Facing Up: A Response to Critiques of Why Law Matters

Alon Harel*

Abstract

Why Law Matters defends the view that public institutions and legal procedures are not merely means to secure independently specifiable ends. They are constituent aspects of a just society, and the contribution they make to it is not contingent. I argue that various legal institutions and legal procedures, often perceived as contingent means to facilitate the realization of valuable ends, matter as such.

This Article is a response to critiques of Why Law Matters. The critiques were devoted primarily to chapter three and chapter four of the book. Chapter three maintains that there are some goods—intrinsically public goods—that must be provided by the state. Chapter four discusses cases of emergency and argues that decisions in cases of emergency are necessarily private rather than public decisions. Among other things, I argue that Why Law Matters defends a normative and not a semantic or a conceptual claim.

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Why Law Matters defends the view that public institutions and legal procedures are not merely means to secure independently specifiable ends. They are constituent aspects of a just society, and the contribution they make to it is not contingent. I argue that various legal institutions and legal procedures, often perceived as contingent means to facilitate the realization of valuable ends, matter as such.¹ Let me illustrate.

On the view developed in Why Law Matters, rights are not mere means to realize values such as dignity or equality. As a matter of fact, such values are themselves partly constituted by rights and stand in reciprocal relation to them. Public officials, whether legislatures or bureaucrats, are not merely charged with the tasks that they are more capable of performing as a contingent matter; instead they are members of public institutions who are to perform tasks that are “intrinsically public,” tasks that cannot even in principle be performed by private individuals. Public officials are agents whose actions are guided by fidelity of deference; consequently, I argue, their acts are done “in the name of the state.” Further there are some goods that can only be provided by agents who act in the name of the state and, it follows, they must be performed by public officials. I also argue in favor of “robust constitutionalism.” Constitutions as well as judicial review are not mere instruments to guarantee good, just or coherent decisions; they are valuable for oth-

¹ Mizock Professor of Law, Hebrew University; Member of the Federmann Center of Rationality, Hebrew University.

er reasons. More specifically I argue that entrenched constitutional rights and the practice of judicial review are justified not merely as means to secure just outcomes. Instead, constitutional rights express an urgent moral duty that binds legislatures, and judicial review provides an opportunity for a hearing and a forum in which that hearing can play out.

The book was the subject matter of a symposium organized by Vera Bergelson that took place at Rutgers Law School on October 25, 2014. I am immensely grateful for the opportunity I was given to defend this book (and at times concede defeat) on this occasion. While writing a book one must speculate about what opponents may say and anticipate potential objections. Yet the objections one raises to oneself are never as forceful as the ones raised by others. It is intimidating but highly rewarding to rethink the themes of the book in light of these objections. I am particularly grateful to Professor Bergelson for having invested the time and energy to bring together a distinguished group of theorists who were willing to read and engage with the arguments of Why Law Matters. I am also grateful to the commentators who forced me to confront my own shortcomings.

Let me turn now to address the comments in the order they appear in this issue.

I. Malcolm Thorburn

In his insightful comment, Malcolm Thorburn focuses upon the themes of chapter three, which discusses what I label “intrinsically public goods,” namely goods whose value depends upon their public provision. One case of an “intrinsically public good” discussed in great detail in this chapter is punishment. Chapter three provides a principled non-instrumental argument against private punishment and, in particular, against private prisons. Let me briefly summarize the argument and turn to investigate Thorburn’s critique.

The argument in chapter three is based on the assumption (shared by many theorists) that punishment is a communicative or an expressive act of condemnation. Condemnation however is ineffective unless performed by an agent who is in a privileged position to that of the one subjected to the condemnation, one whose judgment concerning the appropriateness of behavior is worthy of attention or respect. Condemnation involves a judgment concerning the wrongfulness of the act, and the more privileged the agent who makes the judgment is, the more effective the condemnation is. The state, I argue, is the only agent that deserves attention or respect regarding certain wrongs, and therefore only condemnation of such wrongs made by the state is effective.

Chapter three also argues that only public officials can act in the name of the state. Public officials are those agents whose actions are dictated by the state; more particularly, they are those agents who act on the basis of fidelity of deference rather than fidelity of reason. This is why, when public officials carry out the task of criminal punishment, we may attribute their actions to the state, for they are bound by duty to defer to the state. By contrast, private contractors, no matter how well-defined their contract and how well-meaning the contractor carrying out its terms, are related to the state only by a “fidelity of reason.” That is, it is always up to the contractor to decide, using his own private reasoning, how to carry out the tasks assigned to him under the contract.
Thorburn challenges this view on two grounds and later provides his own theory as to why punishment must be performed by the state. Let me first address his two concerns and then examine his own proposal.

Thorburn believes that there is nothing wrong in the outsourcing of communication (including the communication of condemnation). What is really at stake is not the communication but the hard treatment. Thorburn also believes that it is often the case that the government uses private agents to communicate its views. For instance private advertising firms convey the state’s message that people ought to quit smoking or to engage in sports. More specifically Thorburn argues:

But is the logic of communicating censure really so restrictive? If it is simply a matter of communicating censure from the state, it is not obvious why a private contractor could not convey that message. After all, when the state is in the business of communicating its message directly with the public, it often acts through private actors and no one seems to find anything much the matter with this. When the government wishes to tell citizens that they should quit smoking, or get more exercise, or wear their seatbelts, or any number of other messages that the state tries to communicate to us every day, we would not find it odd to hear that it was a large Madison Avenue advertising outfit that communicated the message on the state’s behalf, rather than the state’s own employees. . . . As long as it was the government that authorized the basic message, it is not obvious why we should object to an advertising firm taking over the specifics of how to “package” that message (239).

This is an interesting observation; yet I believe Thorburn uses the wrong analogy. Messages of the type used by Thorburn can be written or communicated by private individuals and approved by the government primarily because once approved by government there is very little or no discretion on the part of the private agent. As I say in Why Law Matters, if private agents can be fully controlled by the state and are committed to fidelity of deference, they would in effect turn into public officials.2

To see the difference between the case of punishment and the case of the advertising firm, assume that the government hires a firm to make a binding decision as to the appropriateness of using a drug such as marijuana. It also commits itself to accept the findings of the private firm such that the firm’s decision is automatically endorsed by the government.

