

# PLURALITY, AUTONOMY, AND THE RIGHT TO TAKE ONE'S LIFE

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## I. INTRODUCTION

John Garvey endorses the United States Supreme Court decision that the United States Constitution does not grant citizens the right to commit assisted suicide.<sup>1</sup> He argues that the Court arrived at its decision because of its understanding of the nature of freedom,<sup>2</sup> one that Garvey claims is similar to the one he proposes in his book *What Are Freedoms For?*<sup>3</sup> In these remarks, I will first critically assess Garvey's notion of freedom and its attendant philosophical commitments, and then I will consider and reject his position on suicide. I will not address the question of the accuracy of Garvey's belief that he and the Court share the same philosophical beliefs about freedom, agency, and the constitutive identity of persons.

## II. GARVEY'S UNDERSTANDING OF FREEDOM

John Garvey rejects political liberalism, which he characterizes as prioritizing the right over the good with the aim of maximizing the freedom of each

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1. John H. Garvey, *Control Freaks*, 47 DRAKE L. REV. 1, 1 (1998); Washington v. Glucksberg, 117 S. Ct. 2258, 2261 (1997).

2. Garvey, *supra* note 1, at 5.

3. JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 6, 12-19 (1996).

person.<sup>4</sup> Once this freedom is realized, "I then decide for myself what I want out of my life and how to get it. That is the good for me."<sup>5</sup> Garvey argues that, for the *moral* theories which tout this kind of autonomy, no act or form of life has intrinsic merit except one marked by the exercise of autonomy.<sup>6</sup> However, *political* theories that adopt autonomy as an ideal only do so for strategic reasons.<sup>7</sup> They claim that the task of establishing and maintaining a stable democracy forces us to accept that there are irreconcilable disagreements about how individuals should live their lives.<sup>8</sup> In the face of these disputes, which are the source of discord and violence, freedom of choice is necessary in order that civil harmony be preserved.<sup>9</sup> The upshot of both the moral and political commitment to autonomy is, as Garvey puts it, valuing not what is chosen but the choice itself.<sup>10</sup> Thus, Garvey argues, the logical outcome of the commitment to liberalism and to the notion of autonomy central to it is the severing of our understanding of freedom from our notion of the good.<sup>11</sup> This leads to what Garvey views as the common conviction that freedom and morality are unrelated, and that what is important is our right to make choices, not the choices that we make.<sup>12</sup>

But, Garvey argues, this common conviction is based on a misunderstanding of the nature of freedom.<sup>13</sup> It is wrong to understand freedom as the right to make choices because what freedom *is* is the right to act morally. Garvey writes, "I think that some actions are better than others. And the whole point of freedoms is to let us do these things. The law leaves us free to do *x* because it is a good thing to do *x*."<sup>14</sup> Thus, in Garvey's account, freedom is not a good in itself, nor is it defended because individual autonomy is valued, as it is by liberal theorists.<sup>15</sup> Garvey defends freedom only because it allows for action which has been held to be good or important.<sup>16</sup> But by whom, or why? Sometimes, Garvey holds an action to be good or important because of a Supreme Court decision, though at other times it was only a dissenting decision that recognized

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4. *Id.* at 1-2.

5. *Id.*

6. *See id.* at 6-7.

7. *See id.* at 7-8.

8. *See id.* at 6-8.

9. *Id.* at 12.

10. *Id.* at 24.

11. *Id.* at 19.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 20.

16. *Id.*

the good that the exercise of freedom is meant to bring about,<sup>17</sup> and sometimes he seems to suggest that the Court has failed to recognize these goods at all.<sup>18</sup> Sometimes, Garvey approvingly points to presumably shared beliefs about the good he ascribes to the writers and ratifiers of the Constitution.<sup>19</sup> At other times, he variously appeals to parents who understand that children are not very good at making choices, to those of us who believe that only love makes sex important and thus a good, to Calvinists who understand the importance of religious freedom, to a "we" in democratic America who value speech because it is a way to knowledge, to readers who believe that twelve-year-old girls should not have babies, and often simply to John Garvey and his intuitions about what the good is.

Garvey is forced to justify his claims by these appeals to personal intuition, commitment, revelation, authority, tradition, or some combination of these because, like other communitarian theorists, he has no rational normative theoretical resources from which to draw. He eschewed them when he rejected liberalism's commitments to autonomy and moral pluralism. Like Alasdair MacIntyre<sup>20</sup> and Michael Sandel,<sup>21</sup> whose theories resemble his, Garvey arrives at this unfortunate juncture because he makes two especially problematic moves. Both moves respond to what are taken to be intrinsic shortcomings in liberal, moral, and political theory, though they are in fact merely the historical detritus of liberalism's more inadequate articulations.

