

# Judgment, Communication, and Coercion: What's Wrong with Private Prisons?

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## Abstract

This comment focuses on Harel's argument of principle against the privatization of the state's institutions of criminal punishment and of war-making. After summarizing what I take to be the core of that argument, I consider two objections as a way of suggesting that there is something missing in the way he makes the case against privatization. I then propose a different and more compelling sort of argument against the privatization of criminal punishment, based on a republican theory of government that Harel embraces elsewhere in the book.

## I. Introduction

There are plenty of legal scholars today writing about matters of pressing public concern, and there are plenty more who write on theoretical topics touching on our deepest commitments about the nature of law and state. But it is a very rare thing to find a writer who engages with the pressing issues of the day in a way that makes clear precisely how our deepest commitments are at stake and who makes a compelling case for thinking about those issues in a new and interesting way. Alon Harel has done just that with his stimulating, challenging, and evocative new book, *Why Law Matters*. It is a book that raises more questions than it answers. Although I doubt that any reader will be convinced by all its arguments, it is hard to imagine anyone finishing *Why Law Matters* without having at least some of his most basic beliefs about law and legal institutions unsettled, at least a little.

In this comment, I focus on Harel's argument in chapter three, where he provides an argument of principle against the privatization of the state's institutions of criminal punishment and of war-making. My comment proceeds in four parts. First, I summarize what I take to be the core of Harel's argument about the communicative nature of criminal punishment and why it is wrong for private corporations to be the ones to communicate the state's message of condemnation. Next, I consider two objections to Harel's argument as a way of suggesting that there is something missing in the way he makes the case against privatization. I follow this by considering a different sort of argument against the privatization of criminal punishment, based on a republican theory of government that

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Harel embraces elsewhere in the book, which I believe opens up the path to a different and more compelling argument for his conclusion. I end with a brief comment on outsourcing punishment in the “real world.”

## II. Punishment and the Communication of Censure

### A. An Argument About Standing, Not Results

Harel’s argument in chapter three of *Why Law Matters* is focused on the privatization of the state’s powers of criminal punishment and war-making. States usually privatize these activities (where they do) by means of more or less complex contracts with private corporations (such as G4S, Blackwater, and the like) according to which the corporations agree to provide services that are often described with a fair amount of specificity and the government pays them for those services. I say this because there are many other models of privatization that do not allow for nearly so much governmental oversight.<sup>1</sup> For example, when states retreat from the provision of welfare state goods (like education, health care, job training, and the like), they often do so not by contracting out, but by other strategies that give the state far less control over how the service is provided. In these other areas, privatization usually occurs through the creation of voucher programs (giving citizens money to buy services from private providers) or simply by governmental retreat, leaving private actors to fill the void left by the absence of state provision of the service. So if our main concern with the privatization of government services is the lack of control that governments exercise over the provision of services, we should be much more concerned about the way these other government services are outsourced.

But Harel’s concern is (rightly, I think) with the state’s outsourcing of criminal punishment or war-making, for it is here that there are deep reasons of principle to object. Those reasons go well beyond the usual instrumentalist list of worries concerned with efficiency, corruption, accountability, and so on. Of course, there are many of these instrumentalist worries, Harel argues, but they don’t get to the heart of what should bother us. He writes:

Instrumental justifications are mere superficial rationalizations of a different normative sensibility. More specifically, such justifications fail to capture a prevalent intuition, namely that the involvement of the state in the infliction of punishment is not based on its (alleged) ability to “get it right.” The justification for the role of the state is based on *who it is that punishes* rather than on *what the state punishment is likely to be*.<sup>2</sup>

That is, the core of Harel’s argument against the privatization of criminal punishment and war-making is an appeal to an intuition about who has the standing to undertake these tasks, rather than on who will perform them best. Now where does this intuition about standing come from?

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<sup>1</sup> I consider these other modes of privatization in more detail in Malcolm Thorburn, *Reinventing the Night-Watchman State*, 60 U. Toronto L.J. 425 (2010).

<sup>2</sup> Alon Harel, *Why Law Matters* 78-79 (2014) (emphasis in original).

