

SCHMITT, HOBBS AND THE POLITICS OF EMERGENCY

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To what extent do Hobbes's political ideas lend themselves to a general theory of civil emergency? He wrote at a time of civil war in England. *Behemoth*, his history of that war, is particularly critical of Parliament, and accuses it, the universities and various religious interests of being the main fomenters of rebellion. According to *Behemoth*, a badly advised Charles I had tried hard to avoid conflict with Parliament and his subjects in carrying out his obligations to raise money for military defence. But eventually the king's rights ceased to be recognised, and started to be usurped by Parliament. What followed was military action regarded by one side as a war on parliament and by the other (which included Hobbes) as something necessary for the sake of public safety.¹

The war made its impact on Hobbes not only as historian but as a political theorist. He thought that it was the principal task of civil philosophy to specify means of avoiding civil war. Civil war might be thought to set the pattern for emergencies facing states. So Hobbes's account of the causes and remedies of civil war might go far toward being a theory of emergency. Carl Schmitt reads Hobbes as a philosopher who thinks that politics is a response to emergency, and Schmitt adapts what he takes to be Hobbesian ideas to give a politics of emergency of his own, one that was supposed to have particular relevance to the upheavals of the Weimar Republic.

Like Hobbes's own theory, Schmitt's was inspired by a particular period of civil disorder, and, again like Hobbes's, it was supposed to have application to civil war in general, or threats to civil order in general. Schmitt believed that an emergency was best confronted by an unconstrained sovereign. A leader exercising his judgement and implementing whatever measures seem appropriate in time of national peril seems better to him than rule by committee or constitution. I shall consider how Schmitt's theory might apply to

¹ *Behemoth*, Molesworth ed., *English Woks*, vol. 6, p. 136.

at least one recent emergency. I shall claim that when applied it has considerable shortcomings, but that these are not always inherited from Hobbes. Schmitt exaggerates the experienced singularity of emergencies, and he exaggerates the way in which the singularity requires a response in the form of a distinctively personal decision – the decision of a sovereign. It may be true that a perfectly impersonal legal order is incoherent, as Schmitt claims, and that the legal order in liberal democracies operates according to a logic that incoherently tries to remove all traces of the personal. That does not mean that there ought to be as large a personal element in the legal order, especially in the handling of emergency, as Schmitt's theory requires. On the contrary, and as Hobbes's own theory implies, the personal – in the form of a partly passionate act of will – is at the root of war, and averting war is largely a matter of suppressing the purely personal.

I

Schmitt's attachment to the personal emerges in several theoretical connections. A good place to begin is with his criticism of Kelsen's jurisprudence. In *Political Theology* he writes,

The objectivity that [Kelsen] claimed for himself amounted to no more than avoiding everything personalistic and tracing the legal order back to the impersonal validity of an impersonal norm.

The multifarious theories of the concept of sovereignty – those of Krabbe, Preuss, Kelsen – demand such an objectivity. They agree that all personal elements must be eliminated from the concept of the state. For them, the personal and the command elements belong together. According to Kelsen, the conception of the personal right to command is the intrinsic error in the theory of state sovereignty; because the theory is premised on the subjectivity of command rather than on the objectively valid norm, he characterised the theory of the primacy of the state's legal order as "subjectivistic" and as a negation of the legal idea.²

One cannot eliminate the personal from the legal, Schmitt claims, because, for one thing, the objectively valid norm has to be applied by someone competent to do so,³ and because the circumstances of its application in a par-

² *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (Cambridge, Mass: MIT Press, 1988), p. 29.

³ *Ibid.*, p. 31.

ticular case are not always anticipated in the general and impersonal formulation.⁴ How and when the norm fits has to be left to the judgement of someone.

The ineliminability of the personal is all the more clear, according to Schmitt, if one takes seriously the reality of legally exceptional situations. As he puts it in *Political Theology*,

Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm...

The exception, which is not codified in the existing legal order, can at best be characterised as a case of extreme peril, a danger to the existence of the state, and the like. But it cannot be circumscribed factually and made to conform to a preformed law...

The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of extreme emergency and of how it is to be eliminated. The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited... The most guidance the constitution can provide is to indicate who can act in such a case. If such action is not subject to controls, ... then it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution is to be suspended in its entirety.⁵

There is something in the nature of an emergency, Schmitt seems to be saying, that keeps it from becoming the subject of a detailed law. The more detail, the less something counts as unanticipated, as an emergency must be. Again, the more the detail, the more the latitude for action required to deal with an emergency would be circumscribed. In a case where the emergency consisted of extreme national peril, the narrowing of room for manoeuvre would presumably aggravate the peril, add to the threat to the state, and, indirectly, threaten the rule of law in general and the authority of the constitution itself. Since the purpose of emergency laws is to spell out measures that get the state out of peril and back to the rule of law, the detail might be

⁴ Ibid., p. 30.

