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Facing Terror Together: Public Agents and Civic Worth

Ekow N. Yankah*

Abstract

Fearful that moments of great public emergency will create public norms that callously trade the lives of citizens as mere commodities, Harel invokes Kant to undergird the conclusion that actions taken in emergencies can only be taken as a private citizen. Doing so, however, misses the ways in which we can reason together about immense sacrifice as a polity without reducing fellow citizens to commodities and ratify actions taken in the public name. Focusing on the Aristotelian value of franchise, our full-blooded place in our civic polity, affirms that even in the worst of times, we stand together as fellow citizens.

* * *

Alon Harel's engaging book, *Why Law Matters*, persuasively argues that law matters not only for what it accomplishes but for what it *is*. Law, in Harel's view, is an intrinsically valuable way of respecting the dignity of persons; thus the law and legal actors must reflect the political aims and reasoning of citizens in particular ways. This may seem uncontroversial but Harel's picture pushes back against the instrumentalist thinking that dominates so much public policy debate today. It is only when one considers how automatically we accept the instrumental terms of such debates that we notice what has gone missing. This dominant yet flattened political view can be seen across a wide range of examples. No one sane would deny the importance of law's instrumental effectiveness. Growing the GDP is an important step in serving a host of fundamental human interests. Crime statistics are pale reminders of human injury and suffering and when concentrated often indicate a damaged community. Obviously, there are important measures of secrecy that are necessary in meeting national security goals. But a moment's reflection makes clear it is not only the instrumental effects of legal measures that matter but also the role that law plays in important non-instrumental functions.

The costs and benefits of how legal policies treat people in order to reach ultimate goals are not fully captured by the focus on instrumental ends. Moreover, legal policies, as every major election reveals, are a focal point in crafting shared values.¹ Just as importantly, political participation is of intrinsic value to citizens, a point championed as far back as

* Professor of Law, Cardozo School of Law. I am very grateful to the participants at the Symposium on *Why Law Matters*. Additionally, conversations with Helga Varden deepened my appreciation for the nuance and attractiveness of many important Kantian positions.

¹ Jeremy Waldron, *The Rule of Law as a Theater of Debate*, in *Dworkin and His Critics: With Replies by Dworkin* 319 (Justine Burley ed., 2004).

Aristotle and now often carried under the banner of Arendt.² This is true not only because greater participation of disparate voices makes less likely the ugliest government practices. It is also true because participation in the collective governance of one's community is an intrinsic marker of one's political equality, thickening the ties of political obligation, simultaneously discharging one's political duties and experiencing one's political rights. Notice the natural analogy to how participating in one's household is a way of meeting both duties and rights, all the while making the projects of the household in an important way "yours."³ Likewise, political participation, to some degree, is an intrinsic good tied into the capacities of self-determination in a polity and one's role in it.

Though participation is not sufficient by itself to justify a political action, participation legitimates political action in a way wholly separate from the instrumental value of any law. Thus, Harel makes the powerful and persuasive argument that it is only when public actions are embedded in a set of deliberative and integrative practices that they can even count as being taken in the name of the state.⁴ Further, Harel's ultimate conclusion is that many actions can only be valuable when undertaken by the state as appropriately public actions. The claim here is distinct from arguments that certain goods are only practically possible when rendered as public goods. Rather Harel points out that some actions are only morally valuable when done in the name of all. Harel's arguments place him in a growing group of legal theorists highlighting the non-instrumental and republican justifications of law.

I am deeply sympathetic to Harel's claims and its republican inflections. One ought not underestimate how rarely until recently the intrinsic value of law has been highlighted in contemporary legal theory. Though Harel's republican commitments have a different grounding than mine, a note to which I will later return, his focus on law as a way of respecting how persons participate and interact with their political community is one we share.

