

Neutralising the “Specious Name of Libertie”: Hobbes on Freedom as the Silence of the Law

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Abstract

Hobbes uses the most powerful tools of rhetoric to undercut the republican understanding of freedom and the associated ideal of the citizen as a free man. His claim that the greatest freedom of subjects lies in the silence of the law plays a key role in this attack. For all its polemical vigour, Hobbes’s notion of freedom as the silence of the law has, however, received scant attention in the scholarly literature. While discussions of Hobbesian freedom refer to the notion often, it is rarely examined in any detail. This article offers an extended examination of this freedom, which critically engages and ultimately rejects its common reading as a mere extension of freedom as non-interference and/or as a mere remnant of our natural freedom as non-obligation.

Keywords

freedom – silence – right – law – liberty – obligation – permission – interference – free-man – subject

1 Introduction

The first half of *Reason and Rhetoric in the Philosophy of Hobbes* (1996), “Classical Eloquence in Renaissance England,” takes us through the teaching and employment of rhetoric in Tudor England, up to and through the time in which the young Hobbes himself received his education.¹ Through its five chapters, Skinner painstakingly traces how classical texts on rhetoric, especially those of Cicero and Quintilian, lay behind the dissemination of republican ideas in England. He puts the emphasis on the republican ideal of citizenship, the *vir civilis*: the active, virtuous citizen, continuously engaged in public deliberations, who put his mastery of the art of rhetoric at the service of his community. In the republican tradition, rhetorical freedom, as exercised in courts and assemblies, was a major component of what it meant to be a free citizen living in a free commonwealth.

As Skinner demonstrates in the book’s second part, Hobbes was painfully aware of the powerfully mobilising force of rhetoric, much in particular, as this is what interests us here, of the rhetoric of liberty. Reflecting back on the causes of the English Civil War, Hobbes famously observed: “it is an easy thing, for men to be deceived, by the specious name of Libertie.”² Humanist training on notions of liberty and free citizenship derived from Greek and especially Roman authors was to be blamed for the deception and for all the attendant consequences: “And by reading of these Greek, and Latine Authors, men from their childhood have gotten a habit (under a false shew of Liberty,) of favouring tumults, and of licentious controlling the actions of their Soveraigns; and again of controlling those controllers, with the effusion of so much blood.”³

Although Skinner rightly gives pride of place to Cicero and Quintilian in his reconstruction of the republican ideal of citizenship passed on by Tudor rhetoricians, amongst the classical works behind the upsurge of seditious ideas on freedom was Aristotle’s *Rhetoric*, a treatise defining rhetoric as the capacity to perceive possibilities for persuasion. This was also a work in which Hobbes had a significant direct investment both as a translator and as a teacher to his own pupil, the third Earl of Devonshire. In *Rhetoric* Aristotle presented democracy and liberty as intrinsically linked: “the End of

1 Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge University Press, 1996).

2 Thomas Hobbes, *Leviathan*, ed. Noel Malcolm (Clarendon Press, 2012), ch. 21, p. 334 [110].

3 Hobbes, *Leviathan*, ch. 21, p. 334 [111].

Democracy, or the Peoples government, is Liberty.”⁴ What followed from this was unpacked “in his *Politiques*, (*lib.* 6. *cap.*2.)” where (as cited by Hobbes in *Leviathan*), “In democracy, Liberty is to be supposed: for ’tis commonly held, that no man is Free in any other Government.”⁵

The inseparable connection between democracy and liberty, Hobbes intimates, was not innocently established. Rather, it meant to foster regime stability, to “keep them [the Athenians] from desire of changing their Government.”⁶ Ancient liberty constituted thus, in Hobbes’s depiction of it, an ideological form of consciousness built upon a mistake – a false belief about the nature of freedom, but one which nonetheless held key instrumental value. Yet what aimed at begetting stability in Athens had begotten the breakdown of order in England, where it had become common currency that, in contrast to the freedom men enjoyed in a republic, “all that lived under Monarchy were slaves,” and thus at “Libertie to resist their own Representative.”⁷ The conviction that this seditious belief was a culprit for the bloodshed that followed resurfaces in *Behemoth*, where Hobbes reminds his readers of how “the greatest part of the House of Commons” consisted of men well versed in classical works in which “the popular government was extolled by the glorious name of liberty, and monarchy disgraced by the name of tyranny.”⁸ To this Hobbes adds a second, equally important observation: even if such men “were not the greatest part,” they became so, for “by advantage of their eloquence, [they] were alwaies able to sway the rest.”⁹ Education in rhetoric and the ideal of the *vir civilis* fed into parliamentary oratory, and parliamentary oratory filled England with the “Venime of Heathen Politicians,” plunging it into the chaos of civil war and regicide.¹⁰

As Skinner would go on to show in his landmark studies on freedom, Hobbes saw it as his mission to neutralize the appeal – rhetorical and otherwise – of the republican ideal of freedom.¹¹ This implied a twofold strategy. On the one hand, Hobbes ridiculed that ideal as incongruous and incited fear

4 Thomas Hobbes, *A Briefe of the Art of Rhetoric* (London: A. Crook, 1637), 30; Aristotle, *Rhetoric*, in *The Complete Works of Aristotle: The Revised Oxford Translation*, ed. Jonathan Barnes (Princeton University Press, 1984), 1366a.

5 Hobbes, *Leviathan*, p. 334 [111]. Aristotle, *Politics*, in *The Complete Works of Aristotle: The Revised Oxford Translation*, ed. Jonathan Barnes (Princeton University Press, 1984), 1317b.

6 Hobbes, *Leviathan*, ch. 21, p. 334 [111].

7 Hobbes, *Leviathan*, ch. 21, p. 334 [111] and p. 332 [110].

8 Thomas Hobbes, *Behemoth*, ed. Paul Seaward (Clarendon Press, 2014), 110.

9 Hobbes, *Behemoth*, 110.

10 Hobbes, *A Review and Conclusion*, p. 1140 [394].

11 Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge University Press, 2008).

about its disastrous political consequences. On the other hand, he sought to offer an alternative and equally compelling view of what ought to count as freedom, and what was of value in it. Skinner famously cast Hobbes's definition of freedom as the absence of impediments or restraints as Hobbes's antidote to the republican ideal of freedom.¹² In this article, my attention turns elsewhere: namely, to Hobbes's notion that the freedom of subjects is to be found in what is allowed to them by the civil law's silence. This, I submit, constitutes not a form of freedom as non-interference, but a distinctive form of freedom as non-obligation – a kind of third concept of liberty, to borrow Skinner's words – by which Hobbes meant to inflict a major blow on republican freedom's mobilising appeal.¹³

The paper proceeds as follows. In its first three sections (sections 2, 3 and 4), I argue that the nature of freedom as the silence of the law has been misapprehended as it continues to be treated as a form of freedom as non-interference and/or as a mere remnant of our natural liberty. I develop this argument in three steps. First, I show that key modal shifts occur as the predicate of freedom changes: from body, through man, to subject, and discuss the implications of these shifts for establishing the nature of freedom as the silence of the law. Second, I distinguish between the two freedoms of subjects, the “true Liberty of Subjects” and freedom as the silence of the law, to argue that the latter should not be taken for a mere remnant from nature, a kind of natural freedom as non-obligation, standing outside the legal order created by the sovereign. Third, I probe into the category of “silence” to more fully explore the distinctiveness of the freedom that the sovereign's legislative silence affords. Its nature, I submit, is that of an implicit, negative permission, advancing important forms of regulation, while not regulating proper. In the paper's fifth and last section, I discuss what Hobbes identified as being of special value in this freedom and how he deployed it to recast subjecthood as a condition inhabited by freemen. I finish with a brief sketch of freedom as the silence of the law's complex genealogical relationships.

¹² Once dubbed neo-Roman, this has been most recently relabelled by Skinner as freedom as independence, but its meaning has remained unchanged: non-subjection to someone else's arbitrary will. See Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 1998) and his fullest examination of the concept of freedom to date, *Liberty as Independence. The Making and Unmaking of a Political Ideal* (Cambridge University Press, 2025).

