

The modern state as mortal god. On rogues and rogue states¹

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Abstract

Prisoners are confined in the name of the state as the holder of the monopoly of coercion and violence. To delegitimize religion as a political factor, the modern European state has often been upgraded to a divine authority, endowed with sovereign, that is: unlimited power. For Hobbes, this state was an answer to the “state of nature”, a state of permanent threatening violence, where everyone has a “right to everything”. His sovereign state even has the right to punish and kill innocent citizens if he thinks it is necessary. However, as a citizen I do not have to obey when the sovereign wants my death. Both Hobbes and Hegel defend the state, inclusive its roguish behaviour. Is “rogue state” perhaps a tautology? Remarkable, also twentieth-century scholars like Schmitt and Kahn defend this state: in a dangerous world, we have to be prepared for the exceptional situation. Kafka points to the societal and psychological roots of our roguish behaviour – the gap between our self-caressing (collective) self-image and our treating of others, especially strangers and people in prison. It is very tempting and pleasant to get judgmental and to encourage the mortal god (the state) to judge people.

Keywords

mortal god, rogues, sovereignty, prison, Hobbes, Hegel

1. Introduction

For this valediction, I put to myself the task of choosing a theme, which unites both of the terrains of my research and teaching in the past ten

1 This is a shortened version of the valediction-speech of the author, held at Tilburg University at October 25, 2020.

years: practical philosophy (ethics and social and political philosophy), and questions around providing prison chaplaincy in our penal institutions.

A sentence from my inaugural lecture in 2010 may here serve as point of departure. I then stated that a visit to a penal facility was first of all “a visit to one’s own prejudices”.² Let me for a moment zoom in to a visit, some years ago, to one of our prisons or “state hotels” as they are sometimes – not without prejudices – are called. As the guest of one of the chaplains, they allowed me to participate in a group discussion with some of the detainees. During this group session, one of the participants, a friendly older man, caught my attention by his prudent, not to say sage contributions. I could not help but start to wonder: what is this charming grandfather-figure with his well-considered opinions doing here? After the session, we struck up a conversation. He turned out to be very frank about his past. “Best to leave me here”, he confided of his incarceration in the “long stay” unit. I must have looked somewhat bewildered, for he continued by explaining he had already killed three people, and each time he had been released, had murdered again within two years.

I tried to contain my concern somewhat: here I was chatting to a rogue, albeit a self-aware and so to speak lucid one – a somewhat chilling experience. Confusingly, this man possessed a merciless self-insight which few people outside of prison display, including often oneself. Many chaplains in the prison system have told me of similar experiences. They told me also of the miscarriages of justice, where people sat innocently for years, branded and treated as rogues by society – the Lucia de B.’s of this world.³ By itself, the possibility of wrongful imprisonment should serve to caution us in our opinions about prisoners – something which for many of us, including our politicians, may however be asking just a bit too much.

2 Theo W.A. de Wit, *Dies Irae. De secularisering van het Laatste Oordeel* (Universiteit van Tilburg: Tilburg, 2010), 39; English version: “Only God can Judge me”. The Secularization of the Last Judgement.” *Bijdragen. International Journal in Philosophy and Theology*, 72, no. 1 (2011): 77–102.

3 Theo W.A. de Wit, “Legitiem geweld. De grimmige kant van de democratische rechtsstaat.” *Christen-Democratische Reflecties* 1, no 3 (2013): 7–17. Paul Frissen, *Staat en taboe. Politiek van de goede dood* (Amsterdam: Boom, 2018), 137ff., provides a good account of why the state’s monopoly on violence can nowadays no longer be taken for granted.

However, let us rather pause to consider the first concept in the term “state hotel”. At the end of the day people are incarcerated in the name of the *state* as an institution which enjoys a monopoly on legal threat, coercion and physical violence – if possible, in that order.⁴ For a long time, the punishing state was conceived of as an earthly, “mortal god”. The term “earthly god” is not of my coinage: the German philosopher Ludwig Siep recently published a thorough account of the genesis and relevance of this notion.⁵ He calls it a “Hegelian idea”, and devotes much attention to Hegel’s concept of the state as the incorporation of morality.

2. The modern deification of the state

Siep first reminds us that the idea of the religiously neutral state was born in *Christian* Europe. An important intellectual vehicle in this regard was the notion of natural right, possessed by all humans because of their reasoning nature – an older idea, by the way, one with, amongst others, late-scholastic roots. But because humans are not only reasonable beings (another lucid insight by the way), an institution is needed to transform the moral precepts of this natural right into positive laws, so to speak to ensure that things are not merely left at good intentions.⁶ This institution is the state, which no longer bases its legitimacy on holy revelations or divine laws, but because it is considered an expression of the will of the people who had created it.

Determining the proper relationship between natural right, state and religions and churches thus became the central task of pre-modern political thinking. Siep correctly observes that this task has still not been completely accomplished.⁷ The question how a state is to remain religiously

4 Lucia de Berk, a qualified Dutch psychiatric nurse, sentenced to life imprisonment in 2004 for the murder of a number of patients, and following a reopening of the case and consideration of new evidence in 2008, released in 2010 ([Online]. Available: https://en.wikipedia.org/wiki/Lucia_de_Berk).

5 Ludwig Siep, *Der Staat als irdischer Gott. Genese und Relevanz einer Hegelschen Idee* (Tübingen: Mohr Siebeck, 2015). See also Alexander Thiele, *Der gefräßige Leviathan. Entstehung, Ausbreitung und Zukunft des modernen Staates* (Tübingen: Mohr Siebeck, 2019), especially Chapter 1, “Entstehung und Merkmale des modernen Staates,” 11–109.

6 Siep, *Der Staat als irdischer Gott*, 2–3.

7 *Der Staat als irdischer Gott*, 3.

neutral without alienating religions even remains “virulent”⁸ today, just as the inverse question how religions and other spiritual interest groups are to behave so as not to suffocate the state in their coils.⁹ It has been a rather risky undertaking, for not only did the idea of a state neutral towards religion remain highly controversial in Europe into the 19th and 20th centuries, the state also had to compete with the interests of churches and religious communities in giving content to this natural right.¹⁰ It is in this context of competing authorities and an age-old history of faith-bound territorial states, that the temptation to “upgrade” the secular state to a divine or absolute institution is to be understood – a tendency Siep encounters in an entire row of modern thinkers, from Hobbes and Rousseau to Fichte, Kant and Hegel. The deification of the state thus served to delegitimize religion as political power.¹¹

Hegel’s “earthly god”

First an example from the last author treated by Siep, Georg Wilhelm Friedrich Hegel. The development of the spirit of freedom in history (as is known, Hegel’s main theme) aims at the creation of constitutional states, more precisely: national constitutional states. To Hegel, not Catholicism, but Protestantism with its sanctification of worldly existence, embodied the immanent truth of religion.

“Shell of the eternal” (*Hülle des Ewigen*) and “manifestation of the absolute” Hegel calls the national state in which humans – in Aristotelian fashion – fulfil their destiny as political animals.¹² The state is therefore not the result of a contract, but a unification, which aims at itself. Hegel therefore also assigns the predicate of an Aristotelian god to the state: “This substantial unity is an absolute, immovable goal in itself in which freedom attains its

8 *Der Staat als irdischer Gott*, 11.