### B. Punishment and Communication

Harel runs parallel arguments about the state's powers to make war and to impose criminal punishment. But since his argument concerning criminal punishment is much more fully developed, it is the focus of my attention here. His argument against the privatization of criminal punishment is, as we have seen, concerned with the standing of the party imposing the criminal punishment, and that concern arises from an intuition that he thinks many of his readers will share about the conceptual structure of punishment. It is now the fashionable view that the core function of criminal punishment is to communicate censure of the offender's wrongdoing. Building on Joel Feinberg's account of the expressive function of criminal punishment,<sup>3</sup> Antony Duff has probably done more than anyone else to argue for an account of criminal punishment as essentially communicative of censure.<sup>4</sup> At the heart of Duff's argument is an appeal to respect for the personhood of the offender. If punishment is to be justified as a practice that is consistent with respect for persons (including the offender), it cannot be thought of merely as a set of deterrent threats. For when we respond to conduct merely with deterrent threats, we fail to engage with the offender as a rational being, responsive to moral reasons. To show respect for persons, then, we ought to address criminal wrongdoers with a message of condemnation, and not merely as "dogs" who respond to incentives.<sup>5</sup>

Now, if the core of criminal punishment is the communication of condemnation of the offender's act, Harel argues, this requires that the one communicating and the one to whom the message is communicated must stand in a certain sort of relationship to one another. For condemnation is not just any message; it is a message that takes its meaning from the fact that it comes from a particular party. Criminal punishment is not about communicating a message in the passive voice ("your wrongful act has been condemned"). Rather, it is always a message that is expressed in the active voice and in the first person: *we* condemn your wrongful act. And so it matters very much who it is who speaks in the first person when communicating the condemnation of criminal punishment. Harel explains his position on this point in a long but important passage. He argues as follows:

[S]anctioning a wrongdoer is an expressive or a communicative act of condemnation. . . . Unlike deterrence and perhaps other conventional goals of punishment, public condemnation is possible in the first place only if it emanates from the appropriate agent. Condemnation is ineffective unless done by an agent who is in a privileged status to that

<sup>3</sup> Joel Feinberg, *The Expressive Function of Punishment*, 49 *Monist* 397 (1965). The difference between "expression" and "communication" is significant to Duff and to many others these days. To express condemnation takes only one party—the party doing the expressing. To communicate condemnation, however, takes two. To communicate is not merely to send a message but to have it received, as well.

<sup>4</sup> R.A. Duff, *Punishment, Communication, and Community* (2003).

<sup>5</sup> As Matt Matravers points out, Duff has made repeated reference to G.W.F. Hegel's suggestion that to impose punishment merely as a deterrent threat is to treat persons like "dogs." See Matt Matravers, *Duff on Hard Treatment*, in *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* 68, 81 (Rowan Cruft et al. eds., 2011).

of the one subjected to the condemnation, one whose judgments concerning the appropriateness of the behaviour 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.<sup>6</sup>

If punishment were simply a matter of imposing the right incentives on an offender, it wouldn't matter who carried it out. So long as a system is in place to ensure that offenders are subject to the right deterrent threats, there is no reason internal to the logic of deterrence that requires that it be the state (or anyone else) who should carry out the punishment should someone disregard the threats and commit a criminal offence. But if criminal punishment is fundamentally about communicating censure of the offender's wrongdoing, then the very nature of the punishment will change dramatically depending on who is expressing the condemnation. To be condemned by one person is not at all the same as to be condemned by another.

At the next step of his argument, Harel again follows the orthodox line in punishment theory and insists that it is only the state that has the standing to communicate censure of the offender through criminal punishment. But here, it seems that Harel's argument is little more than a stipulation: criminal punishment must communicate the censure of the polity as a whole, and not the censure of any particular private parties within it. Although this is a highly plausible view, Harel does very little to argue for it. Instead, the focus of his argument at this stage is on whether standing can ever matter in questions of punishment. As to why it must be the state and only the state that can have the standing to inflict criminal punishment, we are left only with a few gestures toward an argument. He stipulates that judgments about the wrongfulness of one's conduct can only be made by someone “whose judgments can count legitimately as superior to the judgments of the person who is subjected to the punishment.”<sup>7</sup> As to why this should be, the reader is left to figure out the answer for himself.

### *C. The State and Natural Persons*

The next step in Harel's argument seeks to answer the question: who may speak in the state's name? This is a real and complex issue because the state is not a natural person. For the state to make judgments or to communicate judgments of censure, it must always do so through the agency of natural persons. But if it is crucial that it be the state, rather than some private actor, who makes and communicates these judgments, then we must have an account of the conditions under which we can say that a person speaks in the name of the state and when he does not.

It is in order to answer this question about the relationship of natural persons to the artificial person of the state that Harel invokes a distinction between what he (together with Avihay Dorfman) calls “fidelity of deference” and “fidelity of reason.” The basic idea is that whether or not a particular natural person has the standing to act in the name of

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<sup>6</sup> See Harel, *supra* note 2, at 96-97.

