

and Frowe rightly distinguishes between harm that cannot be effective and harm that could be effective but fails.

What motivates Frowe to claim that Enemy is liable to be killed is her belief that if he is not, then when Victim tries to kill him, she wrongs him and he has a right of self-defense against her—and that seems false. I think, however, that Victim does wrong Enemy, as Enemy does not forfeit his right not to be killed when he in fact poses no threat. That is, he is not liable to be killed because killing him would not be instrumental to the achievement of any justified aim (putting aside considerations of desert, deterrence, the affirmation of Victim's moral status, and so on).

But even though Enemy is not liable to be killed, he has no right of defense. This is because, for him, harm is unavoidable and he bears greater responsibility for that fact than Victim does. Assuming that the possible harms are comparable in magnitude, it is a matter of justice that he rather than she should suffer the harm he is more responsible for having made unavoidable. He is therefore liable to *allow* himself to be killed. (This point may be clearer if we imagine that Enemy cannot defend himself but that a third party with full knowledge can. Although Enemy is not liable to be *killed*, he is liable to be *allowed* to be killed. He has forfeited his right to be saved when the alternative is killing Victim.)

Return now to the question whether a wrongful threatener against whom the only possible defense would be disproportionate in both senses is permitted to harm his victim in self-defense. Assume that Threatener is not liable to disproportionate defensive action and that Victim acts wrongly in attempting it. It may nevertheless be true that Threatener is not permitted to defend himself. For he is in a situation in which harm is unavoidable and he may bear greater responsibility for that than Victim does. If so, while he is not liable to be harmed by Victim, he may be liable to allow himself to be harmed—unless, perhaps, he could defend himself by causing her only minor harm and would not harm her further.

This review does not come close to doing justice to the richness of Frowe's intricately argued, insightful, and challenging book. I have benefited enormously from thinking as carefully as I am able about the positions she defends and the arguments she gives for them. I am confident that the same will be true of others who read this splendid book.

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Harel, Alon. *Why Law Matters*.

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Alon Harel's *Why Law Matters* is an unusual book in many respects. To begin with, few publications are reviewed both in *Ethics* and in the *Washington Post*. This fact suggests—rightly, in my view—that the book will be of interest both to the author's fellow academics and to sophisticated general readers who pay attention to the more theoretical aspects of political and legal affairs. Moreover, Harel's book is also unusual among recent works in political philosophy and the philosophy of law in that it defends a noninstrumentalist view of what justifies political and legal

institutions. It is this latter way in which Harel's book is unusual that will concern us here.

So what is noninstrumentalism as Harel sees it? Answering this question takes a bit of work, and requires getting a hold of instrumentalism first, but this task is necessary for understanding Harel's project. Begin by asking, "What, if anything, justifies political and legal institutions?" Note here that the expression "political and legal institution" denotes a heterogeneous collection of social practices including (but not limited to) a legal right to a fair trial, a system for punishing those who violate a code of criminal law, a national constitution, a scheme of judicial review, and an arrangement for creating and maintaining a citizen soldiery. Harel himself does not evince much interest in exactly what makes something a political or legal institution—wisely so, perhaps—and in this review I'll follow him in operating under the assumption that these diverse institutions have enough in common to be treated as belonging to the same category for purposes of justification. Next, call "instrumentalism" one answer to the question "What justifies political and legal institutions?" As it is understood here, instrumentalism is the view that political and legal institutions are justified if and only if they help promote goods that are themselves extrinsic to the political and legal system in which the institutions exist (194). To use my own somewhat homely image, instrumentalists think that political and legal institutions share something important with the sort of tools one might find in a garden shed. The rake in the shed is a good rake just in case it helps one rake leaves; the trowel is a good trowel just in case it helps dig small holes, and the set of pruning shears is a good set of shears just in case it helps one prune one's bushes. Likewise, for an instrumentalist, political and legal institutions are good—indeed, justified—if and only if they help a society bring about goods such as stability, justice, equality, or other worthwhile goals. Of course, the comparison between garden tools and political and legal institutions is rough, and it goes a bit far to say that a garden trowel is *justified*. But the comparison between institutions and tools is serviceable enough. Finally, let me emphasize that, according to instrumentalism, the goals that political and legal institutions help facilitate are genuinely extrinsic. They are not themselves part of the political and legal systems, just as the rake is distinct from the leaves that it rakes, and the trowel is distinct from the hole that it digs. Now, Harel offers a subtle and nuanced alternative to instrumentalism. He is careful to avoid denying that an institution *might* be justified by the fact that it achieves extrinsically good ends. That is to say, he maintains that the fact that a legal system helps to make people safer and more secure *might* justify the existence of this or that political or legal institution. Harel, then, is not an *anti*-instrumentalist (225). But the heart of Harel's noninstrumentalism and of *Why Law Matters* is his contention that there are at least some cases in which instrumentalism fails to identify correctly what makes a political or legal institution good or justified. Consider one of Harel's examples: judicial review. On Harel's noninstrumentalist understanding, part of what justifies judicial review is that it protects one's legal right to a hearing (202). A legal right is, clearly enough, not something that is distinct from the legal system itself. In other words, it is not a good that is extrinsic to the legal system, as it would need to be if instrumentalism were correct.