Decisions made by private wardens are much closer to this example than to the example used by Thorburn. Private wardens, as illustrated by the Israeli private prisons case, are often given broad powers to make decisions that include, inter alia: the power to order an inmate to be held in administrative isolation for a maximum period of forty-eight hours, the power to order the conducting of an external examination of the naked body of an inmate, the power to order the taking of a urine sample from an inmate, the power to approve the use of reasonable force in order to carry out a search on the body of an inmate, and the power to order an inmate not to be allowed to meet with a particular lawyer in accordance with the restrictions provided in section 45A of the Prisons Ordinance.3

2 Id. at 93-94.

Each one of the choices or decisions specified is made by a private warden and cannot be effectively supervised by a public official. Thus, the judgments of private wardens are in practice endorsed by the state that delegated this power. But then the question is why the judgments of the wardens in a private prison should count more than the judgments of inmates. After all both wardens and inmates are all equal citizens. Arguably, subjecting the inmates to the private judgments of wardens is nothing but an enslavement of the inmates to the private judgments of their wardens. Thus it seems to me that the example of the advertising firms used by Thorburn is simply the wrong analogy.

The second challenge concerns my “insistence that criminal punishment must be communicated in the name of the state, rather than in the name of a private party” (239). Thorburn concedes that this is “a powerful intuition that is at the heart of a common criminal law worry about vigilantes” (239). But Thorburn wants to challenge this intuition and asks: “What is it that is so wrong about private individuals taking it upon themselves to communicate their condemnation of an offender’s criminal wrongdoing?” (239). Surely private individuals can form opinions and communicate them. What they cannot do is communicate them “through the medium of hard treatment” (240, emphasis in original).

I do not of course deny that individuals can form opinions about the behavior of others and convey their opinions. Yet private judgments have limited condemnatory force. Their condemnatory force hinges upon the quality of the moral judgment of the person making them. The target of the judgment (the offender) can insist that his judgment is as good as that of the person condemning his behavior. Further the state cannot endorse without deliberation such a private judgment without violating the dignity of the person whose behavior is being scrutinized. Such an endorsement violates the equality among citizens as it indicates that some citizens’ judgments are superior to others’. In practice it is a form of disenfranchisement of the person whose behavior is judged to be wrong.

Thorburn concludes his critique by saying:

There doesn’t seem to be anything seriously wrong with the outsourcing of state messaging, and there doesn’t seem to be anything seriously wrong even with people making and communicating private judgments about the offender’s wrongdoing, either. If we want to explain what is so troubling about the private provision of criminal punishment, we will have to focus on that aspect of punishment that we have deep reasons of principle to keep in the state’s hands: hard treatment (240).

I agree that there is nothing wrong in forming and communicating private judgments about wrongdoing. There is however something wrong in those judgments being approved and endorsed by the state. What is wrong is not the private judgments but their automatic, unreflective endorsement by the state.

Thorburn provides his own account as to why punishment ought to be public. He believes in a republican ideal—an ideal based on freedom and independence from the whims of private individuals. Thorburn argues that:

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4 For a longer and more detailed argument for this view, see Harel, supra note 1, at 98-99.
Rather, the point of criminal justice is to secure the status of independence that the law confers on each person within its jurisdiction. It is the state’s job, on the republican account, to ensure that each person is secure in his status as independent of the whims of others. And the state may use coercion—the invasion of individuals’ private rights—to enforce those norms so long as doing so is consistent with the basic demand for public justification. That is, when the state imposes criminal punishment, it must be able to show that it was fulfilling a public purpose (in securing our basic rights), that it was necessary to have a system of punishment in place to do so, and that the imposition of punishment was proportionate to that legitimate end (243).

Thorburn’s account can take two forms. Under the first form the notion of “public purpose” is independent of the agent bringing it about. If this is the case then it follows that a private agent can at least in principle be more conducive to the public purpose than the state can. Under this explanation the question of who the better agent is—a public official or a private individual—is a contingent question which ought to depend upon the likelihood that the preferred agent promotes public goals. Under the second form the fact that the decision was made by the public is part of what makes it a public decision. Only under the latter form, can one really establish that the state is not selected merely because it is better in promoting public goals but because part of what transforms a goal into a public goal is that it was selected by the public.

Chapter three is designed precisely to explain why the publicness of the goals hinges upon the identity of the agent. This factor is crucial in developing a genuinely non-instrumental account of the desirability of public institutions and I do not see that Thorburn has provided an alternative explanation as to why this is the case.

II. Ekow Yankah

Ekow Yankah focuses his attention on chapter four, entitled “Necessity Knows No Law,” which deals with emergencies such as torture or downing planes that are used as weapons by terrorists. I think Yankah is right when he describes this chapter as “surprising and counterintuitive” (245). It is perhaps the chapter that has raised the most resistance. Let me try to defend it.

Chapter four defends two main claims. First, that the actions required in extreme cases ought to be performed strictly as acts of necessity. More specifically, the agents who perform them ought not to be guided by general rules or principles or precedents. Instead they ought to make particular rule-free judgments, not guided by norms. Second, that reasoning in extreme cases cannot be conducted by the state or by public officials. It must as a matter of necessity be private. Ultimately, when officials act in cases of emergency, they must be seen as acting as private citizens in their personal capacity rather than as public officials acting in the name of the state.

Yankah’s primary target is the second argument. Yankah believes that “[t]he claim that an official should now suddenly be understood as acting in a private capacity does not accord with either the actor’s self-understanding or that of others” (250). He also thinks that “it is puzzling, bordering on cruel, to describe the soldier in our hypothetical as having acted as a private citizen” (252). He argues that “viewing emergency actions as
embedded in the public name offers the advantage that we as a community are appropriately held collectively accountable for them. Because these actions are taken pursuant to our public reasoning, we must take seriously that they reflect our civic values” (255).