9 This metaphor is derived from Arnon Grunberg, *Vriend en vijand. Decadentie, ondergang en verlossing* (Amsterdam: Prometheus, 2019), 56.

10 E.W. Böckenförde, “Die Entstehung des Staates als Vorgang der Säkularisation” in *Der säkularisierte Staat Sein Charakter, seine Rechtfertigung und seine Probleme im 21. Jahrhundert* (München: Carl Friedrich von Siemens Stiftung, 2007), 43–75.

11 Siep, *Der Staat als irdischer Gott*, 11.

12 Der Staat als irdischer Gott, 129. See also Andrew Buchwalter, “Hegels Begriff des Staates als ‘Irdisch-Göttliches.’” *Deutsche Zeitschrift für Philosophie* 56, no. 4 (2008): 495–509.

highest right, just as this ultimate goal also enjoys the highest right with regard to the individual, whose highest duty is to be a member of the state (...).”¹³ To Hegel this also implies the individual’s willingness to lay down his or her own life in times of war.¹⁴

“Temple of reason”, “divine will”, and, indeed, “earthly god”: these are all terms used by Hegel in singing the modern state’s praises. Hegel was not one for modesty. His philosophy of right therefore also concludes with the following lofty words: “The present has abandoned its barbarism and unlawful caprice, and truth has cast asunder its transcendence and contingent power. Thus, the true reconciliation has become objective, whereby the state becomes the deployment of the image and reality of reason.”¹⁵ Whoever has read any of Hegel’s texts knows that “capriciousness” or arbitrary behaviour (*Willkür*) and the purely subjective have no place in the historical reason he unfolds.

To us disillusioned European democrats, Hegel’s ode to the state nowadays sounds exotic and bombastic when we consider the problems facing our governments and parliaments in for instance the Netherlands and Belgium, or the way in which Europe managed her crises over the past decade. In the meantime, we are starting to agree with the Belgian author Geert van Istendael’s witty observation that “Europe will be Belgian, or will not be.”

Nevertheless, cautions Siep, we should refrain from simply speaking of a “sanctification” of the state or politics. Hegel’s modern state is not based on myth and its associated rituals and symbols, and in the first instance only demands a rational loyalty.¹⁶ To Hegel, religious communities and churches continue to exist alongside the state – not surprisingly, his philosophy of right is located in the tradition of Kant, and even of Thomas of Aquinas.¹⁷

13 Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (Frankfurt am Main/Berlin/Wien: Ullstein Buch, 1972), 215 (Par. 258).

14 See Peter Jonkers, “Justifying Sacrifice.” *Neue Zeitschrift für systematische Theologie und Religions-philosophie* 50, no. 3-4 (2008): 313–329.

15 Hegel, *Grundlinien*, 302 (Par. 360).

16 Siep, *Der Staat als irdischer Gott*, 22–23.

17 *Der Staat als irdischer Gott*, 134–135.

Thomas Hobbes' mortal god

However, let us turn to consider the original version of such a thinking of the state in terms of an earthly or mortal god, to Thomas Hobbes, the father of contract thinking in modern political philosophy.¹⁸ In the seventeenth chapter of his magnum opus *Leviathan* (1651) we read the following with regard to the coming into being of the state by means of a contract of everyone with everyone. It is “as if every man should say to every man: I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner. This done, the multitude so united in one person is called a Commonwealth; in Latin, *Civitas*. *This is the generation of that great Leviathan, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defence.*”¹⁹ The establishment of this mortal God in Hobbes' construct of state is the answer to a rather dramatic situation, which he refers to as the “state of nature” (*status naturalis*). Even today, the discussion continues as to what Hobbes' exactly based this notion on: are we dealing with a mere hypothetical thought-construct, or does it refer to an actual historic state of affairs, which had obtained in Hobbes' England or the American colonies? Does it refer to (the political threat of a looming) civil war, or is it mostly a rewriting of the history of the plague-ravaged Athens of antiquity?²⁰

18 See Rudolf Burger, “Der sterbliche Gott. Eine Bildbetrachtung.” *Merkur* 11, no. 59 (November 2005): 1032–1041.

19 Thomas Hobbes, *Leviathan or the Matter, Forme, & Power of a Commonwealth Ecclesiasticall and Civill*, ed. J.C.A. Gaskin, (Oxford/New York: Oxford University Press, 1996), 114.

20 See Thomas Hühne, “The State of Nature” in *John Locke, Thomas Hobbes and Jean-Jacques Rousseau. A critical analysis and comparision in consideration of their social and historical background* (Norderstedt Germany: GRIN Verlag, 2013). And Julian Nida-Rümelin, “Bellum omnium contra omnes. Konflikttheorie und Naturzustandskonzeption in 13.Kapitel des Leviathan,” in Wolfgang Kersting (Hrsg.), *Thomas Hobbes, Leviathan oder Stoff, Form und Gewalt eines bürgerlichren und kirchlichen Staates* (Berlin: Akademie Verlag, 1996), 109–131. For the colonial background of Hobbes' concept of the state of nature, see Philip Manow, *Politische Ursprungphantasien. Der Leviathan und seine Erbe*, Konstanz: Konstanz University Press, 2011, 11–12; and Franciska Falk, *Eine gestische Geschichte der Grenze. Wie der Liberalismus an der Grenze an seine Grenzen kommt* (München: Fink Verlag, 2011). According to Carlo Ginsburg, Thucydides' description of what happened in Athens after the plague had broken out in 430 BCE, had a profound influence in Hobbes' conceptualization of the state of nature. (Hobbes' first major work by the way, was a

What is however certain, is that the state of nature in Hobbes' description thereof, is populated with some kind of rogues, that such a society is one great collective delict – some have indeed referred to it as “the society of Cain.”²¹ Hobbes' grim description of this barren state belongs to some of the best-known sentences in the history of modern political thinking. In this state of nature reigns “continual fear, and danger of violent death; and the life of man [is], solitary, poor, nasty, brutish, and short.”²² In other words, we are dealing with a state of war, qualified by the footnote that, in speaking of a state of war, we should understand that “the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary. All other time is peace”.²³

I stated that the state of nature is populated by “*some kind of rogues*,” for *the trouble is that in this state it is impossible to employ terms which refer to moral categories, ones such as “rogue” or its equivalents “scoundrel”, “villain” or “cad.*” Based on his description of a war of all against all, Hobbes contends that “*to this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice.*” In the state of nature, “*every man [is] his own judge*”.²⁴

The right to everyone and everything (*ius omnium in omnia et omnes*)

Only once we start concentrating on a detail in Hobbes' description of this state of nature, do we discover the new and hitherto unheard in his approach. In numerous of his writings this thinker speaks of a “natural

translation of Thucydides' history of the Peloponnesian War into English, published in 1629). See Carlo Ginsburg: “Welt der Leviathane. Furcht, Verehrung, Schrecken – Thomas Hobbes Politische Theologie.” *Lettre International*, (Winter 2008), 23–27; 24. And Giorgio Agamben, *Leviathans Rätsel* (Tübingen: Mohr Siebeck, 2014).

21 See Roberto Esposito, *Communitas. Origine et destin de la communauté*, précédé de *Conloquium*, de Jean-Luc Nancy (Paris: Presse Universitaire de France, 2000), 28.

22 Hobbes, *Leviathan*, 84.

23 *Leviathan*, 84.

