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Facing Up to Scarcity: The Logic and Limits of Nonconsequentialist Thought, Barbara H. Fried. Oxford University Press, 2020, xvi+269 pages.
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Facing Up to Scarcity collects Barbara Fried's papers on two themes that pervade her work: the challenge that accidental harm poses for deontological moral theories, and the flaws inherent in much social contract reasoning as it is put forward by political philosophers both on the left and the right side of the

political spectrum. Ten of the 13 papers in the volume have previously been published, but were rewritten for the volume, primarily with an eye to cohesion. Three papers are entirely new. Throughout the book, Fried puts forward no small amendments or minor quibbles; if sound, her criticisms threaten to undermine entire theories. While I believe that her forceful conclusions are not always warranted, her discussions nevertheless highlight important problems that need addressing. Combined with the fact that the book is unusually engaging – Fried's style is both refreshingly personal and surprisingly funny – this makes *Facing Up to Scarcity* a worthwhile read for anyone interested in at least one of its two key themes. While moral, legal and political philosophers are the target audience of this book, its discussions are doubtless of interest to many economists as well. For one thing, Fried's criticism of deontological moral theories amounts to a rather unabashed defence of an economic analysis to tort law and the thoughtful use of cost–benefit analysis to guide policymaking. In addition, her discussion of social contract theorising may prove insightful for economists working on bargaining theory.

Facing Up to Scarcity naturally reads as divided into two parts. Following the introduction in Chapter 1, Chapters 2–6 form the first part of the book. They focus on accidental harm and the difficulties encountered by deontological moral theorists when they try to capture what can make risking such harm morally permissible. Chapters 7–13 form the second part of the book. They explore flaws in the reasoning of political philosophers (Rawls; right and left libertarians) who help themselves to the idea of a hypothetical social contract to derive their respective principles of justice. In what follows, I discuss the two parts of Fried's book in turn.

Accidental harm and deontological moral theories

Suppose you want to get in your car to go grocery shopping. Is driving to and from the store a morally permissible activity? If you drive carefully, it seems that the answer is yes. But even if you drive carefully, you risk accidental harm to innocent others. It is possible that your brakes fail when you reach a red light, and that a person crossing the street ends up severely injured as a result. Many activities that we undertake in our daily lives risk such accidental harm, but we nevertheless deem engaging in them permissible if people take due care. Fried argues that this fact poses a serious problem for deontological moral theories. Her choice of terminology is unusual here. By 'deontological theories', she means essentially all normative ethical theories that are committed to the idea that 'it is wrong to cause death or serious harm to one person in order . . . to realize more trivial benefits for others, no matter how numerous those others are' (45). The problem she sees for such theories takes the form of a trilemma. Either any such theory forbids all activities that threaten accidental harm, in which case the theory is implausibly restrictive: it leads to 'unacceptable . . . moral gridlock' (10). Alternatively, the theory permits at least some risky activities under some conditions, in which case it either offers no more than 'ad hoc solution[s] in a handful of cases' (109) or else accepts, contra its core commitment, that small

benefits to many can and regularly do outweigh harm to a few. For Fried, this leaves utilitarianism (a term she frequently uses interchangeably with consequentialism) as the only viable option. To her, utilitarianism is the only approach to moral theorising that is upfront about the fact that the conditions of scarcity that characterise our lives make trade-offs inevitable, just as it is the only theory that resolves such trade-offs in a principled manner.

There is much to commend in Fried's discussion of the problem of accidental harm. For one thing, Fried is surely right that until rather recently, the deontological literature was unhelpfully dominated by 'trolleyology' (ix), which is her apt phrase of art for a methodology employed in normative ethics that puts heavy emphasis on discussing hypothetical cases where it is simply stipulated that the consequences of all alternatives for action are known to the agent at the time of acting. I agree with Fried that focusing on such cases has obscured just how pervasive the problem of accidental harm is in real life. I also agree that when we move from artificially stipulated certainty about consequences to more realistic cases that include risk and uncertainty, how best to proceed in our theorising is neither a relatively straightforward nor an entirely non-moral issue (see Fried's discussion of Parfit, 27–29). In addition, Fried convincingly argues that when deontologists discuss the permissibility of engaging in risky activities, they frequently tie this permissibility to vague terms such as 'reasonable precaution' (Scanlon, see 30, fn. 16), where it is unclear how the vague terms can be operationalized in a way that departs from a rule consequentialist calculation of what sort of regime would maximize the general welfare. Finally, in her forceful Chapter 6, Fried makes the important point that while deontologists in general, and contractualists in particular, have started to discuss the problem of accidental harm in recent years, they have tended to stipulate the probabilities with which particular individuals will be harmed as a result of an agent's choices. Fried convincingly argues that this type of information will not, in general, be available to agents, no matter how crucial it is for the applicability of many deontological principles that have recently been developed to deal with risk (see esp. 111–116).