⁵ Ibid., pp. 6-7.

self-defeating. So the law must be general, in which case personal discretion will inevitably be called for in implementing it.

Extreme emergency, then, introduces a personal element into the relevant legislation. Not only must personal judgement take up the slack between the generality of the norm and the specific situation it is applied to, as in the case of non-emergency law, but personal judgement may need to find means of saving the state that a constitution fails to envisage or prohibits. It is as if the emergency is the case *par excellence* of the need for free adaptation to circumstance – just what the universality of law prohibits in the normal case. This room for manoeuvre is what defines the sphere of sovereignty, for Schmitt. Sovereignty is precisely the role of taking over where legal rules lapse or a constitution gives out, paradigmatically in cases where national survival is at stake.⁶

There is a correspondence between Schmitt's definition of sovereignty and his definition of the political. Just as Schmitt decried the depersonalisation of the legal, and the attempt to make the concept of sovereignty redundant, so he decried the depoliticisation of the state through the institutions and assumptions of parliamentary liberalism or parliamentarism. Parliamentary liberalism, according to Schmitt, overvalues discussion, and especially "balanced" discussion, and undervalues decision.⁷ It is geared to the idea of policy being corrected in the process of open argument and counterargument between different clearly identified and clearly acknowledged interests. Not everything is discussible in parliament. Matters of deep ideology, or of metaphysical conviction, are not.⁸ What *can* be discussed is anything about which "relative truth" can be reached,⁹ that is, as I understand Schmitt, truth in the form of a conclusion reached through testing debate. Parliamentary liberalism is also geared to the division of powers. Parliaments openly deliberate, and legislate; heads of state and the executive branch of government in general see to it the law is implemented, or take measures only after consulting parliament. Courts interpret the law and settle disputes according to these interpretations. The press informs the public about the activities of the separate powers and about the problems facing government. The openness

⁶ What happens when a threat to national survival is successfully seen off? Presumably, the constitution comes back into force. How can its existence in the background be squared with Schmitt's claim that the norm is 'destroyed in the exception'? (*Political Theology*, p. 12). I think this claim is an exaggeration.

⁷ *The Crisis of Parliamentary Democracy*, trans. E. Kennedy (Cambridge, MA: MIT Press, 1992), pp. 35ff.

⁸ *Ibid.* p. 46.

⁹ *Ibid.*

of the process prevents those who are in charge from ignoring parliamentary decisions or from trying to manipulate those decisions.¹⁰ A free press reports the facts to a citizenry that is thereby empowered to make demands of parliament and the executive.

The emphasis in parliamentarism on balanced discussion and a balance of powers produces, if Schmitt is right, an emasculated state. Certain measures become unthinkable or controversial even if necessary, because they seem to encroach on the freedoms – of property owning, of free speech – that in liberalism politics is supposed to be there to protect. Parliamentarism thus seems to undercut, if not exclude, the most momentous decision a state can make: namely, a decision as to what citizens can be required to fight against, and, if necessary, fight to the death against.¹¹ The decision to go to war is the extreme case of the political decision, according to Schmitt. The sphere of politics is that in which one collectivity has a sense of another collectivity as alien or allies, as enemies or friends.¹² The sphere of the political thus corresponds, in its most extreme case – the case of war between one nation and another – to the sphere of decision making in which the state faces an extreme peril – the sphere of sovereignty. And these two spheres in turn coincide with the sphere of what Schmitt calls “democracy”.

He emphatically denies that democracy and parliamentarism are the same:

The belief in parliamentarism, in government by discussion, belongs to the intellectual world of liberalism. It does not belong to democracy. Both, liberalism and democracy, have to be distinguished from one another so that the patchwork picture that makes up modern mass democracy can be recognised.

Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity... A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity.¹³

¹⁰ Ibid. p. 38.

¹¹ *The Concept of the Political*, trans. G Schwab, trans. (Chicago: University of Chicago Press, 1996), pp.70 ff.

¹² Ibid. p. 28.

¹³ *The Crisis of Parliamentary Democracy*, Preface to the Second Edition, pp. 8-9.

It is not necessary to read these sinister-sounding passages as meaning racial or religious homogeneity. What may matter is not people looking the same or worshipping in the same way, but taking one another to have a stake in the same way of life. This would bring Schmitt's talk of "equals" in a democracy into line with what he means by "friends" in a political order. Democracy, but not political liberalism, according to Schmitt, is able to distinguish between them and us, and to give weight to being one of us that does not attach to being one among others.

