Michigan Law Review

Volume 77 | Issue 3

1979

Persons and Consequences: Observations on Fried's *Right and Wrong*

Stephen R. Munzer
University of Minnesota

PERSONS AND CONSEQUENCES: OBSERVATIONS ON FRIED'S *RIGHT AND WRONG*

*Stephen R. Munzer**†

RIGHT AND WRONG. By *Charles Fried*. Cambridge, Mass. and London: Harvard University Press. 1978. Pp. xi, 226. $15.

I. ABSOLUTIST DEONTOLOGY

Philosophers commonly divide theories of normative ethics into two main types. Teleological theories hold that actions are right if they advance a certain nonmoral end and wrong if they retard it. Utilitarianism is a teleological theory that maintains we should advance the greatest happiness of the greatest number.[1] A standard objection to utilitarianism is that it sometimes commits us to doing an act because it produces better consequences than any available alternative act, even though we know or feel it to be wrong. Deontological theories, such as the ethics of Kant,[2] hold that an act is right if it is in obedience to, and wrong if it violates, a moral principle.[3] A frequent criticism is that this sort of moral theory sometimes commits us to doing an act because a moral principle requires it, even though to do it would have grave consequences.

In *Right and Wrong*, Professor Charles Fried, more persuaded by the objection to utilitarianism than by the criticism of deontological systems, defends a deontological theory of morality.[4] Fried aims to develop an account of what good persons should and should not do, rather than, say, to analyze moral

* Associate Professor of Law, University of Minnesota. B.A. 1966, University of Kansas; B. Phil. 1969, Oxford; J.D. 1972, Yale Law School.—Ed.

† I wish to thank Lance D. Becker, Allen Buchanan, James W. Nickel, and M.B.E. Smith for their detailed and very helpful comments on drafts of this review.

1. Classical statements include J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds. 1970); J.S. MILL, UTILITARIANISM (S. Gorovitz ed. 1971). A modern formulation is Smart, *An Outline of a System of Utilitarian Ethics*, in J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 3 (1973).

2. I. KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (H.J. Paton trans. 1948); I. KANT, CRITIQUE OF PRACTICAL REASON (6th ed. T.K. Abbott trans. 1909).

3. The distinction between teleological and deontological theories is not unproblematic; in particular, the principle of utility must be kept from counting as the sort of "moral principle" that figures in deontological theories. Problems of this sort cannot be pursued here.

4. C. FRIED, RIGHT AND WRONG (1978) [hereinafter cited by page number only].

language.[5] He concentrates on personal moral choice; though he treats briefly such issues as fair contributions to the community,[6] he is not in the main concerned to outline basic institutions for a just society.[7] His chief critical target is utilitarianism,[8] and his alternative is a deontological system which consists, to use his terminology, of "categorical norms."[9] Fried does not list all the norms of his system.[10] In fact he discusses in detail only two norms in the first part of the book, where he devotes a chapter each to the norms that one must not intentionally inflict physical harm on an innocent person[11] and that one must not lie.[12] The middle part of the book concerns rights. Fried first examines the economic analysis of rights,[13] and then outlines his own system of rights to complement the system of categorical norms. His system includes "positive" rights, which are claims to something, such as to a fair share of social resources, and "negative" rights, which are rights not to be interfered with in some way, as by being lied to, assaulted, or falsely arrested.[14] The final part of his essay has to do with roles.[15] Much "discretionary space,"[16] in Fried's view, is left by the categories of right and wrong. Within that space, people may act as they please. Moreover, they can increase their freedom of action to some extent by assuming certain roles. For the occupant of a role may sometimes bestow more resources on others—such as patients, clients, or friends—than fairness or utility would allow. The integrity of such roles as doctor, lawyer, and

5. For such an analysis, see, *e.g.*, R.M. HARE, FREEDOM AND REASON (1963); R.M. HARE, THE LANGUAGE OF MORALS (1952).

6. *See* pp. 139-50.

7. Such a concern predominates in, *e.g.*, J. RAWLS, A THEORY OF JUSTICE (1971).

8. Fried often uses the somewhat broader term "consequentialism." *E.g.*, pp. 2, 7-10. In this usage he appears to follow Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 77, 79-93 (1973). Nothing in this Review turns on any difference between the two terms.

Many prominent contemporary philosophers share Fried's opposition to utilitarianism. *See, e.g.*, Williams, *supra*. Other essays that figure in Fried's perspective include Anscombe, *Who is Wronged?*, 5 OXFORD REV. 16 (1967); Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1 (1958); Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123 (1972); Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977). Favorable references to these works are scattered throughout Fried's notes on pp. 197-219.

9. *See* pp. 11-12 & *passim*.

10. A contrast is provided by B. GERT, THE MORAL RULES (1966), which lists exactly ten basic rules.

11. *See* pp. 30-53.

12. *See* pp. 54-78.

13. *See* pp. 81-107.

14. *See* pp. 108-63.

15. *See* pp. 167-94.

16. P. 168.

friend is not, Fried contends, to be invaded in the name of the common good.[17]

If Fried's moral views formed only another deontology they might arouse modest interest, but their absolutism is likely to raise eyebrows. He holds that violating categorical moral norms is wrong even if significantly better consequences would flow from violation than from obedience:

> Our first moral duty is to do right and to avoid wrong. We must do no wrong—even if by doing wrong, suffering would be reduced and the sum of happiness increased. Indeed, we must not do wrong even in order to prevent more, greater wrongs by others.[18]

Similarly, rights are defined as "categorical moral entities such that the violation of a right is always wrong."[19]

These, then, are some of the main doctrines of Fried's absolutist deontology. Behind them stands a view of human beings as rational moral agents who are responsible for their choices.[20] This is not merely the innocuous thesis that persons should be accountable for choices. It is the more debatable claim that, so far as the absolute force of categorical norms is concerned, persons are morally responsible for the intended effects of their choices, but not for unintended (even if foreknown) causal consequences of their actions.[21] So far as rights are concerned, specific negative rights limit sharply the encroachments that the community may make on its members, who are at liberty to act as they choose aside from permissible encroachments. That freedom of action can in some respects be increased when persons occupy a role, which can shield them from otherwise valid moral claims. This starkly individualist account of respect for persons contrasts with, and indeed is directed against, a pervasive duty to act for the general welfare which Fried believes that the utilitarian will invoke.

Much that is fundamental in moral philosophy is at stake in Fried's book. It is hard to be confident that any sophisticated moral theory is wrong, and it is even harder to be sure that one has a better theory to replace it. This Review airs doubts on some of Fried's leading doctrines. It is not a brief for utilitarian-

---

17. *See* p. 194.

