

## RESPONSE TO PROFESSOR GARVEY

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The question raised in John Garvey's recent book, *What Are Freedoms For?*,<sup>1</sup> at first glance seems an unusual, if not odd, question. Rather than a means to an end, as implied by his question, freedom as understood in the liberal tradition is an end in itself, an *a priori* condition with its own innate value. From this perspective, it is not freedom but limitations on freedom which bear the burden of justification. And in the liberal tradition, that which limits one's freedom is not a requirement to be virtuous or good, but rather a requirement to respect the sometimes conflicting freedom of others. The role of law and the state, consequently, is not to endorse and enforce any moral or religious orthodoxy, but rather to create conditions in which individuals can be free to define, choose, and pursue their interests and values as they see fit. Liberalism puts the right to choose our ends at the center of the good life, saying that the good life is a private, individual matter rather than a public, social matter.

The premise—the political metaphysic, if you will—behind the liberal notion of freedom is the claim, articulated most clearly and vigorously by Thomas Hobbes in his *Leviathan*,<sup>2</sup> that we live in a universe unstructured by objective moral principle.<sup>3</sup> There is no moral architecture to the universe, in the sense that good and evil, right and wrong are not natural categories.<sup>4</sup> Instead of our finding individuals who live within and are constrained by a natural moral order and an *a priori* hierarchy of values, all we have is simply a number of individuals in a condition of absolute freedom and radical subjectivity, each with his or her own personal moral code.<sup>5</sup> Locke, to be sure, wrote in his *Second Treatise of Government*<sup>6</sup> of natural law, but the subjectivity and bias of our interpretations of the norms of natural law in the state of nature lead, in practice, to the same result—as opposed to any natural reality in theory, our practical, concrete moral code is a matter of convention.<sup>7</sup> This is the basic web of assumptions underlying the Supreme Court's central premise in *Planned Parenthood v. Casey*:<sup>8</sup> “At the

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1. JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996).

2. THOMAS HOBBES, *LEVIATHAN* (Michael Oakeshott ed., 1969).

3. *Id.* at 123-24.

4. *Id.*

5. *Id.*

6. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., 1980).

7. *Id.* at 9-11.

8. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."<sup>9</sup>

Problematic as it may be, the consequence of this premise is the duty of liberal government to remain neutral, agnostic, vis-à-vis substantive visions of the good life. With its focus on the priority of individual choice, the liberal vision of the good life is not substantive but, rather, formal.

To deny theoretically or practically the existence of a moral architecture to the universe is, of course, to reject the traditional idea of natural law. Professor Garvey's question as to "what are freedoms for" thus originates outside of the liberal tradition; its intelligibility presupposes the existence of natural law. For Professor Garvey, the good is prior to the right; constitutional rights exist not to give people the choice to do what is good or bad, but to live good lives by doing good things.<sup>10</sup> Professor Garvey's position thus suggests a rewording of the Declaration of Independence: We have, *not* the right to life, liberty, and the pursuit of happiness, but rather the right to life, liberty, and the pursuit of *virtue*. We see this contrast in the standard abortion-related terms "pro-choice" and "pro-life." For the pro-choice position, what matters most is not the choice that is actually made, but rather the question of who makes the choice.<sup>11</sup> For the pro-life position, by contrast, what matters most is not who makes the choice but, because abortion is to them such an unspeakable evil, that the right choice be made.<sup>12</sup> Why would people disagree about moral matters such as abortion and other issues? A natural-law perspective would ground such disagreement in either ignorance or evil—a person either does not know what is right, or willfully and knowingly chooses the wrong. By contrast, from the perspective of the liberal tradition, people disagree because, in all good faith, they really do disagree; it is not a matter of unknowingly or knowingly choosing evil over good.

While we have never lived in a pure liberal, or libertarian, social order, I would ask whether Professor Garvey has considered the reason why the modern liberal tradition arose. A liberal polity is an institutionalized agreement to disagree. It is precisely because people historically and contemporarily disagree about virtue and the good that liberalism insists upon and protects autonomy for one consistent with autonomy for all. Now, I recognize that this argument is not

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9. *Id.* at 851.