Despite these points of agreement, I disagree with Fried that the problem of accidental harm should lead us to conclude that deontology is doomed, or that utilitarianism is the only game in town. Even if Fried were right and an aggregative approach (where 'aggregation' is Fried's shorthand for a utilitarian cost–benefit analysis used to justify a set of moral or legal rules to regulate a risky activity) were the only principled way of thinking about the permissibility of activities that threaten accidental harm, this would not suffice to vindicate utilitarianism. While it is true that risky activities are pervasive in our daily lives, other parts of our lives are of moral relevance also. There is, for example, the problem of harm that we cause intentionally, or the domain of what we owe to each other in intimate relationships. Fried acknowledges this fact in passing (e.g. 83). But if there are domains where rule utilitarianism (or what Fried calls 'aggregation') does not reign supreme, this suffices to redeem non-consequentialist theories, not least because rule utilitarianism has notorious problems of its own (see Hooker 2016: sec. 8). Their value pluralism is characteristic of non-consequentialist theories, and it is thus perfectly consistent

for a deontologist to admit that at least some domains of ethical concern are suitably ordered by something akin to rule utilitarian principles.

But we can leave this first rejoinder aside. Even if we focus exclusively on accidental harm, we can still resist the thought that the only principled moral stance is utilitarian. Consider the Ford Pinto case, summarized by Fried as follows:

> In 1972, a new Ford Pinto stalled in the middle of a highway, causing the car behind to rear-end it. The force of the collision pushed the Pinto's rear-mounted gas tank forward and into the differential housing, puncturing it, [and] engulfing [the car] in flames. One of the two occupants died from the resulting burns. The other, a 13-year-old boy, was severely disfigured for life ....
>
> In the lawsuit the heirs and survivors subsequently filed against Ford for defective product design, pretrial discovery revealed that before the Pinto ever went into production, Ford knew about the danger that a rear-end collision would explode the gas tank.... Internal memos ... estimated that at a cost of $5 to $11 per car, the Pinto could be redesigned to decrease the probability of explosions significantly, saving an expected 180 lives. Ford management, estimating that the redesign would cost the company $137 million but save it only $49.5 million in projected damage awards ... declined to make the change. (22)

From a utilitarian perspective, the key complaint against Ford – if there is a complaint to be made – is that the company was overly focused on its own bottom line when considering whether to make the Pinto safer; it ought to have considered pertinent costs and benefits from a more impartial perspective. But what seems to me most striking about the case is that Ford knew about the relevant risks and would have been able to communicate them to consumers in a conspicuous manner, thus rendering consumers' choice to buy the model more informed. If Ford expected higher profits from *not* redesigning the Pinto at a cost of less than $11 per car, this was only on the assumption that potential buyers of the car would be kept in the dark about an obvious safety issue. For the vast majority of potential buyers, they probably would have preferred a slightly more expensive but significantly safer car had they known about the trade-off. As I see it, it is this deliberately maintained information asymmetry between Ford and the wider public that is most morally reprehensible about the case, not the fact that Ford's focus was on generating profits rather than promoting the general welfare.

Moving beyond the Ford Pinto case and to the problem of risky activities in general, it matters from a deontological perspective that, on expectation, making such activities permissible benefits all members of a society, and does so by their own lights. If we may permissibly engage in risky activities, this allows us to pursue meaningful plans and projects, thus enriching our lives. If the risk of harm that accompanies potentially dangerous activities is kept sufficiently low, the value of being permitted to engage in them outweighs the setback that their permissibility implies for our security (for a carefully developed such argument,

see e.g. Oberdiek 2017). Where the beneficiaries and those who bear the cost of a risk-imposing activity are clearly distinct, this renders the activity problematic for this very reason, even where it is agreed that permitting it would maximize the general welfare.[1] As I see it, this brings out a key problem with Fried's characterization of deontological theories as stipulating that it is 'wrong to *cause* death or serious harm' (45, my emphasis) to some for the trivial benefit of many others. What such theories in fact object to is that trivial benefits to some can ever be *sufficient, all by themselves, to justify* the imposition of grave harm on others.

Of course, it is always open to someone to argue that avoiding asymmetric information and turning everyone into an expected beneficiary are two excellent strategies for ensuring welfare maximization in practice. Maybe this is true. But even if it is, deontologists may reasonably insist that sharing information and ensuring that everyone is an expected beneficiary are considerations that matter morally in their own right. While Fried thus argues that the problem of accidental harm brings out that utilitarianism is the only game in town, I am much more inclined to read her arguments as providing support for the conclusion that welfare-maximizing considerations play an important role in regulating such harm, but are constrained and complemented by other considerations as well. To think that if welfare optimization matters, then other considerations do not matter, and vice versa, is a fallacy that both Fried and some of the deontologists whom she discusses fall prey to, and it is, I believe, a fallacy bred by what John Gardner calls 'excessive polarization'. As Gardner (2018: 57) puts it:

> Theoretical work on private law, as on many other issues in moral, political, and legal philosophy, tends to be excessively polarized . . . . Depressed by utilitarianism, people are naturally tempted to become not just non-utilitarians but anti-utilitarians, siding against the utilitarians on anything and everything. Shocked by an economic analysis, people are naturally tempted to rest everything on the one thing which, to their eyes, the economists missed. Appalled by one kind of reductive thinking, people are inevitably tempted by reductive thinking of some diametrically opposed kind. But most of the truth, here as elsewhere, is not diametrically opposed to anything.

