

FREEDOM TO AND FREEDOM FROM: A RESPONSE TO GARVEY AND ARMACOST WITH A TINGE OF LEGAL PERFECTIONISM

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I. INTRODUCTION

It is part of our national mythology that Americans are free: we have freedom, and this is good; the Soviets did not have freedom and look where it got them. Our popular notion of freedom reflects a view of individualism that not only fits our culture—we cherish the maverick who bucks the system—but also supports of our economy—people buy what they desire, and desires are good for business: beer companies and MTV™ celebrate a "right to party," and billions of dollars change hands.¹ We think of the individual as free to pursue any desire, and we think of

* I am grateful to Kevin Saunders both for his leadership in organizing this symposium as the acting James Madison Chair in Constitutional Law of the Drake University Law School and for the kindness of his invitation. This Article benefited tremendously from conversations with the participants there.

1. The "right to party" seems to have entered the phrase book of popular culture from the lyrics of the song, *Fight for Your Right (To Party)* by the Beastie Boys. BEASTIE BOYS, *Fight for Your*

freedom as the toleration of all desires. Freedom becomes indistinguishable from individualism, licensing us to pursue any desire, even if the desire is excessive, destructive, shocking, and contrary to religion or to good morals.

Clearly, this myth of freedom is a bit incomplete as a picture of a constitutional ideal. It neither explains how freedom works nor (the problems of former Soviet states notwithstanding) explains why freedom is a *good thing*. Especially, it cannot demonstrate why this model of individualist freedom is good in a moral sense.

Risking glibness, I suggest that John Garvey is attempting to reconstruct our idea of freedom, particularly asking us to become engaged in how it comes to be good,² while Barbara Armacost is more concerned to show how freedom works, particularly how it comes to be justly enforced.³ In short, Garvey rejects the myth of individualist freedom for a freedom more justifiably good, and Armacost is concerned that Garvey's model of good freedom ignores important duties of legal officials. Because I share both of their concerns, I think it might be helpful to revisit a few points each have made in their presentations. It is my hope to explore some of the contours and implications of both of the approaches of these able thinkers. In the case of Garvey, this will entail a comparison to recent writings of Lloyd Weinreb and Randy Barnett, as well as to a metaethical construct of such arguments. In the case of Armacost, this exploration will include a contrast with the writings of Francis Lieber and a hint of what a future construction of an argument along such lines might offer in the development of her argument.

II. PROFESSOR GARVEY AND PURPOSIVE FREEDOM: "FREEDOM TO" AND "FREEDOM FOR"

John Garvey has developed a powerful theory of constitutional freedoms of the citizen, which synthesizes constitutional doctrines of citizens' rights and liberties with ancient notions of virtue and the good.⁴ The heart of his theory is an assertion that freedom is instrumental; it is valuable not in itself but in how it makes possible acts that are valuable.⁵ Freedom is valuable to the degree of the purposes of free acts. Put another way, Garvey asserts that "freedom" is not valuable, but "freedom to do something good" is very valuable.⁶ "[W]e value freedoms because they allow us to

Right, on LICENSED TO ILL (Def Jam Recordings 1986). Its lyrics celebrate adolescent independence from parents and teachers in matters of dress and appearance, class preparation and attendance, the consumption of tobacco and pornography, and the ubiquitous but undefined verb, "to party."

2. See John H. Garvey, *Control Freaks*, 47 *DRAKE L. REV.* 1 (1998).

3. See Barbara E. Armacost, *Constitutional Remedies and the Morality of Government Action: A Response to Garvey*, 47 *DRAKE L. REV.* 19 (1998).

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

5. *Id.* at 40.

6. *Id.*

live good lives."⁷ The freedom to do certain things thus gains value as the freedom to do these things for some purpose, hence the title of his book. The question of what we have freedom for, or put another way, the question of what makes good lives, occupies center stage in Garvey's theory.

A. What Garvey Says Freedoms Are For

Initially, it might be helpful to consider some elements of Garvey's methodology in isolating freedom for some purpose from freedom in general.⁸ He asserts that freedoms protect certain acts.⁹ He thinks we, however, commonly misunderstand freedom necessarily to protect a choice either to commit or not to commit these acts.¹⁰ So, a protection of a pregnant woman's freedom to give birth might entail the freedom to give birth or not to give birth. For Garvey, this is not necessarily so.

As Garvey defines it, a freedom to give birth might encompass very similar or related acts, such as providing medical assistance to a birth, or aiding in the births of other forms of animal, because all of these acts share the purpose of promoting life.¹¹ This understanding of a freedom to give birth does not entail the freedom not to give birth, because such an act lacks the purpose of promoting life and so is a moral opposite of the act protected by a freedom.¹² Thus, Garvey's theory rests on a description of acts protected as freedoms, in that these acts have an attribute of moral purpose that ought to be reflected in all acts within the protection of that freedom.¹³ Acts that lack the purpose of a given freedom do not deserve protection by it.¹⁴ This is not to say that all such acts must be moral; some acts may be wicked but still possess an attribute of the purpose of life protected by a freedom.¹⁵

This methodology is explored and amplified in Garvey's thorough ensemble of subtly wrought illustrations, and it is hard to do justice to his theory without taking them all into account. Even so, the most difficult step in each illustration, and the

7. *Id.* at 39.

8. *Id.* at 17-19.

9. *Id.* at 19.

10. *Id.*

11. *Id.* at 17.

12. *Id.* at 18-19.

13. *Id.* at 19.

14. Garvey describes a contrary approach to freedoms as a protection of a core group of morally related acts as bilateralism, the idea that a freedom "to *x*" implies the freedom "to not *x*." *Id.* at 17. Although the structure of his argument implies a full-throated rejection of all forms of bilateral constructs of freedom except for those freedoms that require bilateralism as a matter of definition, such as a freedom of choice, his definition of freedom initially excludes any necessary idea of bilateralism. In other words, a freedom "to *x*" does not imply the freedom "to not *x*." *Id.*

15. *Id.* at 15.

step that seems to me to be the most controversial in each, is the identification of the moral attribute of the freedoms that are asserted.¹⁶ In the same manner that a student of Kant must struggle to ascertain the essential maxim of a particular act, so must a student of Garvey struggle to determine the essential purpose of every freedom.¹⁷

The work done by this struggle, however, is rewarded when Garvey demonstrates the role he believes is played, and ought to be played, by the moral purposes of acts that are the basis for constitutional protections as freedom.¹⁸ Freedom, in the sense that Garvey employs it, is a constitutional dimension of the promotion of important moral purposes. When those purposes are important to making a life good, they provide a federal basis to intervene in the actions of state and federal legal officials that might interfere with those purposes.

