Tragic Choices and the Law

Leo Zaibert*

Abstract
Alon Harel’s *Why Law Matters* is a laudable attempt to sharpen our understanding of how the law deals with complicated moral phenomena, and of why and how these phenomena should matter to the law. I wholeheartedly agree with the non-reductionist spirit of Harel’s project. But I here offer a handful of objections to the letter of some of Harel’s positions, in the hopes that they may contribute to the advancement of the debate surrounding these difficult and important issues.

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Some of the central goals of Alon Harel in *Why Law Matters* are very dear to me.¹ I wholeheartedly agree with the importance of focusing on intrinsic value (regarding not only the law, but other sorts of normative phenomena), on taking notions such as dignity seriously, and on overcoming the overly quantitative rationality that animates much normative theorizing nowadays. Almost forty years ago, George Fletcher, in the preface to *Rethinking Criminal Law*, expressed his hopes that we would become “unstuck” from the recalcitrant utilitarianism underwritten by this sort of impoverished quantitative rationality.² Alas, we have not become unstuck: in spite of protestations to the contrary, in spite of ever more complicated euphemistic games, and in spite of ever more convoluted fancy footwork, the (sometimes vulgar) utilitarian ethos continues to hold sway. Paraphrasing Husserl’s views on science, we could with him lament: merely quantitative ethics make merely quantitative people.³ Regarding these goals, I consider Harel and me brothers in arms.

There are, however, two obvious risks attendant to projects such as the one Harel claims to be interested in undertaking in his book; projects, that is, that seek to overcome this overly quantitative rationality. One of these risks concerns the possibility of directing our gaze so far away from the empiricist moral mathematics of consequences that we end up embracing an obscure—and, at any rate, implausible—position. We may end up embracing a sort of “fundamentalist deontology,” to use Harel’s apt phrase. We could, that is, end up resembling the Talmudic *chasid shoteh*—a man so pious that he refuses to jump

* Professor of Philosophy and Chair, Union College (zaibertl@union.edu).


³ See Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology: An Introduction to Phenomenological Philosophy* 6 (1970). Husserl, of course, used “fact-minded” where I have used “quantitative”—but he clearly meant something very much akin to “quantitative.”
into a river to save a drowning woman, lest he touch her inappropriately. The other risk is to end up endorsing facile compromises between the quantitative approach one wishes to avoid and whatever its non-quantitative counterpart is taken to be. One such example would be the infamous “threshold deontology,” a position which amounts to little more than the formidable principle that, echoing Larry Alexander’s criticism of it, could be formulated as consequences do not matter, unless they matter.4

On a first approximation, it looks as if Harel succeeds in avoiding both these pitfalls. But I will argue that this success is doubtful, given his failure to transcend the reductive methodology that he himself diagnoses and rejects. In other words, to the extent that Harel does not make the usual mistakes attendant to the abandonment of the simplemindedness of much contemporary normative theorizing, this is because he simply does not really abandon that simplemindedness.

I. Harel and Dershowitz

Since Harel rightly rejects the simplistic calculation of lives and deaths that constitutes the bread and butter of utilitarianism—as if the value and dignity of human lives were easily quantifiable—he opposes efforts to build into the law things such as “torture warrants” à la Alan Dershowitz, or authorizations to down planes hijacked by terrorists. Harel usefully mobilizes Jeremy Waldron’s admonition against Dershowitz to the effect that if we legally authorize these sorts of acts, we run the risk of dragging the law, as well as the prisoners, to the waterboards.5 Criticizing Dershowitz for his view on torture warrants may perhaps be too much of going after a low-hanging fruit, for the weaknesses of Dershowitz’s position are abundantly obvious and have been abundantly discussed.6 But it is clear that, regarding whether or not torture warrants are a good idea, Harel and Dershowitz defend very different positions: Harel is against these while Dershowitz favors them. Be that as it may, however, I would like to argue that there is an important sense in which Harel’s position is very similar to Dershowitz’s.

