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**Conceptualising a protection of liberal constitutionalism post 9/11:
an emphasis upon rights in the social contract philosophy of Thomas Hobbes**

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Abstract

John Locke believed individuals covenanted with the state, in return for security they had previously lacked in the state of nature. But in this bargain of protection, individuals still retained fundamental freedoms, such as life, liberty and estate. This reflected the fear that the newly created state, whilst also a guarantor of security, was also a threat to it. But since 9/11, and the continuation of Islamist terrorism, is the state still a significant threat to individual freedom, in the Lockean sense? Another social contract theorist, Thomas Hobbes, vested more power in the state than Locke. With modern interpreters of security from the liberal tradition recognising significant curtailments of freedom for the very protection of the constitutional state from non-state actors, such as Islamists, can these interpretations be premised on the limited rights granted to citizens by the Hobbesian sovereign? These are the issues which this paper seeks to explore.

Keywords: Thomas Hobbes, security, liberalism, social contract theory, human rights

Introduction

John Locke, 1632-1704, believed in the ‘natural’ rights of the individual such as, life, liberty and estate. These freedoms were not conferred on individuals by the state but existed anterior to it and that states were, in fact, created to secure them. But the security provided by the state to enjoy these rights was also itself a threat to the security of the individual.¹ It is no surprise, therefore, that in the history of the global protection of human rights what has preoccupied discourse in the area has been the need for ‘freedoms from’ governmental power. In England, for example, there was the Magna Carta, 1215, which conferred the right of trial by jury; and the Bill of Rights, 1689, which abolished cruel and unusual punishment. In France, there was the Declaration of the Rights of Man and of the Citizen, 1789, which included protection from arbitrary detention, Article VII, and the presumption of innocence, Article IX; and in America, there were the first ten Amendments to the Constitution, the Bill of Rights, 1791, which included Amendment I, free speech, and Amendment V, the right to life, liberty and property. More recently there was the securing of a raft of ‘universal’ human rights, in the Universal Declaration of Human Rights (UDHR), 1948, and the International Covenant on Civil and Political Rights (ICCPR), 1966. The horrors committed by the regimes of Josef Stalin and Adolf Hitler in the 1930s and 1940s, for example – arbitrary killings, enforced disappearances, torture, slavery etc – served to remind us, after World War II, of the absolute need for ‘negative’, ‘freedoms from’ protecting individuals from the exercise of arbitrary state power.

The principles which inspired human rights declarations in the post-War period are still true today because of economic globalisation,² nuclear proliferation³ and climate change.⁴ Then there are the threats to international peace and security by individual countries: state

sponsored terrorism, in the case of Iran;⁵ the prosecution of the Iraq War, for example, by the Americans and its allies in 2003;⁶ and, following ‘9/11’, America’s response – ‘extraordinary rendition’ – permitting the mass abduction, detention and torture of suspected Islamist terrorists at remote sites such as Guantanamo Bay in Cuba.⁷ America’s so called ‘War on Terror’ is ongoing and is a continual violator of international human rights law, with the targeted killing of individuals by Special Forces, such as the death of Osama bin Laden in Pakistan in 2011,⁸ air strikes⁹ and the use of drones,¹⁰ often with incidental loss of life to civilians. Following mass protests by citizens of the Islamic World in 2010-11, against poor living standards in the region – the ‘Arab Spring’ – regimes such as Egypt and Syria became ever more repressive. The latter, in a long and continuing bloody civil war, used chemical weapons against suspected insurgents, including civilians.¹¹ Like the United States, Russia and China are permanent members of the Security Council of the United Nations, so can exercise their veto against collective force to prevent threats to international peace and security, as per Article 27(3) of the UN Charter. Russia and China famously vetoed sanctions against Syria in 2017, to thwart censure of Syria for its breaches of international humanitarian law.¹² This inaction by Russia, for example, was unsurprising, since it has a poor record on protecting human rights,¹³ notably its recent armed offensives in Chechnya¹⁴ and Ukraine. The power of China cannot be overlooked, too,¹⁵ with, for example, its continued suppression of mass public dissent in Hong Kong.

However, a significant threat to safety and freedom, particularly in countries which account for about 75% of the world’s terror atrocities – Afghanistan, Iraq, Nigeria, Pakistan and Syria¹⁶ – arguably no longer emanates from government: it comes from *non-state actors* such as Al-Qaeda, Islamic State in Iraq and the Levant (ISIL) and Boko Haram. The European region, such as countries within the European Union (EU), is not immune from the security

threat posed by third parties such as ISIL either. *The Global Terrorism Index 2018* reports that the number of terrorist incidents in Europe increased to 282 in 2017, which was itself an increase from 2016, when it was 253.¹⁷ At the present time, therefore, terrorism, not the state, is maybe the greater danger to freedom.

Post 9/11, the human rights debate has been dominated by the competing interests of freedom and security. But there is a balance to be struck between the obligation of the state not to harm its citizens and its obligation to protect them. Because human rights are largely seen in ‘negative’, ‘natural’, ‘freedoms from’ – ‘vertical’ – terms, as depicted in the human rights instruments stated above, the ‘horizontal’ aspect of human rights – that is, the state’s responsibility to protect the individual from human rights abuses committed *by third parties* – is often overlooked. With the ongoing terror threat since 9/11, the traditional attitude to human rights, with its emphasis on limiting governmental power, has been challenged by more recent approaches to securing the liberal state. Bruce Ackerman, Richard Posner and others, for example, position the freedom/security ‘balance’ much more in favour of the state. This is to be welcomed. With the greater threat to security perhaps no longer emanating from the state, but non-state actors such as suspected terrorists, the author here wishes to found these modern approaches to liberal security on the social contract philosophy of Thomas Hobbes, 1588-1679. Later critics of Hobbes such as David Hume, 1711-1776, however, described the former as a theorist whose politics were ‘fitted only to promote tyranny’.¹⁸ Moreover, Thomas Hobbes had a disciple in Carl Schmitt, the so-called ‘Crown Jurist’ of the Nazi Party, who described Hobbes, in 1927, as ‘by far the greatest and perhaps the sole truly systematic political thinker’.¹⁹ Indeed, even modern experts on Hobbes such as Norberto Bobbio imply that Hume’s charge was largely justified: ‘[Hobbes was] not a liberal writer, nor a precursor of liberal ideas...The ideal for which he fights is authority, not liberty.’²⁰

The reader will be reassured from the outset that this paper is neither a call to tyranny in the words of David Hume nor a condonation of the Fascistic sympathies of Carl Schmitt, otherwise it would undermine the very democratic ideals such a neo-‘Hobbesian’ model is seeking to protect. Indeed, in sacrificing cherished liberal values, by moving the state towards either a surveillance state, a security state, or worse, we would be doing the terrorists’ job for them, without their related ‘expense’ in resources and manpower. Nevertheless, there are claims that Thomas Hobbes was in fact the founder of modern liberalism, emphasising his respect for natural rights and the apparent indistinguishability of his sovereign state from a liberal constitutional regime.²¹ There is, therefore, for this author, a ‘beautiful’ paradox to Hobbes’s social contract philosophy. Here was a proponent of absolute and unlimited sovereignty who, illogically, founded an edifice of authoritarianism – on the consent of its subjects: ‘[Hobbes’s] position combined an authority whose commands could not be challenged with individual rights and freedoms as the means of establishing and conditioning that authority...The combination is striking, not least because...it is bizarre if not downright perverse.’²² This piece seeks to navigate some of these obvious contradictions presented by Hobbes’s sovereign authority; and, by emphasising the apparent individualism within his writing, apply it to contemporary attitudes to security. Thus, the significance and originality of this piece is not only premised on the claims that Hobbes’s philosophy legitimises a state supportive of the rights and freedoms of its citizens, but that this theory serves to conceptualise modern approaches to liberal state protection from non-state actors post 9/11.

This paper is divided into three parts. Before examining Hobbes in detail, the first part of this work analyses liberal approaches to security. This analysis is sub-divided into different liberal attitudes to security, beginning with the classic approach of John Locke. This paper then examines more modern liberal conceptions of security, specifically after 9/11, as

represented in the works of David Luban. Luban is then contrasted with other liberal exponents, such as Bruce Ackermann, who are much more receptive to the interference with individual freedom, because of the Islamist terror threat. Once an assessment of liberal approaches to security has been completed, there follows, in the second part of this work, a thorough analysis of Hobbes's social contract theory and its reference to the absolute authority of the state and the individuals' unqualified obedience to it. A natural progression from an analysis of Hobbes's thought are the works of Carl Schmitt, who, with Hobbes, shared a very similar approach to 'constitutionalism'. The concluding section of this part warns about the potential dangers to freedoms of embracing Hobbesian – and Schmittian – ideals. The final part of this piece concludes with a reappraisal of Hobbes's thought, emphasising the respect for individual rights within his writing. The purpose of this emphasis is to present Hobbes as a theorist protective of the liberal constitutional state post 9/11. Before doing so, however, it is incumbent to start with an examination of classic approaches to security, beginning with the traditional attitudes of John Locke.

