14. INTENTIONS, RIGHTS AND WRONGS: A CRITIQUE OF FRIED

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ABSTRACT. In this paper I argue against Fried's thesis that a wrong must be intended by the violator in order for a person's negative rights to be violated. With Fried's requirement these rights become in a sense derivative from wrongs. This makes the relation between one's negative rights and one's moral integrity, upon which Fried wants to base rights, indirect and inappropriately weak. If rights are based on one's status as a freely choosing, rational, moral personality, then whether one's rights are violated should be determined by inspecting one's own loss of integrity or function, not by examining the assailant's intentions.

During the past decade a good deal of moral philosophy has centered on rights--what they are, who has them and upon what basis they should be ascribed. The writings of Rawls, Nozick, Feinberg and Dworkin have been most prominent in these discussions. Charles Fried, professor at Harvard Law School, contributed to this literature with his book, Right and Wrong, published in 1978. Like many others Fried argues against consequentialist theories. He then develops his own deontological theory of the foundations of rights and the circumstances under which they are violated.

In this paper I first will summarize the basic elements of Fried's theory and then criticize his requirement that a wrong must be intended in order for someone's rights to be violated. I will argue that with this requirement rights become in a sense derivative from wrongs. This makes the relation between one's rights and one's moral integrity, upon which Fried wants to base rights, indirect and inappropriately weak.

Acknowledging close similarities between Kant's moral theory and his own, Fried bases his theory of right and wrong on moral personality, or on the capacity of persons to function as rational, freely choosing beings. Respect for persons' physical and intellectual integrity is the central concept in differentiating right from wrong. We do wrong when we violate the integrity of another person, or "deny to our victim the status of a freely choosing, rationally valuing, specially efficacious person, the special status of moral personality."
To develop his theory of rights Fried first talks about wrongs. Norms specifying wrongs are categorical or absolute. In saying wrongs are categorical, Fried means that wrongs are not to be assessed by placing them in a utilitarian calculus. Wrongs cannot be justified by good consequences which may result from them. ("Bads" are harms which do not violate categorical norms. Part of their assessment is done in a utilitarian balance, although the complete analysis is more complex than that.) These norms specifying wrongs do not identify results or states of affairs as wrong. Various sets of morally distinguishable circumstances can bring about the same consequences. Rather, norms specifying wrongs, addressed to freely choosing moral agents, indicate what actions are wrong. As examples, Fried gives lengthy explications of two categorical norms: it is wrong to do physical harm intentionally to an innocent person, and it is wrong to lie.

In determining whether one has violated a categorical norm, one's intentions are crucial. If one chooses to violate a norm as either the means to or the end of one's action, one has committed a wrong. But if the same result comes about unintentionally, or as a side-effect of one's action, even if that side-effect is foreseen "with ever so much likelihood" one has not committed a wrong. Fried gives intentionality such an important role in his theory because intentions underlie what we choose to do when acting as agents, that is, as rational, moral personalities.

For Fried rights "recognize and protect...the integrity of the person as a freely choosing entity." Rights are closely correlated with wrongs, in fact, they are equivalent to wrongs seen from the victim's point of view. Fried distinguishes between positive rights and negative rights, defining positive rights as rights to one's fair share of scarce community resources. Negative rights are not claims to anything, but they are claims that others refrain from intentionally treating one in ways which violate one's physical and intellectual integrity. Thus, if innocent, one has negative rights not to be harmed intentionally, not to be lied to, and so on. Again, the intentions of the violator are crucial. For example, one does not have a right not to suffer harm. If one suffers harms as an unintended side-effect of someone's actions, one's negative rights have not been violated.

Several questions can be raised regarding the role Fried gives to intention, both in distinguishing harms which violate categorical norms from those which do not, and as a critical factor in assessing whether rights are violated. In this paper 1 will not discuss Fried's distinction between positive and negative rights, although questions could be raised about that. Instead, I will examine the way he links categorical norms and negative rights. I will mention one problem because it is so obvious, and then develop a second in more detail.

First, there are theoretical difficulties in trying to distinguish between intended means and means or consequences which are foreseen but not intended. Fried uses this example of an unintended but foreseen consequence.

A, seeking to free his friend from prison, explodes a charge under the wall, knowing that a guard stationed on top of the wall will be killed in explosion, though this death is immaterial to his plan.
Fried is not implying that because it is not A's intention to kill the guard, exploding the charge is therefore justified. Fried would argue that one should decide whether A's action is wrong by determining whether the harm expected to be done outweighs the value of the end sought. If so, the action is wrong, although not categorically wrong, and the guard's negative rights are not violated. This example is used here to illustrate the difficulty of differentiating intended results from concomitant side-effects, and not to suggest that Fried's theory condones such actions.

