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A COMMENT ON FRIED, SUMMERS, AND THE VALUE OF LIFE*

Lewis H. LaRuet†

Professor Charles Fried has written a book¹ that Professor Robert Summers has criticized;² since they might be too discrete to engage in reply and rejoinder, I would like to prolong their discussion by my intervention. The matter is important enough to warrant prolongation.

The best sort of debate (or, to be polite, dialogue) is not about a topic, but about how one should talk about a topic. This debate is of that type. In this case the topic is values, and the argument is about how one should talk about them. There is no problem of definition: the word "values" is being used in the ordinary sense as meaning those things that are valued, for example, love, justice, life, and sex. However, once Fried and Summers get started, there is very little else upon which they seem to agree.³

The issue of how one should talk about values is an important one. We must first be clear whether values are to be selected by preference alone or whether there is a role for reason to play. And if reason has a role, we must decide whether it is to star in the play or merely to walk on stage and pronounce a one-liner. No one doubts that values do involve preferences, but the crucial issue is whether we can curb, or at least criticize, someone's (or some majority's) preference by an appeal to something else that we can call reason. It is obvious that we can oppose a preference with our own contrary one, but can we take to higher ground and appeal to reason? Using legal terms by way of metaphor, can we ever claim that a preference is "unconstitutional"? Of course the claim of unconstitutionality ("your preference is unreasonable") cannot adequately be tested by any court, and so the legal metaphor is perhaps not appropriate so long as one is think-

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1 C. FRIED, *AN ANATOMY OF VALUES—PROBLEMS OF PERSONAL AND SOCIAL CHOICE* (1970) [hereinafter cited as FRIED].

2 Summers, *A Critique of Professor Fried's Anatomy of Values*, 56 *CORNELL L. REV.* 598 (1971).

3 Some of the disagreement comes from the philosophical heritage of each writer. Fried cites Kant and Hegel, and thus apparently has chosen the continental tradition. Summers cites those who stand in the analytical tradition today identified with the British.

ing of American law. If one uses the word "constitution" in the British sense, however, then the metaphor is appropriate. Just as the British constitution restrains British politicians because they choose to adhere to it, so might reason restrain preference (if there were a role for reason to play and if we were to choose to adhere to reason).

Professor Fried believes that reason has a role to play in the world of values. The announced program of his book is to analyze "the ends men pursue, and the ways in which these ends are ordered in some kind of system."⁴ In describing the aims of his undertaking, he says:

A second aim is moral and didactic. In presenting a particular analysis I am putting forward an account of how our ends may coherently be regarded. And to that extent I offer a criticism not only of inconsistent accounts, but also of ends and systems of ends which do not accord with it. . . . Thus, for instance, I argue that to be a person capable of love, trust, and friendship entails certain constraints on the possible range of ends and orderings of ends one may have. So also to have a conception of one's own identity over time implies a certain ordering of ends, and to be a person is to have such a sense of identity. But the moral and didactic aspect of this essay is not prescriptive. It does not say you must embrace this or that end, this or that ordering. Rather it works out the entailments of doing so, and not doing so. Morality, after all, cannot be commanded; it can only be chosen. So that by explicating certain ends and systems which might be chosen, I seek to expose what it is to choose in one way or another; to lay bare the entailments of choice.⁵

We can see that Professor Fried does believe that reason has a role to play if humans will only choose to use it; his book delineates examples of the role that it might play, and more importantly, contains justifications for that role.⁶

Professor Summers begins by setting out Fried's assumptions and choice of analytical method, and makes his criticism by finding fault with them.⁷ In other words, Summers begins with the beginning of

⁴ FRIED 1.

⁵ *Id.* at 2.

⁶ A good example of the role that Fried has reason play is his discussion of privacy. Fried argues that privacy is necessary to love, friendship, and trust in the sense that without privacy such relationships are inconceivable. In this argument he uses reason in the sense of "explication" to set out the content of love and privacy. A second sense of reason, "observe the consequences," is then used to argue that negation of privacy is negation of the essential conditions for love. Finally, reason is used in the sense of "avoid contradictions" to argue that privacy should not be negated. *Id.* at 137-52.