Let me say that I learned an enormous amount from *Why Law Matters*, and I suspect that my experience will not be unique. Harel demonstrates a strong

grasp on many of the most interesting areas of controversy in contemporary legal and political philosophy—including rights, privatization, constitutionalism, public goods, punishment, and judicial review. He repeatedly demonstrates a master's touch when discussing these issues: Harel is as a rule scrupulously fair to opposing viewpoints, he draws subtle but helpful distinctions among the contending positions, and he offers many novel and challenging arguments without relying too heavily on contrived counterexamples or question-begging frameworks. One can be substantially unpersuaded by the case for noninstrumentalism, as I am, while finding insight and edification on almost every page. For all of these reasons, I greatly admire *Why Law Matters* and recommend it strongly.

It is one of the virtues of this book that Harel is so forthright about the development of his own views. He tells us that he began this project as an instrumentalist but converted to noninstrumentalism as this very project developed (3). This admission adds personal charm to *Why Law Matters* and helps to draw in readers (like me) who find themselves more inclined to instrumentalism. In light of Harel's change on mind, it is hard not to ask, "Should we too convert to non-instrumentalism?" But I don't think so, and I want to explore in some detail a few places where the case for conversion breaks down.

Harel offers two general criticisms of instrumentalism. For ease of reference, call one of these criticisms "epistemological" and the other "doxastic," but note that these are my labels, not Harel's. These two criticisms, even when considered together, fall short of a refutation of instrumentalism, and, to his credit, Harel recognizes this fact. Rather, Harel offers the criticisms as points of contrast between instrumentalism and noninstrumentalism: instrumentalism suffers from these problems but noninstrumentalism does not, according to Harel (4).

The epistemological criticism begins with the observation that instrumentalism relies on broad claims about the consequences that will arise from having one sort of political or legal institution rather than another. But, the epistemological criticism continues, we often lack sufficient evidence for these claims, and, in at least some cases, we are unlikely ever to have it. As Harel himself puts the matter, "even social science is sometimes impotent in substantiating such claims" as are made by instrumentalists (4).

However, I'm not convinced that the epistemological criticism raises any serious problems for instrumentalism. In particular, I think Harel overstates the level of generality of the sorts of claims that an instrumentalist must make. For instance, Harel imagines an instrumentalist asking, "Are soldiers more likely to comply with humanitarian law than mercenaries?" and then falling into an embarrassed silence as the difficulty of answering the question dawns on her. But it seems to me that an instrumentalist would not need to ask questions at such an abstract level in order to determine whether or not this or that institution is justified. For example, suppose one thinks that considerations of justice require that those who fight on behalf of state X violate humanitarian law as little as possible. When trying to decide whether state X should have citizen soldiers or hire mercenaries, it is not necessary to determine once and for all times and places whether citizen soldiers are more likely to comply with humanitarian law than all mercenaries are. On the contrary, what one needs to know is whether the citizen soldiers that state X can raise now are a better bet to conform to humanitarian law than the mercenaries that it might hire now. This question is much more tractable than the

