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# **Can rights curb the Hobbesian Sovereign? The full right to self-preservation, duties of sovereignty and the limitations of Hohfeld**

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## **INTRODUCTION**

There are two commonly held beliefs about the subjects' rights in Hobbes's political theory. First, that the right to self-preservation amounts to no more than a narrow right to defend ourselves against attack and to strive to preserve our lives in the most literal sense. Second, that the right to self preservation offers no protection for the Hobbesian subject against the (absolute) power of the sovereign. This second thesis is usually said to be the consequence of one or both of the following: first, the right to self-preservation, along with all other Hobbesian rights, is of no benefit to the right holder because it is merely a freedom or liberty right and therefore not correlated with any duties on the part of others. (Such rights, the argument goes, are rights in name only<sup>1</sup> and offer no protection to the subject and no curb on the sovereign power). Second, the right to self-preservation is of no benefit to the Hobbesian subject because the sovereign is absolute and may do what he wishes to the subjects with impunity. The subjects, in other words, hold no rights against the sovereign.<sup>2</sup>

The Hohfeldian assumptions underlying this reasoning are: first, that a liberty right consists in a bare freedom only and offers no protection to its subject because it is never correlated with duties on the part of others to refrain from interference or to assist the right-holder and second, as above, that liberty rights are the only kind of rights held by Hobbesian subjects. In this paper I will argue against the two theses regarding Hobbesian rights set out above. First, I will argue for a different way of understanding the right to self-preservation in

Hobbes's theory, which has, in my view, been interpreted far too narrowly.<sup>3</sup> I will look first at the scope of the right to self-preservation and second, at its relationship to the role and responsibilities of the sovereign. I shall argue that the right to self-preservation, at least as it is presented in *Leviathan*, is much broader than is generally realised and encompasses far more than a basic right to self-defence. I shall also make the claim that it holds greater political significance than it has usually been accorded because, while not directly correlated with any duties of the sovereign, the sovereign does have certain responsibilities as sovereign and these do protect the rights of the subjects, albeit in an indirect way. This view has no obvious supporters amongst Hobbes scholars, although a leaning towards elements of it can be found in the works of Edwin Curley,<sup>4</sup> Conal Condren<sup>5</sup> and, perhaps most significantly, Jean Hampton.<sup>6</sup>

For Hampton, the possible implications of the self-defence right (part of the right to self-preservation), which is retained into the commonwealth, are so serious as to render "the entire Hobbesian justification for absolute sovereignty invalid."<sup>7</sup> I shall say something about Hampton's argument below but first I shall present my own argument, on the extensiveness of Hobbes's right to self-preservation and on its implications regarding the requirements of the office of sovereign and the indirect check on the sovereign's power they provide. I will argue that the right to self-preservation amounts to what I call the right to full preservation. And in asking what kind of right this is, I shall explore its relationship to the sovereign requirement to procure the safety of the people and to guarantee the peace. The right to full preservation becomes, after the institution of a sovereign, a protected right, not quite a claim right, in the Hohfeldian sense, because it is not directly correlated with the sovereign's duties and yet it is protected by what the sovereign must do to fulfil his office as sovereign. As will become clear, the Hohfeldian terminology of 'claim rights' and 'liberty rights' can be misleading and I will say something about the difficulties of applying this kind of 'rights talk' to Hobbes's theory.

The Hobbesian sovereign is famously outside the contract made between individuals in the state of nature, when they agree to form a commonwealth and commentators on Hobbes have often made the case that on entering civil society the rights of the individual subject are either given over to the sovereign in return for his protection or are rendered useless once the sovereign is in place.<sup>8</sup> Hobbes makes it clear, however, that

there are certain rights, pertaining to our self-preservation, which cannot be given up. We enter society for the sake of our preservation and, as Hobbes says, we can never give up the right to defend and preserve ourselves. “[N]o man can transferre, or lay down his Right to save himself from Death, Wounds, and Imprisonment,”<sup>9</sup>

#### A. The Right to Self-Preservation

Hobbes first discusses the right of the individual to preserve herself, when he describes the state of nature. In this context, the right forms the basis of the aggregate right to ‘all things’ that is the right of nature.