24 *Leviathan*, 85 and 93.

right of everyone to everything” which would exist in a state of nature.²⁵ This formulation (*ius omnium in omnia*) was known from, amongst others, the Stoics, to whom it meant the right of use enjoyed by humans as logos-beings over “lower nature” (*natura inferior*).

Some have compared Hobbes’ natural law to Thomas of Aquinas’ “absolute natural law.” Here the state of nature is a situation where “the ethics of the Sermon on the Mount becomes immediate reality. There is no power: all are free; social differences have ceased to exist: all are equal; personal and exclusive property no longer exists: everything is communal, everyone is entitled to everything.” Hobbes, however, while taking all of this more or less verbally on board, however, quietly employs a legal subject completely different to the political-social animal of the Aristotelian-Christian tradition.²⁶

Indeed, for Hobbes, humans are motivated by “competition, diffidence and glory.”²⁷ An additional factor, however, is of conclusive importance, namely human natural equality, that is, the fact that nature “hath made men so equal, in the faculties of body and mind”²⁸ Where for instance physical power is concerned, “the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself.”²⁹ Here we already see a clear difference with Aristotle: to Hobbes there are no natural relations of power such as between master and slave or man and woman. Precisely for this reason there is no stable domination of anyone over another, and relations of quasi-natural dependence do not exist. Rather, it is a matter of “if any two men desire the same thing, which nevertheless they cannot both enjoy,

25 See for instance Hobbes, *Leviathan*, Ch. 14, 87: “(...) in such a condition every man has a right to everything”; Ch. 31, 237: Seeing “all men by nature had right to all things, they had right every one to reign over all the rest”; and in *On the Citizen*, ed. Richard Tuck & Michael Silverthorne (Cambridge: Cambridge University Press, 1998), 28: “Nature has given *each man a right to all things*.”

26 Jürgen Habermas, “Die klassische Lehre von der Politik in ihrem Verhältnis zur Sozialphilosophie,” in *Theorie und Praxis. Sozialphilosophische Studien* (Frankfurt am Main: Suhrkamp, 1978 [1963]), 48–89; 69.

27 See Nida-Rümelin, “Bellum omnium contra omnes,” 112.

28 Hobbes, *Leviathan*, 82.

29 *Leviathan*, 82.

they become enemies".³⁰ Hobbes' competition logic has often been linked to René Girard's famous statements with regard to "mimetic desire."³¹

Thus, we may conclude that Hobbes' interpretation of natural right based on the Sermon of the Mount, holds an abysmal irony. For by employing a completely different legal subject, Jürgen Habermas observes, "he is easily able to demonstrate that precisely the right of everyone to everything, once applied to a horde of "free" and "equal" wolves, would inevitably lead to a murderous situation where everyone tears everyone else apart."³²

The subjectivist turn: From the *recta ratio* to the "own reason"

Some authorities on Hobbes speak of a "subjectivist turn" and a radical "rethinking" of classical natural right.³³ Natural right, in Hobbes' definition, "is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the most suitable means thereunto."³⁴

Conclusive is the subjectivation of the idea of right that takes place here: my will is no longer as a matter of course directed "at a pre-given objective right, but rather the opposite: the right is determined by my own will and of course my ability to make use of my own physical powers."³⁵ In short, the traditional *recta ratio* ["right reason"] turns into *own reason*. Hobbes does not hesitate to point out the ultimate consequence of such a state of affairs: the "right of everyone to everything and all (*ius omnium in omnia et omnes*), is the right to everything that is useful for me, it is the right of everyone to all and everyone, even to one another's body."³⁶ The current #MeToo movement could tweet out what Hobbes says here: as a result

30 *Leviathan*, 83.

31 See Hans Achterhuis, *Het rijk van de schaarste* (Amsterdam: Ambo, 1988); and Paul Dumouchel, *Le sacrifice inutile. Essai sur la violence politique* (Paris: Flammarion, 2011).

32 Habermas, „Die klassische Lehre von der Politik,“ 79.

33 Fritioff Brandt, *Thomas Hobbes' mechanical conception of nature* (Copenhagen: Hachette, 1928), 208; Habermas, „Die klassische Lehre von der Politik,“ 69.

34 Hobbes, *Leviathan*, 86.

35 Brandt, *Thomas Hobbes' mechanical conception of nature*, 207.

36 Hobbes, *Leviathan*, 87.

of the right of nature by which men (including priests) exercise power – including in states which formally call themselves constitutional states – women, children and other vulnerable groups still continue to live in a state of nature.

In addition, others have pointed out the continuity of certain aspects of Hobbes' state of nature, not only in the domains of international politics,³⁷ but also in our ways of co-existing. Thus, the French philosopher Alain Finkielkraut considers Hobbes' *Leviathan* as “the sharpest description of the current crisis of co-existence.”³⁸ He then gives a number of examples from contemporary France, where teachers, policemen and referees get into confrontational situations with the youth who, following their own reason, see all forms of criticism, restriction and arbitration as an intolerable “lack of respect.”³⁹

And in an article on Hobbes, the Dutch Philosopher Hans Achterhuis gives the example of a day on which the Montreal police force went on strike and the city, so to speak, returned to a state of nature: “By the end of the day six banks had been robbed, a hundred or so shops had been looted, twelve fires had been started, countless windows had been smashed in, and an additional three million dollar in damages had occurred.”⁴⁰

3. The punishing sovereign state

But before my argument starts degenerating into a tirade against today's youth, into cultural pessimism and an accompanying call for new authoritarian leaders, it's high time to present the other side of the coin, namely the shadow side of the mortal god Hobbes, Hegel and a row of other thinkers presented in answer to the spectre of the state of nature. Hobbes' entire rhetoric around the state of nature, of which, as said, the

37 Luuk van Middelaar, “De stichting van Europa,” in: Marin Terpstra (ed.), *Onenigheid en gemeenschap* (Amsterdam: Boom, 2012), 548–567.

38 Alain Finkielkraut, “La querre des respects,” in *L'identité malheureuse* (Paris: Stock, 2014), 169–213, 169.

39 Finkielkraut, “La querre des respects,” 169–170.

40 Hans Achterhuis, “De staat van geweld: Hobbes versus Rousseau,” in Maurice Adams & Willem Lemmens (eds.), *Hobbes. In de schaduw van Leviathan* (Pelckmans/ Klement: Kapellen, 2007), 146–169; 153.

status remains ambiguous, is in service of his plea to embrace the mortal god. His mortal god, we can conclude, is also the answer to a form of subjectivity, which was unchained by the absolutizing of partisan religious positions during the wars of religion sweeping through his 17th century Europe. His protecting state secularized theological concepts, first that of an omnipotent god.⁴¹

But here we stumble onto an alarming complication which has caused many to wonder whether with Hobbes' solution we were not merely jumping from the pan into the fire – a complication which is most clearly expressed on the terrain of penal law. Once we have given up our right to everything and have transferred it to the mortal god, we in return expect it to maintain prudent moral laws (by means of sanctions) in order to dispel horizontal fear, and to ensure that social peace is maintained. Fear does not completely disappear; it transforms from an indeterminable fear of the arbitrary behaviour of my fellow citizens into a calculable fear of punishment in cases of transgression of the law.