Fried's discussion – rather ironically, but as one of its key strengths – supplies a wealth of material that we can use to steer away from excessive polarization.

Social contract theories of justice

Compared to the first part of the book, the themes that Fried tackles in the second part are rather more diverse. Chapter 7 is focused on how Nozick argumentatively moves from a state of nature to his desired night watchman state in his *Anarchy, State, and Utopia* (1974). Fried argues that Nozick's move is full of inconsistencies,

[1]Interestingly, Fried acknowledges that where one group is asked to bear costs so that another may benefit, this may justify a departure from rule utilitarianism. See her discussion (74 75).

and that his conceptualization of a right as something that may be crossed if the right-holder is compensated empties the idea of much of its force. Chapters 8 and 9 investigate why and how Rawlsian liberalism and Nozickian libertarianism come apart, and argues that based on their core commitments, both political philosophies might in fact have arrived at a similar conclusion: that a society is just iff it aims to maximize average utility provided everyone has sufficient resources to live a dignified life. In Chapter 10, Fried raises problems for left libertarianism. Her main concern is that the characteristically libertarian commitment to self-ownership does much less substantive work than people tend to assume. Chapter 11 criticizes Nozick's famous Wilt Chamberlain example, arguing that the example's focus on justice in transfer – are Wilt's fans permitted to pay him some small amount to see him play? – obscures what is really at issue, namely whether Wilt is entitled to the full market value of his talent and effort. Chapter 12 lays out how different social contract theories of justice reach vastly different conclusions by assuming different 'exit options'. Exit options specify what alternatives are available to an individual if they decline to participate in a general societal scheme. Most theorists provide no independent support for the exit options that they stipulate, and Fried shows that if we try to make these options realistic, they tend to vindicate the status quo. Chapter 13 argues that progressive taxation can be understood as an instance of differential pricing. Right libertarians have argued that differential pricing is generally permissible, whereas progressive taxation is not. Fried's argument challenges right libertarians to rethink this stance.

One theme that unites these rather diverse chapters is their criticism of the methodology employed by social contract theories of justice. Fried's crucial insight is that such theories yield clear verdicts only if we render vague ideas – of self-ownership, and, more importantly, of a hypothetical bargaining situation – fairly specific. And her main charge is that the specifications chosen by different theorists respond more to their pre-theoretical ideological convictions than to any other reasons we might have for choosing one specification over another. In this way, social contract theories fail to provide support for their (foregone) conclusions.

As before, I believe that Fried puts her finger on an important issue, but is ultimately unduly negative with respect to the problem that she identifies. It is hard to disagree with Fried that social contract theories yield clear verdicts only if, in particular, the initial bargaining setup is specified in sufficient detail. Moreover, Fried shows convincingly that seemingly small differences in assumptions can yield large differences in outcomes. But I find it implausible to presume that choices about specifications are generally made on ideological grounds, in particular if one suspects – as Fried tends to (see e.g. 228) – that this happens in a deliberate or self-aware manner. It seem likely to me that such choices are generally made in good faith, with authors unaware of the lack of independent justification provided for particular assumptions, and with biases creeping in despite attempts to design bargaining situations and the like in an ideologically neutral manner. Be that as it may, the more important point is that the problem diagnosed by Fried does not invalidate social contract theorizing in the way she thinks it does. As Fried sees it, her arguments '[cast] considerable doubt on whether the hypothetical outcome of a [social contractarian] bargain

can ever be anything more than an elaborately tricked-out version of the inputs supplied by authorial fiat' (228). But surely it can. What we need to do is look for independent justifications whenever some input or specification is needed. Where reasonable disagreement exists, this has to be made clear, and different independently plausible specifications might yield interestingly diverging conclusions. Far from being a methodology that we should dispense with because it lends itself to biased reasoning, the social contract approach to political philosophy can thus be put to fruitful use once we have diagnosed how biases can creep in. Finally, even if for some reason Fried is right and all social contract reasoning can merely be used to confirm a theorist's pre-existing beliefs, it might still be illuminating to see what specifications of a hypothetical bargaining situation fit with a particular ideological outlook.

In sum, what is true for many philosophical works is true for *Facing Up to Scarcity* as well: one need not agree with the author's conclusions to benefit from engaging with the arguments. Fried's arguments deserve careful attention, which they reward manifold.

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