The RIGHT OF NATURE, which Writers commonly call Jus Naturale, 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 any thing, which in his own Judgement, and Reason, here shall conceive to be the aptest means thereunto.<sup>10</sup>

This right to preserve ourselves exemplifies what a right is for Hobbes. It is a justified freedom or liberty to do or to forbear from whatever actions will help us preserve ourselves. He famously distinguishes between right and law, saying, “they ought to be distinguished; because 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.”<sup>11</sup> This seems clear enough; where there is a liberty there is no obligation or duty; in other words one is free to act or to forebear from acting and this freedom is normative; one is under no duty. Unfortunately, this clarity is undermined by Hobbes’s definition of liberty as the absence of external impediments,<sup>12</sup> which leaves liberty as meaning merely (physically) unrestricted. There is not the space here to discuss this further. I shall assume a normative element attaches to a liberty, at least as is implied in the distinction he draws above between a law and a right – that it is a lack of obligation to do otherwise – as well as a physical freedom.

The right to preserve ourselves is generally referred to as a liberty right, by commentators on Hobbes, following Hohfeld’s analysis of rights in the legal literature.<sup>13</sup> This right to preserve ourselves, unlike many of the other rights that make up the aggregate right of nature (the right to all things in the state of nature)<sup>14</sup> is, however, retained into the commonwealth. So, after transferring and giving up those invasive rights that militate against a state of peace,<sup>15</sup>

Hobbes insists that we hold onto our right to self-preservation.

... there be some Rights, which no man can be understood by any words, or other signes, to have abandoned or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to ayme thereby, at any Good to himselfe...<sup>16</sup>

A Covenant not to defend my selfe from force, by force, is alwayes voyd, For (as I have shewed before) no man can transferre, or lay down his Right to save himself from Death, Wounds, and Imprisonment,<sup>17</sup>

I shall say more below about the nature of this right that has been carried into the commonwealth, but first I shall address the question of what is included under it. The right to self preservation is a right to what exactly?

## B. Content of the Right

The right to self-preservation has usually been defined narrowly as the right, literally, to preserve our lives. “[N]o one can give up those rights that are necessary for self-preservation: the right of resistance or the right of self-defence.”<sup>18</sup> “It is clear that [Hobbes] believed that our only natural right is the right barely to preserve ourselves, and to use whatever means we take to be necessary for that purpose,”<sup>19</sup> This narrow definition of the right to self-preservation fits well with the right as Hobbes describes it in the *Elements of Law* and in *De Cive*, “... it is not against reason that a man doth all he can to preserve his own body and limbs, both from death and pain.... It is therefore a right of nature: that every man may preserve his own life and limbs, with all the power he hath.”<sup>20</sup> “... things are done by right of nature, and are held to be so done, if they necessarily contribute to the protection of life and limb.”<sup>21</sup> In *Leviathan*, however, Hobbes broadens the right to self-preservation. If one looks at the next part of the passage quoted above, from Chapter 14 of *Leviathan*, where Hobbes describes why individuals must give up the invasive rights held under the right of nature, there is a hint at the much more extensive right to preservation that Hobbes now has in mind.

...And lastly the motive, and end for which this renouncing, and transferring of Right is introduced, is nothing else but the security of a mans person, in his life, and in the means of so preserving life, as not to be weary of it. And therefore if a man by words, or other signes, seem to despoyle himselfe of the End, for which those signes were intended; he is not to be understood as if he meant it, or that it was his will; but that he was ignorant of how such words and actions were to be interpreted.<sup>22</sup>

Here Hobbes draws our attention to the scope of the right he is

describing. Now we are not only concerned with preserving our physical lives but also with \_the means of so preserving life, as not to be weary of it'. We must preserve what we might now call our quality of life as well as our mere physical survival. And in the context of arguing that the right to self-preservation is not to be given up he says the following.

