Critique of Professor Fried’s Anatomy of Values

Robert S. Summers

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation

Robert S. Summers, Critique of Professor Fried’s Anatomy of Values, 56 Cornell L. Rev. 598 (1971)
Available at: http://scholarship.law.cornell.edu/clr/vol56/iss4/2

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
A CRITIQUE OF PROFESSOR FRIED'S ANATOMY OF VALUES*

Robert S. Summers†

Charles Fried, Professor of Law at Harvard University, has recently published what is probably the only philosophical essay on value theory ever written by an American law teacher. Fried may also be the first American legal philosopher to write about love, friendship, and life plans. His work is striking in a further respect: He is actually a system builder, with a penchant for subsumesmanship. The world of human values (which he purports to discover rather than to build) turns out to have a remarkably systematic structure. Insofar as two prominent Harvard colleagues, philosopher John Rawls and sociologist Talcott Parsons, help him “discover” features of this world, he subsumes their views within his system.

Various activities qualify as value theory. It is therefore appropriate to ascertain in what sense Fried’s work is an essay in the subject. He is not mainly interested in evaluating the goodness or badness of the values men hold, and he does not offer any general justificatory theories of value. Nor is he mainly interested in the logic of value reasoning, nor in elucidating the meaning of key concepts in value theory such as “good” and “value judgment.” And his is not a work on moral theory as such. What, then, interests Fried? Insofar as any one factor can be singled out, it seems to be a belief that human beings would be

* Copyright © 1971 by Robert S. Summers. All rights reserved.
† Professor of Law, Cornell University. B.S. 1955, University of Oregon; LL.B. 1959, Harvard University.
1 C. FRIED, AN ANATOMY OF VALUES—PROBLEMS OF PERSONAL AND SOCIAL CHOICE (1970) [hereinafter cited as FRIED]. The present article began merely as a brief review, but it soon became apparent that a more comprehensive critique was in order.
2 Fried is both full-time and full-fledged. Moreover, Fried did a great deal of work with full-time professional philosophers in the course of developing the manuscript for this book. Id. at vii-viii.
3 Most of chapter four is devoted to summarizing Rawls’s “system” of morality and justice. Rawls’s book on justice is soon to appear.
4 Most of chapter seven is devoted to summarizing aspects of Parsons’s social “system.”
5 Lawyers will find Professor William K. Frankena’s summary of the topics within the field a useful way into the subject. See Frankena, VALUE AND VALUATION, in 8 P. Edwards, THE ENCYCLOPEDIA OF PHILOSOPHY 229-32 (1967).
6 For a helpful work in this vein, see P. TAYLOR, NORMATIVE DISCOURSE (1961).
7 An illustrative and useful work of this sort is A. Ross, DIRECTIVES AND NORMS (1968) (see especially ch. VI).
ANATOMY OF VALUES

better off if they acquired a "deeper understanding" of the world of values and then chose and planned accordingly. Human beings may acquire this deeper understanding mainly through "analyses" of the "anatomies" of particular values—particular ends men do or might pursue. Fried offers illustrations of particular analyses in his essay. But he obviously cannot offer many analyses within 265 pages. It would seem, then, that his main task should be that of developing a general procedure for bringing off such analyses successfully, a procedure that others might be able to make use of entirely on their own in contexts beyond those he considers illustratively.

But not just any general analytical procedure can be automatically applicable to just any subject matter. And it would be a telling criticism of a procedure if it should prove irrelevant or inappropriate to its subject matter. To escape such criticism, a general procedure for analyzing the anatomy of particular values would have to be relevant and appropriate—it would have to "accord with" the world of values. Because Fried's general views on the nature of this world are thus "logically prior" to any general analytical procedure he might recommend, we open with a consideration of them.

I

Fried's World of Values

Fried wants to help persons who hold or might hold particular values—persons who pursue or might pursue particular ends. Indeed, he frequently stresses that his essay is addressed to the "point of view" of such persons. Fried thinks we all exist in a world that includes a vast multiplicity of possible ends to be pursued, many of which are highly complex and all of which have a place within some "basic category of value." Unfortunately, Fried does not present his general picture of the world of values clearly and in one place. Rather, the

---

9 See especially the introduction, and chapters I, II, III, VI, and X. Fried actually uses the phrase "deeper understanding" from time to time in stating his objectives. See, e.g., Fried 31.

10 He treats, for example, eating, playing a game, making a gift, making restitution, and acts of love and friendship.

11 There is some evidence that Fried perceives this. This will be taken up in Section II infra.

12 The phrase "world of values" is my own invention and I intend it only as convenient shorthand.

13 See, e.g., Fried 2, 10, 18, 23, 27, 93. Thus, it would seem the book is addressed to Joe Doakes. But sometimes Fried narrows his addressees down to his "readers." See, e.g., id. at 111.
reader has to dig it out of various parts of the essay, and this is an arduous and formidable task in itself. Moreover, readers of this article must be warned that, once Fried's "system" is thus unearthed, it will still not be instantly intelligible to all.

The possible kinds of particular objects of value in Fried's scheme are almost limitless, and include persons, being certain kinds of persons, relationships with persons, actions, feelings, thoughts, perceptions, social institutions, and so on. He focuses on rational actions, and his examples of these include courageous acts, loving, befriending, listening to music, taking in a work of art, trusting, keeping promises, controlling others through law, and so on.

For Fried, the particular end—for example, a particular human action—is the "unit of value" and also the "significant entity" in the world of values. But the most fundamental feature of all in the world of values consists of several "basic categories" of ends to which the various species of particular ends belong. These basic categories include what Fried calls the moral, the aesthetic, and the categories of knowledge, of instinct, and of survival. It is not clear whether these categories are mutually exclusive, but it seems they are, so no particular end may fit in more than one. Each category is made up of what Fried calls a "substance." Thus, the substance of the moral category of ends consists of "actions affecting others," and the substance of the knowledge category consists of "reality." (From all this it follows that law belongs in the moral category.) The substance within each category is diverse and heterogeneous. Presumably this substance makes up part of the anatomy of possible particular ends—what he calls the "material" part. For example, in the aesthetic category, this "material" part includes the color spectrum, the dimensionality, and the framing relevant to the art of painting. It also includes the various possible sounds and rhythms relevant to the art of music.

Thus, within each basic category are its own species of particular

14 I know.
15 See especially FRIED chs. II, III, V, VIII.
16 Id. at 36.
17 Id. at 37.
18 Actually Fried shifts terminology from time to time. For example, sometimes he writes of these categories as if each itself is a kind of ultimate unitary end. See, e.g., id. 89-91. But most of the time he thinks of them as "basic categories of ends."
19 Id. at 89.
20 Id. at 33, 89.
21 Id. at 89.
22 Id. at 125.
23 Id. at 32.
24 Id.
ends, each of which breaks down into an "anatomy" that has a "material" part—a substance. Now, what else is to be found within the "anatomy" of each such particular end? According to Fried, each basic category of ends also "imposes" its own form of "coherence on significant substance"—on the "material" within the anatomy of particular ends that fall in each category. All this is supposed to be easiest to see in the case of the aesthetic category and its particular ends; for example, painting, music, and dance.