⁷ A brief quotation will suffice to show how Summers approaches the job of criticism: [N]ot just any general analytical procedure can be automatically applicable to just any subject matter. . . . [A] general procedure for analyzing the anatomy

the book and says that if one starts in this way one is liable to go wrong. I too wish to criticize Fried, but I would like to go about it in a rather different way. I will assert that the conclusions reached at the end of the book are wrong, and then try to find the source of the error. When I get around to dealing with what I think is the source of the error, I will agree with one of Summers's main criticisms. However, this does not mean that I shall be duplicating Summers's critique, since he apparently thinks that the last chapter's conclusions are acceptable.⁸

The last chapter of Fried's book bears the title "The Value of Life."⁹ Its point is simply that we value life and try to preserve it. One aspect, however, of our lifesaving activity is criticized; we seem to be more willing to attempt to save the lives of those presently in danger than we are to support preventive programs that are designed to save future or statistical lives. The classic example is coal mining; no expense is spared in rescue attempts, but safety measures are regularly shortchanged.

We may agree that something is wrong, but the reason why it is wrong might be crucial if different reasons would lead to different remedial actions. Fried argues that our preference for saving present lives as opposed to future lives is bad because it is an irrational use of resources. He argues that we can choose to spend on lifesaving whatever we wish, but that once we have decided on an amount it is irrational to spend this sum in a way that will not save the maximum number of lives. This is an "efficiency" argument inspired by economic theory;¹⁰ it is also the type of efficiency argument that uses the concept of "maximizing."

Fried does not spend much time arguing positively for maximizing; instead very nearly the entire chapter is devoted to refuting objections that could be made to maximizing. The structure of his argument in this chapter is as follows: first, he asserts that we are more willing to spend our resources on rescue attempts than on preventive measures, even though preventive measures would save more lives in the long run; second, he asserts that the economic rationale governing the expenditure of resources is the maximizing principle, so that we should spend to maximize the number of lives saved; third, he

of particular values would have to be relevant and appropriate—it would have to "accord with" the world of values.

Summers, *supra* note 2, at 599.

⁸ Summers states that the last chapter of the book "treats in enlightening fashion" its subject matter. *Id.* at 623.

⁹ FRIED 207.

¹⁰ Fried acknowledges that his argument is inspired by economics. *Id.* at 207.

considers a series of objections that could be made to this maximizing and judges each of the objections to be either beside the point and thus irrelevant, or if to the point and relevant, then wrong.

If one thinks that there is some issue whether a maximizing argument is appropriate to the subject matter of rescue attempts and preventive measures, then Fried's approach and analysis are not adequate. All that can be established is that maximizing is not refuted by the posited objections. Suppose that a method of analysis other than maximizing were advanced and that a series of possible objections to it were considered and each in turn rejected as either irrelevant or wrong? Then we would have two analytical methods each of which had survived a series of objections, but we would have no way to know which of the two was better. My point is that Fried's argument structure is not sufficient. If one wishes to know whether a particular analytical strategy is appropriate, one must consider not merely the objections to that strategy, but also the desirability of alternative strategies.

Fried has attempted to establish that we should maximize prevention vis-à-vis rescue; however, there are some preliminaries that are missing. To make his case Fried must establish three things: first, when we spend our resources on a rescue attempt, the goal should be to maximize the number of lives saved and to minimize the number of lives lost as a result of the rescue attempt; second, when we spend our resources on a preventive measure, the goal should be similar; and third, we should compare various mixes of rescue and prevention to evaluate the total maximizing and minimizing that we might achieve with various mixes. To me it seems obvious that we cannot reach the third question without establishing that maximizing is the appropriate strategy for both rescue attempts and preventive measures. The initial issue is whether it ever may be appropriate to adopt a nonmaximizing rescue strategy.

At this point, I would like to discuss by way of an example the appropriateness of the strategy of maximizing, as compared to a rather different strategy. The example will be of a rescue attempt and will not involve the issue of rescue versus prevention. Let us pose a hypothetical commander in charge of a combat patrol. One of his men stationed on the flank has been shot and is now lying on the ground seriously wounded. The commander must decide whether to attempt a rescue of the wounded man.¹¹ If we accept Fried's criterion of ration-

¹¹ I will limit the commander's concern to the patrol itself by eliminating two possible complications. First, the patrol does not have any information that would

ality in this instance, we would say that the commander must act to maximize the number of lives saved. The commander's reasoning might be structured somewhat as follows. If I abandon the man who is in present peril, he will surely die (probability 1.0 on a scale on which 1.0 represents certainty that an event will occur and 0.0 certainty that it will not occur). So the expected loss of life is 1.0 (1 man times a probability of 1.0 equals 1.0). Of course, even if I start back now without attempting a rescue, there is some risk to the other members of this patrol (assume 4 other members), but the risk is slight (perhaps 0.2), so the expected loss of life would be less than 1.0 ($4 \times 0.2 = 0.8$). Therefore, if I start back now without attempting the rescue, the expected number of lives lost will be 1.8.