### III. AUTONOMY, VALUE NEUTRALITY, AND THE DISTINCTION BETWEEN LAW AND MORALITY

Garvey believes that adopting a liberal commitment to the value of autonomy commits one to the position that all moral choices are equally legitimate, to believing, as Jeremy Bentham put it, that "the game of push-pin is of equal value with the arts and sciences of music and poetry."<sup>22</sup> Garvey is confused on several counts here. Believing that it is morally important that a person choose a course of action if it is to count as having moral worth<sup>23</sup> does not commit one to believing that all choices are of equal moral merit, nor does it entail believing

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17. *See id.* at 21.

18. *See id.* at 22.

19. *Id.* at 9.

20. *See generally* ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981).

21. *See generally* MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

22. *Id.* at 6.

23. *See id.* at 6-8.

that having the freedom to choose to do the good means that freedom should be understood as morally neutral. It does mean that moral action is essentially tied up with choosing to be moral. While this could be a commitment that Garvey might find difficult to justify within the scope of his theory, I suspect that he would not find it morally repugnant, as it is certainly important to many religious notions of free will to which he seems to be drawn.

In arguing that without a commitment to a thick theory of the good we necessarily fall into a world of moral relativism where push-pin and the arts have the same value, Garvey fails to distinguish abstract principles entailed by a commitment to autonomy and rationality from concrete choices that different individuals make about how to live their lives. There may be many ways to live a life that may be regarded as autonomous and thus as having some value, but that does not mean that all ways of life have value or that autonomy is the *only* measure of the value of a life. A commitment to autonomy is not compatible with all choices about how to live. It must condemn as morally inadequate the unautonomous, unreflective life, such as one in which one's choices are driven by physical addictions to drugs, marked by blind obedience to a seductively charismatic religious leader, or a life marked by reenacting a legacy of abuse or neglect which is in effect a life controlled by a past which is inflicted on others. Making choice essential and necessary for the achievement of a moral life does not make all choices moral, nor does it mean that exercising freedom of choice is an exhaustive measure for determining whether an individual has achieved such a life. Without the freedom to make at least some choices about how to live one's life, one cannot be held responsible for the choices one makes and moral agency becomes meaningless. Thus, freedom is a prerequisite for morality.

Autonomy can be made *identical* with morality only when its achievement is understood in something like the Kantian sense—as identical with the exercise of a universal rationality conceived as analogous to a law of nature.<sup>24</sup> Such a conception reunites freedom with a notion of the good understood as the telos of nature or history. Kant dubbed this unity of nature and reason the *summum bonum*.<sup>25</sup> Most liberal theorists, on the other hand, understand that autonomy is *not* identical to morality, but is essential to it. When autonomy is a precondition for the achievement of the good, but not its full expression, freedom, or liberty must become one of democracy's central concerns.

Garvey rightly recognizes that when freedom is understood in terms of a moral conception that highly values the autonomous exercise of the will, one opens the door to the probability that many individuals will make deplorable

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24. See ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 107-08 (1989).

25. *Id.* at 220.

choices about how to live their lives.<sup>26</sup> But in viewing this as a reason to reconceptualize our understanding of political freedom, Garvey not only misunderstands liberalism's commitment to autonomous choice, he also conflates ethics, morality, and legality, and thus fails to value liberalism's appreciation for the pluralism of values which must be negotiated in the public sphere. Garvey fails to recognize that, while democratic law originates from a community of members who individually have ethical beliefs about how they ought to live their own lives and have intersubjectively negotiated moral beliefs about the norms which ought to govern our communal lives, *law* itself should not be understood to be identical to any individual's or group's "thick" notion of the good. While law reflects the abstract, over-arching, and universalizable norms that make it possible for many (but not all) competing notions of the good to coexist, it is not identical to these norms either. In order to best understand the way law has developed and the way law and legal discourses function, it should be understood to emerge alongside of ethical and moral discourses, instead of being understood to emerge directly from them. Jürgen Habermas calls for this understanding of law in his book, *Between Facts and Norms*,<sup>27</sup> where he traces the distinction and relationship of law to ethical and moral principles.<sup>28</sup> He writes:

[L]egal and moral rules are *simultaneously* differentiated from traditional ethical life and appear *side by side* as two different but mutually complementary kinds of action norms. In accordance with this, the concept of practical reason must be understood so abstractly that it can assume a specifically different meaning depending on which kind of norm is at issue: the meaning of a moral principle, on the one hand, and that of a principle of democracy, on the other.<sup>29</sup>

If law is understood in this way rather than in terms of the fictional narratives of origination offered by philosophers like Hobbes, Locke, and Rousseau, it can be understood as a social device meant to achieve an end different from that achieved by moral norms and discourses, though not unrelated to them. Law can then be viewed as an institutionalized mechanism for creating a normatively regulated social and political world subject to state enforced sanctions. This understanding makes clear that law will have to grapple with a multiplicity of beliefs and values, in a way that competing moral and ethical beliefs need not be dealt with in an individual's life, or in the practices of a community whose mem-

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26. GARVEY, *supra* note 3, at 84.

27. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., 1996).

28. *Id.* at 105.

29. *Id.*

bers share a single moral vision. Hannah Arendt claimed that the reason that no one account of the good should dominate in the public sphere was because one of the most fundamental conditions of human existence is "plurality."<sup>30</sup> Not one person, but many inhabit the earth, and she identified any attempt to impose a "sovereign" vision of the good as arrogant and dangerous.<sup>31</sup> Only if law is understood as distinct from morality (though not wholly unrelated to it), as directed at achieving something different from what morality achieves (though something which cannot be achieved if moral socialization completely fails), can one avoid the pitfalls of moral nihilism that Garvey wrongly ascribes to liberalism, or the dangerous arrogance of inscribing in law a singular interpretation of the good.

Garvey succumbs to the latter failing because, unlike Habermas, who offers elaborate empirical and theoretical justifications for the moral, political, and legal significance of abstract norms which can capture shared normative commitments across our conflicting visions of the good,<sup>32</sup> Garvey can only invite us to share his intuitions of what it means to live a good life, and can only ask us to acknowledge that they either are or ought to be reflected in the choices we make in our individual lives, in the practices of our communities, and in the law of the land.

#### IV. CONFLATING THE INDIVIDUAL AND THE COMMUNITY

In Garvey's view, the value liberalism places on autonomy ultimately springs from its misunderstanding of human nature.<sup>33</sup> It views selves as essentially unencumbered and unsituated, capable of distancing themselves from their beliefs and desires, and of reflecting on those beliefs and desires in light of reason guided by universally applicable principles.<sup>34</sup> Liberalism insists that it is only from this critical and distanced perspective that individuals can make moral choices and that normative political disputes can be resolved.<sup>35</sup> Thus, not only do liberal theorists credit selves with this critical reflective capacity, but they also go further and view the exercise of this critical reflective capacity as a normative ideal.

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30. HANNAH ARENDT, THE HUMAN CONDITION 234 (1958).

31. *Id.*

32. HABERMAS, *supra* note 27, at 105.

33. GARVEY, *supra* note 3, at 8-9.

34. *Id.* at 44.

35. *Id.* at 43.

In the context of a discussion of how the Free Exercise Clause<sup>36</sup> ought to be interpreted, Garvey argues that this is an inaccurate account of human beings and scoffs at the idea that if we scratch John Garvey deep enough we would find some essential self and not just "a middle-class Irish Catholic, husband, father of five children, law professor, part-time musician, Celtics fan, and so on."<sup>37</sup> In short, he accuses liberalism of being guilty of not only prioritizing the right over the good, but in prioritizing the self over its ends.<sup>38</sup> He also rejects the liberal account on normative grounds, and points to the Christian belief of obedience to the law of God as a reasonable alternative.<sup>39</sup>

Garvey is right that much liberal theory has been guilty of imagining persons without ends or attachments.<sup>40</sup> Michael Sandel has described the typical liberal "self" as "wholly without character, without moral depth."<sup>41</sup> But this account of the self is not essential to the theoretical success of liberalism. Liberal theorists can and have offered much more adequate accounts of self identity which recognize both the "situatedness" of the self, while also maintaining that human beings have a capacity to distance themselves from their deeply held beliefs, and values in the exercise of citizenship that is not only real and desirable, but also, in a modern democratic world, necessary.<sup>42</sup> Without the capacity to reflect on the legitimacy of our beliefs, we can only behave according to the dictates of authority, tradition, convention, or habit. Without the ability to reflectively make even religious commitments our own, both moral agency and democratic citizenship which require self-legislation become impossible. If we cannot even reflect on our ends and choices, especially on those most constitutive of our identities, we, like Adolf Eichman, would be reduced to saying "Who was he to judge? Who was he 'to have [his] own thoughts in this matter'?"<sup>43</sup> As Arendt ironically notes, "[H]e was neither the first nor the last to be ruined by modesty."<sup>44</sup> It was because of this failure to engage in moral reflection about his ends and his identity that she accused him of

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36. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . .").

37. GARVEY, *supra* note 3, at 44.

38. *Id.* at 46.

39. *Id.*

40. *Id.* at 43-44.

41. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179 (1982).

42. See, e.g., JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION*, (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990); SEYLA BENHABIB, *SITUATING THE SELF* (1992); RONALD DWORAKIN, "LIBERALISM" IN PUBLIC AND PRIVATE MORALITIES (Stuart Hampshire ed., 1978).

43. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 114 (1963).

44. *Id.*

"thoughtlessness."<sup>45</sup> Indeed, Arendt argues that failures to reflect on our identities and beliefs are at the root of human evil because our ability to discern right from wrong is fundamentally connected with our ability to think about who we are and the choices we make.<sup>46</sup> When Garvey discounts our ability to reflect on our choices and on the ends and attachments which significantly structure our identities, he undercuts the possibility of the moral agency to which he himself is committed.<sup>47</sup>

In the course of his reflections on the Free Exercise Clause, Garvey opposes religious identity to a liberal identity autonomously and rationally chosen.<sup>48</sup> As an example of an alternative and equally legitimate conception of the role choice plays in constituting identity, he offers a version of the Calvinist predestination argument which holds that God, not the individual, is responsible for choosing "the religious option" and cites the Christian belief that "Christian freedom consists in not making our own choices but in obeying the law of God."<sup>49</sup> He argues that we should not adopt liberalism's critical reflectivity as a normative ideal, because it radically conflicts with these religious understandings of the self.<sup>50</sup>

Garvey argues that a religious person should not be asked to engage in the critical reflective distancing from his or her desires, beliefs, or values that the liberal ideal of autonomy requires, because to do so is to ask them to do what they cannot or will not be free to do because of their religious beliefs.<sup>51</sup> Such religious individuals, he argues, would not accept that they freely and rationally choose the course of their lives.<sup>52</sup> Instead, they must understand themselves to be chosen by God, regardless of their own desires.<sup>53</sup>

While Garvey himself recognizes that the individual must *choose* to respond to God's call, he argues that this acceptance is not an act of autonomy in the liberal sense because the submission and obedience that religion demands suborn the exercise of intellect and will that liberal autonomy requires.<sup>54</sup> But I would dispute Garvey's claim here and argue that in most versions of Christianity, will is of paramount importance precisely because one must freely choose one's religious identity. It is because one must "*choose to believe*" that most

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45. *Id.*

46. *See id.* at 135-38, 277-79.

47. GARVEY, *supra* note 3, at 43-44.

48. *Id.* at 49, 148.

49. *Id.* at 45-46.

50. *Id.*

51. *Id.* at 56-57.

52. *Id.* at 57.

53. *Id.*

54. *Id.* at 148-49.

religious sects delay institutionalized rituals of confirmation until adolescence, when individuals are thought to be mature enough to understand the meaning of their professions of faith.<sup>55</sup> Aquinas commented on the complex relationship between faith and choice and recognized their independence and relationship when he wrote, "Man's way is said *not to be his* in the execution of his choice. . . . The choice itself, however, is in us, but presupposes the help of God."<sup>56</sup> Furthermore, it can be argued that it was precisely the recognition of the religious importance of the autonomous exercise of individual will vis-a-vis questions of worship which shaped the American interpretation of liberalism.<sup>57</sup>

Garvey's rejection of the liberal notion of a reflective autonomous self and of its concomitant notions of freedom not only raises problems for his interpretation of the Free Exercise Clause, but also produces a problem in his understanding of the moral and legal relationships between individuals in both the public and private domain.

In particular, I will argue that Garvey's argument against the morality and legality of suicide distorts his view of the relationship of one individual to another and that between individuals and the state. Garvey claims that the arguments defending an individual's right to take his or her life turn on the belief that it is both possible and morally important that individuals exercise control over their own lives, hence his article's title, *Control Freaks*.<sup>58</sup> Against this belief, Garvey argues there is much in our lives that we cannot control and that believing that our dignity depends on our ability to control our "bodies, our lives and our surroundings" means "that we cannot face failure without a loss of self-respect."<sup>59</sup> Rather than viewing sickness and pain as potential threats to our dignity, we ought to view them as "occasions for a life of courage."<sup>60</sup> The courage with which we face death can be a valuable lesson to those around us, Garvey claims, while taking one's life offers only a negative lesson.<sup>61</sup> Because selves cannot be rightly understood as disembedded from families, friendships, communities, and the larger society, "suicide affects the lives of others in several ways, some of which warrant efforts to prevent it."<sup>62</sup> He points to the need to get permission for suicide from the Ancient Athenian Senate as an indication that the Greeks recognized that one's death was not one's own to choose because

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55. *Id.*

56. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* 370 (Anton C. Pegis ed., 1948).

57. See GARVEY, *supra* note 3, at 42-43.

58. Garvey, *supra* note 1.

59. *Id.* at 15.

60. *Id.* at 16.

61. *Id.* at 16-17.