Fried identifies his distinction between intended and unintended but foreseen means or consequences with that used in the law of double effect. That law, frequently used in Catholic moral theology, states that it is sometimes permissible to perform an action which produces both a good and a bad effect, if one intends the good effect, but merely foresees the bad effect, although it would be wrong to perform the act if one intended the bad effect.

In this example, as in many everyday situations, it is difficult to determine which means or consequences are intended and which are not. For example, in the case given above should the dynamiter's intended means be identified as "exploding a charge under the prison wall" or "exploding a charge under the prison wall-with-a-guard-on-top?" I suppose someone defending the law of double effect could argue that the dynamiter's aim was to free his friend, and his chosen means to freeing his friend was to blow up the wall, not to kill the guard. Had the guard not been there, the dynamiter would still have blown up the wall, but he would not have sought out the guard in order to kill him. The guard simply happened to be in the way.

However, explanations using counterfactuals can be tricky, especially ones about things that just happen to be in the way. One could just as well argue that if the guard had been there, but not the wall, the dynamiter would still have blown up, or otherwise disposed of the guard. The point is that the dynamiter, in choosing his means, must take seriously the fact that both the wall and the guard appear together.

In discussing the example Fried acknowledges that with a little mental agility we can juggle what will count as intended means and what will not. He then goes on to admit that he does not have a foolproof criterion for distinguishing intended means from unintended means or consequences. It is a bit unsettling that Fried leaves the problem unresolved, because on this distinction hinges the determination of whether one's action is categorically prohibited, or whether one may proceed, though perhaps at risk of harming others. Our ability to make concrete decisions using Fried's conceptual framework rests on the clarity of this distinction. However, Fried is well aware of the problem and I will not pursue it further here.

A second question, which I will address at length, is whether the distinction between intended and unintended means or ends, even if it can be made with sufficient clarity, can hold the moral significance Fried gives it in his theory. Fried uses the distinction to differentiate wrongs and bads (only intended harms are necessarily wrong) and to indicate circumstances under which negative rights are violated (the in-
attention to harm is a necessary condition). Fried places such importance on intentionality because of its connection with moral agency. Like Kant he wants to base his theory on our capacity to function as moral beings, as rational, freely choosing persons.

Now Kant thinks of humanity as constituting a kingdom of ends, in which each person is to be treated as an autonomous, self-governing being. Kant states that conceiving of people as ends in themselves is "the supreme limiting condition of every man's freedom of action." Whatever goals or purposes we pursue must be circumscribed by the requirement that all persons affected be treated as ends, their autonomy respected. But in the example discussed above the prison guard's status as an end is not taken seriously by the dynamiter. Regardless of his intentions, the dynamiter knows what will happen to the guard, yet he does not regard the guard's status as a morally autonomous being to be a "supreme limiting condition" on his end of freeing his friend from prison. Since killing the guard is not the dynamiter's intention, Fried would argue that the dynamiter may weigh the "bad" of the guard's death against the "good" of his intended end. But when the guard's death is weighed in this way, it does not function as a "supreme limiting condition." Now Fried states that "harm and lying are wrong because they involve the agent's using the victim for his own purposes." In this example the dynamiter uses the guard for his own purposes by overlooking the guard's moral status as that of "a freely choosing, rationally valuing, specially efficacious person, the special status of moral personality." And this is Fried's basis for being wronged, not just treated badly.

The problem may be that Fried does not consider a person's responsibility in formulating his or her intentions. Surely we are responsible for our intentions in the sense that we need to choose carefully which intentions to act on. By making the distinction between intended and unintended means or ends play such an important role in distinguishing wrongs from bads, Fried does not take into consideration how occurrences are linked together in ways that we often cannot separate. Dynamite technology is not refined enough to destroy walls while leaving guards on top of walls untouched. In saying that one intends to blow up the wall, while contending that injury to the guard is merely an unintended, unfortunate side effect, one exhibits an unwillingness to accept the objective constraints of the way the world operates. Surely in forming our plans and choosing which intentions to act on, we are responsible for taking these constraints seriously. If we don't, intentions become a mere conduit for desire, rather than functioning as a way of working out one's life in an autonomous fashion. Respect for the moral integrity of others should limit what intentions we choose to act on and how we choose to pursue them. Taking the moral integrity of others lightly, for example, by not intending to harm them, or not bothering to find out if someone is apt to be harmed, should not alter our moral responsibility by changing a harm which is categorically wrong to one which is merely bad.