Liberal approaches to security

John Locke, the social contract, 'natural' rights and limitations on the state

John Locke's principal work, *Two Treatises of Government*, which was written between about 1679 and 1683, was allegedly a reaction to the government of King James II of England. It was not published until 1689, however, after the deposing of James in the 'Glorious Revolution' of 1688. Locke sought to effect a civil authority that maintained collective peace and order. Pre-the institution of state power, individuals lived in the 'state of nature' – 'a State of liberty' – which was 'a State of perfect Freedom' and 'Equality'.²³

Individuals in the state of nature had ‘a Right of Self-preservation’, to do whatever they thought appropriate for the preservation of themselves and others.²⁴ But why would individuals wish to quit the utopia of their ‘empire’, where they were ‘absolute Lord of...[their] own Person and Possessions, equal to the greatest, and subject to no body’,²⁵ and replace it with the institution of civil government? Locke’s answer: the enjoyment of freedom in the state of nature was ‘very unsafe, very insecure’.²⁶

Individuals had a right to punish and/or seek reparation of transgressors of natural law,²⁷ but they were judges in their own cause.²⁸ They had natural law to guide them, but ‘for the Law of Nature being unwritten...[it is] no where to be found but in the minds of Men’.²⁹ In the absence, therefore, of ‘civil’ law for protection, which was enforceable, interpreted by a judge, who was not ‘indifferent’ (being the term Locke described judges in the state of nature),³⁰ individuals should join together in a commonwealth. This was an original contract or ‘compact’ with everyone’s consent.³¹ The commonwealth acted as one body with the power to determine for the majority.³² It then covenanted with a sovereign, chosen by the majority, to provide the commonwealth with security.³³

‘Natural’ rights of the individual were very important to Locke. In addition to the natural rights of self-security and punishment of transgressors of natural law, there were ‘Lives, Liberties and Estate, which I call by the general name, Property’.³⁴ The ‘great’ and ‘chief end’ of the authorising contract was the preservation of property.³⁵ With Locke prioritising property as the chief instrument for the establishment of a sovereign authority, for him, this natural right could not be sacrificed without the individual’s consent.³⁶ The natural rights of self-preservation and punishment of transgressors of natural law were relinquished on the institution of civil society, however.³⁷

Interestingly, for the collective protection of property, Locke did not subscribe to the idea of the separation of governmental powers in the strict sense, that is, the separation of legislative, executive and judicial powers.³⁸ Locke believed in the separation of governmental powers as an important principle, but this was primarily a separation of the legislative, executive – and federative powers.³⁹ (The function of the federative power was protection from foreign enemies and communication with other communities and individuals still in the state of nature.⁴⁰) The legislative and executive powers were largely separate;⁴¹ the executive and federative powers were less so.⁴² The judicial power, which was not separate, came under the auspices of the legislative function.⁴³ But judges were bound to dispense justice and decide the rights of subjects by promulgated standing law.⁴⁴ And whilst the legislative branch was the supreme power of the state,⁴⁵ it was constrained by natural law⁴⁶ and could not act in an arbitrary way over the lives and fortunes of its people.⁴⁷ Indeed, for Locke, the purpose of law was to secure the freedom of the individual: ‘For Liberty is to be free from restraint and violence from others [including the state], which cannot be, where there is no Law.’⁴⁸

Moreover, Locke believed that the power of the state, or to be exact the power of the legislative, was limited to the ‘Peace, Safety, and [the] publick good of the People’.⁴⁹ The state had ‘no other end but preservation’ and, thus, could not ‘destroy, enslave, or designedly...impoverish the Subjects.’⁵⁰ That said, individuals were expected to endure some hardship.⁵¹ But when the government became too powerful, in that it had breached the trust conferred on it, by, for example, invading the ‘Property of the Subject’,⁵² it had forfeited its authority.⁵³ Individuals then had a right of revolution, with a power reverting to them to establish a new legislative (or indeed any other branch of government).⁵⁴ This was ‘not an act of revenge; it was an act of restoration, of the recreation of the violated political right’.⁵⁵ But this collective power was not reserved only for situations when the old power had gone –

individuals had a right to prevent abuse.⁵⁶

John Locke advocated a minimal role for the sovereign power. The state of nature before the sovereign was ‘very unsafe, very insecure’, so he clearly recognised the threat to individuals’ natural rights from others. But Locke’s description of the freedoms enjoyed in the state of nature implies that the institution of government was borne out of reluctant necessity (rather than a positive desire for citizenship, for example, which can be inferred from the writings of another – later – social contract theorist, Jean-Jacques Rousseau, 1712-1778⁵⁷). For Locke, the primary purpose of the social contract was the protection of individuals’ property. Property could not be abrogated without consent. On the face of it, therefore, Locke clearly does not reflect Thomas Hobbes’s approach to violations of individuals’ natural rights by others and sovereign authority which is examined, and contrasted, later.

Liberal approaches to security post 9/11

Modern conceptions of liberal security, particularly following 9/11, have been much less dismissive of the freedom/security balance, for example, attempting to reconcile both principles to some degree. This is the purpose of a collection of essays, *Human Rights in the ‘War on Terror’*.⁵⁸ That said, one of the contributors to the collection, David Luban, presents a particularly strong defence of human rights at the expense of security.⁵⁹ First, he employs a classic liberal view of rights: ‘Security [of the individual] protects our freedom from governmental abuse’.⁶⁰ And it is easy to embrace a security culture when it is not your rights that are affected.⁶¹ The risks from terrorism are also very small but we are prepared to accept a significant loss of freedom.⁶² He also believes that we are almost in a state of ‘perpetual emergency’: ‘9/11’ was an emergency but we are still facing threats to freedom several years

later.⁶³ Finally, in response to those that claim destroying democracy does not entitle a person to its benefits, he says: 'The very posing of the rhetorical question already assumes guilt.'⁶⁴

Another contributor to the collection, Fernando Teson, also attaches significant weight to freedom at the expense of security, but appears to draw the line more in favour of the state than Luban.⁶⁵ Teson describes a strict approach to security as a 'conservative conception of security' and maintains that absolute safety can only be achieved in a 'police state'.⁶⁶ He then distinguishes 'Liberalism 1', where liberties are curtailed to protect security, from 'Liberalism 2'.⁶⁷ Those that subscribe to the latter branch of liberalism are 'human rights absolutists' who consider that a life with no rights is not worth living.⁶⁸ But Teson argues that those who support the 'Liberalism 2' agenda overlook threats that are directed against the very freedoms they wish to preserve.⁶⁹ He believes that the current 'impasse' between security and freedom is between the strict security approach and 'Liberalism 2'.⁷⁰ Breaking this impasse, Teson supports 'Liberalism 1': 'I question the view that appeal to liberal values can *never* justify temporary justifications to the current level of enjoyment of freedoms.'⁷¹

Further approaches to protecting the liberal state post 9/11

Luban expresses liberal fears about the freedom/security divide, conferring too much power on the state at the expense of the rights of the individual. This attitude to state power, even in an emergency, is, therefore, in stark contrast to the absolutist state proposed by Thomas Hobbes, which is analysed later. Fernando Teson, however, does recognise that liberalism must accept some interferences with freedom to preserve liberal constitutionalism from non-state actors (though, of course, such curtailments are limited and temporary). This is an important theme of Richard Posner's *Not a Suicide Pact: The Constitution in a Time of*

National Emergency.⁷² ‘Suicide Pact’ is linked to the idea that constitutional rights of the individual should be given much less weight where the very survival of the state is under threat, otherwise the constitution is a conspiracy with those seeking to destroy it.⁷³ Unlike Article 15(1) of the European Convention on Human Rights (ECHR), ‘derogation in time of emergency’, for example, the US constitution makes no express reference to crisis powers of the state (other than the suspension of the writ of *habeas corpus* by Congress in section 9, clause 2, of Article I⁷⁴). However, Posner supports a greater balance of constitutional rights in emergency circumstances, when the relative weights of liberty and safety change.⁷⁵ The scope of Posner’s limitations in times of crisis include: the indefinite detention of terror suspects, the mass surveillance of Islamic extremism, the interception of phone calls and emails, even torture.⁷⁶ Posner’s violation of rights, emphasising prevention, is justified thus: ‘Because terrorist attacks are potentially so destructive...the emphasis of public policy shifts from punishment after an attack occurs to preventing it from occurring.’⁷⁷

All of this is legitimate, Posner argues, because ‘like any brittle thing, a Constitution that will not bend will break’;⁷⁸ and current Islamist terrorists are ‘...numerous, fanatical, implacable, elusive, resourceful, resilient, utterly ruthless, seemingly fearless, apocalyptic in their aims, and eager to get their hands on weapons of mass destruction and use them against us.’⁷⁹ But Posner does recognise the seriousness of what he is proposing, thus, his powers of the state are limited to terrorism that has the potential to create a national emergency.⁸⁰ That said, because of judges’ ‘knowledge deficit’ regarding security, there should be ‘a light judicial hand’ in the accounting of the executive action.⁸¹

Moreover, again in direct reference to a lack of crisis powers in the US constitution, Bruce Ackerman, for example, suggests that an emergency constitution be developed that provides

for effective and short term responses to significant threats of terrorism from Islamists,⁸² authorizing the government to detain terror suspects on the basis of reasonable suspicion.⁸³ To monitor this exercise of state power, Ackerman envisages a ‘Supermajoritarian Escalator’. He recommends that the immediate powers granted to the Executive would require the support of a majority of Congress after one or two weeks. These would then lapse after two months unless reauthorized by 60% of Congress. Two months after a reauthorization by Congress would then require a 70% majority to continue the powers; two months after a further reauthorization by Congress would require a 80% majority etc.⁸⁴ He increases the supermajorities of the Legislature ‘as a first line of defense against a dangerous normalization of the state of emergency.’⁸⁵ That said, whilst not envisaging unfettered Executive power, Ackerman does not propose any judicial controls, unlike Posner, at least in the short term. Thus, the rule of law, in particular, holding the Executive to account via the courts, is absent: ‘With the country reeling from a terrorist strike, it simply cannot afford the time needed for serious judicial review. If the President can convince a majority of the legislature of the need for emergency powers, this should suffice.’⁸⁶