¹³ Quentin Skinner, “A Third Concept of Liberty: Isaiah Berlin Lecture,” *Proceedings of the British Academy* 117 (2002): 237–268.

2 Freedom: Key Modal Shifts

Hobbes was never one to shun from a provocative claim meant to spark controversy: “The Greatest Liberty Of Subjects, Dependeth On The Silence Of The Law,” we read in one of the margins of chapter 21 of *Leviathan*.¹⁴ James Harrington, for one, was quick to take the bait and declare Hobbes hopelessly confused. In celebrating the silences in the law as the *loci* of freedom, Harrington claimed, Hobbes took freedom *from* the law for freedom in its proper sense: that is, for freedom *by* the law. It was the law that made us free, not its absence.¹⁵

For all its polemical vigour, Hobbes’s notion of freedom as the silence of the law has received scant attention in the scholarly literature. While discussions of Hobbesian freedom refer to the notion often, it is rarely examined in detail. The examination of Hobbes’s notion of freedom as non-interference takes priority, while the “Greatest Liberty of Subjects” is glossed over or even treated dismissively as a spare category, as in references to it as natural liberty’s “leftovers.”¹⁶ There seem to be two main reasons for this. *First*, Hobbes does not seem to say much about the precise nature of the freedom accruing to subjects from the silences of the law. *Second*, interpreters tend to take this freedom as a relatively straightforward extension of Hobbes’s “proper” sense of freedom, or, that is, the absence of external obstructions to motion.¹⁷ Charles Covell presents a perfect example of this: if the law is impediment, “where law was absent, there was no relevant *external constraint* or limitation on conduct and so men were free to act in accordance with their natural right and liberty” (my emphasis).¹⁸

As it has been widely noted, Hobbes’s claim that “LIBERTY, OR FREEDOM, signifieth (properly) the absence of Opposition,” with “opposition” meaning

¹⁴ Hobbes, *Leviathan*, ch. 21, p. 340 [113], Margin.

¹⁵ James Harrington, *The Commonwealth of Oceana*, ed. J.G.A. Pocock (Cambridge University Press, 1992), 20. Harrington’s objection finds echo in John Locke, for whom “where there is no law there is no freedom.” See John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge University Press, 1960), 57.

¹⁶ Aloysius Martinich, “Authorization and Representation in Hobbes’s *Leviathan*,” in *The Oxford Handbook of Hobbes*, ed. A. Martinich and K. Hoekstra (Oxford University Press, 2016), 323.

¹⁷ Martinich, “Authorization and Representation,” 145. For a more recent example of this see Alan Cromartie, “Hobbes, Constant, and Berlin on Liberty,” *History of European Ideas* 48, no.3 (2022): 215–218.

¹⁸ C. Covell, *Hobbes, Realism and the Tradition of International Law* (Palgrave Macmillan, 2004), 34.

here “externall Impediments of motion,” is striking for both its *corporeal* character and its *negative* character.¹⁹ Being a *corporeal* understanding of liberty, it can be predicated of anything that has a body, and thus “applied no lesse to Irrational, and Inanimate creatures, than to Rationall.”²⁰ This means that the water constricted in a vessel “that otherwise would spread it selfe into a larger space” is no more “at Liberty” than the man who finds himself locked in a room or imprisoned.²¹ Being distinctively *negative*, this freedom is neither more nor less than the *absence* of something. Hence, its articulation is in purely spatial terms as the unimpeded bodily motion allowed by the space created by the absence of impediments. Hobbes’s understanding of liberty is also purely *negative* in a second sense: besides denoting an absence (of effective opposition), it contains *no* constitutive or enabling conditions. Concomitantly, the emphasis is exclusively on “externall,” or non-constitutive, “Impediments.” While their presence limits freedom, lack of power or capacity (to perform an action) do not: “when the impediment of motion, is the constitution of the thing it selfe, we use not to say, it wants the Liberty; but the Power to move.”²² As such, he “who is fastned to his bed by sicknesse” cannot be said to lack freedom.²³ Extending this logic further, from external to internal motions, anything that might affect the formation of the will – namely, the passions, which move the body to action where the relevant body is animated (e.g., fear) – should not count as an impediment to freedom.²⁴

Although Hobbes’s corporeal definition of freedom has been rightly seen to be too restrictive, and thus as leading him to “allow that humans may [also] be unfree in a different, less strict, extended sense,” its importance cannot be underestimated either.²⁵ This is not just because of how hugely influential it has been. But because motion is critically significant within Hobbes’s philosophical system. For Hobbes, all that exists is body and life itself nothing but motion. Voluntary action is simply action towards or away from something,

19 Hobbes, *Leviathan*, ch. 21, p. 324 [107].

20 Hobbes, *Leviathan*, ch. 21, p. 324 [107].

21 Hobbes, *Leviathan*, ch. 21, p. 324 [107].

22 Hobbes, *Leviathan*, ch. 21, p. 324 [107].

23 Hobbes, *Leviathan*, ch. 21, p. 324 [107].

24 For the compatibility between the way in which the passions determine action and Hobbes’s definition of freedom (after all, fear is motion still, albeit motion away from the object), see Hobbes, *Leviathan*, ch. 21, p. 326 [108].

25 Michael M. Goldsmith, “Hobbes on Liberty,” *Hobbes Studies* 23 (1989): 23–39. See also Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge University Press, 1997) where it is argued that Hobbes had two different understandings of freedom which cannot be reconciled.

the efficient outcome of a causal process determined by appetites and aversions, which are themselves immeasurably small motions. It is thus a requirement not just of living but of commodious living that we are free to move around to get hold of what might satisfy our desires. As such, it is unsurprising that Hobbes called freedom as absence of opposition to motion liberty "proper" and that his most ubiquitous metaphors of unfreedom should have a physical, restraining quality to them: chains, ties, walls, prisons, to mention a few. Accordingly, Hobbes would not simply abandon but rather recast the distinction between freedom and slavery, which was central to classical republican theory. He took the sting out of the distinction by defining the slave narrowly as he who is literally kept in chains and the subject as he who protects and effectively extends his liberty as unimpeded motion in taking on obligation.²⁶ In nature the invasive quality of rights and their discretionary use meant that anyone could at any point quite literally stand in one's way. In submitting to the sovereign subjects are granted freedom of motion and are furthermore protected from continuous clashes with one another if they stay within the boundaries of the law. There they are free to move about at will in the pursuit of their desires without fearing everyone else's encroachment.

But with this last observation on exclusive rights that we will be better protected in exercising within the commonwealth, we enter a notion of freedom which can no longer be subsumed under the earlier notion of freedom as the absence of external impediments. Hobbes's definition of "FREE-MAN" offers a bridge to his second conception of freedom. "A FREE-MAN," Hobbes contends, "*is he, that in those things, which by his strength and wit he is able to do, is not hindred to doe what he has a will to do.*"²⁷ At first sight, this might look like a mere extension of Hobbes's definition of freedom "proper." For here too, freedom is about the absence of hindrances, not about constitutive or enabling conditions, such as strength or wit. Also, Hobbes continues to insist that only body, because only it is subject to motion, and thus to impediment, can be the predicate of freedom: "And therefore, when 'tis said (for example) The way if Free, no Liberty of the way is signified, but of those that walk in it without stop."²⁸ This seems to be a typical instance of freedom as absence of opposition to motion.

However, with the shift to "FREE-MEN" the predicate of freedom is no longer simply body, but animated body, or a body endowed with a will, which

²⁶ Hobbes, *Leviathan*, ch. 20, p. 312 [104].

²⁷ Hobbes, *Leviathan*, ch. 21, p. 324 [108].

