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Emergencies in Sober Hobbesianism

Tom Sorell

Thomas Hobbes might seem an unlikely source for a theory of emergency powers applicable to liberal democracies in our own day. He advocated the concentration of political, judicial, economic and military authority, and was in favour of great latitude for a monarch or assembly in the choice of means to security. His theory demands absolute submission to law on the part of citizens, with no *constitutional* limitations on what laws can require.¹ The same theory demands preventive measures against sedition, and has a very expansive conception of seditious behavior. What is more, the concentration of power with wide discretion is supposed to be politics as usual.

What ties these elements together is the idea that social life for human beings is always potentially incendiary. The default condition of human beings living ungoverned in groups is war –cold or hot—and the primary purpose of government is to act against the causes of war in human behavior and human circumstances. For Hobbes, communal human life is the permanent possibility of emergency, and the duties and powers of government are fundamentally to do with the pre-emption of emergency. They are not to do with the distribution of goods that permit each of us to pursue respectable life plans or choices. They are not to do with equipping people for the local pursuit of human flourishing. They are not to do with the fulfilment of human rights. They are for keeping a people safe from one another and from conquest.

Although there are problems with applying the unexpurgated Hobbes to the demands of modern terrorism and civil war, a toned-down but recognizable version of the theory does lend itself to these kinds of violent challenges to state power. ‘*Sober Hobbesianism*’ is my term for the toned down theory. According to me, this form of Hobbesianism gives security great weight while at the same time limiting the legal repression that is sometimes proposed in the name of security during emergencies. Instead of tracing war to simple difference of opinion, and common or garden self-love, sober Hobbesianism traces war to disagreements in which there are *fundamentalist* attachments to a point of view or way of life or a person or place. A fundamentalist attachment is an attachment to something one would rather kill or be killed for than lose. Sober Hobbesianism criminalizes certain expressions of fundamentalist attachments, and limits pretexts both for violence and for departures from a normal legal order, simulating some of the features of a liberal order.

From unreconstructed Hobbes to Sober Hobbesianism

I have previously explained how to get from unreconstructed Hobbes to sober Hobbesianism.² The main working parts of unreconstructed Hobbesianism are (1) a theory of how human beings naturally and pre-scientifically arrive at the valuations

¹ There are natural law limitations which a sovereign power can ignore if abiding by them would endanger public security.

² *Emergencies and Politics* (Cambridge : Cambridge University Press, 2015), chs.2 and 3.

of things they pursue or avoid; (2) the postulation of a so-called “right of nature”; (3) an argument about how (1) and (2) combine to produce general violent conflict when people pursue a thing they cannot both have; and (4) a theory of how violent conflict and its bad byproducts can be avoided in the long term. I now briefly enlarge on (1)-(4).

(1) According to Hobbes, people naturally tend to regard as good what produces immediate pleasure, and to count as bad what produces pain or displeasure. Different people are differently constituted and have different accumulated sensory experiences, and these, as well as rhetoric, account for differences in valuations. People who are able to reflect on pursuing the immediately pleasurable and avoiding the immediately painful can sometimes get enough detachment from their appetites and aversions to judge that even painful things are good on balance, e.g. because of their long-term good consequences.

This sort of detachment is the beginning of a science of good and evil –that is, a theory that distinguishes between *prima facie* goods and goods all-things-considered. Although people can learn from experience to distinguish between apparent and real goods, they can also learn from scientific demonstrations of the good and bad effects of different corporeal things on humans and the good and bad effects of different courses of action. But many people never get even to the stage of reflecting on their own scheme of apparent goods and are at the mercy of their habits of pursuit or avoidance. They may also be swayed by the preferences of those who are powerful or admired –sometimes through persuasive speech—or refine their patterns of pursuit or avoidance by a more or less uncritical imitation. Either way, they are likely to end up in the competitive and even violent pursuit of whatever appeals to them.

(2) There is no objective criterion for what to pursue and how to pursue it if the good itself is no more than a matter of what individuals have an appetite for. Until people agree on, or submit to, imposed common standards, they are naturally entitled to be their own uncritical judges of what to pursue or avoid. Or, in other words, they have the right to be their own judges of ends and means, especially where others are apt to pursue their own ends ruthlessly. This is what Hobbes calls the “right of nature”.

(3) The right of nature permits violent people to pursue things violently. But it also gives peaceful and accommodating people a reason to pre-empt the violence of violent people by violence of their own. In fact, the right of nature gives everyone – of whatever temperament—the right to lie, kill and maim if they are not to become the victims of deception, physical injury or murder themselves. In other words, the right of nature permits and, on some natural additional assumptions, even requires, people to interact violently. The additional assumptions are that some people pursue their own ends violently, and that these may be hard to tell apart from the reasonable and accommodating until it is too late—until one has learnt the hard way that they will stop at nothing. In other words, so long as each retains the right of nature and is guided by their own appetites and aversions, each is at war with every other person living locally.

(4) Hobbes's answer to war of all against all is a simultaneous mass transfer by each of the right of nature to a third party who is to decide for them all what courses of action they must each follow. This third party becomes sovereign on accepting the transfer, and understands that the purpose of the transfer is to deliver all from war. The reason the mass transfer of the right of nature can in principle make sense to otherwise distrustful parties is that everyone has an aversion to death, and war hastens death. What is more, since war results from a plurality of wills spurred by a plurality of apparent goods, the reduction of wills to one is already a peace-promoting measure. Again, since people may revoke the transfer if the sovereign's will reignites war or threatens lives in other ways, it is not absolutely binding.

The mass simultaneous transfer of right is accomplished by a speech act. Each of the many promises not to be his own judge of ends and means if, for the sake of peace, others promise the same. The person to whom the right of judging ends and means is passed is some third party external to the mutual promising. It could be an individual (corresponding to the case of monarchy) or a council. This person accepts to be the judge, and his or her choice of ends and means are embodied in a system of public precepts and prohibitions intelligible as the *legislation* of a sovereign power. For subjects, abiding by the mutual promise is a matter of abstaining from practical judgement on matters pronounced upon by law. Or, as Hobbes puts it, abiding by the mutual promise is a matter of absolute submission to the sovereign. The only just ground of release from submission is an actual threat to one's life – either from the sovereign or from non-co-operating subjects.

The sovereign's free hand as legislator is likely to repel liberals. If the sovereign declares a curfew at sunset, or makes it compulsory for each householder to put bars on windows, then, so far as Hobbes's political philosophy is concerned, the sovereign is entirely within his rights to do so. The sovereign accepts the transfer of the right of nature so as to legislate for peace, and a law establishing a curfew or requiring bars on windows is intelligible as a peace-keeping measure. Suppose that the sovereign declares alcohol-consumption illegal, on the ground that people who get drunk are a mortal danger to one another? That, too, is a legislative option for the sovereign. So also, to name measures on the English legislative agenda in the 1620s, is a tax that raises money for building a naval fleet, or a law requiring citizens to billet soldiers.

