Author's Response to the Commentators

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You may have noticed it too, that amid the usual buck-passing, back-sliding techniques of politicians a new way of denying their responsibility has become prominent. This involves *accepting* full responsibility; and it has to be *full* responsibility. Here is Donald Rumsfeld on the coming to world attention of photographs documenting the torture and psychological and sexual humiliation of Iraqis in Abu Ghraib prison by American soldiers in 2004: 'This happened on my watch. As Secretary of Defence, I am accountable for them. I take full responsibility.' (After a couple of years he left government, and took his full responsibility with him to become a Distinguished Visiting Fellow at Stanford University's Hoover Institute.) Or Tony Blair, the same year, at Lord Butler's enquiry into intelligence leading to the invasion of Iraq which showed there were no weapons of mass destruction: 'For any mistakes made, as the report finds, in good faith I of course take full responsibility.' (He took it with him too, and, along with his substantial consultancy fee from investment bank JPMorgan Chase, became a Distinguished Professor at Yale University, where he currently teaches on the (presumably good) faith and globalization Programme.) Or British Prime Minister Gordon Brown more recently, on a political sleaze outbreak from within his party: note the same formula, but with a nice twist: 'I take full responsibility for what happens, that's why the person who's responsible went immediately.' (It wasn't him, of course, who went – and since he's still in post he hasn't taken up a Distinguished Chair anywhere, yet.)

If 'responsibility', full or not, sometimes appears as slippery as our politicians' usages would suggest, then it is also, at least in part, because we genuinely do use the idea in a number of validly different ways. The conditions of what responsibility requires and entails have been the subject of extensive philosophical taxonomy and debate and for a long time. In the realm of legal philosophy, HLA Hart and more recently Peter Cane have,

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prominently among others, done much to clarify and develop our understanding of these variations as they pertain to law.

We might observe that where the meaning of responsibility seems to slip and slide in ways that may appear problematic, then law and legal institutions have a crucial role to play in fixing meaning and, perhaps just as importantly, in fixing consequences on findings of responsibility. This is not to say that defining responsibility in law is itself a straightforward task or that it is necessarily easier than in other normative realms. Still, law as institutional normative order (to use Neil MacCormick's formulation) does have formally recognised means for determining legal responsibilities, and, as a coercive institution has the authorised capability of having these enforced. Whether in civil, criminal or public law, legal norms sanction material consequences and do so in a way that ordinarily involves a claim to rightness or correctness which have priority over other, often competing non-legal normative standards of responsibility. Findings of legal responsibility then have a social priority that alternative findings or forms of responsibility – no matter how 'full' they may be – do not.

In these respects Ngaire Naffine is right to remind us that law can play an important role in trying to maintain the dignity of the 'responsible subject'. Since to negate this dignity risks treating humans as 'ciphers', risks treating them as means and not ends in themselves, we ought, says Naffine, as a matter of philosophical and political principle to use it as an ideal yardstick against which actual practices can be compared. We ought to 'retain the idea within law of the responsible chooser, as law's central subject', and this is so, perhaps even especially so, when as Naffine notes, the state or the law 'patently fails in so many ways' to reach the critical standard. Important recent work on responsibility in legal philosophy, and in particular in criminal law theory, works precisely in this way: analysing and setting out standards in full awareness that these exist in tension with the reality of unmet standards. Hence we develop the ideal and seek to oblige 'the state to do a far better job of making it real'.

In *Law and Irresponsibility* I was concerned with developing an analysis of just how it is that law and legal institutions do not so much 'fail' in not meeting the ideal, but rather in exploring the opposite hypothesis: how that failure may also in fact be a success. I wanted to pursue this, perhaps counter-intuitive, possibility in particular since it seemed to me that legal institutions were capable of playing a role in legitimating suffering on a massive scale in such a way that merely explaining the dissonance between ideal and reality as a matter of regret or 'could try harder' was itself unpersuasive. It was not so much that the 'responsible subject' was being negated in law, but that in certain – contemporary and legal – practices involving extensive suffering, what being a responsible subject in law required was being *conformed* to, that

this fact played a vital role in the legitimation of that suffering, and that in the process responsibility – of whatever kind – was being routinely, and legitimately disavowed or made to disappear. The cases I documented at length in the book – such as sanctions against Iraq in the 1990s, the ongoing effects of colonial practices, the ultimately devastating potential of environmental and human damages with particular reference to nuclear weapons – provided instances where legal mechanisms ordinarily used to recognise and uphold responsibilities were used *also* to organise irresponsibilities: to make, that is, the question of responsibility disappear *through* practices of responsibility. Hence 'making it' – the ideal of dignity – 'real' could also make it – the reality of suffering – real, and this seemed to me a more challenging issue to understand.

