Emergencies and Human Rights: A Hobbesian Analysis

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Salus populi suprema lex esto—may the safety of the people be the supreme law. If Cicero's maxim is correct, human rights do have limits. When the safety or welfare of the people is under threat because of a situation of emergency, the law that governs is not the law, including the law of human rights if the law happens to enshrine such rights. Rather, a political judgment governs about what it takes to secure the safety of the people. Human rights are therefore neither inalienable nor illimitable since some body or person may legitimately strip people of their legal rights or severely limit the rights in at least one kind of situation, the situation of an emergency.

Thus interpreted, Cicero's maxim has had a deep influence on political and legal thought that reaches into the present. It is regarded as the key to the Roman institution of dictatorship in which in times of emergency one person was for a limited period given otherwise unlimited power to respond to the emergency as he saw fit. In particular, the maxim and its institutional context are central to the 'reason of state' or 'sovereign prerogative' tradition that stretches from Machiavelli through Carl Schmitt and his claim that '[s]overeign is he who decides on the state of exception'[2] to contemporary political thinkers such as Girgio Agamben.

In Schmitt's view, political order has to be understood as 'autonomous'. The 'political' in his theory is the site of an existential struggle between friend and enemy, resolved by the decision of the sovereign made on the basis of a vision of the substantive homogeneity of the *Volk*, whose mark of success is that he attracts their acclaim.[3] Sovereign authority is precisely the unmediated coercive power that reveals itself in an emergency.

Liberals will reject Schmitt's idea of the autonomy of the political and its vision of community. But the claim about sovereign authority in times of emergency, which Schmitt takes as evidence for his account of the political, reaches into the heart of their liberal constitutionalist tradition. This is exemplified in the fact that John Locke made Cicero's maxim his epigraph for *The Second Treatise of Human Government*.[4] Locke extolled the virtues of the rule of law—of the advantages to liberty of life under 'settled, standing' legislated rules common to all in contrast to 'the inconstant, uncertain, unknown, arbitrary will of another man.'[5] But he also insisted that in emergencies the government had to have a prerogative or legally unconstrained power to 'act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it'.[6] It might well seem to follow that, as the editor of a recent illuminating collection *Human Rights in Emergencies* puts it, '[p]ublic emergencies … present the ultimate test for human rights theory in its practical application.'[7]

I will argue not only that the safety of the people may not be *legitimately* secured by acting outside of law, but also that the safety of the people *cannot* be secured by acting outside of law since the 'safety of the people' is itself a juridical concept. But I wish to push the argument even further to the claim that human rights are part of the law to which political authorities are always subject. That claim will, however, seem implausible because of the various ways in which the legal entitlement to human rights seems to be relative.

First, the idea that political authorities must respect human rights as legal entitlements is usually taken to have traction in the practice of states only in the postwar period. Even if we think now that all human beings are entitled to such rights, we should recognize that they are relative at least in the sense they are legal entitlements only in our own time. Second, even in our own time, there are states in which human rights are not legal entitlements or, if they are, the states pay at best lip service to them. Hence, we might say

that such rights are also relative to place in that your legal entitlement to such rights depends very much on where you happen to find yourself.

Third, even if you happen to live somewhere where human rights are legal entitlements, and respected as such, you may find that the respect is conditional on the state not confronting an emergency. Indeed, this conditionality seems to be given formal recognition in the many legal regimes of human rights that make explicit provision for the state to derogate in times of emergency from at least some of the rights enumerated in the regime, an echo of similar provisions in international human rights regimes. Hence, there is yet another sense in which human rights seem relative. They are enjoyed as legal entitlements only in normal times.

This third kind of relativism seems the most troubling of the three. It differs from the relativisms of time and place in that it is political relativism: it relativizes human rights not only to normality but even further to political judgment about normality. It makes it appropriate to recognize that even when human rights are properly observed legal entitlements, they enjoy this status on condition that the safety of the people is not imperilled. It follows that even if the safety of the people is a juridical concept, human rights are not. It is for this reason that public emergencies seem to 'present the ultimate test for human rights theory in its practical application.'

I shall argue that these relativist concerns can be overcome once we understand that the juridical concept of the safety of the people includes respect for the human rights of the individuals who make up what we can think of as the 'jural community': the political community of legal subjects bound together by the rule of law. It follows that emergencies do not so much expose limits to human rights as show how human rights constitute the jural community. Rather than emergencies telling us how human rights will or may legitimately be

limited, they tell us how human rights shape the way in which states respond to emergencies because of the onus of justification states bear to the subjects who make up the jural community. Justification is always justification in terms of such rights.

This last claim will appear worryingly ambiguous between the vacuous claim that political justification by definition satisfies human rights and the too robust claim that a political justification counts as such only when it meets the standard set by human rights. In the vacuous claim, the safety of the people is the supreme human right, and in times of emergency a political judgment about it trumps all other claims. In the too robust claim, Cicero's maxim is opposed by one of it naïve Latin counterparts: *fiat justitia, ruat caelum*—let justice be done, though the heavens fall.