18. P. 2. *See also* pp. 3, 8-9.

19. P. 108. *See also* p. 132. Fried may intend that this doctrine apply only to negative rights, for on p. 113 he says that positive rights cannot be counted "categorical entities." *See also* p. 110.

20. *See* pp. 20-29.

21. *See* pp. 20-22.

ism. So far as my comments rest on a substantive position of their own, they invoke, very tentatively, a pluralist or mixed theory in which otherwise deontological principles can to some extent be qualified or overridden by consequences. Such a position has implications for moral norms, negative rights, respect for persons, and the role of lawyer.

Fried's discussion of the economic analysis of rights[22] lies outside the concerns of this Review. I am not in any event qualified to appraise it in detail, but would like to note briefly an ambiguity in his discussion. Fried argues that the economic analysis contemplates a bargaining process; hence it can provide no theory of "rights" to *informed* choices and *voluntary* exchanges, because if such rights were also open to negotiation, one could not properly describe the exchanges between individuals as "bargaining" at all.[23] The ambiguity is whether Fried intends this argument to establish only the modest claim that informed choices and voluntary exchanges are *background conditions* for bargaining,[24] or the ambitious claim that there are *rights* to such choices and exchanges.[25] The modest claim follows from plausible assumptions about what can count as bargaining. One could then try independently to show that there is a moral right to informed choices and voluntary exchanges by providing an alternative, or supplementary, theory of rights.[26] But Fried's argument does not establish the ambitious claim.[27] One could agree that bargaining presupposes that informed choices and voluntary exchanges in fact exist, but deny that there are rights to them. So the discus-

22. *See* pp. 81-107.

23. *See* pp. 100-04.

24. *See* p. 103: "[S]ome freedom from unconsented-to imposition must be assumed as a privileged starting point, a background against which the very concept of bargaining is defined."

25. *See* pp. 100 ("background entitlements"), 104 ("assumption of some rights before the process gets started").

26. Fried appears to acknowledge the need for such a theory on p. 105, and tries to offer it in the next two chapters. *See also* p. 89.

27. In two passages Fried may move unawares from the modest to the ambitious claim.

> In [the economic analysis of rights], knowledge and rationality are treated both as conditions for making the theory work and as specific goods subject to the processes which the theory founds. What we have, in short, are pretheoretic goods, or *rights*, assumed to be necessary if the theory is to work at all. [P. 102 (emphasis in original)]
>
> And if a useful theory must assume prebargaining privileged starting points, then [Coase's theorem] and [the economic analysis of rights] do not provide a complete account of rights and liabilities as the outcome of their processes, since they require the assumption of some rights before the process gets started. [P. 104]

sion of the economic analysis does not itself establish that there are any such rights. Nor, of course, does it show that, if there are such rights, a person may not voluntarily limit or renounce them for the future.

II. Categorical Norms of Right and Wrong

Fried's deontological system consists of categorical moral norms,[28] such as the norms forbidding lying and intentional physical harm. The word "categorical," as Fried uses it, covers two different characteristics. One is independence of end. This is the Kantian sense in which a categorical imperative directs an agent to act without regard to his desires, interests, or ends—"Do not lie." It is opposed to a "hypothetical" imperative, which involves reference to some desire, interest, or end of the agent—"If you want to be admired, do not lie."[29] The other characteristic is absoluteness. A categorical norm "displaces" competing judgments, so that they cannot be urged as reasons for violating the norm.[30] Fried calls categorical even those norms which invite the weighing of consequences, like that against exposing another's property to undue risk; for once the weighing process is complete, it is wrong not to follow the outcome.[31] An important qualification to Fried's system is his claim that categorical norms do not apply to trivial or absurd situations. The norm against physical harm does not speak to the morality of pinching or of murdering a single innocent person to save the rest of humanity from torture and death.[32]

This account of moral norms appears open to technical and substantive objections. On the technical side, Fried's discussion of the supposed "categorical" character of norms is deficient. To

28. *See* pp. 11-13 & *passim*.

29. *See* pp. 11-12.

30. P. 12.

31. *See* p. 12. To some this may well seem a weakened sense of "categorical," since as much might be said of the outcome of a utilitarian calculation of consequences (though a sophisticated utilitarian might qualify this in the way suggested by Lyons's reading of Mill, *see* note 79 *infra* and accompanying text).

A curious feature of Fried's system is that some norms, such as that against physical harm, are categorical as to intentional harm, but in the case of unintended indirect harm that norm, it is said, "switches out of its absolute mode and balancing is the order of the day" (p. 52). Fried does not explain why the norm should behave in this way. At all events, if the position on p. 12 regarding the outcome of the weighing process is followed, then once balancing has dictated a result in a case involving unintended indirect harm, it would appear to be wrong not to abide by that result.

32. *See* pp. 12, 30-31.

begin, the two features embraced by the term "categorical," as Fried uses it, need not go together. A norm might be absolute, yet still be "hypothetical," should its validity depend on some end (happiness, perhaps) that all adopt.[33] And the norm might apply independently of one's end, but not be absolute, if other considerations can override its application. Fried offers no defense of his apparent assumption that these two supposed features of moral norms are indissolubly connected. More seriously, that norms are deontological rather than consequentialist does not entail that they are categorical in Fried's sense. A norm might avoid appealing to consequences, and yet be neither absolute nor independent of end.

A deeper technical problem is that deontological norms can convincingly be called absolute only if two further theories are made out. Fried's book does not offer the first and fails to make out the second. The first is a theory of moral knowledge and justification. That is, an account must be given, or at least invoked, of how we know what moral norms there are and of why those norms are absolute and stand independent of human desires. Fried does not seem to ground the categorical norms presented in *Right and Wrong* in any such account. Perhaps he wishes to rest these norms on some supposed moral intuition that tells us they exist, or on a Kantian theory that they can be justified in terms of some fundamental principle presupposed by moral thinking and rooted in our rational nature. Yet Fried makes no effort to state either line of argument or to defend either against objection. Several passages suggest that Fried holds the different view that categorical norms express the value of respect for persons.[34] Such a view would certainly accord with the centrality of persons in Fried's moral vision. But tantalizing suggestions are not arguments, nor do they establish why moral norms must express Fried's view of respect for persons rather than some other view, such as the utilitarian principle of counting each person for one and no person for more than one. Moreover, one passage seems to intimate that it is up to us to choose to respect persons.[35] If we choose not to, does that mean we are not bound by moral norms? To answer that we are not bound seems to make the validity of moral norms subjective—a conclusion that Fried

33. *See* Foot, *Morality as a System of Hypothetical Imperatives*, 81 PHIL. REV. 305 (1972).