It is essential to try to elucidate this "coherence" thus imposed on "significant substance," for in Fried's scheme this coherence is both complex and of central significance. The "anatomy" of particular rational ends is supposedly determined by a "dialectic" between the "material" and the "formal" (coherence-determinative factors). The formal has to do at least with (1) what material elements are incorporated in the anatomy of the particular end, (2) how many are incorporated, and (3) in what fashion. Thus, in a particular aesthetic end, the formal aspects of, say, a painting are its draftsmanship, its rendering of dimensions, its color scheme, and so on. And in the moral category the formal aspects of the anatomy of a specific moral end such as the action of making just restitution have to do with the injustice of the original acquisition, the adequacy of the restitution, and the appropriateness of gestures of apology. These formal facets provide what Fried calls "unification in simplicity of a diversity of elements." They "organize" the particular end—the particular action of painting, or of making restitution. They thus "structure substance"; that is, they render the substance within the anatomy of particular ends coherent.

But what the formal facet of the anatomy of particular ends is is one thing, the phenomena that actually "supply" this formal facet quite another. In Fried's world of values, each "basic category of values" is occupied not only by "substance," but also by "formal" principles at several "levels of generality." It is the job of principles within a category to supply the "formal element" in the anatomy of those particular ends belonging to that category. There may be several different systems of principles within each basic category. For
example, in the aesthetic category, there is a system governing painting, a system governing dance, a system governing music, and so forth.34

Such systems include "highest" level, "intermediate" level, and "lowest" level principles.35 This is just the way things are (in Fried's world of values). How do these systems of principles "supply" the formal element in the anatomy of particular values? Within the aesthetic category, Fried instances the activity of dancing. He says the "lowest level" principle operative here will be the principle that specifies the "choreography" for the dance.36 He does not say what the intermediate level principles might be. But he says the relevant highest level principles include the principles of "elegance and grace."37 All these higher level principles supply "coherence," and just because of their greater generality we should not conclude that they are "any the less intimately involved in determining the particular end."38

To take a second example, one from the basic category of moral ends, and elaborate it more fully: Acts of love have a formal facet supplied by principles "at several levels of generality."39 Thus, these acts are formally "structured and ordered" by lowest level principles of love. Although Fried talks of "the principle of love," he nowhere explicitly formulates it.40 He does seek to elaborate a "conception" of love. Perhaps this is the "lowest level principle of love." Here are some of the things he says about the "conception" of love: A lover recognizes his beloved as an end in itself. Love is free and spontaneous. Love requires mutual recognition of personality. Generosity—a willingness to give up entitlements—is essential between lover and beloved. The central notion in love is reciprocity—a mutual sharing of interests. Lovers abandon self-interest. They contribute to each other freely and spontaneously. Sexual expression may be incorporated. And lovers do things together joyfully. These, then, are important facets of love, says Fried, and they apparently comprise a lowest level "formal" principle or cluster of principles of love which inform, define, and structure particular acts of love—particular rational ends.41

Now, these principles are also part of a system of principles, and a full account of the so-called "formal" facet of the anatomy of partic-

34 Id. at 30-31.
35 Id. chs. II, III.
36 Id. at 28.
37 Id. at 33.
38 Id. at 30.
39 Id. at 24.
40 At first Fried is not sure whether he should write of lowest level principles of love. See id. at 37. But later he goes in for it. See, e.g., id. at 122.
41 Fried treats love mainly in id. at 77-80. Hegel liked love, too.
ular rational acts of love requires an account of the intermediate level principles and the highest level principles of the system of which principles of love are a part.\textsuperscript{42}

Principles of love are a part of the system of principles of which the highest level principle is that of morality.\textsuperscript{43} But before we take up this highest level principle, we must consider whether there are any relevant intermediate level principles that are significantly related in some way to principles of love. Fried says there are. Among these is the principle of justice.\textsuperscript{44} Fried offers an account of the principle of justice drawn largely from works of John Rawls. Among other things, justice is a principle that everyone is to be treated alike unless different treatment works out to everyone's advantage.\textsuperscript{45} But how is the lowest level principle of love related to this intermediate level principle of justice? Here, Fried says many different things. One is that the principle of justice defines the "basic, general structure of relations between persons showing mutual respect" (whether or not in love).\textsuperscript{46} If lovers are to love, they must show mutual respect which is a "constraint" imposed by the principle of justice.\textsuperscript{47} Elsewhere Fried also suggests that the principle of justice implies a "valuing of the beloved . . . as a bearer of human personality,"\textsuperscript{48} and argues that this is a necessary condition for love to occur.\textsuperscript{49}

Now, what of the highest-level principle in this category of ends, namely the principle of morality itself? Fried offers an elaborate specification of this principle which, he says, also derives significantly from Rawls.\textsuperscript{50} At the highest level the principle of morality "is an expression of the concepts of equality, of impartiality, and of regard for all persons as ends in themselves."\textsuperscript{51} The principle of justice follows from the principle of morality. He adds that the principle of morality "expresses,"

\textsuperscript{42} Fried says he will show how the highest level principle of morality and the intermediate level principle of justice are "implicated" in acts of love. \textit{Id. at} 74.

\textsuperscript{43} A significant part of the essay is concerned with this "system of principles" which generates principles of justice and love. Indeed his treatment of this topic is the most fully illustrative account of the "system" of thought he utilizes. He says: "In the next chapters I shall discuss one such system of principles, having to do with moral actions in respect to other persons." \textit{Id. at} 31.

\textsuperscript{44} \textit{Id. at} 76-79.

\textsuperscript{45} \textit{Id. at} 61. This is only part of what justice involves. I do not go into Fried on justice, as such, for much of it is, as he says, Rawlsian, and so far unpublished.

\textsuperscript{46} \textit{Id. at} 122.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id. at} 78.

\textsuperscript{49} \textit{Id. at} 77, 84.

\textsuperscript{50} \textit{Id. at} 41-44, 72.

\textsuperscript{51} \textit{Id. at} 42.
among others, notions (principles?) of reciprocity, respect, personality, and impartiality.\footnote{Id. at 41-45.}

Fried offers three alternatives to his principle of morality: The egoist principle according to which the actor simply serves his own interests; the utilitarian principle; and the principle of perversity.\footnote{Id. at 50, 53-54.} The way Fried characterizes these, most would not want to hold them. It should be obvious to readers that whatever may be the case with other things in Fried’s world of values, his “principle of morality” is not easily thought of as the fruit of a voyage of discovery. Here, he is, in the main, telling us what he thinks ought to be, not what he discovers to be. He does not admit as much, but then in this respect he is in good company. Ontologists have often stocked the world with things they think ought to be there, all in the guise of what they purport to find there.

We have seen from two examples, one aesthetic and one moral, how the “formal” aspects of the anatomy of a particular rational end are supposedly supplied by systems of principles which also occupy the relevant basic category of value. But what is meant here by “system”? Fried really does not give a systematic account of this notion, as we shall see. Yet he thinks it of great importance to uncover the “systems of principles” which he says exist. Thus, he says:

It is by exhibiting the relation between particular ends and these more general principles that the rationality of the ends is shown, and at the same time this is the process which brings to view the most significant part of what is hidden to persons who have such ends. Thus the articulation of the system of principles underlying our rational ends is the main task for a rational analysis of ends as such.\footnote{Id. at 31 (emphasis in original).}

On the other hand, as we have seen, Fried wants to say that the particular end is the “unit of value”\footnote{Id. at 36.} and that the particular end is the “significant entity.”\footnote{Id. at 37.} For, he asserts, “[t]he systems of principles are significant only in that it is these principles that make our ends what they are”\footnote{Id. (emphasis added).}—that is, determine the structure of the substance of which these ends are made up.