My argument navigates between these two pitfalls by going backwards in time. Part 1 seeks to clarify the problem at stake in this debate through a discussion of two essays by a remarkable philosopher, Bernard Williams, 'Realism and Moralism in Political Theory' and 'Human Rights and Relativism'.[8] Williams follows Thomas Hobbes in arguing that the mark of 'the political' lies in a society finding a solution to the problem of how to create order. He also argues that a political order differs from a mere coercive order in that it seeks to satisfy the 'Basic Legitimation Demand', which places the state under an onus of justification to those subject to its power. This argument connects to the essay on human rights because it suggests that one way in which human rights are *not* relative is that political justification is always in terms of the human rights of those subject to the state in a way that avoids the pitfalls of being vacuous or too robust.

However, as I show in Part 2, the avoidance is not on the basis of a philosophical answer to the problem Williams's essays illuminate. Rather, the answer lies in putting in place the kind of institutional structure of legality required for the state to discharge its onus of

justification.[9] Despite Williams's dismissal of Hobbes's own solution to the problem of order, it is to be found in the legal order Hobbes envisaged on the cusp of the development of the modern state. Within that structure, we can understand the non-relative way in which human rights are constitutive of legal order and so shape how the state must respond to emergencies. In situations of emergency when the survival of the state is at risk, human rights can ensure the cohesion of the jural community by maintaining the onus of justification. If in situations of emergency the basic (human) right to justification is forfeited, the political order dismantles from within by becoming a coercive order.

In the third and final part, I shall return to the Roman and thus deep historical roots of this institutional structure in light of a revisionist account of how we should understand Cicero's maxim. These roots help to illuminate why human rights, while not being able to avoid the challenge posed by states of emergencies, can – normatively and politically – limit both discourses and practices associated with reason of state by maintaining a basic requirement of justification of sovereign authority. This basic legitimation demand is constitutive of a political order as a jural community and affords an understanding of the autonomy of the political that is both realistic and distinct from Schmitt's.

Legitimacy, Justification and Human Rights

Central to Williams's essays is the thought that political theory should start with the Hobbesian question of how to secure 'order, protection, safety, trust, and the conditions of cooperation'.[10] This, he says, is the 'first' political question because 'solving it is the condition of solving, indeed posing, any others.'[11] But 'first' should not be understood as implying that

the question 'once solved …never has to be solved again' because 'a solution to the first political question is *required all the time*'.[12]

According to Williams, it is a necessary condition of legitimacy that the state solves the first political question, which means that it must satisfy 'the Basic Legitimation Demand' (BLD) that every legitimate state must satisfy if it is to show that it wields authority rather than sheer coercive power over those subject to its rule. To meet that demand the state 'has to be able to offer a justification of its power *to each subject*', which means to every individual in its power, 'whom by its own lights it can rightfully coerce under its laws and institutions.'[13]

Williams regards legitimacy as a matter of actual acceptance of a political order's legitimacy by those subject to it. He thus opposes liberal political theories that make morality prior to politics, either by taking politics to be the instrument of the moral or as structurally constrained by moral principles. In contrast to these versions of 'political moralism', he advocates 'political realism' which he thinks gives a 'greater autonomy to distinctively political thought.'[14] In general, he insists on the autonomy of 'the political'--a deliberate echo of Schmitt.[15] What counts as legitimate in a particular political order is relative to what is accepted in that order, not what some theory has determined as the moral standards which any order has to meet to count as legitimate; for example, and as many liberals would argue, that its laws respect some predetermined list of human rights.

Williams's opposition is not, however, to liberalism as such. Rather, he sees liberalism as providing a candidate for answering the BLD, one that developed at a particular time and confined to a small number of existing states. While liberals are entitled to claim that their answer to the BLD is—at least in their societies--the best possible answer, they should not do so by building the assumptions of their moral theory into political theory

itself. Rather, their theory provides a historically contingent answer to the first political question.

Part of the problem Williams thus sees with the lack of realism in liberal political theory is that its claim that only liberal states are legitimate makes it relevant only to a small number of states and to quite recent times. In other words, if an understanding of legitimacy is central to political theory, liberalism is too reductive in that it reduces legitimacy to correspondence with a set of values that make up one or other liberal position. And that reduction does not so much offer an understanding of the concept of legitimacy as eliminate it from political theory altogether. It puts in place the too robust sense of justification because a claim that a measure is legitimate in political theory is a claim that it should be accepted despite the fact that its content is not in accord with a particular moral position.

But Williams also seems to suppose that Realists should accept that political relativism is right, which might make his position prey to a different kind of reductivism. He emphasizes that a political order to keep itself distinct from what he calls an 'unmediated coercive power' must avoid its solution to the problem of achieving order becoming part of the problem; for example, if it resorts to 'the most blatant denials of human rights, torture, surveillance, arbitrary arrest, and murder'.[16] But he also says that we should recognize that a state may engage its enemies in ways that we find discomfiting but have an authentic claim to be legitimate:

> Thus what is in its terms a legitimate order may use what we would regard as cruel and unusual punishments; it is significant that, not surprisingly, they make no secret of this. They or others may use, rather less openly, ruthless methods against subversives or threatening revolutionaries. Are such measures in themselves violations of human rights? If they are, are they violations justified by emergency? [17]

He continues:

