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*Review Article*

JAMES W. NICKEL

WHY BASIC LIBERTIES ARE BILATERAL

John Garvey argues that grand freedoms such as freedom of religion and association are “not necessarily” bilateral.<sup>1</sup>

Suppose . . . that we protect religious freedom in part because we think that it is a good thing to give praise and thanks to God. What acts fall within the gravitational force of that principle? Prayer is the standard case. Communal religious celebrations are surely covered. We could make a case for the nonreligious celebrations of nature, the kind we associate with the Romantic poets. Antireligious acts, by contrast, belong in a different category altogether. They are not close to the standard case by virtue of being its contradictory. They exemplify a different principle. (p. 18)

Garvey takes a freedom to be bilateral when “the freedom to do x entails the freedom not to do x” (p. 17). The word “entails” is probably too strong; a more neutral definition would be “includes within its scope.” Freedom of religion – or, as I prefer to say, freedom in the area of religion – is bilateral if it includes within its scope the liberty to refrain from religious belief and practice. But Garvey may prefer the word “entails” because he is interested in whether the two sides of a bilateral liberty are supported by the same rationales. I will argue later that they usually are.

Let us say that the liberty to do something and the liberty to refrain from doing that thing (i.e., the two branches of a bilateral liberty) are each other’s *complement liberties*. Garvey allows that

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<sup>1</sup> John H. Garvey, *What Are Freedoms For?* (Cambridge, MA: Harvard University Press, 1996), pp. 2, 17. Hereinafter citations to this book will be made parenthetically. I focus on the first section of the book, which sets out a general theory of liberty. The second section discusses the sorts of actors that can enjoy freedom; the third part considers constraints on freedom; and the fourth part discusses the role of the state in relation to political freedom.



a normative system can contain complement liberties without their being parts of the scope of a single liberty, and without their having the same rationales. So maybe his point is less to eliminate freedom of belief for atheists than to insist that such freedom isn't part of the freedom of religion. It must have a different rationale.

Because of this, Garvey's view isn't refuted by showing that in American constitutional law most of the basic liberties are bilateral. But it is worth emphasizing that they are. Americans have both the freedom to speak and the freedom to refrain from speaking, the freedom to believe things and to disbelieve them, the freedom to associate and to dissociate, the freedom to assemble and to refuse to assemble, the freedom to move and to stay put, and the freedom to have children and to refrain from having them. But it is possible that these complement liberties have different rationales.

Garvey's views on bilateral liberties are grounded in a theory of the grounds for liberty that has strong affinities to the theories of other Catholic intellectuals such as John Finnis and Robert George.<sup>2</sup> The general idea is that we have protected freedoms to do certain things because doing those things for the right reasons and in the right ways is intrinsically good. George calls this sort of view "Pluralistic perfectionism."<sup>3</sup> Garvey holds that the basis for freedom of religion is that "religion is a good thing" (p. 49). The justification for freedom of association rests on the value of love and friendship. "Love (the good) comes first, and the right to freedom follows after it. Love is the horse and freedom is the cart" (p. 28). And the main argument for freedom of speech is its role in the pursuit of knowledge. "One of the most important reasons why we protect freedom of speech is that speech – assertion, conversation, debate, publication – is the pursuit of knowledge, an activity that is intrinsically good" (p. 65).<sup>4</sup>

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<sup>2</sup> John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); and Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993).

<sup>3</sup> R. P. George, *Making Men Moral*, p. 189.

<sup>4</sup> Robert George's broader rationale for freedom of speech seems much more likely to be adequate. It is that "the realization of human goods is regularly (and often necessarily) achieved by co-operation made possible by communication." R. P. George, *Making Men Moral*, p. 194.

This approach is not unique in assuming that liberties should be defended by identifying the important goods that those liberties promote. Most liberty theorists, including Mill, Meiklejohn, Rawls, Feinberg, and Raz make this assumption, although they tend to focus on the value of option-areas rather than on the value of one-sided liberties. They also use broader conceptions of the underlying goods.<sup>5</sup> What is unique – and I think problematic – in Garvey’s approach is how narrowly he defines the goods that the basic liberties are supposed to promote. Narrow accounts of freedom-underlying goods need to be defended against the suspicion that they cannot account for the full scope of the associated liberties. Garvey provides no such defense. Perhaps Garvey likes narrow rationales for liberties because he likes narrow liberties.<sup>6</sup> But one gets no sense in Garvey’s book that he appreciates how difficult it is to defend a theory of freedom-underlying goods. One just finds dogmatic assertions such as “Speech has an intrinsic value that is objectively real” (p. 65).