Alan Dershowitz characterizes typical approaches to tragic choices as follows: “the arguments in favor of using torture as a last resort to prevent a ticking bomb from exploding and killing many people are both simple and simple-minded.”7 In spite of this recognition, and in spite of the fact that, albeit in passing, Dershowitz recognizes that in order to do justice to the complexity of these tragic choices we need to move beyond a certain “morality by numbers,” and consider “other [non-utilitarian


6 In addition to Waldron’s article, id., see Elaine Scarry, Five Errors in the Reasoning of Alan Dershowitz, in Torture: A Collection 281 (Sanford Levinson ed., 2004); Richard A. Posner, Torture, Terrorism, and Interrogation, in Torture: A Collection, supra, at 291; Richard H. Weisberg, Loose Professionalism, or Why Lawyers Take the Lead on Torture, in Torture: A Collection, supra, at 299.

principles of morality, such as the prohibition against deliberately punishing the inno-
cent,\textsuperscript{8} his views simply amount to variations on utilitarian motifs. By and large
Dershowitz simply supplements the crude Benthamite act-utilitarianism with less
egregious elements inspired by rule-utilitarianism—not without admitting that in his
view, “the strongest argument against any resort to torture, even in the ticking bomb
case, also derives from Bentham’s utilitarian calculus.”\textsuperscript{9} But in justifying torture he
never really engages with anything other than the simpleminded considerations of util-
itarianism—whether these are act- or rule-utilitarian. Dershowitz never really
transcends the simplemindedness that he bemoans—a point to which I will return at
the end of this article.

To reduce the problem of torture in ticking-bomb cases to actuarial calculus is to
misunderstand the demands of serious moral philosophy. In fact, to frame the problem in
terms of flatly asking whether or not torture should ever be permissible, as Dershowitz
does, is tendentious and dangerous (as Waldron, amongst many others, has suggested).\textsuperscript{10}
But to flatly reject the idea of torture warrants or of authorizations to down hijacked-
planes-turned-into-weapons, and to leave it at that, may also be a way of evading the real
moral dilemma at hand. That is why Harel admits both that to legally permit the killing of
civilians is to somehow go “amiss,” and that to accept the idea that “no action ought to
be taken to protect the lives of others . . . seems equally disturbing.”\textsuperscript{11} So, we do have a
problem—a real problem.

Rather than dealing with the tragic normative complexity of the dilemma, however,
at this juncture Harel explains the dilemma away with remarkable ease: we should never
have laws that permit torture or downing of planes with innocent passengers on board,
yet we—individuals—can do these things on occasion, provided that we recognize that
they are “extreme cases,” which are, by definition, beyond rules. Harel admits that “on the
face of it,” his line of argument “may seem like mere sophism: an empty analytic distinc-
tion.”\textsuperscript{12} Harel follows this admission with the obligatory “[b]ut this appearance is
misleading.”\textsuperscript{13} However, he never explains why the appearance is misleading—and thus
the air is not really cleared of the suspicion of sophistry and emptiness. All Harel does is to
repeat the very thesis that he admits may look empty or like sophistry: “[A]n action’s

\textsuperscript{8} Id. at 148. I leave aside the fact that, as standardly construed, these cases would not be instances of
punishment at all.

\textsuperscript{9} Id. at 145. Oddly, only one page later Dershowitz admits that this sort of argument (which he has just
attributed to Bentham) is best seen as stemming from rule-utilitarianism, even though Bentham was an act-
utilitarian. Id. at 146.

\textsuperscript{10} Waldron, supra note 5, at 1741.

\textsuperscript{11} Harel, supra note 1, at 108.

\textsuperscript{12} Id. at 122.

\textsuperscript{13} Id.
moral status can differ depending on whether it is done as a permissible act under the rules or as an exceptional one.”

Formally:

(1) I believe that \( p \).

(2) It may appear as if \( p \) is false (empty, a sophism).

(3) But this appearance is unwarranted, because \( p \).

I think that this is a serious problem with Harel’s defense of his thesis—a defense from an objection that he himself launched. While I do think the objection is pertinent, I will here proceed by assuming that such objection should not have been launched in the first place (so that Harel’s non-defense would be a moot point).

Harel unequivocally states that “there are circumstances under which planes ought to be downed. And of course agents are called upon to shoot the planes under such circumstances and not to shoot them under different circumstances.”\(^{15}\) When these agents do this, then they are, according to Harel, not following rules. The obvious objection is that in order to do this “the agent ought to construct a rule identifying the exceptional circumstance. But constructing such a rule and acting on its basis are precisely what is impermissible.”\(^{16}\) In other words, the objection is that every rational agent that decides to down a plane—the legally authorized agent and the one acting in “exceptional” cases alike—is following rules.