The above analysis rests in part upon the dynamiter's ability to know what will happen to the guard if the wall is exploded. This response may be adequate for arguing that negative rights can be violated in cases of unintended but foreseen harms, but what of cases where means or consequences are not only unintended, but also unforeseen and perhaps unforeseeable? Can we say that in such cases wrongs are
committed or rights violated? Consider the case of what could be called the sincere sexist. Imagine a husband who loves his wife dearly, treats her with kindness and would never intentionally harm her. Yet he forbids her from earning an income, from assuming responsibilities outside the home and from learning anything about their financial matters. After all, it is his role to provide for her and as a woman she is simply not capable of performing the functions which belong to him. On Fried's theory one would conclude that because the husband did not wrong his wife intentionally, her negative rights were not violated, although the woman was harmed by not being allowed to function fully as a freely choosing, rational person.

But it seems to me that the negative rights of the prison guard and of the wife are violated, in spite of the fact that those harming them do not intend to do so and in one case do not even foresee that harm will be done. The problem with Fried's formulation of negative rights is that in a curious way he does not base them directly on a person's own moral integrity. According to Fried negative rights are rights not to be harmed intentionally: if x harms y unintentionally, y's negative rights have not been violated. But notice how indirect this is. If someone strikes me or treats me in a way that degrades me or damages my intellectual or physical functioning, I cannot claim that my rights have been violated until I determine my assailant's intentions. But if my rights are based on my status as a freely choosing, rational, moral personality, then should I not be able to claim that my rights have been violated on the basis of what happens to me, by inspecting my loss of integrity or function, not by inspecting someone else's intentions? By making the intentions of the assailant the critical variable in determining when negative rights are violated Fried denies the person harmed some measure of his or her concrete, objective moral status. My rights should be based directly on what sort of a being I am, i.e., freely choosing and rational, and whether my rights are violated should depend on what happens to me.

Fried stresses that negative rights are grounded on a person's moral status as a freely choosing, rational, moral personality. But if a person's rights are based on his or her own moral status, then other persons have duties toward that person because that person has rights, that is, rights are logically prior to duties. However, in Fried's theory this relation is reversed, at least in the sense that whether my rights are violated or not depends on the other's intentions, not my moral status. But if negative rights are logically prior to duties, then we are justified in demanding that other members of the moral community treat us in ways that respect those rights. One's negative rights are violated when other members treat one disrespectfully, whether they intend to or not.

I have argued that within Fried's basic moral scheme in which wrongs are distinguished from bads, and negative rights are violated when wrongs are committed, Fried has drawn the line between wrongs and bads in the wrong place. However, I need to refine my criticism to take into account some of the valid and important concerns which led Fried to give intentions their prominent role in his theory. He wanted a way of indicating the morally significant difference between personal agency, or "efficacy according to purpose," and "that kind of efficacy the causality of which merely runs through my person or my movements." Thus, if a boulder, falling off a cliff, strikes and breaks my
leg, my rights have not been violated because the boulder does not act with intention. Similarly, if a boulder knocks me off a cliff so that I fall on someone and break her leg, I have not violated her rights. My moral status is closer to that of a boulder than a moral agent.

I think Fried has a good point in his concern about boulders. Admittedly, there is something bizarre in saying that boulders or people functioning like boulders violate rights. But there is a way to account for this without making intentionality the critical criterion in whether rights are violated. Instead, we can think of rights and their correlative duties as relational in the sense that rights exist as part of relations with duty holders. Duty holders are beings capable of respecting rights, that is, they are rational, choosing beings who can alter their behavior in light of moral requirements to respect others. If there were no duty holders there would be no rights.

This suggests a new way to distinguish when wrongs are committed and rights violated. One's rights are violated when one's integrity is not respected by someone capable of acting with moral agency and thus capable of having duties. As long as persons can be held responsible for their behavior, their actions, including both intentions and side-effects, may potentially violate other's negative rights. When one functions like a boulder, one is not responsible for one's actions or their effects, and so one is not more capable of violating negative rights than is a genuine boulder. Once the context of rights holders in relation to duty holders is established, then whether rights are respected or violated depends upon what happens to the rights holder, not on the intentions of the duty holder. When functioning like a boulder one is outside the context of rights holders and duty holders. But when in control of one's faculties, one is within that context and so is responsible for choosing one's intentions and actions so as not to violate the rights of others.

Yet Fried's concern for intentions is not inappropriate. Even if wrongs were committed and rights violated in the examples given above, the cases of the prison wall dynamiter and the sincere sexist do not seem morally equivalent, and intentions figure prominently in distinguishing between them. For example, treating women as less than rational, freely choosing beings is to be condemned, but somehow the loving, kindly, sincere sexist seems less blameworthy than the coldly calculating prison wall dynamiter. We also feel there is a morally significant difference between the sincere sexist and someone who knowingly and deliberately treats women in degrading ways. But that difference does not lie in whether rights are violated—they are violated in each of the above cases. Instead, intentions are important in evaluating the moral worth or the guilt or culpability of the one who violates rights. The degree of culpability depends on many things, for example, to what extent could the person have known better? was he or she taking reasonable care? and of course, what were his or her intentions? Analyses such as Aristotle's degrees of wrongdoing are appropriate here.