Yankah describes eloquently some of the reasons that convinced me that the agents reasoning in extreme cases such as torture or downing a plane should always be conceived as acting in their private capacity rather than as public officials. Yet ultimately he disagrees and believes that we ought not to impose the burden of decision-making in such cases on a single person. We as a community ought to deliberate together and be accountable for such decisions.

I want first to clarify the reasons for my (unconventional) view by imagining a dialogue between a soldier who is about to shoot a plane in a case of emergency, e.g., when terrorists plan to crash the plane into an urban center, and the passengers in the plane. Later I will address some of Yankah’s objections. Most importantly I shall argue that to satisfy Yankah’s concerns (the concern with public deliberation) it is not necessary to act as a public official; it is sufficient for the soldier to act as a citizen.

In the following dialogue a soldier is faced with the choice whether to down a plane which is being used by terrorists against the lives of others. The soldier defends Yankah’s position and argues that he ought to act as a public official. The passengers defend my view under which the soldier’s act is private and, consequently, the soldier ought to be freed of any previous rules, principles, or precedents. Needless to say, given that I dictate the content of the dialogue, the passengers ultimately have the upper hand.

A. A Dialogue Between the Soldier and Passengers

Soldier: I am really sorry but I have to shoot the plane and kill all of you as I was ordered to do so and I am bound to defer to such an order. Or: I am really sorry but I have to shoot the plane and kill all of you as the law requires me to shoot planes in cases in which they pose serious risks to the lives of innocent people.

Passengers: But you must also consider our lives. You should look at the particularities of this case rather than follow an order or a rule. We deserve that you consider this particular case rather than operate on the basis of past customs, precedents, or rules.

Soldier: But I read Yankah’s response to Harel and it convinced me that in deciding whether to shoot the plane I act as a public official. Public officials often exercise discretion but they must operate within the boundaries of law. I am doing just what my polity ordered me to do (or what my polity has done in the past) and while the polity may have made a mistake in its moral judgments, it is a just polity and I am obliged as a public official to follow its guidelines. Further, as a public official I am bound to be responsive to intentions and actions of others, to former decisions made by my colleagues under similar circumstances. It is not my job to reconsider afresh the question of whether I ought to or ought not to shoot the plane.

Passengers: If the polity is wrong then shooting us is immoral irrespective of what has been done in the past. The polity, we concede, is a just polity. But even a just polity cannot bind you to shoot when shooting is immoral or not to shoot when shooting is moral. Guidelines and precedents are irrelevant to your decision. When catastrophe threatens, it does not matter what the sovereign dictates—whoever can prevent it ought to do so.
Soldier: But if guidelines, rules, and precedents are irrelevant then my decision is a private decision; it is not governed by the polity. Is it not the case that, as Yankah argued, it “is bordering on cruel, to describe” me as acting as a private citizen (250)? Why should the moral burden rest on me? After all I am trying to promote the public interest.

Passengers: Being moral is sometimes very demanding indeed. We want you to consider whether shooting us here and now is justified. Your reasoning however ought to be freed of any constraints that the polity purports to impose on you. It is you and you alone that ought to make this decision.

I think that the passengers win this debate. It seems to me that it is ultimately the responsibility of the soldier to make the decision and he ought to be accountable for it. This of course does not preclude the duty of the state to train the soldier and guarantee good judgment on his part. But the soldier is obliged to ignore any guidelines provided by the state.

In the rest of this comment I show that the concerns raised by Yankah are not incompatible with my conclusion. Yankah is concerned that by depriving the soldier of his status as a public official we may deprive him of the ability to engage in a debate concerning what the best response to emergencies is, and deprive the polity of engaging with these issues. Yankah argues:

But the ability to invoke the justification that an action has been taken in the public name, or to criticize an action because it fails its claim to act in all our names, is a critical feature in cases of public emergency. By arguing that such actions cannot conceptually be attributed to public agents, Harel denies both the putative agent and fellow citizens the ability to engage in this debate in a way that is both counterintuitive and deeply problematic. This ability to argue over what we together sanction as a community when faced with emergencies is a critical feature of an integrative, deliberative democracy; this kind of debate, as we have seen in recent years, is not abstract philosophy but requires a civic community to define its very bedrock values (250).

And later in defending his Aristotelian approach, Yankah argues:

Rather than viewing such actions as separated from the actor’s role as a public agent, an Aristotelian theory based on franchise views the action as embedded in a civic polity. Indeed, a community premised on the value of franchise will actively search for ways to strengthen the connection between actions taken in emergency situations and the considered judgments of the civic community as a whole (254).

I disagree that my position has this undesirable implication. I think Yankah confuses the role of public officials with that of citizens. Of course we ought to engage as citizens (or as moral philosophers) in the debate about what ideally ought to be done in cases of emergency. It may even be, as Yankah says, that “[t]his ability to argue over what we together sanction as a community when faced with emergencies is a critical feature of an integrative, deliberative democracy” (250). But that does not make the act of shooting the plane an act of a public official. There is a fundamental difference between acting as a citizen and acting as a public official, and I do not think that my proposal precludes the public deliberation that Yankah cherishes.
Yankah also believes that:

Fundamentally, Harel misrepresents the relationship between the public actor and his or her community in the context of emergency situations. The claim that an official should now suddenly be understood as acting in a private capacity does not accord with either the actor’s self-understanding or that of others. Return to Harel’s example of the hijacked plane. . . . Any questions put to her will be answered solely in reference to her training, her role as a soldier and the military proscriptions laid down for such an emergency. Unlike the hijackers, shooting down planes and killing innocent civilians is no part of her personal project and she certainly does not view herself as acting on her personal wishes. Indeed, she may naturally view herself as tragically committed to act in ways that will be personally very painful precisely because of her public duty (250).

I do not think that “[a]ny questions put to her [the soldier] will be answered solely in reference to her training, her role as a soldier and the military proscriptions laid down for such an emergency” (250). I think that the relevant moral questions can only be answered by reference to the lives saved and lives lost and not to the status of the agent. The soldier’s answer could not be “I was trained to perform this act” or “This is the role of a soldier.” In fact such an answer is highly unsatisfactory as an answer to the moral question “Why did you shoot (or not shoot) the plane?”