With so much in common, it is unrepresentative to focus my attention on a place where Harel and I vastly depart. I do so not out of the natural argumentative impulse. Rather, I focus on Harel's discussion of public actions in public emergencies for three reasons. First, given Harel's commitment to the importance of law as speaking in the public voice, his claim that actions taken in the case of emergencies must be entirely divorced from public justification is surprising and counterintuitive. Harel's view casts the agent who finds himself in extraordinary circumstances as a rogue acting outside their public duty for reasons that demand inspection. Secondly, Harel's claim touches upon some of the most pressing problems we currently collectively face. If the threats of public emergencies from terrorist threats and the like are less severe than the hyperbolic would like us to believe, they

² Aristotle, *Nicomachean Ethics*: bk. I, ch. 7, 1097b11; Aristotle, *Politica*, bk. I, ch. 2, 1253a2-18; Ekow N. Yankah, *Legal Vices and Civic Virtue: Vice Crimes, Republicanism and the Corruption of Lawfulness*, 7 *Crim. Law & Phil.* 61, 70-73 (2012); Hannah Arendt, *Between Past and Future* 143-70 (rev. ed. 2006).

³ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 220-23, 226-29, 239-41 (2d ed. 1981).

⁴ Alon Harel, *Why Law Matters* 14, 91-93 (2014).

remain real. Lastly, the disagreement on the nature of public emergencies reveals an important distinction between two republican theories, built on Kantian and Aristotelian grounds respectively. To the extent the Aristotelian theory I offer here is persuasive, this disagreement may offer broader lessons on the nature of political justification.

I. Harel on Public Emergencies

First, it is important to outline Harel's arguments not only for clarity but also to see the attractive impulse that drives them. For Harel, the state is fundamentally justified only insofar as it does not violate strictures against the Kantian dignity of its citizens.⁵ Thus, public officials are prohibited from thinking of persons as mere means. Harel invokes Kant's argument that we can never treat persons as though they were simply objects with a price, where one can be weighed as against three. Rather, the humanity of each person holds inherent value and cannot simply be traded off.

This familiar and attractive maxim for Harel means that public officials are prohibited from undertaking certain emergency measures *as* public officials for two interlocking reasons. The first is that public officials act pursuant to empowering norms, and such norms cannot anticipate or condone the kinds of actions that may be required by circumstances of emergency. This is not because emergencies are unpredictable. Rather, extraordinary public emergencies may create conditions calling for officials to sacrifice some lives to secure the lives of many others or greater public goods. But for such tradeoffs to be sanctioned by public norms would violate the Kantian prohibition that human lives cannot be weighed against each other as though they were objects holding merely a price.⁶ It is for this reason that officials cannot, in a fully legitimate sense, be guided by public rules in cases of emergency. It follows that in extreme cases of public emergencies, officials must not only act in different ways but are pushed to reason in different ways, making tradeoffs that are prohibited in their considerations as public officials.⁷ Ultimately, when officials act in cases of emergency, they must be seen as acting as private citizens in their personal capacity. The claim, to be precise, is not that public officials *couldn't* be guided by rules in the face of public emergencies but rather that public officials *mustn't* be guided by such rules.

Yet Harel does not naively believe that such critical life-and-death decisions can be avoided. There are countless quiet governmental tradeoffs that affect the quality of life and even who lives and dies. This is most dramatically true in extreme cases—going to war or conducting a war, facing terrorist attacks and the like. It is not that Harel actually believes that one may never violate the Kantian prohibition. When faced with such extraordinary moments a person may have no choice but to trade lives against each other.

⁵ Id. at 108-11.

⁶ Id. at 107-10.

⁷ Id. at 118.

But when an actor does so, it is as a private citizen; no legal directive authorizing or ordering this can be legitimate.⁸

This is a puzzling position, one that I will argue is not just mistaken but reveals a fault line in the very foundation of Harel's deontological commitments. But before highlighting its difficulties, one ought to explicate the attractive motivating impulse I take to be underlying the position. Harel's position is, as noted, based on the Kantian position that one cannot treat human beings as having a price, as goods that can simply be traded off against each other. One underlying concern then is protecting the purity of the law. Harel's worry is that introducing into our legal norms a certain mode of thinking—balancing human lives against each other as mere commodities—will corrupt the law at its roots. Nor is this a merely philosophical worry. Examples from our traumatic modern history reveal both the lengths to which public officials may go under the claim of exigency and the inhuman depths to which others will sink if they believe they are excused by law. Harel's commitment, to borrow his words, is to protect the purity of principle even if one cannot always follow that principle.⁹ Harel is committed to elevating the non-instrumental value of law against the threat of sliding into purely instrumentalist thinking; there is a certain noble commitment in Harel's barricading from all public reasoning the measuring of human lives against each other as if this involved an exchange of prices.