This seems to be some kind of progress, but there is a snake in the grass here. For once the authorization has been given, as a citizen I cease to be as actor; in Hobbes' construction the sovereign becomes the "author" of all my actions.⁴² For instance, by means of laws the sovereign managed to bring about an end to the English wars of religion, by single-handedly establishing a kind of minimal, compulsory religious truth: the sovereign has the sword in his right hand, and the bishop's mitre in his left. One can therefore say that in Hobbes the Biblical "fear of God" (Hebrew: *yir'ah, timor dei*, in Hieronymus' Latin translation, *phobos theou*, in the Septuagint), has been transformed and secularized to an *awe of the state*.⁴³

41 See Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (Chicago & London: The University of Chicago Press, 2005), 36: "All significant concepts of the modern theory of the state are secularized theological concepts."

42 Hobbes, *Leviathan*, 115.

43 In this regard, see especially Ginsburg's contribution, "Welt der Leviathane," which focuses on the parallels between the emergence of religion and the state in Hobbes' work: for Hobbes, both were born out of fear. Thus Hobbes' translation of a passage from Thucydides concerning the "state of nature," which descended upon the plague-ravished Athens: "Neither fear of the gods, nor laws of men, awed any man" (Ginsburg, "Welt der Leviathane," 26). According to Ginsburg the Hebrew, *yir'ah* means both *fear* and *reverence*.

The authorization is *without reservations*, with the ultimate consequence that also in terms of penal law the sovereign gets a free hand.⁴⁴ Not only when I break the law, but also when I am innocent: I have to accept the punishment.

The death penalty

Does that also include the death penalty? When the mortal god is of the opinion that keeping the peace is best served by my death, it has – according to Hobbes – the fullest right to bring about my death. Three centuries later the incisive Christian thinker C.S. Lewis – in an argument attacking the modern theory of punishment which no longer considers crimes in terms of moral guilt and accountability, but in terms of safety, prevention and therapeutic effectiveness – would denounce this as “wicked.”⁴⁵ The cruelty of this modern “humanitarian” theory – extremely popular in the post-World War Two England Lewis was writing – lies hidden precisely in its good intentions and amoral statute. When in a society, we read in Lewis, “a victim is urgently needed for exemplary purposes and a guilty victim cannot be found, all the purposes of deterrence will be equally served by the punishment (call it “cure” if you prefer) of an innocent person, provided that the public can be cheated into thinking him guilty. It is no use to ask me why I assume that our rulers will be so wicked. The punishment of an innocent, that is, an undeserving, man is wicked only if we grant the traditional view that righteous punishment means deserved punishment.”⁴⁶ Applied to our Dutch actuality: punishing a Lucia de B. or slandering a minority group could be useful to a society by fostering a “sense of security” and the necessary social cohesion. In addition, if we were to be consistent to the newest slogan *believe the victim*, Arnon Grunberg writes in a recent article on the Dutch system for the criminally insane, then “nobody gets falsely blamed anymore.”⁴⁷

44 See especially *Leviathan*, Chapter XXVII: “Of Crimes, Excuses and Extenuations,” 192–205.

45 C.S. Lewis, “The Humanitarian Theory of Punishment,” 6 *Res Iudicatae* 224 (1953): 224–230; 227. See my commentary: Theo W.A. de Wit, “Humanitaire wredeheid. Met C.S. Lewis op zoek naar een ethiek van het straffen.” *Strafblad* (November 2018), 8–15.

46 Lewis, “The Humanitarian Theory,” 227–228.

47 Arnon Grunberg, “We sollen met tbs’ers alsof het Gogols dode zielen zijn.” *Trouw* [Online]. Available: <https://www.topics.nl/we-sollent-met-tbs-ers-alsof-het-gogols-dode-zielen-zijn>

Also, in Hobbes the authority is neither primarily just or unjust, but rather, effective or ineffective, a successful or a *failed state* as we would nowadays say. Some have therefore correctly argued that the fourth metaphor Hobbes uses for his state is the most accurate one. Not only does he compare his state to the sea monster Leviathan from the Book of Job, but also to a mortal god, a “large man” (*magnus homo*), and a “great machine.” The state is a machine of law animated by a sovereignly representative person.⁴⁸ In addition, to the extent that this machine is made complete, all secular appeal to religious concepts becomes superfluous.

Nature is stronger than culture

Still, Hobbes’ machine of law is not only the precursor to the positivist constitutional state or even the modern state which resorts to the soft manipulation or nudging of its citizens, developing into an electronic prevention and surveillance state, such as may be witnessed in China and a number of other countries. Regarding the question of the death penalty, Hobbes namely poses the question: am I as human obliged to subject myself to the sovereign’s right in matters of life and death? Hobbes’ answer is negative, for the death penalty is at odds with the exchange of obedience for protection located at the very basis of the contract of voluntary subjugation: “a man cannot lay down the right of resisting them, that assault him by force, to take away his life,” we read in Hobbes.⁴⁹

The result of this collision between the rights of the sovereign and those of the citizen we may determine as follows. The lawful state does not have as its counterpart a physical human being with natural rights, but a citizen, an artificial *persona*, a “mask” who pronounces its own death sentence. However, this citizen once more turns into a natural, physical being as

dode-zielen-zijn-a13056556tr [Accessed: 1 July 2019]. He talks of a “nippy consequence.”

48 See Theo W.A. de Wit, *De onontkoombaarheid van de politiek. De soevereine vijand in de politieke filosofie van Carl Schmitt* (Nijmegen, 1992), Ch. 4, “Thomas Hobbes in de twintigste eeuw: de dood van de Leviathan,” 193–261; 223 and 240ff. And Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes. Sinn und Fehlschlag eines politischen Symbols* (2nd ed., Edition Maschke: 1998 [1938]), 100.

49 Hobbes, *Leviathan*, 88.

soon as the sovereign gets it into its head to kill him. In such instances, nature is stronger than culture.⁵⁰

The sovereign also exists in two forms. In Hobbes the state as *mortal god* serves the interest of its own survival well by actually maintaining the peace and thus fostering development and prosperity. As *mortal god*, the sovereign is potentially a rogue – for its own protection, it is able to sovereignly (*legibus solutus*) make decisions affecting the life and death of its citizens. We may therefore support Giorgio Agamben's statement that the state of nature in which the state finds itself with its natural law is “the prototype of a state of exception,”⁵¹ a situation in which violence is neither legal nor illegal. In this state of exception, it is a matter of “the state continues to exist, but right retreats.”⁵²

The self-legitimization of the authoritarian state mostly takes the following form: the state protects its potentially dangerous, rebellious citizens against their own passions – think of contemporary states like Russia, Turkey, Brazil and many more. This rogue state (I will return to this term) is necessary in order to keep in check our slumbering dangerousness or malice. We could also, somewhat less paternalistically, conclude: The state “is the bosom enemy of the society it protects.”⁵³

Hegel's theodicy of the state

Let us briefly return to Hegel's mortal god. I characterized Hobbes' variation of the mortal god as a rough version of Hegel's earthly god: in Hobbes, and later again in Carl Schmitt, potential state violence, including its political-theological roots, is still visible in its unvarnished form. By contrast, Hegel's earthly god is subject to a rational operation, which in

50 For a comparative formulation, also see Brandt, *Thomas Hobbes' mechanical conception of nature*, 213.

51 Giorgio Agamben, *Ausnahmezustand* (Frankfurt am Main: Suhrkamp, 2004), 41. Also see Lars Östman, “The Frontispiece of Leviathan – Hobbes' Bible Use.” *Akademia*, Vol. 2, no. 1 (2012): 1–16; 9.