Peace-keeping, in short, can involve far-reaching and burdensome measures, the only restriction on them being their intelligibility to a sovereign as means of domestic security or security from conquest. If the sovereign sincerely but irrationally believes that his realm is under threat of invasion by creatures from another planet, and that emitting radio signals of a certain frequency is a counter-measure, then lavish spending on radio transmitters, too, is entirely legitimate, according to Hobbes. Of course the more bizarre the measure the less effective it is likely to be, and the more short-lived the sovereign's authority when his security measures fail in practice. Still, the fact that so much depends on the sovereign's

fallible human judgement, and that it may sometimes please the sovereign to be gratuitously repressive, means that sovereignty can easily be misused.

One safeguard against that misuse is recourse by the sovereign to a science of rulership, such as Hobbes provided in his three treatises on sovereignty. Another is a deep psychological identification of the sovereign with the interests of his subjects, exactly what Hobbes calls for in *Leviathan* ch. 30. But since there is no challenging the sovereign's judgement from within a commonwealth—that would be for a subject or subjects to take back the right of nature—and since even the science or counsel that the sovereign consults may be incorrectly disregarded, the scope for uselessly extreme restrictions on people's liberty is great.

The problem is made worse by three kinds of exaggeration in Hobbes's theories of war and the antidote to war: (a) He sets the threshold for war-provoking disagreement far too low. In his earliest political treatise, where sovereignty is connected with reducing many wills to one, he writes as if whenever practical judgement is distributed, it is plagued by indecision and perhaps even faction leading to war. This is behind his unofficial favoritism of monarchy over other constitutional forms. Relatedly, the unreconstructed Hobbes saw the seeds of all-out conflict in ordinary disagreement, academic disputation, and the speeches or publications of powerful people whose self-love made them feel under-rated. Laws against even small scale public disputes or self-aggrandizing personal publicity would have been for him quite natural measures for the sovereign to implement.

(b) The second exaggeration is to do with the *permanent latency* of all-out war in human nature, and the supposition that it is just below the surface in the behaviour of even a law-abiding citizenry. Hobbes often writes as if government is a permanent effort at stifling dispositions to engage in violence that are never eradicated. For example, he often implies that widespread public challenges to the sovereign power would *immediately* reinstate the war of all against all, with all its dangers, as if customs of civility and non-aggression developed in the possibly very long intervals *between* periods of civil war would instantly crumble. In other words, he seems to under-rate the force of *customs* of peace and civility.

To uncover the third exaggeration, it is necessary to point out that Hobbes gives no eligibility conditions for the role of the third party who accepts to be sovereign in the state of nature: presumably it could be anyone; yet it is essential for good sovereignty that the person who takes on that role identify with a whole people who submit to him. It is essential that is, that the third party subordinate the interests of the individual he is to the interests of the many. But this generates a dilemma. Either detachment from one's own interests is possible for any individual naturally, in which case detachment, rather than submission, may be the peace-making measure par excellence; or else detachment is not naturally possible, in which case there is a big gap in Hobbes's picture of the recipient of the mass transfer of the right of nature. Hobbes wants to say that the normal inability of people to behave reflectively and to see their interests as only some among many are a cause of war, but (c)—and here we come to the third exaggeration—he overstates the difficulty of

achieving detachment, and so implies that there *are* after all eligibility conditions for being the receiving third party in the mass transfer of the right of nature.

I think the only way out of this dilemma is for Hobbes to concede that detachment is achievable but difficult for individual human beings. But this opens the possibility of a *democracy* composed of those who are capable of detachment, a democracy with *no* need to transfer the right of nature. It also opens the possibility for each individual of telling real from apparent goods, and of counting as real goods more than peace, including e.g. the good of unaggressively leading one's own life.

Sober Hobbesianism is unreconstructed Hobbes minus the exaggerations. It is in the permissiveness of the legal regime of the unreconstructed Hobbes and in the low threshold that human behavior has to reach to count as aggressive that we encounter the main sources of overstatement. These are the elements which sober Hobbesianism addresses. In relation to exaggeration (a), sober Hobbesianism implies that collective practical judgement is *not* sufficient for indecision, particularly when people exercise detachment from their own interests, or relatively narrow collective interests. Sober Hobbesianism undoes Hobbes's obsession with unitary sovereign judgement. The requirements of communal security can be judged by a plurality of agents, so long as their procedures for overseeing security are adequate to reaching impartial decisions speedily.

More generally, and again contrary to unreconstructed Hobbesianism, only *some* disagreements are precursors of all-out war. Foremost among these are disagreements arising from what I have previously called *fundamentalist* attachments.³ These are non-negotiable attachments to purposes or people or objects, attachments that people would rather be killed or kill for than lose. Even these have to become very contagious in order credibly to provoke a war of all against all, but there are conceivable counter-cultural fundamentalist attachments that might attract such a backlash.

How does sober Hobbesianism deal with exaggeration (b)? It implies that the longer-lived a stable government is, the less likely it is that subjects refrain from violence merely because they are forced to, and the less likely it is, consequently, that they will immediately revert to violence in a general emergency. Sober Hobbesianism gives weight to the transmission of practices of civility and is open to the establishment of institutions that inculcate these practices.

Again, and now coming to exaggeration (c), sober Hobbesianism implies that people *can* reflect on and maybe revalue downwards things that they habitually pursue. It implies that people can reflect and revalue downwards the value something has in virtue of satisfying *their* interests. Crediting people with the ability to gain detachment even about personal interests, sober Hobbesianism makes room for personal autonomy consistent with communal security.

³ *Emergencies and Politics*, pp. 40ff

The liberalism in sober Hobbesianism

Sober Hobbesianism is a variety of liberalism. It promotes the autonomy of self-critical pursuers of a variety of goods, so long as these goods do not endanger life. It assumes that citizens have reflective capacities and that they are not at the mercy of their strongest desires and aversions. It assumes that people can be moved by what is in anyone's interest, and not only by what is good for themselves. But it also gives great weight to the protection of life and freedom from injury, and it calls for institutions designed to secure these things. In other words, it values security. Sober Hobbesianism recalls the unreconstructed Hobbes not in making security the *organizing* value of communal life, but in making security of life the *over-arching constraint* on the organizing value: namely, the exercise by anyone of autonomy.

In my earlier working out of the theory,⁴ I looked to Raz for the elements of the kind of liberalism I was looking for. His *Morality and Freedom* outlines a liberalism geared to autonomy, and associates that with a kind of practical reasoning that is reflective. Raz's theory further recommended itself in view of (1) its connecting individual reasons for action with reasons for the existence of institutions; (2) its theory of a right grounded in an interest in aspects of well-being; (3) its recognition that the autonomous pursuit of well-being depends on stable, non-violent social forms, some independent of state institutions; (4) its recognition of the right to life as a fundamental right; and (5) its claim that conditions of autonomy involve internal critical and reasoning capacities that both individuals and the state have duties not to reduce and even to enhance.⁵ These capacities are of the kind needed in autonomous agents to counteract unreasoned fundamentalisms, and indeed all fundamentalisms.⁶

The three most important requirements of practical rationality from a sober Hobbesian point of view are (1) the ability to detach oneself from one's appetites and ask whether there are reasons for satisfying them independently of the force of appetite or aversion itself; (2) the ability to see one's own appetites and aversions as only some among others distributed among all of the people one lives with or near; and (3) the ability to see that the satisfaction of appetites now or soon is not necessarily better than their satisfaction later. These abilities enable one to criticize and even weaken the associated appetites, and therefore to make decisions without being at the mercy of appetites. They can also make it possible to weaken the effect of appetite that conflicts with being law-abiding, and aversion to doing what the law asks. In short, critical abilities in each person can make it possible for people to think about law in the more impartial way that Hobbes associates with sovereignty. Not just law but public policy allows for this approach. Instead of thinking for others without their appetites and identifying with their interests in survival and prosperity – as a sovereign is supposed to – one thinks for oneself, but without being carried away by the fact that some of the appetites calling for satisfaction are one's own. Instead, some common denominator reachable by detachment comes to put different appetites and aversions on a level.