Garvey intends his theory of freedom to be both descriptive and normative. Because the United States Supreme Court has recognized certain freedoms and refused to recognize others, there is a line of demarcation that can be drawn through the Court's past decisions according to which some claims to have an act protected as within a freedom have been accepted and some denied. Without here exploring the history Garvey depicts in detail, it is enough to sketch the freedoms Garvey asserts the Court has recognized represent a list of the primary goods of life. Thus, we protect speech when it serves moral purposes and do not protect it when it does not.¹⁹ Garvey believes the same divisions hold true in considering love and friendships as a purpose for privacy,²⁰ that rights to control property or enforce contracts are subordinate to other citizens' interests,²¹ and that promoting religious practice is the purpose of the religion clauses.²²

Garvey's description of the choices the Court has made in determining those liberties to protect and those not to protect will not suit everyone, particularly in his characterizations of the interests not given protection.²³ It will also suit others whose

16. *Id.* at 7-8.

17. The maxim is the subjective will of the actor, not the act's objective significance. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 398-400 (Lewis White Beck, trans., Bobbs-Merill 1959). For the difficulty in general of isolating a maxim, and why Kant was so vague in how to do it, see ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 160-62 (1989). For the role of sincerity in the maxim, see John Rawls, *Themes in Kant's Moral Philosophy*, in KANT & POLITICAL PHILOSOPHY 291 (Ronald Beiner & Will James Booth eds., 1993).

18. GARVEY, *supra* note 4, at 2, 19.

19. *Id.* at 58-77.

20. *Id.* at 13-17, 20-41.

21. *Id.* at 242-59.

22. *Id.* at 42-57, 139-54.

23. See, e.g., Alan E. Brownstein, *The Right Not to Be John Garvey*, 83 CORNELL L. REV. 767, 785-86 (1998) (reviewing JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996), and arguing that Garvey's description of Justice Blackmun's opinion in *Bowers v. Hardwick* insufficiently appreciated the dissent's argument for constitutional protections of autonomy).

descriptions of the Court's decisions are likewise controversial.²⁴ Even though these descriptions of freedoms the Court has recognized are controversial generally, their controversial nature is heightened by the normative undercurrent in Garvey's theory, that the only types of acts that ought to be constitutionally protected by federal courts from interference by state and federal officials are acts with fundamental purposes that reflect important moral dimensions.²⁵

B. Some Comparisons

Garvey is hardly the first to assert that the value of freedom, or of autonomy, is contingent upon the choices one freely makes.²⁶ Kant, for example, rested his principles of virtue on an ideal conception of the will that requires spontaneity, so that acts of the will can be autonomous, even though autonomy will be used to act morally.²⁷ While Kant recognized that this ideal of autonomy is not practically realizable, he believed that it might be practically attempted in the world of competing ends.²⁸ In the more recent context of theories of rights, two scholars, Lloyd Weinreb and Randy Barnett, have created various schemes for the basis of rights, and a brief contrast of Garvey's notions of rights with the works of these writers might be of benefit in locating Garvey's work in contemporary legal theory.²⁹

24. See, e.g., Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1599 n.4 (1997) (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996), and contrasting Paulsen's Garveyesque description of Equal Protection Clause cases with that of Suzanna Sherry).

25. GARVEY, *supra* note 4, at 19.

26. See DONALD W. TREADGOLD, *FREEDOM: A HISTORY* 4-5 (1990).

27. Having discussed the negative idea of freedom, Kant considered why freedom is not an absurdity. He then related the ideal of the categorical imperative to free will by seeing in autonomy no method of exercise but by being a law to itself.

The proposition that the will is a law to itself in all its actions, however, only expresses the principle that we should act according to no other maxim than that which can also have itself as a universal law for its object. And this is just the formula of the categorical imperative and the principle of morality. Therefore a free will and a will under moral laws are identical.

KANT, *supra* note 17, at 65. Thus, freedom is the basis for self-legislation but is also a basis for the obligations of moral duty.

28. *Id.* at 81-82. Kant rejected as the ideal form of will a heteronomous form of will, in which the will is based on various external facts and social customs to form hypothetical imperatives (I ought to do A because I will that B occur). *Id.* at 59.

29. There are, of course, many writers whose works might serve in this role. One who agrees with many of Garvey's conclusions regarding the moral purposes of acts as the basis for legal promotion, but who does not see freedom as itself instrumental, is Joseph Raz. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); see also Symposium, *The Works of Joseph Raz*, 62 S. CAL. L. REV. 731 (1989).

1. *Garvey's Rights from Morals and Weinreb's Rights from the Nomos*

Lloyd Weinreb has made a concerted effort at formulating a defense of the conception of rights by linking them to a model of human responsibility as understood in the light of the traditions of a community.³⁰ Thus, Weinreb locates questions of what rights exist not in abstract notions of autonomy but in specific instances. In order to determine whether a person in a wheelchair has a right of wheelchair access to public buildings, Weinreb argues that nothing about the person as a human, and nothing about the abstract nature of justice, liberty, or equality in general can substantiate such a right.³¹ For the right to exist, the people who must pay for such access must have a responsibility to provide it, to finance it, and otherwise accommodate it, which are burdens that cannot be proved by notions of equal justice in the abstract. On the other hand, Weinreb asserts that social policy discussions that take into account accommodations already usually made, the availability of resources, relative benefits as opposed to burdens, and the nature of the disadvantage itself, may reflect sources of the right in the *nomos* of the community.³² When that happens, certain handicaps, such as confinement to a wheelchair, can give rise to a responsibility in the taxpayers to assure wheelchair access to public buildings.³³

Like Weinreb, Garvey is concerned to locate the origin of rights in concrete examples, not in abstracts.³⁴ Both eschew ideas that freedom has meaning without context, rejecting the bilateral notion that a freedom to do X implies a freedom not to do X, regardless of the purposes of doing or of not doing X.³⁵ But Garvey does not locate the source of his freedom in a communal understanding of what is a legitimate responsibility of persons other than those who would be protected by the right. Rather, Garvey locates rights according to the responsibility of the person who seeks this protection.³⁶

According to Garvey's formulation of a right, the moral nature of the act that would be protected is paramount in determining whether the act should be protected.³⁷ In other words, Garvey would protect as rights only actions motivated

30. See LLOYD L. WEINREB, *OEDIPUS AT FENWAY PARK* 148-56 (1994).

31. *Id.* at 164-65.