62. *Id.* at 16.

one's life in an important way belonged to others.<sup>63</sup> Garvey also suggests that when Castro criticized a Cuban revolutionary who took his life because, "every revolutionary knows that he does not have the right to deprive his cause of a life that does not belong to him," he captured a valuable insight, one that supports his contention that human beings ought not to have the right to take their lives.<sup>64</sup> At the same time, however, he claims to prefer our concept of citizenship to that of Marxist Cuba's.<sup>65</sup> Can Castro's belief that suicide is wrong be so easily severed from the understanding of citizenship which Garvey rejects?

## V. THE RELATIONSHIP OF THE INDIVIDUAL TO THE COMMUNITY

Garvey's willingness to conceive of rights as accruing to individuals because they can act to achieve a socially ordained good, and not de facto from their status as citizens, is tied to his devaluing of autonomy. Throughout the history of liberal theory one can trace an irreducible tension between the rights of the individual and those of the state whose existence is what makes individual rights possible in the first place. This tension reflects two compelling but vexed beliefs about the nature of justice. First, it reflects the recognition of the right of a group to come to a collective agreement about the distribution of rights and goods, and the belief that at least some of the rights of individuals should not be sacrificed for the collective good. This tension between the state and the individual, inherent to liberalism, also reflects the recognition that there are legitimate, or at least inevitable, competing notions of the good, and that while the state must be founded on some shared normative commitments, the state should not allow one notion of the good to trump all others, because forcing an individual to capitulate to the collective's notion of the good would violate the very ideal of an individual's right to self-determination, the primary goal of democratic government in the first place.

If one rejects self-determination as unimportant (as Garvey does), and if one does not accept that there are legitimate and competing notions of the good (as Garvey does not), then the tensions between the individual and the political collective that liberalism is committed to sustaining can be collapsed. No inevitable tension between the individual and the state need be recognized because the will of the morally good individual will necessarily coincide with the collective moral will. Individual autonomy (if one were to still refer to it as such, which seems illegitimate given that in this case it would have been emptied of most of what we understand when we use the word) would only be politically or

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63. *Id.*

64. *Id.* (quoting MICHAEL WALZER, *OBLIGATIONS* 172 (1970) (footnote omitted)).

65. *Id.*

morally significant when exercised in achieving *the* good, other choices would be invalid and hence of no inherent value. In the context of this argument, a demand that the state allow and defend the individual's right to freely choose to violate the collective's notion of the good would be tantamount to demanding that the state support and defend the right of individuals to engage in illegal action, which is, at least on the surface, absurd.

It is this absurdity that Garvey believes himself to be addressing when he decries the liberal valuing of individual autonomy above all else, as leading to valuing all choices equally, to judging the game of "push-pin" to be as culturally significant as the art of poetry.<sup>66</sup> But Garvey argues this valuing of choice springs from misunderstanding the nature of freedom.<sup>67</sup> He argues, "we should understand freedom as a right to act, not as a right to choose."<sup>68</sup> Freedoms do not (not necessarily) allow us to make contradictory choices. What's more, I think that some actions are better than others. "And the whole point of freedoms is to let us do these things."<sup>69</sup> It is Garvey's rejection of the moral significance of autonomy, his commitment to a unitary notion of the good, and his understanding that rights should not be understood in terms of freedom, but in terms of that good that allows him to consider the question of the morality of suicide only from the perspective of the communal good, and not also from the perspective of the right of individuals to choose their own notion of the good and thus to self-legislation, or autonomy. While theorists who valued autonomy as inherently important and essentially tied to a notion of individual rights could share Garvey's belief that choosing to commit suicide is morally bad and ought not to be a right,<sup>70</sup> their arguments would have to balance considerations of individual rights and autonomous choice with considerations of the public interest and the extent and limit of the state's right to pursue it. Having made the individual important only insofar as he or she embodies or pursues the collective good, Garvey need not attempt such a discussion about how to balance individual rights and the pursuit of a collectively defined good, and he offers none. Garvey's individual, like that of Castro's revolutionary, belongs to the collective whom it must serve, in life and in death.

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66. GARVEY, *supra* note 3, at 6.

67. *Id.* at 12.

68. *Id.* at 12-13.

69. *Id.* at 2.

70. *See id.* at 6-7.

## VI. BALANCING THE SCALE: TWO DIFFERENT NARRATIVES

In the course of arguing that the state should prevent its citizens from taking their life, Garvey tells the stories of his father's and mother-in-law's deaths.<sup>71</sup> He points to the importance of their deaths for the meaning of their lives and especially to the importance of the example their deaths set for their families and friends.<sup>72</sup> He rightly and movingly reveals the extent to which our lives are embedded in the lives of others, the degree to which choices individuals make, like stones flung in water, ripple outward redirecting the currents and choices of others.<sup>73</sup> He reminds us, too, of the value of conceiving our lives as complex struggles to live well, where earlier failures can be redeemed by later triumphs, where dying with courage can dignify a flawed life.<sup>74</sup> While there is much truth in Garvey's understanding of the relationship of living and dying, and much wisdom and compassion in his account of family and community, the limits of his account can be illuminated by reflecting on two narratives very different than the two about which Garvey writes.