⁴ *Emergencies and Politics*, ch. 4

⁵ Here I adapt a little the formulation in *Emergencies and Politics*, p. 60.

⁶ The following five paragraphs are drawn from *Emergencies and Politics*, pp. 71-74.

Points (1) – (3) do not have counterparts in every form of liberalism. Different varieties of liberalism carry with them differing conceptions of practical rationality, and not all versions of liberalism seem to give the same value to the capacity for detachment from and critical reflection on appetite and passionately felt loyalties. In the same way, not all versions of liberalism give weight to institutions or policies that encourage critical reflection. Since the passionately felt loyalties counteracted by personal critical reflection can include those that generate fundamentalism, not all versions of liberalism pre-empt or counteract fundamentalism. Not all versions of liberalism, for that matter, make much of other capacities for self-restraint, such as the capacity to forgo fattening food, or to forgo purchases until one has saved the money needed to pay for them.⁷ Although liberalism implies that life within the state should to the greatest degree possible be determined by private choice, liberals disagree over whether private choices are to be respected regardless of how they are arrived at, or whether they ought to be informed, self-critical, objectively in the interest of the chooser, or all three.

Liberals also disagree over whether, and, if so, when, the state has a role in improving the outcomes of private choice by restricting liberties or excluding certain choices by force. The difference between Hobbes's own position and liberal positions is partly to do with whether coercion by the state is a first or last resort in the response to peace-disturbing free expression or free association. But the difference is also connected with the character of the threats regarded by each position as the most urgent to prevent. Hobbes tended to worry most about sedition – exercises of freedom intended to, or with the potential to, destabilize government. Neo-Hobbesianism emphasises the danger from projects or attachments on which people are willing to stake their lives.⁸ These attachments can lead to violence without the violence leading to the overthrow of government.

Mill and other liberals concerned with tolerance sometimes worry about officious intervention and its limits. Should I prevent someone walking on a bridge that is about to collapse? Yes, Mill says, if he is unaware of the condition of the bridge: the high risk of harm makes the intervention justifiable. Other cases are less easy to decide. Should I do or say something if two people in a bus I am riding on have a loud conversation in which they express strongly racist sentiments? Differently, should I do or say anything if two people on a crowded public beach at midday decide to have sex? For the most part I set aside questions about personal interventions in non-life threatening situations and concentrate on interventions by the state. Many jurisdictions have laws against having sex in public places, and some punish expressions of racial hatred without necessarily criminalizing one-off outbursts on buses.

⁷ For a theory that does, see William Galston, *Liberal Purposes: Goods, Virtues and Duties in the Liberal State* (Cambridge University Press, 1991)

⁸ Neo-Hobbesianism is a position intermediate between unreconstructed and sober Hobbesianism. See *Emergencies and Politics*, pp. 50ff. It postulates the possibility of widely distributed capacities for self-critical practical reason, but retains security as the organizing goal of the state.

Since my argument against the unreconstructed Hobbes is to the effect that practical rationality in each of the many and not just the sovereign can tell against violence and the ruthless pursuit of self-interest, against sedition and against other sources of harm, including public harm, I am interested in versions of liberalism that concede that personal choice is sometimes defective. I am interested in versions that also insist that personal choice can and should be improved, if possible by agents themselves, but, failing that, with the help of state institutions. This is a modestly perfectionist position.

The perfectionism in liberalism with Hobbesian sobriety implies that the answer to the possibility of large-scale violent conflict is not the delegation of all powers of control to a sovereign but the cultivation of personal powers of detachment as a basis for restraint, tolerance and co-operation, and, where these give out or fail to be formed, the introduction by democratic means of coercive laws that prevent the violent pursuit of particular goals. A modestly perfectionist liberalism with Hobbesian sobriety differs from neo-Hobbesianism by making the use of public coercion conditional on the failure of self-imposed norms of conflict prevention. By making coercion a last resort, it breaks from Hobbesianism – neo- or unreconstructed.

Can Raz's form of liberalism, which is in tune with unreconstructed Hobbesianism up to a point, which is in tune up to a point also with the perfectionist version of neo-Hobbesianism, also address problems raised by fundamentalist attachments? If liberalism came with scepticism about the very category of non-negotiable goods, and if it developed institutions for calling into question claims that particular values were worth fighting or dying for within a liberal state, then its anti-fundamentalism might be beyond question. But liberalism itself sometimes seems to contain a category of non-negotiable goods – usually implicit in the idea of inalienable rights, and liberals of some kinds claim that a failure to respect those rights can justify (violent) rebellion even against a state that claims to be liberal.⁹ A Razian theory that incorporates Hobbesian insights can address this problem. It can address this problem if it adopts the sober Hobbesian diagnosis of fundamentalism as a source of harm, and if it retains the idea that rights can exist and yet be limited or overridden. The Razian theory can then say both that there is a right to free speech *and* that it can be limited if expressing fundamentalist attachments to certain audiences is likely to produce violence.

The doctrine in *Morality and Freedom* needs to be revised to meet these requirements. As it is, its endorsement of strong personal attachments and its rejection of choices detached from social forms are sometimes in tension with one another or else are overfriendly to fundamentalisms.¹⁰ Specifically, its commitment to 'internal critical and reasoning capacities' is in tension with its tendency to deny that we can detach ourselves from social forms: sober Hobbesianism holds that social forms can be objects of critical scrutiny and rejection, e.g. when judged by the criterion of whether they cause physical injury or shorten biological life. Social forms

⁹ See the Preamble to the Universal Declaration of Human Rights

¹⁰ *Emergencies and Politics*, pp. 74ff.

might also be judged defective on account of being over conventional or quasi-ritualized. Raz is wary of adopting points of view on life that are geared to biology and that in general have pretensions to getting outside social forms.

The anti-fundamentalism of sober Hobbesianism

Sober Hobbesianism permits a form of liberal democracy, but its liberalism is relatively thin. The right to life is fundamental, and securing it can limit other rights usually associated with liberalism, including freedoms of speech and association. Although the principal purpose of the state is to facilitate the exercise of autonomy by individuals, it is to be facilitated only if people pursue their life-plans non-violently. Non-negotiable attachments to things one is willing to kill for are *not* elements of preferred lifeplans in liberalism. Either the attachments have to admit of negotiation, or, if they cannot, the use of violent means to maintain those attachments has to be outlawed. For example, attachments to children are often non-negotiable, perhaps blamelessly so: that does not mean that court orders prohibiting access can blamelessly be fought to the death, or flouted by means of an abduction. Sober Hobbesianism is likely to recommend both institutions and social forms that discourage non-negotiable attachments, even when they involve children. Sober Hobbesianism is likely, for example, to endorse the existence of family courts. In the form they are known in Western liberal democracies, these courts acknowledge the brute strength of attachments to children, while also not treating the strength of those attachments as overriding in decisions about custody or rights of access.