Further, some basic liberties don’t seem well-suited to an approach that emphasizes the intrinsic value of the area of action they protect. Physical movement is a valuable liberty not because of the intrinsic value of moving, but because of the enormous *instrumental value* – in relation to many other goods – of being free to move. Enormous numbers of intrinsically and instrumentally valuable actions require that those performing them be able to move

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<sup>5</sup> J. S. Mill, *On Liberty* (1859). Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper and Brothers, 1948). Joel Feinberg, *Harm to Others (The Moral Limits of the Criminal Law, vol. I)*; Oxford, 1984). John Rawls, *A Theory Political Liberalism* (New York: Columbia University Press, 1993). Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

<sup>6</sup> Garvey treats autonomy theories as competitors to his views. He thinks that such theories are indiscriminating in the liberties they support. But autonomy theories can be broad or narrow, and the narrower ones will require good explanations for why some areas of choice are especially important. These explanations can be provided by lists of intrinsic goods of the sorts provided by Finnis, George, and Garvey, by adapting for use in autonomy theory Rawls’s “political conception of the person” (that identifies some capacities and areas of action as especially important to the realization of primary goods), or using Feinberg’s idea of certain liberties as especially valuable instrumentally to the achievement of all sorts of other goals (the sort of account that I give herein of freedom of movement).

in particular ways. Similarly, I believe that the main grounds for freedom of communication are found in the enormous instrumental value of communication.

I will argue that even if one relies on Garvey's very narrow account of the goods underlying the basic liberties, one can still make a strong case for the bilateral character of those liberties. I don't in fact agree with Garvey's narrow approach, but I will proceed dialectically. The general line that my arguments take is that in order to enjoy the liberty to A one must be free to refrain from A on at least some occasions. Without the freedom to refrain from A, many acts of A-ing will become pointless or impossible.

Let's start for illustrative purposes with Alexander Meiklejohn's famous defense of freedom of expression (which Garvey accepts as a secondary justification for freedom of speech (p. 77)). Meiklejohn defended freedom of expression on the grounds that ample public discourse is essential to self-government, and freedom of expression promotes and protects such discourse. A valuable end is identified, namely having a successfully functioning democracy, and freedom of expression is defended as instrumental to this end.

This justification seems to do little or nothing, however, to support the liberty to remain silent, to refrain from speaking and keep information to oneself. It seems to be a one-sided justification. Indeed, if political discourse is so valuable we might think the appropriate response is a duty of all who are capable to engage in such discourse, rather than a mere protected liberty to do so.

But a defense of the freedom to remain silent is already implicit in Meiklejohn's theory; it just needs to be drawn out. Orderly and useful speech requires that one sometimes speak, and that one sometimes listen, and listening usually requires one to be silent. Further, being able to withhold information from the press and public is necessary to permit robust debate within a political organization or party. Not releasing information is also necessary to political timing, to presenting one's views or platform when the time is ripe, and not earlier. And the liberty to keep confidential a group's membership list is often important to protecting that group from harassment or suppression.<sup>7</sup> Let's say that this sort of approach to the justification of a bilateral liberty is *unitary*, rather than *separate-sided*,

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<sup>7</sup> See NAACP v. Alabama 357 US 499 (1958).

since it defends both branches of a bilateral liberty by appeal to a single rationale or underlying good. The complement liberty doesn't "exemplify a different principle" (p. 18).

Freedom of movement is also worth discussing before moving on to Garvey's examples. I think that it is best to understand freedom of movement as a qualified liberty to choose one's location. It is a zone in which one can choose to be deeply rooted in a place that one never leaves, to be deeply rooted but to take numerous trips and vacations, to uproot oneself and find a new home elsewhere, or to flit from place to place like a butterfly. It is this whole realm of possibilities for choice that freedom in the area of movement covers – and that needs to be justified when we justify freedom of movement.

When both moving and staying are possibilities, going somewhere may be more valuable because it raises the possibility that one will tarry for a while or forever, and staying somewhere has greater meaning because the option of being elsewhere is present. If one carves staying out of going, many goings become pointless. And if one carves going out of staying, staying in a place one loves may be imprisonment. In this area of liberty, the values of both going and staying are present, and individuals can emphasize one over the other in attempting to find an optimal mixture.

The same approach can be applied to Garvey's narrow rationales. If, as Garvey suggests, the good promoted by freedom of speech is the pursuit of knowledge, the serious pursuit of knowledge will often require people to remain silent. First, one will often need to keep one's mouth shut in order to listen to and learn from others. Second, one will often need to keep one's views in an area to oneself while one thinks them through and subjects them to scrutiny and testing. And third, some knowledge is about personal and family matters and isn't appropriately shared with strangers. To avoid such sharing people need the liberty to keep quiet about what they know.