I offer these two very different stories because while many of Garvey's reflections on the real lack of control we have over many events in our lives, the extent to which our lives are entwined with those around us, and the degree to which the way we die can be important to others are morally insightful, they do not inexorably lead to the conclusion at which he arrives.<sup>75</sup>

In her short story, *The Ones Who Walk Away from Omelas*,<sup>76</sup> Ursala Le Guin describes a state where the life of an individual is valued because of the communal good it makes possible.<sup>77</sup> This is a place where one small child must live out a life of pain, isolation, and fear in order that the other members of the community can continue to live lives marked by decency, friendship, beauty, and joy.<sup>78</sup> The citizens of Omelas do not lack compassion for this child, and they know that:

It is the existence of the child, and their knowledge of its existence, that makes possible the nobility of their architecture, the poignancy of their music, the profundity of their science. It is because of the child that they are

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71. Garvey, *supra* note 1, at 9-11.

72. *Id.* at 16-17.

73. *Id.*

74. *Id.* at 15.

75. *Id.* at 15-17.

76. URSSULA K. LE GUIN, *The Ones Who Walk Away from Omelas*, in THE WIND'S TWELVE QUARTERS 275 (1975).

77. *Id.* at 275-84.

78. *Id.*

so gentle with children. They know that if the wretched one were not there snivelling in the dark, the other one, the flute-player, could make no joyful music as the young riders line up in their beauty for the race in the sunlight of the first morning of summer.<sup>79</sup>

Garvey's argument asks us to understand the identity of the individual *only* in terms of its relationships with others, and rights *only* in terms of the collective good which their exercise can make possible.<sup>80</sup> To accede to his argument is to fail to recognize that both decency and democracy require that we recognize that the self and society are neither wholly distinct, nor wholly indistinguishable.

While Garvey criticizes liberalism's privileging the right over the good,<sup>81</sup> liberal theory has only rarely failed to recognize that thinking about law requires us to think about its two relevant moments, both the individual and the state, without collapsing either into the other. In his article, Garvey seems to have forgotten this most crucial insight of Western political theory. Le Guin, however, has not, and she continues her short story telling of those who see the child and do not go home sad but grateful that someone has been sacrificed for the greater good.<sup>82</sup>

These people go out into the street, and walk down the street alone. They keep walking, and walk straight out of the city of Omelas, through the beautiful gates . . . . They leave Omelas, they walk ahead into the darkness, and they do not come back. The place they go towards is a place even less imaginable to most of us than the city of happiness. I cannot describe it at all. It is possible that it does not exist, but they seem to know where they are going, the ones who walk away from Omelas.<sup>83</sup>

Similarly, I do not think we would know exactly where we were going if we were to support the individual's right to choose suicide over a life no longer worth living. While Garvey warns of the slippery slope leading from acknowledging the legitimacy of suicide to euthanasia and other forms of moral perdition,<sup>84</sup> he seems not to realize that in recommending that the state should have a right and even an obligation to actively interfere with an individual's choice to not continue to suffer, he walks not away from Omelas but towards it.

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79. *Id.* at 283.

80. GARVEY, *supra* note 3, at 6.

81. *Id.* at 1.

82. LE GUIN, *supra* note 76, at 282-84.

83. *Id.* at 283-84.

84. Garvey, *supra* note 1, at 17.

The second story is not fictional, it is the story of Franci Rabinek Epstein, and it is told by her daughter, Helen Epstein.<sup>85</sup> Helen begins to tell the story of her mother's life by noting that, years after her mother's death from a stroke, she keeps expecting the phone to ring, and for a voice to tell her that her mother had taken her own life.<sup>86</sup> When Helen asked the nurse why after her mother's stroke her hands were tied to the bed rails, the nurse told her that patients, not knowing what they are doing, pull the various tubes out and this was a measure taken to prevent this.<sup>87</sup> Helen writes:

There was no question in my mind that my mother knew. But how to explain that to a stranger? How to explain that she was as familiar with the varieties of death as anyone in this hospital and that she believed that when the time came, she, Frances Epstein, would decide on the most efficient way to die?<sup>88</sup>