The case of attachments to children does not set the pattern for how non-negotiable attachments in general are treated by sober-Hobbesianism. For one thing, non-negotiable attachments to children are frequently not contested, and so are not asserted violently. They may co-exist perfectly well with public order because they underlie normal, privately displayed, parental behavior.¹¹ Hobbes treated *religious* commitments as if they did not have to be displayed to everyone else, either. He claimed that attachment to the tenets of the Christian faith was a matter of inner belief or disposition not necessarily visible or offensive to others, and going through the motions of an approved public worship at variance with one's beliefs could not offend a God who could read inner beliefs. According to Hobbes there was no need for people to advertise their faith to one another, not for the purposes of redemption and reception into a sought after afterlife.

Keeping faith separate from professions of faith and out of the public eye is yet harder where freedom of expression is a right, even if an overridable right, as in a sober Hobbesian state. This brings us to the problem of expressing non-negotiable attachment to a religion that is claimed to be the one true faith. To address the

¹¹ This possibility of co-existence is not due to the existence of a non-political private order constituted by the family. Hobbes was in fact perfectly clear that parents do have power over children that is at least analogous to political power. The chapter in *Leviathan* which addresses this matter is called 'Of Dominion Paternall and Despotical'

problem, the sober Hobbesian state will have to propose institutions and practices of education that defuse fundamentalism by making second nature the *criticism* of non-negotiable attachments. These practices will stigmatize dogmatism and institutionalize the legitimacy of requests for justification. Appeals to authority, and justification by quotation from unchallengeable texts, be they the Koran or Mao's Little Red Book, will be discouraged. Perhaps the methods of secular Anglo-American philosophy are adaptable for the purpose of cultivating the appropriate critical reflexes. If so, then, contrary to unreconstructed Hobbesianism, philosophical disputation about the truth may come to have a use in staving *off* war, not inviting it.

But education is only part of the story. Sober Hobbesian government must formulate in legislation and policy documents criteria under which fundamentalist attachments are unacceptably extreme. Unacceptably extreme attachments may include attachments to war or violence itself, or to war or violence as non-optional means of pursuing something else. Unacceptable expressions of attachments may include not only violent assertions of these attachments, but projects of recruitment to groups that assert attachments violently. Again, the sober Hobbesian state can criminalize action by someone or some group who presumes to be their own judge of the reasonableness of their attachments and what can be done to maintain them.

In other words, the state can limit very severely the things that can justify violence or taking life even in the name of things that many people are willing to die for. Staying close to its roots, sober Hobbesianism can say that the only thing that justifies violence is individual or collective self-defence against the threat of death. The threat of death does not mean the threat of death to one's way of life:¹² it is biological life that must be threatened. Here sober Hobbesianism is at its most Hobbesian. For it is a hall-mark of unreconstructed Hobbesianism that only the sovereign decides what is worth fighting for, and that the primary thing that is outlawed with the threat of force is violence, life-threatening violence before all other forms.

Recall that my category of fundamentalist attachments was devised to improve on Hobbes's idea that communal human life itself is an emergency waiting to happen. It isn't plausible to claim, as Hobbes does, that appetites in local competitors for things that can't be shared are by themselves a war in the making. After all, the appetites could be mild or short-lived or present in unaggressive people. For the same and further reasons, it is implausible to claim that factual or theoretical disagreements will make people come to blows. It is much more plausible to associate war in the making with the existence of widely held, loudly proclaimed, counter-cultural or pro-cultural fundamentalism.

Counter-cultural fundamentalism is non-negotiable attachment to values that are overwhelmingly ignored or rejected locally, say allegiance to country Y expressed in country X, or a commitment to religion X expressed in a place where people are overwhelmingly committed to religion Y. To express countercultural fundamentalism

¹² See *Emergencies and Politics* ch. 5.

is to send a provocative message to those who participate in what the fundamentalists conceive as the majority culture. The message is that the majority are attached to the wrong things, and that being attached to those things is offensive to those going against the culture, who are not about to defer to that culture, and are willing to kill rather than do so. Of course, the message may overstate the intentions of the fundamentalists. Or it may fail to outrage more than a few of the majority. Nevertheless, one can see that the message might be *meant* to outrage the majority and start a general conflict. In the meantime, the outrage of the few against the fundamentalists can lead to killings that in turn engender *procultural* fundamentalist attachments in the majority culture. Or again, *procultural* fundamentalism may grow up unprovoked by counter-cultural fundamentalism –it may develop in pockets of local racist sentiment, for example—and again threaten violence against up to then peaceful minorities.

If that makes sense, legislation against fundamentalism and its expression might be foremost in a body of law with a Hobbesian inspiration, that is, a body of law meant primarily to keep the peace. It would not be an afterthought prompted by the growth of fundamentalist groups. The sober Hobbesian state would recognize that public commitments to die for or kill other than in self-defence directly engage with the purpose of the state.¹³ This is so even when the purpose of the state is not to establish security pure and simple but instead to facilitate the non-violent and non-lethal exercise of autonomy. Of course, legislation against other, non-fundamentalist but potentially lethal crime is also in order from a Hobbesian perspective, but not because that crime conveys or is meant to convey an aggressively offensive message to a majority population, a message that could incite a civil war. It deserves criminalization because of the right to life of the individuals who might be the one-off victims of lethal crime in an otherwise stable political order.

Criminalization is the means by which, in unreconstructed Hobbesianism, government staves off *both* common or garden crime *and* civil war. Law in general is security law, because the guiding purpose of an unreconstructed Hobbesian state is to protect people's lives and a modest well-being against the ingredients of war in communal life. There are no distinctively sweeping and temporarily invoked emergency powers that the sovereign has to put on the statute books: the whole body of law is supposed to pre-empt emergency. Sober Hobbesianism, by contrast, though it does not maintain that the whole body of law is supposed to pre-empt emergency, does hold that the body of law is pervaded by security considerations.

Citizens are to be permitted to lead their own lives, but non-violently. This means that they can adopt any of a wide variety of life-plans so long as they abjure violence, and so long as their non-violent behavior does not put others at risk of injury or death. For example, consider a city dweller who likes to stroll at night studying the different types who come out at night in cities. This is a non-violent

¹³ This is so even, or may be particularly, when fundamentalism is expressed from behind bars by people who are behind bars for encouraging people to commit terrorist offences. The UK government has only recently begun to consider the separation of unrepentant prisoners who have histories of radicalizing others. This measure is strongly supported by sober Hobbesianism.

practice that a certain kind of literary-minded citizen might go in for. Yet In a public health emergency, non-violent carriers of a virus might be forcibly quarantined by a sober Hobbesian government. This would certainly constrain the life of a dedicated but infected *flaneur*. Yet the constraint, which is anyway temporary and non-arbitrary, is justifiable because of the possibly life-threatening harm of the practice in those circumstances. Other liberalisms would balk at quarantining the infectious, but incorrectly, because of the status of the right to life as fundamental.