32. *Id.* at 149-51.

33. *Id.* at 170-71. Merely to summarize one application from Weinreb's elegant structure of articulation and application is certainly to give his argument short shrift. Other applications he considers at length along similar lines are human rights, including a right to be free from execution, civil rights generally, gay rights, and affirmative action. See *id.* at 134, 151, 171, 181.

34. See GARVEY, *supra* note 4, at 6; WEINREB, *supra* note 30, at 164-65.

35. See GARVEY, *supra* note 4, at 1-2.

36. *Id.* at 86-93.

37. *Id.* at 1-2.

by purposes of great moral worth. This is different from Weinreb's formulation, in which acts that are sufficiently located in a community understanding of communal responsibility are to be protected.³⁸ In other words, Weinreb would protect such actions or conditions that the norms of a community already enshrine within a responsibility to protect as rights, regardless of other moral values that inhere in these acts or conditions.

One difference between these formulations is that Garvey's view is potentially less conservative than Weinreb's. Garvey's idea that a moral notion of an act may be defined and defended according to a moral tradition is not to say that a community in a given moment will have a normative climate that reflects the greater moral tradition. When confronted with a problem such as the twentieth-century problem of ending *de jure* segregation of the races under the Jim Crow laws in the American South, Weinreb's formulation of rights is less clearly able to defend a right of black citizens of access to then white-only facilities.³⁹ Segregation was deeply ingrained throughout the *nomos* of Southern communities, as, in truth, it was in many Northern communities.⁴⁰ In 1950, the rule of *Plessy v. Ferguson*⁴¹ was the law of the land and a declaration of the *nomos* in both national and local communities. Only the widest possible understanding of a community normative structure, one that includes moral arguments of what a community *nomos* ought to be rather than what it is, could have led to the change heralded in *Brown v. Board of Education*.⁴² On the other hand, Garvey's notion of a fundamental morality as a basis for rights can support an argument that the Fifth and Fourteenth Amendments should protect a person's moral right to stand before the government without a disability based on race.⁴³ Given my deep belief in the rightness of a racially just Constitution, I thus prefer Garvey's approach on this point.⁴⁴

38. See WEINREB, *supra* note 30, at 148-56.

39. *Id.* at 125-28.

40. *Id.* at 149-54. While segregation in public services was greater in the South than in the North before 1954, racial segregation in neighborhoods and residences, and attitudes supporting segregation, was often greater in the North, and have generally remained so since the 1960s. See NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald David Jayens & Robin M. Williams, Jr. eds., 1989).

41. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

42. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Of course, desegregation on a wider field only occurred following the passage by Congress of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968; a host of private enforcement actions in the courts; and the quieter operation of the private decisions of individuals over time. See Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994); Fair Housing Act of 1968, 42 U.S.C. § 3601 (1995).

43. See GARVEY, *supra* note 4, at 1-2.

44. None of this should be read to suggest that Weinreb does not respect civil rights or equality. Indeed, his consideration of human and civil rights is extensive and sensitive in its

On the other hand, Garvey seems to leave us in suspense as to who his source of moral interpretation is to be. While acknowledging the controversial nature of some of his moral precepts of what acts deserve protection as rights,⁴⁵ he does not go far to resolve the controversy. Precisely whose interpretation of morality and whose understanding of the moral tradition should inform our constitutional privileges is left somewhat unresolved. To be fair, his essential points in this regard are modest, as in *Control Freaks* he tells us that the judgments he compares are first, the Supreme Court's, and second, his own.⁴⁶

In making this comparison between the Court's view and his own, Garvey actually leads us to a path that is perhaps closer to Weinreb's than may first appear. Simply, Garvey accepts the authority of the Court to make its judgments but then resorts to his own understanding of both the moral tradition of Western philosophy and of his own moral experience in order to decide for himself that *Washington v. Glucksberg*⁴⁷ reflects a proper moral decision in refusing to acknowledge a right to assisted suicide.⁴⁸

In making his own judgment and in sharing it in this forum, Garvey does not appear to me to attempt to present a final resolution of how such moral decisions should be made. Rather, he offers a conclusion that seems to him to be sound, as well as a methodology for arriving at such a conclusion that he profoundly believes to be sound, which he both justifies and defends.

By offering this methodology, Garvey might very easily be seen to be acting according to Weinreb's theme, in one careful variation. Garvey is not only redefining a community's source of its *nomos*, but he is also inviting us each to examine our own understandings of the proper nature of acts that might be protected as rights. In so doing, he is limiting the question from Weinreb's, not asking what might we do but asking what might we agree we ought to do according to our moral better judgment. Further, he is inviting us to form the community from which such answers may be derived.

recognition of the need to locate civil rights in defensible structures of everyday experience. WEINREB, *supra* note 30, at 114-56. Particularly, he places matters of access to education in a universal human right, which may not be as susceptible to variations in the local *nomos*. *Id.* at 119-20. Even so, by rejecting the possibility of reason alone as a basis for change in civil rights recognizable within the *nomos*, Weinreb is clearly opting for a system that will be slow to accept new rights, regardless of the moral strength of arguments for those rights.