One can see a number of concurrent attractive motivations underlying Harel's position. The Kantian prohibition on exchanging lives as commodities relies on the idea that public authorities are only legitimate to the extent their actions are consistent with being taken in the name of all but no one in particular. An action that aims at your death in exchange for my life cannot be appropriately described as taken in both of our names (or so the intuition proposes).¹⁰ Thus, public authorities are foreclosed from reasoning in such a way or authorizing such actions through legal norms.

Besides the philosophical or conceptual case, there is a related and perhaps equally important claim that sounds in both prudence and moral psychology. The kind of action undertaken during public emergencies is often morally problematic, to say the least, and can quickly rush into the abhorrent. We ought not mince words; shooting down a plane full of innocent hostages, ordering a quarantine that will result in the deaths of many to save many more, constructing institutions that will lead to shadowy disappearances and the torture of prisoners—these range from heartbreaking necessities to immoral crimes against humanity. Some actions, even when justifiably taken, are for a well-constructed person emotionally and psychologically deeply taxing. The natural tendency in such psychologically fraught circumstances is to shield oneself, claiming that one only acted in accordance with one's public duty. "I was only following orders" has been a terrifyingly reliable refrain invoked in horror after horror for at least our contemporary era. Thus, an-

⁸ Id. at 117-23, 126.

⁹ Id. at 120.

¹⁰ I am terrifically grateful to Helga Varden for enriching conversations on these and surrounding ideas.

other important facet to Harel's argument is that it requires those who take morally precarious actions in an emergency to fully own it; that is, to eschew retreating into their public role as a way of avoiding inspecting the moral quality of their action or holding themselves accountable. Taken together, these are powerful reasons to be attracted to Harel's position.

II. Moral Maxims and Legal Prohibitions

Harel's solicitousness of the law is admirable, but a certain over-protectiveness causes him to impose ethical prohibitions that are misplaced in the context of legal and political emergencies. As a preliminary matter, I have noted that the requirement mandating that emergency actions must be ascribed to one's private self rather than one's public role is in tension with the spirit of Harel's earlier arguments. In preceding chapters Harel focuses precisely on the way actions taken pursuant to public duties are actions taken in the name of all.

Secondly, Harel's Kantian reasons for erecting this barrier rest on dubious textual foundations. While any legalized understanding of dignity will have to be consistent with the ethical maxims in a Kantian system, it is not clear that the discrete laws will be identical or can be simply read off Kant's maxims. Besides, there is reason to take freedom as much more central to the Kantian legal project. As against the too-long-held reflex to superimpose Kant's moral maxims directly onto our legal duties, a small group of philosophers has stressed the need to disentangle Kant's ethical theory from the justification of his legal theory.¹¹ Most notably in his *Force and Freedom*, Arthur Ripstein elaborates a Kantian vision of law that is prominently, indeed nearly exclusively, centered on the preservation of freedom rather than on the overly quick transformation of the moral maxims into legal requirements.¹²

The point here is not simply to dive into competing interpretations of Kantian legal foundations. Rather, let me note two points that point to a deeper claim. The first is that if, as there is reason to believe, Kant placed freedom at the center of his legal reasoning, then it is not obvious that public authorities are prohibited from considering the necessary deaths of some citizens versus others when freedom is not infringed. It is certainly not clear that protecting freedom restricts officials from reasoning about such tradeoffs.

It would take further explication to determine exactly how Kantian freedom is best respected in the cases of extreme necessity but it is certainly not clear that certain types of trade-off would always be ruled out by deontological constraints. In cases sometimes described as the "almost dead"—consider Harel's example of a hijacked plane that has been turned into a deadly missile—it is not at all clear to me that shooting down the

¹¹ One early example of trying to sort out the conflicting strands between Kant's moral arguments and the *Rechtslehre* is Jeffrie G. Murphy, Does Kant Have a Theory of Punishment?, 87 Colum. L. Rev. 509 (1987).