34. *See* pp. 8-9, 28-29.

35. *See* pp. 8-9. *But see* p. 29. *See also* p. 63.

might find uncongenial. To answer that we are bound would imply, *contra hypothesis,* that the validity of the norms does not rest on our choosing to respect persons. Again, can any reason be given within Fried's theory why we should choose to respect persons? To say that it would be wrong not to do so appears circular, since the norms of right and wrong are supposed to be grounded on that choice. In any case, until Fried provides or invokes a theory of moral knowledge and justification, his moral norms, together with assurances of their categorical character, must stand in mid-air.

The second theory needed is a convincing account of the individuation of moral norms, that is, of why and how the total content of a moral system is to be divided into smaller units. Fried supposes that this content is to be represented as absolute norms which are so structured that, with the exceptions stated, no norm conflicts with another and each norm dictates a result within its range of application. This supposition is open to doubt. Morality may be composed of different types of basic units—for instance, specific "rules" that apply pretty rigidly to actions they cover, together with broad "principles" that exert less definitive force where they apply.[36] In addition, even if we assume that there is only one type of basic unit and agree to use the word "norm," it may be that moral norms overlap in their ranges of application. In that event, one norm might forbid what another requires or permits. Conflicts of this sort might, perhaps, be irresolvable within the system; certainly some reputable contemporary philosophers have defended this possibility.[37] But even if such conflicts are thought resolvable, we still need to know what exceptions and limitations[38] each norm has, how norms are related to one another,[39] and how conflicts are to be resolved. Moral norms themselves may be deontological enough, but exceptions and limitations and the resolution of conflicts will, perhaps, depend partly on consequences. Or it may be that consequences are quite

36. *See* Singer, *Moral Rules and Principles,* in ESSAYS IN MORAL PHILOSOPHY 160 (A.I. Melden ed. 1958).

37. *See* B. WILLIAMS, *Ethical Consistency* and *Consistency and Realism,* in PROBLEMS OF THE SELF 166, 187 (1973); Lemmon, *Moral Dilemmas,* 71 PHIL. REV. 139 (1962). Fried's view seems to be to the contrary. *See* p. 112.

38. On the difference between exceptions and limitations, see J. BENTHAM, OF LAWS IN GENERAL 113-16 (H.L.A. Hart ed. 1970); Hart, *Bentham on Legal Powers,* 81 YALE L.J. 799, 803-04 (1972).

39. Discussion bearing on this issue may be found in J. RAZ, PRACTICAL REASON AND NORMS (1975). *See also* J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (1970); Nozick, *Moral Complications and Moral Structures,* 13 NAT. L.F. 1 (1968).

beside the point. At any rate, moral norms may turn out not to be absolute, and reasoning about moral problems may exhibit a different character from the casuistry that Fried is concerned to establish.[40]

Some are likely also to find faults of substance with Fried's categorical moral norms. For instance, his view that moral norms do not apply to absurd or trivial cases seems confused. The annihilation of humanity may be catastrophic and pinching may be trivial, but why are those reasons for saying that the norm against intentional infliction of physical harm simply does not apply? A more natural account would perhaps pay some attention to consequences. Absurdity does not mean that a moral norm is inapplicable and simply disappears from the consideration of the case. Rather, it means that other considerations may override or defeat the application of the norm. If, as in Bernard Williams's famous example,[41] one faces the choice of killing one person or of allowing another to kill twenty, the norm against murder does not vanish from one's deliberations. Instead, the horrible consequence of twenty deaths may *override* its application to the case at hand, and thus license the intentional taking of a life, an action which in other circumstances would be wrong. The matter of pinching and triviality is in some ways more complicated. If, as Fried sometimes appears to think, pinching is indeed physical harm,[42]

40. Fried's view of moral norms and moral reasoning is suggested by this passage:

> In every case the norm has boundaries and what lies outside those boundaries is not forbidden at all. Thus lying is wrong, while withholding a truth which another needs may be perfectly permissible—but that is because withholding truth is not lying. Murder is wrong but killing in self-defense is not. The absoluteness of the norm is preserved in these cases, but only by virtue of a process which defines its boundaries. That process is different from the process by which good and bad are weighed in consequentialism, and so the distinctiveness of judgments of right and wrong is preserved. [P. 10]

In a footnote to the last sentence Fried adds:

> Consider this case: Is it wrong to take another's property? Well, what of emergencies, as when I need your car to get to the hospital and you won't consent? Perhaps what is wrong in that case is not taking the car but taking it without compensating you for its use. What if I do not have the money? Perhaps what is wrong is not compensating you when I can. Though qualified in various ways, the judgment still seems to be absolute. [P. 10 n.*]

41. *See* Williams, *supra* note 8, at 98-99.

42. "By physical harm I mean an impingement upon the body which either causes pain or impairs functioning. . . .This definition covers a wide range of consequences. It covers everything from killing to pinching . . ." (p. 30). On p. 42, Fried appears to regard pushing through a crowd as involving harm; if so minimal an impact on others constitutes physical harm, then perhaps he believes that pinching does so a fortiori.

then the norm against intentional physical harm does apply after all. Of course, the consequences of pinching are typically so slight that we do not ordinarily perceive much need for moral deliberation. But it would appear that since the norm applies, a wrong has been committed—though only a small wrong, for the pain is slight. Surely this is no less plausible than Fried's assertion that a "little lie is a little wrong, but it is still something you must not do."[43] Suppose, however, that Fried believes that pinching does not really amount to physical harm after all.[44] In that case the norm does not apply. But the reason is misdescribed as triviality, for, as noted, Fried is prepared to say that a little lie is still wrong. Rather, the norm does not apply because the term "physical harm" captures only actions which have consequences that reach some threshold of seriousness. In this case, consequences do not (as in absurd situations) override or defeat the application of the norm, but are built into key terms used to state the norm.[45]

Fried also holds that defense of one's property against attack is permitted, not by some balancing process, "but because the 'aggressor-victim' himself intends a violation of the agent's rights."[46] Fried seems in the end to support this position with a consent argument: The would-be robber in effect chooses physical injury in pursuit of someone's property.[47] And Fried flirts with a proportionality requirement under which the owner may not kill or maim to protect property of slight value.[48] I believe that defense of one's property is also illuminated by some reference to consequences. The person robbed is not, assuredly, called upon to weigh his interests against the robber's, and then yield to the slightest balance in the latter's favor. The idea is rather that if the net adverse consequences of defending property are substantial, as by maiming the robber to protect an inexpensive watch, then there may be an obligation not to maim. The consent argument is dubious. As Fried notes, an odd sort of consent is attrib-

43. P. 69.

44. This interpretation is suggested by Fried's statement that the "formal nature" of the prohibition of physical harm is the same for cases of "maiming," "blinding," and "temporary infliction of severe pain" (p. 30). Such harms are said to be "further along the line of seriousness" from pinching, *id.*; these "harms we must not intend to inflict, and consideration of consequences as such cannot outweigh that judgment" (p. 31).