It should be added that in Fried’s world, the systems of principles also have roles beyond those they play in relation to the formal facet
of the anatomy of particular ends. Thus, they also come into play to help us order the relationship between our particular ends. For example, he says:

[W]e can see better how rational principles not only are constitutive of particular ends but also imply an ordering of ends. For each of [these] . . . principles applies to an infinity of situations, and does so categorically—that is, whenever a situation of a particular sort is present, then the principles apply and demand that an end of a particular sort be chosen. Justice is a constraint applicable to any institution or practice; fairness is a constraint in any situation of mutual aid, forbearance, and expectation. Thus the orderings implied by these principles can be quite dense and exigent, though they are far from being complete—there is still a lot of room for diverse ends and actions within the framework they establish. I have shown that it is implicit in the principle of morality that if a person accepts the principle of morality for one action this commits him in a special sense to accepting the ordering of all his other ends. The same arguments hold true for the orderings implicit in justice and fairness—if a man would be a just man or a fair man, who does a just or a fair act, he must accept those principles not just as principles for this end or act but as principles for the ordering of all his ends and actions.\(^{58}\)

Finally, in Fried's world of values, there are not just particular ends. There is a king of all ends. Fried says that this is the human "drive for coherence" which makes all "material elements . . . part of a single, unified system."\(^{59}\) Moreover, he believes that considerable coherence actually "exists between the discrete ends we pursue."\(^{60}\)

So much for a sketch of Fried's general picture of the world of values (save for "ends in themselves" to be considered later).\(^{61}\) Does this world really correspond to reality? This is a crucial question, for to the extent Fried errs, then he will not only be wrong about his basic subject matter, but his errors will also (in all probability) infect the design of any general procedure he offers for the analysis of the anatomies of particular values.

Whether or not Fried errs is in part an empirical question (though perhaps not straightforwardly so). But he states that he will not offer "either logical or empirical proof" in support of his account of the world of values. And he says he hopes "that the reader will bear that in mind and thus justify [his] omission of tiresome qualifications and

---

\(^{58}\) Id. at 73-74.

\(^{59}\) Id. at 100.

\(^{60}\) Id. at 19.

\(^{61}\) See Section III infra.
Rather than rely on "logical or empirical proof," he says he hopes to "carry conviction . . . on the basis of the fullness and coherence of the elaboration and on the basis of the potency of the theory to illuminate the problems and experiences with which it deals."

But surely the question—"What is the character of the world of values?"—is itself empirical in part, so that "fullness and coherence" cannot (logically cannot) do the job of empirical considerations. And Fried himself is not always true to his own disclaimer, for he sometimes forgets himself and gives reasons for including certain phenomena in his world of values.

It is possible on empirical grounds to criticize a "theory" of the type Fried propounds in a variety of different ways.

A. Errors of Inclusion

Does Fried include in his world of values any phenomena that are not really there? First, he sees this world as one in which human beings take aim and act accordingly. Yet the fact is that much of value that we realize from life we do not aim at directly and specifically. Indeed, we probably could not attain it if we did. Much of value that we realize from life is in the nature of "by-products" or hoped for accompaniments of "ways of life." On this, more later.

Then what of Fried's "basic categories of ends"? Is it appropriate to include a category of instinctual ends? Such "ends" include "hunger, sex, aggression, maternal love," and the like. To the extent we engage in these forms of behavior "owing to instinct," so to speak, it does seem inappropriate to consider them ends, for ends in Fried's own scheme are phenomena we value and pursue consciously—rather than owing to instinct. Fried is himself aware of this and is admittedly uneasy about including not only the basic category of "instinctual ends" but also the basic category of "survival" ends. So, perhaps some basic categories of ends ought to be omitted.

Fried has more principles in his own ontology than could an entire priesthood. He has highest level principles, intermediate level principles, particular principles, sets of principles, systems of principles, and

---

62 FRIED 26-27.
63 Id. at 27.
64 A point well made in a paper Fried admires. See id. at 242; Mabbot, Reason and Desire, 28 PHILOSOPHY 113, 117 (1953).
65 FRIED 91.
66 Id. at 87-88, 91-95.
67 But Fried says he will not try to "prove" that such principles exist. See id. at 47-48 n.
more. Yet he says very little about what, in his scheme of thought, a principle is (though he says much about what a principle might do). Is it so that there just are certain highest level principles within systems of principles within the basic categories of ends? It would be nice, for purposes of system building, if there were. But what, for example, is the highest level principle within the category of ends he calls "knowledge"? He does not say. And in regard to the category he calls "moral," he frequently writes as if there is one highest level principle to which at least many persons hold, yet on examination it turns out that this single highest level principle consists really of a whole cluster of principles. Moreover, Fried is forced to recognize that in the "moral" category—the category consisting of ends affecting others—there are several possibly inconsistent highest level principles, including "egoist" principles as well as altruistic ones.

Equally serious, Fried’s "lowest level" principles very often turn out not to be principles at all. Here are some of the things he often calls lowest level principles: rules of games; plans or strategies for games or for military action; blueprints for works of art and architecture; composers' scores for pieces of music; theorems of mathematics; choreographies for dances; directions for assembling machines; and even arguments and legal rules. Small wonder Fried has so many principles in his ontology. This varied reality turns out to be particularly unfortunate, for it signifies that Fried cannot have the systematic elegance he strives for. It is possible to have systems of principles, but not systems of plans, or systems of scores, or systems of choreographies.

B. Errors of Exclusion

Fried omits much that is prominent in at least our own present-day world of values. Thus, he does not treat ideals as such. Insofar as they enter his analysis they ride in on the backs of certain principles he introduces. Moreover, these principles, even the highest level ones, are conceived of as formal principles. Yet men—many men—live by ideals, personal and social, and they conceive of these as substantive in charac-

---

68 Nor does he clarify the criteria he uses for classifying principles as higher, intermediate, and lower.
69 See Fried ch. IV.
70 Id. at 53-54.
71 See id. chs. II, III. Yet elsewhere Fried is critical of what he calls reductionism. Id. at 105. On reductionism as a source of error in legal philosophy, see Essays in Legal Philosophy 10-11 (R. Summers ed. 1968).
72 Justice is an example. See Fried ch. IV. Occasionally, Fried explicitly utilizes the notion of an ideal, but this is only incidental, and sometimes by way of afterthought at that. See, e.g., id. at 232.
ter. Certainly the personal ideal of “being considerate of others” is substantive. So, too, the social ideals of liberty and economic justice. Instead, Fried champions particular ends. These “define us at every moment of our lives, indeed . . . we are our ends.” But surely by this kind of criterion we ought to recognize an independent place for ideals, too, for it is appropriate to say that men fight and die for ideals (though not for particular ends of the moment). Moreover, by the criterion of coherence (or relevance to coherence) ideals should be included, too, for men organize their lives around them.

The concept of “ways of life” does not as such figure in Fried’s world. Yet persons do in fact pursue different ways of life occupationally, geographically (e.g., urban versus suburban), in terms of world view (e.g., secular versus religious), and so on. Indeed, the ways of life persons pursue tell us as much about them (if not more) than the particular ends they happen to be pursuing at the time. Furthermore, ways of life lend coherence to what we do and value.