> Any state may use such methods in extremis, and it is inescapably true that it is a matter of political judgement, by political actors and commentators, whether given acts are part of the solution or of the problem. Liberal states make it a virtue—and it is in indeed a virtue—to wait as long as possible before using such solutions, because they have the constant apprehension that those solutions will become part of the problem, Liberal states are well-regarded, and rightly so, for showing this restraint. They should be less well regarded, as the writings of Carl Schmitt may remind us, if they turn this into the belief that the only real sign of virtue is to wait too long.[18]

If 'such methods' refers to 'blatant denials of human rights', Williams would be committed to the view that human rights are expendable luxuries. In addition, this second invocation of Schmitt may seem ominous, since he is notorious for claiming that the state is legally unlimited in its response to emergencies and that ideas like 'human rights' are vacuous tropes of liberal thought.

On the one hand, Williams's Realism should incline him more to the vacuous claim and thus to a different kind of reductivism in which justification becomes whatever happens to be accepted as such, whatever its content. But, on the other hand, he is also willing to countenance that the BLD is a moral principle, as long as one understands that it is inherent in politics, that is, in the Hobbesian political question.[19] As he puts it, Hobbes did not

> think that a … [legitimate] state could be identical with a reign of terror; the whole point was to save people from terror. It was essential to his construction, that is to say, that the state—the solution—should not become part of the problem. This is an important idea: it is part of what is involved in a state's meeting … the Basic Legitimation Demand ....[20]

In addition, Williams recognizes that successful domination may make it the case that legitimation demands simply do not arise. For example, a group might accept the dominant ideology that deems it to be inferior and so justifiably relegated to a subordinate position in the society. And so he introduces a second principle, the 'critical theory principle' that 'the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified.'[21]

These two essays thus preserve a tension between the idea that acceptance by the subjects of rule suffices for legitimacy and the idea that the critical theory principle can give us reason to doubt that a regime is legitimate despite the fact that it is generally accepted as such by those subject to it. Put in terms of the classical debate in political theory, Williams rejects the distinction between *de facto* and *de jure* authority, but suggests that an authority in fact must always strive for legitimacy and will achieve it only on condition that it does not blatantly abuse human rights.

That tension will seem to some if not many to make his theory incoherent. But it indicates rather that philosophy can only get us as far as seeing clearly what the tension is that has to be resolved. It cannot provide a solution that resolves that tension without resorting to unrealistic transcendental arguments. Williams says of emergency situations that 'there is always room for argument in such cases' but takes it to be a virtue of his account that it is at least clear 'what the argument is about.'[22] The clarity resides, in my view, in seeing that this is the tension that has to be addressed and moreover addressed publicly. I shall now try to show that Hobbes not only, as Williams suggests, correctly posed the first political question of how to achieve order, but also sketched the institutional structure that permits a political community to work through that tension in the requisite public fashion.

Hobbes and the Basic Legitimation Demand

As I indicated, Williams does not take more from Hobbes than his posing of the first political question because he considers Hobbes made the mistake of supposing that the absence of disorder is a sufficient condition of legitimacy when it is only a necessary one.[23] But, while Williams recognizes that Hobbes not only posed the first question, but also did so in a way that requires seeing that BLD is inherent in it, he does not pause to examine how Hobbes himself went about answering the question.[24] As a result, he does not appreciate that for Hobbes the primary way that a political order is distinguished from an *unmediated* coercive order is precisely in that law plays the mediating role. Law's role in transforming might into right constitutes a special kind of political community—a jural community.[25]

In Hobbes's political theory, the state is created by a covenant between individuals in the state of nature who thereby unify themselves into one person.[26] The state cannot by itself act, so it has to be represented by the sovereign person (if one) or persons (if a group) and in the act of covenanting the individuals authorize the sovereign to secure the common peace and their safety. Since he acts in their name, he acts as an artificial not a natural person, so there must be a way of distinguishing acts done by the sovereign in his public capacity from acts done by the individual or individuals who make up the sovereign in their private capacity. The marks of public authority attach to the way that the sovereign communicates with his subjects, which is through a public order of law. Those subject to the sovereign's laws must understand that they own all his laws since they are ultimately the authors of the law. Put differently, since the sovereign always acts with right, *de jure*, they cannot accuse him of injustice because that would be to claim that he acted without the right he has through their authorization.

Hobbes emphasizes that as long as one is in a condition of subjection to a sovereign's laws, it does not matter how that condition came about: the subject will be deemed to have consented to the sovereign's rule. *De facto* authority is *de jure*. In addition, since such subjection permits the escape from the situation of continual emergency in which individuals find themselves in the state of nature, Hobbes often uses the threat of a return to the state of nature as an inducement to subjects to understand their obligation of obedience to the sovereign's laws, whatever their content. His argument may thus seem to present a 'once and for all' and highly authoritarian solution to the question of how to secure order, rather than, as Williams suggests, one that is provided 'all the time'.

It is, however, important, to see that the covenanting individuals do more than create the state; they also transform themselves from natural individuals into legal subjects. With that transformation, they establish a relationship of reciprocity between subject and sovereign: the 'mutuall Relation between Protection and Obedience', as Hobbes puts it in the last paragraph of *Leviathan*.[27] That relationship is between two kinds of artificial person--the person of the sovereign and the persons who are legal subjects, and for Hobbes it is the mark of the political—of the fact that a political order has been established in which rule is by right and the natural realm of rule by might has been left behind.