To conclude, the fact that the person does not act as a public official does not entail that he does not act for the public good, or that the polity is barred from discussing and evaluating the justness of his acts. The civic duties that Yankah mentions are ones that the soldier ought to take into account. This means only that the soldier cannot be guided by rules, customs, precedents, etc. He ought to face the question of whether to shoot the plane here and now. This is what makes this case a genuine case of emergency—one that is not governed by rules; necessity knows no law.

III. Leo Zaibert

I happily endorse Leo Zaibert’s friendly opening statement that he and I are “brothers in arms” as both of us share the distaste for “quantitative ethics” (257). Yet Zaibert also adds that Why Law Matters suffers from reductionism, over-simplification, sophistry, evasions that tend to simplify the real dilemmas, and numerous other vices. In the context of his discussion of my treatment of emergencies, Zaibert believes 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 (264).

Zaibert is aware that such assertions need to be established and in his attempt to establish them he examines chapter four (the discussion of emergencies) and chapter three (the treatment of punishment or, more generally, intrinsically public goods). To establish his claims, he uses several arguments, none of which I find plausible. Let me explain why.

Zaibert’s first main target is chapter four. In this chapter I discuss cases of emergency such as “ticking bomb” cases in which, in order to save many lives, we need to do something we otherwise might not condone, such as use torture or down a plane (9/11
situations). The chapter establishes three main claims. First, there is a moral difference between acts performed under the direction of principles and rules, and unprincipled context-generated acts—acts performed not under the guidance of rules, but under the force of circumstances. Second, there are cases in which morality dictates that we act in ways that are not guided by rules. Third, when we act in such a way we act as private individuals rather than as public officials.

Zaibert attempts to challenge all of these claims. The challenges he provides are not simply that these normative claims are wrong but that they are merely circular and, at other times, unhelpful and empty. In his attempt to challenge the first two claims, Zaibert argues:

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 distinction.” Harel follows this admission with the obligatory “[b]ut this appearance is misleading.” 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 moral status can differ depending on whether it is done as a permissible act under the rules or as an exceptional one” (259-60).

Much of sections D and E of chapter four address Zaibert’s concern. Section D argues that there is a moral difference between being guided by rules and acting without such guidance because when acting under the directive of a law the act (of torture or downing a plane) treats the duty not to hurt innocents as conditional. When, on the other hand, the act is dictated by the force of the circumstances, one does not incorporate a principle according to which the lives of the passengers are dispensable or exchangeable. It is the incorporation of a rule into one’s reasoning which is impermissible, as it distances one’s reasoning from the particular circumstances of the emergency and guides one to act in a way that takes into account future and past cases. By incorporating such a rule or principle, the decision becomes part of a regular institutional coordinative enterprise and thus defies the inherent irregularity that should characterize the deliberation in extreme cases.

Needless to say, one can argue that this difference in reasoning makes no moral difference. Utilitarianism is committed to the view that there is no such difference. Yet reiterating the arguments in sections D and E should convince Zaibert that the difference is not a mere sophistry.

Zaibert’s second main critique of chapter four rests on the claim that a person cannot act on the basis of reasons without being guided by rules. Under Zaibert’s view once an agent uses reasons she is committed to comply with rules. He believes that:

\[\text{Id. at 125.}\]

\[\text{Id.}\]

\[\text{Id. at 127.}\]
Yet, the moment you propose any such explanation [for downing the plane], 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. . . (260, emphasis in original).

Zaibert fails to see the primary difference between reasons and rules. Rules and principles are directives that one is guided by and that one regards as binding in the future and as relevant to the past (e.g., in justifying past actions). It is entirely consistent to be guided by reasons and yet, refuse to commit oneself to act in the same way in the future. I can resolve to make a decision which will not set a precedent and, instead, resolve to reason again when such circumstances occur again. What distinguishes the reasoning of agents under emergency is the reluctance to regard one’s reasoning as binding or guiding them in the future or relevant to evaluating the justifiability of past decisions.

Let me turn to the objections raised by Zaibert with respect to the third claim defended in chapter four, namely that when we are not guided by rules we necessarily act as private individuals rather than public officials. Zaibert rightly believes that:

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 (261)?

Unfortunately instead of consulting section E of chapter four, which addresses all these questions, Zaibert maintains that “Harel’s reply to his own objection strikes me as circular—he merely repeats his puzzling view” (261).

Section E provides a complete, detailed answer to Zaibert’s concerns. When a person acts as a public official his acts are partly justified on the basis of his status as a public official and the rules governing the conduct of public officials. In contrast when his status as an official does not make a difference, he is not subject to such constraints. Section E makes this point as explicitly as it can be made:

The actions characteristic of extreme cases are such that when unjustly performed, no order can exculpate the agent. Thus, if a plane does not constitute a genuine threat to many innocents—if, so to speak, there is no ticking bomb—then the fact that one was ordered to down the plane or torture the prisoner does not justify one’s actions.8

When a person acts as a public official, the justifiability of his act hinges upon his status and his act is attributed to the state. When, on the other hand, he acts as a private individual the justifiability of the act does not hinge upon his status. One of the important (and perhaps controversial) implications of my view is that a soldier who happens to have the power to down a plane and an ordinary citizen who happens to walk by a missile silo have the same obligation in cases of emergency. While this implication is controversial, my view seems to be shared by one of the most orthodox writers on public law, Albert Dicey, who says, “Let it too be noted that what is true of a general holds good of every loyal subject ac-

8 Id. at 128.
cording to his situation and the authority which he derives from it, e.g., of a subordinate
officer, of a magistrate, or even of a private citizen who is helping to resist an invader.”