As it is necessary for all men that seek peace, to lay down certaine Rights of Nature; that is to say, not to have libertie to do all they list: so it is necessarie for mans life, to retaine some; as right to governe their own bodies; enjoy aire, water, motion, waies to go from place to place; and all things else without which a man cannot live, or not live well.”<sup>23</sup>

Here we start to see the extent of the self-preservation right that Hobbes is now arguing for. Not only do we have a right to what is necessary for survival but also to \_all things else without which a man cannot live, or not live well' and this would include, for example, bodily integrity and freedom of movement. (Later, in Chapter 30, when Hobbes discusses the office of sovereignty he refers to the safety of the people and says. “But by Safety here, is not meant a bare Preservation but also all other Contentments of life, which every man by lawful Industry, without danger, or hurt to the Commonwealth, shall acquire to himselfe”<sup>24</sup>). We have a right, in other words, to what is necessary not just to live but to live a good life, to live what Hobbes would call a commodious life. And this right, he says, must not, indeed cannot, be given up, but must be retained into the commonwealth.

Hobbes's commitment to this extended right to self-preservation will become clearer when I look at the move into a commonwealth and what he says there regarding the right. For now, it is enough to say that, according to his argument in *Leviathan*, there is an inalienable right, not only to preserve our lives, that is, to avoid death, but also to what is needed for us to live a life that will be worth living. So, we must retain from the right of nature (that gave us a right to any action or thing we thought we needed for our preservation), the right to those things or actions that will enable us to live a commodious life. Indeed, if we should seem to agree to anything that would \_despoyle' ourselves of the end towards which we aim in transferring and renouncing some of our rights, in accordance with the second law of nature, (as above from Chapter 14 of *Leviathan*,) then we are not to be understood as though we meant it.

### C. Full Preservation

The right to self-preservation, in *Leviathan*, which Hobbes says

cannot be alienated but must be retained by each individual into the commonwealth, amounts to a right to what I shall call *'full preservation'*. This right to what Hobbes would call a *'commodious life'*, amounts to the right to a life in which individuals are able to enjoy at least the minimum freedoms that are required for an active and full life. It includes the right not only to preserve our lives but also to the conditions that are necessary for basic human well-being or flourishing. For Hobbes it is after all a *'commodious life'* that we aim at in forming ourselves into a commonwealth and this is often overlooked by commentators who see him as assuming that we are solely concerned with our physical preservation. *'The final Cause, end, or Design of men, ... in the introduction of that restraint upon themselves, ... is the foresight of their own preservation, and of a more contented life thereby;'*<sup>25</sup> The rights that Hobbes mentions, under the aggregate right to preservation, include: the right to self-defence, the right to resistance, the right to whatever is required to preserve ourselves, the right to basic minimal freedoms such as the right to govern our own bodies, the right to enjoy *'air, water'*, the right to freedom of movement and the right to engage in *'lawful industry'* in order to furnish ourselves with the normal *'contentments of life'*. If I am right about the aggregate right to full preservation, it is a far cry from the *'bare preservation'* right that is assumed by most commentators. The fact that it is inalienable and carried into the commonwealth by each individual means that it also has some implications for the theory as a whole and particularly for the (supposed) absolute power and authority of the sovereign.

#### D. What Sort of Right?

The right to self-preservation starts out, like all rights in Hobbes's theory, as a right of nature; a simple liberty; a justified freedom to any action that I deem necessary to preserve myself while in a state of nature, which is of course, a state of war. As I have shown above, the right to self-preservation (which, I have argued, amounts to the right to full preservation) is not given up or transferred to others in return for protection, as invasive rights are, under the second law of nature. The right to self-preservation is retained into the commonwealth. What is its status after the institution of a sovereign and the erection of a commonwealth? Does it remain a simple freedom, which merely leaves individuals free to compete against one another for survival?