“Good law” and emergency powers under sober Hobbesianism

How in general is a sober Hobbesian government to decide when to constrain autonomous activity for the sake of security? Here it pays to begin by asking the same question of unreconstructed Hobbesianism. Its primary answer is ‘Through law’¹⁴ but where the sovereign’s framing of law is informed by Hobbes’s concept of a *good law*. (see *Leviathan*, ch, 30) For a law to be good, it has to be necessary for security, not simply a recognizable security measure.

A law taxing people in order to raise money for military weapons would not be necessary if it predictably left them so poor that they had to steal or kill to get enough to eat. Far from being necessary, the measure would be self-defeating. Similarly, an all-night curfew might keep malefactors and their possible victims at a safe distance from one another, but if the curfew also interfered with movements of food supplies or caused people to feel imprisoned in their own homes and receptive to demagoguery intended to make them rise up against this confinement, then, again, it would be an invitation to violence rather than a safeguard against it. In a different way, a law enabling precautionary personal searches might be unnecessary if it were introduced without any evidence that, in the places the searches were carried out, people were often hiding dangerous materials or weapons.

Hobbes’s concept of the good law suggests that a balance needs to be struck. On the one hand, the legal regime should recognize sources of harmless well-being – a reasonably full stomach, family life, unencumbered movement for those minding their own business – and allow the many to get on with the enjoyment of these things. The many must also have the freedom to work and create the wealth to pay for an unavoidable defensive war and routine internal policing. On the other hand, the legal regime should snuff out violence as far as possible and restrict whatever liberties encourage violence.

Good law calls for two forms of self-restraint on the part of the sovereign. The first is the by now familiar restraint of the appetites of the natural person the sovereign is, if the sovereign is a monarch, or the natural appetites of the few who are members of an assembly, if sovereign is an assembly. The demands of the appetites of the self or selves must be subordinated to the security needs of the many.¹⁵ Second, the sovereign must not think that his opinion alone counts. Though it is worse to be

¹⁴ Hobbes also recommends institutions of sovereign-worship and certain educational measures

¹⁵ For elaboration, see my ‘The burdensome freedom of sovereigns’ in T. Sorell and L. Foisneau, eds. *Leviathan After 350 Years* (Oxford University Press, 2005), pp. 183–196.

dependent on too much advice than to use one's own head as sovereign, best of all is to listen to the advice of good counsellors – those who, when asked, give dispassionate advice for the sake of public safety.¹⁶ In particular, a sovereign ought to make use of civil science – that is, read *Leviathan* or *De cive*, which Hobbes perhaps intended as counsel of a particularly superior, conclusive, kind.¹⁷

What ties together these two forms of self-restraint is the way both act against personal bias and personal passions and make detached judgement the basis of law. On the one hand, in framing laws or policies, the sovereign tries to take the point of view of the many he personifies rather than his own personal point of view; on the other, he is supposed to form a judgement based on the views of those whose experience makes them expert, or on the basis of rigorous reasoning. He is not supposed to be guided by mere personal hunches, or by the badly skewed advice of a horde of sycophants.

Apart from the sovereign's self-restraint, what is required in good law is that it be effective (actually reduce injury, death and the likelihood of either) and that it be impartially applied. A law must be necessary in order to be good, and it cannot be necessary if it serves no purpose, or is not fit for its assigned purpose. Furthermore, a law or general precept addressed to everyone cannot be a good law if in practice it can be violated with impunity by some of its addressees while others always suffer its advertised penalties. To put it in Hobbes's way, a good law must not only be necessary but be in keeping with the natural law of equity.

Although many laws that Hobbes counted good are illiberal, there is no inconsistency between liberalism and effective and consistently applied law.¹⁸ Which brings us to the question of emergency powers taken by liberal governments. When sober Hobbesianism is supplemented with Hobbes's conception of a good law, it is able to pronounce critically on many emergency measures adopted ad hoc. Leaving aside emergency measures prompted by natural disasters, including public health emergencies, we can concentrate on those that have been introduced internationally since the attacks on New York and Washington on 11 September 2001. Sober Hobbesianism does not, as might be thought, offer carte blanche to counter terrorist measures of all kinds. Although its criticisms of these measures are only *thinly* liberal ones, the targets of sober Hobbesianism and the targets of more full-blooded liberalism are often the same.

Post 9/11 Security

The background to both the introduction and criticism of emergency powers is the thought that in the post 9/11 world a "new normal" is emerging, that is, a legal regime even in liberal democracies appropriate to a prolonged period of emergency. It is a regime typified by legislating ad hoc for emergency --within an emergency. Appropriating Hobbes's concept of good law, I shall argue that even when a new

¹⁶ See *Leviathan*, ch. 25, p. 182. 4 See my *Hobbes* (London: Routledge, 1986), p. 135.

¹⁷ See my *Hobbes* (London: Routledge, 1986), p. 135

¹⁸ Good law is consistent with liberalism without being inspired by liberal values. See my 'Law and Equity in Hobbes'

normal¹⁹ is motivated by a concern with security, it is not necessarily acceptable from a Hobbesian point of view: for one thing, the new regime may be predictably ineffective; for another, the threat it is directed against may not be big enough or imminent enough to count as an emergency.²⁰

Surveys of post 9/11 legislation and government action internationally seem to reveal at least four trends: (1) an increase in public and covert surveillance in liberal democratic states;²¹ (2) ad hoc revision of the law in certain liberal democratic states to limit protections for suspects in counter-terrorism investigations;²² (3) exploitation by liberal democratic state security services of investigatory practices and detention in illiberal states;²³ and (4) opportunistic uses by illiberal states of counter-terrorism as a pretext for illiberal measures directed at ordinary citizens of those states. I shall focus first on (2). It is exemplified by legal measures introduced in the US and the UK to provide for prolonged and even indefinite periods of detention without charge for suspects in counter-terrorism cases. It is also exemplified by the creation ad hoc of special tribunals to try such suspects, tribunals operating under unusual rules, and by attempts to deport foreign counter-terrorist suspects to human rights-abusing, and in particular jus cogens-violating, jurisdictions. Sometimes such measures involve derogations from human rights treaties, as in the UK government derogation from the European Convention of Human Rights (ECHR), Article 5, in November 2001.

Can (2) be justified? Clearly a liberal justification is difficult or impossible to mount, particularly when human rights protections, such as those codified by the ECHR, and the UK counterpart of that Convention, the Human Rights Act (1998), have something like the force of Constitutional provisions. Is it any easier to mount a sober Hobbesian defence? That depends on how Hobbesianism bears on ad hoc revisions of the law in general, on whether, in the circumstances in which ad hoc revisions are being introduced by the UK and the USA, they are genuine emergency measures, and on whether, even if they are regarded as emergency measures, they are necessary or sufficient for preventing a significant loss of life. When these different considerations are weighed, I shall suggest, a sober Hobbesian approach is no more likely to vindicate (2) than a more mainstream liberalism.