45. John H. Garvey, Remarks, at the Drake Constitutional Law Symposium (April 18, 1998).

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

47. *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

48. Garvey, *supra* note 2, at 8-17.

2. *Garvey's Moral Freedoms and Barnett's Informed Liberties*

A second contrast to Garvey's approach is in the neo-Lockean tack of Randy Barnett, whose essential concern appears initially similar to Garvey's, to understand liberty by distinguishing it from license.⁴⁹ Unlike Weinreb, Barnett does not look so much to the normative structure of the community to identify civil rights but to the traditions of justice and the rule of law to define the rights protected by a given system of law, as well as the mechanisms of those protections.⁵⁰

Barnett divides the analytic task of isolating liberties into three component problems: knowledge, or how we know what liberties we have and that others have against us; interests, or how we balance questions of incentive, compliance, and partiality in access to resources; and power, or how decisions affecting liberties and justice are carried out with a minimum of error and abuse.⁵¹ He considers each of these three elements with an avowedly naturalistic concern to base answers for each problem in both a claim that the achievement of any legal or social policy must be based on an understanding of the nature of human beings and the world they live in and a claim that there are shared natural desires, including desires for the pursuit of peace, happiness, and prosperity.⁵² The end of his careful and wide-ranging analysis is a model of diffuse origins for rights, a polycentric model of constitutional order, in which it is reasonable to speak of the jurisdictions of competing jurisdictions as selected by citizens.

In constructing this model, Barnett considers rights as a necessary part of the structure of government. He observes not only that rights serve as methods of guarantee for certain essential protections and assurances, but also that they serve as legitimizations of violence in enforcing them for one person against another.⁵³ Barnett argues that an acceptance of a liberal concept of justice requires rights to give individuals and associations a vehicle for the respect of others for their powers to acquire and control property and to engage in contracts with others.⁵⁴ These rights may be legal, enforced by the mechanisms of the legal system, or background, in which they are understood as moral claims.⁵⁵ There is much more to Barnett's argument, but for our purposes of comparing his notion of rights to Garvey's idea of

49. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 1-2 (1998).

50. *Id.* at 3.

51. *Id.* This brusque overview does not adequately reflect the interrelationships and nuances of each of these problems, which are addressed in chapters two through six (discussing knowledge), seven through eight (discussing interest), and ten through fourteen (discussing power).

52. *Id.* at 4-12.

53. *Id.* at 199-205.

54. *Id.* at 73-83.

55. *Id.* at 90-91.

freedoms, Barnett's dual structure of rights as both supported by a liberal concept of justice and recognized by the legal system is a sufficient focus.

Barnett conceives of rights according to a liberal idea of justice that is rooted in both the American constitutional tradition and in early modern and more recent theory.⁵⁶ His essential form of background rights are natural rights that he argues exist, at least, in such a way so that a legal system that fails to recognize them will be less morally binding upon the citizen.⁵⁷ His form of recognition of these rights is an amalgam both of natural and moral analysis and of knowledge by citizens.

Rooting his initial forms of rights in the ethical requirements of natural law, he accepts a deeply moral notion of what must be rights, those things that are right as opposed to wrong in the nature of human beings and the world in which they live.⁵⁸ To isolate those acts that deserve protection as rights, a process he recognizes as argumentative and not conclusory,⁵⁹ Barnett initially relies on the small set of rights of natural necessity identified by H.L.A. Hart—those things that are necessary for us to survive in the contingent circumstances we find ourselves, as humans in the world we live in.⁶⁰ These rights are, then, defined by their moral dimension; they are all acts of the individual that are morally right for one person to do, whether or not someone else is especially concerned about morality.⁶¹ Barnett's archetypes of such rights are the ability to gain dominion over unowned property, to control things as property, and to enter into noncoercive agreements through consent.⁶²

But background or natural rights only have meaning as rights in the legal system once it is possible to communicate knowledge of them between people and once there is a need to derive modes of action by which the legal system may in fact defend them.⁶³ These two requirements are satisfied according to the internal processes and culture of the legal system, particularly (for Barnett looking at our contingent legal system) according to the mechanisms of justice and the rule of law as developed in the common-law system of adjudication.⁶⁴ Having established that something may be a legal right, Barnett then considers its protection in a world of

56. *Id.* at 63-83.

57. *Id.* at 17-23, 67-68.

58. *Id.* at 14-15.

59. *Id.* at 15 (quoting ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 151 (1991)).

60. *Id.* at 15-16 (quoting H.L.A. HART, THE CONCEPT OF LAW 195 (1961)).

61. *Id.* at 19-26.

62. *Id.* at 83.

63. These are the communication problems that Barnett refers to, respectively as second- and third-order problems of knowledge. *See id.* at 84-131.

64. Here, again, much of the subtle interplay of Barnett's theory is condensed, particularly the difference between principles and rules in the method of adjudication. *Id.*

conflicting interests and problematic enforcement, concerns that are less apposite to our discussion today.⁶⁵

Rather, there is an intriguing comparison between Barnett's approach to rights and Garvey's, which is material here. First, both resort to fundamental notions of morality in determining what rights will be protected. Of course, within that broad rubric there are important distinctions, the most important of which are the source and extent of the morality that serves as the base of the moral judgment. For Barnett, that source is two-fold: the analytical tradition of natural rights and the essential principles of liberal justice, at least to the degree liberalism recognizes interests in property and contract.⁶⁶ For Garvey, the source of morality is not so limited.⁶⁷ While not rejecting a natural rights analysis, and indeed deploying forms of it often in his own evaluations, Garvey has freed his analysis from a single source of morality, relying instead on the narratives of experience of morality both in his own life and in the stories and analyses of traditional literature.

Of course, this apparent refusal to moor the ship of Garvey's morals to a given rock or pier leaves us to wonder precisely where he will anchor on many questions. By enlarging the scope of his moral analysis, Garvey may gain the benefits of greater flexibility, which may be quite beneficial.⁶⁸ On the other hand, it lends less predictability to Garvey's approach. While we are free to think *like* Garvey, employing the type of sources and reasoning he has employed so far to new problems he has yet to personally resolve, we are hard-pressed to think *as* Garvey and be certain of a particular result in the application of his approach to new problems. Of course, this criticism could be made of most moral theories, but those with the greater limitations on their scope are the less burdened by it.

3. *Between the Community and the Courts*

Garvey is in some ways located between the approaches of Weinreb and Barnett, at least as I have summarized their recent work here. Garvey is more rooted in the traditions of the natural law than is Weinreb but less so than is Barnett. Garvey seems more sensitive to the role of community notions of justice than Barnett and less so than Weinreb. Garvey is potentially more flexible in recognizing new rights than are either of the other two, although paradoxically, because his reference does not include the social components of either of the other two views—his answers are

65. *Id.* at 169-215.