52 Carl Schmitt, *Politische Theologie*, *Vier Kapitel zur Lehre von der Souveränität* (München/Leipzig, 1922), 18.

53 Étienne Balibar, “Hegel, Hobbes, and the ‘Conversion of Violence,’” in *Violence and civility: on the limits of political philosophy* (New York: Columbia University Press, 2015), 25–63; 32.

terms of penal law we can best describe as a speculative white-washing exercise. Of course, Hegel realized that concrete states are far from perfect, he even spoke of “disfigured” (*defigurirte*), “degenerate” and “sick” states.⁵⁴

Let us start by succinctly summarizing the difference in the approaches of these two thinkers. Where social violence and the triumph over it are concerned, Hobbes’ argument is no longer moral or religious, but anthropological: outside of the state’s authority, people are extremely competitive, suspicious and ambitious.⁵⁵ It is a matter of allowing rationality to triumph over the natural rights of everyone by means of a social contract. Concrete *history* in this anthropological approach appears as an unwanted guest, a sort of “return of the oppressed,”⁵⁶ for instance in the form of revolts and religious passions turned fanatical. Hegel’s argument on the other hand is historical: to him, violence, or in philosophical terms, the “work of the negative”, is a historical force, and the task of the philosopher is thinking “the speculative identity between destruction and construction, between violence and institution.”⁵⁷

Etienne Balibar speaks of the “conversion” or reassignment of violence and crime in Hegel. In the introduction to his lectures on the philosophy of world history entitled “Reason in History” (*Die Vernunft in der Geschichte*) Hegel argues that the transition from one realization of freedom to the next level, by necessity entails a violation of existing moral principles and the state’s laws. Typical of these situations is the appearance of “great men” – of which Julius Caesar and Napoleon are exceedingly good examples. Caesar’s personal goal, the undivided sovereignty of Rome, according to Hegel coincided with the inherently necessary course of the history of Rome and the world, even when it was achieved with immoral and criminal means. “Such are the great men of History”, Hegel teaches us: “The substance of their own particular ends is the will of the world spirit.

54 Siep, *Der Staat als irdischer Gott*, 73, 74.

55 Schmitt would later also refer to the necessity of a “pessimistic” anthropology for political thinking. Schmitt, *The Concept of the Political* (Chicago & London: The University of Chicago Press, 1996), Chapter 7, 58–69; 61: “(...) all genuine political theories presuppose man to be evil, i.e., by no means an unproblematic but a dangerous and dynamic being.”

56 In Balibar’s formulation, “Hegel, Hobbes, and the ‘Conversion of Violence,’” 32.

57 Balibar, “Hegel, Hobbes, and the ‘Conversion of Violence,’” 32.

Their true power resides in this hidden content, which is present in the universal unconscious instinct of humankind.”⁵⁸

Caesar’s crimes are therefore no common transgressions: they are no “private” crimes punishable by law, but “public” crimes judged by (world-) history. Hegel is concerned with individuals “whose crimes are transformed (*verkehrt*)” into means which serve to realize a certain spiritual ideal or principle. Against these great men the mundane Christian “litany of private virtues – modesty, humility, charity, liberality, etc. – must not be raised.”⁵⁹ Hegel also explicitly speaks of his philosophy of history as of a “true theodicy, the justification of God in history.”⁶⁰ The mortal god therefore realizes itself historically, sometimes in a roguish way.

The cunning of reason: Hegel and Marx

All of this has come to be known as the “cunning of reason” operating in history. With regard to Hegel’s world spirit we may safely speak of a “secular equivalent of providence,” which in this famous German thinker abolishes a number of differences, such as those between conscious and unconscious (or “instinctive”) action, morality and immorality, and between subject and object or victim of history. We can observe the unheard of ethical flexibility of this style of thinking: morality can turn out to be immoral (for retarding the course of the world spirit), and the other way round; subjective impulses of contingent individuals may be written into the genesis of objective morality; crimes may turn out to have been productive, the roguish infancy of a state may be reason in disguise.⁶¹

Transformation (*Verkehrung*), conversion, metamorphosis (*Verwandlung*), these are the key words here – the last one is already a reference to Franz Kafka, of whom more in a moment. The post-Hegelian, socialist tradition, the former Marxist Balibar adds, would in his turn lead to the overturn of Hegel’s scheme of great men creating history through their crimes. We

58 Hegel, “Die Vernunft in der Geschichte,” in *Vorlesungen über die Philosophie der Weltgeschichte*, Vol 1 (Hamburg: Felix Meiner Verlang, 1955), quoted in Balibar, “Hegel, Hobbes, and the ‘Conversion of Violence,’” 37.

59 Hegel, quoted in Balibar, “Hegel, Hobbes, and the ‘Conversion of Violence,’” 38.

60 Hegel, *Vorlesungen über die Philosophie der Geschichte*. Band 12 (Frankfurt: Suhrkamp, 1970), 540.

61 Balibar, “Hegel, Hobbes, and the ‘Conversion of Violence,’” 39.

have to think of the exploited, politically-conscious masses who in violent fashion force political transition, thereby converting crimes into morality or even bring about a peaceful stateless society—Karl Marx already referred to violence as the “midwife” of history.

I would however like to draw attention to a somewhat lesser known of Marx’s texts, a text in which this fierce critic of Hegel turns out to be a loyal pupil of Hegel’s theodicy of history. In a political-sociological article, *The British Rule in India* (1853) Marx gives a detailed and merciless account of what the British were doing in India, the subcontinent of weavers and spinners. “All the civil wars, invasions, revolutions, conquests, famines, strangely complex, rapid, and destructive as the successive action in Hindustan may appear, did not go deeper than its surface. England has broken down the entire framework of Indian society, without any symptoms of reconstitution yet appearing. This loss of his old world, with no gain of a new one, imparts a particular kind of melancholy to the present misery of the Hindoo, and separates Hindustan, ruled by Britain, from all its ancient traditions, and from the whole of its past history.” In addition, towards the end of his text, as parting shot, the following *deus ex machina*: “England, it is true, in causing a social revolution in Hindustan, was actuated only by the vilest interests, and was stupid in her manner of enforcing them. But that is not the question. The question is, can mankind fulfil its destiny without a fundamental revolution in the social state of Asia? As the answer to this has to be in the negative, then England is, regardless of which crimes it may have perpetrated, the unconscious tool of history by bringing about transformation.”⁶² As a Hegelian priest Marx here dispenses the absolution of the world spirit to a rogue British Empire. Compared to this, Hobbes’ original version of the mortal god is of refreshing sobriety, a version lacking self-consolation.

4. Finding a balance

Allow me to recapitulate my argument up to now. According to a cherished prejudice, the state locks up criminals and rogues in a hotel financed by the

62 Karl Marx, “The British Rule in India” (1853); see: marxists.org/archive/marx/works/1853/06/25.htm (accessed March 18, 2020).

taxpayer. However, whoever goes looking discovers that prison is a form of intensive “human farming”, that all comparisons to a hotel are ridiculously romanticized. Even the state, as highest instance a “mortal god” who has to protect us against ourselves and against our appropriation of a “right to everything”, appears somewhat roguish. This is not only given in its monopoly on violence and its ability to unleash wars and thus decide on our lives, it is even more evident in its inherent tendency to grow out into a great legal – and control mechanism, expressing itself as unlimited power in times of crisis, unrest and rebellion. Yet many modern thinkers have the tendency to rush to the defence of this utterly ambivalent institution, with their justifications largely testifying to ethical opportunism and self-forgiveness – an attitude for which we as Europeans are nowadays paying for by for instance our criminal colonial practices returning to haunt our public discourse – matters which were never really digested and processed.