In an illiberal democracy, a decision by the state would not always be constrained to be a decision in favour of the individual in a state. It might be a decision in favour of a people. At the same time, the greatest political threat would not necessarily be any threat to individual freedom or institutions protecting individual freedom. It might be a threat to the existence of a nation, or its way of life. This is the threat that, according to Schmitt, requires a sovereign, and, within the sovereign, a capacity for discernment of national interest, and a willingness to go to war for it. National interest and the willingness to go to war are both things that liberalism, with its internationalist and humanitarian tendencies,¹⁴ officially denigrates, or allows to be subject to international negotiation. Not that liberalism is above military action – in the form of humanitarian or peacekeeping operations.¹⁵ But for liberals the resort to force is always a desperate measure. Schmitt thinks that the fear and contempt for military action is another weakness in parliamentarism. But this is not because he thinks that military action *can* readily be justified. Part of his attack on liberalism in general and parliamentarism in particular is an attack on the rationalism of liberalism and parliamentarism. In keeping with this attack, he denies that there can be a principled or rational justification for war.

It is a manifest fraud to condemn war as homicide and then demand of men that they wage war, kill and be killed, so that there will never again be war. War, the readiness of combatants to die, the physical killing of human beings who belong to the side of the enemy – all this has no normative meaning, but an existential meaning only, particularly in a real combat situation with a real enemy. There exists no rational purpose, no norm, no matter how true, no program no matter how exemplary, no social ideal no matter how beautiful, no legitimacy nor legality which could justify men in killing each other for this reason. If such

¹⁴ See *The Concept of the Political*, pp. 78-79.

¹⁵ *Ibid.* p. 79.

physical destruction of human life is not motivated by an existential threat to one's own way of life, then it cannot be justified. Just as little can war be justified by ethical and juristic norms. If there really are enemies in the existential sense as meant here, then it is justified, but only politically, to repel and fight them physically.¹⁶

Schmitt is saying that the experience of threat to one's way, the experience of the presence and activity of enemies, is by itself all that is necessary, even if it does not justify or give a reason, for fighting or going to war. Again and again he returns to the "existential" character of the threat, by which I take him to mean the lived compellingness of the threat, as opposed to arguments that might underlie the enemy position. It is enough for going to war that a people or a group present itself with some intensity as alien, or as other. The relation of enmity is the 'utmost degree of intensity of a separation... or dissociation'.¹⁷

Whether enmity exists, or, what amounts to the same, whether a threat to the very existence of the state exists, is not determined by a norm but by a personal decision – in a strong state by the personal decision of a sovereign or dictator. There is no organising the state so as to eliminate completely any need for a dictator, and a national democracy may not have much chance of survival if its head of state cannot in some circumstances take on the role of dictator – the role of someone who declares an emergency and then uses personal judgement to eliminate it. A state with no potential to be led by a dictator, with no potential for a authoritative identifications of the enemy would be, in Schmitt's terms, radically depoliticised: it would not have a principle of association based on intense public identification or repulsion from others. Such a "state" might be a kind of economic union, an ethical movement, a religion, but not a political association with the right kind of unity to keep reliably intact a way of life.

II

'The high points of politics', Schmitt writes in the *Concept of the Political*, are simultaneously 'the moments in which the enemy is, in concrete clarity, recognised as the enemy'.¹⁸ Schmitt quotes from a speech Oliver Cromwell gave in September 1656, declaring the Spaniard to be the enemy of the Eng-

¹⁶ Ibid., pp. 48-49.

¹⁷ Ibid. p. 26.

¹⁸ Ibid. p. 67.

lishman. A speech made by President Bush to a joint session of the U.S. Congress soon after September 11 2001 also seems to mark a Schmittian high point of politics. Here is some of what Bush said:

On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning.

Americans have known surprise attacks, but never before on thousands of civilians. All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack.

Americans have many questions tonight. Americans are asking, »Who attacked our country?«

The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are some of the murderers indicted for bombing American embassies in Tanzania and Kenya and responsible for bombing the USS Cole.

Al Qaeda is to terror what the Mafia is to crime. But its goal is not making money; its goal is remaking the world and imposing its radical beliefs on people everywhere.

The terrorists practice a fringe form of Islamic extremism that has been rejected by Muslim scholars and the vast majority of Muslim clerics, a fringe movement that perverts the peaceful teachings of Islam.

The terrorists' directive commands them to kill Christians and Jews, to kill all Americans and make no distinctions among military and civilians, including women and children.

