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A Comment on "Constitutional Rights as Public Goods"

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I want to focus on a paradox that arises from Professor Merrill's very interesting analysis. He says that the unconstitutional conditions doctrine should be used when the exercise of a right has high positive externalities that are unlikely to be taken into account either by the individual right-holder or the government. For instance, the right to vote, even though it matters little to any particular voter's private interests, has high public value because it helps achieve accountability and legitimacy. Courts should not permit the government to induce waiver of the right to vote (even if the incentive is a mere ten dollar bribe) because collectively we all have such a strong interest in voting as a form of political participation. Putting the point more generally: the unconstitutional conditions doctrine should be invoked when the ratio of the right's public value is high relative to its total value. As the voting-bribe hypothetical illustrates, this will tend to be true the more trivial a right is for the private interests of individuals.

The paradox that emerges from this analysis is that the more crucial a right is to you as an individual, the more free the government should be to induce you not to exercise it. This result is a corollary of the principle that utilization of the unconstitutional conditions doctrine should depend on the ratio of public value to total value. The "total value" of the exercise of a right includes the private value to the individual right-holders; hence, if public value is held constant, the higher the private value, the lower the ratio of public value to total value will tend to be. This helps to explain why it is constitutional to use draconian criminal sentences (including the death penalty) to discourage defendants from exercising their right to a trial. While the public has an interest in fair trials (such as maintenance of faith in the justice system), individual criminal defendants have such strong incentives to use procedures that will minimize their punishment that plea bargains can be permitted. That is to say, again, *because* due process is crucial to individual lives, the government may induce waiver.

As applied to the abortion funding issue, this paradox would mean that the current law, which permits the government to provide financial incentive for live births,[1] may be based, oddly enough, on the assumption that the right to

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1. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

privacy (like the right not to be punished without due process) is terribly important to the right-holder. Although he doesn't say this, under Professor Merrill's analysis, the courts should be more inclined to reverse the current law—that is, to require payments for abortion—to the extent that judges are convinced that abortion (like voting) does not matter much to individuals' lives.

This may sound perverse but it makes a certain sense. To say that a woman should be permitted to accept a bribe from the government in return for foregoing her right to abortion might as well reflect the unsentimental view that her private interests—her future—will be sufficiently important to her that the bribe will make little difference. If, however, women are viewed as having little at stake (since, for example, both childlessness and child-rearing have their problems and their joys), the bribe becomes very powerful and should be prohibited if the right to abortion has positive externalities.

You may doubt that any pro-choice advocate's opposition to discriminatory subsidies for live births actually is (or realistically could be) based on such a view, but I am not so sure. Certainly Justice Blackmun's extremely harsh and even paternalistic condemnations of so-called "informed consent" laws have depicted the decision to have an abortion as extremely precarious.[2] That depiction is consistent with the view that some females, at least, will not see the exercise of the right to abortion as crucial to their lives. Thus, a low assessment of the private interest in abortion is one rather surprising explanation for the fear that women will too easily be talked (or bribed) out of the decision to abort. This would be especially unacceptable to those pro-choice advocates who believe that free use of abortion will achieve large political and social benefits, such as the equalization of power relationships between men and women.[3]

I want now to depart from Professor Merrill's analysis and suggest a different justification for the paradoxical conclusion that I have been describing. It seems possible to me that, when the exercise of a right is of plain and tangible importance to individuals, high positive externalities are more likely to be taken into account both by the individual, who must decide whether to waive the right, and by the legislature that must decide whether to try to encourage waiver. Such rights—which in my own opinion would include freedom of speech, property, and abortion—are likely to matter to many organized groups precisely because groups will be organized around rights that matter to individuals. To the extent that the right is crucial in the lives of its membership, such groups—think of the ACLU, the National Federation of Independent Business, the Abortion Rights League—will have both the resources and the incentive to influence the perception in popular culture of the right they favor. They may even be successful in imparting a mythic cast to that

2. The Court once described negative, but truthful, information as creating "the antithesis of informed consent." Thornburgh v. American College of Obstetricians, 476 U.S. 747, 764 (1986). The information, "no matter how objective . . . may serve only to confuse . . . [the patient] and to heighten her anxiety." *Id.* at 762.

3. *See, e.g.*, Ruth B. Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383-86 (1985).

right—consider how journalists have been able to characterize their function as being the heroic watchdog of government or think of the power of adages like "a man's home is his castle" and slogans such as "get your government off my body." Not only will groups have strong incentives to put out such messages, but individuals will have incentives to be persuaded by them to the extent that they want to justify or dignify self-interest. In short, it seems possible to me that rights which are important in the lives of individuals are relatively advantaged in the general culture.

Thus, at least in comparison to those rather abstract rights that have a high ratio of public value in comparison to total value, both individuals and the government will be inclined to perceive positive externalities in privately valued rights. Since, in these circumstances, the government is comparatively unlikely to try to induce waiver unless strong public costs offset the public good, it would follow that courts should tend not to apply the unconstitutional conditions doctrine to rights that matter to individuals.

The possibility that relative political advantage attaches to rights with high private values thus reinforces Professor Merrill's general position. This possibility also supports the implications of his analysis in more complicated settings. Consider, for instance, two rights that have different values in all respects (private, public, and total) but nevertheless have the same ratio of public value to total value.[4] Should, for instance, the same waiver rule be applied to a right that is relatively trivial both for the right-holder and for society as is applied to a right that is crucial to both the individual and society?

Taken at face value, Professor Merrill's analysis seems to me to suggest that—as long as the ratio is the same—the applicability of the unconstitutional conditions doctrine would be the same. It is easy to see that waiver should be permitted if the right-holder thinks the right is trivial and if society has no great stake in the matter. But why should waiver be permitted when, although the private stake is great, the external benefits are also large? Assuming it is correct that high private value will help assure that large public benefit is appreciated in collective decisionmaking, waiver of the high-value right will tend to be permitted only if there are important costs connected with the exercise of the right in particular social circumstances. Waiver, therefore, should be permitted. The implications of Professor Merrill's analysis, while apparently paradoxical in this situation, seem justified.

4. I am indebted to Arthur Travers for raising this issue.