

Correspondence

Simple-minded or Muddleheaded

To the Editors:

I intend no irony when I say that I am grateful to Professor Brian Barry for the attention he devoted to my *Right and Wrong*¹ in the January issue of the *Yale Law Journal*.² Nor do I think it generally seemly for authors to argue with book reviewers, but I must protest against the palpably distorted and inaccurate impression Barry gives of my stated position. Briefly, he has me down as a stony-hearted libertarian somewhere between Friedrich Hayek and Attila the Hun. He accomplishes this only by ignoring until a brief paragraph at the end of his review³ my emphatic argument⁴ that the needs and wants of our fellow man make affirmative moral claims upon us,⁵ and that we are morally bound to work for and support institutional structures that will exact from the more fortunate contributions to meet the needs and wants of the less fortunate.⁶ I do not undertake to specify the formula for that contribution, but suggest as two candidates Rawls's maximin and equality principles.⁷

Barry notes my arguments regarding the constraints on the right to receive and the duty to contribute a fair share of society's scarce resources: that attributes of personality (talents, body parts) are not to be counted as among society's scarce resources and so are not assessable in computing fair shares, and that in the usual case other persons' needs do not make *direct* claims on us—whether as citizens, lawyers, or doctors.⁸ He notes these constraints without adverting to the very substantial positive rights and duties thus constrained. Though my raw talents or body parts are not assessable, my consumption of goods and services is taxable and the taxes may be used to buy both talents and blood for the less fortunate.⁹ Though I do not have a general duty to relieve distress personally, I have a general duty to contribute to institutions that will fairly relieve distress. If such institutions do not exist, I have a duty to work to bring them about—as a lawyer or as a citizen.¹⁰ Just institutions are a kind of clearinghouse for the duty of, and right to, beneficence. And when anomalies cause these institutions to fail, then the duty comes in directly and personally.¹¹

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

2. Barry, Book Review, 88 *YALE L.J.* 629 (1978).

3. *Id.* at 656.

4. Pp. 108-31.

5. Pp. 118-19.

6. Pp. 128-30.

7. P. 129 (discussing J. RAWLS, *A THEORY OF JUSTICE* (1970)).

8. Pp. 139-50, discussed in Barry, *supra* note 2, at 652-55.

9. P. 142.

10. Pp. 128-30, 187.

11. Pp. 130, 188-89.

Correspondence

Finally, as to the callousness with which Barry argues I consider the situation of a person endangered by unintended but foreseen consequences of my action, the discussion of the economic analysis of rights¹² together with that of positive rights,¹³ both of which Barry ignores, leads me to conclude that a person negligently or recklessly risking harm to others “grabs more than his fair share of a scarce resource, namely the moral space in which the members of the community go about their business. . . . [He] is a kind of thief, and what he does is *wrong*.”¹⁴

Barry accuses me of “simple-mindedness,”¹⁵ rigidity, and reductionism. He makes these charges seem plausible by ignoring a crucial part of my argument. Perhaps this was because he concluded that the two halves of my thesis do not fit coherently together. He should then have accused me not of simple-mindedness but of muddleheadedness. In that event, however, Professor Barry could not have struck so satisfyingly righteous a pose.

Charles Fried
Professor of Law
Harvard University

13. Pp. 108-31.

14. P. 159 (emphasis added).

15. Barry, *supra* note 2, at 635.

12. Pp. 81-107.