45. This suggests that formulation of the distinction between teleological and deontological theories must attend to the different ways consequences can bear on the applicability of a norm.

46. P. 46.

47. *See* pp. 46-47.

48. *See* p. 47.

uted to the thief,[49] who would prefer to get the property without injury. In any event, often the thief will not squarely face such a choice,[50] and hence imputing his consent to injury is there implausible. The proportionality requirement is a sensible limitation, but it is hard to see how it can be imposed in Fried's system. If consequences have any internal relevance to his norm against physical harm, it is only to establish some threshold below which there is no "physical harm" at all.[51] That is of no help here; maiming is at once plainly above that threshold and plainly below the catastrophic effects that Fried regards as absurd. Hence Fried seems debarred from a proportionality requirement, because that requirement would allow us to say that protecting an inexpensive article can be outweighed by the consequences of maiming.

Do all these criticisms amount to anything more than the vague idea that consequences count, though not as directly or as much as in utilitarianism? Perhaps they do, in two ways. In the first place, this substantive critique joins hands with the technical objections made earlier. The norms of morality are not drawn up completely without regard to consequences, with ad hoc lower and upper bounds of triviality and absurdity. Rather, moral norms, or perhaps different types of moral units (such as rules and principles), may come into competition with one another. Consequences may be germane, though often not decisive, in resolving competing claims and in setting exceptions to and limitations on these norms. Secondly, the substantive criticisms embody one variety of pluralist or mixed-value theory of morality. The guiding idea is that it distorts or leads to confusion to suppose that, on all occasions of moral choice, the answer to the question "Would this action be wrong?" should be answered by fixing carefully on a deontological principle and articulating a casuistry without regard to consequences.[52] Rather, one must often split the problem into component issues requiring independent consideration. One begins with the issue of which deontological norms bear on the moral choice. One then asks, partly in relation to consequences, how far those principles extend and when noncompliance with one of them is justified or excused, or is required by some competing principle. All this raises difficult

49. *See id.*

50. Fried's discussion presupposes a situation in which the thief does squarely face such a choice. *See* pp. 46-47.

51. *See* notes 44-45 *supra* and accompanying text.

52. *See* p. 10 & n.*, *quoted at* note 40 *supra.*

questions. Is a pluralist model unsatisfyingly ad hoc? How does one constrain the force of consequences once their relevance has been admitted? How does one rank deontological principles once it is said that consequences are not decisive? If I had answers to these questions, I should be glad to share them. Still, it may at least be worth investigating whether a pluralist model can emancipate us from both the single-mindedness of utilitarianism and the absolutism of Fried's deontology.

III. Negative Rights

Kindred difficulties seem to arise in Fried's discussion of negative rights. For Fried it is invariably wrong to violate a right,[53] and one must do no wrong even though great good would come of it or great harm be averted.[54] Negative rights, it will be recalled, are rights not to be interfered with in some way.[55] Examples include the rights not to be lied to, assaulted, or falsely arrested, not to have one's property stolen or one's good name sullied, not to have one's freedom of speech and movement impeded, and not to be forced to incriminate oneself.[56] Negative rights, like categorical norms, "displace"[57] other normative considerations: They cannot be overridden or defeated by consequences,[58] nor do they conflict with one another.[59]

I wish to suggest, however, that it is logically possible for negative rights to come into competition with other normative considerations. For instance, the right not to be lied to might conflict with some substantial good consequences that would flow from telling a lie. Suppose that a government investigator proposes to question Barnes. The investigator has a right to the truth; the political system and the investigation are in the cause of justice, and Barnes has, not anticipating any quandaries, promised to tell all that she knows. As the questioning proceeds, it becomes clear that the target of the investigation is Fletcher,

53. *See* pp. 108, 113, 132.

54. *See* pp. 2, 3, 8.

55. *See* p. 110.

56. *See* pp. 110-12, 133-34. These are "personal" negative rights, except for that against self-incrimination, which is a "legal" negative right (pp. 133-34). Legal negative rights also have categorical status (p. 139). Fried recognizes as well a class of "political" rights, such as the rights to vote and to participate in government, on pp. 133-34; insofar as these rights are said to have "large negative elements" (p. 134 n.*), they would seem to be categorical.

57. *See* p. 12.

58. *See* p. 81.

59. *See* pp. 112-13; note 63 *infra*.

whom Barnes knows to be innocent of wrongdoing. One skillfully phrased question poses a dilemma. The true answer appears to incriminate Fletcher, and will surely lead to his imprisonment for ten years, as there is no way that the appearance can be rebutted; a lie, whose falsity would never be discovered, would throw the investigator off and ensure that Fletcher will remain free. Fried must conclude that Barnes is to answer truthfully, because one must do no wrong even though another's suffering would be avoided.[60] Yet the more appealing response would seem to be that a lie is justified. Observe that lying in this instance cannot be brought under Fried's heading of absurdity; the consequences of telling the truth are not, like the torment and death of all humanity,[61] catastrophic. Observe, too, that a decision to lie is not reached easily and obviously. The investigator's right not to be lied to should have a nonconsequentialist force which cannot be overcome simply by a slight advantage in favor of lying. But here the consequences of a true answer are, though not catastrophic, very heavily outweighed by the beneficial consequences of a lie that will never be discovered. The decision to lie, while perhaps an occasion of disquiet and regret, seems justifiable. The right not to be lied to should, in these circumstances, be overridden by the overwhelming balance of consequences.