66. *Id.* at 1-26.

67. GARVEY, *supra* note 4, at 1-2.

68. For an illustration of this type of benefit in the context of comparing the opportunity for changes in the approaches of Garvey and Weinreb, see Part II.B.1.

potentially the most final and least open to amendment without complete reconstruction.

Perhaps most importantly, his approach has different sources for its authority. It is at once both more engaging and more personal because of Garvey's willingness to include an admission of references to his own experiences in his analysis.⁶⁹ It is hard to imagine that a person's own view of an act does not inform that person's notion of whether that act is based on a morally significant purpose. By presenting his own narrative, Garvey has both admitted the sources of his bias and seized upon them as authority for his views. While this approach has a powerful truth to it, it is also one that is vulnerable to rejection by others whose own experience, or interpretations of their experience, are at odds with Garvey's. Thus, perhaps paradoxically, the form of authority that Garvey's approach takes is both more persuasive and more vulnerable to rejection.

One particularly important distinction between Garvey and the others is that Garvey's focus is inherently limited to those rights that are meaningfully applied to conduct by the citizen. By focusing upon the intent with which a citizen acts, Garvey has limited his inquiry to those citizens' rights that apply to citizens' conduct. As Professor Armacost has demonstrated, there are others.⁷⁰

III. MORAL INTENT, PERFECTIONIST ARGUMENTS, AND LAW

A simple truth undergirds the discussion of not only Garvey's view but also the views of Weinreb and Barnett of what types of act should be protected from state control, and thus promoted in society free from state interference: Legal officials make law. Sometimes the law that they make is framed in such a manner as to be constitutional, overarching, and longer lasting, and sometimes it is more transient as a statute, rule, order, or opinion. The fact, however, remains that every bit of the law is made by individuals working within an institution, and that it is the individual official who acts, even though institutional acts are the result of a cumulation of individual acts over time and among groups.

These people, these officials, act according to motives that are complicated but that are, in the end, no more complicated than most decisions made by citizens acting within the structure of a group. What distinguishes the act of an official in making

69. See, e.g., Garvey, *supra* note 2, at 9-11.

70. See *infra* Part IV. There is an interesting analogy between Garvey's concern only for rights that protect citizens' actions and early twentieth-century concepts of law that were conceived only for rules governing the conduct of citizens. As Hart demonstrated, there is much to be learned by such analysis of law, but a full definition of law must include not only the primary rules that govern citizens but also the secondary rules that govern officials so that law is the union of primary and secondary rules. HART, *supra* note 60, at 96.

law from all other acts is that the official is acting to bind another person to follow the will of the official, to engage in or refrain from conduct for reasons chosen by the official. An important subset of these acts arises in the case of constitutional and similar matters, when the official acts not to bind citizens but to bind other officials, so that they will engage in or refrain from certain conduct while making or carrying out other laws.

The considerations made by Garvey, Weinreb, and Barnett are each of what conditions justify the act of a legal official.⁷¹ This consideration is made, in the first instance, by determining whether the official is justified in interfering with the conduct of the citizen (or an official who might interfere with a citizen's conduct), but this determination of justification is itself dependent on an evaluation of the moral content of the citizen's conduct. Each of the three theorists have proposed a scheme that, first, offers some limits to the accepted sources of information about the ethical conduct of people's lives, that, second, demonstrates mechanisms to apply which information to the conduct which might or might not now be protected by a right, and that, third, reaches conclusions which are capable of determining both what types of conduct should be left to the moral agency of the citizen to choose and what types of conduct may be given to the moral agency of the state to oversee. Thus, each of these theories is a particular case of a perfectionist argument.

Perfectionism is a theory about the law that claims that the substance of some laws that deal with how citizens lead their lives may be practically based on a view of the ideal ethic or good life.⁷² This theory may serve as a tool in the description, justification, criticism, or advocacy both of a specific law and for the legal system.⁷³ The theory of perfectionism is based on six assertions, which roughly parallel and expand on those of perfectionist doctrine:⁷⁴

71. See GARVEY, *supra* note 4, at 240-59; WEINREB, *supra* note 30, at 145; BARNETT, *supra* note 49, at 42.

72. Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 1013 (1994).

73. *Id.*

74. The doctrine of perfectionism comprises the argument that perfectionist reasons are appropriate bases for legal conduct by the state's official. It contains five assertions:

(D-1) Some forms of life are better than others.

(D-2) It is possible for lawmakers to judge some of the conditions that constitute a good life.

(D-3) The law can assist in making lives good and assist in diminishing incentives to commit evil.

(D-4) Neither individual lawmakers nor the institutions of law are morally excluded from attempting to make or enforce laws that render such assistance for such reasons.

(D-5) Lawmakers and institutions of law are sometimes morally obliged to judge the conditions that constitute a good life and to make and enforce laws that assist in encouraging it among members of the polity.

The doctrine and the theory related here are taken from Steve Sheppard, *The Perfectionisms of American Law* (manuscript on file with the author) and are developed from an initial description that

(T-1) Particular form of life *X* is good (or bad) for all citizens.

(T-2) We know that this is so for some reason, which can be communicated between individuals.

(T-3) The reason this is so is not a reason prohibited from reliance by the particular legal official who seeks to employ it, according to secondary rules of the legal system.

(T-4) Form of life *X* can be efficaciously encouraged (or discouraged) through the operation of a particular law.

(T-5) The means employed by this law are compatible with other elements of the legal system of equal or greater concern to lawmakers as the form of life in question.

(T-6) It is prudent to enforce laws that can encourage or discourage this form of life.

Garvey has, in his theory, created an indeterminate set of T-2 arguments that may support a set of T-1 claims, each of which is the basis for distinct perfectionist argument. So, too, have Weinreb and Barnett, although by locating their T-2 arguments with greater specificity in the sets of reasons, they might each have created a smaller set of possible arguments that may be employed as T-1 arguments.