Within the class of particular ends, Fried is preoccupied with rational actions as actual or possible ends. To the extent he recognizes the existence of actual or possible forbearances within the world of values, this is largely coincidence. Yet much of moral life (an important facet of the world of values in Fried’s own scheme) consists not of positive actions of one sort or another, but of forbearances. This is not merely a linguistic point. It is true that many forbearances can just as well be represented as actions; for example, refraining from lying may be represented as telling the truth, and refraining from promise-breaking may be represented as performing promises. But even so, much is left for the category of true forbearances; for example, refraining from forms of covetousness such as theft and rape and refraining from interfering with advantageous relationships that others have. Perhaps one reason for Fried’s neglect of this important facet of our value world is that he generally neglects the “bad” in this study, and in the realm of forbearance we refrain mainly from the bad. The only place in his work where he takes account of forbearances in any sustained fashion is to-

---

73 Id. at 37. But what on earth can this mean? One is reminded of Proudhon’s remark that property is theft. Even if patently false, it is still a way of making a point.

74 Fried is not explicit about the ontological criteria he uses, but the two mentioned in the text—“what defines us” and “coherence-determinativeness”—seem to be the only ones, and they would both require that independent status be accorded to ideals. For an illustrative account that accords such status to ideals, see Findlay, *The Structure of the Kingdom of Ends*, 43 Proc. Brit. Acad. 97, 105-08 (1957).

75 For a helpful recent account, see P. Taylor, *supra* note 6, at 151-58. Less helpful is Summers, *Professor Fuller on Morality and Law*, 18 J. Legal Educ. 1, 4-5 (1965). At one point, Fried uses the phrase “way of life” but it is quite incidental. *See Fried* 121.
wards the end where he treats forbearances from taking unreasonable risks (a relatively narrow sub-class).

C. Errors of Mis-Relationship

To the extent a thinker fails to get the relationships between the phenomena within his scheme "straight," he also errs in a significant way. First, Fried thinks the relationship between the constituent elements within any particular rational end is aptly represented as a kind of "dialectic between the material and the formal." Here, he seems preoccupied with the aesthetic category (and with Hegel). It may be that the artist consciously "incorporate[s] the material limits of his work into his formal structures." But this jargon does not felicitously apply to a wide range of other sub-classes of rational ends. It does not apply to forbearances. And it does not apply to wide varieties of actions that may count as ends, too. Indeed, consider examples obvious to the lawyer interested in moral theory. A man has entered a well-drawn contract. Now, when he performs it, is there a kind of "dialectic between the material and the formal"? No. The promisor is not free to create in the way the artist is. Rather, he must perform according to the contract, as specified. True, he has to put "materials" together to perform the contract, but this is at best only remotely analogous to the work of the artist who "incorporate[s] the material limits of his work into his formal structures." Contract performers are not artists; they are "bound" to contract specifications. Artists are free to create, more or less.

Of course, before two phenomena can "have relationships" there must first be two phenomena. Can the anatomy of particular rational ends be divided up into "formal" and "material" elements in the first place? Fried gives examples, and again, his aesthetic ones are most plausible. One can envision an artist working with art forms (the "formal") and a brush, colors, and a canvas (the "material"). But how are we to draw this distinction outside aesthetic contexts where the familiar notion of an art form is inapplicable? Fried asserts, for example, that in the action of making just restitution for some valuable thing, the "formal" facets have to do with the injustice of the original acquisition, the adequacy of the restitution, and the appropriateness of gestures of apology. But Fried does not tell us how such considerations of justice, adequacy, and appropriateness are "formal." Certainly they are not art forms. Fried does say they help "determine" the structure

76 Fried 33.
77 Id. (footnote omitted).
of the particular act of restitution. But so, too, do considerations of time and place, and the physical capabilities of the actor, and so on. Are these phenomena formal as well? If so, what is left for the "material"? No doubt for the sake of preserving the comprehensiveness of Fried's general theory it would be nice if we could divide all particular rational ends into "anatomies," each of which includes formal and material elements. But Fried himself does not articulate generic criteria for doing so, and in many of his specific examples the way he draws the distinction seems arbitrary. It would be possible to say that what is formal within the anatomy of a particular value consists of that which is supplied by formal principle. But this would only transform the analytical problem into one in which the difficulty would be that of deciding how to distinguish formal from material principles. Moreover, it is interesting that Fried does not seem to be able to decide whether or in what sense principles of morality (which are of great importance in his scheme) are formal or are material. Thus, at one point Fried says "the principle of morality is formal." At another he says "morality" is a "substantive" end. This, at the very least, is somewhat mystifying.

What are the relationships between Fried's various principles (at all levels), on the one hand, and the particular rational ends that they are supposed to "structure," on the other? He usually proceeds as if there were only one relation here—that of structuring to structure. Whatever this relation involves, it is plain that for Fried there are still further functional relations between principles and ends. Thus, he says pursuit of certain ends depends upon commitment to certain principles. This would be a second kind of relationship beyond the "structuring" one. For example, he says for a person to be a friend he must accept Fried's principle of morality. It is not possible (logically?) to be a friend without this. A third kind of relationship between principles and ends is this: Principles are supposed to offer some practical guidance with respect to the choices we ought to make. Thus, it will not do for Fried to proceed generally as if his principles merely structure particular ends (if in fact they do). Instead, he subsumes, without ever conceding as much, a wide variety of supposed "relationships" under this heading.

A further "relationship" question is this: What are the relationships between the various levels of principles that Fried stresses so
emphatically? There are at least several possibilities including: the relationship of instance to generalization, the consistency of inter-relationship, and the deduction of one from another. But Fried is obscure, partly because he does not settle on any of these but vacillates between them. He offers at least three different accounts of the relationship, each of which is quite different in character, yet he proceeds as if they were identical. The three are as follows:

(1) Indeed in a formal sense the process of accounting for a particular instance is generally that of finding some more general rule or principle of which it is an instance. What else can the process of accounting for the principle consist of than referring that principle to some more general concept?82

(2) My thesis is, however, that such deeper and more general principles do exist, and that the coherence of the more specific principles and plans of particular rational ends is a function of their consistency with these deeper, more general principles.83

(3) Neither Rawls's principle of right nor my principle of morality is meant to apply directly; rather both are intended to generate further more particular principles. In the scheme of this work, the principle of morality is the most general principle for transactions. From it are derived more specific principles, until finally we arrive at the rational principle for a particular end or action.84

The first of the foregoing suggests a relationship of instance to generalization, as in some forms of scientific induction. The second suggests merely a relationship of consistency. The third suggests a relationship of “following.” The first is obviously different from the latter two. But the latter two are themselves quite different as well. It is one thing for a principle to be consistent with another principle and quite another for it to follow from it. Thus, the principle “act in accord with one’s own self interest” and the principle “keep one’s promises” may be consistent with each other (depending on the circumstances), but the latter hardly follows from the former.

D. The Ultimate Error

In Fried’s Kingdom of Ends, the End of Coherence is King.85 This must mean that very strange people inhabit Fried’s kingdom. For what these people value seems far less valuable than what men as we know them actually value. Men as we know them value goodness first and

82 Id. at 28.
83 Id. at 30.
84 Id. at 72.
85 Id. at 4, 60, 100.
foremost (although they may sometimes entertain perverse notions of what is good). They are interested mainly in those features of the "anatomy of particular ends" which lend value to those ends. They are interested in those features of particular systems or orderings of ends which to these persons lend value to such ends. Now, no doubt coherence is a part of this, but so, too, is goodness, and a much larger part, at that. In short, the valuing beings who inhabit Fried's world and thus strive mainly for coherence are a most peculiar species. Possibly they are not even persons.