²⁸ Hobbes, *Leviathan*, ch. 21, p. 324 [108].

is itself the result of a mechanistic process of decision-making or deliberation.²⁹ As such, Hobbes stresses that only hindrances to what one has set oneself to do count in determining the existence of liberty. This is important, since it shows that for Hobbes unfreedom results from actual (and not just potential) hindrances. In other words, we ought to speak of a lack of freedom only when one has formed a will to and this will cannot be realised because of something other than a lack of power.³⁰ Both man and nonhuman animals have voluntary motions so both are unfree to the extent that they are stopped from doing what they have “the will, desire, or inclination to do.”³¹ But Hobbes’s concern here is with man and the definition of freedom he gives under “FREE-MEN” puts one in mind of his definition of right in chapter 14 of *Leviathan*: “RIGHT, consisteth in the liberty to do, or to forbear.”³² This liberty is unrestricted but unprotected in nature but is limited yet properly enforced upon submission to the commonwealth, the only place where men can truly be “FREE-MEN.”³³

The other examples Hobbes provides show that we are effectively transitioning from freedom as the absence of external impediments to motion into the domain of freedom as non-obligation. “And when we say a Guift is Free, there is not meant any Liberty of the Guift, but of the Giver, that was *not bound by any law, or Covenant to give it*” (my emphasis).³⁴ The liberty of the giver makes no sense under the definition of freedom as the absence of

29 Deliberation is in Hobbes but the outcome of the struggle between the push of our appetites and our aversions: “in deliberation the last appetite, as also the last fear, is called WILL.” Thomas Hobbes, *The Elements of Law: Natural and Politic*, ed. Ferdinand Tönnies (London: Simpkin Marshall, 1889), I.12.2. Deliberation is thus quite literally de-liberation, the end to our liberty to go one way or another.

30 The qualification is important because Hobbes’s notion of negative freedom is not to be confused with the “open-door model” advanced by Isaiah Berlin: “[t]he extent of a man’s negative freedom is, as it were, a function of what doors, and how many are open to him; upon what prospects they are open; and how open they are.” Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969), xlviii and xxxix. For Hobbes, all that matters is whether the door one *pushes on* is open: “it is no impediment to him that the door is shut till he have a will to play.” *Hobbes and Bramhall on Liberty and Necessity*, ed. V.C. Chappell (Cambridge University Press, 1999), 91.

31 Hobbes, *Leviathan*, ch. 21, p. 324 [108].

32 Hobbes, *Leviathan*, ch. 14, p. 198 [64].

33 In entering the commonwealth men “*lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.*” Hobbes, *Leviathan*, ch. 14, p. 200 [65]. That is, they give up those rights that they would not want others to hold against them and take on duties not to interfere with the exercise of the remaining rights.

34 Hobbes, *Leviathan*, ch. 21, p. 324 [109].

external impediments. For what is at stake here is not whether the giver is physically free to give (i.e., not physically compelled), but that he is not forced by the law or a previous covenant to do so. It is also freedom as non-obligation that is at stake in Hobbes's final example of what it is to be free, focussing on what is meant when we are said to "*speak Freely*."³⁵ Freedom of speech, Hobbes explains, refers not to the "Liberty of voice" but to the freedom of the man whom "no law has obliged to speak otherwise."³⁶ The first could be removed through physical obstruction, by literally having one's mouth shut or lips sown. The latter is taken away by a forbidding law, eliminating one's freedom to speak as one wishes. Although in negative definitions of freedom it is not uncommon to see obstructions and obligations being treated as two species of the genus "restraint," as these two examples show, freedom as non-obligation is clearly distinct from freedom as non-obstruction.³⁷ Hobbes himself, in his discussion of the servant-slave distinction, acknowledges that where one is present the other need not be: a servant has contracted obligation and gains his bodily freedom in exchange, while a slave is kept in chains but in possession of his freedom as non-obligation.³⁸

Attempts at subsuming all Hobbesian freedoms into a more general category of freedom as non-obstruction overlook, therefore, key modal shifts as Hobbes moves from his discussion of bodies *in genere*, through his discussion of man (bodies endowed with will and rights), to his discussion of subjects (or, by definition, men bound by law). As the predicate of freedom changes, the relevant definition of freedom must change, too. Subjects are men who subjected themselves to a sovereign, and thus to new kinds of bond: of covenant and law. Hence, it makes perfect sense to speak of a free man – since, after all, it is possible to conceive of a man who has not subjected himself to any bond of covenant and/or is not obliged by law. But to speak of a "*free Subject*" is to speak "without meaning; that is to say, Absurd."³⁹ For

35 Hobbes, *Leviathan*, ch. 21, p. 324 [109].

36 Hobbes, *Leviathan*, ch. 21, p. 324 [109].

37 Richard Price, *Observations on the Nature of Civil Liberty* (London, 1776), 8.

38 "And after such Covenant made, the Vanquished is a SERVANT, and not before: for by the word *Servant* (whether it be derived from *Servire*, to Serve, or from *Servare*, to Save, which I leave to Grammarians to dispute) is not meant a Captive, which is kept in prison, or bonds, till the owner of him that took him, or bought him of one that did, shall consider what to do with him: (for such men, (commonly called Slaves,) have no obligation at all; but may break their bonds, or the prison; and kill, or carry away captive their Master, justly:) but one, that being taken, hath corporall liberty allowed him; and upon promise not to run away, nor to do violence to his Master, is trusted by him." Hobbes, *Leviathan*, ch. 20, p. 312 [104].

39 Hobbes, *Leviathan*, ch. 5, p. 68 [19].

subjects are always necessarily “OBLIGED, or BOUND.”⁴⁰ In generating a commonwealth, every covenanting individual must necessarily “*devest* himselfe of the *Liberty*” to act at will and commit to any restrictions to liberty the civil law imposes.⁴¹ The relevant notion of freedom here is freedom from obligation. As Hobbes explains, law and right are opposed, meaning obligation and liberty, respectively: “RIGHT, consisteth in liberty to do, or to forbear; Whereas LAW, determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent.”⁴² The chains of civil law are thus different in nature to the literal, tangible, and visible restraints that obstruct bodily movement. They belong within the world of artifice that man creates for his own safety and prosperity. They constitute, in Hobbes’s own words, “Artificiall Chains,” self-imposed chains, “which they themselves, by mutuall covenants, have fastned at one end, to the lips of that Man, or Assembly, to whom they have given the Sovereigne Power; and at the other end to their own Ears.”⁴³

These bonds of law differ from physical bonds that impair or halt movement in two important respects. First, whereas the latter are imposed *externally*, the former are self-imposed, there being “no Obligation on any man, which ariseth not from some Act of his own.”⁴⁴ The fact that they are self-imposed makes them weak and easy to break. Their strength depends on the threat of punishment and our internalised understanding of how far better we are because of their existence, an existence depending on generalised compliance.⁴⁵ Second, although subjects are bound by law, and thus definitionally not free, they can nonetheless enjoy a substantial domain of freedom. That is, it may be nonsensical to speak of a free subject, but it is perfectly

40 Hobbes, *Leviathan*, ch. 14, p. 200 [65].

41 Hobbes, *Leviathan*, ch. 14, p. 200 [65].

42 Hobbes, *Leviathan*, ch. 14, p. 198 [64].

43 Hobbes, *Leviathan*, ch. 21, p. 328. The cover illustration of *Reason and Rhetoric* is taken from Laurentius Haechtanus’s *Microcosmos: parvus mundus* (Amsterdam, 1579). It shows Hercules as a master of eloquence, capable of moving men with the power of his tongue, with his power of persuasion being represented through a long chain, tying the ears of several men to Hercules’s tongue. As Skinner rightly notes, this image of the protean power of eloquence (*vis eloquentiae*) resonates closely with what Hobbes says about the nature of laws in chapter 21 of *Leviathan*. Herculean power is there transferred to the “Artificiall Man,” which we have ourselves created, and “which we call a Common-wealth.” Hobbes, *Leviathan*, ch. 21, p. 328 [108].