In order to investigate this it was necessary to pursue the insight that just as the production of social 'goods' on a massive scale – food production and distribution, national healthcare or education, meeting global fuel needs, whatever – is not plausibly understood as the result of the 'responsible chooser' choosing, but is rather the result of complex extensive and intensive processes of production, exchange, distribution and consumption – the result in other words of the division of labour as conventionally understood – then it was also true that the production of social 'bads' also involved, if not in inspiration then in delivery and technique many of the very same processes. The work of social theorists such as Zygmunt Bauman and Stanley Cohen had brilliantly documented some of the major social forces involved in this, and had shown in nuanced ways how the same social institutions, forms and expectations that were part of the elementary furniture of modern life could also allow extensive suffering to be produced and maintained and yet responsibility for this not register. This did not mean that individual choice was thereafter to be thought of as entirely irrelevant, nor that philosophical ideals were not worthy of pursuit; but it did show that there was an awful lot more to social processes than responsible choosers and the failure of their ideals being met.

But where the work of authors such as Bauman and Cohen was, and remains, important and inspirational, it seemed to me nonetheless that there might have been insufficient attention paid to the specific contribution that legal norms, techniques, and reasoning played in the extensive production and legitimation of human suffering, at least in the contemporary cases I was interested in. Hence there was important work to be done from the jurisprudential point of view that analysed the distinctive capabilities of modern law, even if these should not and indeed could not be entirely dissociated from the sociological insights these other theorists offered.

The working (again, not the failure) of law and legal institutions was especially important to be analysed in this respect because we lived in an

increasingly juridified world. This was a world in which law, as Jurgen Habermas had shown, played an increasing role across a growing range of social practices, and an increasingly significant role as a medium of normative communication by becoming a secular embodiment, in the instantiation of practical conceptions of human rights and the doctrine of the rule of law, of deeply held values. However, *if* the legal instantiation of norms of responsibility was *also* capable of legitimating extensive suffering and making responsibility for that disappear, then it became all the more important to understand *how* this was occurring.

In certain respects law and legal norms both mirrored and fostered aspects of other social processes. Law itself had both a dual capability – capturing and dispersing responsibilities – and a role in connecting and disconnecting norms and expectations of other normative social systems, albeit, I suggested, in patterned ways. I am grateful to Andrew Goldsmith for drawing attention to the work of Robert Cover in the title of his comments because Cover had a very acute sense of the dual roles of legal norms. In particular, in an important text Goldsmith refers to, he analysed the law's irenic and violent functions through consideration of the violence of judicial interpretation which was something so often overlooked by more textual academic analyses. Judges, Cover explained, were people of peace, but at one and the same time dealt in, and dealt, 'pain and death' through legal interpretations which drew on 'organized, social practices of violence'. Cover's point – like Hobbes and Kant and many others before him – was not that resort to violence was symptomatic of a failure or an 'excess', but rather that it was also the very condition of law's success. Yet how judges and legal institutions carried out this dual work was not always straightforward, and not always what it seemed. Cover relates a wonderfully telling story of how a judge, preparing to hand down a sentence in a criminal case, was unable to use the courtroom and had to convene in the much smaller robing room, along with the accused and his family. In this circumstance it was impossible, notes Cover, 'for the judge to hide or insulate himself from the violence that would flow from the words he was about to utter,' and this became manifest when the accused responded by lurching at the judge to try to get him to change his mind, before 'normality' was resumed and the accused restrained and forced to leave by court officials.[1] What is particularly vivid about this story is its drawing attention to the dualities of law that are so commonplace and yet seldom exposed: the way in which law and its paraphernalia simultaneously are inescapably bound up with and *distance* themselves from violence; how the law categorises and differentiates in order to separate *and* bring together: the people involved are simultaneously just people *and* take on roles – judge, accused – that mean they are more than just 'people', and so on.

[1] R Cover, 'Violence and the Word' (1986) *Yale LJ* 1601 at 1616.

Goldsmith is correct to say that it is a mistake to concentrate overly on the judicial role to the exclusion of the many other aspects of law's functioning, and indeed Cover brings this out admirably in this example: the judicial practice of sentencing cannot be understood except in the wider 'field' of socially organised violence. This is why it was so important to me also to situate the analysis of legal operations so lengthily amongst the 'ordinary' processes of social organisation, processes that are so commonly missed out even by more supposedly critical contemporary scholars.