Compare this with the risk if I attempt a rescue. There is still a risk (perhaps 0.5) that the wounded man will die, and furthermore, the rescue attempt itself plus the delay in return will increase the risk to the other members of the patrol (to perhaps 0.7). Quickly calculating ($1 \times 0.5 + 4 \times 0.7$), I arrive at an expected loss of life of 3.3. Ergo, let us leave immediately.

There is of course another method of analysis (or strategy) that the commander might adopt. He might consider the issue of solidarity; he might want to act in such a way that the soldiers in the patrol would not see themselves as isolated individuals but rather as part of the group. The calculus of maximizing regards the individual solely as a separate unit. Solidarity, however, may well be functionally related to combat effectiveness. A second issue that the commander might consider is also related to the patrol's morale. The choices that a man makes define the sort of man he is. The commander might conclude that neither he nor the members of his unit are willing to ignore internal moral scruples or feelings of loyalty to the wounded comrade solely because a cold calculation of risk would command such a result.

Let us set aside for the moment which method of analysis (or strategy) the combat patrol commander should pursue so that we can determine what it is that leads Fried to prefer a maximizing strategy (perhaps we should say that he writes so as to invite us to view him as preferring such a strategy).

The title of his book is "An Anatomy of Values." The word "anatomy" suggests structure and the way things fit together. In this case the metaphor is felicitous in that it accurately evokes the style of Fried's argument. Typical of the questions discussed in the book is whether

affect the survival of a larger parent unit. Second, the patrol is not under a tight deadline as to time so that a rescue attempt would constitute disobeying orders.

love has some special relationship to justice that is similar to the special relationship it has to friendship.¹² Another is whether one can talk about means and ends (with reference to love or justice) so as to separate them sharply, as they have been so often separated in our intellectual tradition, or whether they are so intertwined as to make separation impossible.¹³

In these two sorts of questions, if I may use traditional vocabulary, Fried asks about the relationships among the several ends (or values) that we may pursue, and the relationships between means and ends. The excellence of the book is based in part upon Fried's clear recognition that traditional vocabulary is inadequate. To state that there are two types of issues—ends among themselves, and means to ends—obscures as much as it enlightens, and a good deal of Fried's book is devoted to delineating the confusion that can arise in this way.

Fried points out that one of the problems is that ends are often talked about as though they were simple things. The problem with the word "end" is that it is a simple word that reminds one of the word goal. When we talk about pursuing an end, we often talk as if we have set out on a trip towards a specific destination. It is clear enough, however, that love, justice, and happiness, for example, are not simple goals. Fried argues that they are very complex structures of thought and behavior, and gives persuasive examples and arguments in favor of his propositions.¹⁴

If we begin to think about ends in this way, then at least one interesting consequence will follow. If the "end" is stipulated to be a complex structure of thought and behavior, and not just a goal, then the behavior which we might once have called a "means" now becomes part of the complex. To illustrate, Fried points out that the steps, rhythms, and pauses of a dance, are not means to the dance, but the dance itself.¹⁵ The statement can perhaps be refined by saying that the movements and pauses are *both* the instrument to the dance and the dance itself. Even so refined, the statement still is a criticism of the classic dichotomy of means and ends.

The next point that Fried makes is the troublesome one. My initial question concerned the role of reason in the world of values. So far, the notion of values has been identified with the notion of ends, and it has been contended that ends are complex structures of behavior

¹² FRIED 75-86.

¹³ *Id.* at 7-25.

¹⁴ *Id.* at 11-19.

¹⁵ *Id.* at 28. Fried actually uses the phrase "instrumental to the dance" instead of "means to the dance," but there is no difference in meaning.

and thought and that we cannot talk about means as something clearly separate from ends. Fried pulls reason into the world of values by creating a class of ends that he calls "rational ends."¹⁶ To use Fried's own language: "Rational ends . . . are those ends to which may be ascribed a principle of ordering, which explicitly, implicitly, or inchoately is a principle the person holds or accepts as his own."¹⁷ Note that by this definition, the distinguishing characteristic of a rational end is its principle of order. In other words, an end can be called rational if there is a principle of order within it.¹⁸

Summers criticizes Fried for this definition.¹⁹ Summers asserts that this makes coherence king and leaves out goodness. The point that Summers is making is that we normally speak about ends as something of which we approve or think of as good. For most of us it is not a sufficient cause of our approval that something is ordered. Nor do we believe that it is a sufficient grounds for action that our action is orderly. Summers seems sound on this; it is true that we try to say of that which we value that it is good. The controversial point is whether there can be sufficient grounds for the assertion that a valued act is good, or whether the assertion merely involves a preference that rests on no more secure foundation than one's own idiosyncratic personality.²⁰ If there is sound ground then reason has a role to play, for we could use our reason to inquire what that ground might be.