44 Hobbes, *Leviathan*, ch. 21, p. 336 [111].

45 Threat of punishment for breaking the law triggers fear but fear and liberty are consistent, as one who is moved by fear is not hindered in that motion. It is only if one is imprisoned for breaking the law that freedom as impediment to corporeal motion comes into play.

possible to speak of the liberties of the subject. While some of these liberties may be the subject of explicit rights, most liberties, Hobbes contends, are far more likely to be implicit in all that is not forbidden or otherwise subject to legal regulation. This – I will argue next – constitutes a form of freedom in its own right: neither an extension of freedom as non-obstruction, nor simply a leftover of natural freedom as non-obligation – which are the two ways in which interpreters have commonly understood it – but a form of, to borrow Lars Vinx's apt formulation, "civil non-obligation."⁴⁶

Vinx is one of the very few interpreters who has given Hobbes's freedom as/in the silence of the law its proper due. While conceptually my understanding of freedom as/in the silence of the law bears similarity with Vinx's, I offer a more comprehensive and more textually grounded analysis of the freedom opened up by legislative silence. An extended comparison between different types and effects of legislative silence allows me to advance a more precise characterisation of freedom as/in the silence of the law as a form of *negative* permission contingent on a determination of the sovereign power, even if a *negative* one.

I also differ from Vinx's conclusion that freedom as/in the silence of the law is integral to the "rule-of-law based conception of non-arbitrariness" he assigns to Hobbes, one according to which "all political rule must abide by rule-of-law standards."⁴⁷ This is for two main reasons: one more general, one more specific, which are in fact related.

I start with the more general: *pace* Vinx, Hobbes's sovereign has the authority to rule extra-legally.⁴⁸ The original covenant establishes no limits to what the sovereign may permissibly do or command, as subjects authorise all his actions, and do it "without stint."⁴⁹ That the sovereign can issue biding commands that do not abide by rule-of-law standards – and, moreover, that contravene the natural law – is clear, for instance, from Hobbes's discussion of King David's killing (by proxy) of Uriah, "an Innocent Subject," or from his discussion of Athenian ostracism, a political tool used for banishing a powerful citizen not for a "crime he had done; but what hurt he could doe."⁵⁰ Hobbes's always maintained that sovereignty is necessarily absolute and

46 Lars Vinx "Hobbes on civic liberty and the rule of law," in *Hobbes and the Law*, ed. David Dyzenhaus and Thomas Poole (Cambridge University Press, 2012), 162.

47 Vinx, "Hobbes on civic virtue and the rule of law," 162.

48 See, for instance, Hobbes's distinction between commands obliging "by force of a former Law" or "by virtue of his Power." Hobbes, *Leviathan*, ch. 21, p. 342 [113].

49 Hobbes, *Leviathan*, ch. 16, p. 250 [82].

50 Hobbes, *Leviathan*, ch. 21, p. 330 [109–110].

arbitrary, unrestricted by civil law or formal constraints, although in *Leviathan*, in particular, he did this “through the incorporation (and hence political neutralization) of proto-liberal principles like the rule of law.”⁵¹

I now turn to the more specific reason. I agree with Vinx that in developing the notion of freedom as/in the silence of the law Hobbes's target was the republican conception of freedom and the ideal of the *vir civilis* – both of which, I argue, made freedom rest on public service and collectively authored laws. Yet, although this freedom is not (for Hobbes) morally arbitrary, in that the natural law recommends its protection, and although this is also a freedom allowing certain actions to be done without one having to face arbitrary interference by fellow-subjects, the domain of permission created by the law's silence is arbitrary still in the sense that it depends entirely on the sovereign's will and discretion. In Hobbes, rule belongs not to the law but to the sovereign – whether he chooses to exercise it through the law, over which he retains a power both absolute and arbitrary, or through protecting its gaps.⁵²

3 The Freedom of Subjects

With this clarification, let us return to the discussion of the freedom of subjects. Hobbes is adamant that since the freedom of subjects can only be conceived in relation to the bonds imposed by law, it ought not to be mistaken for two other types of liberty, of which, he contends, there is plenty and none in a commonwealth, respectively. The first of these is “corporall Liberty; that is to say, freedom from chains, and prison.”⁵³ The second is “exemption from Lawes.”⁵⁴ Since I have already shown that the first is *as if not more* plentiful in the commonwealth, I focus here solely on the second. To claim exemption from civil laws is to resume the liberty of nature, a form of natural non-obligation, whereby every man claims the right to be his own master. This is the very same liberty “by which all other men may be masters of their own lives.”⁵⁵ That is, it is an unlimited liberty of self-government which

51 Johan Olsthoorn, *Hobbes on Justice* (Oxford University Press, 2024), 17. On the proto-liberalism of Hobbes's illiberalism, see Noel Malcolm, “Thomas Hobbes: Liberal Illiberal,” *Journal of the British Academy* 4 (2016): 113–136.

52 For Hobbes's claim that sovereigns must have “an Absolute and Arbitrary Legislative Power,” see *Leviathan*, Review and Conclusion, p. 1135 [391].

53 Hobbes, *Leviathan*, ch. 21, p. 328 [109].

54 Hobbes, *Leviathan*, ch. 21, p. 328 [109].

55 Hobbes, *Leviathan*, ch. 21, p. 328 [109].

underpins the wretched condition of nature in which every man has the right to everything but is effectively left with no (safe) right. The liberty of the subject cannot, therefore, consist in exemption from the law – in unilaterally arrogating to oneself liberty as non-obligation (for instance, as one's "Private Inheritance" or "birth right").⁵⁶ This has been laid down in the transition to the commonwealth, when everyone covenanted to having their wills (con)formed to the will of the sovereign as expressed in general laws and decrees. All subjects are equally subject to these and only the sovereign can grant exemptions.⁵⁷

Having excluded exemption from the law from the liberties belonging to subjects, Hobbes differentiates two different types of liberties of subjects. First, there is "the true Liberty of a Subject."⁵⁸ Then, there are those liberties which "dependeth on the Silence of the Law."⁵⁹ The true liberty of a subject comprises all those natural liberties that cannot be covenanted away as this would frustrate the purpose of the covenant. It consists, as Hobbes puts it, of those rights "without which a man cannot live, or not live well."⁶⁰ Hobbes calls it "the *true* Liberty of a Subject" (my emphasis) perhaps to emphasize that it is enjoyed independently of the sovereign and even where the sovereign chooses to interfere with it. That is, this is a liberty extending to those "things, which though commanded by the Sovereign, he [the subject] may nevertheless, without Injustice, refuse to do."⁶¹ Prominent amongst these liberties are one's right to defend oneself from force by force (even when this force is exercised at the command of the sovereign, as in the case of imprisonment);⁶² the right not to accuse oneself, without assurance of pardon; the right to refuse the sovereign's command to exercise a dangerous or dishonourable office (as long as the end of the commonwealth is not jeopardized) and the right not to abstain from the use of food, air, medicine, or "waies to go from

56 Hobbes, *Leviathan*, ch. 21, p. 334 [110].

57 Hobbes provides several examples of such permissions: "Yet Charters are Donations of the Sovereign; and not Lawes, but exemptions from Law." Hobbes, *Leviathan*, ch. 26, 450 [150].