¹² Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (2009).

plane is an imposition on the freedom of the captured citizens on board or for that matter a degradation of their human dignity.¹³

I have elsewhere argued that Kant is deeply equivocal about our deontological limitations when faced with the kind of massive emergency that threatens our ability to maintain our civic community.¹⁴ Despite Kant's colorful and oft-cited language about observing duty even if disbanding a desert island community and the requiring justice even if the heavens fall, Kant quickly reminds that justice must give way if doing our duty will destroy the bonds of our civic polity.¹⁵ Kant argues that despite the absolute duty to punish the guilty, if observing this duty will be so costly that it threatens to dissolve our civic bonds, public authorities ought to curtail their actions. If this is initially surprising one must remember Kant's insistence that we commit wrong in the highest degree if we do not enter into and protect a civic community (a state of rightfulness).¹⁶ In conclusion, it is simply unclear if Kant's actual theory supports Harel's claim that *legal* prohibitions cannot weigh lives against each other in conditions of civic emergency or if Kant's theory would be persuasive if it did support this claim.

Whatever the most persuasive limitations Kantian freedom (or dignity) places on public officials, a second and more important point to note is that it does not at all follow that the inverse is true; that private actions by individuals are dignity-preserving because they avoid publicly advocating the trade-off between human lives. Indeed, it seems clear that Kant was dedicated to the opposite conclusion. Kant argues repeatedly, as Harel notes in earlier chapters, that private actions violate the freedom of another precisely because they are the elevation of one person's individual will over another's.¹⁷

For Kant, it is only when an action is taken pursuant to the omnilateral will, a political representation of our collective agency, that one does not unilaterally impose one's will upon another. Indeed, the core of what is objectionable about brute individual actions is exactly that they seem to ignore my dignity as your equal. Though the most important wrong in many crimes, particularly *malum in se* crimes, is the harm to body and soul, surely part of the harm to soul is that such crimes often declare that you, as a private person, disregard my civic equality, choosing to do as you wish. The easy example is the case of legally repossessing a car rather than stealing one. The answer to what gives you the right to do this naturally comes by referencing the laws that represent our joint civic permissions. Private acts, far from preserving dignity by avoiding a certain type of harm, capture exactly a way to slight another's dignity.

¹³ Harel, *supra* note 4, at 125-26; Tatjana Hörnle, *Hijacked Airplanes: May They Be Shot Down?*, 10 *New Crim. L. Rev.* 582, 604-07 (2007); F.M. Kamm, *Morality, Mortality, Volume II: Rights, Duties, and Status* 52-55 (1996).

¹⁴ Ekow N. Yankah, *When Justice Can't Be Done: The Obligation to Govern and Rights in a State of Terror*, 31 *Law & Phil.* 643, 654-57 (2012).

¹⁵ *Id.* at 656.

¹⁶ Immanuel Kant, *The Metaphysics of Morals* 6:306-08 (Mary Gregor ed., 1996).

¹⁷ *Id.* at 6:253-57; Ripstein, *supra* note 12, at 164-69.

There is, of course, no denying that actions taken in the public name may undermine our dignity in a different way: by declaring that the polity stands behind the action taken against one. But the ability to invoke the justification that an action has been taken in the public name, or to criticize an action because it fails its claim to act in all our names, is a critical feature in cases of public emergency. By arguing that such actions cannot conceptually be attributed to public agents, Harel denies both the putative agent and fellow citizens the ability to engage in this debate in a way that is both counterintuitive and deeply problematic. This ability to argue over what we together sanction as a community when faced with emergencies is a critical feature of an integrative, deliberative democracy; this kind of debate, as we have seen in recent years, is not abstract philosophy but requires a civic community to define its very bedrock values. One wonders why Harel sets aside this conclusion that he so persuasively invoked in the chapters immediately preceding.