Harel’s solution is to assert that “identification does not have to be based on rules.” Harel does not give us much to work with: “[D]owning a passenger plane is to be done regardless of directives, statutes, or rules.”\(^{17}\) But this is just too unhelpful. In regard to what is this identification to be done? To refuse to propose a rational explanation as to why some planes ought to be downed and others ought not to, is to refuse to engage with the tragic choice at hand. Yet, the moment you propose any such explanation, then you have eo ipso introduced rules. Whenever we provide a reason why a plane ought to be downed, then we have a rule: something along the lines of “when such and such reason obtains, then the plane ought to be downed,” or even something very general, like “extreme cases require extreme measures,” as Harel himself says.\(^{18}\)

I take it that a fundamental problem facing Harel’s thesis itself is that it is not at all clear what Harel means by “acting (or not acting) under rules.” His view appears to boil down to the following: there are “normal, non-extreme contexts” which are to be covered by legal systems, in which torture is impermissible and planes ought never to be downed; and there are “extreme contexts” in which torture is sometimes permissible and planes sometimes ought to be downed (although these are mysteriously somehow “beyond

\(^{14}\) Id.

\(^{15}\) Id. at 124.

\(^{16}\) Id.

\(^{17}\) Id. at 125.

\(^{18}\) Id. at 129.
rules”). Legal systems cannot, in Harel’s view, deal with tragic choices. But then the rules that Harel has in mind circularly refer back to legal rules, for otherwise he could not deny that agents downing a hijacked plane are following some rules.

Extreme cases are, then, by definition matters for private individuals alone. As Harel succinctly puts it: “[O]nly private individuals may act in extreme cases, and their decisions do not count as decisions of the state.”19 If any public employee (“a soldier or a minister”)20 were to down a plane, the moment she did this, she would have ceased to be acting as a state official. So, imagine that after facing a tragic choice, a given government decides to act in this or that way; this government, by Harel’s lights, may have an easy time washing its hands by saying that, as a matter of sheer definition, the act it ordered would be wholly imputable to the individual torturer or the individual plane-downer—even if these individuals had been state officials following orders.

Once again, Harel realizes that his view whereby the fact that an “action is done [by a public official] in the name of the state” is not enough to claim that it was a state action “may be puzzling to the reader.”21 And once again Harel’s reply to his own objection strikes me as circular—he merely repeats his puzzling view:

The fact that an agent serves as a public official does not imply that an act she committed is a state act. Extreme cases are a distinctive category: cases that ought to be governed by a distinctive type of reasoning, which also dictates who the agents capable of engaging in it are. Only private individuals may act in extreme cases and their decisions do not count as decisions of the state.22

This is, I am afraid, a new iteration of the fallacious gambit we encountered before:

(1) I believe that p.
(2) It may appear as if p is puzzling.
(3) But this appearance is not real, because p.

Independently of this circular defense, Harel’s view that state officials simply cannot act in extreme cases is surely odd. Governmental agents can be faced with extreme situations, calling for difficult, tragic choices—at least as often as private individuals. But Harel stipulates that the moment they do anything about these extreme situations, they cease to be acting as state officials. This of course invites a series of questions. What is the point of this distinction? If Harel admits that a given action of downing a plane could be the right one, why does he insist that this action can never be done by a state official (as a state act)? Why does Harel stipulate that if the action were indeed done by a state official, she would eo ipso cease to be a state official?

19 Id. at 128.
20 Id.
21 Id.
22 Id.
I suspect that Harel thinks that this insistence is necessary in order to avoid “dragging the law to the waterboards.” I suspect that Harel thinks that this insistence is necessary to distance himself from positions such as Dershowitz’s. As noted above, I believe that Dershowitz’s position is very weak. But I just do not see how Harel’s maneuverings are helpful—either in allowing him to offer a cogent alternative position, or indeed in sufficiently distinguishing, at least in terms of a conspicuous simplemindedness, his position from Dershowitz’s. One could, after all, steadfastly reject entrenching torture warrants or justified hijacked plane downings in the law without resorting to the view that whenever a state official did one of these things she would eo ipso have ceased to be a state official.