Put differently, a political order is characterized by authority relationships by contrast with unmediated coercive power. The point is not that a political order can do without coercive power, only that it wields power in a way that makes plausible a claim to have been authorized by those who are subject to that power. Any exercise of coercive power by the state must therefore be recognizable as an authoritative act, which entails that it must meet two conditions of public authority. The first is formal--the 'validity proviso' that any exercise of power must show a legal warrant in a law that has been made in accordance with the

order's formal public criteria for recognizing a law. The second condition is substantive. Any exercise of power must meet the 'legality proviso': the laws the sovereign makes have to be interpreted, and so must be interpretable, in light of Hobbes's extensive list of the laws of nature.[28]

In large, complex societies, the exercise of sovereignty will require officials to implement the laws and subordinate judges to provide authoritative interpretations of the law. These officials are a necessary part of the exercise of sovereign authority since it is they who ensure that the general laws that the sovereign enacts are appropriately applied to subjects.

While the sovereign qua ultimate legislator and judge is not accountable to his subjects for infractions of the laws of nature, his subordinate officials--including judges--must seek to show that the law as it is applied in particular cases is consistent with the laws of nature, notably the law that commands that subjects be treated equitably. That puts an onus of justification on officials which, if it cannot be discharged, raises the question whether the subject is within the reciprocal relationship of protection and obedience, and so implies that the relationship is not political but one of hostility or unmediated coercion between more and less powerful natural individuals. Put differently, while Hobbes's solution to the first political question is the injunction, 'Obey the law, whatever its content', it is far from unmediated coercion. It is coercion mediated by legal right because the content has to be put into legal form and then applied and interpreted in a way that discharges the onus of justification.

Hobbes's solution is not then a once and for all one. Subjects are entitled to a justification of how a law applies to them as members of a jural community in which each individual enjoys equal freedom before the law. If the only possible interpretation of the

state's response is that it outlaws a subject by ejecting him or her from the jural community that person is in the emergency condition of the state of nature from which entry into the political is supposed to be an escape. The solution, as we have seen Williams say, becomes the problem.

Thus, if the political relationship between sovereign and subject is to be maintained, it has to shape the way in which the state responds to threats, including threats that, in the opinion of those who hold sovereign office, rise to the level of a public emergency. For when states respond to emergencies, they must continue to meet the two conditions of public authority lest they change the relationship between officials and subjects from a civil-society one of authority mediated by law to a state-of-nature one of unmediated coercion. For Hobbes, in contrast to Locke, the sovereign may not act against the law without ceasing to be sovereign.[29]

In this shaping, what we would today call human rights play a role. Hobbes, of course, does not talk of 'human rights'. But he insists from the beginning of *Leviathan* that the individual human being as such is the subject of political order. Moreover, he does have a category of 'inalienable rights', the rights that follow from one's right to preserve oneself.[30] Indeed, he makes it clear that this right carries over into the civil condition so that the subject has the right to resist punishment, even when the violence of punishment is fully mediated by law.[31]

Hobbes's theory of punishment is peculiar but instructive for an understanding of the requirement of justification. On the one hand, it has at its core a distinction between punishment and hostility where the former requires that the person has been convicted in a fair trial of a crime set out in a prior general law, and is proportionate in that it is aimed at reforming the individual and deterring others, not at revenge. On the other hand, Hobbes

insists that while subjects must be taken to have authorized the institution of punishment in general, no one can be taken to have authorized the sovereign to punish him or her in particular, so that the subject who is about to be punished is entitled to resist. At that moment, the subject is in a relationship of unmediated power or hostility with the sovereign or his officials.

Hobbes's theory of punishment thus presents a double optic on the violence necessary to maintain order.[32] There is the private optic of the about-to-be-punished individual who is in a kind of mini-state of nature *vis à vis* the officials. But there is also the public optic of fellow subjects for whom it is very important to observe that the individual got all of the protections afforded by the rule of law before being subject to coercion.[33]

The tension between the two optics comes about because Hobbes's subject is the bearer of human rights. There is only one pre-political right, the right that every human has to self-preservation, including the right to judge for oneself how to exercise that right. In the state of nature, it is a worse than useless right since its existence contributes to the precariousness of that state, so it is rational for individuals to authorize a sovereign to govern them. It is thus also rational for anyone subject to such government to understand that he or she should be taken to have consented so to be governed. But it is rational only as long as the reciprocal relationship between protection and obedience is maintained in which protection is of the subject understood as a person who is free and equal before the law.

Hence, the pre-political right to preserve oneself survives into the civil condition in two ways, first as a political right, for Hobbes the right of rights, which is the right to demand a justification from public officials for any exercise of coercive power in terms of the reciprocal relationship between protection and obedience. Second, it survives as setting

the limit of that political relationship by marking the point where justification runs out and political order turns into unmediated coercion.