It is true that in unreconstructed Hobbesianism the sovereign is above the law and able to impose it or repeal it at will.²⁴ Even in that version of Hobbesianism,

¹⁹ The phrase 'new normal' is inspired by US Vice-president Dick Cheney's claim that the steps being taken against counter-terrorism in the US after a supposed period of emergency

²⁰ The following sixteen paragraphs are adapted from *Emergencies and Politics*, pp. 153-161.

²¹ [www.privacyinternational.org/survey/phr2003/threats.htm#Increased%](http://www.privacyinternational.org/survey/phr2003/threats.htm#Increased%20Communications%20Surveillance%20and%20Search%20and%20Seizure%20Powers)

[20Communications%20Surveillance%20and%20Search%20and%20Seizure%20Powers.](http://www.privacyinternational.org/survey/phr2003/threats.htm#Increased%20Communications%20Surveillance%20and%20Search%20and%20Seizure%20Powers)

²² Neil Hicks, 'The impact of counter terror on the promotion and protection of human rights: a global perspective' in R. Ashby Wilson, ed. *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005), pp. 216-217.

²³ 11 See J. Mayer, 'Outsourcing torture' *New Yorker* 14 February 2005. 12 Ashby Wilson, *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005), p. 215. For a perspective other than an AngloAmerican one, see W. Sadurski, ed. *Political Rights Under Stress in 21st Century Europe* (Oxford University Press, 2006).

²⁴ *Leviathan*, ch. 26, Tuck, ed. p. 184. 14 Tuck, ed. p. 108

however, the sovereign is subject to the moral Law of Equity. As the ultimate judge of right and wrong, the sovereign falls under what Leviathan counts as the eleventh law of nature: . . . if a man be trusted to be judge between man and man, it is a precept of the Law of Nature, that he deale Equally between them. For without that, the Controversies of men cannot be determined but by Warre.¹⁴ Not that this is a precept that the sovereign is obliged to follow in practice, if he sincerely thinks that his, i.e. the public's, safety, is imperilled by doing so; the laws of nature only oblige in the sense of having to be given weight in foro interno, i.e., in deliberation before it issues in action. It may be overridden if, e.g., the agent's life might be lost by abiding by it. The question is whether a breach of the law of equity can typically be sincerely thought to be overridden by considerations of public safety.

Detention

Many of the revised rules of detention and trial in counter-terrorism that we are considering deal unequally between offenders involved in terrorist action and people thought to be involved in highly organized violent crime or successful long-term serial murder. But it is unclear that the danger to the public posed by these sorts of criminals need be greater than the danger posed by terrorism, and so it is unclear whether different methods of detention are necessary either. Admittedly, certain considerations do distinguish the cases, e.g., the greater legal difficulty in some terrorist cases of assembling evidence, of exposing the identities of witnesses, or of introducing evidence that might allow terrorists to draw inferences about the sources of evidence; but these are not considerations that trump a law of nature in unreconstructed Hobbesianism.

When it comes to sober Hobbesianism, there is no presumption that the sovereign is above the law, and no presumption that Equity in Hobbes's sense fails to apply. On the contrary, the presumption that everyone counts for one and no more than one is written into the exercise of democratic detached judgement that is at the heart of sober Hobbesianism. From the angle of sober Hobbesianism it matters that suspects held for having harmed or murdered or for planning to harm or murder are treated similarly. Departures from equity might in principle be justified if an imminent threat to life on a significant scale could be counteracted as a result – in short, if the context for the departure were an emergency situation. It is not entirely clear that this is the context for changes to detention rules that we are considering. The fact that wars are emergencies, and that ad hoc counter-terrorism procedures are routinely represented as belonging to an on-going 'War on Terror' no more establishes that the threshold for emergency has been met than a 'declaration of war' against gang crime would justify comparable changes to the detention and interrogation regime for gangs with a record of murder and assault.

Again, the UK government's counter-terrorism strategy²⁵ contemplates a long-term effort of challenging the claims of Islamic extremists among the UK Islamic community so as to undercut terrorist recruitment and radicalization more generally; if this is an emergency measure, it is a necessarily slow-working one, and

²⁵ <http://security.homeoffice.gov.uk/counter-terrorism-strategy>

one that is conducted by persuasion rather than by legislative change.²⁶ Could persuasion over the long term and anti-radicalization by media techniques really be represented as measures being adopted in an emergency? Being slow working, they cannot possibly be effective against an imminent threat to life. Operating as they do to change minds, they must be assumed to be pitched to people who are not so consumed by fear or distrust that they cannot be receptive to the relevant messages. In other words, the context for this part of the counter-terrorism strategy is not being assumed even by the UK government to be a state of emergency. Rather, it is a state of heightened public attention and willingness to express views in a speech setting subject to familiar liberal rules. Admittedly, the heightened public attention may belong to the aftermath of an emergency situation, namely the 7/7 attacks in London in 2005, but that emergency situation was not part of a longer emergency that started in New York in September 2001; it was a short-lived, local emergency situation from which the people affected – perhaps inhabitants of Central London at most – subsequently returned to normal, or something close to normal.

In claiming that the context for UK counter-terrorism strategy is not an emergency context, I am not in the least implying that there is no terrorist threat to worry about, or that it does not call for some extraordinary measures. I am claiming rather that it is not an emergency context in the sense of the UK being permanently on the verge of attack. Even the UK authorities concede variations in threat levels, not all of which indicate the high probability of, e.g., another 7/7 bombing. I am also claiming that the introduction of extraordinary measures needs justification. When extraordinary measures are proposed and ordinary measures might be effective, the onus is on a government to show that those extraordinary measures are necessary for the sake of preventing loss of life or other significant harm. I take this to be in the spirit of Hobbes on 'good' law. Not only must the new measures be necessary – in the sense that they act on a threat that the ordinary measures do not act on; they must indicate a route from the extraordinary back to the normal, or indicate a connection between the institutions for the normal administration of justice – which command a wide consensus – and the abnormal.

Extraordinary measures can meet these conditions by being time-limited and by needing authorization when they are used from those who are familiar with legal norms for normal times and capable of judging the relative claims of security and liberty in particular cases. Extraordinary measures can also meet these conditions by passing through a legislative process in normal times in which the opinions of security experts and human rights defenders are given a fair hearing. These requirements are met more fully by UK detention and deportation regulations than by, e.g., ad hoc provisions in the US for the detention and trial of those once imprisoned at Guantanamo. In the case of Guantanamo, inmates were taken by the US government to have the status of military irregulars and a tribunal regime was

²⁶ 'Preventing Extremism Together' Report of Working Groups (August 2005)
www.communities.gov.uk/documents/communities/pdf/152164.pdf

invented for them mostly under the direction of the Executive branch,²⁷ as opposed to the legislature.²⁸The Judiciary, what is more, made a series of objections to the departures of this invented regime from Constitutional protections, ruling in June, 2008 that Guantanamo detainees could challenge their imprisonment in US courts.²⁹