Zaibert raises similar objections with respect to chapter three (the discussion of
punishment). In this chapter I argue that there are “agent-dependent goods,” namely goods
that can be provided only by certain agents. One primary example of such goods are “in-
trinsically public goods,” in other words, goods whose value hinges upon their provision by
the state. One such “intrinsically public good” is criminal punishment. Punishment by the
state is sometimes a prerequisite for certain goods of punishment to be realized. Thus, to
the extent that punishment is designed to convey condemnation by the polity, it must be per-
formed by public officials. At some point I also assert that given certain understanding of
what punishment is, “[i]t is false therefore to say that private individuals ought not to punish;
they simply cannot punish, as their acts do not constitute punishment.”

Zaibert attacks this view primarily because he misinterprets it as a metaphysical ra-
ther than a normative claim. Zaibert argues that:

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.” And again: “It is false there-
fore to say that private individuals ought not to punish; they simply cannot punish, as their
acts do not constitute punishment” (262) (some emphasis added).

This metaphysical interpretation rightly seems implausible to Zaibert. He believes
that of course private individuals can punish, as the example of the virtuous vigilante illus-
trates. But it is quite evident from a literal reading of chapter three that when I argued that
certain forms of punishment cannot be inflicted by private individuals, I did not make any
“explicit” (or for that matter implicit) metaphysical claims about the intrinsic essential na-
ture of punishment or semantic claims about the meaning of the word “punishment” but
a moral claim. In the very same passage cited by Zaibert I argue:

Blood feuds and punishment bring about certain goods, and the goods resulting from
both blood feuds and criminal punishment are contingent upon the identity or status of
the agent inflicting it. To be properly labelled “punishment” under this view, it is not suf-
ficient that it hurts or causes displeasure to those who have wronged (as those can result
from the action of a private agent or even of an animal or from natural forces); it must al-
so reflect an authoritative judgment concerning the wrongfulness of an act, and such a
judgment can only be made by an authoritative entity—the state.

And later in the same chapter I also argue that while private punishment can deter
and incapacitate, and can even serve retributive justice purposes, it cannot serve as an ex-
pressive or a communicative act of condemnation on the part of the state. To the extent

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10 Harel, supra note 1, at 72.
11 Id.
12 See id. at 96.
that the relevant goods justifying punishment rest on such a condemnation, one can say that private individuals cannot punish. This is not a metaphysical claim nor a conceptual claim; instead it is a standard use of what is often labelled a functional definition of punishment, namely one that relies on its function.

To clarify this claim let me use a famous analogy developed by Lon Fuller. Fuller provides a functional analysis of the rule of law. To illustrate what he means he used the analogy of a knife. Sharpness, he argued, is the property that allows knives to perform their function. Absent a certain minimum level of sharpness an object that looks like a knife is not strictly speaking a knife, as it cannot perform the function of a knife. It is evident that this is not meant to be a metaphysical claim about knives. Similarly if one believes that some of the goods provided by punishment can only be provided when the state inflicts it, a functional definition can use the provision of punishment by the state as part of what punishment means. Of course I have no objection to definitions that are not functional, and there are no metaphysical or conceptual claims underlying this observation.

Chapter three develops a detailed normative rather than metaphysical or semantic argument. It maintains that “sanctioning a wrongdoer is an expressive or a communicative act of condemnation.” I also argue that:

Condemnation is ineffective unless done by an agent who is in a privileged status to that of the one subjected to the condemnation, one whose judgment concerning the appropriateness of the behavior is worthy of attention or respect. Otherwise, an infliction of “a sanction” amounts to an act of violence which cannot express or communicate censure for the culpable and wrongful acts done.13

The claim that punishment involves condemnation is a standard understanding of punishment shared by many, including Robert Nozick, Joel Feinberg and Antony Duff.14 My additional observation is only that under certain assumptions this has implications concerning who can punish or whose punishments serve the communicative goals of punishment. It would be of great value to hear what Zaibert has to say about the normative argument I defend in chapter three, rather than the metaphysical argument he attributed to me.

I am confident that some of my claims could have been articulated in clearer ways and perhaps would have prevented some of Zaibert’s gross misunderstandings. Yet in his comment there is an indication as to why Zaibert misunderstood my views. Zaibert mentions the dirty hands problem. The dirty hands analysis rests on the belief that “sometimes we need to do things that are simultaneously both right and wrong” (256). I believe that there is a fundamental gap between the dirty hands analysis and mine, which reflects a different intellectual disposition. Why Law Matters points out that the justifiability of our actions often hinges upon who we are or how we reason. It explores such considerations with a view to providing an answer to the question of what we ought to do and when. In contrast, the dirty hands analysis is often satisfied pointing out that under some circumstances whatever we do, we are both wrong and right. It exempts itself from making an

13 Id. at 97.

14 See id. at 97 n.55.
unambiguous statement concerning what ultimately ought to be done. It seems to me that Zaibert’s failure to address the arguments made by me may be explained not merely as the byproduct of unfortunate assertions of mine but on the basis of his different intellectual dispositions, which distorted his understanding of *Why Law Matters*.

IV. Guyora Binder

In his comment, Guyora Binder provides a remarkably comprehensive description of jurisprudential theories. He rightly classifies my view as Kantian; he identifies the similarity between my view and Kant’s by pointing out that *Why Law Matters* rejects the view that “it can make no moral difference whether one’s physical security and access to resources are protected by law or by the indulgence of a slavemaster” (280) and endorses the view that “[l]egal rights secure not just material goods, but one’s status as an equal and as a subject, to whom power must answer in the discourse of reason” (280).

*Why Law Matters* argues that legal institutions are sometimes necessary for the realization of value. Different chapters examine different legal institutions and procedures, and establish that those institutions are constituent aspects of a just society as they are necessary for securing equal dignity to all. Binder urges me to examine what implications this view has for the duties of citizens and, in particular, the duty to obey the law. He believes that “[o]ur duty to recognize one another’s equal dignity as subjects of rights is *Why Law Matters* matters for our moral obligations” (280).

Binder defends this proposal in different ways. Let me identify and examine three arguments made by Binder on why *Why Law Matters* matters to our moral obligations. They are: a) the moral duty to support indispensable means for protecting dignity, b) the moral duty to treat others with dignity, and c) the mutual commitment argument.

