

Book Reviews

And Who Is My Neighbor?

Right and Wrong. By Charles Fried. Cambridge: Harvard University Press, 1977. Pp. x, 226. \$15.00.

Reviewed by Brian Barry[†]

I remember, . . . about 1646 (or 1647) that Mr. John Maynard (now Sir John, and serjeant) came into Middle Temple hall, from Westminster-hall, weary with business, and hungry, when we had newly dined. He sate-downe by Mr. Bennet Hoskyns (the only son of Serjeant Hoskyns, the Poet) since Baronet, and some others; who having made an end of their Commons, fell unto various Discourse, and what was the meaning of the Text (Rom. v. 7.) "For a just man one would dare to die; but for a good man one would willingly die." They askt Mr. Maynard what was the difference between a just man and a good man. He was beginning to eate, and cryed:—Hoh, you have eaten your dinners, and now have leisure to discourse; I have not. He had eate but a Bitt or two when he reply'd:—I'll tell you the difference presently: serjeant Rolle is a just man, and Mathew Hale is a good man; and so fell to make an end of his dinner. And there could not be a better interpretation of this Text. For serjeant Rolle was just, but by nature penurious; and his wife made him worse: Mathew Hale was not only just, but wonderfully Charitable and open handed, and did not sound a trumpet neither, as the Hypocrites doe.¹

I. Introduction: Charles Fried and the Revolt against Consequentialism

The term "consequentialism" entered into Anglo-American philosophical discourse in 1958,² and has come to mean the doctrine that

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1. J. AUBREY, *AUBREY'S BRIEF LIVES* cxi-ii (O. Dick ed. 1950).

2. It first occurs in Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1, 12-14 (1958), reprinted in *ETHICS* 186-88 (J. Thomson & G. Dworkin eds. 1968).

one should judge the morality of an action by its consequences.³ In principle, a consequentialist could use any criterion, however bizarre, for judging consequences as better or worse. For example, a consequentialist could say that good actions are actions that have the effect of raising the level of the sea, or of increasing the amount of radiation at certain frequencies. In practice, however, consequences normally are defined in terms of human interests. An egoistic consequentialist judges actions by the way they affect him, a patriotic consequentialist by the way they affect his country, and a universal consequentialist by the way they affect all human beings.⁴ The term "utilitarianism" will be employed here to correspond to "universalistic consequentialism."

In practice nobody goes around calling himself a consequentialist. "Consequentialism" is a term introduced and used mainly by anti-consequentialists. There are a few utilitarians, but they are very few. The best-known utilitarian is J.J.C. Smart, and even he recently has shown serious signs of wavering in the faith.⁵ There may be as many as half a dozen other committed utilitarians scattered over Britain, Canada, the United States, and Australia, but I doubt if there are more.

If consequentialists are an endangered species among the philosophers of the world, how can there be a revolt against consequentialism? To pose the question in that way is to ignore the importance of where you start: what you regard as easy cases as against what you regard as qualifications designed to take care of difficulties. You can start from consequentialism and then build in some side-constraints on particularly repellent actions. Alternatively, you can start from absolutism (which I shall take to be the doctrine that actions are right or wrong according to their nature) and add some escape clause for situations in which the consequences of following such a rule would be too horrendous. In principle, it is possible to imagine that you could reach the same concrete judgments starting from either point, but in practice it tends to make a big difference which cases you take as clear and central and which as difficult and exceptional.

What we are in the middle of, I claim, is a shift from consequen-

3. C. FRIED, *RIGHT AND WRONG* 8 (1978) [hereinafter cited by page number only]; see A. DONAGAN, *THE THEORY OF MORALITY* 190 (1977); Williams, *A critique of utilitarianism*, in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 84 (1973).

4. A "non-speciesist" universalist might judge actions by their consequences for all sentient beings. I shall not consider this extension of universalism in the present essay.

5. See Smart, *An outline of a system of utilitarian ethics*, in J. SMART & B. WILLIAMS, *supra* note 3, at 72-73.

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tialism as a starting-point to absolutism as a starting-point. This kind of shift is nothing new. The most striking analogue is perhaps the rapid repudiation of logical positivism after the Second World War that led A.J. Ayer to complain that he went from being a Young Turk to being old hat without an intervening period of solid respectability.⁶ Today in Anglo-American philosophy the prevailing way of looking at morality is in the process of changing from utilitarianism (with some qualms about lying, breaking promises, or killing innocent people in a good cause) to absolutism (with residual doubts about catastrophic consequences).

Putting it very schematically, we might think of the shift in starting-point as having four stages. In the first stage, a dominant paradigm (to use the inevitable Kuhnian terminology)⁷ rides high. Scholars devote their research to developing the dominant paradigm, exploring its implications, and trying to clear up anomalies. There are some objectors, either left over from a previous paradigm or reacting on their own initiative against the dominant paradigm, but they are voices crying in the wilderness. In the second stage, criticisms of the dominant paradigm build up but the paradigm holds the field. It is still, as it were, the thing to beat. The decisive period is the third stage, in which a new paradigm becomes the focus of attention.

Taking the offensive is not always the way to conduct a war (as Marshall Foch demonstrated) but in the war between paradigms the offensive is critical. As Imré Lakatos emphasized, a paradigm becomes dominant when it generates a research program that looks interesting and holds out hopes of being feasible.⁸ As the new paradigm begins to take hold, those who continue to support the previously dominant paradigm are relegated to the wilderness. The final stage is that in which the new paradigm is triumphantly established. Afterward, history is rewritten by the victors so that those who in some way anticipated the current paradigm (especially prophets who previously were crying in the wilderness) become the major figures while the heroes of the earlier paradigm fall into obscurity.⁹

In order to initiate the third stage, in which critics of the old paradigm move from the defensive to the offensive, it is necessary

6. A. AYER, *A PART OF MY LIFE* 294-95 (1977).

7. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

8. I. Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 175 (I. Lakatos & A. Musgrave eds. 1970).

9. Economics provides good illustrations of this last process. Keynes rediscovered the "underconsumptionist" J. A. Hobson; now with the resurgence of monetarism we again begin to hear about how Hume said it all. Even Say's law, regarded during the Keynesian era as a monument to asininity, is being rehabilitated.

to have a critical mass of work that exemplifies the new approach and provides handholds that the less adept may use to scramble up after the virtuosi. To put it more mundanely, you cannot have articles until you have books. You can, of course, have a lot of articles peppering the old paradigm. But to obtain the reassuring sense of cumulative development characteristic of "normal science" there must be a solid body of literature forming a common reference point.

Charles Fried's *Right and Wrong* is best seen, I suggest, as a contribution to the building of that critical mass. To appreciate *Right and Wrong* in this context, one must consider also two books published a few months earlier: Alan Donagan's *The Theory of Morality*¹⁰ and Michael Walzer's *Just and Unjust Wars*.¹¹ The three books are different but complementary. Donagan's is the most ambitious work: in a relatively brief compass, *The Theory of Morality* undertakes to expound the substance of what Donagan calls the Hebrew-Christian moral tradition, and also to ground the Hebrew-Christian ethic in a Kantian metatheory of morality. Donagan's book is sharp, spare, and clear. Walzer's *Just and Unjust Wars*, in contrast, is diffuse and theoretically unrigorous; ultimately it may even be incoherent. But Walzer's book gets onto the table a mass of problems in one large and important area of morality that others can refer to and work over. Fried's book is different again. The talent most on display in *Right and Wrong* is Fried's ability to synthesize the work of other recent writers with his own earlier work.¹² If it is potential influence with which we are concerned, we should never underestimate the importance of a good work of synthesis.

I may be hopelessly wrong in my reading of the entrails, but it seems to me that the evidence for some fundamental shift is persuasive. If we take a birdseye view of postwar Anglo-American moral philosophy we have to note not one change but two. The first shift, which is not of concern here, is the virtually complete abandonment of the view that the role of moral philosophy is to analyze words (or the functions of moral discourse) to the exclusion of any concern with first-order questions of morality. So far has the pendulum swung to the other extreme that I cannot remember when I last read a discussion about the criteria for a good cactus or an extra-fancy apple.

The second postwar shift is the change with which I am concerned

10. A. DONAGAN, *supra* note 3.

11. M. WALZER, *JUST AND UNJUST WARS* (1977).

12. At the end of the book there is a valuable reference section that is not keyed to specific points in the text but provides a kind of running bibliographic commentary on the sources (many of them also from Harvard) drawn upon. See pp. 197-219.