Like many perfectionist arguments, Garvey's argument is authoritative and yet not conclusive. He has created a platform for discussion and criticism, for agreement and disagreement in each of the higher arguments of the metaethical requirement. By reference to sources of particular authority, his platform holds special merit for those who acknowledge or presume a conclusive authority in such sources, particularly in considering truth claims of T-1 and the prudential arguments of T-6. By reference to these special sources of authority, some of which are personal, such as his stories of personal revelation, and some of which are public, such as his resort to the meaning of the suffering Oedipus, Garvey invites us to accept his point of reference, but he also lays out a template for our own consideration of the very problems he seeks to resolve.

Even though some views of morality, or of natural law, even a view informed by classical traditions, might suggest that there is a single natural result to such issues, this is not necessarily the case.⁷⁵ Garvey does not suggest that his view is the

was presented in Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969 (1994).

75. Much of the tradition of natural law expounded by Catholic legal scholars follows a path suggestive of canonic results for most questions whose answers are reduced from first principles in natural reasoning. John Finnis's enterprise may be seen as an exemplar of this tradition. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23-50 (1980); JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 136-52 (1983); see also ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 189-229 (1993) (articulating a theory with "a legitimate realm for morals legislation and

only possible moral view, merely that it is the view he believes to be right in the light of a careful examination of the matter. There are, after all, reasonable and moral arguments against him, not the least being that offered by the "Fab 6," the leading American moral philosophers, to the Court.⁷⁶ Furthermore, there are classical arguments for the morality of suicide, a principle of Stoic fortitude,⁷⁷ just as there are arguments for it by early modern divines, indeed one by John Donne,⁷⁸ and artistic celebrations of the courage of suicides by Shakespeare⁷⁹ and David.⁸⁰ I personally think the individual has a right to make and to act on such decisions without interference by state officials, and so I reject Garvey's conclusion as contrary to notions of moral agency, even though I respect deeply both his method and his conclusion.⁸¹

Thus, Garvey does not appear to me to be authoritative in the sense of barring further consideration or independent judgment. Nor, as I have said, does he seem to me to intend to be. Rather, he has set forth a valuable template for the consideration of great matters of public concern, leaving to us all the ability to engage in conversations according to this template.

Of course, for *us* to engage in such conversations is of varying importance to the question of what acts should be given the status of protection as rights. As we

still permit[ing] a desirable diversity of ways of life and provid[ing] principled grounds for respecting and protecting basic civil liberties."); Dennis J. Goldford, *Response to Professor Garvey*, 47 *DRAKE L. REV.* 105, 105 (1998) (stating that the law "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."). Each of these writers accept the role of reason, held by many but not all natural lawyers, that might suggest single answers to many questions. Such a view of reason is not, however, necessary to a view of natural law or analysis according to natural principles.

76. See Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thomson as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (Nos. 95-1858, 96-110). These philosophers are far from the only moderns to reach this conclusion. See, e.g., DAVID HUME, *ESSAYS ON SUICIDE, AND THE IMMORALITY OF THE SOUL* (Thoemmes Press 1992) (1788).

77. See Epicetus, *Discourses*, in *THE STOIC AND EPICUREAN PHILOSOPHERS* 241, 266 (Whitney J. Oates ed., 1940); Marcus Aurelius, *Meditations*, in *THE STOIC AND EPICUREAN PHILOSOPHERS* 523, 550, 564 (Whitney J. Oates ed., 1940).

78. Donne's essay was released posthumously but went through at least three editions prior to 1700, and has remained an object of current interest. See JOHN DONNE, *BIATHANATOS* (2d prtg., Facsimile Text Soc'y 1930) (London, John Dawson 1644); JOHN DONNE, *BIATHANATOS* (Michael Rudick & M. Pabst Bottin eds., Modern Spelling ed., Garland Publ'g, Inc. 1982).

79. See WILLIAM SHAKESPEARE, *ANTONY AND CLEOPATRA*, act 5 sc. 2.

80. David, *The Dying Socrates* (Metropolitan Museum of Art).

81. In direct response to the moral claims of Garvey's argument, I might mention one point of substantive and one of analytical disagreement. Substantively, there is a great tradition, flowing in part from the Stoics, that control is a virtue that is distinct from courage. But see Garvey, *supra* note 2, at 11. Methodologically, the fact that suffering in lieu of suicide may have a nobility of its own cannot, without more, prove that suicide itself is immoral. But see *id.* at 13-14.

saw in the comparative exercise with the theories of Weinreb and Barnett, Garvey is comparatively rigorous in locating the origins of rights in the notions of morality that are within the moral traditions of our intellectual culture. In that, he was less invested in locating a right according to the moral sense of the community than was Weinreb or according to the traditions of the legal system than Barnett.

Even so, Larry Alexander is quite right to remind us that Garvey's own approach will be applied, if it is to be meaningfully applied, from the bench.⁸² In his discussion of Garvey's consideration of the free exercise of religion, Alexander is careful to measure who must be satisfied of the sincerity of a religious belief held by someone who would have an act based on that belief protected by the First Amendment.⁸³ Alexander correctly suggests that, regardless of any result reached by Garvey or even held truly by the litigant, the judges' views of another's religion will be informed by their own views of what can be the truth or what can be sincerely held as truth.⁸⁴ Thus, the views of the community and the moral tradition that inform the views of the judges will have an effect on the content of the moral values that will be recognized by the judges as worthy of protection as rights.

Just as I do not read Garvey as intending his work to be to bar further consideration of his views, it does not appear to be meant as comprehensive. In other words, his approach to the consideration of rights is not designed to be a complete theory of all possible forms of rights. Certain rights, particularly procedural rights, may not fit in his scheme, which does not diminish its persuasive or explanatory force in considering the rights to which it applies. Professor Armacost's article is illuminating in considering this limit on Garvey's theory.

IV. PROFESSOR ARMACOST AND THE MORAL LAWMAKER: "FREEDOM FROM"

While Garvey is focused in his concern for the nature of the citizens' intent to engage in acts that ought to be accepted as moral foundations of rights by legal officials, Barbara Armacost has turned her attention toward limits on those who must reach this acceptance. Specifically, she has postulated an important relationship between the operation of morality and the understanding of lawmakers about what forms of citizens' intent can or should form the basis for protected rights.⁸⁵

These governmental duties, like the freedoms they protect, have a moral component: Just as particular freedoms protect people's rights to engage in

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

83. *Id.* at 41-43.