This group and its leader, a person named Osama bin Laden, are linked to many other organizations in different countries, including the Egyptian Islamic Jihad [and] the Islamic Movement of Uzbekistan.

There are thousands of these terrorists in more than 60 countries.

They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction.

The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan we see al Qaeda's vision for the world. Afghanistan's people have been brutalized, many are starving and many have fled.

Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.

The United States respects the people of Afghanistan – after all, we are currently its largest source of humanitarian aid – but we condemn the Taliban regime.

It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists.

This speech and its immediate context have all the marks of a Schmittian high point of politics. The leader of a strong state, having seized emergency powers, declares a certain group to be the enemy of his state, and accuses them of having perpetrated an act of war. This declaration is accompanied by a declaration of war. No squeamishness about the use of military force. And a clear, widely felt, intense alienation caused by the attacks on the Twin Towers and the Pentagon. A democracy shaken into illiberalism by exactly the right sort of thing: the experience of spectacularly violent attack.

Yet, questions widely asked by liberals after September 11 appear to make sense, and to tell against Schmitt's account. Why were the attacks to be regarded as acts of war, rather than criminal acts? Why was the use of war powers and a military response to be preferred to an especially well-co-ordinated use of police powers, perhaps under laws against murder and hijacking? These questions have a particular edge when pressed against Schmitt, because they raise the possibility that legal norms intended for normal times also apply in extraordinary ones, and that the declaration of an exception can be gratuitous, even in the face of groups as intensely alien in America as al Qaeda, and actions as repulsive as flying airplanes into the World Trade Centre.

President Bush's speech itself darts between claims concerning criminal acts and acts of war. To the extent that it declares Al Qaeda to be the enemy rather than an organised criminal gang, Al Qaeda is not supposed to be the enemy only of America. The perpetrators of the September 11 attacks are also supposed to be enemies of the people of Afghanistan, whose country they

have taken over as a base for terrorist attacks. Besides being enemies of these two nations, al Qaeda are made into the enemies of freedom. This claim makes them enemies of a certain international political grouping, rather than of America alone. My point is not that Bush's speech is confused in its application of the rhetoric of war and enmity, though the speech may be that; rather, there is no obvious limit on how relations of enmity can be described, no confinement of relations of enmity to nations, no need for it to be the *sovereign* of a single nation that declares these relations to hold. Schmitt was himself aware of the possibility of appropriating the friend/enemy relation to a global struggle between the global proletariat and the global bourgeoisie, with specifically national groupings apparently transcended. And he was conscious of how a strong country adjoining weak ones could by default exercise the power of deciding on friends and enemies for the weaker countries. These possibilities, however, seem to detach the power of declaring friends and enemies from people playing the role of sovereign. An Osama bin Laden can play the role; and so can the head of a superpower.

Another difficulty, this time with Schmitt's existentialist understanding of enmity, is illustrated by the aftermath of September 11. Was the enemy Al Qaeda, or was it any militant Muslim grouping, or was it any terrorist organisation? If people of Middle Eastern appearance began to occasion intense fear and loathing among American airline passengers or among the general public, would *they* be an enemy or part of the enemy, even if they had nothing to do with al Qaeda, even if they were third generation Arab Americans who voted for George W Bush? Nothing in the Schmittian apparatus prevents the drift or spread of enmity from al Qaeda to the Arabs. Perception of a group as threatening to a way of life, not *justified* perception of a group as threatening to a way of life, seems sufficient for enmity.

Suppose President Bush was right to say that the attacks of September 11 were acts of war, requiring international military retaliation rather than a series of police actions in different countries. Then are Al Qaeda members taken prisoner to count as prisoners of war, and are they to benefit from the protections of the Geneva conventions? The Bush administration claimed that al Qaeda members could be treated worse than ordinary prisoners of war, and that they could be incarcerated in a military facility outside mainland US civilian jurisdiction. But if the al Qaeda members were not real prisoners of war, were their acts real acts of war? Schmitt's theory supports wide discretion for the president in the action against al Qaeda, and presumably also allows laws protecting suspects to be waived for terrorist suspects after September 11. These laws were in fact suspended in the US after September 11, allowing many suspects to be detained indefinitely without charge, if their names

came up in searches tracing the activities of the airline hijackers on September 11. But are these suspensions of laws consistent with a war against the enemies of freedom? Liberals thought not. And Bush's speech, with its description of a war of retaliation by freedom-loving America against its enemies encourages this line of thought. Schmitt's illiberalism, too, is not impervious to complaints about the suspension of the normal laws limiting the time and grounds for detention. For it is no obligation of the sovereign to keep an exceptional situation going, or to take all possible powers against a threat even where the powers seem to no one to be useful in counteracting the threat.