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here. In the mid-1950s the utilitarian paradigm encompassed almost all work published on substantive questions of morality. As I have emphasized, to say that work is located within a paradigm is to say only that the paradigm provides the focus of attention; the attention may be either positive or negative. In this respect we can, I suggest, trace a change between the 1950s and the 1960s. Although the period of the mid-1950s hardly corresponds fully to my ideal-typical first stage, it would not be over-interpretation to sum up the prevailing mood of that period as follows: utilitarianism, in some shape or form, has just got to be the right general answer and the research task is to apply enough technical ingenuity to crack the problems of application in order to derive the right specific answers. This was the period of mixed strategies, varieties of rule utilitarianism, and so on.¹³

If we turn to the books and articles of the mid-1960s, however, we find very few people investing in attempts to make utilitarianism work. We can see the 1960s as a classical prerevolutionary period. The old regime still survived but it was the subject of widespread yet diffuse disaffection and it found few thoroughly convinced defenders. By 1973, we find Bernard Williams pronouncing a sentence of death on the utilitarian paradigm: "The important issues that utilitarianism raises should be discussed in contexts more rewarding than that of utilitarianism itself. The day cannot be too far off in which we hear no more of it."¹⁴

The books by Fried, Donagan, and Walzer are not primarily critiques of consequentialism; the authors' criticisms of consequentialism are incidental to their purpose. Instead, the books seek to work out a nonconsequentialist ethic. Each author grounds his nonconsequentialist system in traditional Hebrew and Christian religious morality, which thus constitutes the emerging alternative paradigm. So, for example, we find three highly respected academics taking seriously the doctrine of double effect,¹⁵ which most philosophers had thought of as a quaint survival from the Middle Ages—like the custom of venerating the relics of saints. At the same time, fine discriminations between different varieties of utilitarian theory that would until recently have been treated as raising serious issues tend to be dismissed summarily. The function of the term "consequentialism" is to make this change of focus seem natural.

13. See, e.g., J.S. MILL, *UTILITARIANISM* (S. Gorovitz ed. 1971) (containing several works from mid-1950s).

14. Williams, *supra* note 3, at 150.

15. See p. 643 *infra*.

Already we can begin to discern how the anti-consequentialist history of morality is going to look. First there was Hebrew and Christian traditional morality and its scholarly expositors such as Maimonides and Aquinas.¹⁶ Then there came the dark age of utilitarianism during which the traditional doctrines took refuge in Roman Catholic moral theology. The 1970s, beginning with John Rawls' *A Theory of Justice*,¹⁷ presumably will count as the beginning of a new era.¹⁸

Fried's role in the shift to the new era of the absolutist paradigm is primarily that of an intellectual broker. He brings together two anti-consequentialist lines of thought: the Hebrew-Christian tradition of "Thou shalt not" and the "libertarian" doctrine of natural rights, which recently has enjoyed such a curious revival in American academic philosophy. Fried then adds some "integrity" from Bernard Williams: in conjunction with the Hebrew-Christian tradition, integrity means keeping your hands clean, while, in its libertarian guise, integrity means doing your own thing. The result is a potent brew with something for (almost) all tastes. Of the mainstream moralists recognized in Britain and North America, only Jesus and John Stuart Mill are left out in the cold. It is, indeed, quite a feat to accommodate within a single theory the God of the Pentateuch, Robert Nozick, Pontius Pilate, and Henry David Thoreau.¹⁹

This is intended as a way of characterizing what Fried is doing, not as a piece of intellectual biography. If we want intellectual biography, I imagine that we can get nowhere without taking into account Fried's elder colleague John Rawls. Rawls presented his early *Two Concepts of Rules*²⁰ as a variant of utilitarianism, closely related to Urmson's interpretation of Mill.²¹ By the time of *A Theory of Justice*,²² Rawls's theory appears as an alternative to utilitarianism. It is clear from the form of the argument that the object of *A Theory of Justice* is to wean the reader away from putatively utilitarian loyalties. Yet the line of analysis developed makes the theory incommen-

16. The actual teachings of Jesus found in the Gospels tend to be played down. As we shall see, the injunction that "Thou shalt love thy neighbor as thyself," *Matthew* 19:19, would undercut Fried's central claims, and the Sermon on the Mount, especially *Matthew* 5:43-48, explicitly repudiates the particularism defended as a "natural right" to liberty by Fried.

17. J. RAWLS, *A THEORY OF JUSTICE* (1970).

18. The reference notes in Fried's book may be understood as a first sketch of this revisionist history. See pp. 197-219.

19. A quotation from Thoreau leads off the introduction to *Right and Wrong*.

20. Rawls, *Two Concepts of Rules*, 64 *PHILOSOPHICAL REV.* 3 (1955).

21. Urmson, *The Interpretation of the Moral Philosophy of J.S. Mill*, 3 *PHILOSOPHICAL Q.* 33 (1953).

22. J. RAWLS, *supra* note 17.

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surable with utilitarianism. The question is not, as it might at first appear, between average and maximin utility but between basically incompatible visions of man and society. Subsequent developments in Rawls's thinking carry this process further.²³

Fried's thinking traces the same course. Comparing *Right and Wrong* with Fried's first book, *An Anatomy of Values*²⁴, we find a common pattern of concerns. In particular we find Fried returning again and again to the tension between general beneficence and the duties that special relationships such as friendship or professional service impose on us.²⁵ The concrete conclusions of *An Anatomy of Values* and *Right and Wrong* are recognizably similar to each other. The first time, however, Fried developed his conclusions as deviations from utilitarianism. Now the conclusions are derived directly from the limitations on what anyone can be required to do for another in the absence of some special relationship.²⁶

There is much to admire in the eloquence, passion, and forthrightness with which Fried develops his theory. Yet the same cannot, I fear, be said of the theory itself. The central doctrines of *Right and Wrong* seem to me to constitute a uniquely obnoxious blend of Pharisaism and narcissism. Moreover, the analysis seems to suffer from simple-mindedness, the fault usually attributed to utilitarians.²⁷

I shall set out my objections to Fried's theory under two heads: that Fried is mistaken in reducing morality to a matter of rights and wrongs; and that the notion of saving one's soul does not survive translation into secular terms. I shall conclude by sketching in one element of what seems to me a more plausible nonconsequentialist view of what others reasonably can expect us to do for them.

23. See Rawls, *A Kantian Conception of Equality*, 96 CAMBRIDGE REV. 94 (1975). Meanwhile, the rewriting of history is taking place with respect to *A Theory of Justice*: I would hazard the guess that most people read *A Theory of Justice* in a more Kantian light now than when the book first appeared, both because of Rawls's own subsequent glosses and the concomitant changes in the mental climate that I am trying to depict here. See Sumner, *Rawls and the Contract Theory of Civil Disobedience*, 7 CANADIAN J. PHILOSOPHY 47 (Supp. III) (1977). Thus, although publication of *A Theory of Justice* did not shift the paradigm, Rawls's work can be utilized to form an important part of the intellectual ammunition of the neo-Kantians.

24. C. FRIED, *AN ANATOMY OF VALUES* (1970).

25. See pp. 167-93. This tension also forms the core of Fried's second (and in my view most valuable) book. See C. FRIED, *MEDICAL EXPERIMENTATION* (1974).

26. In both *An Anatomy of Values* and *Right and Wrong* we also find a pervasive Rawlsian influence. But, whereas in *An Anatomy of Values* it is the Rawls of the first half of *A Theory of Justice* who is most in evidence (even including hypothetical contracts), in *Right and Wrong* it is the emphasis on the responsibility each person has for shaping his own life that is uppermost.

27. Bernard Williams refers to the "simple-mindedness of utilitarians," Williams, *supra* note 3, at 150, which "consists in having too few thoughts and feelings to match the world as it really is," *id.* at 149.

II. Right and Rights, Wrong and Wrongs

The title of the book is *Right and Wrong*, but the two major sections into which it is divided are called "Wrongs" and "Rights."²⁸ The shift from right and wrong to rights and wrongs is momentous. Wrongs are things we do to particular people: we wrong people when we do certain things to them. Yet to assume, as Fried does, that we can talk about wrong by talking about wrongs is to commit ourselves to the substantive moral doctrine that, other things being equal, it is wrong to wrong people. But cannot there be wrong without anyone being wronged?