Fried seems uneasily aware of this possibility. On the second page of his essay, he says:

As I will consider ends in respect to notions like love, friendship, trust, knowledge, beauty, life and death, as well as in respect to institutional notions like justice, society, and law, I am quite clear that much—most, perhaps—of what makes these ends most vivid and crucial to us will escape this statement and analysis. But this too is a gain for understanding and appreciation, since these most elusive aspects of significant ends are at least picked out negatively; they are the unstated residuum which defies analysis, or at least has defied my analysis.

But the foregoing can be interpreted, too, to mean that Fried does not realize that it is goodness he leaves out of account. Indeed, some of his later remarks suggest as much, for he says, among other things:

For in all such ends, and in the system of these ends, the elements which are not susceptible to an analysis in terms of consistency with more general principles are as important as those which are susceptible to such an analysis. I shall call such elements material elements. Consider again the example of a formal proof. The canons of logical consistency supply the formal, what I have called the rational, element in the ordering. But what of the primitive terms in the proof, the definitions and premises? These, by hypothesis, are not derived from more general principles. They are given; they are a starting point. Roughly and loosely, the problem one wants to solve—where solution means consistency with general formal principles—is not set by general principles. It is the material element. This is perhaps clearer in the cases of music, poetry, art, and games. In each of these there are various levels of material ele-

---

86 It is not my own view, nor is it Fried's, that particular persons actually value only what is good. They may also value what is bad. They might even value phenomena that are neither good nor bad. Indeed, value has been defined by some thinkers as "any object of any interest." See, e.g., R. Perry, General Theory of Value ch. V (1926). But it is my own view, as indicated in the text, that it is goodness (rather than coherence) that makes most things valuable (either instrumentally or intrinsically so) to most persons who value these things.

87 Fried 2.
ments, of givens. In painting they may be the facts of color, shape, two dimensionality. . . .

. . . .

. . . In this essay I have been seeking to unpack the internal structure of those ends and values and thus to show if possible why a particular value requires that it be assigned a certain weight.\textsuperscript{88}

Of course, it is difficult for anyone in a work in value theory to leave goodness out of account. And despite the emphasis on coherence, on consistency, on structure, on order, and on form, it fortunately creeps into the analysis.

Finally, it should be noted that those peculiar persons in Fried's value world also make lots of conscious choices. They even choose whether to be moral persons—whether generally to do good and avoid evil.\textsuperscript{89} They thereby differ from humans familiar to us. These familiar types are "socialized"—most of them—generally to behave morally. They do not decide to behave that way.\textsuperscript{90}

II

Fried's Procedure for Analyzing the Anatomy of Particular Values

Fried says he wants to make the ends men pursue more "perspicuous" to those who pursue or might pursue them.\textsuperscript{91} He gives specific analyses of the anatomy of a variety of particular ends. He gives some analyses of relationships between ends. He is explicit at least about what a full analysis of the former kind might look like. Thus, a full analysis of the anatomy of a particular rational end would involve the following:

(1) an anatomization of that end into basic elements, "material" and "formal";

(2) an account of the "lowest level" rational principle that contributes to the formal element in the end;

\textsuperscript{88} Id. at 32, 96. Surely goodness lends weight. This remark quoted in the text (and others) also help show that Fried thinks he is concerning himself not only with anatomy but also with physiology.

It is appropriate to add that, of necessity, many criticisms in an article format must be suggestive in character rather than fully worked out. This is preeminently so of my criticism that goodness rather than coherence must be of primary significance in any satisfactory value theory. Obviously, it is not possible to work out an affirmative general theory of goodness here. A book (at least) would be necessary. And, at that, it would have to be tentative in nature.

\textsuperscript{89} Id. at 55-57.

\textsuperscript{90} See Mabbott, supra note 64, at 121.

\textsuperscript{91} Fried 1.
(3) an account of higher level principles that also contribute, albeit indirectly, to this formal element; and

(4) an account of the systematic character of the relationship between the relevant lowest level principle and the system of higher principles of which it is a part.

But to give examples of particular analyses and to set forth explicitly what a full analysis would look like are not at all identical with setting forth a procedure for the fruitful analysis of the anatomy of particular values. Although Fried alludes to the existence of an analytical procedure from time to time, he does not directly confront the task of constructing one. This is disappointing, for he is generally aware of the inevitably illustrative character of much of his effort. Indeed, he acknowledges that he gives only one more or less fully worked out illustration of the relationships between principles at various levels within a basic category, namely, those involving morality, justice, and love, all within the category of morality. Yet despite this awareness he does not seek rigorously to develop a procedure for analyzing the anatomy of values which persons might go on to utilize on their own in contexts beyond his illustrations.

This is not to say he says nothing of procedure. Fried certainly proceeds as if a procedure exists. Indeed, he states: “I assert that there is a procedure for analyzing ends which illuminates the end or value, qua end or value, for a person holding it.” Now, to what is this procedure to be applied? Fried is ambivalent. Sometimes he proceeds as if the question were: How is the anatomy of particular possible objects of value to be analyzed? At other times, he proceeds as if the question were: How is the anatomy of a particular value that a particular person actually has pursued or is now pursuing to be analyzed? Yet these are quite different (though not unrelated) questions, and the second requires a “fuller” procedure that also sets forth how we are to determine what end the actor has pursued or is actually pursuing. Fried struggles to formulate the criterion that this fuller procedure supposedly includes for determining what principles are the principles of the agent. He envisions an interlocutor stopping the actor and interrogating him about what his principles are. He thinks the actor will “acknowledge” the applicable principle when the interlocutor presents it to the actor as one among several alternatives. (This in itself is supposed to be

---

92 See, e.g., id. at 31.
93 Id. at 31, 74, 115.
94 Id. at 23.
95 Id. at 17, 22-25.
illuminating to the actor who has been interrupted, for he is supposed then to see more clearly what he has been trying to do all along.) 96 But Fried sees many difficulties with all this, and it is not clear that he ultimately ends up with the required criterion (or with an answer to the question: How is the interlocutor to know what alternatives to pose?). One difficulty he does not squarely confront is that his scheme presupposes pre-existing principles. But is it valid to assume that these principles always pre-exist, however implicit or inchoate they may be?