Negative rights logically can, perhaps, also come into competition with each other. As a possible example, consider a case involving the right against self-incrimination[62] and the right not to have one's name sullied. Hanson, a witness in a civil trial for libel, exclusively possesses one item of evidence. The evidence relates to a writing of Hanson's which has thrown in doubt the good name of Thornton, the plaintiff. Thornton's attorney artfully poses a question to Hanson on the stand, the answer to which will bring that evidence to light. If Hanson invokes his right to remain silent, Thornton's reputation will be destroyed. Thornton will also suffer a mental breakdown, her family will reject her, and her business associates will be ruined. On the other side, if Hanson answers truthfully, he will be exposed to a minor criminal charge and, if convicted, will receive a short suspended sentence but will suffer no other significant ill effects. *Pace* Fried, there appears to be a conflict between Hanson's right against self-

60. *See* p. 2.

61. *See* p. 31.

62. For purposes of discussion it will be assumed, with Fried, that this legal right has categorical moral status (p. 139). I do not, however, assume in general that legal rights are moral rights.

incrimination and Thornton's right not to have her good name sullied.[63]

Is this conflict of negative rights merely apparent? A defender of Fried might argue that if there is a conflict at all, it is only between a negative right and a positive right. Hanson's writing, not his invoking the negative right against self-incrimination, besmirched Thornton's name. So the incompatibility is just between Hanson's negative right and Thornton's supposed *positive* right to have her name cleared by Hanson. But this seems implausible, because one must see Hanson's entire course of behavior as violating Thornton's negative right not to have her name sullied. That right includes the entitlement not to have her name continue to be sullied by allowing the libel to stand. Alternatively, a defender of Fried might suggest that the example shows only that it would be wrong for Hanson to invoke the right to remain silent.[64] To do so might indeed be wrong, but the example suggests that, in addition, it might be justifiable to compel Hanson to answer. The right against self-incrimination is an important right, and we might hesitate to invade it. Nevertheless, even if we resolve the conflict in Hanson's favor, that does not mean that there never was a conflict. Finally, a defender of Fried might instead appeal to the concept of intention. In invoking the right to remain silent, either Hanson intended to tarnish Thornton's name or he did not. If he did, then it would be morally wrong for him to remain silent, and we should draw the limits of the right against self-incrimination in such a way that it is not available in cases of intentional wrong. If he did not, then the harm to Thornton's reputation, though foreknown, is merely an unintended consequence and therefore not wrong, and we should uphold Hanson's right to remain silent. This, too, seems an implausible way out. On the one hand, should it be wrong for someone to intend harm by remaining silent, that would seem to be not an abstract condition on the boundaries of the right against self-

63. *See* pp. 112-13. Fried seems unclear whether logical or only empirical conflict is ruled out. He writes that it is "logically possible to respect any number of negative rights without necessarily landing in an impossible and contradictory situation" (p. 113). Later in the same paragraph, however, he states that positive rights are not categorical entities, and gives as an example the supposed impossibility of providing in time of famine a subsistence diet to the Indian subcontinent. He then adds: "But it is this impossibility which cannot arise in respect to negative rights" (*id.*). Yet if the food program is indeed an impossibility, it is so not as a matter of logic but as an empirical or technological problem of raising sufficient food.

64. *See* p. 182.

incrimination, but a consideration which, in some instances, might override or defeat the application of the right. On the other hand, the appeal to unintended harm can be defended only by the doctrine of double effect, which holds that while certain bad effects must not be directly willed, they may be tolerated as the foreseen concomitants of one's chosen means or ends. Fried is willing to accept this doctrine.[65] Nevertheless, it has been heavily criticized,[66] and Fried's discussion does not appear to advance its plausibility. At all events, even if the doctrine is acceptable in general, it may not, in its standard formulations, apply here because of the lack of a "proportionately grave reason for permitting the evil effect."[67] Hanson's aim in invoking the doctrine is to avoid a minor criminal charge. Without more, it is hard to conclude that that aim is a sufficient reason for allowing the grave effects on Thornton, her family, and her business associates.

The point of this discussion has much in common with my critique of the categorical character that Fried assigns to moral norms. I would suggest that two modifications may be needed of his picture of an assemblage of negative rights whose limits have been so set that they conflict neither among themselves nor with any other relevant moral considerations, and of which every violation is a wrong. First, an analytical account might be in order which recognizes that negative rights are not absolute and can come into competition with one another and with other normative considerations. One might define a right as prima facie if it can be outweighed or overridden in some circumstances by competing considerations. To call a right prima facie is not, however, to say that it is a bogus right which disappears or is obliterated whenever it yields to other considerations. It is a genuine right whose applicability can be overridden or defeated by such considerations as consequences and other negative rights. Allied with this view of prima facie rights is the idea that not every failure to honor a right is a "violation" which is invariably wrong. Sometimes, declining to honor a right may not be wrong, at least if compensation is paid, and may be better described as a justified infringement than as a violation. Second, a normative account

65. *See* pp. 21-22, 202-03.

66. *See, e.g.*, Bennett, *Whatever the Consequences*, 26 ANALYSIS 83 (1966); Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in MORAL PROBLEMS IN MEDICINE 267 (1976); Thompson, *Rights and Deaths*, 2 PHIL. & PUB. AFF. 146 (1973). In the notes Fried directs the reader's attention to these and other sources (pp. 202-04).

67. Mangan, *An Historical Analysis of the Principle of Double Effect*, 10 THEOL. STUD. 41, 43 (1949) (quoted with approval by Fried on p. 203).

may be needed of the relative weights of rights and the other considerations to which they can yield. It may be that no full account is possible, and that sometimes weights may have to be assigned by intuition. Still, an effort should be made to map out the structure of rights and to ascertain, so far as possible, the power of given rights to withstand pressure from other rights or from other normative considerations. The attempt to frame such a theory does not commit one to utilitarianism. One can give consequences some weight in a normative account of rights without making them decisive.

With these modifications, a theory of rights is perhaps better able to treat the cases presented earlier. One could now say that the right not to be lied to is an important right whose force is not exhausted by the net good consequences which attend it. Nevertheless, perhaps that right can, as in Fletcher's case, be overridden by significant good consequences that would flow from infringing it. One might feel more doubt about Hanson's case. Some would say that Hanson's right to remain silent should be upheld, while others would say that Thornton's right not to have her good name sullied should prevail. But one taking the latter position need not rely on the doctrine of double effect, or hold that the contours of the right against self-incrimination are so tailored that it simply has no bearing on the case at hand. Rather, that right seems to be outweighed, in these circumstances, by Thornton's right to her good name. Thornton's right does not draw the limits of Hanson's right, but overrides it.