### E. The Right to Self-preservation Becomes a Protected Right

The reconstruction of Hobbes's argument that I am suggesting, explains how individuals become protected by instituting a sovereign, in terms of the right to full preservation. This aggregate right becomes protected in a Hobbesian commonwealth by the actions and responsibilities that are required of the sovereign if he is to fulfil the purpose of the office with which he has been trusted.

### F. Securing the Peace and Protecting the People: the Sovereign's Role

The right to full preservation is protected in the commonwealth in two ways; first, by the fact that individual subjects have given up their invasive rights under the second law of nature, and taken on duties to stand out of each others' way when exercising their transferred rights.<sup>26</sup> Second, the right to full preservation is protected by the sovereign, whose responsibilities as sovereign include those to: secure and maintain the peace, protect individual subjects and provide

26 "... when a man hath ... abandoned or granted away his right; then is he said to be OBLIGED, or BOUND, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it: and that he Ought and it is his DUTY, not to make voyd that voluntary act of his own:" Hobbes (1968, p. 191). In other words when someone transfers an unacceptable (invasive) right or liberty to another, she is then obliged to stand out of the way of the person to whom she has transferred the right when they exercise that right. So, for example, if I transfer my right to your body (which I have under the right of nature which is the \_Right to every thing; even to one anothers body' Hobbes (1968, p. 190)) I am then obliged to stand out of your way or not to interfere with you when you exercise your right to your body. You now have what could be said to be a claim right to your body, because it is now directly correlated with my duty to respect it and not violate it. In the mutual transferring of all invasive rights that must happen when individuals conform to the second law of nature, we are left with no invasive rights over others and with comprehensive duties not to violate the remaining allowable rights that we hold on to. At the same time, those \_allowable rights' have become claim rights, as above. For a more detailed presentation of this argument see, Curran, Eleanor, \_Hobbes's Theory of Rights – a Modern Interest Theory\_, *The Journal of Ethics*, 6(2002): 63–86.

and maintain the conditions necessary for a commodious life. When Hobbes describes the setting up of a commonwealth and the instituting of a sovereign he makes it clear that the purpose of such actions is to secure the peace and protection of individual subjects.



The only way to erect [such] a Common Power, as may be able to defend them from the invasion of forraigners, and the injuries of one another, and thereby to secure them in such sort, as that by their owne industrie, and by the fruites of the Earth, they may nourish themselves and live contentedly; is, to conferre all their power and strength upon one Man, or upon one Assembly of men, .... This done, the Multitude so united in one Person, is called a COMMON-WEALTH, in latine Civitas. This is the Generation of that great Leviathan, or rather (to speake more reverently) of that Mortall God, to which wee owe under the Immortal God, our peace and defence.<sup>27</sup>

So, we institute a sovereign in order to gain security and the conditions necessary to live an active and contented life.

“And because the End of this Institution, is the Peace and Defence of them all;” ...<sup>28</sup>

The sovereign is required to ensure that the commonwealth achieves or remains in a state of peace. And the sovereign must provide protection for the subjects. The passage from Chapter 30 of Leviathan quoted in part above, can now be seen to describe this requirement.

The Office of the Sovereign, (be it a Monarch, or an Assembly,) consisteth in the end, for which he was trusted with the Sovereign Power, namely the procuration of the safety of the people; to which he is obliged by the Law of Nature, and to render an account thereof to God, the Author of that Law, and to none but him. But by safety here, is not meant a bare Preservation, but also all other Contentments of life, which every man by lawfull Industry, without danger, or hurt to the Commonwealth, shall acquire to himselfe.<sup>29</sup>