The remaining features of a procedure for analyzing the anatomy of particular rational ends would be equally applicable to the analysis of either rational ends actually being pursued by a person or rational ends that might possibly be pursued. Let us assume our concern is with possible ends. First, we are to divide the possible particular end up into its "material" and "formal" elements. 97 But how? Fried does not say. He does not even articulate generic criteria for drawing this distinction. And we have already seen that difficulties arise in applying the distinction outside the world of aesthetics and art forms. 98

Second, we are to identify and "unpack" the various levels of principles that "govern" the formal element in the particular end. But how? Here Fried does offer something explicit. He says: "[T]he procedure of formulating rational principles might be taken as similar to the method of Socrates." 99 And he alludes to "the general conceptions of courage, or wisdom, or justice which Socrates elicits from his interlocutors." 100 But Socrates used no one method, 101 and the methods Socrates used are not precisely relevant anyway. His concerns were not the same as Fried's. Socrates wanted to "unpack" courage, yes, but not with an eye to showing how, as Fried might say, it "structures the internal complexities within the anatomy of particular acts of courage." Furthermore, Socrates's methods are difficult to characterize and apply, as Fried himself seems to concede. 102

Third, we are to show that various levels of principles "intimately involved in determining the particular end" 103 are systematically inter-
related. But how? Fried does not say. He does not even settle on a consistent overall account of what the nature of this systematic inter-relation is supposed to be.\textsuperscript{104}

Thus, it turns out that although Fried may think he offers a general procedure for analyzing what he calls the anatomy of particular values, he does not do so. Had he done so, it would then have been useful to consider how a proffered procedure of this sort might be evaluated. We have already stressed that because of Fried's view of the world of values in which coherence reigns supreme (in place of goodness)\textsuperscript{105} any procedure he might offer would inevitably analyze coherence and not goodness, as such. Thus it would fail to capture what it is about particular objects of value (as viewed by persons) that makes them most valuable to most persons. But such a procedure might be deficient in still other ways, too. And in the final analysis, it would be important to consider whether any such general procedure for the analysis of all rational ends could be rigorously developed.

Finally, a procedure for giving an account is not identical with a standard or standards for judging the correctness of accounts. A thorough study would have to confront the problem of standards, too. From time to time, Fried offers this as a test: Does the procedure provide accounts that are illuminating for "the reader"?\textsuperscript{106} It is submitted that this is a non-standard.

\section*{III

\textsc{Fried on Means, Ends, and Intrinsic Value}}

In addition to offering a general picture of the world of values and some suggestions for analyzing the specific anatomies of particular values (all with accompanying illustrative analysis and examples), Fried is also out to slay a few dragons. Of these, the most important is the notion that all rational human activity takes the form of striving, via some means, to achieve some separable end state, distinct from these means, which is itself the ultimate object of value.\textsuperscript{107} A close corollary of this notion is the thesis that all such striving can therefore have only instrumental value, not intrinsic value.\textsuperscript{108} Fried believes that both the foregoing notion and its corollary thesis are false. And from their

\begin{footnotesize}
\footnotesize
\textsuperscript{104} P. 611 \textit{supra}.
\textsuperscript{105} \textit{See} text accompanying notes 85-88 \textit{supra}.
\textsuperscript{106} \textsc{Fried} 23, 47-48 n.
\textsuperscript{107} \textit{Id.} at 9.
\textsuperscript{108} \textit{Id}.
\end{footnotesize}
falsity, it seems to follow "that there is a multiplicity of ultimate ends, things valued for their own sake, and not just as instruments to the attainment of some other end."\(^\text{109}\) Fried suggests that bringing us to view things in this way will redress an important imbalance.\(^\text{110}\)

Fried gives a wide variety of examples of particular pursuits in which it is not, in his view, possible to differentiate between a "means," on the one hand, and a separable and distinct "end-state," supposedly the ultimate value, on the other. Thus, a dance is not to be thought of as so many steps taken in accord with a given pattern so as to achieve a separate and distinct end called the dance. The dance just is these patterned steps.\(^\text{111}\) Acts of love are not to be thought of as means to some separable and distinct end state called love. Love just is loving.\(^\text{112}\) No further end state can be adduced as determining loving in the way that, say, the end of securing nourishment determines the aptness of eating certain foods to that end.

Still, Fried recognizes that even if the acts of dancing and the dance, and the acts of loving and love are \textit{inseparable}, dancing and loving might nonetheless only have \textit{instrumental} value, for the agent might not think of himself as engaging in them at all "for their own sake," but rather for some further, higher purpose. He might be dancing to improve his health, or loving to discharge certain religious obligations. To have intrinsic value in Fried's scheme, the agent must consciously pursue the end \textit{at least partially} "for its own sake."\(^\text{113}\) And Fried thinks humans do often pursue ends for their own sake, or partly for their own sake. He thinks we can see most "clearly" how this can be if we recognize the very considerable internal complexity displayed in the anatomies of even the seemingly simplest ends.\(^\text{114}\)

Fried is at great pains to stress the inner complexities of the "anatomies" of seemingly simple ends. He considers eating:\(^\text{115}\) Eating is an action. Eating can be not just a complex end, but an exceedingly complex end. Consider eating at a historic state occasion. This eating may be broken down into several elements; for example, sight and smell of food, handling and cutting it, biting, chewing, and swallowing, and also special memories or beliefs associated with the occasion, and so forth. Thus, eating can be complex in the sense that it includes

\(^{109}\) Id. at 10.  
\(^{110}\) Id. at 10, 12.  
\(^{111}\) Id. at 28.  
\(^{112}\) Id. at 77-80.  
\(^{113}\) Id. at 28.  
\(^{114}\) Id. at 10.  
\(^{115}\) Id. at 11-12
several elements, complex in the sense that these are elements of different sorts (e.g., nonmental and mental), complex in that the elements are "arranged in a particular, only partially variable order," and complex in that the rhythm and spacing in time as well as the sequence in time of the elements is important to the realization of the end.

In stressing the internal complexities of the anatomies of particular ends, Fried is really trying to kill two birds with one stone (although he is less than explicit about this). As we saw in the first section of this article, he wants to break the anatomy of particular ends down into various parts in order to show how "coherence-determinative" factors are at work, for he thinks this will enlighten persons who pursue or might pursue these ends. However, he thinks that if we break down the anatomy of certain particular ends into various elements of a complex whole, this will enable us to see more "clearly" how these ends can be valued for their own sake. Here he seems to be assuming that it is easier for us to understand how an agent might value something for its own sake if it is something complex rather than simple. Actually, this is a dubious assumption and probably reflects the preoccupation of academic minds with the "complex and difficult." For, as poets tell us, even the simplest things in life are objects of great value. It might be that some of the simplest things really turn out to be complex, but this remains irrelevant to whether they can be valued "for their own sake." At times, Fried even seems to require that the end be a significantly complex one before it can be valued for its own sake.

Fried does not offer an extended analysis of the key phrase "valued for its own sake," a notion that serves as his prime criterion of intrinsic value. Nor does he consider the psychological sources of difficulty in applying the distinction between valuing something instrumentally and valuing it for its own sake. Doubtless when human beings act they seldom think consciously in terms of this distinction. And when they do, they may (erroneously?) think of what they are doing as a means to some separate end state. (Indeed, this is something Fried wants to rail against.) Possibly, Fried or some other interlocutor might be on hand to straighten such persons out and make them realize that they were

---

116 Id. at 13.
117 Text accompanying notes 9-31 supra.
118 Fried 10.
119 It may be that the fact we do value some things "for their own sake" (if we do) does not enable us to distinguish between instrumental value and intrinsic value, a possibility Fried does not consider. Indeed, Fried generally refrains from taking sides in the philosophical controversies over the tenability of this distinction. (Actually, more than one possible distinction may be involved.)
really pursuing something for its own sake (at least partly). But if this
is to be a possibility, how can it be a requirement (as it is in Fried’s own
scheme) that in order for a particular end to have intrinsic value the
agent himself must think of himself as pursuing that end at least partly
for its own sake?