Hobbes, then, is one of the founders of the modern political discourse of constitutionalism about the reciprocal relationship between, on the one hand, the sovereign person of the state and the officials who implement and interpret the law and, on the other hand, the persons who are subject to the law. The sovereign as an artificial person speaks to the subjects through law and legal language has its own grammar that requires that subjects be addressed in a way that respects them as bearers of what we today call human rights. As a result, the officials who apply the law to that person are under an onus of justification that requires them to demonstrate why the law as it applies is respectful of such rights. And this is the case even when the state is thought by those who wield public power to be under severe threat.

Hobbes's position is a realist one in that legitimacy depends on what people in particular time and place actually accept. As he said in *Behemoth*, 'the Power of the mighty has no foundation but in the opinion and the beleefe of the people.'[34] But it is not reductive in either of the two ways sketched above. In that same book, as elsewhere,[35] Hobbes makes it clear that a sense of duty, not fear of coercion, underpins the maintenance of civil society. He asks: 'For if men know not their duty, what is there that can force them to obey the laws? And army you will say? But what shall force the army?'[36]

But Hobbes is not a total realist in that his theory is built on an assumption of political morality.[37] Hobbes tries to put the right to preserve oneself which each individual enjoys equally in terms of facts about individuals in a state of nature--the fact of our more or less equal intellectual abilities and the fact of our more or less equal physical abilities to harm each other.[38] But, as Kinch Hoekstra has argued, the role that equality plays for Hobbes in

civil society shows that in his theory 'it is less a matter that we are equals because we can destroy one another if we are so inclined, and more that we must acknowledge one another as equals because we will otherwise be inclined to destroy one another.'[39] In other words, Hobbes builds into his political theory a normative presupposition of equality that subsequently informs his understanding of the kind of protection or safety that the sovereign must supply his subjects for them to be able to accept that he governs in their name.

That presupposition was radical in his time. *Leviathan* is best read as an invitation to an audience who had just survived a civil war fought over, in part, that very presupposition. It invites them to attempt to build a society on the foundation of this presupposition--on the promise that the experience of living in such a society will show that individuals with very different gods and demons can coexist peacefully as long as they acknowledge each other as equals. It is that acknowledgement that requires the political idea of legitimacy—the idea that one should accept the legitimacy of a public order of laws not because one morally approves of their content, but because they can be justified as not undermining one's equal status before the law at the same time as they afford the conditions of peaceful interaction.

The vindication of the promise does not depend on any transcendental argument about why one must accept that presupposition. It rests on the appeal to the kind of experience that will result from adopting it as one's foundational presupposition. But once adopted, certain things do follow, for example, the need to establish the institutional structures that will make such experience possible; notably, the legal institutions that ensure that legal subjects can get answers to the question—'But how can that be law for me?'

Because it rests on an appeal, a kind of bet based on past experience about how future experience will turn out if one regulates public life on the basis of the presupposition, it may seem vulnerable to what we can think of as the Schmittian challenge: The

constitutionalist commitment to the rule of law cannot survive an emergency, which will then reveal the falsity of the presupposition. And it is to that challenge that I now turn.

Constitutionalism v. Reason of State

Constitutionalism is not the only modern political discourse. As I suggested at the beginning, there is also the discourse associated with Machiavelli and Schmitt of 'reason of state' and prerogative, in which sovereign authority is precisely the unmediated coercive power that reveals itself in an emergency. At least in Schmitt, and in deliberate contrast to the constitutionalist tradition, the essential political relationship is one of hostility between friend and enemy and the normative force of a sovereign decision comes from its ability to eradicate conflict from a territory by establishing the substantive homogeneity of the people of that territory. The criterion of membership of the people is substantive rather than formal and legal and the solution to the first political question is a once and for all one. Once a 'concrete order', to use Schmitt's term, is established, the function of law is as a top down instrument of rule and the sovereign can decide to rule otherwise according to his judgment about what is necessary to secure the safety of the people.[40]

As I also suggested, Cicero's maxim and the Roman constitutional context in which in times of emergency the consuls gave a dictator authority to do whatever in his judgment seemed necessary to restoring the safety of the people figure large in this tradition. But in *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution*, Benjamin Straumann argues that this maxim and its context have long been misinterpreted.[41] Cicero did not mean that the maxim placed consuls above the law. Rather, he offered a supreme principle that governed their conduct in accordance with the law, for

the consuls remained subject to law in at least the sense that they were subject to fundamental or constitutional law.[42]

Straumann's point is not confined to getting Cicero right. Rather, the correct interpretation of the maxim enables an understanding of the institution of emergency dictatorship within the Roman legal order as subject to law, or, as we say today, subject to the rule of law. And since the maxim is taken to stand for the alleged truism that in times of emergency one or other political authority within the state structure may legitimately act unconstrained by law, the correct interpretation helps to make a wider point about legal order in general. The safety of the people cannot be legitimately secured by acting outside of law.