#### G. Does the Sovereign Have ‘Duties’?

In the passage above, Hobbes uses the term obligation, to say that the sovereign has a moral obligation to procure the safety of the people. We can be satisfied that he means a moral obligation or duty because it comes from the law of nature, which refers to the moral law<sup>30</sup> and to ‘the author’ of the moral law – God. Much has been made of the fact that Hobbes says that the sovereign owes duties to God rather than to the subjects and of the ‘fit’ between this and his insistence that the social contract is made between individuals and not between the sovereign and the subjects.<sup>31</sup> We can be clear that there is no contract between the sovereign and the subjects and that there are therefore no contractual duties of sovereign to subject. And yet the sovereign does have duties and I suggest that he has two kinds of duties. First, he has the moral, duty outlined in the passage above, to procure the safety of the people, which includes providing the necessary conditions for a commodious life. This moral duty is controversial in several ways. Depending on which view one takes of Hobbes’s moral theory, one might say, for example, that the theory, being subjectivist and egoistic, has no place for

the notion of moral duty which is a deontological notion.<sup>32</sup> Or one might say that these moral duties are duties held in *\_foro interno*<sup>33</sup> only and so bind the sovereign in conscience but not in action.<sup>34</sup> And so, disagreements about the nature of the moral theory being described by Hobbes mean one can interpret what Hobbes means by the sovereign's moral duties, in several ways. I shall leave these difficult issues concerning Hobbes's moral theory aside and argue instead for a second type of duty held by the sovereign.

As well as moral duties, the sovereign has duties that exist simply as requirements of the office of sovereign. As the passage above, from Chapter 21, states; it is the end or purpose of the office of sovereign, *\_for* which he was trusted with the Sovereign Power' that the sovereign should procure the safety of the people. And there are real and dramatic consequences for the sovereign if he fails to do so. If the sovereign fails to protect the people then *\_the* Subjects are absolved of their obedience to their Sovereign'<sup>35</sup> because as he famously tells us "the Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them."<sup>36</sup>

And so, I argue, the Hobbesian sovereign, as well as having moral obligations, (which, for the present purposes, I am leaving undefined), also has responsibilities, which he holds simply by being sovereign; to fulfil the end of the office he holds, namely to procure and maintain the safety of the people. And the office itself is so tied to these responsibilities, that any sovereign who fails to fulfil them, will lose all the rights of sovereignty.

Whoever is sovereign, she (or they) must protect the people and provide or maintain the conditions necessary for subjects to be able to preserve themselves and to have the basic freedoms necessary in order to live a commodious life. And the position of sovereign is tied to these responsibilities in such a way that one cannot be sovereign without fulfilling them. I can, therefore, call these responsibilities *\_duties*', not as moral duties, but as duties in the sense of requirements of a job or position, such that those duties define the job or position, just as, say, duties to teach define the job of teacher. A person cannot be a teacher without teaching and carrying out the duties that make up the role or position of teacher. If the teacher fails to: take classes, explain what material is to be covered, instigate and chair discussion, instruct, etc., then she is no longer a teacher.

It is these sovereign duties; to protect the subjects, ensure peace and provide or maintain the conditions for a commodious life, that protect the right to full preservation of each subject.

They protect the individual subject's ability to exercise the rights that fall under the aggregate right to full preservation. For example, the right to freedom of movement can be exercised under a sovereign who legislates and governs to ensure that subjects are able to move freely about the commonwealth. If the sovereign were to, say, write and enforce a law that stated that all subjects must hold identity papers and not be allowed to move out of their own district, then the sovereign would be failing in her duties as sovereign and the subjects would be unable to exercise their right to freedom of movement.

#### H. Duties Owed to Whom?

If the duties I have described as attaching to the office of sovereign are not owed to the subjects, then to whom are they owed? Two possible options are; that they are owed to the office itself or to the person or people who placed her in that position (analogous to the employer). Yet, there is a difficulty with the second option, because, as I have already pointed out, Hobbes emphasises the lack of contract between the sovereign and the subjects. So, the duties are owed to the office itself or to the commonwealth, rather than to the subjects.