Hence the question which has frequently recurred not only amongst liberals and Christians since the 17th century, but also amongst Marxists, anarchists and libertarians since the 19th century: is the mortal god Hobbes brought to life not precisely what he himself had called it: a monster? Christians would even be able to draw on Augustine of Hippo, who in *The City of God* calls a kingdom lacking an organic link with justice a “great pack of robbers.” Augustine even approvingly quotes a pirate who, once taken prisoner and interrogated by Alexander the Great as to what had inspired him to make the seas unsafe, replied: “Precisely that which had inspired you to do it to the whole world! But because I go about doing it with a small ship, I am called a robber; while you with your great fleet are called a ruler!”⁶³ Of interest here, it should be noted that pirates on account of their contempt for law and order for a long time represented – and too many jurists still do – the example *par excellence* of the rogue, even the “enemy of humanity” (*hostis generis humani*).⁶⁴ Even Osama bin Laden was juridically defined as

63 Augustine, *The City of God* (London, Penguin Classics, 2004), Book IV, Ch. IV.

64 See the special edition of the *Netherlands Journal of Legal Philosophy* (ed. Luigi Corrias & Wouter Veraart) for David Luban’s “The Enemy of All Humanity.” *Netherlands Journal of Legal Philosophy* 47, no. 2 (2018): 112–137 and especially Louis Sicking’s article on piracy, “God’s Friend, the Whole World’s Enemy’. Reconsidering the role of piracy in the development of universal jurisdiction.” *Netherlands Journal of Legal Philosophy* 47, no. 2 (2018): 176–187; also see Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York: Zone Books, 2009).

a “pirate.”⁶⁵ In short, is the more recent term “rogue state” (of which soon more) not simply a tautology?

The question posed in this article – how to drive out Satan with Beelzebub? – in some way ties up to a question which Bob Becking, professor in Bible, Religion and Identities at the University of Utrecht raised in his valediction in 2015 and later elaborated into a book entitled *Zonder monsters gaat het niet* (“We can’t do without the monsters”). The book is dedicated to the cultural history of the mythical creature Leviathan. Towards the end of his fascinating overview, he presents some of his own conjectures as to why this Leviathan monster – which we tend to regard as a relic from the infancy of humanity – continues to appeal to our imagination: in literature, in film, video games and visual art. He writes: “In a number of cases the human subconscious translates unarticulated or opaque anxiety into images of mythical animals and monsters. These then haunt the mind. As soon as a name can be attached to this anxiety, it becomes more manageable, potentially leading to the reduction of anxiety.” A small poem by G.H. Chesterton serves as motto to his book: *Fairy tales are more than true:/ not because they tell us that dragons exist/ but because they tell us/ that dragons can be beaten.*⁶⁶

5. Rogue state a tautology?

We can’t do without the monsters: does that also hold for the monster of the state? Just a few months ago the term “rogue state” made a comeback in my country, when a large group of Dutch parliamentarians were wondering why Queen Maxima was seen in the company of the Saudi crown prince Mohammed Bin Salman Al Saud. In other words, the man accused in a UN report of having the dissident, freedom-loving Saudi journalist Jamal Khashoggi assassinated, and then presumably had his body cut into pieces and disposed of: how wicked do you want?⁶⁷

65 See Luban, “The Enemy of All Humanity,” 113.

66 Bob Becking, *Zonder monsters gaat het niet. Een geschiedenis van de Leviathan* (Vugt: Skandalon, 2015), 185 and 4.

67 “Waarom gaf het kabinet toestemming?” (“Why did the cabinet give permission?”), *NRC-Handelsblad*, 2-07-2019, 9.

In 2003 Jacques Derrida published a book entitled *Voyous*, “*rogues*,” a book of which the subtitle (*Two Essays on Reason*) gives an indication of the immense problem touched upon in these essays, namely the relationship between power and (reasonable) right.

In this book Derrida provides an elaborate overview of the word “rogue” and the concept “rogue state” which featured especially prominently in the geo-political rhetoric of the post-Cold War United States of the 1990s. Prior to this, this concept, or synonyms such as *outlaw state* or *pariah state* were in the first instance the designation for such states which violated international norms in the treatment of their own citizens, states such as Pol Pot’s Cambodia, Idi Amin’s Uganda, or Apartheid South Africa.⁶⁸

However, during the 1980s and 1990s, and especially under the Clinton administration, the term “rogue state” migrated in the US from the sphere of internal politics to signify the international behaviour – or misbehaviour – of other states.⁶⁹ Litwak’s description of this term directly takes us to Derrida’s problem. Litwak’s description boils down to the statement that “a rogue state is whoever the United States says it is.”⁷⁰

In recent history, the United States has treated a whole number of states – without necessarily always referring to them by so many words – as rogue states; from Noriega’s Panama, Gaddafi’s Libya, Saddam Husain’s Iraq, Castro’s Cuba, and to Nicaragua, North Korea and Iran. Well now, according to Derrida, the crux of our problem has been baked into international

68 See C. Wunderlich, *Schurkenstaaten als Normunternehmer. Iran und die Kontrolle von Massenvernichtungswaffen* (Wiesbaden: Springer Fachmedium, 2018), Ch. 3, “Wider die Normen der internationalen Gemeinschaft: ‘Schurken’, ‘Outlaws’, und ‘Parias’,” 83 ff.

69 Noam Chomsky, *Rogue States: The Rule of Force in World Affairs* (Cambridge, MA: South End Press, 2000); Robert S. Litwak, *Rogue States and U.S. Foreign Policy* (Baltimore, MD: John Hopkins University Press, 2000); William Blum, *Rogue State: A Guide to the World’s Only Superpower* (Monroe, ME: Common Courage Press, 2000). Also see Litwak’s later title *Regime Change. U.S. Strategy through the prism of 9/11* (Baltimore: The John Hopkins University Press, 2007), especially Chapter I. “The ‘Imperial Republic’, Rogue States, and International Order,” 15–48.

70 In the French edition of Jacques Derrida’s *Voyous*: Deux essais sur la raison (Paris: Galilée, 2003), 139 and 148, it appears to be a literal quote by Litwak. The translators of the English edition of this work however point out that it is rather from Mark Strauss’ summary of Litwak’s argument, “A Rogue by Any Other Name.” *Chronicle of Higher Education* (Dec. 15, 2000): B11, quoted by Derrida, 169.

law, specifically in the contradictory nature of the two principles upon which it is based, namely those of *democracy* and *sovereignty*. We see this contradiction most clearly in the composition and competencies of the UN Security Council.

While the General Council – also by being explicitly bound by the Declaration of Human Rights – may be called democratic, this democratic sovereignty is “powerless”, because it lacks coercive executive power – it is a “right without force,” as Kant would have put it.⁷¹ The members of the Security Council however *do enjoy veto power*.