Modern liberalism has struggled with the competing claims of freedom and security. More ‘traditional’ liberals such as Luban seemingly reject the idea of a trade-off between the two ideals; others such as Teson are less dismissive of the balancing exercise where the survival of liberal constitutionalism is under threat. Posner and Akerman are much more receptive to a sacrifice of freedom for the securing of the liberal state – but important safeguards against governmental abuse must still be maintained. For Ackerman this is confined to legislative, not judicial, regulation. Historically, the social contract theory of John Locke legitimised the state as a preserver of the security of the citizen, a protector from others within the state of nature. But, at the same time, Locke feared that a conferring of too much power on the

sovereign was itself a threat to security, hence the continuation (and deification?) of natural rights after the institution of civil government, particularly a right of rebellion if the state had become destructive of fundamental freedoms. Although Locke did not criticise Thomas Hobbes expressly, there is an acceptance that Hobbes's approach to the social contract, in conferring absolute power on a sovereign body for the purposes of public protection, which is discussed in more detail below, was a target of Locke.⁸⁷ But Hobbes has been the subject of a renaissance within elements of liberalism in recent times. In this respect, therefore, is it possible to reconcile, at least to some degree, his philosophies of sovereign protection and individual rights with the more security orientated approaches of Posner and Ackerman? Assuming this to be so, for the purposes, therefore, of utilising Hobbesian theory as a basis for conceptualising these modern attitudes to protection of the liberal state post 9/11, the next section of this piece analyses the social contract philosophy of Thomas Hobbes.

Thomas Hobbes and his legacy for the protection of the liberal state post 9/11

Thomas Hobbes, the social contract and the Leviathan

Like John Locke, Thomas Hobbes also sought to effect a central authority maintaining collective peace and order, but, for Hobbes, the sovereign body was seemingly much more powerful. Hobbes's most famous work is *Leviathan*.⁸⁸ The very description of the sovereign as a 'Leviathan' (or 'Mortall God') was telling: it was a reference to Chapter 41 of the Book of Job in the Bible. The 'leviathan' (or sea monster) is described in terms of its unconditional and terrifying power: '19 Out of his mouth go burning lamps, and sparks of fire leap out...20 Out of his nostrils goeth smoke, as out of a seething pot or caldron...[and] 33...upon earth there is not his like, who is made without fear'.

Hobbes wrote *Leviathan* in exile in France between 1647 and 1650, but the book was not published until 1651. Unlike Locke's *Two Treatises of Government*, Hobbes wrote *Leviathan* during a much more turbulent time in England's history than the rule of James II: the execution of King Charles I, after defeat in the English Civil War, and the start of the Cromwellian Commonwealth. Both of these events occurred in 1649. Hobbes was, therefore, much more concerned at the evil of state collapse than Locke. Notably, Hobbes's earlier work, *The Elements of Law Natural and Politic*, written in 1640, but not published until 1650, under the title of two separate books, *Human Nature* and *De Corpore Politico*, was written under the absolutist rule of Charles I and the threat of civil war. For this author *The Elements of Law Natural and Politic* serves as a more concise and succinct exposition of Hobbes's social contract theory than *Leviathan*, so is examined in this piece, too. He also believes Hobbes's *De Cive*, first published in Latin in 1642, but not published in English until 1651, is significant in informing a person's appreciation of *Leviathan*, so is analysed here as well.

Like John Locke, for Thomas Hobbes, there was also a state of nature. But all people in the state of nature had 'a desire and will to hurt'.⁸⁹ Pre-the existence of civil society Hobbes also believed that individuals possessed a natural right of self-preservation.⁹⁰ This right, thus, allowed individuals to do whatever they wanted in furtherance of this self-security.⁹¹ Yet, because virtually anything might be necessary for one's self-preservation, this right of nature was in practice, for Hobbes, a 'Right to every thing'.⁹² The consequence of this right was that the state of nature became a 'War of every man against every man'.⁹³ And life within it would be 'solitary, poore, nasty, brutish, and short'.⁹⁴ Hobbes therefore adopted a much more malign view of the state of – and human – nature than Locke,⁹⁵ meaning that the threat to individuals' natural rights from others was much more acute. For Hobbes, as soon as people

appreciated this ‘hateful condition, do desire, even nature itself compelling them, to be freed from this misery...This cannot be done, except by compact, they all quit that right they have to all things’.⁹⁶

Hobbes also envisaged, therefore, individuals would first covenant between themselves, whereby they would all agree to organise themselves into a ‘Common-wealth’.⁹⁷ There would then be a second, authorising covenant which provided the content of the first covenant, where the commonwealth would pass from a state of war to a state of peace.⁹⁸ This second covenant entailed the commonwealth agreeing to obey a sovereign chosen by the majority (which was one of only three kinds of government: a collection of persons with equal voting power, a ‘democracy’; a collection of persons without equal voting power, an ‘aristocracy’; or where power had been vested in one person, a ‘monarchy’⁹⁹). The commonwealth agreed to obey a sovereign in exchange for the sovereign authority providing them with ‘common peace, defence, and benefit’¹⁰⁰ they had previously lacked in the state of nature.¹⁰¹

To achieve ‘common peace, defence, and benefit’, absolute power was vested in the sovereign body.¹⁰² This absolute power was definitive and unconditional; it was neither reversible nor subject to proviso.¹⁰³ Sovereignty could not be separated, too. Whilst Hobbes recognised that the process of government could not literally be undertaken by one person, for example, thereby necessitating the appointment of ministers and magistrates, their appointment was ‘an inseparable part of the same sovereignty’.¹⁰⁴ Indeed, Hobbes was also committed to the necessity of the sovereign acting outside the civil law, or even against it, to decide what was best for the safety of its citizens.¹⁰⁵ For John Locke, an absence of law would have been tyranny: ‘Where-ever Law ends, Tyranny begins.’¹⁰⁶

Unlike Locke, the authorising compact of Thomas Hobbes was between individuals, not between individuals and the sovereign power: 'For while the democracy is a making, there is no sovereign with whom to contract.'¹⁰⁷ Curiously, therefore, as the sovereign was not a party to the second covenant, it did not stand in any reciprocal relation of obligation to its subjects, though it was a beneficiary of it.¹⁰⁸ Indeed, did Hobbes have much appreciation for individual freedom, since he also defined the term narrowly, in that everyone had liberty who was not actually physically restrained, liberty being 'the absence of Opposition; (by Opposition, I mean externall Impediments of motion)?'¹⁰⁹ So if a person were to spend their life in subservience and conformity, for fear of the law or what their the sovereign may do to them, then according to Hobbes they were still perfectly free in their actions – they did have a choice after all.¹¹⁰

The subject's duty of obedience to the sovereign body was indefinite, which was implicit within Hobbes's third law of nature: the duty to perform covenants.¹¹¹ The motivation for subjects' honouring the social covenant was Hobbes's first law of nature, 'to seek Peace, and follow it'.¹¹² (All other natural laws were the means to obtain peace.¹¹³) The degree to which the citizen submitted to the sovereign power even included a duty to obey the latter's conscience.¹¹⁴ (The state did remain neutral with respect to its citizens' religious thought, and Christianity in particular,¹¹⁵ however. So, in the absence of an express right to manifest one's own religion – a person was expected to follow the religion prescribed by the sovereign in public – they did have the right to their own private, theological conscience.) In principle, therefore, the absolutist state premised within Hobbes's works does not naturally serve as a protector of liberal constitutionalism post 9/11. The alleged totalitarianism of the Leviathan perhaps explains why Hobbes was so attractive to the so-called 'Crown Jurist' of the Nazi Party, Carl Schmitt, 1888-1985, the Thomas Hobbes of the 20th Century.

The Influence of Thomas Hobbes on Carl Schmitt

Carl Schmitt's *Concept of the Political*, first published as a journal article in 1927, and later revised as a book in 1932, was significantly influenced by Hobbes: 'No form of order, no reasonable legitimacy or legality can exist without protection and obedience.'¹¹⁶ Furthermore, like Hobbes, Schmitt believed that the endeavour of a normal state consists above all in assuring 'total peace' ie 'tranquillity, security and order' within the state and its territory.¹¹⁷ Again, like Hobbes, Schmitt thought that man was essentially dangerous, though, unlike Hobbes, Schmitt thought that there was a state of war between groups or nations rather than between individuals.¹¹⁸ For Schmitt, politics was dominated by the necessity of drawing distinctions between friend and enemy.¹¹⁹ If the sovereign entity could not at a crucial moment distinguish between the two, then it had ceased in the political sphere; and there would always be another state which could assume the burden of politics.¹²⁰ In Schmitt's earlier work, *Dictatorship*, dating from 1921, he supported the conferring of wide powers on the German President to protect the state, at that time, from extreme groups seeking to destroy it. Schmitt based the President's powers on emergency provisions within Article 48 of the Constitution, 1919.¹²¹ Schmitt premised this form of constitutional protection on a 'commissarial dictatorship', in that a commissioner dictator was appointed by the head of the state, whose aim was to 'eliminate the danger and to strengthen the foundation which had been threatened'.¹²²

Schmitt was an important critic of liberalism. He believed that it was ill-equipped to protect the state from extremist groups seeking to destroy it. Liberalism's neutrality and tolerance exacerbated the potential for chaos. Extremist groups then abused this neutrality and tolerance for their own political gain, meaning the liberal state was unable to distinguish

friend from enemy.¹²³ In 1932, in *Legality and Legitimacy*, Schmitt famously provided, therefore, the legal and theoretical justification for a much wider use of emergency powers by the President under Article 48 of the German constitution.¹²⁴ Although this Presidential ‘dictatorship’ had its roots in the 1919 constitution, Schmitt’s conception for it went beyond this document, so was no longer within the constitution’s spirit and the letter.¹²⁵