58 Hobbes, *Leviathan*, ch. 21, p. 336 [111].

59 Hobbes, *Leviathan*, ch. 21, p. 340 [113].

60 Hobbes, *Leviathan*, ch. 15, p. 234 [77].

61 Hobbes, *Leviathan*, ch. 21, p. 336 [111].

62 This compatibility is captured in Hobbes's claim that "the Consent of a Subject to Sovereign Power, is contained in these words, *I Authorise, or take upon me, all his actions*; in which there is no restriction at all, of his own former naturall Liberty: For by allowing him to *kill me*, I am not bound to kill myself when he commands me." Hobbes, *Leviathan*, ch. 21, p. 338 [112].

place to place" (as motion – we have seen – is essential to life, and enforced immobility might threaten it, e.g., by blocking access to food or water).⁶³

But the greatest part of the liberty of subjects is not constituted by these rights. It consists rather of rights over a whole range of actions which are not excluded from the terms of the covenant, nor constitute exemptions from the law, but about which the law is silent. The freedom at stake here is still freedom as non-obligation, or, that is, freedom or liberty to do something or to forbear from doing it. Yet it is not natural but *civil*: it cannot be held independently of the sovereign for it is entirely dependent on his legislative silence: "In the cases where the Sovereign has prescribed no rule," Hobbes writes, "there the Subject hath the Liberty to do, or forbear, according to his own discretion."⁶⁴ That is, this freedom arises from the fact that the sovereign has not ruled and exists purely at his pleasure – insofar and as long as he refrains from ruling. Although this liberty may differ considerably from time to time and place to place,⁶⁵ it comprises what we have come to know as typical bourgeois liberties: liberties of the private man (which Hobbes polemically recasts as the liberties subjects/citizens should effectively aspire to), such as the liberty of buying and selling, of entering into private contracts, of choosing where to live, what to eat, what trade to practise, how one's children are to be educated, and so on.⁶⁶

Taking freedom as the silence of the law as a mere "remnant," "leftover" or "survival" from nature does not sufficiently nor accurately distinguish this freedom. True, both freedoms of the subject belong within freedom as non-obligation. But while one is natural, the other is civil; while one is owned (by us), the other is given (to us).

To explain: we acquire obligations through a process of "consideration of reciprocal benefit [as] covenants and signs of the will, or last act of deliberation, whereby the liberty of performing, or not performing, is taken away."⁶⁷ Chief amongst these obligations is the one we acquire through the covenant instituting the commonwealth, which transforms us from "men" (animate

63 Hobbes, *Leviathan*, ch. 15, p. 234 [77].

64 Hobbes, *Leviathan*, ch. 21, p. 340 [113].

65 "As for Example, there was a time, when in *England* a man might enter in to his own Land, (and dispossesse such as wrongfully possessed it,) by force. But in after-times, that Liberty of Forcible Entry, was taken away by a Statute made (by the King) in Parliament. And in some places of the world, men have the Liberty of many wives: in other places, such Liberty is not allowed." Hobbes, *Leviathan*, ch. 21, p. 340 [113].

66 Hobbes, *Leviathan*, ch. 21, p. 328 [109].

67 Hobbes, *Elements of Law*, I.15.9.

rational bodies) into "subjects" (animate rational bodies bound by law). In submitting our will to the sovereign's, and in making his will our own, a part of our natural liberty to do what we will is taken away. But not all. As subjects, we retain the liberty to do X either because:

1. X could never have been relinquished through the covenant; or because
2. X is not incompatible with one's authorisation of the sovereign *and* X is not forbidden by the sovereign.⁶⁸

Hence, 1.: the "true Liberty of a Subject," is a mere, albeit critical, *remnant* of one's natural freedom as non-obligation. It consists in those inalienable natural rights that one cannot "passe away," or those liberties that we cannot "deny our selves" in authorising and submitting to the sovereign.⁶⁹ Because they are inalienable we retain the right to perform X, even though X is forbidden by the sovereign, because we could not have laid down our right to X, and are therefore not obliged. This means that the true freedom of subjects is a freedom compatible with interference: subjects are free even in those cases where the sovereign intervenes, for they have not obliged themselves, and "may [therefore] nevertheless, without Injustice, refuse to do."⁷⁰ This is no longer the case with 2.: the freedoms resulting from silences in the law. They comprise liberties which are *not prima facie* incompatible with the subject's authorisation of the sovereign and the ends that authorisation serves. But this alone does not license them. It is necessary that the sovereign neither commands nor prohibits them. They are always at his sufferance. This much is clear from the formulation given in *De Cive*: freedom as the silence of the law stands "for that part of natural Right, which is *granted* and *left* to Subjects by the civill Lawes." (my emphasis)⁷¹

The latter corresponds therefore to the liberty implicit in all that is not (provisionally) forbidden or otherwise subject to legal regulation. It arises not from subjects' right to be exempt from the law nor from the sovereign's lack of the right to impose it, but from the sovereign's omission (passive inaction or his positive decision) not to impose a rule even as he has the authority to do so and can always do so if he so will. For the sovereign alone is the judge of what rights it is necessary or convenient to surrender, and at which point in time. In short, the "true Liberty of a Subject" is a *remnant* of one's *natural*

68 Here, my formulation draws on David Gauthier, *The Logic of Leviathan* (Oxford University Press, 1969), 131.

69 Hobbes, *Leviathan*, ch. 21, p. 336 [111].

70 Hobbes, *Leviathan*, ch. 21, p. 336 [111].

71 Thomas Hobbes, *De Cive: The English Version*, ed. Howard Warrender (Clarendon Press, 1983), 13.15.

freedom as non-obligation – i.e., a reserve of natural rights surviving into the civil condition and resumable only when subject and sovereign are already outside it, at war with each other. By contrast, liberty as a domain of permissibility is a case of freedom as civil non-obligation – i.e., an integral part of the civil condition and the system of jural relations it establishes and protects. For the liberties implicit in all that is not forbidden are liberties permitted by the sovereign and thus also liberties he is ultimately committed to protect.⁷²

4 Silence's Freedom

The reasons behind the sovereign's legislative silence may be twofold. First, it may simply reflect the fact that no system of law can possibly cover every human contingency. Hobbes provides such an argument from impossibility in both *De Cive* and *Leviathan*. No "Common-wealth in the world" will ever set down sufficiently compendious rules "for the regulating of all the actions, and words of men."⁷³ From the virtually limitless number and variety of motions and actions subjects may engage in it follows that there will necessarily be "infinite cases" in which "men have the Liberty, of doing what their own reasons shall suggest, for the most profitable to themselves."⁷⁴ From this perspective, silences of the law indicate a constitutive limitation (*de facto*, not *de jure*) to the (legislative) power of the sovereign.⁷⁵ It is simply not possible to make all action and motion the subject of rules concerning what is allowed, and what is not allowed. But the argument from impossibility is not the only argument Hobbes offers. He hints at a second way of understanding the silence of the law when he claims that "Liberty of a Subject" lies "only in those things, which in regulating their [the subjects'] actions, the Sovereign hath

⁷² By "committed to protect" I mean committed to use coercion against those who might seek to prevent an action permitted by the silence of the law that one has willed and is otherwise able to perform. Commitment is not contractual obligation, as the sovereign has no obligation towards subjects to protect their freedom as the silence of the law. But insofar as "Sovereigns are all subject to the Lawes of Nature," and these set a presumption in favour of harmless liberties, sovereigns (despite being free to do otherwise) should endeavour to allow their subjects as much of that freedom as possible. Hobbes, *Leviathan*, ch. 29, p. 504 [169].

⁷³ Hobbes, *Leviathan*, ch. 21, p. 328 [109]; see also *De Cive* 13.15.

⁷⁴ Hobbes, *De Cive* 13.15 and Hobbes, *Leviathan*, ch. 21, p. 328 [109].

⁷⁵ It is a constitutive limitation because no sovereign can regulate it all; however, every sovereign has the *right* to.

praetermitted."⁷⁶ The choice of verb is relevant here. For "to pretermitt" covers a wide range of actions, both involuntary and voluntary: failing to notice or to do, overlook, neglect, disregard intentionally, omit, leave out, not to mention, allow or permit to pass. Seen in this light, the silences of the law appear no longer necessarily as passive inaction, but as possible signs of action, or the exercise of the sovereign's will *not to* – or, in this case, the will *not to* lay down a rule. For he who has the power (in this case, the power to legislate) also has the power to withhold. As Hobbes puts it in his debate with Bramhall: "I find no difference," "between the will to have something done and the permission to do it where he that permitteth can hinder it."⁷⁷ Hobbes is here speaking of God, who, being omnipotent and omnipresent, can hinder anything. The human sovereign does not have the same attributes. It is from this difference that Hobbes's argument from impossibility springs. Unlike God, the human sovereign cannot prescribe the whole of man's conduct, there being always human behaviour that a human sovereign can hinder, but chooses not to, and human behaviour that he is simply too weak to hinder. This is also the reason why God's permissions and the human sovereign's permissions differ: positive, or granting an action ("the will to have something done"), in God's case, negative, or simply defining what is not forbidden, in a human sovereign's case.

