

Comments on Alon Harel, *Why Law Matters*

David Estlund*

A central theme of Alon Harel's deeply thought and elegantly argued book is the claim that certain legal institutions that are often justified instrumentally, in support of prior and independent values such as certain rights, are really best justified noninstrumentally. I will concentrate on his noninstrumental justification of the institution of judicial review.¹ I will suggest that the criticisms of instrumental approaches, and the defense of a noninstrumental or intrinsic procedural approach, leave open the possibility of a superior hybrid approach, an instrumental-proceduralist approach. I start with Harel's critique, then turn to his proposal, and then come back to the idea of a hybrid approach

The view we will call "instrumentalist" holds that "judicial review is justified to the extent that it is likely to bring about contingent desirable consequences."² Harel is critical of instrumental justifications of judicial review, which he takes to be dominant in the literature, for the following reasons (among others).

Evidence: There is inadequate evidence for the instrumentalists' premise that judicial review better promotes rights than ordinary legislative procedure.

Contingency: The success of instrumental accounts is contingent on whether judicial review really, empirically, serves those values. But (he thinks), *whether it does or not*, the justification for judicial review is intuitively not so contingent.

Insult: The claim that judicial review will better protect rights than legislatures is an affront to the "dignity" of ordinary citizens, alleging that they are not as wise as judges.

*Lombardo Family Professor of Humanities and Philosophy, Brown University.
Email: David_Estlund@brown.edu. Thanks to Tim Syme for editing assistance.

¹ I will leave aside complexities about "weak" and "strong" versions, as he defines those terms at ALON HAREL, *WHY LAW MATTERS* 281 (2014)

² *Id.* at 194.

Any expert: Epistemic versions of the instrumental approach cannot explain why judges should not be replaced by whoever would actually do the best job at protecting rights.

I will come back to these after considering the noninstrumental nonepistemic account Harel develops to avoid these challenges. An alternative to any instrumentalist account would be a proceduralist account—one that holds that the value of judicial review derives from its nature—from the kind of procedure it is—and not from what consequences it has for other values such as protecting independently defined rights. Harel observes that proceduralist accounts are usually employed by opponents of judicial review, by defending the intrinsic value of democratic legislative procedures. He criticizes such accounts, focusing on accounts of democratic procedures as procedurally fair to the participants, and this is indeed the approach taken by Waldron in his influential critique of judicial review.³ Harel rejects the fair-proceduralist argument for giving majoritarian institutions final say in disputes about rights. He argues (as I interpret him) that mere fairness to everyone who participates in the decision completely fails to respond to the substance of such disputes.⁴

Now, there is a possible tension here, since we already know that Harel does not propose to substitute judicial review on the grounds that it will accurately get the substance right. That is the very instrumentalist approach he is rejecting. So here is the challenge Harel is trying to address: if fair-proceduralist critiques of judicial review are not sufficiently responsive to the merits of rights disputes, and if instrumentalist defenses of judicial review are too fixated on accuracy with respect to the merits, what ground might be left? As a matter of logic, there is no alternative to proceduralist and instrumentalist, since these are defined here as contraries. So some version of one or the other, or some combination, must be where the answer lies. Harel opts for a proceduralist (noninstrumentalist) defense of judicial review, and we know that the virtue of this procedure will not be its fairness to the deciders. The question becomes this: what might be procedurally valuable about judicial review in such a way that we should think that citizens who argue that some legislation violates their rights have a right to such a procedure of judicial review.

Harel calls his proposal, “a right to a hearing.”⁵ He does tell us what it takes to count as a hearing of the right kind, although he declines to offer any account of why we might have a right to such a thing, since he takes it to be intuitively compelling.⁶ In laying out what he means by a hearing, I begin to pursue an objection of the following form: unless the account tips over

³ This is perhaps most clearly developed in JEREMY WALDRON, *LAW AND DISAGREEMENT* (1998).

⁴ See his example of one person owing another money at Harel, *supra* note 1, p. 140ff.

⁵ The idea is introduced at *Id.* at 191, and used extensively.

⁶ See *Id.* at 208.

into an epistemic, instrumental one, it cannot account for central features of the kind of judicial procedure he defends. To count as a “hearing” of the kind he says people have a right to, the procedure must have the following features:

Voice:

the opportunity to voice a grievance, . . .

Justification:

. . . the opportunity to be provided with a justification for a decision that impinges (or may impinge) upon one’s rights, . . .

