

THE ROLE OF FREEDOMS: A REACTION

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My position, that while citizens have a right to commit suicide, they do not have the right to assist another to do so, would support Professor Garvey's assertion that assisted suicide is wrong. Garvey's examples of the virtue of courage and living well to die well¹ are persuasive, and thus make it clear that no one should commit suicide lightly. Further, I agree with Garvey that we should not encourage suicide or punish those persons who attempt to commit suicide and fail.² I also agree with Garvey that we should not fine the estates of those persons who successfully commit suicide.³

I also agree with Garvey that one should live for others as well for one's self.⁴ Where I part company with him is that it is not the "state" for me, but one's family, friends, and associates that should be taken into the calculation. When one commits suicide, it creates pain and suffering for those who know us, not for an impersonal, far-off collectivity. As Garvey notes, it creates a bad example which others may emulate with even less cause.⁵

Assisting another to commit suicide seems a step on the slippery slope to euthanasia of, for example, "defectives" or "the senile." This was the thinking of the Third Reich, the Nazi doctrine of superior/inferior peoples, which the world fought a war to deny. Because I believe humans to be "fallen angels" rather than God, I do not see them as having the capacity to make the proper judgements on who should be "assisted" to die and who should not.

This issue of human judgement versus God's commands is raised in Professor Alexander's article concerning free exercise exemptions:

[W]hy should a compelling secular (state) interest ever override the interest in satisfying God's commands? From the believer's perspective, God's commands trump those of the state, however "compelling" the latter may seem to nonbelievers. From the perspective of nonbelievers, on the other hand, the believer is in error. What he believes God has commanded is

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1. John H. Garvey, *Control Freaks*, 47 DRAKE L. REV. 1, 8-15 (1998).
2. *Id.* at 13.
3. *Id.*
4. *Id.* at 16.
5. *Id.* at 16-17.

false. And if it is false, then it is not the case that the state is elevating its laws above God's commands.⁶

The bottom line seems to be that it is not religion or religious belief that is good, but only True religion or True religious belief, and some group of humans ("the state") gets to decide which is which—it is all right to exempt the Amish from compulsory schooling laws,⁷ but not all right to allow Native Americans to smoke peyote as part of their religious ceremonies.⁸

In the space allocated to me, I cannot solve this fundamental and long-argued point. I would merely suggest we can make some progress in our thinking about this issue by noting the distinction in the above examples between the rights of a child and an adult, the fact that education is an extension of the authority of the family and, therefore, religious beliefs should come into play, and the fact that peyote has physiological as well as psychological effects on the user and, thus, any "harm" caused by use is of a different order. Such considerations have lead to the decisions to allow Seventh Day Adventists to be granted an exemption from being forced by their employers to work on the Sabbath,⁹ but have not resulted in decisions to allow those persons who want to handle poisonous snakes as part of their religious observances and involve children in doing the same, an exemption from state interference.¹⁰

Speaking philosophically, when people leave a "state of nature" and covenant to set up civil society, they agree to give up some rights in order to make their enjoyment of other rights more secure. Freedom is ordered liberty, not license. For example, the Mormons had to agree to give up polygamy in order to have Utah admitted to the union of states. So while the "rights" of society trump the freedom of the individual in some cases, a society would do well to adopt the position that whenever possible, the rights of the individual to liberty as they themselves see it should trump the rights of the state to regulate their conduct. In other words, if there is not the most compelling and clear-cut case for state intervention, the "benefit of the doubt" should be with individual liberty.

This brings me to the more fundamental issue that seems to unite the positions of Garvey and Alexander: Does man, alone, control his situation? I perceive Garvey to be saying, with the Founding Fathers, that man does not—that God, or nature, plays a role as well, and that one is dogmatic to insist on the opposite view. Given that we live in a state of imperfect knowledge of ourselves,

6. Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35, 42 (1998).

7. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

8. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

9. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

10. See *State v. Pack*, 527 S.W.2d 99 (Tenn. 1975).

our fellows, and our world, one should be moderate in one's claims. The claim that man is totally autonomous is an extreme, not a moderate, position to advance.

As Alexander said of Garvey's argument, it is based on faith, not liberal rationalism.¹¹ Without a natural rights theory, or a God-given scheme of justice, it is difficult, if not impossible, to refute claims of the strong to do as they please—to choose to be a cannibal, a pedophile, or a spouse abuser. Yet, if we are to live as civilized human beings and prevent the strong from preying on the weak, it is important that such distinctions be drawn, such "wrong" behavior sanctioned and discouraged. This is the reason most Founding Fathers, even those who were not personal adherents to a particular religion, believed that democracy and freedom ultimately depended upon faith.¹²

11. Alexander, *supra* note 6, at 43.

12. See Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 157-58 (1991).