IV. Persons and Responsibility for Choices

In Fried's theory, persons are to be respected as rational moral agents who are responsible for actions they choose to take, but not for unintended causal concomitants of those actions.[68] The good person's duty is to observe the norms of right and wrong. Outside these norms lies an expanse of "discretionary space"[69] which the good person can fill with other choices. These choices are not a matter of right and wrong,[70] and a failure typically to make choices in this area for the benefit of others is not morally prohibited.[71] Fried does, indeed, wish to leave room for

68. *See* pp. 20-29.
69. Pp. 167, 168. *See also* pp. 171-72, 194.
70. *See* pp. 13, 175.
71. *See* p. 194.

acts that are beyond the call of duty;[72] yet while supererogatory acts make a person noble or saintly or heroic, they are not, of course, required for someone merely to be a good person. Fried also allows that sometimes one might be obliged to maximize net good consequences.[73] But in general a person has no duty of benevolence, and the failure to make choices for the benefit of others does not make an otherwise good person bad or even diminish that person's goodness.

This view of persons is related to a critical argument that Fried directs against utilitarianism.[74] He supposes that the utilitarian will say that persons are responsible for all the causal consequences of their acts, and so in moral deliberation must strive to weigh and balance all those consequences, even those most remote in space or time. To Fried this involves "disintegrating universality,"[75] by which he seems to mean an abstract impartiality which breaks apart a person's sense of his own uniqueness.[76] For if only the sum total of happiness counts, then its distribution is important only so far as it affects that total. But in that case the individual has only instrumental significance, namely, as a particular body to which happiness can attach. That, however, is a *reductio ad absurdum,* since it deprives persons of any moral significance.

An appraisal of Fried's view of persons can conveniently begin with this critical argument. The utilitarian may well feel that the argument caricatures utilitarianism before it butchers it. Moral assessment of persons—and hence their moral significance—is not exhausted, in utilitarian terms, by determining the rightness or wrongness of their actions. Mill, for example, believed that

> [u]tilitarians are quite aware that there are other desirable possessions and qualities besides virtue, and are perfectly willing to allow to all of them their full worth. They are also aware that a right action does not necessarily indicate a virtuous character, and that actions which are blamable often proceed from qualities entitled to praise.[77]

In addition, there may be perfectly good reasons of utility for directing our concern to those most immediately affected by our

---

72. *See* p. 201.
73. *See* p. 13.
74. *See* pp. 32-39, especially pp. 32-35.
75. Pp. 32, 33, 36-37.
76. *See* pp. 36-37.
77. J.S. MILL, *supra* note 1, at 26.

acts. Effects on those near to us are often easily known; consequences remote in space or time are difficult to predict and to identify; and the time for calculation is usually short. Thus it will rarely be productive for private individuals to trace the consequences of their actions as one might follow the concentric circles generated by a stone cast into water.[78] Finally, a case can be made that within Mill's utilitarianism an act can fail to promote the general welfare in the most efficient way, yet fall short of being morally wrong.[79] Such an act can, of course, be criticized because it does not optimally advance utility. But for the act to be wrong, and not merely undesirable or inexpedient, there must be warrant for "internal sanctions" like guilt feelings or pangs of conscience. To feel guilty or be conscience-stricken detracts, so far as it goes, from happiness. Hence, warrant for calling an act wrong presupposes a justification for embracing the costs of internalizing certain values so that internal sanctions will be felt. True enough, if the utilitarian recognizes desirable qualities other than acting rightly, or generally directs concern to the people in his vicinity, or takes into account the costs of guilt in deciding whether an act is wrong, that is because utility is ultimately served by doing so. And perhaps utilitarianism is ultimately vulnerable to some objection that it cannot adequately respect the separateness of persons. Nevertheless, I doubt that it falls prey to the version of this objection which is embodied in Fried's critical argument of disintegrating universality.[80]

Whatever the merits of a utilitarian view of persons, one might still have reservations about Fried's alternative perspective. If I understand Fried correctly, a good person scrupulously observes categorical moral norms, yet parts with none of this goodness through absence of disinterested benevolence; and in moral deliberation, a good person attends only to what the norms, and their accompanying casuistry, require and forbid. This is an odd image of a good person. It would often be supposed that lacking a substantial amount of sympathy and concern for the welfare of others diminishes a person's goodness. A good person, in addition to observing the requirements of justice by not violat-

78. *See id.* at 25-26.

79. *See* Lyons, *Human Rights and the General Welfare*, 6 PHIL. & PUB. AFF. 113, 119-23 (1977).

80. The utilitarian is likely to protest similarly against Fried's abrupt dismissal of an analysis of roles along the lines adumbrated by Mill and Sidgwick (p. 170). Such a utilitarian strategy is not mentioned in Fried's earlier presentation of the argument from disintegrating universality.

ing others' rights, displays such virtues as charity and forgiveness. No doubt it would be supererogatory to possess these virtues to a high degree, but any person properly called good must have them to some extent. It may be less clear how a good person reflects sensitively on moral problems. He might well find unsatisfactory both baroque calculations of utility and simple goodheartedness. Perhaps it is more likely that a good person tries to combine reflective moral capacity with a measure of virtue and generalized concern for others. That combination seems much attenuated in Fried's view of persons.

Lest all this be thought merely of abstract interest, it is worth noting that Fried's overemphasis of persons' responsibility for their choices leads to some debatable practical conclusions.[81] An illustration is Fried's defense, in his chapter on negative rights, of a consumption tax as the proper way for society to obtain a fair contribution from its members.[82] Such a tax would be based on the monetary value of goods or services consumed, and is said to be preferable to a tax on wealth, income, capacity to earn, or some other basis. Fried's discussion suggests two arguments in favor of a tax on consumption. Consumption accurately measures what one draws from the common pool of resources.[83] And a consumption tax "respects individual rights, because its incidence falls only on what a person chooses to do, not on what he might do—as would a tax on capacities, talents, or dispositions."[84]

Both reasons are questionable. First, consumption as ordinarily understood is not the only thing which is a draft on common resources. Resources also include opportunities for the production of goods and services. To avail oneself of certain opportunities and the benefits flowing from them may affect the competitive position of others. If one becomes a factory owner and uses raw materials, or if one becomes a physician, then there commonly will be less opportunity for others to become entrepreneurs or physicians. Of course, it does not follow that there will be a net loss to others; gainers may be able to compensate losers, as by a scheme of taxation. But any such scheme would seem to be based partly on income or use of opportunities, not on con-

81. In this connection consider also Fried's use of the argument that the would-be robber may in effect be choosing physical injury if the owner defends his property. *See* pp. 46-47; text at notes 47, 49-50 *supra*.