III. Public Agents and Public Agency Divorced

The point is not simply that Harel and I diverge on possible ways to interpret Kant's maxims, but rather that something important is lost when Harel argues that acting privately can be a way of respecting the dignity of others, even if only by avoiding a certain way of thinking. And in the same way that Harel displaces the distinct wrong of acting privately as a way of offending rather than preserving dignity, I fear that he displaces the distinct rightfulness of acting in the public name because he abhors the idea that consequentialist reasoning about extraordinary situations may be normalized into public norms.

We needn't invoke Kantian phraseology to isolate why Harel's claims are so discordant. Fundamentally, Harel misrepresents the relationship between the public actor and his or her community in the context of emergency situations. The claim that an official should now suddenly be understood as acting in a private capacity does not accord with either the actor's self-understanding or that of others. Return to Harel's example of the hijacked plane. Imagine a soldier who, pursuant to her training, shoots down the plane, killing the innocent civilians onboard, along with the hijackers. It seems a bizarre alchemy that we should now understand this soldier as acting on her own. Any questions put to her will be answered solely in reference to her training, her role as a soldier and the military proscriptions laid down for such an emergency. Unlike the hijackers, shooting down planes and killing innocent civilians is no part of her personal project and she certainly does not view herself as acting on her personal wishes. Indeed, she may naturally view herself as tragically committed to act in ways that will be personally very painful precisely because of her public duty.

What this example makes vivid is not just that Harel's firewall is puzzling but that it is deeply unjust. Imagine the soldier's utter disbelief if, when she has already borne the heavy burden of shooting down the plane, we were to suddenly arrest her for having shot down the plane for her own private purposes. Her bewilderment, I presume, would double when it was admitted to her that all, including Harel, agree she acted justifiably.¹⁸ To

¹⁸ Harel, *supra* note 4, at 128.

declare against all evidence by conceptual fiat that her action cannot have been taken in the public name would be to treat her unjustly.

This is not to deny the quite ordinary phenomenon of public agents exceeding their public duty to act on private motivations. A public agent may steal public monies or exploit his or her position in other ways. The more difficult case is that of the soldier who runs amok during warfare, exceeding his or her mission and committing war crimes.¹⁹ But those cases are challenging because they demand that we determine the line between a particular person acting on public duty and acting on personal passions—not, as Harel would have it, because we decree that a state of emergency means one can never be acting on public duty.

There is another, related way in which Harel's argument problematically divorces public agents from public justification. Imagine that a private citizen analogously finds herself faced with a public calamity threatening large numbers of lives or catastrophic damage that can be averted but only with the taking of some lives. The person acts; a small number of lives are lost but the calamity is avoided. The action, however, is not without controversy; perhaps the loved ones of those sacrificed demand to know what right this citizen had to forfeit the lives of those lost. Our heavy-hearted citizen may well understand and be responsive to their heartbreak. A perfectly natural reply to such questions will be to offer a public accounting, seeking public judgment and vindication of the action taken. So this citizen will find it natural to testify before the appropriate public agency or administrative body or even to be subject to a trial. In so doing, the very thing the citizen seeks is vindication that his acts were justified in the public name.²⁰

It is unclear if, when Harel argues that actions taken in emergency conditions must be seen as private actions, he means that one cannot submit them to a public authority for ratification. That Harel's argument potentially erects a barrier preventing a citizen from civic vindication is no small thing. One need only recall the example of civil rights marchers and their open defiance of segregation laws to understand how deeply important it can be to submit oneself to one's polity to have one's actions judged.²¹ Indeed, being unwilling to submit oneself for public judgment often undermines confidence in claims that one's actions were motivated by the public good; Edward Snowden's flight across the world found sympathy amongst those who thought his life was in danger but certainly put his motivation in question for many in the general public. In cutting off the agent's ability to point at the reasons he or she acted as fully in the public name and in

¹⁹ It bears noting that even in these difficult cases, though we may judge a soldier to have been acting *ultra vires*, we may still view the act as connected to our public selves in a way that is difficult to capture. Thus our collective responsibility for actions taken by our soldiers does not simply evaporate when they exceed their mandate. See John M. Cooper, *Political Animals and Civic Friendship*, in *Aristotle's Politics: Critical Essays* 65, 65-66, 72-73 (Richard Kraut & Steven Skultety eds., 2005).