This criticism of Fried—that he fastens onto coherence and leaves out goodness—is especially pertinent to the last chapter of his book in which he questions whether human resources are being spent to maximize the number of lives saved. Fried achieves coherence by subsuming a large range of activity under one category, lifesaving, and by using one principle of action, maximizing, to govern that category. In this case the drive to discover the anatomy of lifesaving has caused Fried to posit a coherence where there is none and to neglect the question of goodness when it should not have been neglected.

In other words, Fried has simplified the world so that he can make a coherence argument about it. He is led to this by his notion of a rational end as one that has some principle of order. Unless he can find some order to, or some coherence principle for, the range of lifesaving activities, then he is, by his definition, unable to describe them

¹⁶ *Id.* at 26-39.

¹⁷ *Id.* at 26.

¹⁸ *See id.* at 15.

¹⁹ Summers, *supra* note 2, at 611-13.

²⁰ For a recent and challenging argument that sound grounds do exist, see Bamhrough, *A Proof of the Objectivity of Morals*, 14 *AM. J. JURIS.* 37 (1970).

as rational. It is true that lifesaving does involve an expenditure of resources, and so it seems natural to turn to economic principles that govern expenditures. Thus Fried uses maximizing as a tool for analysis and criticism, and asserts that it is irrational to spend resources set aside for lifesaving in a way that will save fewer than the maximum number of lives.

Fried leaps directly to the problem by comparing rescue with prevention. He apparently assumes that rescue attempts and preventive measures are each "pure" activities addressed to one goal alone, that of maximizing the number of lives saved. However, it is highly plausible to assert that each of these activities is not pure—it is not engaged in solely to maximize one variable. I have already given an example of how a rescue attempt might be viewed as a mixed activity.²¹ I would suggest that preventive measures might also be pursued on other than a maximizing basis. For example, a preventive measure might require the administration of medication to the populace by way of inoculation or otherwise, yet one might not make such a program compulsory because of respect for certain sects' religious scruples. A preventive program might require medical experimentation, yet notions of liberty might prevent one from adopting the experimental procedure that would promise the surest results. In both of these cases one might rationally pursue more than one value; lifesaving and liberty are both relevant and appropriate goals.

So far I have argued that Fried assumes that rescue as such and prevention as such are each more coherent than they are in fact. I would now like to argue that lumping rescue and prevention together also assumes a greater coherence than there is in fact. The issue is whether there are a set of expenditures that may logically be grouped together and treated for the purpose of analysis as a "lifesaving budget," and in particular, whether we should group together rescue attempts and preventive measures. My assertion is that it is improper to speak of a lifesaving budget.

Let us begin by looking closely at the phrase "lifesaving." It is obvious that the man saved will die anyway; lifesaving is not a gift of immortality, but rather only the removal of a particular threat of death. Viewed as threat removal, a successful rescue attempt ensures only that the person saved will now die at a later point in time. He may die from the same sort of threat from which he was saved or from a different sort of threat, but he will die later. A successful prevention program,

²¹ See text accompanying note 11 *supra*.

on the other hand, will lessen the statistical incidence of a certain type of threat so that a certain percentage of individuals will die from different perils than they would have otherwise. However, there is no guarantee from all of this that the statistical individual whom one has "saved" will live a statistically longer life. One may have been successful in lessening the incidence of particular threats, but there is no guarantee that remaining threats will not strike the statistical individual down. We are inclined to rely on a rough "other-things-being-equal" assumption that greater longevity will result, when in fact we should temper this by the notion of diminishing returns. For example, when one first sets up a public health program designed to eliminate certain noxious little beasties, the average life span will increase. However, such a public health program after the passage of time may find itself doing nothing but fighting mutations that have made the little beasties immune to the old methods of control.