But judges do nonetheless encapsulate and express a certain legal reason that cannot be ignored, in part because their pronouncements both embody and authorise a wider social force one key part of the make up of which is the co-existence of peace *and* violence. Noting this, however, should not shield us from realising – indeed it should constantly alert us to the possibility – that such co-existence often plays out in entirely asymmetric if patterned ways. This is something that is indeed commonly missed in judicial reasoning, but is usually clearly observable from other perspectives. A rare exception to this is Chief Justice Brennan in his judgement in the 1992 *Mabo* decision where he stated *both* that 'the peace and order of Australian society is built on the legal system' *and* that Aboriginal 'dispossession underwrote' – and thereby continues to underwrite – the 'development of the [Australian] nation'. This case seems in an important respect emblematic of the way in which legal categories organise irresponsibility – they make effective the disappearance of the possibility of responsibility – and in doing so legitimate ongoing harms even when – *especially* when; this is my point – this is carried out in the name of contemporary legal norms of equality and fairness. By analysing the ways in which the High Court read the role and interrelations of law, politics and economy it also provides an emblematic example of the ways in which the organised transference *and* blockage of responsibilities across social systems are given effect as a routine part of legal reasoning. We might then profitably ask whether in this context the state and the law could 'make real' the ideal of the 'equal dignity of responsible choosers', when in practice their very condition requires the denial of this. Here again we encounter the inadequacy of a reading which is expressed as the dissonance between ideal and reality, for it is a measure of the successful achievement of the 'legal normality' that this instance fails to register for what it is (and it is not entirely clear how the approach of a 'hopeful realist' such as Goldsmith would have us work through this legal position.)

Patrick Emerton, in his sympathetic reading of my analysis, makes an intriguing suggestion which is worth noting at this point. Where my own use of Hobbes is limited largely to drawing on the way in which he analyses how legal techniques can be used to legitimate that suffering which does not register as injury – in the Latin phrase, *damnum absque injuria* – rather than to any normative insights Hobbes may offer, Emerton suggests that Hobbes's

account might be used productively in such a way. Specifically, it could be operationalised in a way that radicalised the problem of legitimation of social order thus: an order is only legitimate where it 'satisfies the urgent preferences of all those subject to it'. Where it does not, then as Hobbes says, 'man hath yet the Liberty to disobey'.

This, what might even be called an 'anarchist', reading of Hobbes is valuably thought-provoking and it flows from an honesty that is so continuously refreshing in Hobbes's work. In this instance, he confronts head-on the essential limit of normative authority in the face of elementary need. Perhaps this could be used, suggests Emerton, as, so to speak, a normative lever to open up to contestation the basic conditions of social order particularly in those instances where the existence of normative authority for the larger part of the society seems to require as its condition the destruction or dispossession of another part. Perhaps indeed it could, and we might do well to take this suggestion further. I will not pursue it here though, except to point out in passing that a difficulty remains: that where the commonwealth is not already instituted, the problem is not merely a matter of consent or authority, but ultimately and inescapably one of power. We would be well advised to take note of Hobbes's counsel in an earlier chapter, that 'whether he be of the Congregation, or not; and whether his consent be asked, or not, he must either submit to their decrees, or be left in the condition of warre he was in before; wherein he might without injustice be destroyed by any man whatsoever.'[2] Hobbes's honesty cuts both ways.

Returning to the overall thesis then, according to the analysis I have offered, legal norms and institutions need to be analysed for the ways in which they may play a key role in legitimating human suffering and may do so, moreover, in ways that make that suffering difficult to register. Not only might they do this, I argue, but in the cases I analyse they *do* do so. But does this argument not overgeneralise law's negative capabilities? Does it not fail to give due recognition of the good that legal ordering can and does provide? And, moreover, in so describing the work of law does it not miss central aspects of the way in which numerous modern regimes have worked to produce extensive suffering without any reference to and indeed *in opposition* to modern western legal norms? These are themes that are taken up by several critics and I will try to respond directly to them now.

Taken together the analysis offered in the book can be criticised from the perspective that it overstates *law's* role in the legitimation of extensive humanly produced suffering, and that it underplays the cases where the intention to cause harm, and the instantiation of that intention relies on non-legal and profoundly unjust modes of legitimation. This point is made most

2 Thomas Hobbes, *Leviathan* (1651; Richard Tuck (ed),1991), 123-124.

forcefully by Martin Krygier in his comments: acknowledging the role of modern social structures in the delivery of harms is one thing, he points out, but the workings of modern law had little role to play in the worst crimes of the last century. As such the account I have offered is unbalanced 'to the extent that it washes out the malign significance of evil leaders and evil regimes that used law, if at all, for very different purposes in the tragedies of our times'.

It is of course true that I did not have much to say about these crimes, their execution or their ideologies. This is because I emphatically agree with Krygier's point that they were largely carried out beyond the pale of legal regulation, and certainly without reference to the legitimating potential of modern western legal techniques. But since I was concerned only with these instances where the latter *were* employed, it made sense to exclude them from the ambit of the book. Yet there is something more to Krygier's point that this rather obvious reply would fail to engage with, and here I would like to make two related responses to a deeper, potentially more troubling, issue.