84. *Id.*

85. Armacost, *supra* note 3, at 27-34.

certain activities because they are highly valued, so it is "bad" for the government to infringe on people's freedom to do those good things.⁸⁶

Armacost is clear that the possibility of government infringement is, particularly, a possibility of wrongdoing by individual legal officials.⁸⁷ Indeed, she offers a substantial body of reasoning toward this view from the rules for limiting immunity granted to legal officials whose acts harm citizens in violation of constitutional protections.⁸⁸

Her argument is directed toward Garvey's apparent failure to address a freedom of citizens from abusive actions by officials, because such a freedom does not turn upon the morality of the citizens' actions.⁸⁹ While Garvey admits that actions by officials may lack justification when done with bad intentions,⁹⁰ it is true that his derivations of rights do not easily extend to encompass the procedural rights that Armacost illustrates as the first defenses against official abuse of power.⁹¹

Recognizing that governmental abuse of power, in other words, an abuse of authority by a legal official, creates "a sense of indignation on the part of the governed,"⁹² Armacost turns to the role played by the abusive officials' liability to damages in a civil suit brought by those hurt by the abuse.⁹³ That role "serves a moral blaming function more akin to criminal liability than to civil liability."⁹⁴

Her rationale for this enlarged extent of the moral blameworthiness of constitutional violations is carefully articulated, flowing from cases in which the Supreme Court has upheld citizens' suits against abusive officials.⁹⁵ She particularly relies on the second Justice Harlan's discussion in *Monroe v. Pape*,⁹⁶ in which he argued that legal officials who violate a citizen's constitutional rights were different

86. *Id.* at 20.

87. *Id.*

88. *Id.* at 25-27. Armacost describes the intricacies of the rules of qualified immunity for legal officials who violate individual citizens' rights in greater detail in Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998).

89. Armacost, *supra* note 3, at 20-21.

90. GARVEY, *supra* note 4, at 173, 215-18.

91. Armacost, *supra* note 3, at 21-24.

92. *Id.* at 30.

93. *Id.*

94. *Id.*; see also Armacost, *supra* note 88, at 669-76. Professor Armacost discusses several "good reasons for thinking that the label 'constitutional violator' carries with it a level of social condemnation that is more akin to criminal liability than to ordinary, private civil liability." Armacost, *supra* note 88, at 671.

95. Armacost, *supra* note 3, at 27-29.

96. *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled by* *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

and more serious than violations of other types of rights.⁹⁷ Although in this analysis Armacost is careful to distinguish the contours of legal liability from moral blame in assessing official conduct,⁹⁸ she does, in the end, attempt to demonstrate the existence of immorality from the fact of illegality.

While such a move has a strong pedigree,⁹⁹ there remain more direct methods by which to establish both the moral basis for wrongdoing and the extralegal responses that may attend the citizen's understanding of immoral conduct by officials, regardless of whether such conduct is also the basis of civil or criminal sanctions against the official. Simply, there are other bases for considering the meaning, scope, and sanctions of political ethics. There may be good cause to prefer nonlegal bases for moral schemes of official conduct, particularly if these bases are more likely to encompass not only legislators and judges, who are often immune from legal liability, but also intentional acts that do not violate clearly established laws.

The content of such a moral obligation of legal officials to the citizenry, in effect the content of official ethics, is a topic that was once well known in this country. Its most significant exponent was certainly Francis Lieber, an American law professor of a century and half ago.¹⁰⁰

97. *Id.* at 196 (Harlan, J., concurring); Armacost, *supra* note 3, at 27-28; Armacost, *supra* note 88, at 671-72.

98. One of the most important distinctions Armacost makes in her comparison of moral and legal wrong by officials is in her consideration of officials' intent. She rightly determines that intent is irrelevant for the purpose of establishing official immunity or liability, although she argues that it remains important in determining the morality of the official's conduct. Armacost, *supra* note 3, at 32-34.

To fully understand Armacost's position in the light of Garvey's initial argument, one point must be borne in mind. In making her argument in response to Garvey, Armacost deliberately uses the nature of intent in her examination of official's conduct in a matter that is quite distinct from the manner in which Garvey uses it. Garvey is concerned with the intent of a citizen in committing an act, using the intent to determine whether there ought to be a right to commit the act. GARVEY, *supra* note 4, at 215-18. In other words, Garvey tests the *citizen's* intent to see if it is sufficient to *escape* liability. On the other hand, Armacost considers the intent of an official in committing an act as a method of determining whether presumptive immunity of the official from suit should be removed. Armacost, *supra* note 3, at 33. In other words, Armacost's question is whether the *official's* intent is sufficient to *confer* liability.

99. There is considerable literature on the role of the legal system as an influence upon the moral normative system within a community. See generally HANS Kelsen, *GENERAL THEORY OF NORMS* (Michael Hartney trans., 1991).

100. Lieber, a German immigrant to the United States in 1827, was a professor at the University of South Carolina and, later, at Columbia. His tremendous influence in the 19th century American legal academy is chronicled in Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL ED. 339 (1992). Lieber has been largely, but not completely, forgotten in the jurisprudence of the latter half of this century. The notable exceptions are those who study his pioneering work in legal hermeneutics, as well as those few who have followed the researches of Michael Hoefflich and Paul Carrington to consider his work in civic virtue. The fullest recent consideration of Lieber's work is the recent symposium at the Benjamin

Lieber's approach to official ethics was to apply the same system of morals that would apply to general circumstances, specifically emphasizing the particular opportunities and obligations of officials charged with administering the power of the state in a democratic and divided government.¹⁰¹ His treatise articulating this method, *Manual of Political Ethics*,¹⁰² surveyed not only the institutional role of the legal official, but the proper scope of, and dangers posed by, officials' actions animated by such motives as perseverance, moderation, peevishness, ambition, affection, and gratitude. Moreover, Lieber was specific in considering obligations of officials to act in moral contexts specific to their offices; judges ought to show mercy in the application of ambiguous criminal statutes,¹⁰³ and executives who interpret constitutional questions ought to do so in good faith and with common sense.¹⁰⁴

Even so, there has been little discussion of a moral obligation of lawmakers to the governed in this century.¹⁰⁵ An attempt here to put flesh on such old bones is at best preliminary.