*It is this constellation, which Derrida in so many words calls a monstrosity (monstruosité), for it is not justified by any universal right: decisions of the General Council are easily undone by members of the Security Council exercising their veto power.*⁷² Because of this, some authors pin the epithet “rogue state” onto the United States itself. Rogue states are first and foremost “those that have ignored and continue to violate the very international law they claim to champion, the law in whose name they speak and in whose name they go to war against so-called rogue states each time their interest so dictate. The name of these states? The United States.”⁷³

American exceptionalism

This last statement and Litwak’s definition (“a rogue state is whoever the United States says it is”) are interestingly enough essentially *endorsed* by an American philosopher of law who precisely defends American sovereignty, Paul W. Kahn, author of a number of thorough books on this question.⁷⁴ He gives a comprehensive account of America’s so-called “exceptionalism,” that is, that state’s refusal to enter into international treaties on human

71 Jacques Derrida, *Rogues: Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas. *Meridian: Crossing Aesthetics* (Stanford: Stanford University Press, 2005), 98.

72 Derrida, *Rogues*, 98.

73 Derrida, *Rogues*, 96.

74 Paul W. Kahn, *Putting Liberalism in its Place* (Princeton and Oxford: Princeton University Press, 2005); *Sacred Violence. Torture, Terror, and Sovereignty* (Ann Arbor: The University Of Michigan Press, 2008); *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011); “Evil and European Humanism.” Yale Law School, Faculty Scholarship Series 319 (2008); https://digitalcommons.law.yale.edu/fss_papers/319/

rights and to subject itself to the jurisdiction of the International Criminal Court. This refusal, he frankly admits, is “puzzling,” for many of these treaties are frequently in part brought about by American foreign policy in the first place, and their content are as a rule not at odds with US doctrine. Why then the refusal?

Kahn gives two important reasons. The first is that Americans have a problem imagining “international” law. “If law is an expression of popular sovereignty, how can a system of norms that has no source in that sovereign constitute law?” – holds the democratic conviction of most Americans.⁷⁵

The second reason is even more fundamental. The American idea of the sovereignty of the people, Kahn writes, “links the Constitution – and thus the rule of law – to the Revolution”, that is, to an exceptional event.⁷⁶ Here he means that in the political imagination of Americans the origin of American popular sovereignty, the American revolution of 1776 (War of Independence), is not merely an event that took place in a remote past, but remains present, and may recur in moments where this “extraordinary event” presents itself anew, for instance should an enemy appear. Therefore, hardly a better definition of American sovereignty could be found than Litwak’s: “a rogue state is whoever the United States says it is,” as Derrida keenly realizes.

In one of his books – already in the title⁷⁷ – Kahn appeals to Carl Schmitt and his equally renowned and infamous statement “Sovereign is he who decides on the exception,” for instance by determining whether an existential threat is posed in the form of an enemy.⁷⁸ Kahn for instance subtly refers to the fact that everywhere he goes, the US president is shadowed by a military official holding the box containing the nuclear launch codes – the president always needs to be prepared in case of exceptional circumstances.⁷⁹

75 Kahn, *Political Theology*, 10.

76 *Political Theology*, 10.

77 Kahn’s book only adds the word “new” to the German subtitle of Schmitt’s work *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (München/Leipzig 1922): *Political Theology. Four New Chapters on the Concept of Sovereignty*.

78 Schmitt, *Politische Theologie*, 9.

79 Kahn, *Political Theology*, 2

“Americans”, an American philosopher once told me during a conference, “have a Gulliver-complex”. By this, he meant that Americans live with the fear that the scene described in Swift’s famous book, where Gulliver is tied to the ground by a host of Lilliputians, may come true. Here the Lilliputians are all those UN member states, which in this nightmare are trying to tie the US down with a *rule of law* of their own making.

The conclusion Derrida in turn draws from all of this is clear: “(...) states that are able or are in a state to make war on rogue states are themselves, in their most legitimate sovereignty, rogue states abusing their power.”⁸⁰ From the moment that sovereignty is defined as *indivisible* (and from the earliest definitions, it cannot be shared)⁸¹ abuse of power comes into play, and the *rogue State* comes into being. A sovereign nation state, therefore, is always an *outlaw state* – prepared for the exceptional moment, the suspension of law, prepared also for the sacrifices it may entail.

In defence of the rogue state

All of this would be endorsed by Kahn, Schmitt, and Hobbes (albeit not without some reservations, as we have seen), but differing from Derrida in their appreciation thereof. In their opinion, *we can’t do without (state) monsters*.⁸² Friedrich Nietzsche once referred to the modern state as “the coldest of all monsters (*Ungeheuer*).” Hobbes would have replied that his Leviathan was only in answer to another monster from the Bible, the land-dwelling *Behemoth*, in his eponymous book a reference to the Civil War gripping the England of his time, and taken over by the 20th century political theorist Franz Neumann in his characterization of the National Socialist Moloch.⁸³

80 Derrida, *Rogues*, 102.

81 See Schmitt, *Politische Theologie*, 16 ff., on J. Bodin.

82 See for instance Carl Schmitt, *Der Leviathan*, 34: “Der Staat ist nach Hobbes nur der mit grosser Macht fortwährend verhinderte Bürgerkrieg. Danach verhält es sich so, dass das eine Ungeheuer, der Leviathan ‘Staat,’ das andere Ungeheuer, den Behemoth ‘Revolution’, andauernd niederhält.” (“According to Hobbes, the state is only that which, through the exercise of great power, continuously prevents civil war. Accordingly, it is a case of the one monster, the Leviathan ‘State’, continuously keeping the other monster, the Behemoth of ‘Revolution’, in check”).

83 Burger, “Der sterbliche Gott. Eine Bildbetrachtung,” 1036–1037; Thomas Hobbes, *Behemoth or The Long Parliament*, ed. by Ferdinand Tönnies (Chicago and London: The

Long ago, Schmitt had even turned around the arrow shot from Derrida's bow. It is not the sovereign state (which, just like its peers – other sovereign states – determine war or peace), which is roguish, it is precisely the liberal, and pacifist attempt to abolish war, which inevitably raises the spectre of the rogue. The moralizing and criminalizing of war, the "war against war," places the enemy outside the confines of the law. Schmitt: "The adversary is thus no longer called an enemy, but a disturber of peace and is thereby designated to be an outlaw of humanity. A war waged to protect or expand economic power must, with the aid of propaganda, turn into a crusade and into the last war of humanity."⁸⁴

We thus arrive at a mirror opposite: the sovereign state is unavoidable – in order to keep human roguishness in check (Hobbes, Schmitt) or to protect the liberty of a sovereign people (Kahn). However, a world which is governed by such states also feeds off the desire for a democracy without undivided sovereignty (Derrida's familiar theme of *democratie à venir*), and an international law shared by member-states, one to which they are bound.⁸⁵ That is at the core of the dilemma which I wanted to address in this article. Indeed, perhaps we only have a choice between two kinds of monsters: the monsters of the sovereign states, and those of the enemies of humanity, pursued by humanity in the name of a universal morality.

6. Kafka's community of rogues

It appears that, having ended up in the higher regions of international law and state sovereignty, I have strayed from the world of the prison and the enlightened rogue I had met at the *long stay facility*. *Let's return to society, to the citizen, citoyen or bourgeois*, at any rate: to *common people*.

While Thomas Hobbes may well be the author of the most famous phrase in modern political philosophy, Franz Kafka presumably penned one the best known opening sentence in modern literature: "When Gregor Samsa

University of Chicago Press, 1990 [1668]); and Franz Neumann, *Behemoth. Struktur und Praxis des Nationalsozialismus 1933–1944* (Fischer Taschenbuch, 1984 [1942]).