In arguing, as I do, that legal mechanisms organise irresponsibility 'as much as they determine responsibility' Krygier claims that this 'suggests a sort of moral (or immoral) equivalence and mutuality between the generation of responsibility and its opposite'. It is extremely important to me to make clear here that this is *not* a moral equivalence being made, but rather a descriptive one: that the same (legal) categories, institutions, and arrangements that produce goods, as I put it earlier, can operate 'as much' to produce bads. There was no intended implication here to say that it is of no matter, or more significantly, that it is arbitrary as to what exactly it is they do produce. Nor does 'as much' signify a quantitative claim; as if 'as much' was meant to be synonymous with 'as often as' – it was not. To be clear: to say that modern law can equally play a role in the legitimation of extensive suffering is not to say that it plays that role equally well or equally as often as something else. It is just to say that it does this also. I suspect I did not make that point as clearly as I might have.

The second point is more important though. Krygier asks of my thesis on law's legitimating role: 'Compared to what?' One answer to this question might be given along the following lines: Compared to modern law's own professed standards. On this account, and in contrast to Naffine's point, we ought to compare not the reality of law's departures from the ideal of the responsible subject, but compare these (lawful) departures with *law's own* existing standards. So, for example, compare the legal principle of the right to life, the presumption of innocence, or the right to be free from torture in the domestic realm with how each of these play out in a particular country's treatment of foreign nationals; or, again, compare the principle of equal treatment before the law with the legal practices of economic exploitation, etc

etc. By doing this kind of work one might expose to the light of critical evaluation the hypocrisy of double standards by which states and their laws often operate.

This kind of comparison work is undoubtedly important; and it is importantly only *possible* in 'legal states', in comparison to those regimes that have no regularised legal standards according to which the state, its henchmen or its adjunctival forces operate. That, it seems to me, is correct.

But I would not like this to be confused with another possible reading of the question, Compared to what? For it also seems to me correct that when we try to describe some practice that delivers extensive suffering, it is *not* in the comparison with some other such practice that we gain insight into the delivery or the awfulness of the one we are concerned with. In attempting to understand the process, human impact and significance of, for example, the Armenian genocide, we would not require to measure our understanding of it by asking, compared to what? Indeed, we might perceive a certain unease in setting out from this question; a certain reluctance to think in such terms, as if the question of extent, or murderousness, or malignity only made sense when set on a scale, and according to which therefore something might not be *too* bad 'compared to ...'. But if this reluctance or unease is perceived as justified then it would also seem to be relevant with respect to those occasions where suffering is carried out or justified according to legal authority. To repeat: we do not usually need to understand the operation of any such practices, as a matter of description, by *comparison*; we seek to understand them for what they are. Whether legitimated by racist ideology or by legal means, we analyse their distinctiveness and do not learn from posing the question as one of moral or immoral equivalence; we do not do either kind justice, so to speak, by gauging them 'better' or 'worse', compared to something else.

If this is right, as I believe it is, we ought not to turn away from the harms that are legally legitimated, nor as lawyers or legal philosophers, fail to learn how it is that these occur. That these can also legitimate suffering does not require or benefit from a comparison and in that sense I believe that the analysis does not overreach or negate either law's other capabilities or those of non-legal modes of organisation; the analysis is not *over*stated to the extent that it states only its own case based on the cases studied. *Law and Irresponsibility*, despite its occasional intemperance (something pointed out by more than one commentator, and which might be the cause of the lack of clarity about the issue of overreach), was essentially intended as a descriptive book; a description, that is, of what law and legal institutions can also do when they are working.

Learning more about the detailed conditions of how this happens, what it involves, what it facilitates, causes and legitimates, would have to be a – to

me, necessary – first step if we wanted to learn *from* how these all happen as they do. The crucial fact that a great deal of store is set by law, its standards of responsibility, human rights, and ability to hold actors to account, in contemporary domestic, regional and global society, was all the more reason for pointing out the very elementary capabilities that these same means have of legitimating massive harms too.

So it was not a normative argument being made. There are plenty of normative arguments being made, but not in this book. (As it happens, I suspect that the most effective and successful practical normative engagements are not found in books at all, but I leave that unsubstantiated provocation for another time.) We start from where we are, and it is best to be straightforward about that, and, as legal philosophers, to chart the part of the legal terrain we are concerned with well. Otherwise we are in danger of getting more of the same, good and bad; and in circumstances of a global precariousness about which one must be, if nothing else, concerned, omitting from deep scrutiny the potentially dangerous work of successful legal capabilities would be unwise.

Let me end by thanking again the commentators, who have provoked me to think beyond where I was, as I hope, in some small way I might have done the same to other readers. I should note though, that for what I said in the book, I still take responsibility: full responsibility. Now, where's that distinguished chair…