²⁰ Note that American law is committed enough to this concern as to insulate those who would otherwise be liable for private damages when they act to preserve the public good in cases of public necessity.

²¹ William A. Edmundson, *The Virtue of Law-Abidingness*, 6 *Philosopher's Imprint* 1 (2006).

disabling public norms from incorporating those reasons for actions, Harel does much to divorce citizens from standing fairly and asking for ratification by their civic community.²²

IV. Price, Worth and Civic Values

I have argued that Harel's claim that actions in a public emergency may never be considered actions of a public official rests on a dubious foundation that too quickly reads Kantian moral proscriptions into legal restrictions. More importantly, Harel's position unjustly divides public agents from invoking their actual public regarding reasons for acting in two ways. First, it is puzzling, bordering on cruel, to describe the soldier in our hypothetical as having acted as a private citizen. All of the reasons the soldier will invoke to justify her actions will center on her public duty. Secondly, in the situation of private citizens thrust into acting for public necessity, insisting they must be viewed as acting only as private citizens prevents public ratification of actions taken in the public name.

Earlier I indicated that my disagreements with Harel ultimately revealed a fundamental divide in the foundations of our competing republican justifications; we are now required to excavate those foundations. Despite its attractive features, republicanism premised on Kantian foundations problematically divorces public agents from their polity in the moments of greatest distress. What is needed is a theory that captures Harel's intuition that those in a position to avoid catastrophic harm to their polity should do so without deserting those who do so in the public name. Further, we are on the search for a theory that does so without treating persons as mere commodities, to be exchanged one against the other. Lastly, our theory should hold both the actions of the public officials appropriately accountable and, for that matter, hold the political community as a whole accountable for the politically endorsed responses to public emergencies.

Elsewhere, I have argued that the most intuitive and compelling theory of political obligation is premised on a neo-Aristotelian republican theory.²³ Building on Aristotle's insight that human beings are not only social animals but political animals, we notice that part of the good for persons is defined and expressed in our common projects. Not only are important parts of human well-being impossible to pursue without authoritative coordination, but even the way we define great portions of what it means to be doing well can only be understood by reference to our commonly agreed-upon parameters. Whether one is a pharmaceutical magnate or an illegal drug kingpin, a savvy real estate investor or a swindler, depends in large part on complying with the laws that govern the relevant industries.

Though both Aristotle and Kant can be understood as holding broadly republican views, Kant takes the requirement to live in civil society as a reason to jealously guard our freedom from mutual interference, establishing freedom as the limitation on legal legitimacy. Aristotle, by contrast, sees that the natural extension of our political nature grounds legitimacy not in freedom from interference but in sharing a voice in the necessary joint

²² François Tanguay-Renaud, Making Sense of "Public" Emergencies, 8 *Phil. Mgmt.* 31, 36-41 (2009).

²³ Yankah, *supra* note 2, at 61; Ekow N. Yankah, Republican Responsibility in Criminal Law, 9 *Crim. L. & Phil.* 457 (2015).

governance of our civic community. Republicanism premised on Aristotelian values simultaneously highlights our rights and duties to our civic polity and illuminates that the justification of political power is not limited merely to protecting individual rights against invasion. I have denoted this Aristotelian value as “franchise,” best defined as the right and the duty to an equal voice in governance in the pursuit of the common civic good. The value of franchise, focused on one’s civic role, elegantly accords with our most considered political commitments when faced with emergency situations while avoiding the problems presented by Harel’s Kantian inflected republicanism.

To make the example more vivid, I rely (with the reader’s indulgence) on a short story taken from the Hundred Years’ War. Though the specifics of the episode remain the source of historical disagreement, those need not be resolved for our purposes. In 1347, English King Edward III laid siege to the French port town of Calais for over a year. The French King Philip VI ordered the city to hold out but ultimately starvation threatened the city. Finally, the French town had no choice but to negotiate with their English invaders.