Thus, intentions are important in assessing the culpability of one who violates someone else's rights. But intentions are not critical in determining whether negative rights have been violated. To make them so denies to the rights holder some measure of his or her objective status as a moral being worthy or respect.
If my criticism is correct, it points to a serious flaw in Fried's theory in the way he conceptualizes norms and negative rights as categorical and absolute. One of Fried's basic objections to utilitarianism is that in it no values are absolute; each value can be balanced and traded-off against others. He finds deontological theories more adequate because their norms are categorically obligatory. In saying norms and negative rights are categorical, Fried means a) that one is always morally prohibited from committing a wrong or violating a right, and b) that the system of norms and rights is logically consistent, that is, it is at least theoretically possible to uphold all norms without their coming into conflict.

Fried sees this as necessary in order to make respect for persons as "freely choosing, rationally valuing, specially efficacious" moral personalities the foundation of his ethical theory. It is through making choices and acting on one's intentions that one exercises one's moral personality. For example, in discussing the norm against intentionally causing physical harm Fried writes, "It is just because the person of the victim is threatened by the person of the actor that the relation has a special moral significance." (emphasis added) Thus, for Fried, intention is important because it links persons together as distinctively moral beings.

Since Fried wants norms and negative rights to be categorical, he needs some boundary on norms to keep them from conflicting with each other. (At this point one could bring out the moral conflict examples: Do I lie or return the gun to the insane killer? Do I prolong the cancer victim's life or reduce suffering with a potentially fatal dose of morphine?) If we inevitably harm people in this life, then an acceptable moral theory cannot have absolute prohibitions against harm per se. Also, as Fried recognizes, if harming others was categorically prohibited, then the good life would have to be lived in a straight-jacket, for any act at all carries the risk that someone will be harmed. Fried solves these problems in the way he uses intentions in his theory. Presumably we can control our intentions, and in cases where we cannot avoid harming others, we at least need not harm them intentionally.

I argued above that it is incorrect to make the agent's intentions a necessary condition for violating someone else's negative rights because in doing so one does not base a person's rights directly on his or her own moral status. Now, Fried needs to use intentions as he does in order to maintain that norms and negative rights are categorical. However, if my argument is correct, intentions cannot serve this function. Given Fried's understanding of the moral demands of deontology and consequentialism, if Fried wants negative rights to be absolute in his theory, he must choose between two undesirable alternatives: a) make intention a necessary condition for the violation of rights, which gives inadequate recognition and protection to a person's own moral status; or b) do not make intention a necessary condition for the violation of rights, with the result that the moral life becomes impossibly constricting. Fried rejects the second alternative, and I have argued that the first is not acceptable. Fried needs either to revise the relation he sees between intention and negative rights, or to modify his insistence on the categorical, absolute nature of negative rights.
1 In his review of *Right and Wrong* Caws argues that Fried uses consequentialist reasoning to defend his anti-consequentialist theory. See Peter Caws, "The Origins of Right and Wrong," *Hastings Center Report*, 8 (Dec. 1978), 43-45.


4 Fried, 12.

5 Fried, 28; Chapter 5.

6 Fried, 11.

7 Fried, Chapter 2.

8 Fried, Chapter 3.

9 Fried, 21-22.

10 Fried, 109.

11 Fried, 81.

12 Fried, 133.

13 There are problems both with the distinction between positive and negative rights (See Henry Shue, *Basic Rights* (Princeton, NJ: Princeton University Press, 1980), Chapter 2), and with Fried's formulations of negative and positive rights. In an excellent review Brian Barry argues that Fried's theory is faulty because he uses a legal understanding of right and wrong as the model for moral rights and wrongs. But, Barry contends, morality is richer and more complex than that. See Brian Barry, "And Who Is My Neighbor?" *Yale Law Journal*, 88 (1979), 629-658.

14 Fried, 23.

15 See Fried's analysis of the reckless motorist, 155-59.

16 Fried, 21.

17 Additional criteria are included in the full formulation of the law of double effect. Fried lists a number of sources both critical and supportive of the doctrine in his Notes, 202-204.

18 Fried, 24.

20 Fried, 132.

21 Fried, 29.


23 Fried, 27.

24 This leaves open the question of whether animals or natural objects have rights. Criteria for being a rights holder are different from criteria for being a duty holder. Animals, natural objects, the severely retarded and the insane may have rights, but not duties. See Feinberg's discussion of this topic in "The Rights of Animals and Unborn Generations," in Philosophy and the Environmental Crisis, ed. William T. Blackstone (Athens, GA: University of Georgia Press, 1974), 43-68.


26 Fried, 9, 12, 113.

27 Fried, 32.

28 Fried, 15-16.