At a minimum, a moral obligation of legal officials to the citizen must be to diminish the injustice of acts made by that official.¹⁰⁶ This might be accomplished,

Cardozo Law School. See, e.g., Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO L. REV. 2107 (1995); Johnathan S. Henes, *A Lieber Bibliography, with Annotations*, 16 CARDOZO L. REV. 2321 (1995).

101. For a general view of Lieber's conception of the representative nature of a government divided among branches and federal levels, see FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* (1853).

102. FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* (Theodore D. Woolsey ed., 2d ed. rev., J.B. Lippincott & Co. 1875).

103. 2 *id.* at 404-05.

104. 2 *id.* at 389.

105. Such discussion as there has been in this century have been on a much more general plane, largely concerned with the problems of the inescapable wrong-doing associated with political decision-making. See, e.g., Bernard Williams, *Politics and Moral Character*, in *PUBLIC AND PRIVATE MORALITY* 55 (Stuart Hampshire ed., 1978). Most of these discussions have followed either a tack related mainly to officials' obligations to provide justice, see, e.g., STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* (1989); CALUM R. PATON, *ETHICS AND POLITICS: THEORY AND PRACTICE* (1992), or the difficulties of avoiding or compromising with the Machiavellian notion of necessary political immorality, see, e.g., BEN-AMI SCHARPSTEIN, *AMORAL POLITICS: THE PERSISTENT TRUTH OF MACHIAVELLISM* (1995). Father Richard Regan's work is probably the most detailed or recent writing that attempts to construct moral obligations for officials. See RICHARD J. REGAN, *THE MORAL DIMENSIONS OF POLITICS* (1986). These works are, of course, directed to consider the moral content of acts by political, and not necessarily legal, officials. Legal officials are bound by, and their actions are occasionally considered according to the rules of, legal ethics. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

106. For two recent treatments of the problem of injustice that have attained the status of young classics, see JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* (1990) and BARRINGTON MOORE, JR., *INJUSTICE, THE SOCIAL BASES OF OBEDIENCE AND REVOLT* (1978).

at least in some measure, by the application of general standards of right conduct to official conduct, so that the official should treat the citizen as the official would be treated, holding the official's own private conduct to the same standard to which that official holds others.¹⁰⁷ It may be that a further refinement of these standards may be had by a redefinition of Fuller's moral obligations of the law, to read them as moral obligations of lawmakers.¹⁰⁸

In any event, it is certain that the sanctions that may be brought by citizens against the legal official or officials who sufficiently (in the many ways that sufficiency may be measured) violate their moral obligations, and it is certain that these sanctions are not dependent on legal avenues to be quite real. In a personal sense, there is damage to reputation, both personal and professional. In a public sense, there is a diminished regard for, and obedience to, the laws as a whole. In its extremes, this disregard may lead to anarchy or revolution. H.L.A. Hart recognized that a legal system without habitual obedience to the law is liable to collapse,¹⁰⁹ and it is no accident that the American Declaration of Independence was largely a chronicle of the failures of Parliament fairly to enact laws for the good of the people. Regardless of the direct effects that flow from officials' violation of moral limits on their conduct, there are effects that flow from the mere consideration of moral obligations of the official to the governed. One effect of criticizing the moral components of acts by legal officials is to encourage the democratization of the making of legal decisions, without otherwise altering the structure of the legal system itself. It is to answer the critics question, "Should everyone participate in the making of social policies?"¹¹⁰ with a democratic certainty. Another effect is to distinguish acts by an official that are immoral in a manner that affects the office from immoral acts by the same official that do not affect the office. In other words, a sound conception of the moral obligations of lawmakers can mark out some acts as private, even if they are

107. This "sauce for the goose" approach is deliberately a faint echo both of Christian injunctions to follow the golden rule and of Kant's categorical imperative. It is noticeably violated by acts of Congress that routinely exempt members from standards to which the rest of the country is held.

108. According to this formulation, officials would be morally obliged to ensure that laws

- (1) must be sufficiently general so like cases are treated alike;
- (2) must be publicly promulgated;
- (3) must be sufficiently prospective;
- (4) must be clear and intelligible;
- (5) must be free of contradiction;
- (6) must be sufficiently constant through time so people can order their relations accordingly;
- (7) must not require the impossible; and
- (8) must be administered in a way sufficiently congruent with their wording so people can abide by them. See LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969).

109. HART, *supra* note 60, at 97-107.

110. WAYNE A.R. LEYS, *ETHICS AND SOCIAL POLICY* 385 (1941).

made by lawmakers, because they are irrelevant to the moral obligations of the official as an official.

V. SOME CONCLUSIONS

John Garvey has publicly created a provocative theory of freedom, one which encourages us not only to reconsider the nature of freedoms, but also personally to engage ourselves in the moral examinations of what freedoms there ought to be. Granted, the conclusions of his applications are controversial, as are his choices in some of the sources of moral rectitude that he brings to bear.

Even so, this controversiality is a benefit of Garvey's writing. His work seems to me to be an invitation to consider the questions he raises, with the expectation that all of us who answer his invitation will employ tools personal to us as well as tools from Garvey's workshop.

The nature of a discussion of the depth of the moral content of a citizen's action leads us to the question posed by Barbara Armacost: must not the legal official also act with moral intent?¹¹¹ Surely, if citizens are immune from the interference of legal officials only for morally sound actions, then the legal officials must also be bound to some moral strictures in their interference.

One of the most important insights to be gained by the notions of a political ethic, or a moral obligation of legal officials to carry out their duties with purposes appropriate to their fiduciary roles, returns us to the very problem that Garvey set for us in his article and book. It is simply to acknowledge the most profound duty of the lawmaker who is called upon to determine whether a right should protect some act from the interference of (usually other) lawmakers.¹¹² In doing this, the official has a moral duty to reach a moral decision.¹¹³

The methods by which such a decision can be reached may well follow the path that Garvey has begun to chart.

111. Armacost, *supra* note 3, at 33.

112. See Garvey, *supra* note 2, at 3-4; GARVEY, *supra* note 4, at 232.

113. This is much the point of Ronald Dworkin's recent efforts to promote a moral reading of the Constitution. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve*, 65 *FORDHAM L. REV.* 1247 (1997).