Whether through passive inaction or through the deliberate exercise of a power *not to*, legislative silence opens a domain of permissibility. The permission is *implicit* because it must be understood through something else, namely, silence, taken as an inferential sign. "Signes by Inference," Hobbes writes, "are sometimes the consequence of Words; sometimes the consequence of Silence; sometimes the consequence of Actions; sometimes the consequence of Forbearing an Action."⁷⁸ Silence is able to express tacit consent or implicit permission.⁷⁹ Hobbes is, of course, aware of the ambiguity

⁷⁶ Hobbes, *Leviathan*, ch. 21, p. 328 [109].

⁷⁷ Thomas Hobbes, "Of Liberty and Necessity," in *The Collected Works of Thomas Hobbes*, vol. 4, ed. William Molesworth (Routledge/Thoemmes Press, 1992), 250.

⁷⁸ Hobbes, *Leviathan*, ch. 14, p. 204 [67]. As such, silence can be performative, an illocutionary act of consent. It can (under certain circumstances) constitute "a signe by Inference, of any Contract" by "sufficiently argu[ing] the will of the Contractor." Hobbes, *Leviathan*, ch. 14, p. 204 [67].

⁷⁹ Hobbes makes this point when explaining what lends a customary rule legal authority: "it is not the Length of Time that maketh the Authority, but the will of the Sovereign signified by his silence, (for Silence is sometimes and argument of consent), and it is no longer Law, than the Sovereign shall be silent therein." Hobbes, *Leviathan*, ch. 26, 416 [138]. Implicit permission, I will argue, is that which is conferred by the silence of the law.

surrounding silence as a sign by inference and of the difficulties of determining whether silence “sufficiently argue[d] the will.”⁸⁰ His formulation in the *Elements of Law* shows that much, as he prefaces the claim that silence can be sometimes taken as a sign of consent with: “*Silence in them that think it will be so taken*, is a sign of consent.”⁸¹ But in the absence of express conventions or directives (such as the “speak now or forever hold their peace” directive in marriage ceremonies) silence can be interpreted as consent or even approval, even if one does not intend it.⁸² In the case of the silence of the law, the validity condition for permission to be inferred from the sovereign’s silence seems relatively easily met. This is partly due to the nature of permissibility. Permissibility is simply the absence of a rule against something. It does not imply endorsement or active approval but simply allows an action to occur. Furthermore, and importantly, there is a presumption in favour of liberty under natural law which backs up the reading of sovereign silence as permission. For it is contrary to the law of nature that one should be constrained by human law to a greater extent than is necessary for the good of the commonwealth.⁸³ As such, as Hobbes puts it in the *The Elements of Law*, there should “be no prohibition without necessity of anything to any man, which was lawful to him in the law of nature.”⁸⁴ From this it follows that “supreme Commanders are bound to preserve for their subjects by the Lawes of nature” their subjects’ “harmlesse liberty.”⁸⁵

Besides being implicit, the permission is also a *negative* one, in that it does not rest on any determinate act of the law or its granting of anything positive, but on its absence.⁸⁶ Since the actions left unregulated fall nonetheless under

80 Hobbes, *Leviathan*, ch. 14, p. 204 [67].

81 Hobbes, *Elements of Law*, I.13.11.

82 Hobbes’s benchmark for consent when it comes to the commonwealth is relatively low: in sovereignty by acquisition (conquest), consent is inferred from the simple act of non-resistance by the vanquished party; more generally consent can be attributed to anyone enjoying the sovereign’s protection since “Intention is to be understood by the End for which he so submitteth.” Hobbes, *Leviathan*, ch. 21, p. 336 [111].

83 Hobbes, *Elements of Law*, II.9.4.

84 Hobbes, *Elements of Law*, II.9.4.

85 Hobbes, *De Cive*, 13.15.

86 It is worth noting that many of the liberties Hobbes lists as resulting from the silence of the law are liberties that previous authors in the natural law tradition would have grounded on a permissive law of nature. See Brian Tierney, *Liberty and Law: The Idea of Permissive Natural Law, 1100–1800* (Catholic University of America, 2014). However, the traditional binary preceptive/permissive makes no sense under Hobbes’s understanding of law as command and thus as invariably preceptive or imposing obligation. That is, law must always forbid or enjoin – it excludes permission. Hobbes, *Leviathan*, ch. 26, p. 414 [137].

the sovereign's legislative jurisdiction, our enjoyment of the greatest freedom of subjects is always, as we have seen, at the *sufferance* of the sovereign – that is, only insofar as, and as long as, the sovereign does not lay down a rule. In this sense, freedom as/in the silence of the law remains entirely conditional on a determination of the sovereign power, even if a *negative* one. Should the sovereign decide to limit or change the scope of that freedom, any refusal on the part of subjects to abide by the sovereign's declared will is without right.

It should be noted, however, that not all legislative silences of the sovereign are of a kind, nor do they all *do* the same thing or have the same effect. Take, for instance, the silence of the sovereign regarding the common law. This is a silence that has a specific object – a rule, or custom – that is already in operation and that acquires legal authority from the sovereign's non-intervention: "it is not the Length of Time that maketh the Authority, but the will of the Sovereign signified by silence."⁸⁷ This law *by* silence works differently to the silence *of* the law. The latter does not bestow the authority of law. Rather, it preserves indeterminacy, through the non-subjection of things (i.e., actions and motions) to legal regulation.

Although the silence of the law does not regulate, it still produces a regulation of sorts.⁸⁸ Permission, we have seen, does not regulate action as such insofar as it does not imply an obligation of the beneficiary to do or forbear. But this does not mean that it does not serve any regulatory purpose.

A comparison will help us make this point. The space created by the silence of the law can be conceived in one of two ways. One may think of it as a space that is perfectly unregulated, or, in other words, an area of conduct in which we are free to choose how to act, while others are equally free to restrain us from acting in the way we choose. Alternatively, one might think of this space as a space entailing an implicit obligation, not of the beneficiary towards a specific command of law, because none will have been prescribed, but of others, who are required not to impede my free exercise of the sovereign permission.⁸⁹ It is the latter, not the former, that corresponds to Hobbes's notion of freedom as the silence of the law.

87 Hobbes, *Leviathan*, ch. 26, p. 416 [138].

88 This is a chief reason why Lars Vinx's name for it, "civil non-obligation," is particularly apt. Lars Vinx, "Hobbes on civic liberty and the rule of law," 162.

89 This is the view set forth, for instance, by Grotius in *De Jure Belli ac Pacis*, as he writes: "Now as to permission, it is no act of the Law, but only the silence of the law, it however prohibits any one from impeding another in doing what the law permits." Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Liberty Fund, 2005), Bk. I, Ch. I, IX.

A permission arising from the silence of the law, we have maintained, is not an act of the law, and does not produce the regulation produced by law's express declarations. Permissions do not come within the notion of law (as for Hobbes, law is always command: it either orders or prohibits) and they do not operate as law, namely in respect to those in whose favour they are granted. In respect to others, however, they operate as law, in that they prohibit them from impeding or obstructing me in the enjoyment of what is so permitted. This is why speaking of freedom as the silence of the law as simply a "leftover" of natural freedom is misleading. For freedom as the silence of the law is no unaltered "extraneous body," surviving into the commonwealth. Instead, it is part of the latter's overarching system of jural relations which extend beyond a domain of explicit, formal jural relations, grounded on explicit rights, into the domain of what we may do, of what is allowed.