The dangers of Hobbes, and Schmitt

For reasons of public protection, the author finds a Hobbesian approach to security post 9/11, and its Schmittian comparisons, particularly seductive. But these models of protection seemingly ignore the reason(s) why we may be conferring greater powers on the state in the first place: to protect the very principles of democracy we are seeking to defend. The consequence of a substantial sacrifice of human rights is a ‘surveillance state’, a ‘security state’ or worse: a ‘police state’. We do not want to do the terrorists’ job for them. Indeed, greater security is counter-productive for another reason: there is a danger that the very communities whose support is needed in the fight against terrorism will be alienated.¹²⁶ Historically, David Hume warned against the tyranny of Hobbes, as did, implicitly, John Locke. The consequence of a move to absolutism substantially augments, from a Lockean perspective, risks to the security of the individual. But a significant increase to power of the state is also a serious interference with individuals’ autonomy. Another famous liberal writer, John Stuart Mill, warned against infringements of freedom merely for the good of the person. The state and third parties had a responsibility to prevent harm to the individual but this responsibility could not be supported by criminal sanction if the person continued to ignore advice. Unless an individual’s actions caused harm to others, they should be free to suffer the consequences of their own actions.¹²⁷

In further criticising Thomas Hobbes, he always considered interests of the commonwealth as a whole, and assumed, tacitly, that the major interests of all citizens were the same. In time of war, of course, there is a unification of interests, but in a time of relative peace, as there is now, a clash may be very great between the interests of one class and those of another.¹²⁸ Thus, a common criticism of Hobbes is his faith that all the individuals in the commonwealth will keep to their promises of obeying the sovereign authority if it turns out to be to their advantage later to break it?¹²⁹ Others have questioned why later generations, who were not party to the original covenant, would honour its obligations.¹³⁰

But there is a certain logic to Hobbes's seemingly all powerful state. Against the backdrop of civil war and the execution of King Charles I, was it unreasonable that Hobbes sought a top-down approach? Indeed, other absolutist sovereign powers are prevalent in the writings of later, social contract theorists, such as Jean-Jacques Rousseau. (See, for example, Rousseau's *The Social Contract*, which was first published in 1762.)¹³¹ Notwithstanding the apparent logic of Hobbes pursuing the ideas of a strong state, was it actually correct to characterize his sovereign body as absolute, even though he himself literally described it as so?¹³² For example, in Hobbes's day, the image of the Leviathan was not necessarily one of an evil and hateful sea monster. Hobbes used this image because he considered it to be an impressive symbol, not because he wanted to represent a vile and hideous state. He failed to realise, however, that in using this symbol he was conjuring up the invisible forces of an old, ambiguous myth.¹³³ Influential writers on Hobbes, such as Taylor, therefore argue that 'what has escaped most observers is the extent to which Hobbes' absolutism is mitigated by his own principles, qualifications, and doctrines'. Hence, Hobbes needs to be 'saved from himself'.¹³⁴ For reasons of word length this article is unable to examine further the rationality of Hobbes adopting a Leviathan to exercise sovereign power; or indeed whether in fact

Hobbes's Leviathan was all-powerful. The author intends to pursue these lines of argument in more detail in a follow-up piece. But, even only a brief reference above to some of these arguments, supports the recurring theme of this article that the social contract theory of Thomas Hobbes arguably did not produce an edifice of authoritarianism and is a foundation for the protection of the liberal state post 9/11.

Moreover, parallels have been drawn here between Thomas Hobbes and Carl Schmitt. But in the late 1920s Schmitt began to distance himself from Hobbes's ideas. And in 1932, in *Legality and Legitimacy*, Schmitt famously provided an 'unconstitutional' interpretation of the German constitution. A year later, in 1933, Schmitt embraced the anti-liberal ideology prevalent at the time by joining the Nazi Party.¹³⁵ Indeed, Strong believes that, immediately prior to Schmitt becoming a Party member, he had not even been seeking to protect the existing German regime in his writings but, in the Nazis, he saw an opportunity to realise his own approach to the absolutist state and install an authoritarian nationalist regime that would express the 'real will' of the German people.¹³⁶ So the Schmitt of the 1930s is where this piece ceases to rely on comparisons between him and Thomas Hobbes. Indeed, whilst subscribing to the strong state ideal of Hobbes (or at least for the Germany of the 1920s), Schmitt also sought to expressly distinguish himself from the Leviathan of Hobbes. A significant Schmittian source of criticism is *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure in a Political Symbol*,¹³⁷ from 1938, which McCormick describes as an 'overtly, virulently, almost cartoonish anti-Semitic book.'¹³⁸

It will be recalled that, for Hobbes, individuals could not surrender their right to private judgement on matters of theology, particularly Christianity. This was one of Hobbes' principal flaws, according to Schmitt. In Schmitt's opinion, this had serious consequences:

the space Hobbes reserved for private religious belief became the gateway for the subjectivity of bourgeois conscience and private opinion. History had shown that the private sphere had extended into the bourgeois public sphere finally overthrowing the Leviathan.¹³⁹ Stanton eloquently describes Schmitt's criticism of Hobbes thus: 'By admitting into his arguments an ineradicable individualistic component Hobbes was sawing off the branch on which he was sitting.'¹⁴⁰ For reasons of word length, this piece is also unable to explore in more detail the distinctions between Hobbes and Schmitt. This, too, will be explored in a later article. Thus, analyses of Schmitt's other works, such as *Political Theology*, dating from 1922, where famously he decreed that the sovereign had the authority to decide whether an extreme emergency was at hand – and, if so, to do whatever was necessary, including suspending all legal rules, to secure a normal situation – will be reserved for a future, more detailed comparison with Hobbes.¹⁴¹ However, again in briefly distinguishing, here, Thomas Hobbes from Carl Schmitt (or at least the Schmitt of the 1930s), in making the latter more absolutist than the former, this further supports the ongoing emphasis of this piece on the apparent liberalism of Hobbes and his foundation for modern constitutional protection from non-state actors.

There are several qualifications to this article because of word length, but the principal aim of this piece is to identify rights within Hobbes's social contract theory. Direct limitations on the Leviathan's power, that is whether the sovereign authority was in fact absolute, which are going to be analysed in more detail at a later date, will naturally overlap with an identification of citizen's rights within Hobbesian political thought pursued here. But the objective is to keep these two analyses separate, by employing a distinction between express freedoms – 'rights' – which is the purpose of this article, and freedoms inferred from limitations imposed on the sovereign's power – 'liberties' – which is for the future.

Reappraising Hobbesian social contract theory

The rights of the individual under the Leviathan

Continuing the theme of this piece, this next sub-section considers the freedoms within Hobbes, and especially the rights conferred on the individual expressly by the Leviathan after the authorising compact. First, it will be recalled, pre-the institution of the sovereign authority, the freedom of the individual was limitless, to exercise their natural right of self-security. Equality between individuals was also prescribed by natural law.¹⁴² To this end, Douzinas proclaims that Hobbes is the ‘founder of the modern tradition of individual rights’.¹⁴³ For Douzinas the law of self-preservation, for example, derived from human nature and as such it did not impose external constraints or restrict liberty.¹⁴⁴ With this move, Hobbes separated the individual from the social order and installed them at the centre, as the subject of modernity and the source of law.¹⁴⁵ Paradoxically, the citizen’s natural right of self-preservation was given up to the Leviathan.¹⁴⁶ (Equality endured, however, since, being a law of nature, it was ‘Immutable and Eternall’.¹⁴⁷) But the right of self-preservation – the right ‘to all things’ – survived in some form: ‘The Sovereign right retains all the characteristics of the individual natural right.’¹⁴⁸ For Hobbes, therefore, freedom was crucial, which endured after the institution of sovereign authority.

In the first instance, the Hobbesian compact was designed to maintain collective security. Security is a basic human right and is essential to the enjoyment of other rights. Of significance, Hobbes said: ‘It pertains...to the harmless and necessary liberty of subjects that every man may without fear enjoy the rights which are allowed him by the laws.’¹⁴⁹ It is no coincidence, therefore, that collective security, for the full realisation of human rights, is the

first Article, Article 1, of the ECHR. Individually, after the authorising contract, a person was granted the rights to their own life and bodily integrity, which are Articles 2(1) and 3 of the ECHR respectively: ‘If the sovereign...command a man...to kill, wound, or maim himself; or not to resist those that assault him; or to abstain from the use of food, air, medicine, or any other thing without which he cannot live; yet hath that man the liberty to disobey.’¹⁵⁰ (Indeed, for Hobbes, it was contrary to natural law for an individual to harm themselves: ‘A man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same...’¹⁵¹)

There were other express freedoms conferred on citizens, in addition to the rights to life and bodily integrity, that resonate with modern human rights law. Hobbes proscribed the sovereign power from compelling a citizen to confess to a crime,¹⁵² so the use of torture to extract a confession from a person was excluded, which is Article 3 of the ECHR. The presumption of innocence was assured, which is Article 6(2) of the ECHR. An individual was entitled to a fair trial by an impartial adjudicator,¹⁵³ which is Article 6(1) of the ECHR; and retrospective law-making was prohibited, which is Article 7(1) of the ECHR.¹⁵⁴ As regards punishments for crimes committed, they had to be prescribed by law,¹⁵⁵ which is also Article 7(1) of the ECHR; and punishments out of proportion to the crimes committed, which were ‘cruel’, and therefore contrary to the laws of nature,¹⁵⁶ were also unlawful. Disproportionate punishments are also outlawed by Article 3 of the ECHR. The sovereign was also forbidden from punishing the blameless (that is, individuals who were not enemies of the commonwealth).¹⁵⁷