Fried offers many examples of ends that can have intrinsic value
(can be “ends in themselves”), depending on the psychological states of
the agent, for he wants to stress their ubiquity. Indeed the following
phrases are among the most commonly used in the entire essay: “end
in itself,” “ends in themselves,” “intrinsic value,” and so on. It is
therefore puzzling to find him opening his otherwise illuminating and
lengthy account of the “concept” of privacy with the remark that we
value privacy highly but that it cannot be or is not an end in itself.121
Precisely why it cannot, he never says. He seems to think it only a
“rational context” within which other ends such as love may be realized.
Yet there is no reason why one could not value privacy for its own sake,
by Fried’s own criteria. Some forms of privacy are indeed “complex,”
and the notion that a person might, for example, “want to be alone” in
some places and in some circumstances just for the sake of being alone
is at least intelligible.

Fried equates “end” with “value,” and “intrinsically valuable”
with “end in itself.”122 But he does not address himself to the fact that
what may be intrinsically valuable to a particular person may, objec-
tively speaking, be either a positive good, or something bad. Certainly
a person could pursue something bad for its own sake. It seems, at least
generally, that when he uses the phrase “intrinsic value” or the phrase
“end in itself” he has in mind something that he considers a positive
good.123 Thus, for him it is one of the very highest goods for men to
treat other men as ends in themselves and not as means to their own
ends.124 This way of thinking may tempt one to think that all men are
ends in themselves—have intrinsic value—are intrinsically good. But
so far as we humans can know, at least some men appear rotten to the
core.

Moreover, any “intrinsic value” thesis that equates value with

---

120 The terminology “end in itself” is likely to be misleading. It is odd that Fried
adopted it, for it suggests (to some) that ends may be divorced from their means of
realization, a point Fried wants to deny, at least for some ends. See p. 617 supra. For
reasons Fried would likely endorse, John Dewey once urged that “end-in-itself” is a
121 FRIED 137-38.
122 Id. at 11, 137.
123 See, e.g., id. at 77, 117-18.
124 See id. at ch. IV, 244.
goodness encounters at least two further problems. First, what has intrin-
sic value (goodness) may lose this value if pursued to excess. Cour-
age may turn into foolhardiness, generosity into lavishness, and so on.\textsuperscript{125} Second, it will always be possible to fill out descriptions of actions that are generally "good in themselves" but which in the circumstances are actually bad. An example is telling the truth but thereby giving away an important state secret.

Finally, Fried, as we saw, hopes that via his analysis an "important balance may be redressed"—that we will be "brought to see that there is a multiplicity of ultimate ends, things valued for their own sakes, and not just as instruments to the attainment of some other end."\textsuperscript{126} Yet his analysis does not bring us to see this. At most, his analysis brings us to see the \textit{possibility} that our world might include many things valued for their own sakes. For it would be consistent with Fried's own analysis of intrinsic value for all the agents in the world at a given time to view almost everything that they undertook to do as done for some further purpose, and thus to have only instrumental value.

IV

\textbf{THE PLACE OF LAW IN FRIED'S SCHEME}

Law comes in for a brief treatment. As part of his overall effort, Fried says he wants to provide a "conceptual structure to bridge a theory of individual ends and a theory of social institutions ....."\textsuperscript{127} He thinks of "property, the law, and bureaucracies, mechanisms like the market, systems of roles like professions or social class" all as social institutions.\textsuperscript{128}

But it turns out that he is most concerned with trying to establish the point that these social institutions not only have instrumental value, but are also "ends in themselves," and therefore have intrinsic value. "[L]arge parts of the social system are necessarily ends in themselves."\textsuperscript{129} Thus, legal institutions such as marriage, criminal procedure, and a legal profession are ends in themselves. To the extent marriage is an end in itself, so too is its legal facet, for its legal facet helps define and

\begin{footnotesize}
\begin{itemize}
\item[125] A widely recognized point. \textit{See}, e.g., A. MacIntyre, \textit{A Short History of Ethics} 65-66 (1986).
\item[126] Fried 10.
\item[127] \textit{Id.} at 106 n.
\item[128] \textit{Id.} at 114.
\item[129] \textit{Id.} at 105.
\end{itemize}
\end{footnotesize}
express the nature of marriage itself. It is argued that the institutional aspect of being married is an end in itself in that it shapes the underlying relationships that have "intrinsic value, as for instance relations of love." Criminal procedure, too, is partly an end in itself—an end having intrinsic value, because, for example, it defines and expresses such ends in themselves as (1) the system of constraints that assures that the innocent are not convicted and condemned, and (2) the adversary system of trial that expresses the moral equality between accuser and accused which is thus an end in itself. A legal profession is an end in itself in the sense that certain professional roles—for example, defending unpopular causes—are expressive of such ends in themselves as justice. Thus, the lawyer defends the unpopular cause "because justice requires" this, and justice is an end in itself. More generally, the whole legal profession is "systematically bound to certain aspects of justice."

Fried tries to show how legal actions, and relations, being ends or sets of ends, fit into some basic category of ends. Thus, he says law belongs to the category of ends involving actions that affect others—the moral category. The highest level principle relevant to the determination of actions and relations having legal facets, then, is the principle of morality. An example of an action with a legal facet would be that of paying one's taxes. This action has an internal complexity. But a full analysis of its character requires (1) an account of the lowest level rational principle that defines and determines this action, (2) an account of the bearing of any relevant intermediate level principles, and (3) an account of the bearing of the highest level principle—that of morality. Now the lowest principle here, according to Fried, would be a legal rule imposing the tax. Intermediate level principles of relevance include the principle of justice. Thus, the constraints of justice are expressed through law. Fried sums up: "[T]he function of concretizing the constraints of justice is the most characteristic function of law." Presumably, in the taxation example, justice specifies, among other things, equality of tax burden. Ultimately, we arrive at the relevant highest level principle at work here, the principle of morality, which, as we have already suggested, generates the principle of justice (among other principles). For Fried, the foregoing schema reveals a "mode for

---

130 Id. at 117-21.
131 Id. at 125-32.
132 Id. at 132-35.
133 Id. at 125 n.
134 Id. at 124-25.
135 Id. at 122.
evaluating” social institutions, such as law, which is “appropriate to their nature.”

Fried’s main thesis about law in society is a valid and neglected one. Law is not necessarily merely instrumental in character. Certainly some laws, legal institutions, and legal processes may themselves have their own independent significance quite apart from the particular ultimate uses to which they are put. Take legal processes as an example: Quite apart from the outcomes, decisions, and results of these processes, we may inquire, too, into their own “intrinsic worth.” A process for trying criminal defendants may be designed to incorporate such important “process values” as procedural fairness to the parties and freedom from undue influence on decision makers, both of which are values not unrelated to the quality of the outcomes of these processes but which nonetheless have an independent significance of their own in that failure to observe them is separate ground for criticism even where the relevant outcomes may be considered sound in substantive terms. Many other illustrative examples could be cited.

But why shroud this perfectly valid thesis in the terminology of “ends in themselves,” as Fried does? Doubtless he wants comprehensive symmetry and systems. He buys it at the price of terminological awkwardness and conceptual strain (of his own making). This awkwardness is most obvious when he concludes that law as such is an “end in itself.” And conceptual strain is indeed evident, for earlier in his essay, Fried conceptualizes those objects of value he labels “ends in themselves” as ones that persons think of themselves as pursuing “for their own sake.” Who on earth thinks of himself as pursuing law, or even particular facets of law, “for their own sake”?