Perhaps even more problematic is that this is not the only case in which Harel posits an overly sharp distinction between the public and the private spheres, or between the “normal” and “extreme” cases. These sorts of crisp binary distinctions are very conspicuous and important in his book. Just as Harel thinks that extreme actions cannot be carried out by state officials (but only by private individuals), he thinks that there are other actions that simply cannot be carried out by private individuals (but only by state officials). Allegedly, this is in part because Harel believes that “there are certain forms of reasoning which are not accessible to private individuals” and that there are other forms of reasoning that are not accessible to state officials: “[P]ublic officials cannot reason in extreme cases ‘by force of the circumstances.’”23 Other than because in the final analysis both state officials and private individuals are human beings (and they have the same access to the same sorts of ‘rationalities’), this is, I think, problematic at least in that it is not clear what Harel means by “accessible to.” After all, as we have just seen, Harel’s view is that when public officials do reason by force of circumstances they magically cease to be state officials. But obviously, whatever reasons Harel turns out to have for believing that it is sometimes permissible for someone to down a plane, these reasons are intelligible and therefore accessible to anyone—be she a state official or a private citizen.

II. The Law and the Evasion of Axiology

Consider Harel’s example of choice concerning an action that cannot be performed by individuals: punishment. Harel is very explicit about the metaphysical impossibility he has in mind: “It is not that it is impermissible for non-state agents to punish; it is rather that no other agent can punish, and any attempt to punish on the part of such agents is bound to fail, and constitute a mere (impermissible) act of violence.”24 And again: “It is false therefore to say that private individuals ought not to punish; they simply cannot punish, as their acts do not constitute punishment.”25 Unfortunately, at times these views appear to be in tension with some of Harel’s other views: “I do not argue that the exertion of violence by non-state actors can never count as punishment. Parents seem to be able to punish their

23 Id. at 126.
24 Id. at 81 (emphasis in original).
25 Id. at 72 (emphasis in original).
children; and even the law in certain cases allows for victims of torts (private wrongs) to extract punitive damages from tort-feasors.”

The tension may perhaps be explained by the fact that, in a footnote, Harel clarifies that “the argument in the text picks out the case of punishment for crimes (public wrongs).” But then other problems arise. For if, on the one hand, “punishment for crimes” is supposed to mean something along the lines of “punishment for crimes in the ways that the state inflicts punishment via its criminal justice system,” then Harel’s explanation would turn out to be yet another instance of circular reasoning—it would again be true by definition. But if, on the other hand, the suggestion is that private citizens cannot punish people for crimes at all, then the suggestion strikes me as false. For example, you learn that your next-door neighbor is a child molester, and has in fact raped your own five-year-old daughter; while the police are looking for him, you find him and decide to take justice into your own hands. It seems to me clear that you, a private citizen, have punished your neighbor.

It is crucially important to realize that there are many normative spheres at play here, and that some actions may be permissible in one sphere and not so, or not so much or so unproblematically, in another. Thus, a virtuous vigilante may be criticized—and indeed punished—because vigilantism is politically objectionable (even though in this example we can stipulate that the action is morally correct). It is not, as Harel explicitly asserts, that the vigilante is not punishing and cannot punish—of course she can punish, and is indeed punishing. The truly important questions all revolve around these sorts of normative conflicts. Harel, however, by and large avoids these sorts of questions by artificially breaking down the territory into private and public spheres and into the legal/normal and the exceptional spheres.

The legal/normal and exceptional spheres and the public and private spheres can overlap in ways that are problematic for Harel. Consider the following (Tarantino-inspired) scenario. In early 1945, a group of escapees from Auschwitz gets hold of a missile capable of downing a plane. They come to know that Hitler, Eichmann, Mengele, and so on are on board a given plane, all sporting new identities and bound for Argentina, where they will enjoy the rest of their lives with complete impunity. When the plane flies overhead, the escapees shoot it down, as a way of punishing these Nazis for their crimes. Would Harel deny that this is an instance of punishment? If he agrees that this is punishment, then this case would show that private citizens can indeed punish people for crimes after all. But if Harel does not agree, then we would need an explanation as to why not—not a mere repetition of the stipulation that individuals simply cannot punish.