The English King Edward put the town to a political and moral test. Edward offered to spare the city if six of its most prominent citizens would give themselves up for execution. According to legend, Edward demanded the six exit the city with nooses around their neck, carrying the keys to the city. One of the town’s wealthiest citizens, Eustache de Saint Pierre, volunteered and convinced five others—though there are versions of the tale in which a number of them were pressured or even coerced—to join him lest their entire city be lost. Finally, according to the most romantic accounting, the burghers of Calais were spared when King Edward’s wife Phillipa persuaded him to pardon them on the behalf of their unborn child.²⁴

Whatever the historically accurate particulars of this story, it calls to imagination a particular view of how public officials can legitimately reason in times of emergency. First, the story fixes the kind of public emergency that plausibly calls for authorizing extraordinary actions. The year-long siege of Calais and its threatened starvation was a threat not just to particular persons but to the very ability to remain a coherent and governing polity. Limiting our reasoning about public emergencies to such a situation provides a buttress against the radical infection of our everyday legal norms by actions that are at least imaginable in extraordinary moments.²⁵ Though we cannot ignore how readily some political actors find existential threats, remaining assiduous about the extent to which something strikes at or threatens our ability to continue to function as a polity reasonably separates massive terrorist attacks, military invasions and plagues from important but quotidian challenges such as ordinary crime control. The criterion that such emergency measures are publicly available only when the polity is under serious threat serves as a bulwark against

²⁴ Historians dispute the accuracy of this romantic accounting and some have argued that such ritual surrenders were part of the norms of warfare at the time without a serious threat of actual execution. See Jonathan Sumption, *The Hundred Years War: Trial by Battle 1346-59* (1999); Jean Marie Moeglin, *Les Bourgeois de Calais: Essai sur un mythe historique* (2014).

²⁵ Yankah, *supra* note 14, at 668-69.

full-blown consequentialism and even introduces a particular nuance to well-known arguments surrounding threshold deontology.

Secondly, focusing on the relationship between the burghers and Calais harmonizes the deep intuition that those positioned to prevent calamity to their polities should take it upon themselves and may even be called upon by their state to do so. The figure of Eustache de Saint Pierre, head held proudly while facing death, as immortalized in the stunning Rodin statue, reminds us that many citizens, when faced with a threat of such proportions to their civic community, will see it as natural to submerge their interests (indeed, their lives) for the common good.²⁶ Yet the vivid images cast by Rodin of the accompanying burghers, some wearing a look of terror, others resignation and still others utter despair, are equally vivid reminders that to fail to leap to such overwhelming sacrifice does not invite shaming or contempt. It should never be forgotten that such civic sacrifice in times of emergency remains deeply costly on a personal level. And as the conflicting versions of the legend and Rodin's images remind us, there will be times when the community will be required to enforce such demands in light of emergency threats to the entire polity. Conscription in the face of military aggression stands as an obvious analogy when civic duty may demand requiring many among us to risk death for the preservation of the political community.²⁷

As importantly, whether it be ancient Calais or contemporary America debating war, the lives at risk are not, under healthy conditions, reduced to commodities to be traded on some consequentialist metric.²⁸ For example, under conditions when public and military service are widely and evenly distributed, where the military is not only the province of the poor or racial minorities and the wealthy do not easily buy their way out of harm's way, all citizens view the costs to be shared, by themselves, their sons and daughters, neighbors and friends, in a way that makes causal cost-benefit analysis distant.

Imagining a robust public debate in Calais (or a robust and honest one surrounding our contemporary decisions to go to war) reveals another important feature that differs dramatically from Harel's Kantian underpinnings. Rather than viewing such actions as separated from the actor's role as a public agent, an Aristotelian theory based on franchise views the action as embedded in a civic polity. Indeed, a community premised on the value of franchise will actively search for ways to strengthen the connection between actions taken in emergency situations and the considered judgments of the civic community as a whole.

This happens in a completely intuitive way that Harel's position forecloses. Facing King Edward's ultimatum, the citizens of Calais had no choice but to publicly debate a

²⁶ Richard Kraut, Aristotle 102, 265-67, 275 (2002).

²⁷ Id.; Alasdair MacIntyre, *Is Patriotism a Virtue?* 11 (1984).