<sup>7</sup> *Id.* at 53.

the state turns on whether or not his decisions about how to act are guided to the last detail (in principle, at least) by deference to the political offices of government. “Under this view,” Harel argues, “political offices ought in principle to be able not only to set the practice into motion but also to determine its content, guide its development, and steer its course.”<sup>8</sup> This is because the core of our idea of the state, it seems, is the decision-making of those who occupy publicly elected offices.

In the next step of the argument, Harel argues that public employees almost always bear the right sort of relationship to the political offices of government and private contractors almost always do not.<sup>9</sup> When we are dealing with a private contractor, even when the relationship is governed by a highly detailed contract that specifies precisely how the contractor is to carry out its assigned task, that contract must still leave open to the contractor certain questions about how to carry out those tasks. And it will be up to the contractor to decide how best to carry out those functions because, *ex hypothesi*, those questions about how to carry out his contractual duties were not specified in the contract. By contrast, public employees are, in virtue of their status as public servants, subject to the control of their political masters even in the last detail of how to carry out their tasks. Of course, this doesn’t mean that they will, in fact, be instructed by their political superiors in how to carry out their tasks. What matters is that as a matter of status, they are liable to the superior judgments of their employers in deciding even these detailed questions about how to carry out their duties.

From all this, Harel concludes that when public officials carry out the task of criminal punishment, we may attribute their actions to the state, for they are, by their very status as employees of the state, members of an “integrative practice” through which they and their political masters decide precisely how they will impose criminal punishment on offenders. By contrast, private contractors, no matter how well-defined their contract and how well-meaning the contractor carrying out the terms of the contract, 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. So the hard treatment offenders receive at the hands of private contractors loses at least some of its character as the communication of state censure. It will turn back into a simple act of hard treatment at the hands of another private person. And that, Harel insists, is inconsistent with our dignity as independent persons who should not be liable to hard treatment at the private discretion of other private parties.

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<sup>8</sup> Id. at 89.

<sup>9</sup> The “almost” here is significant. Harel points out that this is a functional argument, not a formal one:

Nothing in this argument turns on a formal definition of “public official” or “private employee”; the spectre of tautology in this respect is hence groundless. . . . Accordingly, it is in principle possible that private employees of a private firm would be considered, under this analysis, public officials. This may be in the (fantastic) case in which they satisfy the two conditions articulated above: that of participation in a *practice* which takes an *integrative* form.

Id. at 93-94 (emphasis in original).

### III. Two Challenges

I am very sympathetic to Harel's overall project. In fact, I think his conclusion on the question of privatization is basically right. But in this section of my comment, I raise two challenges to his argument as a way of highlighting what I take to be two key problems with Harel's basic strategy. The first challenge concerns the central role that the communication of censure plays in Harel's argument. Recall that for Harel a key premise in his argument for why the state should not privatize criminal punishment is that the essence of criminal punishment is its function as communicating the state's condemnation of the offender's wrongdoing. It is because this message must be conveyed in the state's name that Harel later imposes the constraints on who may do the communicating. 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. Indeed, this is not only true when the state wishes to communicate more general messages of this sort. If the government outsourced the communication of a more personal, first-person message (such as the many apologies that the government of Canada has issued in recent years), this would not seem out of place either. 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.

The second challenge concerns Harel's insistence that criminal punishment must be communicated in the name of the state, rather than in the name of a private party. This is a powerful intuition that is at the heart of a common criminal law worry about vigilantes.<sup>10</sup> Even if we could be sure that vigilantes were more efficient, more effective and less corrupt than the public officials who run the criminal justice system, most people share the intuition that there is something deeply wrong in principle with those who would "take the law into their own hands" and punish criminal wrongdoers in their own name. So far, this is all in support of Harel's argument: our intuitions about the evils of vigilantism seem to support Harel's insistence that criminal punishment must be carried out in the name of the state. But to say that our intuitions are in line with Harel's position is not to say that there is an argument in favor of either. What is it that is so wrong about private individuals taking it upon themselves to communicate their condemnation of an offender's criminal wrongdoing? Harel's insistence, quoted above, that such judgments of condemnation can only be

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<sup>10</sup> I argue that this worry about vigilantes is an important feature in a number of important criminal law doctrines. See Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 *Yale L.J.* 1070 (2008).

made by those “whose judgments can count legitimately as superior to the judgments of the person who is subjected to the punishment”<sup>11</sup> just sounds false to most ears. Surely it is possible for anyone to make such *judgments*. If there is something wrong with vigilantism and with private prisons, it cannot be explained by insisting that no one but the state is entitled to make judgments about the wrongfulness of the offender’s conduct. Private parties are not precluded from making such judgments; they are not even precluded from communicating those judgments; what they are precluded from doing is communicating them *through the medium of hard treatment*. It is the hard treatment involved in punishment, and not its communicative aspect, that puts it squarely within the province of the state.