Decision

. . . and the duty to reconsider the initial decision giving rise to the grievance. (all at 202)

Harel is at pains to insist that, even though procedures of “hearing” importantly involve such rights of voice, justification, and decision, the value of judicial review has nothing to do with any tendency of the court to make a substantively good decisions—he eschews any such instrumental aspect to the account, because he believes that the evidence for such virtues is weak. This is a surprise to the reader, I think, and a challenge to explain how these normally epistemic/instrumental features of certain decision procedures coincidentally also serve an utterly nonepistemic value of great importance. Suppose I argued that each citizen has a right to quality health care: early affordable screening, medication, hospitalization, etc. But then my account, driven by various philosophical worries, attempts to ground this right without any appeal to the effect of healthcare on people’s health. It just turns out, on the imagined account, that there are other nonhealth values that happen to justify a right to the very same treatment that would be called for by an effort to promote health. This is a kind of coincidence that should lead us to wonder whether a sound appeal to nonhealth values really supports this result.

Put a bit bluntly, it is natural to object in the following way: Harel’s right to this kind of a “hearing” looks like a right to an epistemic procedure but for completely nonepistemic reasons. Harel endorses a procedure for reviewing legislation in which evidence and argument is carefully assembled and assessed for and against a proposal to change the law, much as would be done if the procedure were being designed to make substantively good decisions. But he then asserts that there happens to be a right to those exact features of the process for entirely different reasons, having nothing to do with tending to make good decisions. This naturally raises two concerns: first, if we must reject instrumentalist views, then we should look closely at the alternative noninstrumental account to see whether it can really convincingly generate or explain why these features must be present. Second, if we do want those very features, we should look back at the critique of instrumentalist views and see if they really fail, since they would seem to elegantly explain them. The

dilemma—finding a course between being too procedural and too substantive (to put it roughly)—closely resembles one in democratic theory. If we emphasize instrumental, and especially epistemic value, we might be led straight to nondemocratic arrangements in which the wisest ought to rule whether anyone authorizes them to or not. If, instead, we run from the epistemic and emphasize procedural fairness to all citizens as participants, we have trouble explaining many of the institutional features of democratic politics, such as institutionalized debate, and maybe even voting itself.⁷

As we saw, Harel presses a very similar objection against majoritarian democratic critics of judicial review, by eliciting the intuition that when my rights are at stake it seems simply beside the point to resolve this by a procedure that gives each citizen a fair measure of influence (an ancient objection to democracy itself).⁸ We need to put Harel's use of this point carefully, since we know he is not marshaling it in support of an instrumental or epistemic alternative. Hence, the objection is not (as it is in its ancient form) that a fair procedure is not epistemic. Rather, we learn that the alleged problem is that such a merely fair majoritarian procedure fails to be a reasoned (though not necessarily epistemically valuable) engagement with the merits of the dispute. It fails to be a "hearing," and Harel says people have a right to a hearing in such cases.

Although Harel opts not to look for deeper justification for the right to such a hearing, I think it is worth looking more deeply. One reason is that if the justification for a hearing, which has obvious epistemic features, is not epistemic then it will be important to know what nonepistemic rationale might happen to recommend these very same features. As we have seen, the content of the right to a hearing is a right to a procedure that includes what we are calling, for shorthand, voice, justification, and decision. Let us begin with *voice*, and grant for the sake of argument that there is a right to voice one's objections when a law is thought to violate one's rights. We can understand a kind of value here even without appealing to any instrumental or epistemic role it might serve. So far, so good. By itself, of course, this right to publicly state one's objections does not entail a right either to any reply such as a *justification* from the authorities, or any reconsideration of the initial *decision*.

Of course, it is not hard to see value in a right to being given a public justification for a law when one objects on the grounds that it violates rights. There is a thinner and a thicker version of a right to a justification. On a thin version, one might receive a justification even if it is not any response to (and might even occur before) the complainant has stated her objection. This, of course, would not support the kind of responsive justification that

⁷ This set of questions is central to the structure of my argument in DAVID ESTLUND, *DEMOCRATIC AUTHORITY* (2008).

⁸ See PLATO, *THE REPUBLIC*, BOOK IV (any edition.)

Harel has in mind by a judicial hearing, so the question is what the extra value of *responsive* justification (this being the thicker kind) is supposed to have over and above voice plus justification, even while making no appeal at all to its having any tendency to lead to substantively good or better decisions.

I will momentarily grant, for the sake of argument, that there is value in, and a right to substantively responsive justification, but first I want to emphasize that we would like to know what the value of its being substantively responsive is if it is not in any way instrumental or epistemic. Here, I wonder if we can really separate the idea of substantive responsiveness sharply enough from epistemic value. Is it a substantively responsive justification if the reasons raised by the petitioner are at least mentioned in the response even if their *force* is completely missed or unacknowledged, or in any case substantively unanswered? I take it that, even though we can see some value in this minimal recognition by the court of what the petitioner has said, Harel does not count this as a hearing of the kind we have a right to. I gather this from his speaking of a procedure that is based on deliberation, which would require more than mere acknowledgment of the petitioner's text and testimony.⁹ But if I am wrong about this, then the right could be met by a panel of court reporters armed with a pre-formulated justification written by off-stage judges. The panel could hear and show that they comprehended the testimony, and then, or even beforehand, recite the canned justification. It is not clear to me how to explain the (very plausible) further requirement of a substantively responsive justification, one that understands and answers the force of the petitioner's case, at least to some degree, without showing a concern for the epistemic value of such an exchange. If this archetypical epistemic method—reasoned deliberative exchange—has a basis in some nonepistemic value, it would be helpful to know what the value is and how it supports just this practice.