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26 Id. at 96 n.54.
27 Id.
28 In order to stave off the typical, but gimmicky, rhetorical contortion of suggesting that the escapees in this example would be involved in “revenge” rather than “punishment,” I must cite my own work: Leo Zaibert, Punishment and Revenge, 25 Law & Phil. 81 (2006).
Independently of whether or not Harel wishes to see this case as an instance of punishment, would Harel characterize this case as an “extreme situation” (in his sense)? Perhaps Harel could answer negatively, arguing that the only consideration that renders a case “extreme” is that it is done with the perceived necessity of saving as many lives as possible. Even so, we still need a much more systematic account as to what renders a case extreme: some perfectly legal (non-extreme) defenses may be available for some cases of necessity and self-defense, etc. We may tinker with the initial example in such a way that the Auschwitz survivors not only know that the Nazis are on board the plane, but that they also know that the Nazis will kill thousands of innocents in Argentina. So, they down the plane, partly as punishment and partly in order to save these innocent lives. Would Harel be committed to claiming that we are in the presence of an action which is simultaneously “extreme” and “not extreme”: “not extreme” in the sense that it is a punishment, which, in his view, can only be inflicted by the state, and thus by definition not extreme; and “extreme” in the sense that it seeks to save as many lives as possible in the requisite ways? Or would Harel instead deny that these people can possibly have both plans (to punish and to save lives) simultaneously?

I am afraid that rather than offering solutions to the complicated moral problems associated with tragic choices of these sorts, Harel’s conceptual distinctions are in fact evasions of these problems. And evasions that tend to simplify the problems in ways that are regrettably similar to some of those other simplifications that both Harel and I wish to avoid. Recall that for Harel some goods “can only be produced (or provided) by public agents,” that punishment meted out by non-state officials is simply not punishment, that extreme decisions made by state officials are simply not state acts, and so on. Concomitantly, Harel believes that an action that would ex hypothesi have some value when performed by one person would simply have zero value when performed by some other person. About this Harel is, again, perfectly explicit: “[T]o the extent that some goods can only be provided by the state it follows that privatization changes dramatically the character of the goods, rendering the privately provided goods worthless.” And then again: “[A]n execution performed by a private individual does not constitute a criminal punishment; it is merely an act of violence.”

It is true that vigilism is in principle politically wrong, and so is the privatization of some state functions. Moreover, it is also true that some goods are more valuable when produced by this or that specific sort of agent. But these assertions do not obscure the fact that Harel’s position is reductive to a fault. Consider again a group of Auschwitz survivors who upon liberation manage to capture and kill some of the fleeing sadistic SS thugs who had terrorized them for years. And let us stipulate that the death penalty was indeed the (morally) justified punishment for the crimes the SS thugs committed. Harel’s

29 Harel, supra note 1, at 69.
30 Id. at 96.
31 Id. at 72.
view is not merely that the survivors are, as a conceptual matter, not punishing the SS thugs when they kill them. His view is that when they execute the SS men, the Auschwitz survivors in our example are no different from any garden-variety murderer: their “mere act of violence” is completely “worthless.”

This is too cavalier a disregard for axiology: if a given state of affairs is valuable when brought about by one person, why should its value completely disappear when brought about by someone else? No doubt such cases may exist: the value of the state of affairs containing sexual intercourse with a romantic partner may be completely absent if the romantic partner is replaced by a stranger. (Although even in this case it is not immediately clear why the latter state of affairs has to be completely worthless.) But there are myriad cases in which the value of a certain state of affairs is affected merely as a matter of degrees by the particulars of the agent who brings it about. Again, not so for Harel: the punishment that was worth something when inflicted by the state becomes utterly “worthless” (and “a mere act of violence”) when inflicted by a private individual.

In other words, Harel seems to believe that only state officials can have standing to punish. And Harel seems to believe, too, that this standing does not come in degrees—either you have it or you do not. But it seems to me that this is to confuse “standing” with “authority”—it is authority, and not standing, that is an all-or-nothing property. You either have the authority to marry people or you do not; but whether or not you do, you may have more or less standing to do so. But even if standing were like authority in being an all-or-nothing property (without thereby collapsing into authority), that would not entail that the axiological consequences of doing something with or without standing has the radical consequences that Harel thinks it does. For Harel believes that lack of standing (or of authority) does not merely reduce the value of an action—it completely eliminates it.