When it comes to the justification of the ad hoc detention measures we have been considering, then, we find that there is a fall at the first hurdle: that of demonstrating their necessity. Where there is clear evidence that some of those detained without charge are dangerous, that can usually be made material for a criminal prosecution and so for the customary detention with charges, in which case detention without charges is unnecessary; where there is no such evidence, on the other hand, and so no material for prosecution, it is hard to see what evidence for the need for detention there is, either. Proponents of indefinite or long detention without charge might have a more intelligible position if there were great restrictions on legally admissible evidence of the danger posed by particular terrorist suspects, or great legal restrictions on methods for acquiring such evidence. Then indefinite detention might be claimed to be necessary for eliciting, through confession, say, evidence that could not be obtained in any other way. Even so, the case for departures in counter-terrorism from the normal standards of admitting evidence, and normal methods of evidence gathering, seems much stronger than the case for departures from normal standards of detention. For one thing, violations of privacy are intuitively less serious than loss of liberty; for another, so long as surveillance is not indiscriminate and omnipresent, and so long as there are safeguards when a prima facie case for its use has been made, surveillance, including secret surveillance, seems eminently justifiable. Again, so long as admitting evidence, and normal methods of evidence gathering, seems much stronger than the case for departures from normal standards of detention. For one thing, violations of privacy are intuitively less serious than loss of liberty; for another, so long as surveillance is not indiscriminate and omnipresent, and so long as there are safeguards when a prima facie case for its use has been made, surveillance, including secret surveillance, seems eminently justifiable. Again, so long as the surveillance comes from sources that someone versed in normal standards of admissible evidence could regard as reliable, the dangers of the evidence being manufactured might be mitigated.

Surveillance

²⁷ For a complete survey of counter-terrorism legislation in the US as well as several Executive Orders dealing with Guantanamo detainees, see the heading 'Domestic Security' at www.counterterrorismtraining.gov/leg/index.html

²⁸ The passage of the Detainee Treatment Act (2005) introduced protections for detainees. It contains several loopholes, however. See www.law.harvard.edu/students/orgs/hrj/iss19/suleman.shtml#Heading23

²⁹ For a general discussion of the role judges should have in challenging the ad hoc legislation of governments in alleged emergencies, see Dyzenhaus, *The Constitution of Law* (Cambridge University Press, 2006). For a diagnosis of some of the sources of occasional judicial timidity in this area, see Dyzenhaus, 'Deference, security, and human rights' in B. Goold and L. Lazarus, eds. *Security and Human Rights*, (Portland, OR: Hart, 2007).

In the UK, surveillance is of data and persons.³⁰ Communications data, ranging from names and addresses of registered holders of landlines and mobile telephones to logs of calls made, to IP addresses and registered users of email accounts, are available to the police if a 'necessity' test is passed. This means persuading 'senior officers of a public authority' that the surveillance is required. National security is one ground for communications data surveillance, which in many cases is personally authorized by the member of Cabinet in charge of the Home Office

There is a wide range of further grounds for targeted surveillance, ranging from 'public safety' to tax evasion to an individual's mental or physical health. Surveillance of persons can be 'directed' or 'intrusive'. Directed surveillance occurs when suspects are followed and observed in public places by police or intelligence officers. Intrusive surveillance is where observation occurs in private places: homes, hotel rooms and cars, or where communications are intercepted, usually electronically. Directed surveillance requires warrants from senior police officers. These warrants are time limited. Intrusive surveillance is considered necessary only where those observed are suspected of serious crimes and the seniority of the officers whose authorization is required is higher than for directed surveillance. Authorizations of this kind are in turn reviewed by the Office of Surveillance Commissioners. Soon a new unified office of communications data oversight is likely to be introduced, providing a check on Home Office authorizations, as well as bringing together a plurality of existing oversight bodies.

Not all surveillance evidence is legally admissible. Evidence from intercepted communications is not. The UK government has sometimes sought to avoid disclosing this evidence by introducing forms of detention and restricted movement that can be approved by law officers working under unusual rules. To the extent that the inadmissibility of this evidence is cited as a justification for recourse to these new procedures, such as those associated with 'control orders' under the Prevention of Terrorism Act (2005), the inadmissibility rule seems unjustified. Perhaps it deserves to be abolished anyway.³¹ Though admitting evidence from intercepted communications seems to erode the sphere in which anyone at all can speak his mind without fear of the consequences, the hurdle that has to be crossed for the interception to be authorized in the first place is not low. Where the benefit of intruding on unguarded conversation is the prevention of a serious crime, and where not being able to admit such evidence contributes to an arbitrary extension of powers of arrest, the badness of intrusion seems heavily outweighed.³²

Not that privacy is of no importance. If that were so, then no hurdle at all would appropriately be put in the way of applying electronic intercepts, and there would

³⁰ www.homeoffice.gov.uk/security/surveillance/types-of-surveillance.

³¹ A private member's bill to make evidence based on intercepts admissible was introduced in the House of Lords in the 2006–7 Session of Parliament. For the text, see www.parliament.the-stationery-office.co.uk/pa/pabills/200607/interception_of_communications_admissibility_of_evidence.html. The admissibility of intercept evidence may also be addressed in upcoming reforms of communications data legislation.

³² See my 'The Scope of Serious Crime and Preventive Justice' forthcoming in *Criminal Justice Ethics*

indeed be an invitation to nosy officials to investigate the tax or medical records of people they had grudges against or were simply curious about. Nothing that has emerged so far justifies the warrantless wire-tapping that has sometimes gone on in the US since 9/11.³³ But it is hard to explain or define the value of privacy entirely satisfactorily in legal terms,³⁴ and the right to privacy sometimes claimed by citizens against the state is hard to reconcile with their undeniable appetite for journalistic intrusions on the lives of celebrities, or voyeuristic reality television. It may also be inconsistent with the exhibitionism and self-advertisement associated with social networking internet sites.

The value of privacy rises in proportion to the need to live in public, and to make public professions of belief or loyalty. Thus, in the China of the Cultural Revolution or in East Germany when the Stasi was at its strongest, the value of a sphere in which the unorthodox or irreverent could be spoken, or in which relationships independent of politics could be cultivated, would have been of the first importance.³⁵ Where public standards of life penetrate even the fine detail of what one wears, whether one shaves, and what one reads or listens to, the value of privacy stands out very clearly. But where practically anything can be done publicly without anyone feeling embarrassed or disgusted, matters are not so straightforward. Wanting to do things in private can look and feel like prudery or evasiveness or snobbery; privacy can be seen as a cost.