Here is one way to think about substantive responsiveness while bracketing any epistemic, instrumental value the procedure might have, although I do not think it will suffice: we might grant some value—a kind of satisfaction—in a petitioner's having a right to have whatever objections she raises acknowledged, appreciated, and substantively responded to, even if there is no reason to assume that the petitioner will raise enough points, or the right points, to lead the procedure to improve epistemically on the initial legislative process. On this view, the court owes the petitioner substantive reasoned response only to the considerations and arguments that she happens to raise. Granting that we can understand how there is some value in this for the petitioner, it will not explain judicial review as we know it, in which “friends of the court,” and the justices themselves are allowed and even expected to raise further arguments and evidence on the petitioner's behalf. That cannot be explained by this

⁹ “The duty to a hearing requires deliberation concerning the justifiability of the decision in light of the specific circumstances.” (HAREL, *supra* note 1, at 206.)

“satisfaction” move, and seems to me hard to explain without an appeal to its epistemic value.

Turn next to the requirement that the judicial process make a *decision* about whether to strike down or uphold the law, Harel’s third feature of a “hearing.” Our question now is what kind of value this is supposed to have for the petitioner if we eschew any appeal to improved prospects for a substantively better decision. If, as Harel insists, no appeal is made to such instrumental or epistemic considerations, it would seem that (oddly, of course) the decision might just as well be made by a coin flip as in the culmination of a prior reasoned exchange whose value Harel hopes to explain.

This is meant as a challenge to Harel’s complete avoidance of instrumental and epistemic considerations. Suppose we find the noninstrumental approach to have serious difficulty in accounting for what we would recognize as a process of judicial review: even if voice, why responsive justification? And even if so, why any decision? But if so, why not a random decision? We should, in that case, look back at Harel’s critique of instrumental approaches to see if it can be answered. To recall, Harel argued that a justification of judicial review by appeal to an alleged tendency to make substantively better decisions runs up against the following objections: Evidence (for this alleged superiority), Contingency (where we doubt the right really is contingent), Insult (to the epistemic capacities of nonjudges), and difficulty explaining why to rest with judges rather than any expert who might tend to make even better decisions than the judges.

As I noted earlier, since we are defining instrumentalist and proceduralist approaches as exhaustive, any proposal must be one or the other or both. I want to propose an approach that is both—a hybrid between epistemic and proceduralist—and suggest that although it introduces an instrumental/epistemic element, it might be able to avoid Harel’s objections to instrumental accounts. Consider the institution of jury trial in the criminal law. Among its characteristic features are all kinds of rules and procedures that are most naturally explained on epistemic grounds—the “correct” answer being whether the defendant committed the crime. Obviously, there are lots of aspects that are not like that, and which even work contrary to it, such as rules preventing the introduction of ill-gotten evidence, the high standard of evidence for conviction (leading predictably to lots of false negatives), etc. Hence, although on one hand, the jury procedure as we know it (in its variations, in say, contemporary Western legal systems) is not what we would get if we cared only for accuracy with respect to the verdict, yet on the other, we would not get anything like the jury procedure if that concern were completely put aside as no part of the justification.

Harel is persuasive, to my mind, that the justification of judicial review, and the legitimacy of its decisions, cannot be *wholly* explained by their being correct or promoting good consequences, and so must be explained, at least partly, in

virtue of the nature of the procedure itself. In that case, the outcome might be legitimate if it came from the right procedure even if it is substantively incorrect. And, too, the procedure might be a justified one even if it does not lead to better outcomes or decisions than all available alternatives. But all this can be said about the jury system too, even though a big part of its justification is quite plausibly epistemic. What we can say in that case is that the procedure is justified *partly* by its epistemic value, though subject to other appropriate considerations and constraints on appropriate procedures (such as due process, erring toward acquittals, etc.). And the legitimacy of the jury's decision, even when it is substantively incorrect, can rest on its procedural provenance, but this allows us to cite among the procedure's legitimating features its epistemic superiority to other methods (subject to the other appropriate constraints).

Just to follow this analogy with the method of jury trial through, the parallel kind of account of judicial review might go like this: the justification of judicial review is owed, in important part, to the epistemic superiority of a process of reasoned and substantively responsive justification and reconsideration in light of arguments by the petitioner and anyone else on her behalf, but subject to certain additional considerations bearing on the appropriateness of the procedure. And the legitimacy of its decisions, even when incorrect, might be said to stem from its source in a certain procedure, but the procedure's legitimating power might still come importantly from certain epistemic virtues.