Franci Rabinek Epstein had not arrived at her belief that she should have some say about the circumstances of her death casually. As a nineteen-year-old, Jewish, only child in German-occupied Czechoslovakia, she had been incapable of abandoning her parents and fleeing the country with her young friends.<sup>89</sup> She encouraged her parents to remain calm in the face of the rumors of Nazi atrocities that swirled around them.<sup>90</sup> Even a month after the invasion, when she was forced to turn her thriving dress salon over to a non-Jewish seamstress in an attempt to hold on to her business, even after she had been interrogated in Pankrac prison, she did not believe the Nazi's aimed to exterminate every Jew in Europe.<sup>91</sup> When she returned from the prison interrogation and found a bottle of cyanide hidden in her father's desk, she was afraid that provoked by the awful rumors he might do something rash, she took them to a pharmacist and had the capsules refilled with saccharine.<sup>92</sup>

Eleven months later, Franci and her parents were taken to Terezin.<sup>93</sup> Franci was ordered to remain there and her parents were ordered to board a death transport, most likely bound for Auschwitz.<sup>94</sup> Standing in the hot sun of Terezin,

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85. Helen Epstein, *My Mother's Life in Prague, 1939-1942*, COMMON QUEST: THE MAGAZINE OF BLACK AND JEWISH RELATIONS, Winter 1998, vol. 3, no. 1, at 40.

86. *Id.* at 40.

87. *Id.*

88. *Id.*

89. *Id.* at 41.

90. *Id.*

91. *Id.*

92. *Id.* at 42.

93. *Id.* at 45.

94. *Id.*

Franci's father told his wife and daughter that he was not going to board the train and be murdered on a schedule convenient for the Nazis, he had made his own plans, he said, and pulled out the "poison," saying that he had enough for them too, if they wanted it.<sup>95</sup> Franci told him how she had found the pills and had the poison replaced.<sup>96</sup> It was not her father's rage that made clear to her the enormity of her mistake, it was the whiteness of her mother's face.<sup>97</sup>

It dawned on me that she too had known about my father's secret escape hatch and was now as lost as me . . . . Instead of being protective, I had deprived my father of the last possibility to decide his fate as a free man, I wanted to explain. I wanted to tell them that I had exchanged the pills only because I could not face the idea of being alone. I wanted to tell them how much I loved them. I could not utter a word.<sup>98</sup>

Franci's parents were marched off, and she, sobbing, was restrained and prevented from joining them.<sup>99</sup> Neither of her parents looked back at the daughter who had refused to flee Europe and abandon them, but through her love and need, had denied them a minimally dignified death.<sup>100</sup>

Initially, it is surprising to discover that suicide was not permitted in the death camps. The statistical records for Buchenwald indicate that scarcely more than one-half of one percent of the deaths could be traced to suicide.<sup>101</sup> If the Nazis' goal was the extermination of the Jews, then why would their suicides have been forbidden and actively prevented? Arendt argues that this is only understandable if the goal of totalitarianism is understood to be the total domination of the individual, which requires destroying the "infinite plurality and differentiation of human beings" by destroying all human spontaneity.<sup>102</sup> This is impossible in normal circumstances "because spontaneity can never be entirely eliminated insofar as it is connected not only with human freedom but with life itself."<sup>103</sup> The camps served as laboratories where the experiment in total domination could be undertaken.<sup>104</sup> Scheduling death at the movement's convenience was the final effort in realizing this goal. Franci's father, though not at all politically sophisticated, seemed to realize this on some level and

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 455 n.161 (1958).

102. *Id.* at 438.

103. *Id.*

104. *Id.* at 437-38.

sought with his suicide to claim the right of the individual to spontaneous action, to his own death, and thus, to a minimum of freedom and dignity.<sup>105</sup> Franci, out of love and fear, had interfered.<sup>106</sup> She was herself eventually transported to a death camp but survived.<sup>107</sup> In telling the story of her parents, the pills, and her need and love to her own daughter Helen, Franci had made clear that there is suffering so great that even from love, one cannot demand that another endure it. She made clear that human dignity requires some degree of autonomy even if only expressed in refusing to be killed at the convenience of the collective.

Garvey suggests that misery and pain provide an opportunity to display courage and thus to redeem past failures of character.<sup>108</sup> If Oedipus had died younger when he wanted to escape his terrible physical and psychological afflictions, he would not have had to endure as much pain, suffering, and disgrace. "His life would in that sense have finished with a better balance of happiness and pain. But he would not have shown the virtue of courage that redeemed his failures."<sup>109</sup> To view pain as redemptive, as Garvey does, is to romanticize suffering and to be oblivious to the impact pain can have on human beings. He condemns suicide because it deprives both the suffering self the opportunity to redeem past failures by dying courageously, and because it denies the significance of the self's relationships to family members and to community and denies them the opportunity to witness and learn from the courage displayed when enduring the physical assault to the body.<sup>110</sup> Living courageously in pain and disability can enhance human relationships, Garvey argues, and suicides fail to recognize that life brings with it many circumstances beyond our control—they fail to accord enough importance to our relationships with others.