These objections count against more than the detail of Schmitt's account; they call in question his claims about the significance of the exceptional, and the general relation between norm and exception. For Schmitt, the exception to law is a better key to law, the political order, and the preferred form of democracy, than the norm. Up to a point, Schmitt seems to be right. There is no such thing as a system of norms that applies itself to situations and in doing so bypasses personal will and judgement. But for a personal element to be ineliminable is not for it to deserve to be given free reign. Even in a situation of extreme national peril and an atmosphere of intense enmity, it does not seem to be true that anything the sovereign thinks goes. Still less does authority seem to attach to the intensity of the existential situation of hatred or the perception of threat, with all of its invitations to exaggeration and distortion. The sovereign, exercising emergency powers, is not incorrigible about relations of cause and effect. Sweeping powers of arrest may remove terrorists from the street, or they may be ineffective because there is so little intelligence about them. In the latter case, the act of seizing sweeping powers of arrest may be questionable. This is not to say that in an emergency someone or a small group shouldn't be in charge or be able to exercise discretion. It is to say that the bigger the departure from the norms of pre-emergency times, the bigger the burden on whomever is in charge to be sure that the departures will have results that bring the emergency to a conclusion. And this means appealing not to personal judgement but to claims about what measures will produce what effects, claims that have *no* great personal element to them. Again, the fact that it is departures from the norms of normal times that have to be justified, shows that the normal casts its shadow on the abnormal, just as much as the abnormal or exceptional tells us something about the normal.

III

I come now to the question of how Hobbesian Schmitt's theory of emergency is. Schmitt himself thinks of Hobbes as the decisionist or personalist *par excellence*, and he finds it striking that these tendencies should co-exist in a writer who is so rationalist and scientific in his general philosophy. The rationalist/scientific turn *after* Hobbes rejected the idea of a sovereign declaring the law. Schmitt thinks that the subsequent tradition tended to detach law from its maker in much the way it had detached natural law from a personal God who created the world.¹⁹ In Hobbes this had not yet happened. Schmitt thinks that this is because Hobbes wanted to grasp the distinctive reality of legal and societal life, a reality that he thinks Hobbes traced to concrete decision emanating from a particular authority.²⁰

This explanation betrays a misunderstanding of Hobbes. Schmitt makes it seem as if the sovereign's personal will makes the law, which provides a unity to the polity; Schmitt also thinks there is no system of norms to which this will is answerable. Neither of these claims is Hobbesian. It is not the sovereign but subjects who make a polity into a unitary thing. Each passes the right of ruling himself to someone else, and it is this act, performed simultaneously by everyone other than the sovereign in the state of nature that makes those individuals into a commonwealth (*Lev.* ch. 18, Tuck ed. p. 120).²¹ The right of each to rule himself is passed to the sovereign in the expectation that, once transferred, it can be used by the sovereign to see to the security of each better than each can himself. The reason why the sovereign can do it better than each individual is complex. First, he stands apart from each individual and is free from the biasing self-love that often drives each into conflict with the other. Second, he can muster the combined resources of his subjects to generally beneficial purposes. Third, he has a great deal to lose if he directs the combined resources of his subjects to his own benefit, or to the benefit of some favourite, rather than theirs. Not to secure the safety and well-being of the many is to face the dissolution of the state, the return of each individual to the status of free agent, and the risk that each will turn on the former sovereign in vengeance for failure to keep the peace. The commonwealth thus becomes a balancing act in which the sovereign does well to decide from the point of view of the union of individuals he personifies, and his subjects do well to lend their obedience to the commonwealth by obedience to the sovereign's decrees. The balancing act is what constitutes the uni-

¹⁹ *Political Theology*, p. 34.

²⁰ *Ibid.*

²¹ *Leviathan*, ed. R. Tuck (Cambridge: Cambridge University Press, 1991), ch. 18, p. 120.

ty of the commonwealth in practice. This is the "reality of societal life" that Hobbes's theory captures, and it is a reality based more on co-ordination of the many with the one, rather than on the personal decision of the one.²²

Schmitt is of course right to think that the sovereign's decision counts for a lot.²³ Hobbesian subjects are not in any sense co-legislators with the sovereign, or people who have to be content with the laws that they live under in order for those laws to be just. Except when it comes to immediate mortal threats, or choices that the sovereign's laws permit them in their private lives, ordinary subjects delegate entirely their right to judge what is necessary for their well being or security. They agree amongst themselves to write the sovereign a nearly blank cheque, and to do what they are told so long as by obeying they avoid war. Even when the sovereign's judgements as to what is necessary for the public safety turn out to be wrong, and a commonwealth gets into economic or military trouble, the sovereign is in no way answerable to his subjects. Nor can his subjects reasonably regard themselves as innocent bystanders who are damaged by the sovereign's choice of unsuccessful policies. For it is *their* signatures on the nearly blank cheque, *their* acts of submission, *their* choice, to give the sovereign whatever latitude he thinks he needs to keep the peace.