A. The Moral Duty to Support Indispensable Means for Protecting Dignity

Binder argues that:

> By virtue of the state and the institutional structures that constrain it, law can confer dignity on individuals in ways that would not be possible without it. Does this oblige us to obey law? If we add an assumption it might. Let us assume that people deserve to be treated with the kind of dignity that only law enables. If so, law is an indispensable means of treating people as they deserve. It would seem to follow that we have a moral duty to create, preserve and support the legal regimes necessary to treat people as they deserve (271).

This paragraph contains the following two premises. First, according to *Why Law Matters*, law can confer dignity on individuals in ways that would not be possible without it. Second, people deserve to be treated with the kind of dignity that only law enables. Consequently, law is an indispensable means of treating people as they deserve. Binder believes that it follows that “we have a moral duty to create, preserve and support the legal regimes necessary to treat people as they deserve” (271).

I think that this argument, while plausible, is not free of difficulties. After all I do not have a duty to create, preserve or support *any* means that are needed for protecting
dignity. Assume for instance that instead of supporting dignity-maintaining institutions, I invest an effort in promoting the well-being of the poor (rather than their dignity). Would this count as violation of my duty to promote dignity-enhancing institutions?

More generally, given that law confers dignity and that people deserve to be treated with the kind of dignity that only law enables, it is evident that individuals have a reason to promote and sustain legal institutions. It is not entirely evident, however, that they have such a duty. Individuals have a duty to treat others with dignity, but it does not follow that they have a duty to guarantee or even to facilitate dignified treatment by other agents such as the state. So the mere fact that the state is necessary for protecting dignity does not imply a duty on the part of individuals to support the state or to obey the law.

**B. The Moral Duty to Treat Others with Dignity**

Binder argues that:

Thus, Harel claims that individuals deserve to be publicly recognized and treated as subjects of rights, and this moral good requires a liberal state governed by a rule of law. Yet Harel's reasoning implies not only that law and government are moral goods, but also that individuals are morally obliged to obey and accept the authority of at least some laws. Thus, if individuals deserved recognition and treatment as subjects of publicly conferred rights not only by officials, but also by other individuals, then each of us would have a moral duty not only to avoid infringing such rights, but also to respect them as law (276, emphasis in original).

*Why Law Matters* defends the view that individuals deserve to be publicly recognized and treated as subjects of rights. Binder believes that my argument also implies that individuals are morally obliged to obey at least some laws. I am not sure such an inference can be made. Let me explain why.

First, Binder believes that my argument implies that individuals do not merely have a duty not to avoid infringing rights but also to respect them as law. I am not sure my argument implies such a strong commitment on the part of individuals. Of course a person is obliged to treat others with dignity. But nothing I said implies that failing to respect the rights the state protects as laws is a violation of dignity. In some ways this view conflicts with the Kantian tradition, which regards legal rights as governing external action rather than the motivations of the agent.15 It seems to me that imposing a duty to respect laws as laws is much too demanding, as it requires individuals to be moved by certain reasons.

Second, I am hesitant to say that the duties of officials and of the state imply that individuals owe a duty to others to obey the law. The duties of the state and of state officials could radically differ from those of private individuals. Respect for each other takes different forms in different contexts and, in particular, what counts as dignity often depends on the status of the agent. I am not persuaded that one can make inferences from the state’s duties (or public officials’ duties) to individual duties.

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15 See B. Sharon Byrd, Kant’s Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution, 8 Law & Phil. 151 (1989).
C. The Mutual Commitment Argument

Binder argues that:

Harel’s insight is that political freedom is not only a set of arrangements that manages the problems of scarce and common goods in a tolerable way. It is also an identity, a legal status of personhood. This identity is a social identity that protects us from harm and secures to us recognition as a rational subject whose objections must be heard and who must be answered with reasons. At the same time, a status of political freedom is a personal identity that we claim, and that we thereby commit ourselves to recognize in others. In demanding that others treat us reasonably according to law, we obligate ourselves to do the same (280).

Binder believes that a duty to obey the law emerges from the fact that each and every one of us benefits from our legal status. He further argues that “a status of political freedom is a personal identity that we claim, and that we thereby commit ourselves to recognize in others” (280). I am not confident that claiming such a status can be attributed to each one of us. But perhaps such a claim is not needed; the mere benefit conferred to us by law is sufficient.

Such an argument is, in my view, a sophisticated version of the fair play argument. The fair play argument rests upon the view that to the extent that a person benefits from state institutions, she owes a duty to support and maintain them. The only difference is that traditionally the fair play argument focuses on tangible benefits such as security or property, while Binder uses this argument to defend obedience when the benefit is the legal status of personhood. This is indeed a plausible argument but it requires acceptance of the premises of the fair play argument.16

Let me provide a simpler explanation why Why Law Matters may justify an obligation to obey the law. To make such an inference one only needs to adopt the view that individuals have a natural duty to support just institutions. To the extent that such a duty exists, Why Law Matters implies that individuals have a duty to support those institutions that satisfy the conditions of justice as described in Why Law Matters. As Why Law Matters investigates what the requirements of justice are, it also sheds light on the obligation to obey the law.

Lastly, even if Why Law Matters does not have any implications with respect to the duty to obey the law, it clearly has other implications on personal morality. At times my argument implies that individuals ought not to use powers conferred upon them by the law. For instance in chapter three I defend the view that private punishment and, in particular, private prisons violate the dignity of those are subjected to the punishment. Under this view, “it is unjust to confer upon private entities an official mandate to subject other private persons (be they convicted criminals, residents of an enemy state, or persons threatening to disrupt public order) to physically violent treatment.”17 Although I made no such inference it seems to follow that when the state violates its duties and establishes

16 Robert Nozick as well as many other theorists raised grave doubts concerning the fair play argument. Robert Nozick, Anarchy, State and Utopia 90-95 (1974).