One additional constraint would help in addressing several of Harel's complaints about instrumental approaches, namely a Rawlsian requirement that political arrangements be justifiable on grounds that are acceptable to all reasonable or qualified points of view. The guiding idea would be that even some views that are mistaken are, in a relevant way, sufficiently reasonable that adherents ought not to be politically coerced if the only justification available is one that conflicts with those individuals' deepest convictions. This is not the place to defend that principle, and it is hardly uncontroversial, but we can at least see how instrumental or epistemic elements could enter such an account without leading to several difficulties that would be present without that Rawlsian tenet.¹⁰ "Public reason" refers to the fund of doctrines and arguments that respect this constraint. I now look briefly at how this might open up some replies to Harel's four complaints about instrumental approaches:

Any Expert? The account can now say that one of the constraints is that the alleged epistemic credentials of the selected judges (or, more complexly, the quality of some method for selecting epistemically superior judges) must be agreed by all, or at least beyond reasonable disagreement. Hence, even if the epistemically best pool of judges

¹⁰ The view would be of the kind John Rawls calls "political liberalism," a version of which he famously develops in detail in JOHN RAWLS, *POLITICAL LIBERALISM* (1993) and other writings.

would be Catholics who graduated from Boalt Hall, this might not be an admissible argument in public reason.

Insult (to the epistemic capacities of nonjudges): The very idea that some could do better at the judicial task than others, or better than majoritarian processes, is not obviously insulting, or not in any way that should deter justificatory theory. What might be more insulting are *certain* invidious comparisons such as distinctions based on gender, race, or even formal education. But some or all of those might be blocked by a requirement of public reason.

Evidence (for this alleged superiority): Suppose that it is true and is common knowledge that there is not adequate evidence, within public reason, for the claim that any recognizable method of judicial review has the requisite tendency to improve the substantive quality of resulting decisions. Then, as I have argued, it is hard to see what rationale there is for recognizable institutions of judicial review, including not only the opportunity to having a voice, but also to substantively responsive justification, and decision. I would add, here, however, that it would not make sense to narrow the question to empirical studies of the quality of outcomes, for all sorts of reasons. Without going into this at length, let me just interpret the standard here to be whether there is good reason (within public reason) to believe it has such epistemic value.¹¹

Contingency: This hybrid approach would simply embrace the consequence that the justification of judicial review is contingent on showing that it has epistemic value, within the other appropriate constraints, including public reason. Maybe this can be shown, maybe it cannot. Many people might have an intuitive conviction that we should have judicial review anyway, but I am not one of them.

Now is this an instrumental view or not? The answer is yes and no. It is what we might call an instrumental or epistemic proceduralism.¹² It is instrumental in one important respect: it does not do without all appeals to instrumental value as Harel's preferred approach would. But it is not wholly instrumental since the use of instrumental and epistemic considerations is constrained by other values. Some of these, and here I include any use of a constraint of public reason, represent a nonepistemic dimension that might fairly be called a citizen's right to a certain "standing." The justification for the constraint of public reason itself is not based on any instrumental or epistemic value it might have, and may run quite counter to such concerns. Hence the justification for, say, judicial review *rather than review by the truly wisest*, is utterly noninstrumental, and is based on a right of each citizen to justifications of basic social institutions in terms that are beyond reasonable or qualified

¹¹ One often hears the claim that there is no adequate reason to believe it, but I am far from sure. David Cole argues, (David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565–95 (2003)), "When considered over time, courts have played a valuable role in reviewing and ultimately restraining some of the more egregious rights violations undertaken in the name of saving the country." (2594) "To paraphrase Winston Churchill, judicial review is the worst protector of liberty in times of crisis, with the exception of all the others." (2568) I am not sure who is right about this.

¹² "Epistemic proceduralism" is the term I introduce in ESTLUND, *supra* note 7 for views with this structure.

objection. This Rawlsian feature carries well-known philosophical challenges of its own, especially how to determine which points of view are to be put beyond the pale. I do not pretend to answer those here.

To conclude, I have argued for the following propositions:

- Harel's pristine noninstrumental approach would have trouble explaining the rational, deliberative, responsive, and decisive features of judicial review.
- His complaints about simple instrumental approaches can be at least partly answered by an instrumental or epistemic proceduralism.
- Suitably reformulated, the question of adequate evidence looks different and less daunting,
- A version of contingency would remain, but the view that judicial review's justification is contingent in the resulting way is not so implausible. It would be different if the noninstrumental account gave a clear alternative basis for judicial review, but I have argued that it is hard to see how it could.