extremely general question with which Harel saddles instrumentalists. Moreover, there is more empirical work done on questions of this sort than Harel notices (though this is not the place to go into the matter). And even in those cases where it is true that no one has recently researched the behavior of soldiers of state X or the mercenaries it could hire (perhaps because I just made up state X), there are likely to be studies of cases similar to state X's that will be of use. In point of fact, political and legal bodies as well as corporations and nongovernmental organizations quite often decide how they ought to behave in order to realize a goal by looking at what happened in cases much like their own. Furthermore, even if we set aside all of these responses to the epistemological criticism, I am uncertain that Harel's noninstrumentalism is in a significantly better position here than instrumentalism. After all, the noninstrumentalist, as noted above, does not deny that in some cases it is the fact that an institution promotes an external good that justifies it. So the noninstrumentalist will also have to ask the same sorts of questions that an instrumentalist must ask about the contingent consequences of having this or that institution. Furthermore, the principal distinction between the instrumentalist and the noninstrumentalist concerns whether or not the goods of the political and legal system are extrinsic (instrumentalism) or at least partially intrinsic (noninstrumentalism) to the system. With that point in mind, recall Harel's own example of whether fielding citizen soldiers rather than mercenaries promotes greater conformity to humanitarian law. To my eye, conformity to humanitarian law is itself at least partially intrinsic to the legal system in question. So, to the extent that it raises any difficulties, it raises them for the noninstrumentalist, not the instrumentalist.

The main thrust of the doxastic criticism is that instrumentalism doesn't map onto the beliefs and sentiments that most of us have about justification of political and legal institutions (78). The idea seems to be that while instrumentalist philosophers and theoreticians might argue that legal prohibitions against the use of torture are justified, for example, because they promote overall well-being, the woman on the Clapham omnibus thinks that it is something like the inherent wrongness of torture that does the justificatory work (116ff.). Even worse, one might find oneself shifting back and forth between the point of view of the philosopher (when one is in the seminar room) and the woman on the Clapham omnibus (the rest of time), leaving one open to a charge of "inauthenticity or insincerity" (29).

Yet I am skeptical that the doxastic criticism has as much probative force as Harel believes. Start with the apparent disagreement between the philosopher and the woman on the Clapham omnibus. Both as a philosopher and as a fellow citizen of this woman, I want to know which political and legal institutions we *should* have. If I disagree with others about the justification that our shared institutions should have, then I should do my best to persuade them of the truth. But it is difficult to see why I should give up on my answer to questions about political and legal justification simply because it is not the answer of those around me. And with good reason: Harel himself admits that the folk accounts of justification might simply be misguided and unworthy of any deference (226).

I think a better question to ask is whether the woman on the Clapham omnibus would, under ideal epistemic conditions, herself agree with the philoso-

pher's attempt to explain the reason that a political or legal institution is justified. I admit that this question is not easy to answer, but I think that it is only the possibility of persistent disagreement at this epistemic level that should keep one awake at night. Moreover, I wonder how much divergence there really is between folk accounts and instrumental theories concerning the justification of political and legal institutions. If there's one takeaway from recent work in experimental philosophy, it is that we should be very careful about making assumptions concerning the views of the folk. To be sure, if I ask the woman on the Clapham omnibus about torture *while she's riding the omnibus* and trying to take care of life's many daily concerns, she might give a rather short answer: we should have laws against torture because torture is wrong. But I wouldn't be surprised to learn that when, like Bishop Butler, she sits down in a cool hour she provides an answer that is a little closer to what the instrumentalist philosopher would like. And what's true of the woman on the Clapham omnibus is true of me as well, which might explain why even philosophers sometimes find themselves shifting back and forth between instrumentalist and noninstrumentalist answers when they shift conversational contexts. As such, these inconsistencies would not be part of the case for inauthenticity or insincerity.