#### IV. Privatization and the Rule of Law

I raise these two challenges to Harel’s arguments against privatization because I believe that they highlight important weaknesses in his argument focused on the communicative theory of punishment. 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.

There is another, more promising ground for arguing against the privatization of criminal punishment that Harel alludes to elsewhere in the book (mostly in a later chapter arguing for the right to judicial review). It is based on a larger republican theory of legitimate government centered on a conception of freedom as independence<sup>12</sup>—an account that has deep roots in the tradition of common law constitutionalism,<sup>13</sup> in the American constitution,<sup>14</sup> and in the postwar paradigm of constitutional rights protection.<sup>15</sup> This account, unlike Harel’s argument based on the communicative nature of criminal punishment, has the potential to explain why the hard treatment of criminal punishment must be administered only by the state. This is because, unlike deterrence-based arguments, it establishes that punishment must be administered only by a party with the appropriate standing, and unlike Harel’s communicative argument, it focuses on the hard treatment aspect of punishment, rather than on the making and communicating of judgments of wrongdoing.

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<sup>11</sup> Harel, *supra* note 2, at 53.

<sup>12</sup> Philip Pettit, in a series of works, including Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1999), and Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (2013), has developed the conception of republican freedom as a way of thinking about how to structure government.

<sup>13</sup> T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1994).

<sup>14</sup> Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (1988); Michael P. Zuckert, *Natural Rights and New Republicanism* (1998).

<sup>15</sup> See Malcolm Thorburn, *Proportionality*, in *Philosophical Foundations of Constitutional Law* (David Dyzenhaus & Malcolm Thorburn eds., forthcoming).

The republican account turns on its embrace of a particular conception of freedom. For the republican, the freedom that matters is not just an empirical condition—not being subject to physical constraints at the present time. Rather, it is a matter of our enduring status. To be free is to be one’s own master, and to be one’s own master means that no one else can tell us how to run our own affairs. A slave is unfree, on the republican account, not because there are any specific choices that are closed to him at any given moment. Indeed, it may be that some slaves have more choices open to them than some free people. Slavery is the worst kind of unfreedom because it simply defines the legal status of unfreedom: to be a slave just is to have the status of being subject to the absolute discretion of one’s owner in all things. Although we might be lucky and have a kind and generous owner, this is all a result of the grace and favor of the owner. Should he decide to take away our choices, he is within his rights to do so.

Now, this account of freedom brings together an account of legitimate political authority and an account of legitimate coercion in a way that suggests why it is that the state—and only the state—has the standing to inflict criminal punishment. The objection to the status of slavery is not that the slave’s *well-being* depends on the whims of others. To some extent, our well-being must always depend on the whims of others in one way or another. It would be preposterous to grant all persons the right to the love, companionship, and admiration of others in order to ensure that we are never dependent on the whims of others in anything. Indeed, to grant rights such as these would be get things precisely backwards: it ought to be up to each of us to decide whom we love, admire, and take as our companion just as we see fit. The point of republican freedom is to put in place a system of rights that allows each of us to be the masters of those matters that are properly our own private business. And this means that it is generally up to us to decide what we do with our own bodies and with our own property; any efforts to make these decisions for us constitutes illegitimate coercion. That is, coercion on the republican account is not defined in terms of physical interference or even in terms of limiting a choice set; it is defined in terms of interference with another’s private affairs.

Now, if republican freedom is a status of being masters of our own affairs because they’re off-limits to others, this will require an authority to establish and to vindicate that status as a matter of positive law. The worry, however, is that the state—the very entity whose purpose is to secure our freedom from interference by other private parties—might itself become an even greater threat to our freedom. In order to avoid this problem, then, the republican account insists that the state must be a different kind of entity from private persons altogether. Whereas private persons have their own private interests and their own private reasons for acting as they do, the state must be a thoroughly public entity that has neither its own private interests nor its own private reasons for action. Any act carried out by the state must be directed at setting in place and maintaining the just system of laws that guarantee everyone the status of free person.