82. *See* pp. 139-50, especially pp. 147-48.

83. *See* p. 147.

84. P. 148.

sumption as usually understood.[85] Second, consumption is not always the product of free choice. Much that we consume has its roots in personal needs, advertising, class or social conditioning, or a host of other factors which cannot plausibly be cast as *choices* to consume this or that.[86] In one remark Fried seems to allow that, while the tax would be *based* on consumption, the tax *rate* might be progressive.[87] Perhaps this signals a healthy retreat from the idea that there is, or can be, any single measure of fair contribution. Nevertheless, there is a problem of consistency. If the tax is progressive, then some factor apart from consumption must be the index for the tax rate, and it is unclear what factor could comport with the choice model. In all this, of course, I do not suggest that a consumption tax cannot be a useful part of a comprehensive tax policy, but merely question Fried's reasons for making such a tax the sole measure of fair contribution to society.

V. Roles and Lawyers

It is against the background of Fried's general moral theory that his discussion of roles, including the role of lawyer, must be seen. For Fried, roles are "forms of life"[88] adopted in the "discretionary space left by the categories of right and wrong."[89] The occupant of a role may lavish more time, energy, and resources on, for instance, a patient, client, or friend than fairness or efficiency can justify.[90] This may seem anomalous, but we are urged to accept, not suppress, the anomaly; it would be inappropriate to compel impartial behavior when a role is involved.[91] Fried goes on to say that the

> traditional conception of professional loyalty is sound and practical. It offers a form of life and work which a just society must permit and a morally sensitive person may confidently adopt. It is

85. Fried seems concerned to allow taxation for consumption of public goods (p. 147 n.*), but his later emphasis on consumption being connected with *depriving* others of goods (p. 149) may block such taxation; for use by a person of many public goods, such as a defense system, does not deprive others of those goods.

86. On pp. 124-26, 146-47, Fried stresses the role of free choice in constructing our own system of wants and tastes. But unless his remarks are to beg the question, I think that at most they show only that we freely choose *some* of our wants and tastes. It is perfectly consistent to reject philosophical determinism and still to insist that in fact *many* of our wants and tastes which bear on consumption are not in an ordinary sense freely chosen.

87. *See* p. 147. *See also* p. 147 n.*.

88. P. 167. *See also* p. 3 ("patterns").

89. P. 168.

90. *See* pp. 168-71.

91. *See* p. 175.

> my thesis that if a lawyer *in a reasonably just society* gives good and faithful counsel, then he fulfills his role well and that role itself is a good one.[92]

Fried concludes that the lawyer is "not morally entitled . . . to engage his own person in doing personal harm to another, though he may work the system for his client even if the system then works injustice."[93]

To appraise Fried's discussion it will be useful to distinguish two questions:

> (1) Should a reasonably just society allow individuals to occupy the role of lawyer as Fried understands it?
> (2) Can a morally sensitive person be such a lawyer?

A negative answer to the first question seems correct for many cases involving property, contracts, and taxation.[94] Fried holds that a lawyer may choose clients in any way he wishes and may assist a client in a spiteful lawsuit.[95] If a lawyer selects wealthy clients, and if those less well off generally get less competent or less thorough lawyers, then the wealthy will receive better legal advice on the whole. Better advice, particularly in matters of property, contracts, and taxation, will enable the wealthy to entrench their position. Hence over time class differences will be exacerbated. Again, in those cases where a lawyer uses the legal system to win a meritless suit for a spiteful client, he produces injustice. In both instances, observe that the society is only reasonably just; its grip on fairness and its members' sense of justice, unlike those of a perfectly just society, are less than complete. For this reason, were lawyers as Fried conceives them permitted, their manipulation of the system might eventually strip the society of its reasonably just character. It might well be wrong for a pernicious society to ensure its own preservation. A reasonably just society, however, would seem entitled to take some measures to protect its just character. Hence, for a large and important class of cases, it would have good reason to disallow the role of lawyer as Fried understands it.

A defender of Fried might reply that the adverse consequences have been exaggerated or would be outweighed by good consequences, or that, consequences aside, persons should be allowed to develop their individuality by acting as lawyers. But the choice is not simply between having lawyers as Fried sees them

---

92. P. 178 (emphasis in original).
93. P. 193 (footnote omitted).
94. For criminal cases a different response may be in order.
95. *See* pp. 181, 179.

and having no lawyers at all. If consequences are relevant, it must be shown that having lawyers on Fried's model is better on balance than having lawyers who answer to any other conception of their role. This will be very hard to show; for alternative conceptions which hinder manipulating the system to produce injustice appear, other things being equal, better calculated to preserve a reasonably just society. Similarly, if appeal is made to respect for persons, the individuality of a lawyer on Fried's model must be shown to be superior to the individuality of all other sorts of lawyers whose capacity to produce injustice is more circumscribed. This again seems difficult to show. Thus a reasonably just society, should it permit lawyers at all, may have good grounds for adopting both a conception of their role and an institutional framework which limit their freedom to produce injustice.

Let us turn to the second question: Can a morally sensitive person be a lawyer as Fried understands that role?[96] This question should not arise if society prohibits such lawyers. But suppose that my answer to the first question is mistaken and that a reasonably just society can tolerate lawyers as Fried conceives them. Does it follow that a morally sensitive person could be one? To answer this question we must clarify what it means to occupy that role. One possibility would be that, while others see a person as a lawyer conforming to Fried's model, the person does not see himself in that image and indeed combats that model. It is as hard to say that this possibility involves moral wrong as it is easy to see that this case is so innocuous as to be uninteresting. A different possibility would be that others identify a person as a lawyer answering Fried's description, and the person sees himself in this way but never actually manipulates the system to produce injustice. This is a closer, but still not very controversial, case. Perhaps it is not morally wrong to be such a person; but, on the other side, perhaps a morally sensitive person would not hold himself out as someone who would use the system to produce injustice. The difficult and important case is presented by a third possibility: A person sees himself in Fried's image of the lawyer, is so seen by others, and on some occasions actually employs the system to produce injustice. Here it seems morally not only insen-

96. This question, unlike the first, does not involve social enforcement. The issue is whether it is wrong to occupy a certain role; it is not the issue of moral paternalism of whether, if it harms a person to occupy a role, society should bar its occupation. Fried's position on this matter is not clear. *See* pp. 172, 175, 182. *See also* p. 180.

sitive but wrong to occupy the role of lawyer as Fried conceives it. This conclusion does not conflict with an affirmative answer to the first question. Someone might consider it desirable in a reasonably just society that a certain role be filled, yet shrink from the idea that any morally sensitive person could fill it. Suppose that you believe in capital punishment. Then you may conclude that society must have executioners, but argue that no person who is sensitive to the harms which typically count as moral wrongs could exhibit the lack of squeamishness which being an executioner betokens. The point is not that lawyers on Fried's model are executioners. It is that a morally good person might find it hard to occupy and take advantage of the role of lawyer so conceived.