10. GARVEY, *supra* note 1, at 28-47.

11. See generally KATHY RUDY, BEYOND PRO-LIFE AND PRO-CHOICE: MORAL DIVERSITY IN THE ABORTION DEBATE XI-XIII (1996) (recognizing the inherent divergence of viewpoints between pro-life and pro-choice advocates—the former sees "death" while the latter sees "only an exercise of rights").

12. *Id.*

unproblematic. In a book called *Liberal Virtues*,<sup>13</sup> Stephen Macedo has argued that liberalism presents a picture of the good life consisting of society as a kind of forum of principle, in which people meet and hold principled arguments over moral and political matters.<sup>14</sup> It is a view of society as an academic symposium. As I read the book, however, I wondered if Macedo had, for example, ever watched Pat Robertson's *700 Club*. Had Macedo ever encountered people who were so outside of the liberal tradition that they could not agree to disagree? Politics—certainly liberal politics—cannot function in a condition of an absolute rejection of agreement to disagree. But short of such a disastrous condition, politics is the way we negotiate our differences in order for people of differing moral conceptions to be able to live together. But this again is a prudential, if not theoretically satisfying, argument for the liberal notion that government must neither endorse nor enforce a particular moral or religious orthodoxy.

I, therefore, would ask Professor Garvey the following: If the highest value in his theory is that we do good things, is there any logical, principled stopping point in his position which would forestall the argument that government should *enforce* goodness? On the other hand, if, as I would expect, Professor Garvey would argue that doing good things—acting virtuously—*voluntarily* is fundamental, then choice—the right to choose—is perhaps more important than he seems to allow.<sup>15</sup> Further, even if Professor Garvey were to argue that it is not the place of law and the state to *enforce* virtue, that still leaves open the option of arguing that law and the state may—indeed must—*endorse* virtue. Here too, however, the question of a logical stopping point arises:

- May the state endorse religion over non-religion?
- May the state endorse Christianity over other religions?
- May the state endorse Protestant over Catholic or Orthodox Christianity?
- May the state endorse the Assemblies of God over the Presbyterian Church?

While Professor Garvey argues that the notion of freedom as autonomy, the right to choose, is too powerful—it overrides seemingly instinctive moral distinctions we conventionally make<sup>16</sup>—my concern in this example is that *his* notion of freedom is too powerful—it threatens to undermine such things as the speech and religion clauses of the First Amendment.

Finally, Professor Garvey makes an argument against the liberal idea of freedom very similar to Michael Sandel's notion of the unencumbered self which

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13. STEPHEN MACEDO, *LIBERAL VIRTUES* (1996).

14. *Id.* at 44-45.

15. GARVEY, *supra* note 1, at 20-28.

16. *Id.* at 40-41.

appears in his book *Democracy's Discontent*.<sup>17</sup> Garvey's idea of the one-way street, his idea that we as persons are embedded in all sorts of relationships and commitments which function as givens, resembles Sandel's argument that we are not, as individuals, isolated and independent Cartesian egos of pure choice.<sup>18</sup> Yet while Professor Garvey claims that the Supreme Court agrees with him in this view of freedom,<sup>19</sup> Sandel, criticizes the Court for holding precisely the liberal view of freedom.<sup>20</sup> The Court, to be sure, is not necessarily consistent within or between substantive doctrinal areas, but I think it is too much to claim the Court's authority on behalf of Professor Garvey's notion of freedom as virtue.

In the end, I would submit that Professor Garvey's question as to the purpose of our freedoms is one which must be answered at the micro-level of the individual rather than the macro-level of society as a whole. That is the classically liberal solution to the problem of the pluralism of values which non-liberal positions such as that of Professor Garvey necessarily find insoluble by peaceful, political means. Nevertheless, we must be grateful to Professor Garvey for raising and debating anew this difficult issue in his delightfully gentle way.

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17. See *id.* at 56-57; MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 26-28 (1996).

18. GARVEY, *supra* note 1, at 5-12; SANDEL, *supra* note 17, at 103.

19. GARVEY, *supra* note 1, at 5-6.

20. SANDEL, *supra* note 17, at 100-08.