In *Leviathan*, Hobbes introduces the apparatus of authorization and of representative person to make these points.²⁴ The many authorise the sovereign to act on their behalf in matters of security, and they own the sovereign's actions. What is more, according to *Leviathan*, since they own the sovereign's actions, they cannot accuse him of injustice when those actions turn out damaging:

But by this Institution of a Commonwealth, every particular man is Author of all the Sovereigne doth; and consequently, he that complaineth of injury from his Sovereigne, complaineth of that whereof he himself is Author; and therefore ought not to accuse any man but himselfe; no nor himselfe of injury; because to do injury to ones selfe, is impossible. It is true that they that have Sovereigne power may commit Iniquity; but not Injustice, or Injury in the proper signification.²⁵

²² See my 'The Burdensome Freedom of Sovereigns', in *Leviathan after 350 Years*, ed. T. Sorell and L. Foisneau (Oxford: Clarendon Press, forthcoming).

²³ In the rest of this section I draw upon my 'Autorité politique et science politique', in *Hobbes et la question de l'autorité dans le Leviathan*, ed. M. Pecharman (Paris: P.U.F. 2003).

²⁴ *Leviathan*, ch. 16.

²⁵ *Leviathan*, ch. 18, p. 124.

Subjects cannot complain of injury, for injury is to do with going back on what one has agreed, and the sovereign has agreed only to seek the public safety as he sees fit. It may be implausible for Hobbes to claim that subjects are authors of *all* the sovereign does, for there must be some acts that the sovereign carries out as a natural person that are his in two senses: they are not directed at the aim of public security, and they are not carried out by the sovereign acting as agent for the many. Again, it may be irrelevant that one cannot do injury to oneself if one can *damage* oneself. But these things are beside the present point, which is that Hobbes's way of connecting the will of the many with the actions of the sovereign does not limit the sovereign's freedom of action, or increase the subject's latitude for opposition or action: on the contrary, it reduces the subject's scope for legitimate complaint virtually to the point of disappearance.

It does not follow that the sovereign is answerable to no norms in fulfilling his role. Like any individual, he is subject to the laws of nature. And Hobbes recognises such a thing as duties of sovereigns. There are chapters devoted to the duties of sovereigns in all three of the political treatises: chapter 28 of the *Elements of Law*, chapter 13 of *De cive*, and ch. 30 of *Leviathan*. These are remarkable chapters in two respects. First, they all operate with a concept of *salus populi* that requires as much liberty for subjects as is compatible with security. Not as much liberty as the sovereign feels like giving; not as *little* as can be given without threatening the means of the commonwealth to secure itself, but as much as is compatible with security. This does seem to re-open the question of whether Hobbes is a liberal, and it certainly indicates the possibility that not everything the sovereign decides will be right. Second, the three chapters recommend quite specific policies that sovereigns should adopt or avoid, different policies in different political treatises. Why isn't this presumptuous or even unjust, on Hobbes's principles? It is one thing to say what the rights of sovereignty are, and to say they cannot be divided; it is another to indicate, even by implication, how these rights are to be exercised, or what would count as a misuse of office: for this is to pass judgement, albeit in general terms, on matters that all subjects, Hobbes included, are, according to Hobbes's theory, supposed to leave entirely to sovereigns.

The apparent inconsistency would probably not be very serious if Hobbes's duties for sovereigns amounted only to duties to exercise the rights of sovereigns exactly as sovereigns see fit. But this is not quite what they turn out to be. It appears that Hobbes cannot resist the temptation to descend to the detail of sovereign prescriptions and prohibitions. For example, in the *Elements of Law*, he insists that a sovereign must explicitly outlaw the 'promis-

cuous use of women', polygamy on the part of women, and copulation with blood relatives.²⁶ In *De cive*, he makes policy again, calling for the appointment by the sovereign of intelligence agents,²⁷ and specifying a duty to permit redress against corrupt judges and to appoint a court of enquiry into regular judges.²⁸ In *Leviathan*, he seems to say that it is the duty of the sovereign to use universities for instruction in civil duty,²⁹ and also that sovereigns should tax consumption rather than income.³⁰ Even if these are defensible proposals, they imply that a sovereign is in breach of his duty if he does not impose a consumption tax, or if he does not appoint intelligence agents, and Hobbes's own theory implies that the sovereign is the *sole* judge of what is required for peace. If the sovereign judges that intelligence agents are no use, or too unreliable, or occasion a damaging general mistrust, then, on Hobbes's principles, he is not to be gainsaid; yet the chapters on the duties of sovereigns the political treatises *do* gainsay – apparently – a sovereign who disagrees with Hobbes about tax or promiscuity or the uses of universities.