Hobbes was also anxious to ensure that individuals had ‘commodious passage from place to place’.¹⁵⁸ To modern conceptions of human rights this would constitute a right to be free from

arbitrary detention, which is Article 5(1) of the ECHR, or even freedom of movement, which is Article 2 of the Fourth Protocol to the ECHR. It will be recalled that whilst the creation of the commonwealth was with the consent of everyone, so a person acted voluntarily as regards to its inception, the commonwealth's choice of sovereign was by the majority. The consequence, therefore, was that the minority was compelled to accept the will of the majority. But individuals who did not accept the authority of the majority's sovereign were free to leave (though they did return to the state of nature and were enemies of the commonwealth).¹⁵⁹

The submission to the Leviathan also ceased when the sovereign body had exceeded its authority (those who left the commonwealth, because they disagreed with the choice of the majority for sovereign power, also relinquished their unfettered obedience to the Leviathan). Like Locke, Hobbes also envisioned a right of rebellion against the state (though this was exercised in more extreme circumstances).¹⁶⁰ Thus, individuals in the commonwealth had rights against the sovereign; the latter's power was conditional on continuing to guarantee individuals' protection. A sovereign power who could not protect its citizens was simply not a sovereign. A return to the state of nature therefore left individuals free to contract with another who could provide them with security. For Taylor, this meant that 'the individual was the original and irreducible seat of political authority'.¹⁶¹ Indeed, when the state had failed to provide security and the lives of individuals were in danger from the state, for Hobbes, individuals then had a right to protect themselves – a 'right of self-defence' – from the sovereign's power.¹⁶²

For Douzinas liberty is at the foundation of Hobbesian philosophy: conflicting natural rights lead to the pact, which give birth to the Leviathan, who lays down the law in order to protect

and secure individual rights. Civil law is created through the unstoppable advance of individual rights; law's end is the creation of rights. Private rights are the end and value of the system of law.¹⁶³ Douzinas therefore surmises: 'John Locke's political writing are commonly presented as the early manifesto of liberalism and as the opposite of Hobbes 'totalitarianism'. Yet the main assumptions of Locke did not differ radically from his predecessor.'¹⁶⁴ Indeed, whilst Hobbes was not a 'libertarian' in the mould of later classic liberals such as F A Hayek or Milton Friedman,¹⁶⁵ he did argue for something close to *laissez-faire* in some economic areas: the sovereign ought to define property rights as clearly as possible and avoid sudden and unpredictable taxes.¹⁶⁶ In modern day human rights law, this is an example of the express right to certainty in the law, which is interpreted within Article 7(1) of the ECHR.¹⁶⁷ Legal certainty is also another example of the rule of law.

That said, Hobbes saw the accumulation of wealth as a threat to social harmony; individuals would not be entitled to amass more than was necessary for their own preservation, if by doing so they deprived others of the necessities of life.¹⁶⁸ If they did the sovereign was required to intervene and redistribute the accumulated wealth.¹⁶⁹ The sovereign was therefore obliged to guarantee everyone a minimum level of support necessary for their survival: fire, water, free air, a place to live, and 'to all things necessary for life'.¹⁷⁰ (Hobbes even believed that if someone had committed a crime, because, to do otherwise would threaten their survival, then the person's conduct would be excused.¹⁷¹) Thus, Hobbes's conferring of rights on individuals did not merely extend to classic liberal ideas of 'negative', 'freedoms from' the state, but to 'positive', 'economic' rights. *Prima facie* Thomas Hobbes was a state absolutist for the purposes of public security. Post 9/11, the liberal state has had to augment its powers to cement its survival. A natural consequence of an increase in state authority is a reduction in individual liberty. But with a significant respect for human rights within the

Hobbesian social contract, and therefore express limitations on the power of the sovereign authority, this is arguably a foundation for the modern protection of liberal constitutionalism from non-state actors such as Islamist terrorists. Indeed, the classic liberalism of John Locke, which conceivably is the antithesis of Hobbesian totalitarianism, was not in fact the absolute guarantor of personal freedom one would naturally infer from his writings.

The gulf between Hobbes and Locke, if at all

Douzinas claims that in practice Hobbes's writings did not differ radically from those of the later social contract theorist John Locke. For Hobbes, there was an absence of a separation of governmental powers. It has already been noted above, however, that a strict separation was even absent from Locke's theories, too. Of particular note, the judicial branch was not independent from that of the legislative.¹⁷² Hobbes's approach to freedoms arguably does not sit well with the Lockean attitude to the deification of 'life, liberty and estate' and a minimal state to secure these natural rights. This is certainly the case if one were to approach Hobbes through the critical eye of Locke. But does Locke deserve to be the lens through which we assess Hobbes? The liberal dread of tyranny, emanating from Locke's apparent fear of an absolutist sovereign, is primarily that the state will have its own ideological axe to grind. But, for Hobbes, the state was almost definable as the body in a society which had no ideological axe of its own.¹⁷³

In spite of Locke's perceived rejection of absolutism in favour of maximum liberty, what appears to be overlooked is that even Locke conceded that there must be scope for significant discretion in some cases. To protect the public good, in 'unforeseen and uncertain Occurrences',¹⁷⁴ the state (or to be exact the Executive branch) had a prerogative that may

sometimes require immediate action ‘without the prescription of the Law’.¹⁷⁵ Thus, ‘there is a latitude left to the Executive power, to do many things of choice which the Laws do not prescribe’.¹⁷⁶ Indeed, Locke went further: ‘Without the prescription of the Law, *and sometimes even against it*’ [my italics].¹⁷⁷ Moreover, the exercise of this prerogative power was never to be questioned.¹⁷⁸ Earlier it will be recalled that Locke said: ‘Where-ever Law ends, Tyranny begins’.¹⁷⁹ In his explanation of prerogative, Locke was clearly being hypocritical. This prerogative, according to Neocleous, ‘conveniently allowed Locke to ignore the fact that arbitrary power was precisely the kind of power his theorising was designed to prevent’.¹⁸⁰ Neocleous concludes that this Lockeian approach was ‘nothing less than a liberal prioritising of security’, suggesting that liberalism, rather than being in opposition to security, was in fact wedded to ideals of security as a way of protecting the status quo.¹⁸¹

Moreover, in Schmitt’s particular criticism of liberalism in the *Concept of the Political* he argued that liberals of all countries had in the most different ways coalesced with non-liberal elements and ideas.¹⁸² A classic example could be John Locke’s condonation of slavery, being a shareholder in a slave trading company, the Royal African Company.¹⁸³ Locke even went further: he drafted the Constitutions of Carolina, 1666, to accommodate slaves as property, since this advanced the economic system of the day.¹⁸⁴ This apparent double standard of Locke is one of the alleged contradictions of liberalism – liberalism downgrades some interests to protect itself.¹⁸⁵

Conclusion

Thomas Hobbes foresaw an unqualified submission to the sovereign's powers in return for state protection. He had apparently little interest in liberal considerations of the social contract, such as the protection of individual freedoms, the separation of powers etc. For Hobbes the compact was seemingly reduced to the surrender of all a person's rights. Furthermore, the sovereign was not a party to the authorising covenant between individuals, so a reclamation of an individuals' gifted freedoms seemingly relied on the sovereign's whim to re-grant them. Censorship for the common good was also permitted. Thus, critics of Hobbes such as David Hume described him as a philosopher whose politics were 'fitted only to promote tyranny'. Assuming such an interpretation of Hobbes's statist philosophy is correct, his theories would surely be rejected by modern liberals such as David Luban. Post 9/11, Luban has been sceptical about the trade-off between rights and security, since, for him, it is an unfair exercise: the rights of the minority are given up for the security of the majority. Indeed, greater powers of the state become normalised, resulting in a state of perpetual emergency; and once liberties are sacrificed states are reluctant to relinquish them, even when the security threat has diminished.

But, unlike John Locke, who was reluctant to abandon the utopia that was the state of nature for fear that the newly instituted sovereign power was itself a threat to the security of the individual, Hobbes was arguably much more concerned about the threat from '*non-state actors*'. So his conception of the state, and the protection it provided, is particularly appealing, especially post 9/11; it can found a theoretical basis for modern approaches to protecting the liberal state from Islamist terrorists. Prescribing what its citizens believed and read was no doubt a serious interference with individual liberty. But even existing human

rights law accepts substantial curtailments on freedom of thought and expression in times of either 'war or public emergency threatening the life of the nation', as per Article 15(1) of the ECHR, for example. And, whilst for Hobbes there was apparently little toleration of individuals' public conscience, citizens were free to hold their own private views on religion. This, for the so called 'Crown Jurist' of the Nazi Party, Carl Schmitt, was the fissure which eventually destroyed Hobbes's Leviathan from within. For reasons of word length this piece is unable to examine in detail whether in fact the sovereign authority of Hobbes was absolute, as well as emphasise the differences between him and Schmitt, but the brief references here present Hobbes as a theorist (much?) less absolutist than traditionally perceived.

Moreover, Hobbes's foundation of the state was the very protection of natural rights (albeit in the person of the sovereign), like Locke. There were also rights conferred on citizens, such as the right to life, bodily integrity and fair trial by an independent adjudicator, as well as a prohibition on retrospective law-making and disproportionate, cruel punishments. The significance of freedom in Hobbesian philosophy was therefore very important. However, even Locke recognised that in exceptional circumstances the state may have to act against liberal values for its own preservation: sometimes outside the law, and sometimes even against it. An example of this could be the famous action of President Abraham Lincoln during the American Civil War in suspending *habeas corpus* in 1861. This was literally unconstitutional, being an act of the President, not Congress, as prescribed by section 9, clause 2, of Article I of the US Constitution. But, since Congress was not in session, Lincoln's motive for doing so was in fact to protect the Constitution, not destroy it. If not, the failure of the state in sacrificing freedoms for the sake of its own protection would have been, to use Richard Posner's words, a 'suicide pact' with those seeking to destroy it.