17 Harel, supra note 1, at 98.
private prisons, individuals have a duty not to exercise the powers conferred on them by the state. This is only one example of an inference that can be made from the institutional claims defended in *Why Law Matters* as to the moral duties of individuals.

### V. Kyron Huigens

Kyron Huigens’s comment is highly ambitious as it aims not merely to challenge the moral or political views proposed by *Why Law Matters* but primarily the methodology which I use to defend my positions, and even proposes an alternative methodology. As Huigens rightly observes, *Why Law Matters* rests upon an attempt to design a theory that is respectful of common-sense intuitions. In the very end of the book I say so explicitly: “In engaging in this enterprise I was guided by the attempt to look at these institutions from within through the perspective of those who support and cherish them.”18 In contrast, Huigens advocates naturalistic moral realism: morality is a scientific subject and ought to be analyzed with scientific tools and without reference to people’s moral judgment.

Unfortunately I cannot do justice to the meta-ethical views advocated by Huigens. *Why Law Matters* is a book that (primarily) uses an existing influential methodology in political theory without defending it. Let me therefore first address the more particular claims made by Huigens and then turn back to make some observations concerning the more general methodological issues.

In discussing punishment I argue that criminal punishment cannot serve as a method to authoritatively condemn behavior unless it is inflicted by the state. This is because when inflicted by private individuals the offender could always challenge the judgment that his behavior is wrongful and argue that his moral judgments are not inferior to those of the individual who inflicts the punishment. In what I now understand may have been an unfortunate articulation of my thesis I argue that:

To be properly labeled “punishment” under this view . . . it must also reflect an authoritative judgment concerning the wrongfulness of an act, and such a judgment can only be made by an authoritative entity—the state. It is false therefore to say that private individuals ought not to punish; they simply cannot punish, as their acts do not constitute punishment.19

Huigens regards this paragraph as indicative of an ambitious and overly strong thesis. He argues that:

It is important to appreciate how strong Harel's claim is. He wants to show, not only that prisons cannot be privatized, not only that this is so because private prisons impose punishment without respect for dignity, not only that respect for dignity requires deliberation with fidelity of deference, not only that punishment imposed without fidelity of deference is not punishment at all, and not only that the value of punishment is not realized in private punishment. Regarding punishment and instrumental explanations, Harel is not making the weak claim that punishment is best explained in non-instrumental terms, but instead the strong claim that any instrumental explanation of punishment is impossible because punishment does not occur as a result of *any means*, not as a means to *any end* (282, emphasis in original).

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18 Id. at 230 (emphasis in original).

19 Id. at 72.
What in fact I meant to say was more modest than what is attributed to me. I argue that there are some goods whose provision depends upon the identity or status of the agent inflicting it. I also argue that punishment is one such good, at least to the extent that punishment is understood as a communicative practice aimed at conveying the wrongfulness of an act. Private punishment does not serve the communicative goods of punishment because it is crucial that the condemnation of the act be attributed to the state rather than to a private individual. If the condemnation of the act is attributed to a private individual, the offender may protest and argue that “we are equal citizens and no-one’s moral judgment is superior to another.” Hence “your judgment concerning the wrongfulness of the act is no better than mine.” Condemnation is therefore ineffective unless done by an agent who is in a privileged position to the one subjected to the condemnation, one whose judgments concerning the appropriateness of the behavior is worthy of attention or respect. To the extent that punishment is a functional term, namely a term defined on the basis of the functions it serves, one can infer that private punishment is not punishment as it cannot provide the goods punishment is designed to provide, namely official condemnation by the state.

This is a much more modest claim than the one attributed to me by Huigens for several reasons. First I have no objection to define punishment in non-functional terms. In such a case the proper way to express my views would be to say that private punishment is punishment but it does not provide all the goods that public punishment provides. Second and more importantly I never argue that: “any instrumental explanation of punishment is impossible because punishment does not occur as a result of any means, nor as a means to any end” (282, emphasis in original). As a matter of fact I say:

Certainly, private entities can accomplish a variety of desirable goals by exerting violence on their addressees. Thus, for example, privately run prisons can promote deterrence . . . ; they can also incapacitate prisoners; and certain retributive concerns can also be promoted by private bodies.20

Chapter three, discussing punishment, makes two main assertions. First, to the extent that punishment’s primary rationale is communicative, it must be provided by the state. Second, while this rationale is not the only possible rationale, it is a convincing one and it serves to illustrate the existence of intrinsically public goods—goods that can only be provided by the state.

I think these observations are sufficient to establish that some additional claims attributed to me by Huigens are not ones I adhere to. My claim that under a functional definition of punishment private punishment is not punishment is not a claim about “causal instrumentality.” I also think that the sophisticated apparatus borrowed from philosophy of language by Huigens is superfluous. There is no need to explore whether my analysis rests on the meaning or the extension of the term “punishment.” Ultimately the issue is not the definition of the term “punishment” nor its extension; it is instead the

20 Id. at 96.
normative claim that there are certain goods that can only be realized when the state provides them and thus, to the extent that one adopts a functional definition of punishment, private punishment should not count as punishment.

Huigens turns to examine another central methodological issue, namely the use of intuitions to draw moral conclusions. He is concerned that the use of intuitions can be misleading:

Many of Harel’s arguments about punishment are vulnerable to the charge of immodest conceptualism. Many people do not share the intuition that respect for dignity is a necessary feature of punishment. A large segment of American popular opinion and plenty of American public officials see degradation as a necessary feature of legal punishment. Dignity also is not a value that is entrenched in public punishment. . . . It is pleasant to imagine that conceptual analysis might rid us of other people’s primitive intuitions and offensive beliefs, but this is a job for immodest conceptualism—showing that widespread folk intuitions are simply wrong about the nature of the world—and Harel does not carry that heavy burden (286-87).