Let us use an example to tease this out.⁹⁰ The silence of the law results typically from abstaining from legislating. But it might equally result from the repeal of a former law – e.g., from the withdrawal of the prohibition of something –, or be inscribed within the law itself, in the form of those things the law does not determine. Take marriage law. The enforcement of marriage contracts depends on there being a state, and thus the rules of marriage (concerning things such as adultery, polygamy, and so forth) are at the discretion of its laws. Should these not stipulate or be silent *about* the number of wives one might legally have, they tacitly permit polygamy. If silence produced a perfectly unregulated space, those who find polygamy sinful, against the law of God, or offensive in other ways, would be free to seek to stop one from having several wives. Such a situation epitomises the natural condition, with its invasive rights, and the attendant patterns of domination and conflict. Rather than producing an unregulated space of interaction, permission implies an implicit obligation of third parties not to interfere with the beneficiary's free enjoyment of what is permitted. Hence, where polygamy is a liberty under the silence of the law, if the sovereign permitted subjects must follow suit, no one has the right to stop me from having more than one wife simultaneously.

Before closing this section, a final and related distinctive trait of freedom as silence of the law needs stressing. The liberty of having many wives is not my liberty because it is the subject of an explicit right granted by the sovereign. Nor is it an inalienable natural right. It is the liberty found in what is allowed to me by the absence of specific legal regulation. As such, this liberty does not

⁹⁰ The example is drawn from Hobbes. See Hobbes, *Leviathan*, ch. 21, p. 340 [113].

exist as a domain prior to the rule of law (which in Hobbes is always rule *by* the sovereign) and nor is it sheltered from sovereign interference (as in the liberal notion of natural rights). It is rather the case that cultural transformation (that is, changing subjects minds as to which is their most valuable liberty *qua* subjects and their willingness to respect it in one another) and sovereign oversight – the ever present possibility of the sovereign intervening where subjects refuse to permit what he has permitted – is necessary to ensure compliance and the thriving of the “Greatest Liberty” of subjects.

5 Conclusion

The “Greatest Liberty” is the greatest not just because it is the most comprehensive but because, Hobbes submits, it is most important for the pursuit of the good life. Against teleological conceptions of the good life, including classical conceptualisations of the good as inherently tied to partaking in the life of the *polis*, Hobbes insists that “there is no such *Finis Ultimus*, (utmost ayme,) nor *Summum Bonum*, (greatest good,) as is spoken of in the Books of the old Morall Philosophers.”⁹¹ Instead, “Felicity is a continuall progresse of the desire, from one object to another.”⁹² And “the full enjoyment of innocent liberty” (as protected by the law’s silence) is the most likely route to a life where subjects live as freemen choosing how to pursue their desires and having their initiative developed by the “[h]ope by their Industry to obtain them.”⁹³ “Unnecessary Lawes” are thus “not good Lawes; but trapps for Mony.”⁹⁴ Sovereigns exercise their power to legislate well when they exercise it economically.

Law exists to provide a reliable framework within which subjects are free to pursue their desires without hurting themselves or others, rather than to impair “all Voluntary actions.”⁹⁵ Their purpose is to guide (quite literally, to keep one on track), to define the exclusive personal rights protecting citizens from clashes against each other, not to cancel out one’s motions and actions. Hence two extremes need to be avoided.⁹⁶ Too little regulation, or excessive

⁹¹ Hobbes, *Leviathan*, ch. 11, p. 150 [47].

⁹² Hobbes, *Leviathan*, ch. 11, p. 150 [47].

⁹³ Hobbes, *Leviathan*, ch. 13, p. 196 [63].

⁹⁴ Hobbes, *Leviathan*, ch. 30, p. 540 [182].

⁹⁵ Hobbes, *Leviathan*, ch. 30, p. 540 [182].

⁹⁶ This much is clear from Hobbes’s encompassing definition of “*Propriety*,” as premised on “the whole power of prescribing the Rules, whereby every man may know, what Goods he

license, would fail to give sufficient form to civil society, like a stream, which, having no banks, “spreads too largely.” Too much regulation would plunge civil society into decay, like the water which being “inclosed on all hands with banks, stands still and corrupts.”⁹⁷ Subjects who “might doe nothing without the commands of the Law” are left without initiative.⁹⁸ Lacking in resourcefulness and inventiveness, they “would grow dull, and unwildly.”⁹⁹ Also, excessive legislative creation stifles subjects’ capacity to align their actions with the law of nature and undercuts their ability to follow the law *tout court*. For “where there are more Lawes than can easily be remembered, and whereby such things are forbidden, as reason itself prohibits not of necessity,” men find themselves repeatedly breaking the law, “without the least evill intention.”¹⁰⁰ They stumble over the law that causes them to stumble with no apparent reason at all.

For all of Hobbes’s “disaffiliation” with the rhetorical tradition, his discussion of freedom engages in its “metabolization, cooption, transformation.”¹⁰¹ He provides an asphyxiating tangibility to unfreedom by figuring it forth as entrapment halting our motions and actions. He mobilises an army of metaphors to cast laws as treacherous cage-style devices – snares or traps – arresting men’s motion, stopping them in their innocent activity. He ridicules the republican understanding of freedom for seeing law as constraint on (arbitrary) power rather than constraint on everyone’s freedom “to do what he has a will to.”¹⁰²

Hobbes’s counterpoint to the claim that only citizens of a republic can be free is that liberty is not regime-specific. Any commonwealth, irrespective of its form of government, is collectively free insofar as it is not subject to any external authority. This freedom is distinct from the individual liberty of citizens. For in any commonwealth, irrespective of its form of government, citizens are subject to the authority of the sovereign and bound by the civil laws, which restrain freedom. Any freedom they might enjoy bears thus on one and the same thing: namely, on the contingent content and scope of the

may enjoy, and what Actions he may doe, without being molested by any of his fellow Subjects.” Hobbes, *Leviathan*, ch. 18, p. 274 [91].

97 Hobbes, *De Cive*, 13.15.

98 Hobbes, *De Cive*, 13.15.

99 Hobbes, *De Cive*, 13.15.

100 Hobbes, *De Cive*, 13.15.

101 David L. Marshall, “The Afterlife of Rhetoric in Hobbes, Vico, and Nietzsche,” in *The Making of The Humanities*, ed. Rens Bod, Jaap Maat, and Thijs Westersteijn (Amsterdam University Press, 2012), vol. II, 338.

102 Hobbes, *Leviathan*, ch. 21, p. 324 [108].

civil law; on how extensively it governs their conduct; on how much it leaves outside its jurisdiction.

"Whether a Common-wealth be Monarchicall, or Popular, the Freedome is still the same" is the conclusion Hobbes famously arrives at after comparing the freedom of a Lucchese to the freedom of a Turk in chapter 21 of *Leviathan*.¹⁰³ The belief that a Lucchese is necessarily freer, Hobbes submits, results from two fundamental equivocations: about the subject of liberty (commonwealth vs. individual), and about the nature of the relevant liberty (natural non-obligation vs. immunity from the civil law).

The liberty Greek and Romans celebrated, Hobbes explains, "is not the Libertie of Particular men; but the Libertie of the Common-wealth," which is but the absolute liberty that everyone has in nature.¹⁰⁴ Hence, to say that the Greeks and Romans were free is just to say that they were "free Common-wealths" – that is, sovereign.¹⁰⁵ This means that their representative was at liberty "to resist, or invade other people" (something that is true of any sovereign representative, regardless of the type of commonwealth), not that subjects "had the Libertie to resist their own Representative."¹⁰⁶ One would be wrong in taking the freedom of the subject to mirror the freedom of the state. They are not co-extensive.