Suppose a woman could conceive a child now, while she is taking a drug that will cause the child to be gravely deformed at birth, or she could postpone conception for a few months and have a normal child.²⁹ If the woman goes ahead and conceives the defective child, we can say that the child she bears is much worse off than the child she might have borne later. But we cannot say that the woman has harmed the child, because that child otherwise would not have existed. The child therefore has not been wronged, unless we say that bringing it into existence at all was wronging it (a case of wrongful birth). Suppose that the child is not so miserable as to regret having been born. Yet it still seems reasonable to say that the woman did wrong by conceiving the defective child, and to say this without taking into consideration the effects on others. We can maintain that the woman did wrong, however, only if one can do wrong without wronging anybody.³⁰

Let us take two other cases, the first of which Fried discusses and both of which have attracted a good deal of scholarly comment in recent years. A hospital has a limited supply of a scarce drug. The doctor in charge either could use the drug in a massive shot to save the life of one person (less will be of no use to the person) or divide it into five equal doses which will save the lives of five people. Would he do wrong to give all of the drug to the one person rather than to

28. The remaining part, which consists of only one chapter discussing implications of the theory for friendship and professional ethics, Fried entitles "Roles." Pp. 165-94.

29. This example is drawn from Parfit, *On Doing the Best for Our Children*, in *ETHICS AND POPULATION* (M. Bayles ed. 1975).

30. It also follows that if the present generation gratuitously depletes the world's resources and causes future generations to live in far greater poverty than otherwise, this is not wrong so long as a byproduct is that different people get born, as (after a few generations) it is quite plausible to suppose would be the case. For then there is nobody who is worse off than he otherwise would have been. Therefore nobody is wronged. See Schwartz, *Obligations to Posterity*, in *OBLIGATIONS TO FUTURE GENERATIONS* 3 (R. Sikora & B. Barry eds. 1978).

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divide it among the five?³¹ Or, imagine several people stranded on one rock, and one person stranded on another rock. Assuming that there is not enough time to rescue the people on both rocks before the tide rises and drowns them, does someone with a boat do wrong by rescuing only the lone person?³² The reason for saying that the doctor or the man with the boat does not do wrong would be that nobody is wronged. Nobody has any cause for complaint, the argument goes, so long as the drug or the boat was used and not wasted.³³

Why should we not say, however, that it would be wrong to save fewer lives rather than more? It seems to me spurious to argue that the drug and the boat were not wasted: they were wasted in the sense that they were not used to the best advantage. Suppose the doctor treated one of the five patients with an adequate dose of the drug and poured the remaining four-fifths of it down the sink. If giving all the drug to one patient would have been all right, is there anything wrong with that? If so, why? In both cases one person is saved when five might have been. Or suppose that the man with the boat goes to the rock with lots of people and takes off just one person picked at random. He is surely wasting life-saving space in the boat as much as—but no more than—if he went to the rock on which just one person is stranded and rescued that person. The question “Who is wronged?” thus is irrelevant. We need not show that anyone is wronged before we can say that it would have been better to use the life-saving resource to save more lives.

Fried bases his concept of what would be right and what would be wrong on a legal/theological model, according to which acts are to be judged not as better or worse but as either prohibited or not prohibited. Any act is either legal or illegal. There are no degrees of legality. Similarly, an act can be more or less sinful only in the sense that it is a more or less grave sin. The borderline of any given category of sin is an area of increasing doubt about its application, not a continuum of decreasing sinfulness.³⁴

31. See Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 5, 9 (1967).

32. This example originated with G.E.M. Anscombe. See Anscombe, *Who Is Wronged?* 5 OXFORD REV. 16, 17 (1967).

33. See *id.* at 16-17:

Why, just because he was one of the five who could have been saved, is he wronged in not being saved, if someone is supplied with it who needed it? What is *his* claim, except the claim that what was needed go to him rather than be wasted? But it was not wasted. So he was not wronged. So who was wronged? And if no one was wronged, what injury did I do?

34. Cf. Anscombe, *supra* note 2, at 201 (discussing borderline cases in context of consequentialism).

The question that must be raised is whether it makes sense to construe morality on the legal model, as Fried does, in the absence of a divine lawgiver. Miss Anscombe observes that "it is not possible to have [a *law* conception of ethics] unless you believe in God as a lawgiver; like Jews, Stoics and Christians."³⁵ I think that she is right. Since Fried does not call on supernatural authority to underwrite his theory, we must say that his "wrong" is, to adapt Hobbes, the ghost of sin sitting upon the grave thereof.³⁶

Suppose we get rid of the notion that there is a system of rules applicable to human beings at all times and places reposing in some secular equivalent of heaven. How are we to proceed? Take again the case of the people stranded on the rocks. How shall we appraise the behavior of the man with the boat in this emergency? Instead of asking simply "Was what he did right or wrong (licit or illicit)?", we shall ask more fine-grained questions, and according to the answers respond in a variety of ways.

Thus in some circumstances we would treat the man with the boat as a moral leper if he failed to rescue the people—the man happened to be passing the rock anyway, the sea was calm, and he could have taken the stranded people off at almost no inconvenience or risk to himself. Under other circumstances we might award a medal for heroism to the man with the boat—the sea was stormy and he was putting his own life at risk by going out to rescue the people. In between is a continuous gradation: the further the rock, the more severe the storm, the less seaworthy the boat, the less robust the man's health, for example, the better the man's deed in rescuing the people. Similarly, rescuing one is better than rescuing none, but rescuing many is better than rescuing one.

Taking everything into account, we thus may ask whether rescuing should be regarded as praiseworthy and not rescuing as acceptable conduct in the circumstances, or whether not rescuing should be regarded as blameworthy and rescuing as no more than reasonably could be expected of any decent person in the circumstances. All people probably will not draw the line in exactly the same place: some people set higher standards for themselves and for others than do other people. There does not, moreover, have to be a line at all. After establishing all the morally relevant facts, we may feel disinclined to say that rescuing was praiseworthy or not rescuing blameworthy. This is not, of course, to deny that rescuing would always be better than not rescuing.

35. *Id.* at 192.

36. T. HOBBS, *LEVIATHAN* 457 (M. Oakeshott ed. 1946) (1st ed. London 1651).

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The crucial point, and the one that Fried consistently fails to acknowledge, is that we do not have to choose between the notion that judgments of right and wrong are reflections of a system of natural rights and wrongs and the notion that judgments of right and wrong are to be derived from the utilitarian dictates of universal consequentialism. In fact, my description of the process of appraisal is actually inconsistent with the precepts of universalistic consequentialism. For consequentialism is, like Fried's concept of right and wrong, just another way of dividing all acts into the required, the prohibited, and the permissible. Consequentialism is a peculiarly implausible way of assigning content to the trichotomy because consequentialism narrows the range of moral indifference to cases in which two or more acts would have equally good consequences. All the rest of the time there is one act that is right (*i.e.*, required), and all the alternatives to it are wrong.³⁷

My point is that Fried *and* the consequentialist unite in reducing morality to the three categories of required, prohibited, and permissible acts. I can best show what is at stake here by turning to Fried's analysis of rights. Fried explains what constitutes a right as follows:

A person exercising a right may to some extent be dispensed from weighing the unintended consequences of his actions so long as what he does intend is the pursuit of a right. I want to do something. It is not wrong, but it has (bad) unfortunate concomitants. Do I have to weigh these, and forbear if the balance is unfavorable? Usually yes, *unless I have a right to do whatever it is I am doing*.³⁸

Fried claims to give us "an account of moral choice and of substantive moral values that is rich, complex, and true to the facts."³⁹ This claim is correct only if the standard of comparison is universalistic con-

37. The identification of utilitarianism with universalistic consequentialism of this rigoristic variety seems to go back only as far as G.E. Moore, who in *Principia Ethica* maintained that "the assertion 'I am morally bound to perform this action' is identical with the assertion 'this action will produce the greatest possible amount of good in the Universe.'" G. MOORE, *PRINCIPIA ETHICA* 147 (1903). In *Ethics*, Moore claimed it to be a substantive moral truth that whatever act produces the greatest good is always a duty. G. MOORE, *ETHICS* 172 (1912). That was the time-bomb that has been ticking away ever since. It is hardly surprising if it has at last blown up utilitarianism. The delay is accounted for only by the fact that ethics was thought to be a matter of cheers and boos, and therefore beyond rational discussion, from the mid-1930s through the mid-1950s. Then it took about 10 years to make sure that nothing could be done to save utilitarianism and another 10 years to move toward the absolutist paradigm.