Is Hobbes going back on his decisionism when he works out of the concept of *salus populi*? At first sight the answer is 'Yes'. For it seems to make the purpose of forming the commonwealth more ambitious than it is where Hobbes is speaking about it mainly as the antidote to slaughter in the state of nature. In these passages, the commonwealth is said to deliver human beings from the worst of avoidable evils, namely war, and this is a great benefit however much people are inclined to magnify the accompanying inconveniences. Life in the commonwealth may not be all that pleasant, but it is greatly to be preferred to life in the absence of the commonwealth. When Hobbes speaks of the commonwealth as assuring *salus populi*, on the other hand, the commonwealth ceases to be a security device simply, and is supposed, in addition, to create conditions for at least a modicum of contentment or well being.

The Elements of Law connects *salus populi* to the procurement of eternal as well as temporal good. To the extent the commonwealth promotes the eternal good, it is by authorizing the teaching of appropriate doctrines about the means to salvation.³¹ As for temporal good, an important component of it is what Hobbes calls "the commodity of living":

²⁶ *The Elements of Law*, ed. J. C. A. Gaskin (Oxford: Oxford University Press, 1994), ch. 28, iii.

²⁷ *On the Citizen*, ed. and trans. R. Tuck and M. Silverthorne (Cambridge: Cambridge University Press, 1998), ch. 8, vii, p. 145.

²⁸ *On the Citizen*, ch. 8, xvii, p. 152.

²⁹ *Leviathan*, ch. 30, p. 237.

³⁰ *Leviathan*, ch. 30, pp. 238–39.

³¹ *The Elements of Law*, ch. 28, ii.

The commodity of living consisteth in liberty and wealth. By liberty I mean, that there be no prohibition without necessity of anything to a man, which was lawful to him in the state of nature; that is to say, that there be no restraint of natural liberty, but what is necessary for the good of the commonwealth; and that well-meaning men may not fall into the danger of laws, as into snares, before they be aware. It appertaineth to this liberty, that a man may have commodious passage from place to place, and not be imprisoned or confined with the difficulty of ways, and want of means for transportation of things necessary. And for the wealth of people, it consisteth of three things: the well-ordering of trade, procuring of labour, and forbidding the superfluous consuming of food or apparel...³²

The conception of liberty outlined here seems clearly to limit the prerogative of sovereigns. For restrictions on what subjects may do not only have to do no harm to peace or help it a little: they have to be essential or necessary to keeping the peace, and the burden of proof seems to be on the sovereign to think out why any liberty must be taken away, rather than why it should be allowed to be retained. The requirements for promoting wealth are far less exacting. It is not for the sovereign to make anyone rich, or to employ anyone, but only to allow people to do these things privately: and wealth is the possession of necessary goods, not luxuries.

In *Leviathan*, Hobbes comes up with the concept of good *law* to explain how the public safety is to be achieved. A good law in the relevant sense is definitely not a law that a sovereign merely *thinks* is good, Hobbes says.³³ For a law may seem good and not be needful. It may seem good, for example, because it seems to benefit the sovereign. But benefiting the sovereign is not sufficient for a law to be good.³⁴ Besides giving the impression that liberty is only to be taken away from individuals if there is a good reason, which seems to give a pretext for those who are under strict laws to think that their safety is not being promoted, and that they may rebel, Hobbes once again seems to be coming up with a ground for something counting as a good law that is detached from the judgement of the sovereign.

De cive offers fewer pretexts for rebellion. While it also operates with a concept of *salus populi* that is wider than bare preservation, it makes virtually nothing of liberty. In a passage significantly different from *Elements of Law*, ch. 28, iv, but parallel to it, Hobbes writes:

³² *The Elements of Law*, ch. 28, iv, pp. 173-74.

³³ *Leviathan*, p. 240.