As the Hobbesian social contract retains some significant liberal values after the institution of the sovereign authority, is there much difference in practice, therefore, between this and modern approaches to the security of constitutionalism post 9/11? With the continuation of Islamist terrorism, many academics – some with distinguished liberal backgrounds, such as Bruce Ackerman – have in fact openly called for restrictions on the rights of suspects – indefinite detention of terror suspects, wide powers of warrantless surveillance, even torture – to necessitate the preservation of the liberal state. For Thomas Hobbes, human rights were not ‘universal’: enemies of the commonwealth were not granted all the same rights as citizens. And whilst there was a general prohibition on cruel treatment, torture was condoned for the purposes of information, if a person refused to answer questions (though its admissibility as evidence in court was excluded).¹⁸⁶ Ackerman, for example, advocates minimal regulation of the exercise of executive power, excluding judicial review. Thus, for him, the rule of law, in particular, ‘the legality principle’, is suspended; Hobbes’s sovereign was also outside civil (but not natural) law.¹⁸⁷ This reference to an absence of the rule of law, for Ackerman, also overlaps with the principle of the separation of governmental powers, too, in that the accountability of the executive branch of the state by the judiciary is excluded. Of course, Thomas Hobbes also did not subscribe to a division of the sovereign’s authority.

The author does not claim to make extensive comparisons between Thomas Hobbes and Bruce Ackerman and Richard Posner. Whilst the torture of captives to extract confessions, the use of informants to provide real-time intelligence and the indefinite detention of violent political opponents will have been common even in Hobbes’s day, more modern techniques of countering terrorism such as the interception of telecommunications and emails and the use of satellites and drones would not have been – the author is not ‘comparing like with like’ in every situation. But, as the balance for Ackerman and others falls much more in favour of

the state, and the balance, for Thomas Hobbes, falls much more in favour of the individual, is it not fair to conclude that the approaches of the two camps – theoretically opposed to each other – might in fact meet somewhere in between?

However, in their desire to protect the state from third parties, such as Islamists, Ackerman and others are themselves keen to ensure that these exceptional powers of the state are only exercised in a national emergency. And the measures they suggest for preventing further terrorism such as the indefinite detention of terror suspects, in some cases without judicial oversight, imply (a degree of?) proportionality between these curtailments of individual freedoms and the prevailing terror threat (or at least at the authors' time of writing). Currently, the terror threat level in the UK, for example, is 'severe', meaning an attack in the UK is 'highly likely'. Significantly, even after the horrific terror attacks in Manchester and London in 2017, these would not meet the threshold for Ackerman's 'Emergency Constitution'. Ackerman's extraordinary powers of the state, exercised only when a serious terror attack has taken place, are the exception, not the rule. At the heart of Hobbesian ideology is the protection of individuals from the state of nature, which for Hobbes was the English Civil War. This was surely an Ackerman exception. Naturally, the conclusion here about the rights exercised by citizens after the Hobbesian authorising compact, conceptualising modern preservations of liberal constitutionalism, seemingly ignores the spectre of perpetual power, even after the Hobbesian sovereign has restored peace. (In a further study, which will analyse the apparent absolute nature of the Leviathan, the endurance of the sovereign will in fact be disputed.) But, according to contemporary philosophers such as Giorgio Agamben, the regularisation of temporary security measures in modern times, after an emergency has elapsed, have in fact become the norm within liberal constitutionalism

for a number of years.¹⁸⁸ For Neocleous, this permanence would be a consequence of maintaining the capitalist status quo.

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¹ John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), *Second Treatise of Government*, Chapter XIX.

² Paul O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights', *Human Rights Law Review* 7 (2007): 483–509.

³ Alexander Lanoszka, 'Nuclear Proliferation and Nonproliferation among Soviet Allies', *Journal Global Security Studies* 3 (2018): 217–233.

⁴ Barry S Levy and Jonathan Patz, 'Climate Change, Human Rights, and Social Justice', *Annals of Global Health* 81 (2015): 310–322.

⁵ See, for example: Michael Stohl, 'The State as Terrorist: Insights and Implications', *Democracy and Security* 2 (2006): 1–25; Zeynab Malakoutikhah, 'Iran: Sponsoring or Combating Terrorism?', *Studies in Conflict and Terrorism* (2018) <<https://doi.org/10.1080/1057610X.2018.1506560>> accessed 13 December 2019.

⁶ Ahsan I. Butt, 'Why did the United States Invade Iraq in 2003?', *Security Studies* 28 (2019): 250–285.

⁷ Satvinder Juss, *Human Rights and America's War on Terror* (London: Routledge, 2018).

⁸ Stephanie Carvin, 'The Trouble with Targeted Killing' *Security Studies* 21 (2012): 529–555.

⁹ Olivia Flash, 'The legality of the air strikes against ISIL in Syria: new insights on the extraterritorial use of force against non-state actors', *Journal on the Use of Force and International Law* 3 (2016): 37–61

¹⁰ Jaume Saura, 'On the Implications of the Use of Drones in International Law' *Journal of International Law and International Relations* 12 (2016): 120–150.

¹¹ Richard Price, 'Syria and the Chemical Weapons Taboo', *Journal of Global Security Studies* 4 (2019): 37–52; Geoffrey Chapman, Hassan Elbahtimy and Susan B. Martin, 'The Future of Chemical Weapons: Implications from the Syrian Civil War', *Security Studies* 27 (2018): 704–733.

¹² Reuters, 'Russia and China veto UN resolution to impose sanctions on Syria' 1 March 2017 *The Guardian* <<https://www.theguardian.com/world/2017/mar/01/russia-and-china-veto-un-resolution-to-impose-sanctions-on-syria>> accessed 13 December 2019.

¹³ Bill Bowring, 'Russia and Human Rights: Incompatible Opposites?' *Goettingen Journal of International Law* 1 (2009): 33–54.

¹⁴ Freek Van der Vet, 'Seeking life, finding justice: Russian NGO litigation and Chechen disappearances before the European Court of Human Rights', *Human Rights Review* 13 (2012): 303–325.

¹⁵ Philip Baker, 'Human Rights, Europe and the People's Republic of China' *The China Quarterly* 169 (2002): 45–63.

¹⁶ Institute for Economics and Peace, *The Global Terrorism Index 2018*, November 2018, <http://visionofhumanity.org/app/uploads/2018/12/Global-Terrorism-Index-2018-1.pdf> (accessed February 18, 2019) 8.

¹⁷ Ibid., 2. But in 2018, in Europe, the number of deaths from terrorism fell to 62 – see, for example: Institute for Economics and Peace, *The Global Terrorism Index 2019*, November 2019, <http://visionofhumanity.org/app/uploads/2019/11/GTI-2019web.pdf> (accessed December 13, 2019) 2.

¹⁸ See, for example, Mark G Spencer, *David Hume: Historical Thinker, Historical Writer* (University Park: Pennsylvania State University Press, 2013), 209-211.

¹⁹ The reference for this is a journal article written by Carl Schmitt – see: Tracey Strong, ‘Foreword’ in Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure in a Political Symbol* (Chicago: University of Chicago Press, 1996), vii-xxviii, ix. The journal article was later revised and published as a book in 1932: Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996). Here Schmitt toned down his earlier assessment of Hobbes: ‘[He was] a truly a powerful and systematic political thinker.’ (65)

²⁰ Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition* (Chicago: University of Chicago Press, 1993), 70.

²¹ Alan Ryan, ‘Hobbes’s Political Philosophy’, in *The Cambridge Companion to Hobbes*, ed. Tom Sorell (Cambridge: Cambridge University Press, 1996), 208-245, 237.

²² Timothy Stanton, ‘Hobbes and Schmitt’, *History of European Ideas* 37 (2011): 160-167, 162.

²³ Locke (n 1), *Second Treatise of Government*, Chapter II, 269.

²⁴ This right was circumscribed by natural law, however – see: *ibid* Chapter IX, 350.

²⁵ *Ibid.*, Chapter II, 269.

²⁶ *Ibid.*

²⁷ *Ibid.*, 272-274.

²⁸ *Ibid.*, 275.

²⁹ *Ibid.*, Chapter XI, 358.

³⁰ *Ibid.*, Chapter IX, 350-351.

³¹ *Ibid.*, Chapter VIII, 331.

³² *Ibid.*

³³ *Ibid.*, Chapter XIX, 428.

³⁴ *Ibid.*, Chapter IX, 350. There is a significant debate about the precise meaning of ‘property’ in Locke’s writing. Does Locke define the term in a ‘narrow’ sense of material possessions or in an ‘extended’ sense as a classification of these natural rights? Laslett, for example, prefers the latter option – Peter Laslett, ‘Introduction’ to Locke (n 1) 3-122 – but still states: ‘Locke’s doctrine of property was incomplete, not a little confused and inadequate to the problem as has been analysed to this day.’ (107)

³⁵ *Ibid.*, 350-351.

³⁶ *Ibid.*, Chapter X, 360. In this context, for example, Locke describes property as ‘Estates and Possessions’ – see: *ibid.* Chapter XVI, 395.

³⁷ *Ibid.*, Chapter IX, 352-353.