38. P. 83.

39. P. 2.

sequentialism. Judged on any other basis Fried's analysis is woefully inadequate.

An account fully sensitive to the complexities would, I think, regard almost all the substance of morality as falling outside either the sphere of rights or wrongs or the sphere of universal consequences. Counting the interests of everyone equally is something legislators and administrators often should do. For a private individual to count himself only as one is, depending on the context, heroic, selfish, meddling, or crazy. Moreover, there are very few types of cases in which consequences can be discounted totally in arriving at a moral judgment. Rape and physical injury would be examples: nobody would be criticized for refusing to be raped or beaten however a utilitarian balance of advantages and disadvantages might come out.

Fried illustrates his definition of a right with the example of marriage. According to Fried: "If I have a right to marry whom I want (who wants to marry me), then this just means I do not have to consider how our happiness compares to the unhappiness our marriage will cause my rivals or hers, our parents, the neighbors."⁴⁰ It would be one thing to say that, having considered everything, I would rarely be blameable for preferring my interest to that of third parties. But that is a far cry from saying that it is totally irrelevant to any judgment of moral quality how my act would affect others. P.H. Nowell-Smith in his book *Ethics*, for example, writes that: "I am not free to marry the girl of my choice, because I know that it would break my mother's heart and I am obliged by filial duty."⁴¹ If the case of marriage fails to convince, take divorce. There is and ought to be a legal right to divorce, but surely the decision to seek a divorce is open to evaluation on the basis of the impact of the divorce on the interests of all those affected.

I would conclude that, if a right is what Fried says it is, the only rights are rights not to be wronged. This does not entail rejection of the notion of having a nonlegal right to something other than not being wronged. All that follows is that these nonlegal rights do not take the form specified by Fried.

There are moral rights that arise out of positive morality in the same way that legal rights arise out of positive law. Positive morality is the sphere within which morality (mores) can be construed according to the legal model. Thus, just as contracts give rise to legal rights, so promises give rise to moral rights. If you have promised

40. Pp. 83-84.

41. P. NOWELL-SMITH, *ETHICS* 210 (1954).

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me something, then, whether or not the promise is legally binding, I have a right to demand fulfillment, even if it would be burdensome to you to carry out your promise and of trivial advantage to me to have you do so.

But there is a point at which the analogy between moral and legal rights breaks down, and I suspect it is failure to take account of this that leads Fried into error. If I have a legal right to do something, I never do wrong legally by exercising it, however inopportunistically. Substituting "moral" for "legal" in both places turns a correct statement into an incorrect statement. It is not true that if I have a moral right to do something I never do wrong morally by exercising it, however inopportunistically.

The analogy between moral and legal rights is, rather, that the exercise of either a moral or legal right is always open to moral appraisal and, potentially, to moral condemnation.⁴² Thus, suppose that I have a moral right based, say, on an earlier agreement that is not legally binding to play the piano for an hour every evening in the apartment above yours. That means that you cannot require me to refrain; but if I do not enjoy it much and you hate it, I certainly would be a better person if I did not exercise my moral right to play. Thus, we often say both that somebody is "within his rights" in doing something and wrong to do it. That is a kind of complexity that Fried cannot accommodate in his theory of rights.

Contrasted with the mode of moral appraisals in terms of rights is the so-called balancing mode that makes an appearance in Fried's definition of rights. It deserves attention as an exception to the equation of wrong with wrongs. I find the place of the balancing mode in Fried's theory rather mysterious. Balancing makes only three fleeting appearances, in comparison with the many anti-consequentialist passages about balancing as something we should *not* do. In these references Fried clarifies neither the content nor the scope of balancing.⁴³

42. A source of confusion is that "moral" is used in two senses here: to refer to mores and to refer to criteria for criticizing conduct. See Feinberg, *Supererogation and Rules*, 71 INT'L J. ETHICS 276, 288 n.10 (1961), reprinted in ETHICS, *supra* note 2, at 405 n.10 ("On the one hand, . . . moral has the ring of supreme authority, and on the other, it still carries its original sense of informal 'customs' or 'ways.'")

43. One reference is the statement that in the absence of a right to do something one should "forbear if the balance [of consequences] is unfavorable." P. 83. The second reference, oddly enough, is found in a version of the doctor case (with four patients against one rather than five against one), in which Fried says that, since the one patient would not intentionally be killed to benefit the four, "the norm [against intentionally harming people] switches out of its absolute mode, and a balance of values becomes appropriate." P. 52.

The puzzle is that Fried also endorses the proposition that the numbers don't count.

I have to confess that I am not sure what to make of Fried's oblique references to balancing. The most straightforward interpretation would be that, when rights and wrongs do not come into play, one ought to pursue the net balance of advantage, which presumably makes the theory one of constrained utilitarianism. But this does not fit in with Fried's view that it would be wrong, in the balancing mode, to refuse to throw a freshly painted life buoy to a drowning person for fear of getting paint on your clothes.⁴⁴ In the life buoy example, it appears essential to the case that the balance be egregiously disproportionate. I suspect the answer is that Fried has not really thought very hard about balancing because in the end he expands people's negative rights so widely that there is very little scope left for the balancing mode. Fried says that "just as respect for personal integrity generates the negative rights which forbid compelled organ donation, so respect for liberty limits the implementation of positive rights, the pursuit of fairness or even of sympathy."⁴⁵ The right of the individual to choose freely how to live his own life swallows up so much that it is hardly surprising that throwing the occasional life buoy, if it is not too much trouble, seems to be all that is left of the balancing mode.

Fried opens his book by writing: "This is a book about how a moral man lives his life."⁴⁶ The book is nothing of the kind. At most *Right and Wrong* is about how a *just* man lives his life. Justice is only a part of morality, however, as my opening quotation from John Aubrey illustrates. Fried's overriding concern is that there should be a clearly demarcated area in which we can do as we please without moral considerations limiting our freedom of choice. At the bottom of Fried's whole theory lies the conception of the core of morality as a system of quasi-legal rules, obedience to which entails that a man is a good man. This is made explicit toward the end of the book when Fried writes:

See p. 219. The only way I can imagine of reconciling the quotation with the endorsement would be to interpret Fried as saying simply that letting somebody die in such a case is not wrong, so the doctor can choose whom to save. But that is not very aptly expressed by talking about balancing values: surely, if we balance, saving four must be better than saving one. The third reference appears when Fried says that it would be wrong (in the balancing mode) to refuse to throw a freshly painted life buoy to someone who was drowning for fear of getting paint on your clothes. *Id.* But Fried does not appear here to think that it is wrong simply because there is a net balance of advantage in favor of throwing the life buoy. Rather, what makes it wrong is "an egregiously disproportionate balance in favor of harm." *Id.*

44. *Id.*

45. P. 150.

46. P. 1.

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We must recognize a discontinuity: Between the merely just man and the chiseler comes the dividing line of right and wrong, while the whole distance between the saint and the merely just man occurs within the range of the morally good, and thus the categories of condemnation and compulsion are wholly inappropriate within that range. At most, what are in order are judgments of regret, but even those are questionable. The scale of judgment is marked, if at all, in degrees of praise only.⁴⁷

It may be that a good citizen can be defined as a law-abiding citizen. I don't think so. But in any case a good man cannot be defined as one who obeys certain minimum standards of duty. Victorian novels and biographies are thickly populated with self-righteous prigs who never did anything wrong in Fried's sense but still managed to make life hell for everyone around them.⁴⁸

III. Soul Saving as Face Saving

In the Introduction to the book, Fried writes:

Religious views . . . expect the secular future to share the imperfections and suffering of the present and the past. With such expectations it follows that the focus must be on personal moral perfection. Thus Christianity rejects consequentialism on the (consequentialist) ground that man is unlikely to gain the whole world (or its betterment) even if he were prepared to lose his soul. And *of course* one need believe neither in original sin nor in any theology at all to share this sense of our situation.⁴⁹

I believe that the "of course" here is too easy. If we make the appropriate substitution of secular concepts for theological concepts, so that "moral perfection" replaces "a state of grace" and "protecting your moral integrity" replaces "saving your soul," we are left with a doctrine that is, in my view, scarcely credible.