Straumann's study shows that central to the Roman constitutionalist mode of responding to crises was the preservation of, first, the institution of *provocatio*—the citizens' right of appeal against decisions which affected them negatively by those who held high office—and, second, of the principal legislative institutions of the state and their modes of law-making. Such preservation was seen as a matter of the higher order or natural law that expressed the normative core of the republican idea of 'the people' of a political and legal order.[43]

In particular, Straumann brings to the surface the Roman idea of political community as a jural community. As he explains, the jural conception of politics emerged against a backdrop of the decay of Roman political institutions that made vivid the possibility of the disintegration of society into the anarchy of a state of nature and so raised as urgent questions the location of sovereignty in--as well as the fundamental commitments of--the political order. Simply put, the question was raised of the nature of the Roman political order. The Roman answer, as formulated principally by Cicero, rejected Greek theories that

asserted a continuity between ethics and politics such that there is some highest ethical good at which politics aims. Instead, it was based on the argument that politics is limited by 'law-like constitutional principles' so that the highest officers of state are in charge of 'the people' only because it is the case that these principles are in charge of the officers.[44]

In addition, Straumann sketches the trajectory of these ideas through Bodin to Hobbes to the present. As in Hobbes who finished *Leviathan* at a time when civil war had made vivid the possibility of the disintegration of his society into anarchy, the point of political theory is to establish the principles of order that mark the distinction between a condition in which individuals are subject to unmediated coercive power and a civil condition in which they interact with each other within a stable and secure framework of laws.

A mark of this conception of the political is, then, that political order is always legal order, in that the subjects of the law can demand of officials that they justify their coercive acts by showing that there is a basis or warrant in the law for these acts, not only in the positive or enacted law of the order, but also (where relevant) in the constitutional principles of that order. These principles will come more to the fore in times of stress and it is not the case that their application will be uncontroversial. But even when there is deep controversy over their application, they are still considered as the principles that constitute the political realm, so that the disagreements are to be worked out within the institutional structures of that realm.

That the Roman legal order already has this conception is significant. As Straumann shows, the jural conception was first conceived by the Romans, and no one would accuse the Romans of liberalism. As a result, the jural conception of politics is not liberal, except in the following sense. The very idea that individuals do not have to consider themselves as striving

to achieve some highest ethical good, but simply as members of a community in which coercive state action has to be justified as being in accordance with law may in our era favour liberal ideologies over others. Indeed, the claim that authority is a matter of reasoned justification is strongly associated with both liberalism and the constitutionalist tradition.

But notice that that claim opens up the prospect of a realm of politics which is independent of any conception of the highest ethical good for individuals, and that the alternatives in the reason of state tradition are all about closing down political conflict by a legally unconstrained decision. Somewhat ironically, one can consequently argue that if Schmitt is right that political theory needs a conception of the autonomy of the political, it is to be found in the constitutionalist tradition that was first articulated by Roman political theorists and jurists.

Even more important is that the constitutionalist tradition established both the right to reasoned justification as the mark of the political relationship and that an institutional structure be put in place that seeks to ensure that such justification is available. As Straumann shows, in the hands of Bodin and Hobbes the ruling out of a constitutional right of resistance is matched by the installation within the political order of the legal institutions of a well-ordered society, one that militates against a sovereign's need to resort to the secret policies and acts of illegal violence that form part of the *arcana* or 'dark matter'[45] that is the stuff of the reason of state tradition.[46]

The constitutionalist tradition cannot of course claim to have eliminated such dark matter from any particular legal order. Rather, its ambition is to strive for its elimination through a continual process of experimentation in light of experience. It is deeply pragmatic in spirit and in the latter half of the twentieth century has developed an apparatus both internationally and domestically around human rights regimes that is immensely complex in

comparison to the constitutional instruments that typified the period before World War II, let alone those of the Roman Republic. It includes distinctions between derogable and non-derogable rights, different kinds of supervisory bodies at the international and national levels, doctrines of deference, proportionality, reasonableness, margin of appreciation, and so on.[47]

But all this complexity can be distilled down to the constitutional fundamentals of the Roman political and legal order: the subject's right of appeal to a body independent of the official who wields coercive power and the claim that the law—both enacted law and constitutional principle--is in charge of the officials, no matter how elevated their office. These two fundamentals make up the necessary institutional basis of the political right of rights, the subject's right in virtue being subject to state coercive power to have justified any exercise of such power.

The question whether a subject's human rights have been violated thus depends ultimately not so much on whether an official has violated a right on a prior list of rights each with a determinate content, but on the answer to the BLD that is given within the institutional structures of the order. The content of rights and their limits will thus vary from order to order and across time. But that does not make human rights subjective or relative in any interesting fashion. It just makes their content contingent on the justificatory processes within particular societies in which what counts is actual acceptance, though under the scrutiny of the critical theory principle that requires suspicion 'if the acceptance itself is produced by the coercive power which is supposedly being justified.'

Note that the critical theory principle can to some large extent be institutionalized through legal mechanisms that require public reasons and independent checks on both the accuracy and cogency of the reasons. But in order to think such a process worth undertaking, one has to adopt as a regulative assumption of institutional design that the

point is to channel coercive power so that is it mediated in a way that enables its application to be justified. Proponents of this tradition do not, as Schmitt charged, face the option of either ignoring emergencies or suspending their deepest commitments.[48] Rather, they require a 'progressive realization of constitutionalism' in a bid to keep the solution from reintroducing the problem.[49]

Difficult questions remain: What does the rule of law and of human rights actually require of states in terms of justification? Who decides whether the onus of justification has been fulfilled? In particular, who interprets the constitution in situations of emergency? Who balances conflicting human rights (the right of the people to safety v. individual rights)? How do human rights impose limits on possible justifications? But in this light, Schmitt's challenge to the constitutionalist tradition has to be reformulated.