This is indeed a pressing concern, which is also discussed in Why Law Matters. The question of whether the intuitions used by me are prevalent is crucial. Yet I believe that Huigens’s understanding of the way intuitions operate is too simplistic. I used intuitions to establish that punishment ought to be inflicted by somebody who has a privileged status to that of the one subjected to condemnation. I explained this prevalent phenomenon in terms of dignity. I never claimed that people share the intuition that respect or dignity is a necessary feature of punishment. Why Law Matters does not reproduce an exact replica of common sense intuitions. Intuitions are indeed used but they are used in conjunction with theoretical concepts such as dignity; intuitions are only one component in a much broader comprehensive theoretical framework.

I completely share some of Huigens’s more general concerns about intuitions. Huigens argues:

Without empirical work, conceptual analysis never leaves the world of intuition, and this is a bad place to be. Beyond the obvious questions of “whose intuitions” and “which intuitions,” there is the fact that intuitions—beliefs that are unreflective, probably biased, and possibly infected by magical thinking—are a poor starting point for even the most rigorous analysis. In the end there is the unavoidable possibility that everyone’s intuition is wrong, because we are confined to a point in history at which we are not likely to have the facts, methodology, or theory needed to formulate an adequate conception of any given matter. All conceptions of the concept “ether” as an immaterial medium for cause and effect were wrong because everyone’s intuitions about “ether” were entirely unfounded (287).

The concern that intuitions can be misleading is justified. As I say in the conclusion to Why Law Matters, “[T]he mere fact that a justification accurately captures popular sensibilities is not sufficient. Perhaps the popular sensibilities ultimately fail because there is no way to rationalize the institutions and procedures in terms that are respectful of the passions of those who uphold them.” Given these important concerns I think that the use of intuitions ought to be carried out carefully and be sensitive to these limitations. Yet, without using intuitions, morality becomes detached from those whose behavior it ought

21 Id. at 227.
to guide. Morality requires deliberation; deliberation inevitably reaches beyond the prevalent convictions of individuals. Yet I believe it ought not to be blind to these convictions.

Huigens is critical of my claims against instrumentalism. He believes that instrumentalism is unavoidable. Consequently he believes my arguments should ultimately be construed in instrumental terms. Huigens argues:

Harel’s argument is unpersuasive because we have no reason to think that respect for dignity is always, necessarily, a non-instrumental justifying reason. We can, with Harel, construe dignity as a mode of operation and take this operational mode to be expressive. But the expressive mode is no less an instrumental mode of dignity than it is a non-instrumental mode. For example, expressive value serves prominently in Dan Kahan’s writings on punishment, and it does not operate there as a non-instrumental reason (289-90).

Later on when he discusses the communicative justification of punishment and my claim that communication of condemnation must be performed by the state, Huigens argues:

If the communication of condemnation by the causal instrumentality of hanging is a reason for punishment—as it is in the communicative theories Harel cites—then why must we refrain from proffering the acts of private jailers as means of communicating condemnation (290-91)?

Huigens believes that to the extent that the acts of private jailers are effective means of communicating condemnation, they should be acceptable to the public as (under my own view) the ultimate aim of punishment is to communicate condemnation. Note however that it was crucial for me that condemnation be an authoritative condemnation, i.e., condemnation by the state. It is difficult for me to imagine how acts of private individuals would be interpreted as condemnation of the state. The content of the communication ought to make sense; it ought to be intelligible and justifiable. A private individual’s judgment cannot be attributed to the state in the way a public official’s judgment can.

More generally my concern is to establish that in some cases legal institutions and procedures are necessary for the realization of the relevant values. In most chapters I show that legal institutions or procedures constitute a component of the ends (and thus are not instrumental to the ends). By stating that institutions or procedures are instrumental to some values, one presupposes that the institutions or procedures are separable from the value they are designed to realize, namely that at least in principle the ends (values) can be realized without using the means (the institutions or procedures). But to the extent that the institutions or procedures constitute a component of the value, they are not separable and therefore they are not instrumental to the realization of the values. Let me illustrate.

In chapter six I argue that judicial review is not a means of providing a hearing; it is nothing but a hearing. There is a special affinity between judicial deliberation and the right to a hearing, such that judicial deliberation is tantamount to protecting the right to a hearing.22 In other words, there is a strong, intimate, conceptual relation between the “means,” i.e., the institutions of judicial review, and the ends, i.e., the values that these

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22 Id. at 212.
institutions and procedures are designed to bring about such that protecting the means necessarily brings about the ends.

The conclusion of *Why Law Matters* discusses these problems in great detail. I argue that the modality characterizing the relations between the institutions and the values is a weak modality. The institutions and procedures are not necessarily valuable *universally*. They are necessarily valuable given *certain legal and political traditions.*

This concession is not unique to my view. Even Kant, who defended the view that the justification of law and legal institutions does not turn on contingent sociological and psychological facts, has to concede that there would be circumstances under which law would serve no value, e.g., if the world consisted of one inhabitant. I agree therefore that the case for law depends on some facts and is therefore contingent. The difference between my view and the traditional instrumentalist views is only how different the world has to be in order for legal institutions to have no value. While, in Kant’s case, for law to have no value we need to construct a world with no agents who interact with each other, and for Hart we need to imagine individuals who are unable to injure others or to be injured by others, for *Why Law Matters* we need to imagine a radically different cultural and legal background from the one we are familiar with.

Let me end by returning to the more general methodological critique raised by Huigens. Huigens is critical of the use of conceptual analysis and he advocates the use of naturalistic and scientific methods. I do not deny that those are very valuable for moral theory, but they cannot be sufficient. Ultimately what is of value cannot be discovered scientifically. What can be discovered scientifically is what people believe is valuable and the potential gap between what is valuable and what is considered valuable cannot be bridged by science.

*Why Law Matters* defends the view that public institutions are not mere means to secure rights or justice; as a matter of fact, they are constituent aspects of a just society. The book does so in a way that is respectful of the perspectives of those who support and cherish these institutions. At the outset of the symposium I was concerned that the critiques of *Why Law Matters* would expose the virtues of unabashed instrumentalism. I was relieved to find out that many of the interesting and insightful critiques share my conviction that some legal institutions are not mere contingent means to promote justice; instead they share my conviction that such institutions matter as such. This symposium is an important step in pursuing this agenda.

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23 Id. at 227.