To illustrate, let me turn to Fried's chapter on the absolute wrongness of lying, whatever the human consequences of telling the truth. In the course of his discussion, Fried cites Augustine's *De mendacio* as follows:

Having argued that God destroys all who tell lies, he [Augustine] asks: If this truth be granted, who of those who assent will be

47. Pp. 175-76.

48. One might recall the description of Dr. Temple, the mid-Victorian headmaster of Rugby School as "[a] beast, but a just beast." OXFORD DICTIONARY OF QUOTATIONS 5 (2d ed. 1953).

49. P. 2 (emphasis added).

shaken by such argument as are given by those who say: "What if a man should flee to you, who by your lie can be saved from death?" . . . In very truth, some are indignant and angry if someone is unwilling to lose his soul by telling a lie so that another may grow a little older in the flesh.⁵⁰

Granted the premises, Augustine's conclusion seems fair enough. If life on earth is the blink of an eyelid compared to eternity (which is going to be spent in bliss or torment depending on how you conduct yourself here), and if telling a lie will shift you from being saved to being damned (or even has any finite probability of doing so), surely it would be quixotic to lie in order to add a few years to somebody else's life on earth (which is also the blink of an eyelid). If that is the setup, Augustine is quite right. But suppose that there is no God, that this is the only life we have, and that violent death is one of the greatest evils we know. Is anything left of the argument?

Fried says that he can offer "secular versions" of Augustine's arguments.⁵¹ Thus, corresponding to the passage from Augustine quoted above, Fried offers the following:

[T]he frequent references to lying as defilement might fairly be given the following interpretation: If lying is (absolutely) wrong, then to treat lying as something which is simply bad, undesirable, but to be traded off to procure other goods, to avoid worse harms, is to pursue good ends by impermissible means. To use a Kantian formulation, the violation of the categorical imperative is inestimably worse than any harm one may fend off by such a violation, since the categorical imperative and our obligation under it are what found our moral nature. Any violation for a mere contingent good trades what gives us moral status at all for something which has moral status only insofar as it is attributable to a moral being. This, then, is the Kantian version of the notion of gaining the whole world but losing one's soul.⁵²

I do not know if I am eccentric in this respect, but I find the secular translation a step from the sublime to the ridiculous. We are, after all, talking about a case in which by telling a lie you can save a man's life. If I were the man who was fleeing death, I should not think much of the "moral nature" or "moral status" of somebody who was agonizing about whether to pollute his precious "integrity" to save my life.

50. P. 70 (quoting *De mendacio*, in 6 TREATISES ON VARIOUS SUBJECTS 67-68 (R. De-Ferreri ed. 1952)).

51. *Id.*

52. Pp. 70-71.

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"Moral status" is a very poor substitute for "soul." It seems to me that the moral theory that Fried puts forward needs the original article. "Moral status" simply will not carry the weight. If we take God and the soul out of the picture, the emphasis on "integrity" becomes a form of narcissism. The question Fried would have us keep in the forefront of our minds always is "How do I come out of this looking?" I know people like this, but the idea that I should be expected to admire them seems to me bizarre.

The reasoning that this moral dandy is supposed to offer to the refugee runs as follows:

[W]e are responsible for the wrongs we do ourselves and not for those which by our wrong we fail to prevent others from committing. This argument is necessary . . . to maintain the distinction between the wrong and the bad. The category of the wrong speaks in the first or second person, but not in the third person: it tells me what I must not do, and I violate it just by doing the forbidden thing. But though the norm is universal in its application, a violation by another person is not a wrong except in relation to that other person. In relation to me it is bad, so that my lying to prevent a wrong by another is a case of my doing wrong in order to prevent something which *from my point of view* is a bad. To be sure, what the other will do *is* wrong, but it is *his* wrong.⁵³

Thus the fact that, by revealing your whereabouts, I give the pursuer the opportunity to work his nefarious will is neither here nor there. That the pursuer will kill you is a foreseeable but unintended consequence of my act. Anyway, it is his wrong, not mine. If this is Kant, I prefer to spell it with a "c."

To keep the record straight, I should add that Fried finally extricates himself from the conclusion that it is wrong to lie in this case with a complicated argument, extending over seven pages, that the pursuer has no right to the truth and thus is not wronged by being lied to.⁵⁴ Yet the point is not whether it is possible with enough of a struggle to get out the obviously right answer. The point is that, as Fried admits, "[a] struggle is necessary in the context of my argument."⁵⁵ Bernard Williams correctly argues that the object of setting up hard cases for utilitarians is not to see if utilitarian calculation can reach the right answer with enough effort, but to point out that

53. P. 71.

54. Pp. 72-78.

55. P. 72.

the effort is needed.⁵⁶ Any theory that requires seven pages of fancy footwork to establish that it is all right to lie to a would-be murderer in order to save the life of his prospective victim is subject to the same objection.

The last long quotation raises two questions, one about double effect, the other about responsibility. I shall argue that the question regarding double effect is fairly straightforward, although the issue involving responsibility is far more complicated than Fried, with his sweeping metaphysical assumptions, admits. Fried raises the issues in the following example: a man seeking to free a prisoner (1) blows up the prison wall with the predictable consequence that a guard will be killed by falling masonry, or (2) shoots the guard to obtain the keys.⁵⁷ Fried apparently wants to say that there is a difference in the moral quality of the two acts: in the first case the death of the guard is a foreseen but unwanted byproduct of blowing up the wall, whereas, in the second case, the guard's death is deliberately brought about as a means to the escape.

Surely, however, the responsibility for the outcome is the same whatever the intention of the actor. It is monstrous if, as seems to follow from Fried's view, a man can disclaim responsibility for almost anything that happens as a result of what he does just so long as he picks his intentions carefully enough. Not only is the man who brings about the guard's death equally responsible in both cases, but he is equally culpable. That the death of the guard is in the first case a byproduct and in the second case a means is irrelevant, and if the doctrine of double effect implies the contrary, as Fried apparently holds, that is a sufficient basis for dismissing it.

Consider any situation in which it is claimed (a) that we properly hold somebody fully responsible for an act of his under some description, such as aiming at a military target or organizing a peaceful civil rights march, but (b) that we should acquit the person wholly or partly of responsibility for all or some of the harmful consequences of the act, such as the death of innocent people or a race riot. Whenever the claim is plausible I wish to maintain that somebody else will be held responsible, wholly or in part, for these harmful consequences.⁵⁸ The simplest situation in which we hold somebody other

56. Williams, *supra* note 3, at 99.

57. P. 23.

58. Clause (a) above is designed to eliminate cases in which "the actor's conduct is not wholly voluntary," as when he acts on the basis of "coercion, deceit, or the exercise of authority" by another. H.L.A. HART & A. HONORE, CAUSATION IN THE LAW 324 (1959). The proposition in the text may be expressed conditionally: *if* there is any description of his

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than the actor responsible is when some other act (*a novus actus interveniens*) occurs between his act and its foreseeable consequences. The more complex scenario is when, although the act produces its natural consequences without any other intervening act, we hold someone responsible for the circumstances in which that act has those consequences.

It seems reasonable that the responsibility may shift to those who create the circumstances. If, for example, a military enemy puts civilian hostages on military trains⁵⁹ or straps innocent persons to the front of its tanks "so that the tanks cannot be hit without also hitting them,"⁶⁰ the enemy is responsible for their deaths. But notice that we assign responsibility here by saying something like "You can't expect people fighting a war to call it off because the other side fixes things to make it impossible to fight without killing innocent people." Some judgment about what it is reasonable to expect cannot be escaped.

Suppose, to modify the example of the tanks, that I am tired of tailgaters so I grab a child who is playing in the street and lash the child to the back of my car before setting off down the freeway. If you drive behind me at a distance that does not leave you with ample room to avoid running into my car (even if it would be considered enough normally), then I would say that, in the event of a collision, you are partly responsible for the resulting injuries to the child. Why? Presumably because in this case "business as usual" is not reasonable.

In the case of the *novus actus interveniens*, Fried regards the solution as simple: an act always breaks the chain of responsibility. The last actor before the consequence is always responsible for that consequence—subject, of course, to the proviso about responsibility for the circumstances being what they are in the first place. Thus, "we must not do wrong even in order to prevent more, greater wrongs by others. If those others do wrong it is their wrong, for which they are responsible."⁶¹ Once again, I find Fried's theory to be too simplistic.

Fried is haunted by the nightmare of our being saddled with excessive personal responsibility for the state of the world. Thus, in his opening paragraph Fried writes:

act under which the actor is fully responsible for it, *then* he is responsible for all the foreseeable consequences of it, *unless* someone else is responsible for some of those consequences.