It is no longer the challenge that the sovereign may act extra-legally and so disregard legal entitlements to human rights. Rather, it is that the requirement that the sovereign act legally stretches the language of legality to the point where law's controls become merely formal and the claim to comply with human rights becomes vacuous. The question becomes one of how the state responds to what I have called in other work the 'compulsion of legality'—that it is a necessary condition of legitimate state action that the public officials who perform the action have a legal warrant.[50]

I sketch in that work the two very different 'cycles of legality' the compulsion of legality can set in motion. In one 'virtuous cycle', the institutions of legal order cooperate in devising controls on public actors that ensure that their decisions comply with the principle of legality, understood as a substantive conception of the rule of law. In the other 'empty' cycle, the content of legality is understood in an ever more formal and vacuous manner, resulting in the mere appearance or even the pretence of legality.

With this second cycle, the compulsion of legality may conclude in the subversion of the kinds of values associated with a conception of the rule of law oriented to the protection of human rights. One gets what a UK judge memorably described as a 'thin veneer of legality' over the 'reality' of 'executive decision-making, untrammelled by any prospect of effective judicial supervision."[51] But while the prospect of the empty cycle presents a constant risk, it is more than matched by the opportunity that the virtuous cycle presents. As lawyers, judges and social activists in Trump's USA have shown, what it takes for the virtuous cycle to unfold is commitment and hard work in particular cases and contexts, all done within the jural community that is 'the people' of the modern state.

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[2] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, 1988; George Schwab, trans.), 14.

[3] Carl Schmitt, *The Concept of the Political* (New Jersey: Rutgers University Press, 1976; George Schwab, trans.).

[4] John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980; C.B. MacPherson ed.).

[5] Ibid, paragraphs 22 and 137.

[6] Ibid, paragraph 160.

[7] Evan Criddle, 'Introduction', in Criddle, ed., *Human Rights in Emergencies* (New York: Cambridge University Press, 2016) 1, 11.

[8] Both in Bernard Williams, *In the Beginning was the Deed: Realism and Moralism in Political Argument* ((Princeton: Princeton University Press, 2005, Geoffrey Hawthorn, ed.) 1 and 62.

[9] This is the major difference between my Williams-inspired argument and Rainer Forst's influential account of the right to justification in various works, for example: Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2011) and *Justification and Critique* (Cambridge: Polity Press, 2014). While I find many points of contact between his work and mine, his account of the right to justification depends on the quest for a transcendental philosophical basis for the right that is not only, in my view, misguided, but also has the consequence of along the way importing considerations that require the too robust claim. See, for example, 'The Basic Right to Justification: Towards a Constructivist Conception of Human Rights', in *The Right to Justification*, 203 where he says that his 'moral constructivism' has to find a 'level' which 'shows that moral persons, both in a given context and beyond it, must grant certain rights to one another, rights that they *owe* one another, in a moral sense'; 220-1, his emphasis. As Forst makes plain on these pages, his theory thus seeks an even stronger transcendental grounding than that provided by Jürgen Habermas, one that has a 'core content' 'prior to political justice'; ibid. (Compare his 'The Justification of Human Rights and the Basic Right

to Justification: A Reflexive Approach' in *Justification and Critique*, 38, 46-7.) For trenchant criticism, see Lois McNay, 'The Limits of Justification: Critique, Disclosure and Reflexivity' (2016) *European Journal of Political Theory* 1.

My own view, in contrast, is pragmatic both in that it is based on practice and experience and makes successful practice the test of whether it should continue to be held. It is inspired by Etienne Mureinik's articulation of legal culture as a 'culture of justification'—Etienne Mureinik, 'A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31, 32 as elaborated in David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture', (1998) 14 *South African Journal on Human Rights* 11.

[10] 'Williams, 'Realism and Moralism in Political Theory', 3.

[11] Ibid, and 'Human Rights and Relativism', 62.

[12] Ibid, 62 and 'Realism and Moralism in Political Theory', 3. His emphasis.

[13] Williams, 'Realism and Moralism in Political Theory', 4, his emphasis.

[14] Ibid, 3.

[15] See also his remarks in 'From Freedom to Liberty: The Construction of a Political Value' in Williams, *In the Beginning was the Word*, 75, 77-8.

[16] Williams, 'Human Rights and Relativism', 69.

[17] Ibid, 70.

[18] Ibid, 70. See William E Scheuerman, 'Human Rights Lawyers v. Carl Schmitt' in Criddle, ed., *Human Rights in Emergencies*, 175.

[19] Williams, 'Realism and Moralism in Political Theory', p. 3.

[20] Ibid, 4.

[21] Ibid, 8.

[22] Williams, 'Human Rights and Relativism', 72

[23] Williams, 'Realism and Moralism in Political Theory', 3.

[24] Williams is hardly alone in his inattention to Hobbes's legal theory. It is characteristic of nearly all Hobbes scholars.