²⁸ Hörnle, *supra* note 13, at 606-07. In discussing the historical context of the German prohibition on shooting down a hijacked airplane, Professor Hörnle makes explicit the connection to the rejection of Nazi-era reasoning and, most importantly, the way in which such reasoning explicitly discounted the value of the Jews and other minorities.

difficult range of plausible choices and the values they instantiate. Is it better that just over a handful of citizens sacrifice themselves or would such a choice be so abhorrent to the community that better the city resist even unto destruction? Establishing the contours of a public response by submitting the question for reasoned debate among citizens will mean precisely that actions taken during an emergency will reflect the public will.

Though a slow-moving emergency affording a year of reflection may seem a highly stylized example, it is hardly exotic. The build-up to the American invasion of Iraq featured months of public debate, though the public players failed in the honesty that would have permitted a truly republican moment of consideration. This is not meant as excuse-making. While it is telling that the public officials involved are now seen as having led a purposeful campaign of dissemination, this is not to say a maximally robust public debate could not lead to equally disastrous decisions. The internment of Americans of Japanese descent is a shameful reminder of how great injustice can be wrought by mass hysteria and baseless suspicion leading to imagined existential threats to the polity. Republicanism is no guarantee against folly. What it can hold out is that such a debate would make any decision taken more fully attributable to the polity as a whole.

In any case, no polity need or indeed would rationally wait for such an emergency to arrive before constructing various protocols for a range of looming emergencies. Unlike Harel, who would prohibit considerations of emergency actions lest they infect public norms, I suspect most would be bewildered and distressed to discover that relevant public authorities were not considering responses to a range of the most difficult public emergencies that a state may face.

Lastly, notice that by premising public action on franchise—our right and duty to an equal voice in pursuing our civic good—we address worries underlying Harel's Kantian prohibition. The conceptual argument was that public actions are only legitimate when taken in the name of all, something that was seen as impossible when an official acts to save some lives in a way that will be fatal to others. But this example shows that under the right circumstances, even actions which result in the death of some can be viewed as taken in the name of all, including those killed. To have considered, debated and approved collectively with one's polity, actions we know will result in the death of some currently unknown persons before the emergency occurs is to ratify such actions as taken in the name of all. In the same way, for example, mountain climbers are bound by norms that permit severing off those "down rope" if the alternative is the death of the entire party. Indeed, examining such reasoning beforehand ensures that the results are not impermissibly motivated once the particular persons bearing the costs become clear.

Lastly, viewing emergency actions as embedded in the public name offers the advantage that we as a community are appropriately held collectively accountable for them. Because these actions are taken pursuant to our public reasoning, we must take seriously that they reflect our civic values. Such collective civil responsibility, very much out of vogue in contemporary thinking, makes clear why entire nation-states may still bear some responsibility for the actions of their colonial or imperial ancestors, though the human

actors have long passed. Further, because such reasoning will have been at least roughly weighed before the emergency occurs, those who act in the public name may fully stand before their fellow citizens to have their actions weighed against legal protocols and public norms for ratification, holding themselves fully accountable for their actions. Of course, this does not erase the danger that the norms governing public emergencies may be morally odious. Civic virtue is a powerful political value but is not the only moral demand that weighs on us. Each citizen will have to weigh whether his or her public role is morally acceptable. But embedded in an arching civic life, constitutive of that which humans find valuable, is a better place to find oneself than to be told that when the going gets really rough, you are on your own.

Harel has written a rewarding book which reminds us that certain things that the law does—indeed, the law itself—can only be valuable when related to citizens in a particular way, embedded in an integrative and deliberative democratic process. But fearful that moments of great public emergency will cause public norms to callously trade the lives of citizens as mere commodities, he invokes Kant to undergird the puzzling conclusion that actions taken in emergencies can only be taken as a private citizen. In doing so he misses the ways in which we can reason together about immense sacrifice as a polity without reducing fellow citizens to commodities and ratify actions taken in the public name. Focusing on the Aristotelian value of franchise and our full-blooded place in our civic polity may encourage him to regain the courage of his earlier convictions and affirm that even in the worst of times, we can stand together as fellow citizens.