59. See M. WALZER, *supra* note 11, at 174, for an example from the Franco-Prussian War.

60. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 35 (1974).

61. P. 2.

My central concern is to discern structure and limits in the demands morality makes upon us. . . . We are constrained but not smothered by morality once we acknowledge that there are limits to our responsibility for the world's good and ill, that we are responsible for some things but not everything.⁶²

Within limits, the concern to limit our liability for consequences is quite appropriate. It would indeed be intolerable if people always could get us to do things by suffering if we did not do them.⁶³ It would be even worse if people always could manipulate us by threatening to create bad consequences unless we did what they demanded. But Fried's desperate struggles to escape suffocation take him much too far. In slashing away at the clammy tentacles of consequentialism, Fried also cuts off a large chunk of live morality.

The legal model again misleads here. The law generally holds people solely responsible for their own actions. But moral judgments admit of much finer nuances. We can allow for all kinds of relations between the actions of different people that would, and should, never get into a court.⁶⁴ One example is advice: except for professional advisors or counselors of crime, people are not legally responsible for advice they give others, even if the advisees suffer disastrous consequences by following the advice. The responsibility falls squarely on the person who decides whether or not to take the advice. Morally, however, if someone does something bad on our advice, especially if the advice pertains to a matter of fundamental choice rather than to the means to an end the person was going to pursue anyway, we share the responsibility.⁶⁵ Other examples are provocation and temptation. From a moral point of view we tend to hold people rather widely

62. P. 1.

63. One might recall Scobie, in *The Heart of the Matter*: "He had always been prepared to accept the responsibility for his actions, and he had always been half aware too, from the time he made his terrible private vow that [Louise] should be happy, how far *this* action might carry him." G. GREENE, *The Heart of the Matter*, in *THE PORTABLE GRAHAM GREENE* 154 (P. Stratford ed. 1973).

64. See H.L.A. HART & A. HONORE, *supra* note 58, at 62:

The use of the legal sanctions of imprisonment, or enforced monetary compensation against individuals, has such formidable repercussions on the general life of society that the fact that individuals have a type of connexion with harm which is adequate for moral censure or claims for compensation is only *one* of the factors which the law must consider, in defining the kinds of connexion between actions and harm for which it will hold individuals legally responsible.

65. "If people ever took advice," Virginia Woolf noted defensively in her diary, "I should feel a little responsible for making up Ralph's mind [to marry Carrington]. I mean I am not sure that this marriage is not more risky than most." 2 Q. BELL, *VIRGINIA WOOLF* 80 (1972). Although there is no question that Ralph Partridge did the marrying—it was his act—Virginia Woolf was surely right to feel qualms about her role.

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responsible for provoking and tempting others—far more widely than in law.

More generally, it seems to me that we cannot absolve ourselves totally from responsibility for the foreseeable actions that others do as a result of our actions. Suppose that I have a contractual right to keep my employee late at work once a week. I know, however, that he tends to beat his wife when I keep him at work late, and that he rarely does so at other times. No doubt the beating is the employee's wrong, not mine. But if I know what the facts are and still keep the employee late, don't I have some moral responsibility too? Should I be able to excuse myself on the ground that the result, although foreseen, was not intended?

Fried is concerned that too strong a sense of responsibility for the world's sufferings will be bad for our moral health.⁶⁶ As the old Chinese song put it:

Don't escort the big chariot;
You will only make yourself dusty.
Don't think about the sorrows of the world;
You will only make yourself wretched.⁶⁷

I am inclined to believe that there is relatively little risk of that danger in the countries where Fried's book is most likely to be read. Think of the kind of context in which people say things like: "My conscience is clear." This generally is a defensive statement made to deny responsibility for the consequences of one's acts, such as the ruin of a business competitor or the suicide of a subordinate. Fried would say that, provided it was not your intention to procure the ruin of the competitor or to drive the subordinate to suicide, your conscience is quite properly clear. I suggest that it is a lot less simple than that. We do not have to choose between holding a man responsible for all the consequences of his acts and limiting liability for consequences as stringently as Fried does.

Obviously, if this is so, the right answer is going to be very complicated. In developing the right answer I predict that we shall not get much help from the lawyers. One particular reason why the law is a poor model is that when responsibility for an outcome is divided, the legal total normally adds up to 100%: if one driver was 70% responsible for the collision at an intersection then the other

66. Pp. 34-35.

67. A. WALEY, *THE BOOK OF SONGS* 231 (1960).

driver contributed 30% to the accident. Following this logic, Fried assumes that if we are to hold one person 100% responsible for his actions we must absolve everybody else of responsibility. Attributing moral responsibility, however, is not a fixed-sum game.⁶⁸ If one maintains that men as well as women should be responsible for preventing unwanted pregnancies, for example, this does not mean that the responsibility should split fifty-fifty, or in any other ratio.⁶⁹ Just as there can be overdetermination of events there can, so to speak, be overresponsibility for outcomes. In arguing so strenuously for limited liability, Fried simply is telling us what we would like to hear.

Underlying all of *Right and Wrong*, as Fried often repeats, is a Kantian notion of human freedom according to which we have not merely freedom to choose what to do but also freedom to choose what to choose: we are literally responsible for making ourselves.⁷⁰ If Fried's theory is correct, society is due for a great leap backward. Marx and Freud—and everything they stand for—will go out the window. There can be no room for the subversive notion that men are products of their social environment or that men's actions may have deep-rooted psychological causes. You can do anything if you try, and it is metaphysically guaranteed that you can always try. Out go any suggestions that there are causes of suicide, criminal recidivism, alcoholism, baby-battering, inability to hold a job, failure to use contraception, etc. Pleas of insanity or diminished responsibility will disappear from the legal system. Social workers and psychiatrists will be out of a job.

Fried might reply that this is to take him too literally. But if we once allow Fried's metaphysical absolute to be turned into an empirical claim about actual people, how can we avoid concluding that nobody fully has the ability and opportunity to shape his own life?

68. If Virginia Woolf was 30% responsible for Ralph Partridge marrying Carrington, that does not have to entail that Ralph Partridge was only 70% responsible. See note 65 *supra*.

69. Cf. K. LUKER, *TAKING CHANCES* 136 (1975) ("If men were able to take responsibility for their risk-taking behavior . . . and were held responsible for that behavior, the number of unwanted pregnancies would decline. . . . [I]t is assumed that both partners can and should use contraception, even if this sometimes means that two people are independently using contraceptives at the same time.")

70. Pp. 124-26 ("The . . . conception I offer holds a man responsible for his wants. . . . The respect we are entitled to as regards our wants . . . depends on the fact that as free beings we have freely chosen this conception of the good.") As it happens, the passage from which these quotations are drawn is devoted to making an argument the conclusion of which is in my view quite sensible: that distributive justice concerns the distribution of money (or more generally "primary goods") and not the distribution of want-satisfaction. But that conclusion is in no way dependent on the premises Fried uses. Even if "a person cannot help his tastes any more than he can the state of his health," p. 125, that is still no reason for saying that distributive justice requires that people with more expensive tastes should get more of the social product.

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How, moreover, can we avoid concluding that the extent to which people are in fact able to shape their own lives varies greatly from country to country and within countries from class to class?

Fried at no point offers any defense of his conception of freedom. At one point he says that "in moral philosophy we may often be forced to swallow some quite unchewed metaphysical morsels."⁷¹ But does that also apply to forcing these unchewed morsels on everybody? In a liberal society everyone has the privilege of believing what he likes—even that the earth is flat or that men are noumenal beings. But when it comes to questions of public policy, it matters a lot to everyone whether the premises on which proposals are made are in fact true.

Let us grant that the freedom to shape our own lives and achieve our own ends is of central importance. As Fried puts it: "Happiness is . . . the aim and outcome of individual *choice*, the success of the self in realizing its own values through its own choices and efficacy."⁷² I maintain that it is nothing better than a cruel hoax to say that everyone has such freedom by virtue of being a noumenal self. Only a privileged minority of the human race ever have had the opportunity either to choose their own ends (to the extent that anyone ever can do so) or to be efficacious in pursuing self-chosen goals. To develop a core of identity, to be able to integrate short-term and long-term aims into a coherent "life plan," and to acquire the skills necessary in order to have a reasonable opportunity to carry out that plan: none of these abilities just accrues to people as a concomitant of their metaphysical status. What chance has an unemployed high-school dropout in the ghetto or a Mississippi plantation worker to "realize his own values" through his own "choices and efficacy?"