[25] Although Williams barely discusses law, it is clear that he regards law and the rule of law as part of the answer to the first political question See his remarks about Habermas, 'Realism and Moralism in Political Theory', pp. 15-16.

[26] This section summarizes a view of Hobbes I have developed in several places, for example, David Dyzenhaus, 'Hobbes on the Authority of Law' in David Dyzenhaus and Thomas Poole, eds., *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012) 186. The account below is primarily an account of the argument in Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 2014; Richard Tuck, ed.).

[27] Ibid, '*A REVIEW*, and *CONCLUSION*', 491.

[28] See Dyzenhaus, 'Hobbes on the Authority of Law'.

[29] This claim requires me to treat as an aberration Hobbes's claim in *Leviathan*, chapter 21, 153, that the sovereign can act purely on the basis of power rather than law, as well as Hobbes's reliance on the biblical story of David and Uriah in the same chapter at 148. For the argument as to why one should take this position, see David Dyzenhaus, 'How Hobbes met the "Hobbes Challenge"' (2009) 72 *Modern Law Review* 488, 493-6. For a view of Hobbes that sees him as moving between the constitutionalist and reason of state traditions, see

Thomas Poole, 'Hobbes on Law and Prerogative', in Dyzenhaus and Poole, *Hobbes and the Law*, 68.

[30] Hobbes, *Leviathan*, chapter 14, 93: see the marginal note—'not all rights are alienable'; and see further, chapter 21, 150-1.

[31] Ibid, chapter 27.

[32] I owe these insights to the work of Alice Ristroph, for example, 'Criminal Law for Humans' in Dyzenhaus and Poole, *Hobbes and the Law*, 97.

[33] On the importance of publicity in Hobbes, see Jeremy Waldron, 'Hobbes and the Principle of Publicity' (2001) 82 *Pacific Philosophical Quarterly* 447.

[34] Thomas Hobbes, *Behemoth or the Long Parliament,* Ferdinand Tönnies, ed., Stephen Holmes, Introduction (Chicago: University of Chicago Press, 1990), 16.

[35] For example, Hobbes, *Leviathan*, chapter 30, 232: 'And the grounds of these Rights, have the rather need to be diligently, and truly taught; because they cannot be maintained by any Civill Law, or terrour of legal punishment.'

[36] Hobbes, *Behemoth*, 58-9.

[37] For illuminating discussion of Hobbes's realism, see Robin Douglas, 'Hobbes and Political Realism' (2016) *European Journal of Political Theory* 1 and David Runciman, 'What is Realistic Political Philosophy' (2012) 43 *Metaphilosophy* 58. Note that while the basic insight of Realism is sound that one should avoid the reduction of legitimacy to a liberal substantive position, it is also obvious in the extensive debates about Realism that no realist wants to embrace the second kind of reductivism. For a recent round in these debates, see the special issue of (2016) 33 *Social Philosophy and Policy*.

[38] Hobbes, *Leviathan*, chapter 13, 86-7.

[39] Kinch Hoekstra, 'Hobbesian Equality", in S.A. Lloyd, ed., *Hobbes Today: Insights for the Twenty First Century* (Oxford: Oxford University Press, 2013) 76, 77.

[40] Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denken* (Hamburg: Hanseatiche Verlag, 1934).

[41] Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (Oxford: Oxford University Press, 2016), 35 ff.

[42] Ibid, 36.

[43] Ibid, 129-39.

[44] Ibid, 25.

[45] See Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge: Cambridge University Press, 2015), 56, arguing that Hobbes thought that the sovereign must have capacities to act extra-legally and that these make up the 'dark matter of Hobbes's constitutional universe.' See also Thomas Poole, 'The Law of Emergency and Reason of State' in Criddle, ed., *Human Rights in Emergencies*, 148.

[46] See Straumann, *Crisis and Constitutionalism*, 306-7. Influential in his argument here is Luc Foisneau, 'Sovereignty and Reason of State: Bodin, Botero, Richelieu and Hobbes' in Howell A. Lloyd, ed., *The Reception of Bodin* (Leiden: Brill, 2013) 323.

[47] See the chapters in Part 1 of Criddle, ed., *Human Rights in Emergencies*.

[48] Schmitt, *Political Theology*, 14.

[49] CJ Friedrich, *Constitutional Reason of State* (Providence: Brown University Press, 1957), 90. Friedrich, who had observed the travails of the Weimar Republic as a student in Germany before he embarked on a career that made him one of the USA's most influential political

scientists, wrote that while the Kantian solution of a world state was unattainable, there was nevertheless something to be learned from it. It had 'the advantage of providing a developmental model and a pragmatic, if not a practical projection into the future, by which concrete political action programs may be inspired and policy shaped'; ibid, 89. For an exploration of similar ideas in the international domain, see Evan Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford: Oxford University Press, 2016).

[50] For an extensive treatment of these themes, see David Dyzenhaus, 'Preventive Justice and the Rule of Law Project', in Andrew Ashworth, Lucia Zedner, and Patrick Tomlin, eds., *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) 91.

[51] Sullivan J. in *Re MB* [2006] EWHC 1000 (Admin) [2006] H.R.L.R. 29 (2006) 150, para 103.