But, of course, the state must undertake a great many actions that do interfere with the basic rights of individuals, especially when carrying out the functions of criminal



justice: depriving people of freedom when arresting them or imprisoning them, interfering with their property when undertaking searches, and so on. What makes these actions by the state legitimate is that they are undertaken as properly public acts. That is, each time the state interferes with our rights in our person, our property, etc., it must be able to show that this was done (a) by the state (and not by a private actor); (b) for a legitimate state purpose (and not in pursuit of some purpose specific to a private person or group); and that (c) the act was a necessary and proportionate interference with the individual's rights in pursuit of that purpose. If all of these justificatory steps can be satisfied, then we may characterize the state's act as in service of the system that is necessary to secure everyone's freedom, and not just another imposition of one party's private will over another.

According to the logic of this republican conception of freedom and legitimate government, we must be able to attribute to the state any actions that interfere with our basic rights, and the state must be able to justify such acts according to a form of reasoning that is public, based on a shared commitment to securing a system of laws that secures the freedom of all. According to the logic of this argument, then, even the force that private actors use in self-defense must be attributable to the state and justifiable in terms of public reasons. When acting in self-defense, then, we are best understood as undertaking a state role in circumstances of necessity, where recourse to the usual official channels is impossible. I have argued for precisely this conclusion elsewhere.<sup>16</sup> At first glance, this might seem to provide an opening to those who would want to allow the state to privatize prisons and much else. For if any ordinary person is entitled to use coercive force in self-defense without explicit authorization, then surely it must be permissible for the state to contract out the running of prisons through detailed contracts that provide for careful oversight of the private prison operators. But that is not so, and the reason for this lies in the role of necessity. Private individuals may act as state agents in cases of self-defense only because recourse to genuine state officials is impossible: the requirement of retreat that obtains in most jurisdictions allows private actors to use coercive force only when there is no other way for the state to carry out its proper functions. Self-defense is not a policy choice open to the state; it is how a legitimate state must respond in extreme circumstances. Even though private actors should never be in a position to decide when and how to interfere with another person's rights, this ideal may be legitimately infringed in order to ensure that the rights of the person under attack to life or bodily security are not sacrificed altogether. What is really wrong with private prisons, then, is that it is a matter of the state granting discretion to private actors over the interference with basic rights—and that this is done in the normal course of things, as a matter of policy choice, rather than out of necessity. It is the *normalization* of outsourcing that is at the core of what's wrong with it.

Now, if we based Harel's conclusions about why the state may not outsource criminal punishment to operate on an argument of this sort, we might be able to justify his conclusions somewhat more easily. For on this republican account, the limits on pri-

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<sup>16</sup> Thorburn, *supra* note 10, at 1125.

vate prisons have nothing to do with the communicative function of punishment. 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. If we want to explain why criminal punishment must be carried out by the state, we must focus on the fact that criminal punishment constitutes an invasion of the basic rights of offenders. Imprisonment deprives persons of their liberty, execution deprives them of their lives, and so on. The puzzle of criminal punishment is not whether private actors may judge another's acts as wrongful or whether they may be entitled to communicate that message. The puzzle is how anyone may deprive a rights-bearing person of his most basic rights to life and liberty. The republican account of the state sketched out here gives us one way of squaring the circle: it is the state, and only the state, that is entitled to interfere with individuals' basic rights. And even then, it may only do so on the basis of the right sort of public reasons. The criminal trial sets out those public reasons and the state itself must carry out the punishment.

### V. Coda: Outsourcing in the Real World

I end with one last thought on the role of public reasons in justifying the invasion of an offender's rights that is necessarily involved in criminal punishment. In the real world, the state does not contract out the running of prisons to individuals; when it contracts out, it does so to corporations. And this sets up a very special sort of problem. For corporations are not only separate from the apparatus of the state. They are governed internally by fiduciary duties to shareholders. When directors of a private security corporation decide how to react to a specific scenario that has not been outlined in their contract with the state, they are obligated by law to consider their shareholders.<sup>17</sup> So the problem with corporate decisions about the running of prisons is not just that they are *not* constrained by the state in their particulars, but that they *are* governed by duties to shareholders that will often be at odds with the public interest. So even if we have no problem with outsourcing as such, we might still have problems with real-world outsourcing to corporations.

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<sup>17</sup> Harel puts the point this way:

[P]rivate employees . . . can appeal to the basic principles to which they are committed by virtue of joining the organization—the maximization of stockholders' wealth in the case of a for-profit organization and, in the case of a non-profit organization, the vindication of certain values (as construed from the organization's own point of view regarding the meaning of these values).

Harel, *supra* note 2, at 91-92.