³⁸ See, for example: Charles Louis de Secondat Baron de Montesquieu, *The Spirit of Laws* (CreateSpace Independent Publishing Platform, 2015); and Articles I-III of the Constitution of the United States

³⁹ Locke (n 1) *Second Treatise of Government*, Chapter VIII, 338

⁴⁰ *Ibid.*, Chapter XII, 365.

⁴¹ *Ibid.*

⁴² *Ibid.*, 366.

⁴³ *Ibid.*, Chapter VII, 326.

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- ⁴⁴ Ibid., Chapter XI, 358.
- ⁴⁵ Ibid., 356.
- ⁴⁶ Ibid., 358.
- ⁴⁷ Ibid., 357.
- ⁴⁸ Ibid., Chapter VI, 306.
- ⁴⁹ Ibid., Chapter IX, 353.
- ⁵⁰ Ibid., Chapter XI, 357.
- ⁵¹ Ibid., Chapter XIX, 414-415.
- ⁵² Ibid., 412.
- ⁵³ Ibid., Chapter XIII, 367.
- ⁵⁴ Ibid.
- ⁵⁵ John Dunn, *Locke* (Oxford: Oxford University Press, 1984), 61.
- ⁵⁶ Locke (n 1) *Second Treatise of Government*, Chapter XIX, 411.
- ⁵⁷ Rousseau seemed to embrace the transition to civil society much more than Locke. In *The Social Contract* Rousseau states: ‘Although...[man] is deprived of many advantages that he derives from nature, he acquires equally greater ones in return; his faculties are exercised and developed; his ideas are expanded; his feelings are ennobled; his whole soul is exalted...[He] is transformed...from a stupid and ignorant animal into an intelligent being and a man.’ See: Jean-Jacques Rousseau, *The Social Contract* (Ware: Wordsworth Editions, 1998), Book I, Chapter VIII, 19.
- ⁵⁸ Richard Ashby Wilson, ‘Human Rights in the “War on Terror”’, in *Human Rights in the ‘War on Terror’*, ed. Richard Ashby Wilson (Cambridge: Cambridge University Press, 2005), 1-36, 3.
- ⁵⁹ David Luban, ‘Eight Fallacies About Liberty and Security’, in Ashby Wilson (ibid) 242-257. Luban also proposes a strict liberal approach to security in other places – see, for example: David Luban, ‘The War on Terrorism and the End of Human Rights’, *Philosophy and Public Policy Quarterly* 22 (2002): 9-14; David Luban, ‘Lawfare and Legal Ethics in Guantanamo’, *Stanford Law Review* 60 (2007-08): 1981-2027; and David Luban, ‘Liberalism, Torture, and the Ticking Bomb’, in *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory*, ed. Steven Lee (New York: Springer, 2007) 249-262. Luban’s *magnum opus* is probably: David Luban, *Torture, Power, and the Law* (Cambridge: Cambridge University Press, 2014).
- ⁶⁰ Ibid., 245.
- ⁶¹ Ibid., 243-245.
- ⁶² Ibid., 247.
- ⁶³ Ibid., 249.
- ⁶⁴ Ibid., 252.
- ⁶⁵ Fernando Teson, ‘Liberal Security’ in Ashby Wilson (n 44) 61-62. For some of Teson’s other liberal approaches to security, see, for example: Fernando Teson, ‘A Defence of Liberal Democracy for Africa’, *Cambridge Review of International Affairs* 13 (1999): 29-40; Fernando Teson, ‘The Liberal Case for Humanitarian Intervention’ in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003), 93-129; and Fernando Teson, ‘Eight Principles for Humanitarian Intervention’, *Journal of Military Ethics* 5 (2005): 93-113.
- ⁶⁶ Ibid.
- ⁶⁷ Ibid., 61.
- ⁶⁸ Ibid.
- ⁶⁹ Ibid., 62.

⁷⁰ Ibid., 61.

⁷¹ Ibid., 62.

⁷² Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006). For other references to Posner's attitude to liberalism, see, for example: Richard Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990); and Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge, Harvard University Press, 2003).

⁷³ Posner uses the phrase 'suicide pact' in the title of the book as a homage to the dissenting judgment of Justice Robert Jackson, in the Supreme Court of the United States, in *Terminiello v. City of Chicago* 337 US 1 (1949): 'This Court has gone far toward accepting the doctrine that...all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.' (36)

⁷⁴ This states: 'The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.'

⁷⁵ Posner (n 72) 40.

⁷⁶ Ibid., 10-13.

⁷⁷ Ibid., 44.

⁷⁸ Ibid., 1.

⁷⁹ Ibid., 5.

⁸⁰ Ibid., 7.

⁸¹ Ibid., 36.

⁸² Bruce Ackerman, 'The Emergency Constitution', *Yale Law Journal* 113, (2004): 1029-1091. Ackerman seems to have had a 'qualified' approach to liberalism for some time – see: Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980). See, also, for example: Bruce Ackerman, 'The New Separation Powers', *Harvard Law Review* 113 (2000): 633-729; and Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006).

⁸³ Ibid., 1047.

⁸⁴ Ibid., 1037.

⁸⁵ Ibid.

⁸⁶ Ibid., 1066.

⁸⁷ But there are certainly implicit criticisms of Hobbes: Locke questioned whether a Civil Government, such as an absolute Monarchy, was any better than natural laws existent in the state of nature – Locke (n 1) *Second Treatise of Government*, Chapter VII, 328. Indeed, Locke does use the term 'Leviathan' on some occasions – Locke (n 1) *Second Treatise of Government*, Chapter VIII, 333. Nonetheless, Locke's *Two Treatises of Government*, especially the *First Treatise*, is primarily an attack on another state absolutist of the time, Robert Filmer, who believed in the divine right of Kings. Filmer's principal work was *Patriarcha*, which was first published in 1680.

⁸⁸ Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1996).

⁸⁹ Thomas Hobbes, *Man and Citizen (De Homine and De Cive)* (Indianapolis: Hackett Publishing Company, 1998) *The Citizen*, Chapter I, 114.

⁹⁰ Thomas Hobbes, *Human Nature and De Corpore Politico* (Oxford: Oxford University Press, 1994), Chapter XIV, 79. Or a natural right of the person *to use their own judgement*

about preservation [my italics] – see, for example, Richard Tuck, ‘Introduction’ in Hobbes (n 74) ix-xlv, xxxii.

⁹¹ Hobbes (n 88) Chapter XIV, 91.

⁹² Ibid.

⁹³ Ibid., 88.

⁹⁴ Ibid., Chapter XVII, 117.

⁹⁵ Rousseau also referenced a state of nature prior to the transition to civil society. But, for Rousseau, the state of nature in *The Social Contract*, for example, was seemingly expressed in more neutral terms than that of Locke and Hobbes: ‘an uncertain and precarious mode of existence’ – see: Rousseau (n 43) Book II, Chapter IV, 33. Rousseau was much more critical of the state of nature in his earlier works, however, such as *Discourse on the Origin of Inequality* – see, for example: Robert Wokler, *Rousseau* (Oxford: Oxford University Press 2001) 44-70.

⁹⁶ Thomas Hobbes, ‘The Author’s Preface to the Reader’ in Hobbes (n 75) 95-106, 101.

⁹⁷ Hobbes (n 90) Chapter XX, 112.

⁹⁸ Ibid., 110.

⁹⁹ Hobbes (n 89) *The Citizen*, Chapter VII, 192.

¹⁰⁰ Hobbes (n 90) Chapter XX, 107.

¹⁰¹ Ibid., 111.

¹⁰² Hobbes (n 90) Chapter XVII, 120.

¹⁰³ Hobbes does recognise a time limited sovereign, however, where the sovereign power would only be exercised by a Monarchy – see: Hobbes (n 89) *The Citizen*, Chapter VII, 199-201.

¹⁰⁴ Hobbes (n 90) Chapter XX, 113.

¹⁰⁵ Thomas Poole, ‘Hobbes on Law and Prerogative’, in *Hobbes and the Law*, ed. David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press 2012, 68-96, 73.

¹⁰⁶ Locke (n 1) *Second Treatise of Government*, Chapter XVIII, 400.

¹⁰⁷ Hobbes (n 90) Chapter XX, 119.

¹⁰⁸ For this reason – individuals relinquishing all their power in the hope that the bargain will be fulfilled by the sovereign body unlike in a Lockean sense individuals’ power was leant to the sovereign on condition that the contract was fulfilled – Hampton claims that Hobbes was not, therefore, a social contract theorist – see, for example: Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press 1986), 278.

¹⁰⁹ Hobbes (n 88) Chapter XXI, 145.

¹¹⁰ Ibid., 146. The author is grateful to one of the reviewers of this piece, Brian Rosebury, for making this point.

¹¹¹ Ibid., Chapter XV, 100.

¹¹² Ibid., Chapter XIV, 92.

¹¹³ Hobbes (n 89) *The Citizen*, Chapter III, 145.

¹¹⁴ Hobbes (n 78) Chapter VIII, 124.

¹¹⁵ ibid Chapter XXIX, 223.

¹¹⁶ Schmitt (n 19b), 52.

¹¹⁷ Ibid., 46.

¹¹⁸ George Schwab, ‘Introduction’ in Schmitt (n 19b) 3-15, 7-8.

¹¹⁹ Schmitt (n 19b), 26.

¹²⁰ Georg Schwab, *The Challenge of the Exception: an Introduction to the Political Ideas of Carl Schmitt Between 1921 and 1936* (Santa Barbara: Greenwood Press, 2nd edition, 1989), 52.