The relevance of these comments to the notion of coherence is that rescue and prevention cohere; they may be grouped together as serving the same end only if that end is solely threat removal. If the only worrisome thing is the removal of a certain type of threat, then one may rationally group together for the purpose of analysis threat removal by rescue and threat removal by prevention. However, if one is interested in increasing the longevity of life, then the two may not be automatically grouped together. Rather one must ask and answer such questions as whether other things will be equal and whether there will be diminishing returns, before one can know how to balance rescue against prevention.

Another problem that I have with the notion of a lifesaving budget is that, as an abstraction, it fails to treat real occasions for lifesaving. By "occasion" I mean a state of knowledge that a lifesaving attempt may be possible. One comes to know that a rescue may be possible on the basis of a verbal or visual message that another is in danger. One comes to know that prevention may be possible on the basis of a calculation. My point is not just that receiving messages and calculating are different types of activities, but that the difference is important. The notion of the lifesaving budget as it is presented by Fried appears to focus solely upon the expenditures that will be necessary to carry out the rescue attempt or to carry out the prevention program. This leaves out two very important costs: the cost of reporting an immediate danger to specific persons as opposed to the cost of calculating the statistical danger to nonspecified persons; and the cost of persuading

persons to act on the basis of a report as opposed to the cost of persuading them to act on the basis of a calculation. I would assert that reporting is cheaper than calculating and that persuasion is cheaper when based upon a report than when based upon a calculation.

Reporting is cheap because almost anyone is capable of reporting an immediate peril. But calculation requires competent calculators who unfortunately are rare. It takes time, and time is precious; and it requires information that is often expensive to gather. Persuasion too is radically different for the two types of activities; it is easy to check a report to see if it is correct, whereas social calculations are generally controversial and difficult to judge. Perhaps the most important difference is that we can generally rescue without disturbing vested interests, but preventive measures quite often require changing the way we do things and thus disrupting someone.

At this point I would like to return to the notion of coherence without goodness. So far I have criticized Fried by saying that he has made a coherence that is not natural; but this is not enough to refute his argument. He could answer these criticisms by saying that he realizes that his way of looking at the world is hard and unnatural, but that we still ought to look at it that way.

Should we look at it Fried's way? If the only value that is at stake in lifesaving is the saving of lives (or threat removal in my interpretation), then we should. However, I deny that it is the only value at stake. Do we not often act to save another's life for our own sake as well as for the sake of the other? Suppose a father sees his son in danger. The son may lose his life, but the father may lose his son. We clearly could not say that the only value at stake is the son's interest in living a longer life.

Such an example does not even begin to exhaust the values that are at stake in lifesaving. The values we hold, our moral and ethical principles, can be used for our self-definition—to give a particular shape and meaning to our life. Furthermore, they can be used to represent the type of society in which we wish to live. If we return to the combat patrol example, we might note that men in such a plight might think it important to live on a "band of brothers" principle. They might do this because it would define the sort of men that they wish to be and the sort of group of which they wish to be a part. And, as the medical examples show, in our efforts to save men from future threats we still refrain from changing certain of the terms upon which men base their lives.

I am reluctant to expound this theme any further because there

is a danger of slipping into irrelevancies. To summarize positions very briefly, Fried has said that when one is engaged in lifesaving one should act so as to save the maximum number of lives. I have argued that even when one is engaged in lifesaving, one may also pursue other values at the same time, so that the mix of pursuing several values at once may result in one of them (for example, threat removal) not being maximized. Just how far apart this leaves us, I am not sure; I note that Fried says that "the issue is rarely faced in such starkly abstract terms."²² The problem is that he writes as though it were.

The ultimate question is whether it ever is useful to moral discourse to pose the issue in such abstract terms. To what audience would the argument be directed? Let us go back to the example of the mining industry, where rescue attempts are common but preventive measures are rare. It seems naive to suggest that mine operators are ignorant about the matter. Their vice is not ignorance and lack of rationality, but greed; by shortchanging preventive measures they can make more money. If one wishes to argue with mine operators, union officials, and miners about this topic, one should argue about the real problem, not an academic one.

The lesson that I draw from all of this is that the pursuit of coherence in moral discourse must be tied to the pursuit of goodness in order for the pursuit and the results to be acceptable. Summers makes the same point with reference to other topics, and I think his argument is sound. By not focusing on the issue of goodness, Fried fails to see the goodness that is present in the combat soldiers' rescue actions and the actual evil in the mine operators' actions. This omission means that Fried is not talking about the problems that we really face. To borrow another phrase from Summers, Fried's analysis does not "accord with"²³ the world of values.

²² FRIED 209.

²³ See note 7 *supra*.