Turning to the liberty of subjects, Hobbes insists that there is no reason to infer from the inscription of the word "LIBERTAS" in the turrets of Lucca that "a particular man has more Libertie, or Immunitie from the service of the Commonwealth there, than in Constantinople."¹⁰⁷ The inscription should be taken to refer to the liberty of the commonwealth, not the liberty of individual subjects. In both places, Constantinople and Lucca, the commonwealth enjoys the same absolute, blameless liberty of nature. With subjects, it is a different story. Subjects are men subject to the civil law. The civil law significantly removes liberty by imposing obligations, for obligations limit the range of lawful actions open to one.¹⁰⁸ The freedom of individual subjects depends thus on the extent of their "immunity" from legal obligation and public service.¹⁰⁹ Hence, whether in Lucca or in Constantinople subjects'

¹⁰³ Hobbes, *Leviathan*, ch. 21, p. 332 [110].

¹⁰⁴ Hobbes, *Leviathan*, ch. 21, p. 332 [110].

¹⁰⁵ Hobbes, *Leviathan*, ch. 21, p. 332 [110].

¹⁰⁶ Hobbes, *Leviathan*, ch. 21, p. 332 [110].

¹⁰⁷ Hobbes, *Leviathan*, ch. 21, p. 332 [110].

¹⁰⁸ See Hobbes, *Leviathan*, ch. 26, p. 450 [150].

¹⁰⁹ While Hobbes does not mention "immunity" from the civil law explicitly, the term has been taken to extend to it. This much is shown by James Harrington's polemical

liberty is something to be found in the private sphere as enabled by dispensation from public service and the gaps where the law is silent.

If this is indeed the kind of freedom subjects can enjoy, then there may be reasons to prefer one constitutional form over another.¹¹⁰ True, one can never be sure of how much freedom as “immunity” from legal obligation or public service will be granted in any given commonwealth. But there is little reason to assume this kind of freedom will be more prevalent in republics. “Democratical gentlemen”, Hobbes contends, wrongly conflate individual freedom with popular sovereignty or collective self-government. They believe freedom to mean having a share in rulership or direct influence over government.¹¹¹ Yet obligations – in the form of service to the commonwealth (coercive or not) or in the form of the civil law – are no less restrictive of one’s liberty where they are self-imposed. The freedom of the subject depends not on who makes the laws but on how many laws one is submitted to.¹¹² It is only there where the law does not speak that the subject is free from fetters while also having the permission to (securely) be sovereign over himself. Yet “democratical gentlemen” unwittingly trade this sovereignty for the illusion of a collective one. Unaware of the fact that “Law, and Right, differ as much, as Obligation, and Liberty”, they can be expected to err on the side of too much obligation.¹¹³

In depicting freedom as absence – that is, as a *non-*: non-opposition, non-obligation, natural or civil, and thus also non-regulation –, rather than presence, Hobbes’s intent is to drain out the revolutionary appeal of the “specious name of Liberty.”¹¹⁴ For where liberty is made into a thing (a birth right, an inheritance, a status), on which a claim of right can be grounded, it is prone to reification and to become an object of desire, something worth killing and fighting for. This is however no longer the case when all it denotes is absence. For then freedom depends not on subjects laying a claim to it but

engagement with Hobbes’s passage by distinguishing between “immunity from the law” (spheres of life falling outside the law’s jurisdiction) and “immunity by the law” (protection against arbitrary interference). James Harrington, *The Commonwealth of Oceana*, p. 20. The latter is Harrington’s republican freedom; the former corresponds to Hobbes’s freedom as/in the silence of the law.

110 In this respect, I disagree with Vinx’s “constitutional indifferentism” thesis. See Vinx, “Hobbes on civic liberty and the rule of law,” 146–48.

111 Hobbes, *De Cive*, 10.8.

112 It should be noted that, in all manner of commonwealths, laws are of our authorship as in his exercise of his legislative power the sovereign always acts with the authority that we passed on to him. See Hobbes, *Leviathan*, ch. 17, pp. 260–62 [87–88].

113 Hobbes, *Leviathan*, ch. 14, p. 198 [64].

114 Hobbes, *Leviathan*, ch. 21, p. 334 [110].

on their behaving in ways that do not provoke the sovereign to speak authoritatively. That is, on their remaining inconspicuous in their enjoyment of the liberties allowed to them by the sovereign's continuing legislative – intentional or unintentional – omissions.¹¹⁵ For all its reliance on words and their binding power, Hobbesian civil society is as much a verbal artifact as it is an artifact of silence.

Hobbes's treatment of the words "freedom" and "liberty" has been singled out as one of his most egregiously abusive uses "of the most powerful tools of rhetoric under the guise of scientific orthodoxy."¹¹⁶ And it is certainly true that in his discussion of freedom Hobbes pretended to be conjoining similars when effectively distinguishing different modalities of freedom. But if I am right in my characterisation of freedom as silence of the law as belonging in an extended understanding of freedom as (civil) non-obligation, then the genealogical links of Hobbes's notion of freedom are perhaps more complex than usually understood. For although freedom as the silence of the law covers traditional liberal freedoms, it does not take them as inalienable rights imposing permanent constraints on what sovereigns might do. The liberties silence affords do not define a realm of action protected from state intervention. They are not freedoms *from* the law, but freedoms *by* the law's silence, and therefore freedoms *contingent* on the sovereign's legislative non-intervention. Similarly, although these liberties thrive where laws are stable and limited in number, freedom as the silence of the law is no concession to the republican rallying cry that "not Men should govern, but the Laws" because only the latter can exclude dependence on the arbitrary will of others,

¹¹⁵ Freedom as/in the silence of the law carves out a space requiring mutual toleration. Hence, in a Hobbesian state, the expansion of this freedom would need to be supported by a civic programme encouraging the cultivation of self-restraint, virtues of discretion and complaisance, civil silence about difference, and even, *in extremis*, a ban on certain forms of contumelious speech. Expressions of contempt or under-value for actions and/or life options left open by the silence of the law – e.g., polygamy, different forms of worship, etc. – perform microaggressions and can instigate broader violence. They may thus necessitate the sovereign's intervention, to stop them or to prescribe a rule ruling out actions and/or options formerly made available by the silence of the law in favour of uniformized behaviour. For an understanding of Hobbesian toleration as implying "difference without disagreement" see Teresa Bejan, "Difference without Disagreement: Rethinking Hobbes on "Independency" and Toleration," *The Review of Politics* 78, no.1 (2016): 1–25.

¹¹⁶ Philip Pettit, *Made with Words: Hobbes on Language, Mind, and Politics* (Princeton University Press, 2008), 54. Pettit refers to Hobbes's claim that the subjects of the sovereign enjoy extensive freedom as a "rigged job." Philip Pettit, *Made with Words*, 140.

republicans' very definition of unfreedom.¹¹⁷ In Hobbes, the legislative will of the sovereign is arbitrary by definition insofar as he is the sole arbitrator of right and wrong, just and unjust, expediency and in expediency.¹¹⁸ The liberties allowed to subjects by the silence of the law are liberties entirely conditional on the sovereign's *arbitrium* as to whether (or not) to interfere (to regulate), as to whether and when interference is expedient or even necessary. Hobbes blamed the disorders of his age on an infatuation with extremes: on the one side for excessive liberty, and on the other side for too much authority. Freedom as the silence of law emerges as uniquely suited to navigating these extremes: it exercises a power *not to*, premised on a discretionary – and thus flexible and infinitely adaptive – absolute authority *to* (act). There could be hardly a better way for Leviathan to steer between two other dangerous sea monsters, Scylla and Charybdis.

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¹¹⁷ Hobbes, *Leviathan*, ch. 46, p. 1096 [377].

¹¹⁸ The argument here is not that the legislator's will is or should be purely arbitrary. It is rather that in Hobbes it is the sovereign who rules through law, not the law that rules. As Noel Malcolm notes, "he [Hobbes] does have a clear concept of the public and systematic character of the law," yet "[n]o sovereign, in Hobbes's theory, is forever trapped or constrained by the particular framework in which it operates, as the power to alter that framework belongs to sovereignty itself." Noel Malcolm, "Thomas Hobbes: Liberal Illiberal," 130–31.