed upon a lenient sentence was deemed not to be a penalty because it arose from a bargaining process. The term "penalty" thus seems to have evolved into a form of smoke screen behind which the Court may make a non-standardized decision as to whether it wishes to find infringement. In actuality, the members of the Court seem to be responding to unarticulated political or social concerns, or on the basis of intuitive notions—and then simply announcing that the unconstitutional condition in question is not a penalty. The fact that the Court now finds nothing wrong in the state acting for the sole purpose of discouraging the assertion of a right only increases this free-floating discretion.

Any standard which emphasizes form over substance is unlikely to cure the ill to which it is addressed. The various approaches developed by the Warren Court were well addressed to rooting out unconstitutional conditions which had real and substantial negative effect upon the exercise of rights, and requiring that such conditions be justified by strong state concerns other than a mere dislike for these rights. If the present Court continues to frame the question as to whether an unconstitutional condition takes the form of a penalty, some conditions which in fact have substantial impact upon a right will be only minimally scrutinized. The fact situations in *Maher* and *Hayes* are extreme illustrations of the tremendous pressure that government is capable of utilizing in the distribution of privileges so as to discourage the exercise of unpopular rights. In the case of Medicaid, state and federal governments, based upon evolving standards of humanitarian concern, have decided that needy members of society should not be forced to do without adequate medical treatment. Yet the *Maher* decision permits a state selectively to utilize non-provision of medical treatment, an alternative which society generally finds inhumane and unacceptable, so as

249. Maher, 432 U.S. at 464 n.8.

250. *See* text accompanying notes 184 & 185 *supra*.

251. *Cf.* McDaniel v. Paty, 435 U.S. 618 (1978) (invalidating state statute disqualifying minister from becoming delegate to state constitutional convention); Elrod v. Burns, 427 U.S. 347 (1976) (patronage policy of dismissing county employees belonging to losing political party violated First Amendment right of association).

to coerce indigent women to forgo their constitutional right to choose abortion. Undoubtedly, a great many indigent pregnant women who desire abortions will, not only in response to financial pressure, but also out of a concern for their physical health and well-being, be forced to take what the *Maher* opinion refers to as "the preferred course of action" and forgo abortions. The pressure involved in *Hayes* was similarly inescapable. There the state was permitted to exercise the threat of a substantive hardship of its own making and under its exclusive control, namely, a severe prison sentence, to attempt to induce a defendant to forgo his valuable constitutional rights to contest his guilt before a jury.

Yet in neither case was the state required to come forth with a strong or compelling justification. It is suggested that when government uses its power to grant privileges so as to greatly disfavor the exercise of particular constitutional rights, as in these two cases, government should be required to show strong justification for its policies.

The extension of a governmental privilege is a response to a socially perceived need. The purpose of eroding the right-privilege distinction was to force government to respond to those needs in a manner that did not discriminate against individuals exercising constitutional rights; the State was given the choice between a constitutionally benign distribution of a privilege or no distribution at all. The new direction of the Court taken in these two recent unconstitutional condition cases will tend to shield government from such a choice. Due to the Court's "unqualified" right distinction which may limit the reach of a right, or the Court's newly narrowed concept of what constitutes a penalizing impingement, some privileges conditioned on the waiver of rights will not receive significant judicial scrutiny. If a state wishes to discourage the assertions of certain rights it need only utilize some discretion as to method and hope that the Supreme Court will approve. *Maher* and *Hayes* in effect partially recreated the right-privilege distinction. There is no right to a governmentally-granted privilege, and government may therefore grant a privilege on whatever terms it chooses; so long as the condition does not take the form of a penalty, a privilege may be conditioned on the waiver of a constitutional right.

Conclusion

The *Maher v. Roe* and *Bordenkircher v. Hayes* decisions represent a significant shift of the Supreme Court's direction in cases involving unconstitutional conditions placed upon governmentally granted privileges and benefits.

Through the first half of the twentieth century such cases had generally been analyzed under the philosophical constructs of the right-privilege distinction. That which was only a privilege was not constitu-

tionally protected and might be conditioned in any manner that a bountiful government saw fit—including upon the waiver of constitutional rights.

In the Warren Era, the Court began to adopt a less tolerant attitude toward such conditions, perceiving that government, which was forbidden from directly preventing and punishing the exercise of rights, should not be allowed to use its unlimited ability to grant privileges in order to accomplish these forbidden results indirectly. Under a variety of approaches, conditions creating a negative impact upon the exercise of a constitutional right were subjected to rigorous judicial scrutiny. Whether the impact was sufficiently negative was determined on the basis of two criteria: first, whether it served to deter exercise of the right; and second, whether it placed relative hardship and disadvantage upon individuals exercising the right solely because of this exercise. Conditions significantly having these effects were struck down if they were not justified by strong state interests unrelated to punishing or discouraging the exercise of constitutional rights.

In *Maher* and *Hayes* the Court's pendulum seems to have reversed its swing. Deterrence criteria were abandoned and emphasis was placed upon the question of whether any relative hardship attached to the exercise of a right took the *form of a penalty*. Thus, despite the fact that the government policies examined in these cases resulted in significant discouragement of the assertion of rights and extreme hardship upon citizens exercising rights, no impingement of any constitutional right was found because there was no *penalty* present. Furthermore, the Court indicated that the questioned policies in each case could be justified solely by a purported state interest in encouraging individuals to take the alternative course of action to exercising a right.

By emphasizing the form an unconstitutional condition takes in relation to a right, rather than its substantive effect, and by indicating that government may have a legitimate cognizable interest in a citizen's not asserting a right, the Court has created the potential for permitting great leeway for the government to create policies which have the effect of rewarding those individuals willing to forgo disfavored constitutional rights. Yet this note urges that the same reasons that compelled the erosion of the right-privilege distinction indicate the undesirability of such a result. Allowing government to, in effect, buy off unpopular rights disparages the dignity and value that constitutional rights should have in our system of government. Furthermore, policies which will, under the newly developed analysis, be subjected to only minimal scrutiny may foreclose rights to some individuals just as effectively as would absolute prohibitions. To a person whose actions are tightly governed by situational restraints, such as a criminal defendant facing a stiff prison sentence or an indigent pregnant woman, state-offered op-

tions like the ones in *Hayes* or *Maher* appear to offer little or no choice at all but to surrender those rights—no matter how much free will is apparent to someone viewing the situation from the perspective of the Supreme Court. Laws thus tampering with the rights of citizens should be tolerated only when justified by some pressing purpose beyond governmental dislike for the assertion of disfavored rights.

The rationale articulated in *Maher* and *Hayes* deserves to be carefully reevaluated. In these two cases the Court moves toward rejecting a constitutional standard which addresses the substantive impact that the conditioned grant of a privilege may have upon the exercise of a right, and instead utilizing an amorphous test looking to form rather than effect. In so doing the Court comes far too close to effectively overruling the much more realistic approach to policies granting benefits in those cases where the dividing line between recipient and nonrecipient coincides with the question of whether a citizen has exercised a constitutional right.