It makes a big difference politically whether or not we swallow the unchewed metaphysical morsels that Fried offers us. If we say that freedom is something human beings are guaranteed metaphysically, we almost inevitably finish up with Fried's complacent kind of liberal conservatism. If, by contrast, we take freedom as empirically problematic, as something that has to be created, we find ourselves committed to a social and economic revolution to create the conditions in which freedom can thrive.

IV. Conclusion: Good Samaritans, Free Riders, and Others

The triumph of anti-consequentialism is inevitable. That in itself is no cause for regret. Very few people ever have managed to

71. P. 20.

72. P. 34 (emphasis in original).

swallow universalistic consequentialism as a theory and I venture to surmise that nobody ever has tried seriously to conduct his life according to its requirements. Those who come closest to abiding by the standards of universalistic consequentialism are not utilitarians but saints, as Fried quite correctly observes.⁷³

I agree with Fried that harming others and lying (his paradigms of wrongs) are not things we should be prepared to do whenever a utilitarian calculation of net advantage might suggest that we should—*e.g.*, killing one innocent person in face of a plausible threat by somebody to kill two innocent people otherwise. I think that Fried is too indifferent to consequences, as in the case of lying to save someone's life. Yet even Fried's indifference is only a matter of degree since he says that "we can imagine extreme cases where killing an innocent person may save a whole nation. In such cases it seems fanatical to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall."⁷⁴

In the matter of doing good to others, I also have no quarrel with Fried in rejecting the doctrine that it is always morally obligatory to perform that act of all available acts that has the best balance of consequences for everyone affected, counting yourself for one in the computation. Where Fried goes astray is first in reducing the question about doing good to an inquiry into what we morally are required to do for others (what it would be "wrong" not to do for others), and in assuming that one can answer the question by asking what "positive rights" others have against one.⁷⁵

The first move is the familiar flattening of the moral landscape produced by the right/wrong division. We are not to criticize people as mean and stingy, as not public-spirited or socially responsible, as bores, as insensitive to the feelings of others, or as casting a pall over any gathering in which they participate, unless we are prepared to take a deep breath and pick out discrete bits of their behavior (some "acts") to be labelled with the dread adjective "wrong." The second move is the corollary of the doctrine that doing wrong is a matter of wronging other people: here we say that doing wrong is a matter of failing to respect the rights of people. Unless someone has a right

73. Pp. 174-75.

74. P. 10. This, ironically, would make him a "consequentialist" under Miss Anscombe's original definition, since she called a consequentialist anyone who would admit that it ever could be permissible to kill an innocent person. Anscombe, *supra* note 2, at 196, 206-07.

75. "Positive" is contrasted here with "negative." Where I wrote previously of "positive rights," the contrast was with "natural rights": I was referring to rights established in the positive law or the positive morality of a community.

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to receive a service from us, we do not do wrong in refusing to provide the service.⁷⁶

We can see what is at stake here by reflecting for a moment on Judith Jarvis Thomson's article about the famous violinist with failing kidneys who is plugged into your blood circulation for nine months of recuperation.⁷⁷ Thomson poses the question: "Is it morally incumbent on you to accede to this situation? No doubt it would be very nice if you did, a great kindness. But do you *have* to accede to it?"⁷⁸ Before we know where we are, this is turned into the question whether the violinist has a right to life that trumps your right to determine the use to which your own kidneys are put. The answer, according to Thomson, is that the violinist does not have such a right, even if he needs to be plugged into your circulation for only one hour.⁷⁹

For a second example, Thomson asks us to imagine that the life of someone would be saved by the cool touch of Henry Fonda's hand upon his or her fevered brow.⁸⁰ Does Fonda have to supply it? If we look closely at what Thomson says about the case, it again becomes clear that she sees the question as a matter of what you (the feverish patient) have a right to receive from Henry Fonda. If we feel any temptation to say that you have a right to have Fonda cross the room to soothe your fevered brow, how far exactly does he have to come before the right ceases to exist: across the street, across town, across the country, half way around the world? Any particular cut-off point seems absurd. "So that I have a right to it when it is easy for him to provide it, though no right when it's hard? It's a rather shocking idea that anyone's rights should fade away and disappear as it gets harder and harder to accord them to him."⁸¹

We thus are driven to conclude that either you have an unconditional right to a touch of Fonda's cool hand or you do not have such a right, and in that case it seems evident that you do not. But why can't we simply say that the further Fonda would have to come the less badly we would think of him if he doesn't? Couldn't we condemn him for not crossing the room, just because it would be so easy?⁸²

76. The exception is the shadowy balancing mode, which, it will be recalled, required throwing the life buoy to the drowning man even at the cost of a little wet paint on the clothes. See note 43 *supra*.

77. Thomson, *A Defense of Abortion*, 1 PHILOSOPHY & PUB. AFF. 47 (1971), reprinted in THE PHILOSOPHY OF LAW 112-28 (R. Dworkin ed. 1977) [page references to reprint].

78. *Id.* at 113 (emphasis in original).

79. *Id.* at 123.

80. *Id.* at 118.

81. *Id.* at 123.

82. Of course, I am perfectly well aware that lurking in the background of all Mrs. Thomson's talk about "rights" is a policy question about positive law: should the law

Fried, like Mrs. Thomson, poses the question: what right do others have to demand from us services beyond abstention from inflicting harm on them? And he comes up with the answer: precious little. The "negative right" not to contribute services rules out just about any enforced beneficence. Most of the time, Fried discusses enforced beneficence as if the kind of enforcement in question were solely legal enforcement. Thus, in his analysis of blood and kidney donation, Fried writes as if there were only two alternatives: either you have a right of bodily integrity to do what you like with your blood and tissues, or it would be permissible for a squad of medical policemen to drag you off, clamp you to a table, and extract your blood or organs without your consent.⁸³

Fried then applies his conclusion—that forced donation is out—to the question whether people must develop and employ their talents to benefit the community.⁸⁴ Robert Nozick makes the same move.⁸⁵ It thus is no surprise to find Fried in effect reproducing the whole of Nozick's attack on Rawls's idea that people with talents owe their services to the community.⁸⁶ Fried and Nozick construe talents on the model of blood and kidneys: you can use your talents to benefit yourself, or to benefit others. In the latter case you can either sell them or give them away. You can choose not to develop your talents, or, if you have developed them, you can let them deteriorate or simply not use them. Thus, a tax on people's earning potential would be bad because it would penalize those who choose to be lazy; an income tax is bad, though less bad, because it penalizes those who choose to be hardworking.⁸⁷ Fried therefore argues for a tax on

enforce a right to life? But why should we suppose that in order to answer that question we first must find out about the existence or nonexistence of some other, spooky, "right?" In the end, it turns out, even Mrs. Thomson concedes that what she calls "Minimally Decent Samaritan laws" could be defended. At least she says that "Minimally Decent Samaritan laws would be one thing, Good Samaritan laws quite another, and in fact highly improper," *id.* at 125, which I take to mean that Minimally Decent Samaritan laws would not be improper. But does that not mean that saving a life by crossing a room or, more plausibly, going a few yards out of your way to pull a suffocating child out of a puddle could be made something you "have to" do? If so, however, it must be that the person you "have to" save does not have a "right" to be saved—in the "natural right" sense—because we would then fall back into the position of having to say that the person's right depends on the presence of somebody in the vicinity who could save the person while being no more than Minimally Decent. But if we can argue about the pros and cons of enforcing Minimally Decent Samaritanism either by legal sanctions or social pressure without ever mentioning natural rights, cannot we do the same for Good Samaritanism?

83. P. 140.

84. Pp. 139-50.

85. R. Nozick, *supra* note 60, at 183-231.

86. Pp. 143-47.

87. Pp. 143-47.

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consumption on grounds that, although he does not mention it, were stated first by Hobbes.⁸⁸

Toward the end of the book, Fried suddenly extends all this earlier discussion of legal enforcement to exclude moral criticism of refusal to help other individuals or to serve the community.

It would violate the rights of individuals . . . to *enforce* notions of fairness or efficiency in respect to the deployment of what I have called a man's discretionary resources. But should we not at least recognize a *moral* duty to use these resources for the good of all mankind—fairly and efficiently? Yet if a man may not be compelled but may be blamed (and should blame himself) if he does not use his liberty to maximize the good of all mankind, then we have accomplished very little by affirming that negative rights establish the core of moral personality. . . . It is not enough that a man cannot be forced to act like a utilitarian maximizer; it should also be the case that he cannot be morally condemned if he does not act that way.⁸⁹

I hope that by this point it is not necessary to emphasize that the choice between freedom from any possibility of moral criticism for not doing something for others and a moral requirement to act as a "utilitarian maximizer" is a wholly bogus one.