- ¹²¹ Carl Schmitt, 'Appendix: The Dictatorship of the President of the Reich According to Article 48 of the Weimar Constitution' in Carl Schmitt, *Dictatorship* (Cambridge: Polity Press, 2014), 180-226. To be exact this Appendix was an addition to the second edition of *Dictatorship*, which was not published until 1928.
- ¹²² Schwab (n 120), 32-33.
- ¹²³ Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009), 38-40.
- ¹²⁴ George Schwab, 'Introduction' in Carl Schmitt, *Political Theology* (Chicago: University of Chicago Press, 2005), xxxvii-lii, xlviii-xlix.
- ¹²⁵ Schwab (n 120), 14-15.
- ¹²⁶ Human Rights Watch, *Briefing on the Terrorism Bill 2005* November 2005, <<https://www.hrw.org/legacy/backgrounder/eca/uk1105/uk1105.pdf>> accessed 21 March 2019, 11.
- ¹²⁷ John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), *On Liberty*, Chapter IV, 83-90.
- ¹²⁸ Bertrand Russell, *History of Western Philosophy* (London: George Allen and Unwin, 1961): 540.
- ¹²⁹ Richard Tuck, *Hobbes* (Oxford: Oxford University Press, 1989), 77-78.
- ¹³⁰ Brian Bix, *Jurisprudence: Theory and Context* (London, Sweet and Maxwell, 6th edn, 2012), 110. Bix suggests that later generations who accept the benefits of such a society – taking welfare payments, for example – have impliedly consented to the original covenant (110). Indeed, the later political theorist, John Stuart Mill said that, though society was not founded on a contract, and though 'no good purpose' was answered by 'inventing a contract', 'every one who receives the protection of society owes a return for the benefit' – see: Mill (n 127) *On Liberty*, Chapter IV, 83.
- ¹³¹ Rousseau (n 57) Book II, Chapter IV, 31.
- ¹³² Hobbes (n 89) *The Citizen*, Chapter VI, 181.
- ¹³³ Schmitt (n 19a) 81.
- ¹³⁴ Quentin P. Taylor, 'Leviathan Bound; or the Re-education of Thomas Hobbes', *Hobbes Studies* 22 (2009): 123-143, 123.
- ¹³⁵ But Schmitt left the Nazi Party in 1936 and retired from public life after an intellectual attack from the Gestapo publication *Das Schwarze Korps*. Schmitt was detained and interrogated after the war for over year by the Allies as a possible defendant in the Nuremberg trials but released. In his testimony at Nuremberg, Schmitt identified 1936 as the date when he 'renounced the devil' – see: Tracey Strong, 'Foreword' in Carl Schmitt, *Political Theology* (Chicago: University of Chicago Press, 2005), vii-xxxv, xxxiii. Strong is much less neutral about Schmitt's apparent anti-judaism elsewhere, see: Tracey Strong, 'Foreword' in Schmitt (19a) vii-xxviii, xviii. Even postwar, Schmitt espoused anti-judaism, although more quietly (xxiii).
- ¹³⁶ Strong (n 19a) vii-xxviii, xviii-xix.
- ¹³⁷ Schmitt (n 19a). But, here, Schmitt was still very much indebted to Hobbes's ideas: 'If protection ceases, the state too ceases, and every obligation to obey ceases. The individual then wins back his "natural freedom"' (72). Schmitt concluded this book on the Leviathan by saying: 'Even in his failure Hobbes remains an incomparable political thinker.' (86)
- ¹³⁸ John P McCormick, 'Teaching in Vain: Carl Schmitt, Thomas Hobbes, and the Theory of the Sovereign State', in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2017), 269-290, 270. Indeed, in response to his alleged collusion with the Nazis, Schmitt claimed that *The Leviathan in the State Theory*

of Thomas Hobbes should in fact be read as an act of resistance to Nazism – see: Tracey Strong, ‘Foreword’ in Schmitt – (n 19a) – vii-xxviii, ix.

¹³⁹ Jacob Als Thomsen, ‘Carl Schmitt – the Hobbesian of the 20th Century?’, *Social Thought and Research* 20 (1997): 5-29, 12. (But, for Schmitt, the state did survive, in some form, that is, the administrative apparatus – the ‘machine’ – remained (n 19a) 65.) In fact Schmitt credited this contradiction within Hobbes, first, to Baruch Spinoza’s *Tractatus Theologico-Politicus*, which was published only a few years after *Leviathan* in 1670 (n 19a 57).

¹⁴⁰ Stanton (n 22) 161.

¹⁴¹ Schmitt (n 135) 5-7.

¹⁴² Hobbes (n 89) *The Citizen*, Chapter II, 143.

¹⁴³ Costas Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000), 69.

¹⁴⁴ *Ibid.*, 71.

¹⁴⁵ *Ibid.*, 76.

¹⁴⁶ Hobbes (n 88) Chapter XXVI, 185.

¹⁴⁷ *Ibid.*, Chapter XV, 110. Hobbes does recognise the limitations of the enforceability of natural law against the sovereign body, however, in stating that they oblige only in the court of conscience – see: Hobbes (n 89) *The Citizen*, Chapter III, 149. Whilst the sovereign power was limited by natural law, the citizen had little redress against the sovereign, if at all, if ‘it’ acted in contravention of Hobbes’s natural laws. It would be much more preferable for the citizen, therefore, for the sovereign body to convert them into positive, civil laws. Indeed, natural law was obviously a weak protection against rights abuses committed by others in the state of nature, otherwise entering into civil society in the first place would have been unnecessary. On this point Dyzenhaus notes: ‘There is...no place in Hobbes’s conception of legal and political order for mechanisms on which legal subjects can rely to enforce their rights which liberals traditionally suppose are inviolable.’ See: David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997), 9.

¹⁴⁸ Douzinas (n 143) 80.

¹⁴⁹ Hobbes (n 89) *The Citizen*, Chapter VIII, 270.

¹⁵⁰ Hobbes (n 88) Chapter XXI, 151. This was not an unqualified right to life, however, since the sovereign power could legitimately put a person to death if, for example, they disobeyed the authority’s call to arms to defend the commonwealth (though only on condition, strangely, that the person had failed to find someone else to replace them) – see: Chapter XXI, 151.

¹⁵¹ *Ibid.*, Chapter XIV, 91.

¹⁵² *Ibid.*, Chapter XXI, 151. Nevertheless, in *De Cive*, Hobbes does reject a ‘right to silence’, in that torture is permissible if a person refuses to account for themselves. This is not evidence, but merely ‘for searching out the truth’ – see: Hobbes (n 89) *The Citizen*, Chapter II, 131.

¹⁵³ Hobbes (n 90) Chapter VII, 94-95.

¹⁵⁴ Hobbes (n 88) Chapter XXVII, 203-204.

¹⁵⁵ Hobbes (n 89) *The Citizen*, Chapter VIII, 269.

¹⁵⁶ *ibid* Chapter III, 142.

¹⁵⁷ Hobbes (n 88) Chapter XXVIII, 219.

¹⁵⁸ *ibid* Chapter XXIV, 174.

¹⁵⁹ Hobbes (n 89) *The Citizen*, Chapter VI, 175.

¹⁶⁰ Hobbes (n 88) Chapter XXI, 153. Ryan, however, claims there is no right of revolution in Hobbes, but merely says that individuals’ promises from the original contract to obey the

sovereign cease when their lives become too dangerous – Alan Ryan, ‘Hobbes and Individualism’, in *Perspectives on Thomas Hobbes*, ed. GAJ Rogers and Alan Ryan (Oxford: Clarendon Press, 1990), 81-105, 99. Indeed, Carl Schmitt believed that, to give individuals a right to resist the Leviathan, that is, to confer on them ‘a right to war’, was a ‘paradox’, since the Hobbesian state was created for the very reason of ending war – see: Schmitt (n 19a) 47.

¹⁶¹ Taylor (n 134) 129.

¹⁶² Hobbes (n 88) Chapter XXI, 151-152 and 154.

¹⁶³ Douzinas (n 143) 80.

¹⁶⁴ *Ibid.*, 81.

¹⁶⁵ F A Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) and Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) support a minimal role for the state such as enforcing contracts, protecting private property from theft and keeping the peace. That is, in the name of human freedom, they oppose government regulation and favour unfettered markets. People should do whatever they want with their things as long as they respect other peoples’ rights to do so – see, for example: Michael J Sandel, *Justice: What’s the Right Thing to Do?* (London: Penguin Books, 2010), 142.

¹⁶⁶ Ryan (n 160) 100-101.

¹⁶⁷ See, for example: *SW v. United Kingdom* Application no. 20166/92.

¹⁶⁸ Hobbes (n 88) Chapter XXX, 238.

¹⁶⁹ *Ibid.*, 238-239.

¹⁷⁰ Hobbes (n 89) Chapter VIII, 93.

¹⁷¹ Hobbes (n 88) Chapter XXVII, 208.

¹⁷² Locke (n 1) Chapter VII, 326.

¹⁷³ Tuck (n 129) 85.

¹⁷⁴ Locke (n 1) *Second Treatise of Government*, Chapter XIII, 373.

¹⁷⁵ *Ibid.*, Chapter XIV, 375.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, Chapter XVIII, 400.

¹⁸⁰ Mark Neocleous, ‘Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics’, *Contemporary Political Theory* 6 (2007): 131–149, 135.

¹⁸¹ *ibid* 139.

¹⁸² Schmitt (n 19b) 69.

¹⁸³ Dunn (n 55) 51.

¹⁸⁴ *Ibid.*

¹⁸⁵ John Alder, *Constitutional and Administrative Law* (London: Palgrave, 10th edn, 2015), 32.

¹⁸⁶ Hobbes (n 89) *The Citizen*, Chapter II, 131.

¹⁸⁷ Hobbes (n 88) Chapter XXVI, 183-184.

¹⁸⁸ Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005), 1-31.