Freedom of association, even if it is defended on the narrow grounds that it is essential to the pursuit of genuine love and friendship, surely needs to be accompanied by freedom of dissociation. Love and friendship are special relations, ones that are not – and cannot be by their nature – be extended literally to everyone. Marriage means "forsaking all others." In order to be able to enjoy the goods of love and friendship with some people, one must be free

to exclude other people from love and friendship (I don't mean, of course, that others may be excluded from civil and humane treatment).

Perhaps freedom of religion is the hardest case. As we saw earlier, Garvey defends freedom of religion on the grounds that religion is a good thing (notice that he doesn't say that *true* religion is a good thing – the view that my Mennonite parents held).<sup>8</sup> But if religion is objectively and intrinsically a good thing, how can this good support the liberty to refrain from religious belief? As Garvey puts it, "Rejecting religion is an exercise of freedom, but it is not an exercise of religion" (p. 43). Perhaps Garvey relies too heavily on our abbreviated phrases for describing liberties: if we described this liberty not as "freedom of religion" but as "freedom in the area of religion" his conclusion wouldn't seem to follow in such an obvious way.

Some religious acts that flow from one religion, or view of religion, are anti-religious in the sense that they contradict or rebel against other religions or versions of the same religion. Baptising adults, which the Anabaptists advocated during the Reformation, was anti-religious in the sense that it defied the Catholic tradition of infant baptism. Accepting some religious beliefs typically requires rejecting others. If one doesn't have the freedom to disbelieve, this will make many acts of belief pointless or impossible. To hold a particular religious belief is almost always to reject other religious beliefs as alien or wrong. This is not to deny that religions vary in how strongly they reject or disapprove of other religions, nor to deny the possibility of syncretism. But to fully endorse one religion is almost always to exclude some others, and to exclude irreligious views as well. To understand religious freedom, we have to think of it as an area in which both belief and disbelief are simultaneously occurring.

Garvey might allow that the good of religion supports freedom to disbelieve any particular religion but deny that it supports the

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<sup>8</sup> Robert George proposes a broader conception of what is valuable in religion. What he finds intrinsically valuable is "considering whether there is some ultimate, more-than-human source of meaning and value, of enquiring as best one can into the truth of the matter, and of ordering one's life on the basis of one's best judgment" (*Making Men Moral*, p. 221).

liberty to reject religion entirely. But the founder of a new religion may disagree so totally with existing religions that he or she rejects them wholesale, keeping only the word “religion” if that. There are also Millian arguments here about the value to religion of religious dissent and doubt. Going through a period of questioning one’s religion, including one’s belief in God and in the value of religious practice, is often very useful in arriving at a mature personal faith. Religious figures from St. Augustine onward have emphasized what they learned from episodes of sin and doubt. This includes, but goes beyond, Mill’s point that acquaintance with doubt keeps beliefs from becoming dead dogmas.

It is far from obvious that the good of religion cannot support a liberty to reject religion. Indeed, Garvey himself quotes one famous argument from John Locke’s *Letter Concerning Toleration* why the good of religion requires religious freedom:

True and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force. (p. 50)

The point here is not merely that it is futile to try to compel religious belief, it is also the idea stated first that such belief will not be fully voluntary if disbelief is forbidden. The presence of an alternative is required for the meaningfulness of the choice. It is true, of course, that people sometimes happily endorse things that they cannot change such as who their parents or siblings are. In the same way, people could happily endorse the religion that they are required to believe and practice. Millions do. But choice is more voluntary and meaningful in the presence of an option. The value of religious commitment is undermined in the absence of freedom to refrain from religious belief and practice. It is undermined in exactly the same way that the value of staying somewhere – even a place that one loves – is undermined when one lacks the freedom to leave.

Offering a unitary justification for both sides of a bilateral liberty does not require us to avoid looking at these sides separately in circumstances where that is useful. First, one side may be menaced by different threats, and have different costs of protection, than the other. To take an example that Garvey might not like, we can say that there is a single zone, reproductive freedom, in which freedom

to have children (where this includes both having them at all and having some number of them at particular times) and to not have them (where this includes both never having them and not having them at particular times) play intertwined roles. But we can still allow that these two complement liberties are currently threatened by different agents and policies (e.g., compulsory abortion in China versus restrictions on abortion in the U.S.). And we can also allow that there can be partial differences in the values supporting these complement liberties.

We can also allow that the two branches of a basic liberty can have different levels of weight or importance. Because one branch of the liberty may be more threatened than the other in a particular country or era, the threatened branch may have more practical significance or weight than the unthreatened one.

I have shown that even if we accept Garvey's narrow account of the goods that underlie basic liberties this doesn't undermine the bilateral character of those liberties. I think that this is lucky for Garvey, since if his theory couldn't explain the bilateral character of most basic liberties that would be a fatal objection to his theory.

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