But pain does not enhance human relationships, it cannot be the source of important lessons in the meaning of membership in the human community, because intense pain is fundamentally isolating, it obliterates everything but its sufferer's awareness of it. In her fascinating and compelling book, *The Body in Pain*,<sup>111</sup> Elaine Scarry makes this point: "in serious pain the claims of the body utterly nullify the claims of the world."<sup>112</sup> It does so because it "obliterates all psychological content, painful, pleasurable, and neutral."<sup>113</sup> This function of

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105. Epstein, *supra* note 85, at 45.

106. *Id.*

107. *Id.* at 40.

108. Garvey, *supra* note 1, at 13.

109. *Id.* at 12.

110. *Id.* at 12-14.

111. ELAINE SCARRY, *THE BODY IN PAIN* (1985).

112. *Id.* at 33.

113. *Id.* at 34.

pain can be clearly seen in the case of physical torture, where pain is used to bring about precisely this destruction of the self.

It is the intense pain that destroys a person's self and world, a destruction experienced spatially as either the contraction of the universe down to the immediate vicinity of the body or as the body swelling to fill the entire universe. Intense pain is also language-destroying: as the content of one's world disintegrates, so the content of one's language disintegrates; as the self disintegrates, so that which would express and project the self is robbed of its source and its subject.<sup>114</sup>

What can one learn from watching someone in terrible pain? One can learn that love is made futile in the face of anguishing physical and mental pain because beyond a certain point it becomes very clear that loving someone does not make the pain any more endurable; that pain destroys all the ways of being together that constitute a relationship; that the person one loved disappears into their pain as into a hell to which no one can follow; and that loving someone means not asking them to endure more pain for anyone else's sake. By watching someone one loves writhe in agony, or disintegrate into the abyss of disability and the psychic pain that accompanies it, one can learn quite a bit about "the useless, unjust, incomprehensible, inept abomination that is physical pain."<sup>115</sup> One can learn enough to know that, when Dylan Thomas urged us to not go gently in the night,<sup>116</sup> he had not yet learned enough about love and dying. Up to a point, pain can be endured; very few adults believe that they can control all aspects of their life, and most of us are not the "control freaks" that Garvey takes us to be.<sup>117</sup> But to believe that pain is intrinsically meaningful, and that one's life belongs wholly and completely to the community such that the state should always and actively prevent anyone from taking their own life, is to be blind to the extent that pain is an abomination undercutting to the self, its relationship to others, and to the entirety of human meaning.

It is ironic that Garvey decries philosophical arguments in support of the right to take one's life as reflecting a freakish desire for control, while connecting the belief in a right to suicide as evidence of cowardice and self-deception: "the resolution to deal with death by suicide finds an earlier outlet in a desire to run, or deny our shortcomings."<sup>118</sup> This seems at bottom to harbor the demand that one *control* one's desire to run in the face of pain and suffering. In other

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114. *Id.* at 35.

115. *Id.* at 11.

116. DYLAN THOMAS, *Do Not Go Gentle Into That Good Night*, in THE POEMS OF DYLAN THOMAS 207, 207-08 (Daniel Jones ed., 1971).

117. Garvey, *supra* note 1, at 15.

118. *Id.*

words, it is a demand that one exercise the very control that Garvey claims makes some of us "freakish." I have argued above that Garvey is caught up in unforgiving philosophical commitments that demand the suffering of some for the moral good of the community, but he is also committed to another kind of Platonism. He demands that the truly moral self, the moral "hero," is "born from the struggle with necessity."<sup>119</sup> In conquering, or at least gracefully enduring, the pains of the body, we acquire the dignity of heroes and achieve the status of moral exemplars.<sup>120</sup> A philosophical doctrine, a civic ethic, or legal statutes which require such heroism can do so only by denying the costs of physical pain and suffering, and by recognizing no limits to what decency can demand in the name of the right, the good, or the legal.

The demand for the right to take one's own life need not be heard as the selfish, egotistic cry of John Garvey's "control freak"; it can be understood as the act of an individual whose dignity as a person motivates and explains their suicide and it can be allowed by a society that recognizes the "inept abomination that is physical pain."<sup>121</sup> Garvey is right to view living and dying as an ethical and a political matter. And, as Aristotle noted long ago, doing the good "is not for everyone, nor is it easy; wherefore goodness is both rare and laudable and noble."<sup>122</sup> To decide to take one's life or to allow another to take their own life and even to help them do so, for the right reasons, in the right way, and with the right motive, is like all ethical decisions difficult, but that neither makes it impossible nor immoral.

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119. *Id.* at 15.

120. *Id.* at 15-16.

121. SCARRY, *supra* note 111, at 11.

122. ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 935, 963 (Richard McKeon ed., 1941).