³⁴ *Ibid.*

Regarding this life only, the good things citizens enjoy can be put into four categories: 1) defence from external enemies; 2) preservation of internal peace; 3) acquisition of wealth, so far as this is consistent with public security; 4) full enjoyment of innocent liberty. Sovereigns can do no more for citizens' happiness than to enable them to enjoy the possessions their industry has won them, safe from foreign and civil war.³⁵

Hobbes does not say that citizens can expect to retain all of freedoms of the state of nature that do not threaten security, and he makes a contentment with the possession of goods other than security depend on individual success in gainful employment. This conception of *salus populi* seems to me *not* to exclude significant inconveniences of government. It is also a conception that fits in better with the general argument of the *Elements of Law* and *Leviathan* than the conceptions one actually finds in those texts.

IV

Although there are elements in versions of Hobbes's civil philosophy that seem to undercut, or at least limit, the authority of sovereigns, these elements do not always cohere with the texts of Hobbes's political treatises taken as wholes. The *Elements of Law* and *Leviathan* would make perfectly good sense if they dropped the expansive conception of *salus populi*, while *De cive* seems to do without it in the first place. Perhaps it is the same with the chapters on the duties of the sovereigns in general. If these were subtracted from the political treatises, a coherent political philosophy would still come over from each of the books. It would be a theory of the duties and rights of a sovereign permanently presiding over a potential emergency, and of the rights and duties of subjects permanently threatened by a potential emergency.

In Schmitt, the belief that human beings are evil, or at least dangerous, means that, for him, political arrangements are permanently threatened just in so far as they are arrangements involving human beings. He goes so far as to say that

all genuine political theories presuppose man to be evil, i.e. by no means an unproblematic but a dangerous and dynamic being. This can easily be documented in the works of every specific political thinker. Insofar as they reveal themselves as such, they all agree on the idea of a

³⁵ *On the Citizen*, ch.13, vi; p. 144.

problematic human nature, no matter how distinct they are in rank and prominent in history. It suffices here to cite Machiavelli, Hobbes, Bossuet, Fichte...³⁶

It is unclear, however, that it is to an evil nature that Hobbes traces the ingredients of war and therefore emergency. For him, certainly by the time of *Leviathan*, the crucial element seems to be the division of decision-making power among the many – the retention of the right of nature – combined with any credible distribution of competition, vainglory and diffidence among the many. He does not assume that all human beings are alike, still less that all are greedy, vain and aggressive. A whole chapter of *Leviathan* chronicles the variety of active ingredients in men. The chapter is entitled ‘The *difference* in manners’ – my emphasis. Nor is it thought impossible by Hobbes for men to refrain from the slaughter that the distribution of unpleasant character traits makes likely. Part of the reason is that the passions that incline people to war can be counterbalanced by other passions – the fear of death and the desire for a “commodious” life – that civil science channels into submission to a single decision-maker.

But countervailing passions are not the only helps to avoiding war. At one place in *Leviathan*,³⁷ Hobbes says that it isn’t enough for durable submission that people be terrified at the thought of breaking the sovereign’s law. They need to be taught the grounds for the sovereign’s right of declaring the law. And this means engaging faculties of human beings that are not passions, and that are not dangerous. If the education takes, it is hard to see human beings being unchanged by their involvement in a commonwealth. Instead, involvement in the commonwealth becomes genuinely civilising, and human beings, if not made good, are at least tamed. The danger goes out of them, and with it, any necessary connection between humanity and danger.

By the same token, danger does not have to figure in the motivation for staying in the state. If the early history of a single people or of humanity consists of coming in from the state of nature largely out of fear of something worse, then their subsequent history may substitute for that fear, or add to it, some *understanding* (based of course on Hobbes’s civil science) of why staying out of the state of nature is for the best. Why it is for the best *anyway*, independently of fear. And then one starts to see the rationale for the state detached from emergency. It may be, as Hobbes says, that the division of labour, prosperity, the arts and sciences, are all impossible without submission. Seeing as much can be as great an aid to the maintenance of government as ter-

³⁶ *The Concept of the Political*, p. 61.

³⁷ *Leviathan*, ch. 30, p. 232.

rible punishment for law-breaking, or hair-raising accounts of the bloodbath of civil war. So staying out of the state of nature makes sense *anyway*.

Again, it may be – and this is Kant's reading of the significance of the state of nature – that so long as one stays in the state of nature all understandings of what one ought to do, even ought to do for the sake of well-being or prudence, are on a level. Everything is permitted, because there is no common standard of the permissible. Hobbes certainly thought it was an advance for a single decision-maker to control the actions of the many. But he did not think that the decisions of the single decision-maker were incorrigible or that there were no general rules that a sovereign could and should follow. His books of political philosophy state these rules. There is a sense in which the rules are supposed to have an authority even over sovereigns. Nor was the authority meant to be local and temporary. Rules of science hold for good, and across epochs. In this respect, Hobbes is very far from being the personalist, the decisionist, or the existentialist about power that Schmitt is.