Harel’s reductionism, anchored in overly crisp binary distinctions, does not strike me as the way forward. This is why the specialized literature on moral conflict, and especially the literature devoted to “dirty hands” cases (a literature which includes thinkers as influential and diverse as Machiavelli, Weber, Sartre, Walzer, and Williams—and with which Harel does not engage at all), treats these sorts of cases so dramatically differently from Harel. Unlike Harel, no contributor to this rich tradition has ever sought to solve the thorny moral dilemmas with which we are concerned by stipulating that some distinction between the public and the private is capable of doing our work for us. The essential characteristic of “dirty hands” problems is, to repeat the famous slogan, that sometimes we need to do things that are simultaneously both right and wrong. This is exactly what characterizes the examples of tragic choices with which Harel is concerned: when we down a hijacked and weaponized plane we do wrong (kill the innocent passengers) and

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we do good (save more innocent civilians than we kill); when we punish a wrongdoer we do wrong (inflict suffering) and we do good (administer justice, prevent further wrongdoing, etc.).

The fact that in these cases there is an inescapable simultaneous convergence of wrongdoing and good-doing cannot be wished away by Harel’s stipulations. In fact, there is virtual unanimity among scholars writing on these topics that while merely as an empirical matter, “dirty hands” cases most commonly face public officials, they can face private citizens as well. There is nothing conceptual about who you happen to be that would necessitate anything about what sort of tragic choice you may happen to find yourself facing.

III. Coda: The Varieties of Utilitarian Evasions

While utilitarianism is an extraordinarily resilient and malleable doctrine, it also suffers from a series of embarrassments. None is more famous than the infamous case of punishing innocents. There is virtual unanimity amongst philosophers of all persuasions that this is a very serious problem for utilitarianism. Very briefly, the problem is this: utilitarians care above all about maximizing utility; but this can sometimes be accomplished by punishing an innocent person, by scapegoating her—and that is obviously very bad. A famous utilitarian response is that she cannot possibly be committed to “punishing” an innocent, because, given the very definition of punishment, this cannot be done. Hart famously dubbed the stratagem the definitional stop. This is an obvious abuse of definition, at least in the sense that it (unpersuasively) seeks to stave off objections by stipulating them away. Obviously, the force of the objection remains intact even if one grants that the right word to use may not be “punishment”: the utilitarian would still tolerate “victimizing,” “abusing,” or “scapegoating” innocents, or “using them as mere means,” etc. There is something wrong with that practice, regardless of the word we use to describe it. And the utilitarian response is simply an evasion.

It seems to me that there are worrying resemblances between this sort of utilitarian evasion and the evasions of which I think Harel may be guilty. To assert, as Harel does, that, as a matter of definition, individuals cannot punish strikes me as a definitional stop. To assert, again as Harel does, that as a matter of definition, state agents cannot down hijacked planes (for if they did, they would eo ipso cease to be state agents) strikes me as a definitional stop. A certain utilitarian undertone in Harel’s position appears to reach further. Although Harel never tells us exactly why in some “extreme cases” it is morally permissible (and indeed morally obligatory) to down hijacked planes (albeit only when those downing the plane are “private citizens”), it seems to me that what Harel has in mind is plain old utilitarianism. His rationale appears to be that downing the plane will save more lives than any other available alternative, or something along those lines.

We thus come full circle regarding the similarities between Harel’s views and Dershowitz’s. Dershowitz’s foundational presupposition is that torture ought sometimes to be inflicted—of course, he claims to favor torture warrants because of his concerns with transparency and accountability in democratic societies. While Dershowitz’s concern with
transparency and accountability may perhaps admit of non-utilitarian readings, Dershowitz’s justification of torture in the first place is itself utilitarian through and through. Harel’s foundational presupposition is that hijacked planes ought sometimes to be downed—of course, he claims to want the state not to do these things in part due to his concern with symbolic meanings and communicative rationales. While Harel’s concern with symbolism and communication may perhaps admit of non-utilitarian readings, Harel’s justification for downing hijacked planes in the first place is itself utilitarian through and through.

In the final analysis, Harel appears to have simply displaced the coarse moral mathematics that he claims to reject, transferring it from its usual context to the fabricated context of “extreme cases.” Ordinary citizens ought to reason like good old utilitarians. Moreover, in the other fabricated context, that involving state officials and their actions, matters are also extremely coarse: the state ought to blindly abide by the very “fundamentalist deontology” Harel claims to criticize. The “rationality” of state officials is none other than that of the chasid shoteh. It is, then, not just Harel’s distinctions between the public and the private, and between the ordinary and the extraordinary, that are problematic: what Harel thinks is supposed to happen in each of these realms is remarkably uninspiring as well.