Legality is not to be equated with morality. Fried quite shrewdly assumes that the vision of people having their kidneys forcibly extracted is going to be abhorrent to most of his readers. But we can agree that it should not be legally required to give blood or contribute to the common good without agreeing that people should not feel bad about failing to do so. Why it should be an assault on somebody's integrity to feel that the decent thing to do would be to give blood is completely beyond me.

You may have thought that these low standards of service to the community, though applicable to the ordinary slob in the street, do not apply to practitioners of high-toned service-oriented professions like law and medicine. If such qualms assail you, be reassured by Fried. In his closing sections on medical and legal ethics,⁹⁰ Fried reaches the conclusion that a doctor or lawyer cannot be criticized for serving only white clients, rich clients, deferential clients, clients

88. Pp. 147-50. See T. HOBBS, *supra* note 36, at 226 ("For what reason is there, that he which laboureth much, and sparing the fruits of his labour, consumeth little, should be more charged, than he that living idly, getteth little, and spendeth all he gets; seeing the one hath no more protection from the commonwealth, than the other.")

89. P. 172.

90. See pp. 176-93.

with interesting cases, or taking on no clients and growing roses instead. Once a doctor or a lawyer accepts a client, that creates an obligation to the client to pursue the interests of the client—if necessary at the expense of the greater or more justly founded interests of others. But the choice of clients in the first place is within the sphere of the practitioner's rights and therefore, according to Fried, outside the sphere of moral appraisal.

In the end, the only "positive right" that Fried acknowledges is a positive right to a "fair share" (not further defined) of society's resources. This right to a fair share generates a duty to pay taxes, which should be related to consumption. Although Fried indicates vaguely that the right to a fair share may not exhaust the sphere of positive rights, he does not tell us of any other positive rights. Since Fried continually emphasizes "the moral right of an individual to determine [the] personal investments of himself according to inclination, chance, his own particular genius,"⁹¹ I doubt if any other positive rights would amount to much.

I cannot create a full-blown alternative here but let me sketch what one might look like. I suggest that the value of fairness calls for doing good to others insofar as there exist widely practiced social norms that one should do that kind of good. People quite properly can be criticized, I believe, for failing to live up to such norms.⁹² The basic idea is that a whole variety of alternative norms would be consistent with the requirements of justice. Which norms exist in a society is a matter of culture and tradition. One can criticize these norms even if the existing norms fall within the range of justice. A utilitarian may say that the norms should be more stringent; a libertarian that they are too stringent. In the framework I am proposing, the moral basis for obeying the existing rule is that it is unfair to be a "free rider" who takes advantage of the contributions of others without contributing in return.⁹³

This general idea is familiar enough when the source of the norm is a legal enactment. Thus, within broad limits the level of taxation is neither just nor unjust, but if others with your income are paying

91. P. 175.

92. I emphasize the incompleteness of this sketch. I have no intention of denying that it would be a very bad thing to be less than a Minimally Decent Samaritan in a State of Nature (what Locke called the woods of America—perhaps a contemporary equivalent would be the cities of America). Nor, although I do not try to spell out the relevant considerations, do I intend to imply that *any* set of social norms gives rise to an obligation of fairness.

93. See Hart, *Are There Any Natural Rights?* 64 *PHILOSOPHICAL REV.* 175 (1955); Rawls, *supra* note 23.

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their assessed share it is unfair of you not to pay.⁹⁴ Likewise it is neither just nor unjust to ban open fires in the middle of a city to diminish air pollution; if others comply with these regulations, however, it is unfair of you not to comply. It is the behavior creating the benefits that creates the obligation of fairness, not the law itself. Thus, if nobody else takes any notice of the city ordinance requiring owners of dogs to clean up after them, it is not unfair if you do not either.

As with positive law, the positive morality of a community can be the source of benefit-creating behavior. Let us call the degree to which people expect and are expected to help one another individually and contribute to the common good the *level of public morality* of a society. This level will be different in different societies.⁹⁵ It is, for example, relatively high in small, ethnically and socially homogeneous welfare states such as Norway or New Zealand, lower in Britain, and lower still in the United States. The level of public morality is yet lower among the "amoral familists" of Montegrano in Southern Italy, where there is an "entire absence of civic improvement associations, organized charities, and leading citizens who take initiative in public service,"⁹⁶ and even lower among the Ik in Uganda, who are "as unfriendly, uncharitable, inhospitable and generally mean as any people can be."⁹⁷

The levels of public morality in different societies provide the basis for judgments of fair and unfair behavior within the society, and for criticism of those who fall too far short of the standard. What would

94. See Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A. L. REV. 780, 793-94 (1963).

95. The term "public morality" is borrowed from a paper entitled *The Causes of Public Morality in New Zealand*, which begins by quoting a notice on the wharf in Auckland: "'Ask any porter for help with your baggage. We shall be pleased to help. Gratitude or tips are not accepted and should not be offered.' It is the first indication to the newcomer that he has entered a culture with a somewhat different level of public morality," Willmott, *The Causes of Public Morality in New Zealand*, in *PAPERS IN HONOUR OF HARRY HAWTHORN* 25-26 (V. Serl & M. Taylor eds. 1975). The author goes on to say that the visitor to New Zealand is also impressed by

good-Samaritanism, the willingness to go out of one's way, even take risks, for the benefit of strangers without thought of personal gain. Recently, to take a heroic example, a young woman from New Zealand jumped down a manhole in London and rescued two suffocating men from a gas-filled tunnel while Londoners of both sexes stood around unwilling to take the risk. At a more mundane level, a car with a flat tyre will occasion another car to stop almost immediately to offer assistance. *Id.* Another aspect of public morality is "a strong commitment to the commonweal," evidenced by willingness to pay high taxes to support an elaborate and comprehensive social welfare system and readiness to engage voluntarily in all kinds of collective endeavors for the good of the community. *Id.*

96. E. BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* 86 (1958).

97. C. TURNBULL, *THE MOUNTAIN PEOPLE* 32 (1972).

be an unfair refusal to help others in New Zealand, for example, would be perfectly fair among the Ik. Fried's theory requires us to say that it would be wrong, as an attack on inalienable negative rights, for a society to have a public morality that entailed duties of beneficence. I suggest, on the contrary, that to elevate to the status of natural law the alienation of contemporary American society is provincialism, and to put forward as binding on all mankind the latest intellectual fashion in Cambridge, Massachusetts is parochialism.

It is also, I believe, limited imagination rather than superior insight into the "nature of things" that leads Fried along with Nozick to regard the idea that being a kidney donor might be a matter of morality as so utterly absurd that it can be used as the cornerstone of a whole theory of negative rights. It may, indeed, well be that kidney donation by live donors will never become a social norm anywhere. For it has several distinctive features that make it relatively unsuited to being the subject of a norm.⁹⁸ But, just for that reason, anybody who has clear intuitions that even the mildest form of social pressure toward being a kidney donor would be unjust should beware of being stampeded into the kind of reckless generalizations engaged in by Fried and Nozick.

Suppose, however, that kidney donation did become a norm to the weak extent, for example, that being a blood donor in Britain might be thought of as a norm.⁹⁹ Would that really be such a terrible assault on individual integrity? Or would it be one of the highest expressions of human fellowship? The answer to that question probably will prove an accurate discriminator between those who will like Fried's book and those who will not.

98. First, giving up a kidney involves a serious operation and some increased risk of eventual renal failure, though the prospect of this would be much less grim if one could be sure of a ready supply of donors in case one's remaining kidney were to fail. Second, rather a small proportion of the population would be donors, even if all who could benefit from a transplant got one, raising the question "Why me?" Similarly, conscription runs into increasing trouble the smaller the proportion of those eligible who are drafted. And, third, the question "Why me?" is answered less persuasively by saying "Because our tissue-typing shows that you are the person in the whole country who is most compatible with somebody who needs a transplant" than by answering "Because you're there" when you are the only person on the beach and somebody is drowning just offshore.

99. See R. TITMUS, *THE GIFT RELATIONSHIP* 215, 225, 242-43 (1970).