Notice, too, how lust for comprehensiveness and systematic structure induces Fried to categorize legal rules as “lowest level principles” within his scheme. The foregoing taxation example is illustrative. The legal rule (lowest level principle) imposes the duty to pay taxes and thus “structures or orders” the anatomy of the particular end of paying one’s taxes. Here Fried’s anatomical schema has become an idée fixe. True, there are analogies between what some legal rules are supposed to do and the various functions of choreographies, game plans, musical scores, art forms, and the like (all of which Fried ultimately lumps under the heading of “lower level principles”). Perhaps the analogy

---

136 Id. at 136.
137 Of course, these could be of independent significance without having “intrinsic value,” a possibility Fried does not take up.
138 Fried 136.
139 Id. at 22-23, 28.
between legal rules of marriage and non-legal rules of games is the closest, for both kinds of rules are in some sense constitutive. But generally speaking, although all rules of games are "constitutive" of the games they structure, most rules of law are not thus creative and are, rather, regulative in character. Most rules of law are not institution-creative, like the rules of marriage or rules of criminal procedure. Most rules of law govern "already created" forms of human behavior.\(^\text{140}\)

Finally, Fried is led, it seems, by preoccupation with his own framework of thought, to see law as structured and ordered by "higher level" principles of justice which he thinks of as standards for the criticism of law which are "appropriate to [law's] nature" as a system of expressive relations—as ends.\(^\text{141}\) Aristotle might go for this way of looking at law (and other things). But, at the very least, if Fried is to say that law has a true nature, and that part of this nature is to do justice, then he should also confront the well-known objections to this way of looking at things, objections that comprise a whole critical tradition centuries old.\(^\text{142}\)

### Conclusion

Although the thrust of this article has been critical, Fried's essay is not devoid of merit. Important segments are devoted to notions of morality and justice.\(^\text{143}\) I have refrained from giving frontal consideration to these, for Fried acknowledges that they are much influenced by the work, published and unpublished, of John Rawls.\(^\text{144}\)

But there is much of merit in Fried's essay that is plainly his. In the chapter on privacy he demonstrates how privacy is essential to the pursuit of such important personal and social ends as love, friendship, and marriage. He shows, too, how unlike our own and how objectionable would be a world in which each of us was subjected to some kind of electronic monitoring device. Then, too, Fried takes up and treats in enlightening fashion the seemingly anomalous fact that "we are prepared to expend far greater resources in saving the lives of known persons in present peril, than we are prepared to devote to measures

---

\(^{140}\) On the well-known distinction between constitutive and regulative rules, see D. Shlayder, The Stratification of Behaviour 271-73 (1965).

\(^{141}\) Fried 136.


\(^{143}\) E.g., Fried ch. IV.

\(^{144}\) See note 3 supra. Not until Rawls's forthcoming book on justice is published will it be possible to separate Fried from Rawls. At least one should wait before trying.
that will avert future dangers to persons, perhaps unknown and not yet even in existence.”

Then, too, although not original with Fried in basic concept, this essay includes interesting and fruitful developments of the idea of a “life plan.” A person can go seriously wrong in his value pursuits if he does not understand the constraints they impose and the conflicts they generate, and plan accordingly. But if he understandingly adopts a rational “life plan” he can maximize the value of life. One cannot hope to eliminate all constraints—indeed, if one is to be a just man or a moral man, this in itself will impose constraints on the ends one may choose and on how he may pursue them. Nor can one hope to eliminate all conflicts between the various ends that he might pursue. But through a life plan one may, among other things, eliminate some conflicts and arrange to do possibly conflicting things at different times, thereby minimizing conflicts. Through a life plan one rationally “deploys ends in time.” Fried also illuminatingly discusses what he calls the “form” of possible life plans, and various factors that, as he puts it, “shape” particular life plans.

In sum, I for one want to see more Fried. No doubt other readers will feel this way, too. But it also seems safe to predict that some future readers will prefer that he eschew the form of system building that pervades (and in my view, mars) his essay. One is hard put to identify a single substantive insight in the essay that clearly derives from his “system” as such.

Furthermore, some of his future readers will prefer that he strive for more clarity. Much of the first two-thirds of his essay proved ex-

---

145 FRIED 207. This part of the essay, and the part on privacy, have both been published before. Fried, The Value of Life, 82 HARV. L. REV. 1415 (1969); Fried, Privacy, 77 YALE L.J. 475 (1968).

146 See especially FRIED 97-101, ch. X. Fried acknowledges indebtedness to Hegel, Sartre, and Mabbott. In particular see J. SARTRE, BEING AND NOTHINGNESS (H. Barnes transl. 1956). See also Mabbott, supra note 64, at 118-23.

147 Id. at 157.

148 Id. at 101, 155-69. Fried says he is content in this essay to sketch the rational structure of a life plan only with respect to how it “orders ends relative to questions of life and death.” Id. at 101.

149 Id. at 169-77.

150 Of course, a given system may have value. But then, too, it may not. And it may get in the way. Worse than this, it may prove to be an affirmative source of error, rather than a distinctive source of insight and illumination. For example, at one point after having set up basic categories of ends to which all particular ends belong, Fried decides there must be one unitary end or category of end at the very top, and this, he says, is the End of Coherence. Now surely this is highly questionable, and even more surely, Fried would not have been led to say it if he had not been afflicted with a case of symmetrophilia.
ceedingly difficult to read.\textsuperscript{151} Perhaps Hegel's influence is partly to blame. Certainly there are some striking similarities in form and in style—system building for its own sake, notions of “dialectical” interrelationship, the persistent equating of highly disparate phenomena, recurrent but subtle shifts in thesis,\textsuperscript{152} excesses of profundity,\textsuperscript{153} and continuous repetition of key terminology.\textsuperscript{154} Now it is certainly not for me to say whose work should inspire whom, or whose work another should emulate (if anyone's). And doubtless Hegel puts forth many substantive insights.\textsuperscript{155} Still, it was no less an admirer of clarity than John Stuart Mill who, on reading Hegel, complained that:

I found by actual experience of Hegel that conversancy with him tends to deprave one's intellect. The attempt to unwind an apparently infinite series of self-contradictions not disguised but openly faced, really, if persisted in, impairs the acquired delicacy of perception of false reasoning and false thinking which has been gained by years of careful mental discipline with terms of real meaning. For some time after I had finished the book all such words as reflection, development, evolution &c., gave me a sort of sickening feeling which I have not yet entirely got rid of.\textsuperscript{156}

\textsuperscript{151} The chapter on privacy is an exception.
\textsuperscript{152} Discussions of this and the preceding three Hegelian attributes of Fried's work can be found throughout this article. See also Hegel's Philosophy of Right (T. Knox ed. 1965).
\textsuperscript{153} See, e.g., Fried's statement that “[t]hough there is a close relation between law and the concept of justice, there is no simple one-to-one correspondence.” Fried 122.
\textsuperscript{154} See, e.g., Fried's “structuring and ordering,” “ends in themselves,” “systems of principles,” and so on. Id. \textit{passim}.
\textsuperscript{155} Actually, in substantive terms, much of Fried's book is rather more Kantian than Hegelian. Compare id. chs. II-IV with I. Kant, Groundwork of the Metaphysic of Morals (H. Paton ed. 1956).
\textsuperscript{156} 2 The Letters of John Stuart Mill 93 (H. Elliot ed. 1910) (emphasis in original).