Finally, I should point out that there is no guarantee that noninstrumentalism will do a better job than instrumentalism of agreeing with folk accounts of what justifies political and legal institutions. The woman on the Clapham omnibus could, for instance, tell us that laws against torture are justified because they help enforce God's will. But God's will is surely a good that is extrinsic to our political or legal system. Hence, no special advantage accrues to the noninstrumentalist as a result of the doxastic criticism. While I am duly impressed by *Why Law Matters*, as mentioned above, I don't think that instrumentalists should give up on their own answer to this question.

The author himself might have preferred that this review focus more on, say, his noninstrumentalist account of legal rights or punishment instead of the broader battle between instrumentalism and noninstrumentalism (5 and 225). Yet, while that response is understandable, it does an injustice to *Why Law Matters*. The glue that holds together the various and sundry forays into legal and political philosophy in *Why Law Matters* as a single project is the noninstrumentalist approach. But if that approach is undermotivated as an alternative to instrumentalism, as I have been arguing, then we might need to reconsider whether or not there is a need for an ongoing noninstrumentalist project to pursue.

But let me conclude by offering something of an olive branch to noninstrumentalists. I believe that a large part of what Harel sees as valuable in noninstrumentalism can be accommodated within an instrumentalist paradigm. Take state punishment. Unsurprisingly, Harel contrasts instrumentalist and noninstrumentalist approaches to state punishment. The noninstrumentalist is superior, Harel argues, at least in part because punishment is an "intrinsically public good" (96).

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 judgments concerning the appropriateness of the behavior is worthy of attention or respect. (97)

Let's assume that Harel is right about this claim and ask, "Must an instrumentalist deny it?" I don't think so. Instrumentalists who believe that the only goal that can justify an institution of punishment is, for example, deterrence, will certainly balk here. But those of us who think that legitimate instrumentalist goals are broader and might include community and respect for all need not pull up short. We can agree that punishment is an intrinsically public good, provided that "intrinsically" modifies "public," not "good." The fact, if it is a fact, that X is a necessary means to achieve some intrinsic good Y does not show that X itself is intrinsically good. Likewise, the fact, if it is a fact, that a public institution of punishment is the only way to pursue intrinsic goods like community and respect for all does not show that a public institution of punishment is intrinsically good. So instrumentalism, in the form I've described it here, seems capable of doing what Harel wants noninstrumentalism to do. Perhaps considerations of this sort will even persuade Harel to consider a return to the old faith of instrumentalism.

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Hausman, Daniel. *Valuing Health: Well-Being, Freedom, and Suffering*. Oxford: Oxford University Press, 2015. Pp. 288. \$55.00 (cloth).

This book is a comprehensive and very insightful discussion of the value of health and how to measure it. The book entails some well-developed distinctions and rather groundbreaking statements: first, that we must distinguish between measuring health and measuring the value of health, and that the latter is the measurement of most political interest; second, that in measuring the value of health we must distinguish between the private and the public value of health and that we would do best to focus on the public value of health. The book then provides a plausible suggestion for a framework for how to assign value to health states by assessing their public value by pairing information about the degree of distress they impose with how much they limit people's ability to engage in common and important activities. And although the suggested framework is still sketchy and unfledged, it is carefully grounded in normative reasoning and seems to fare better than the available alternatives from welfare economics. Thus, the book provides a sound and important contribution to the literature.

The book takes its reader on a dialectic journey through a landscape of both philosophical consideration and practical issues, all of which are nicely and in a perfectly clear way related to the main issue of how to assess the value of health. Hausman's style is distinctive in the way that each new chapter raises the most important critical points against the former chapter's conclusions and gives them a fair and well-informed discussion upon which new conclusions are reached. In this way, the book provides the reader with the feeling of being together with Hausman on a joint quest for the right answer to the question of how to measure the value of health. This characteristic style gives the book an overall dialogical expression and shows comprehensive understanding of the complexity of the issue in question—always taking the most plausible and weighty reasons and positions into account before arguing against them. Consequently, readers of all levels can easily