In between these extremes a generally valued sphere of privacy still does exist. Virtually everyone thinks that privacy is a requirement of romantic and family relationships, and such relationships seem to be highly valued universally. So if for no other reason than to protect these relationships, there should be a presumption against the violation of privacy. That said, it is hard to deny that the value of privacy

³³ 'Bush Lets U.S. Spy on Callers Without Courts' New York Times, 16 December 2005.

www.nytimes.com/2005/12/16/politics/16program.html

³⁴ See Peter Galison and Martha Minow, 'Our privacy, ourselves in an age of technological intrusions' in Ashby Wilson, *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005), pp. 258–294. It is important not to be misled by analogies in this area. The fact that it seems very undesirable to be viewable naked by others whenever they want to is not a proof that surveillance is highly undesirable, since (i) having one's data accessed does not necessarily expose one very much; (ii) it is never supposed to be undertaken on someone else's whim, but for the sake of some important benefit. The nakedness analogy is used by Lustgarten and Leigh in *In From the Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon Press, 1994), pp. 39–40. B. Goold argues on the strength of the analogy and on the unpleasantness of having information about one collected without one's consent that 'there is a clear relationship between privacy and the construction of personal identity'. See 'Privacy, identity and security' in B. Goold and L. Lazarus, eds. *Security and Human Rights*, (Portland, OR: Hart, 2007), p. 63. This line of thought suffers from the obscurity of the associated concept of personal identity. The fact that information collected about me can be false and unflattering and therefore harmful to me is certainly a reason for safeguards, but this doesn't change who I am. Nor does the cultivation by a person of a self-deceiving self-image determine who he is. Still less does the piercing of this self-image by unwanted home truths necessarily count as humiliation. The idea that each person should be able to project the self-image he likes best sounds like a spin-doctor's charter, and not the basis for an argument, as in Goold, that privacy is a human right.

³⁵ Jung Chang, *Wild Swans* (London: Harper Collins, 1991); see also the film by Von Donnersmarck (2006), *The Lives of Others*.

can be outweighed. A terrorist who reveals his secret plans to his lover may do so in the context of pursuing a private or family life to which international law recognizes that he has a right. But if an electronic bug in his bedroom picks up the conversation in which the plans are revealed and the security services decide that the terrorist should then and there be arrested, so as to disrupt the terrorist operation and prevent loss of life, that seems perfectly justifiable notwithstanding the need in general not to penetrate the sphere of intimate relationships. The value of life hugely outweighs the value of privacy when they conflict. For one thing, life is a condition of privacy of all kinds.

Surveys of public opinion – important at least for emergency measures in force in democracies – seem to show that where terrorism is concerned, even fairly indiscriminate covert access to communications and personal data is acceptable to citizens, at any rate in some regions of the world. A Eurobarometer study of 27000 EU inhabitants published in February 2008 showed that 82 per cent of those questioned had no objection to monitoring of personal details connected to taking a flight, and 75 per cent were content to have all their Internet usage monitored.³⁶ It is possible that people who worry about violations of privacy and security make it hard for surveyors to contact them, which skews the results in favour of surveillance.³⁷ But it is also possible that, in the popular mind, security trumps privacy where the two are perceived to conflict, so that laws permitting intrusion in counter-terrorism are legitimate.

I have been concentrating on the UK. In the US, the USA/Patriot Act, introduced shortly after the 9/11 attacks, made it much easier for the government or the security services to access large data bases of, e.g., Internet providers in criminal investigations. Not only could data legally be monitored covertly, but there was no requirement to show that those whom the data concerned had committed or would commit a crime. Provisions so sweeping are very hard to show to be necessary, and so they fail even the unreconstructed Hobbesian test of 'good law'. Similarly for the Foreign Intelligence Surveillance Act (1978) under which warrantless surveillance went on in the US. The Foreign Intelligence Surveillance Act as amended in 2008 introduced obstacles similar to those for intrusive surveillance in the UK when it comes to approval for electronic surveillance of those outside the US communicating with Americans: the electronic monitoring had to be of people suspected of involvement in terrorism. But this seems to be an afterthought, and it comes late in mitigating the effects of a law that is bad even by Hobbesian standards.

In 2013, Edward Snowden revealed that in the US and the UK there has been large-scale secret bulk collection of communications data, including personal communications data. In the United States the bulk collection is intended to identify the associates of individuals against which there are definite intelligence-based suspicions of terrorist activity. But it is known that there has also been collection of communications data produced by governments allied to the United States,

³⁶ http://ec.europa.eu/public_opinion/flash/fl_225_sum_en.pdf.

³⁷ K. Haggerty and A. Gazso, 'The public politics of opinion research on surveillance and privacy' *Surveillance and Society* 2 (2/3) 173–180.

including the personal communications data of the Chancellor of Germany, Angela Merkel. Spying on allies raises issues of its own, but let us concentrate on bulk collection by government of communications data from its own citizens. Is it, as some journalists have claimed,³⁸ intrusion befitting the Stasi State? If it is that the conclusion bears not only on US but British practice, since GCHQ also engages in bulk collection on a large scale.

In a sequence of other papers,³⁹ I have claimed that bulk collection is actually less intrusive than more conventional surveillance technologies. This is because, being big data analytics, it often looks for patterns of communication at a very high level of generality. It starts from terrorist suspects about whom there is definite human intelligence, and then uses machine algorithms to identify telephone numbers linked to the suspect's telephone number, sometimes at several removes. Bulk collection can also reveal connections people and organizations by credit card transactions. Where algorithms or human analysts identify some of the links as worthy of further investigation, conventional investigation techniques including human surveillance, or targeted surveillance assisted by bugs or wiretaps are used with authorizations to investigate individuals further. It is at that stage that, according to me, significant intrusion begins.

Although the NSA measures are grossly disproportionate as a means of pursuing terrorists, they are not necessarily intrusive in the sense of bringing human attention to bear on details that people would rather not have disclosed or known. The measures consist of "collecting everything" –collecting vast amounts of citizens' communication data-- and then mining it, sifting through it with search terms--- *not* listening or looking at everything. Since the point of mining is to get to a residue of the information collected that *can* be examined because it has met certain algorithmic tests of relevance, its effect is to *exclude* much of what is collected from any investigation or attention at all. "Collecting everything" does not mean looking into everything—except in as much as the subsequent mining engages everything in order to exclude a lot.

Again, the purpose of the mining is not to identify the politically heterodox as in Stasiland, but to head off terrorist attacks. The means may be out of proportion to the end, but the end –preventing terrorism-- is not human-rights-violating. It is true that if the search terms used by the mining express some sort of discriminatory bias, that is a count against the mining, but this is a different ground for objection from privacy violation –which is what surveillance usually elicits. Again, it is true that the NSA has sometimes operated outside the law and without informed oversight by even security-cleared American politicians. That is a way of associating bulk collection with a democratic deficit, but not necessarily with intrusion, still less intrusion comparable to Stasi intrusion. Sober Hobbesianism is able to engage with the objection from lack of democratic oversight. It could also engage with the relative ineffectiveness of NSA bulk collection in finding needles in haystacks.

³⁸ Reference from Loughborough presentation

³⁹ 'Power and Surveillance in Democracies', Liberal democratic regulation and technological advance', 'Bulk Collection and the Ethics of Surveillance'

Conclusion

Sober Hobbesianism removes some of the excesses of unreconstructed Hobbesianism. It is less obsessed than unreconstructed Hobbesianism with highly unitary government. It is less paranoid about sharp public disagreement, refusing to see it as war in the offing. It is friendly to democracy. It promotes not autonomy *tout court*, but only non-violently exercised autonomy. It is intolerant of fundamentalist attachments and projects, because of they are potential causes of violence. Sober Hobbesianism appropriates from Hobbes himself the concept of good law and often reaches the conclusion that legislation made ad hoc to cope with emergencies, especially terrorist emergencies, are *not* good law. Although it is less tolerant of fundamentalist free speech than ordinary liberalism, it does not seem to me wrong to be.