If Fried's discussion of lawyers indeed has these deficiencies, what at bottom has gone wrong? Some will argue that Fried exaggerates the ways in which lawyers resemble friends, and fails to consider changes in or alternatives to the adversary system that would reduce lawyers' capacity to produce injustice. These arguments have merit. Yet no diagnosis would be complete which neglected to draw attention to a pair of fundamental philosophical points raised by Fried's discussion.

The first point has to do with two connected questions about roles. These are knotty questions, treated here very incompletely, but it is vital to get clear on them. (i) What is a role?[97] Roles as normally understood seem to involve social or institutional behavior related to a person's status, not just, as Fried says, "patterns" or "forms of life"[98] which are left open by the categories of right and wrong. Moreover, roles differ widely—a matter not sufficiently attended to by Fried. There are public roles (cabinet minister or military chief of staff), occupational roles (physician or lawyer, but probably not plumber or mason), family roles (parent, but not nephew or second cousin), and others. It is perhaps not obvious that to be a friend is to occupy a role, at least if the "role" of friend means something other than the place or duties of a friend. Nor is it clear that the contours of a role are always set in the same way; the mix of express definition, social convention, and intention of the occupant seems to vary. (ii) On what basis do roles insulate their occupants in some measure from common obligations? Perhaps, as Fried suggests, insulation

97. My attention was first drawn to the importance of this question by Charles W. Wolfram.

98. Pp. 3, 167.

has something to do with respect for individual personality.[99] But while this suggestion may be correct so far as it goes, it does not take us very far. I suspect that the basis of insulation is likely to shift importantly from one type of role to the next, and that this shift undermines analogies between the role of lawyer and other roles. With public roles, an important factor is that large issues and numbers of people are commonly involved. For this reason a cabinet minister or military chief of staff may sometimes be entitled not to try to assess the full effect of his decisions on particular individuals. The lawyer's case seems dissimilar. Here the issues are typically narrower and the impact on those affected more readily discernible, though one may have to deal specially with lawyers who handle public law issues. Now compare the case of friendship. A salient reason that we do not moralize in some ways about how friends have to take account of the interests of third parties is that it is terribly costly to do so. It is intrusive, and the risks of drawing conclusions on the basis of erroneous or incomplete information are high. Much less clearly does this reasoning apply to lawyers. For a society could have a strong requirement of client equity, and compel every lawyer to do some work for the poor. In addition, a society might think of legal assistance as a scarce resource, though it would be unusual so to conceive of friendship. Friendship and happiness are valuable, but having them does not seriously affect the amount left for others. Here one might wonder why Fried's positive right to a fair share of social resources does not include a right to legal assistance, and hence significantly limit a lawyer's right to select clients as he wishes—especially since a substantial investment of social resources is needed to train lawyers.

The second point relates to an underlying philosophical assumption in Fried's discussion. The assumption concerns not what lawyers may do in the course of their work, but how they may choose their clients. In Fried's view, clients may be chosen in any way the lawyer wishes.[100] A corollary of this view is that potential clients may not complain about selection. The corollary, as Fried observes, rests on the thesis that no one can claim to be wronged or treated unfairly if someone, who has the means to help, helps fewer persons than he could, or helps persons less in need of assistance.[101] This thesis may seem counterintuitive to

99. *See* pp. 176, 179, 180.

100. *See* p. 181.

101. The thesis of this section and indeed of this chapter might well be

readers innocent of academic moral philosophy, and even among professional philosophers it is far more controversial than Fried's treatment acknowledges.[102] Respect for persons demands that we attend not only to those who make choices but also to others affected by choices. Thus we must, *ceteris paribus,* respect the chooser's integrity by acknowledging and accepting any morally permissible choice. But in the case at hand *cetera* are not *paria.* At issue is how we are to appraise the lawyer's behavior when he has a choice between helping one group of persons or helping a larger or needier group. My thought would be that, without more, the lawyer is morally bound to help the larger or needier group. Equal concern and respect for other human beings require that much. As Derek Parfit has perceptively argued, we help the larger number or those in greater need *because* we give equal weight to helping each: "Each counts for one. That is why more count for more."[103] Moreover, if some need legal assistance because of past injustice, or need it more acutely because of an especially disadvantaged position, their need may count for more than it would otherwise. Of course, the role of lawyer may alter somewhat the moral position of its occupant—as by creating new duties, rights, and liberties. But this falls well short of Fried's view that a lawyer can morally choose clients however he wishes.

This second point alludes compendiously to features of Fried's moral vision that this Review has questioned. Fried seems to endorse what might be styled a boundary-line conception of morality. His categorical norms apply within the limits set by intention; his negative rights sharply curtail encroachments on the individual's moral discretion; his view of persons and roles presents persons as individual units who may give substantial preference to friends and clients. This Review has tried to suggest a broader and more complicated picture of a good person's moral life. Such a person will find that moral norms often intersect, with no clear indication of what course of action is right, and will attend more fully to consequences, even when they are unintended. He will look not only to norms of right and

---

summed up by G. E. M. Anscombe's argument that if saving the life of one patient requires a massive dose of a drug that could be divided up and used to save five other people, not one of those five can claim that he has been wronged. . . . [P. 219]

See Anscombe, *Who is Wronged?*, *supra* note 8. As Fried notes on p. 219, Anscombe's brief argument is greatly developed by Taurek, *supra* note 8.

102. *See* Parfit, *Innumerate Ethics*, 7 PHIL. & PUB. AFF. 285 (1978).

103. *Id.* at 301.

wrong, construed as requirements for just dealings with others, but also to the development of such virtues as charity and forgiveness. And he will have a wider sympathy for others. Generalized benevolence may not be an unconstrained duty, but will reflect an equal concern and respect for other human beings and support a broader conception of social responsibility. I cannot claim to have proved that this picture is superior to Fried's moral vision. The picture is often sketchy and faint; proof may, at all events, be out of the question. Even so, perhaps there is warrant for developing this different view of what it means to be a good person.