84 Schmitt, *The Concept of the Political*, 79. See also Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (München, 1938).

85 See Derrida, *Voyous*, 115 ff.

one morning awoke from restless dreams,” Kafka starts his *Metamorphosis* (*Die Verwandlung*), “he discovered that in his bed he had turned into a monstrous beast.”⁸⁶ However, here I want to stand still at another transformation described by Kafka, in a rather less well-known, ultra-short story he wrote in 1917, entitled *A community of rogues*.

I will first quote and translate – with exception of the last sentence – the entire text:

“There once was a community of rogues, that is to say, they were no rogues, but common people, average people (*der Durchschnitt*). They always remained loyal to one another (*Sie hielten immer zusammen*). When for instance one of them had in some roguish way upset a foreigner, someone from outside their community – this meant nothing roguish, but was as was normal and customary – and had confessed it to the community, they investigated and adjudicated the matter, imposed fines, made light of it and suchlike. It was not meant badly, the interests of the individuals and the community were carefully considered, and the confessor was made a compliment of which he himself had already determined the general hue: “What? You let this trouble you? After all, you did what was obvious; you acted as you had to. Something else would have been unimaginable. You are only stressed somewhat. Get a grip of yourself!” In this way they always remained loyal to one another; also, in death they did not give up their community, but ascended to heaven in a dancing row. On the whole, the way they flew was a spectacle of the purest childlike innocence”.⁸⁷

Kafka here in a brilliant way alludes to an experience, which could befall anyone, both individually and collectively: the experience of the difference between our self-caressing self-image and a confrontation

86 Franz Kafka, *Die Verwandlung/Brief an den Vater*, Interpretiert von Joachim Pfeiffer (München: Oldenbourg Verlag, 1998), 37: “Als Gregor Samsa eines Morgens aus unruhigen Träumen erwachte, fand er sich in seinen Bett zu einem ungeheueren Ungeziefer verwandelt.”

87 See Franz Kafka, “Eine Gemeinschaft von Schurken,” in *Die Erzählungen und andere ausgewählte Prosa*, Hrsg. Roger Hermes (Frankfurt am Main: Fischer Taschenbuch Verlag, 2000), 352. Max Brod, Kafka’s friend and editor of his literary testament provided the title.

with harsh reality.⁸⁸ His community is that of ordinary people, normal, average, “hardworking citizens,” the kind of folk politicians on all sides of the political spectrum would stand up for. As soon as members of the community however have to deal with outsiders and seem prone to a certain clumsiness, rudeness – in short, a *roguishness* – a collective mechanism of distortion, denial and self-justification kicks in. Our psyche, a theatre director once remarked, “is made up of labyrinths and catacombs of distortion: humiliations are transformed into victories, aggression becomes self-defence, egoism masquerades as love.” In our prisons, this is often very apparent at an individual level. Prison chaplains have often told me that it not seldom takes years for someone to let go of all the illusions in which he or she had wrapped their crimes – if at all. If it does happen, one may witness fascinating transformations (*Verwandlungen*) in the lives of these incarcerated men and women.

The same mechanism is at work in Kafka’s story, but then at collective level. Solidarity (“they always remained loyal to one another”) turns out to rest on an eagerness to transform roguish behaviour into acceptable or even morally unblemished actions. It is not difficult to give some current examples, for instance from Dutch politics. “These so-called refugees and asylum-seekers, don’t they just want to come here to get cheap breast enlargements?” Or: “are those NGOs rescuing refugees on the Mediterranean not simply the helpers of criminal organizations, and should therefore simply be locked up themselves?” Fleeing war or poverty is thus transformed into a lust for luxury and comfort, the provision of aid under difficult conditions is criminalized.

Kafka’s community of rogues’ instinct towards moral self-preservation by means of collective self-blinding is therefore powerful and very ingenious. The same goes for political communities; in the Netherlands, according to the latest political trend, the *Forum for Democracy*, whoever now questions our fable-telling and self-caressing political community, suffers from “oikophobia” (“fear of the own *Heimat*”).

88 I am here inspired by Bernd H. Stappert, “Die Hinwendung der Kunst zu den Schwachen und Ausserseitern oder die Umwertung der Umwertung der vermeintlich Wertlosen.” I found this text on the internet under the title “Kafkas Gemeinschaft von Schurken.” It was originally written for the Süddeutschen Rundfunk. See <https://klausbaum.wordpress.com/2011/09/14/hello-world/>.

Yet there is something like an hour of truth in Kafka's little story. This moment is announced with the reference to "heaven". Initially it seems like the community of rogues would manage to maintain itself even in heaven: they "ascended to heaven in a dancing row". Now follows the apotheosis – and last sentence – of the story:

"However, because at the gates of heaven everything is broken down to their elements, they tumbled from the sky like blocks of stone."⁸⁹

The intriguing question is of course: what does this "heaven" stand for? Perhaps literature or art itself, which in a secular context needs to reveal non-subjective truth, thereby once more giving suppressed humanity another chance, just like Jesus of Nazareth did in his own way.

Our collective treatment of prisoners provides an excellent demonstration of the mechanism described by Kafka. In one of the commentaries on Kafka's story, the author remarks that "Calling a murderer a murderer is no trouble at all". It is a matter of labelling. Getting to the root causes of a crime however is troublesome; you even risk having to admit that our way of life is part of the problem and not of the solution.⁹⁰ This ties up with a rather bewildering experience, which anyone opening up a conversation with the inmates of our prisons is able to have. Whoever is prepared to listen to their life stories comes to the realization that you risk to *lose something*. What you may lose is your comfortable impulse to be judgemental. Not infrequently you start wondering: what would I have done in his or her place under similar circumstances?

On this issue, also Hegel, one of the thinkers of the state as mortal god, can teach us something. In a text written in 1807 entitled *Who is thinking abstract? (Wer denkt abstrakt?)* he describes extensively a public execution and the fiery consensus within the audience about the wickedness of the condemned. Then, Hegel concludes: "Abstract thinking consists of regarding a murderer as purely a murderer, and by means of this simple characteristic, to wipe away all his remaining humanity."⁹¹

89 Kafka, "Eine Gemeinschaft von Schurken," 352.

90 See Stappert, "Kafkas Gemeinschaft von Schurken," 7.

91 Hegel, "Wer denkt abstrakt?" in Jenaer Schriften 1801-1807. Band 2 (Frankfurt am Main: Suhrkamp, 1970), 575–582. Also quoted in part by Stappert.

A recent French study, partly based on observations of the daily penal ritual followed in provincial courts of law in statist France, argues that precisely the abstraction of social, historical and political context and the procedures of the “individualized telling” of the deed and its perpetrator constitute the core of the penal-judicial construction of reality in that country.⁹² Moreover, all of that in the name of a transcendental instance which first protects itself: the mortal god.⁹³ More so the reason to keep open the place of the true God, as we are admonished to do by the first Commandment.

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92 Geoffroy de Lasagnerie, *Juger. L’État pénal face à la sociologie* (Parijs: Librairie Arthème Fayard, 2016). I consulted the more comprehensive German edition: *Verurteilen. Der strafende Staat und die Soziologie* (Frankfurt am Main: Suhrkamp, 2017).

93 See Lasagnerie, *Verurteilen*, especially Zweiter Teil: “Staat und Gewalt,” 41–89.

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