These duties of the sovereign are not incidental. His right to rule is dependant upon his ability and willingness to carry them out. Indeed, if he should fail in his duty to protect the people then, as above, "[s]ubjects are absolved of their obedience to their Sovereign"<sup>37</sup> And furthermore, it is the subjects who must decide when their obligation to obey the sovereign has ceased, for only they can decide when they are no longer being protected. They have held on to their right to full preservation. It has not been given up to the sovereign, and rights such as the right to self-defence would make no sense if they could only be exercised on the say so of the sovereign; so subjects must be free to make judgements as to when they are being protected and when not and as to who can protect them and who cannot.

"The end of Obedience is Protection; which, wheresoever a man seeth it, either in his own, or in another's sword, Nature applyeth his obedience to it, and his endeavour to maintaine it."<sup>38</sup>

What could Hobbes mean by "wherever a man seeth it" except that it is the man who decides where his protection lies?

This latter point has potentially far reaching implications for the (supposedly absolute) authority of the sovereign and the rights of the subjects. If the subjects can decide that they are not being protected and if, at the point of critical mass, the sovereign loses the right to rule, then his (the sovereign's) authority cannot be said to be absolute. To argue comprehensively

against the absolutism of the Hobbesian sovereign would take far more than this and cannot be attempted here but the preceding argument about the right to full preservation and the duties that can be said to protect it, do at least suggest, that the absolute power and authority of the sovereign is undermined by the rights that Hobbes puts in place for the subjects. The right to full preservation, carried into the commonwealth by each subject rather than given up, combined with the sovereign duties outlined above, can be said to provide the beginnings of an argument that Hobbes did, after all, intend that the sovereign's power be limited rather than absolute.

#### I. Support from Commentators?

Jean Hampton would not grant that Hobbes limits the power of the sovereign deliberately but she does argue that if we take the right to self-preservation seriously then Hobbes's argument for instituting an absolute sovereign fails. She points out that each individual does, according to Hobbes's argument, carry the right to self-defence into the commonwealth and she discusses the implications of this right, concluding that the self-defence right can be said to be "equivalent to the entire right to preserve oneself."<sup>39</sup> Once this is admitted, she argues that the implication must be that Hobbesian subjects themselves decide whether obeying the sovereign is conducive to their preservation or not "and hence makes the subjects the judges of whether or not they will obey any of the sovereign's laws".<sup>40</sup> She argues that if they do "retain a right to determine whether or not to obey the sovereign's laws, then the sovereign not only fails to be the ultimate decider of every issue but also is not the decider of the most important question in the commonwealth: whether or not he will continue to receive power from his subjects."<sup>41</sup> The conclusions Hampton draws from this are different from mine. Instead of reading the selfpreservation right as one that has real purchase and curbs the power of the sovereign, she reads it as demonstrating the failure of Hobbes's argument for absolute sovereignty. "[W]e now see that Hobbes's social contract argument is invalid: That argument cannot show that people, as he has described them, can institute what Hobbes defines as an absolute sovereign."<sup>42</sup>

This raises a question for my interpretation. Should I not also conclude that the argument is invalid? The answer to this seems to me to turn on what Hobbes's intentions are regarding the power of the sovereign. If he is really trying to argue for the institution of an absolute sovereign and we

understand that the self-preservation right allows subjects to decide whether or not (and when) to obey, depending on their assessment of their own interests, then it seems the argument fails, as Hampton argues. If, on the other hand, Hobbes deliberately puts in place rights for the subjects that will reduce the power of the sovereign, then his argument has not failed because it is not in the end an argument for absolute sovereignty, despite many remarks he makes that suggest his support for absolutism. Employing the principle of charity, (according to which we hesitate before attributing fairly obvious mistakes to historical figures such as Hobbes), I would argue that it seems unlikely that he would have failed to see such an obvious problem with his argument.

J. Recent Commentators – Glimpses of a Tempered Sovereign  
Commentators on Hobbes generally remain convinced of his absolutism but there are some whose readings of certain passages and arguments in *Leviathan* lend at least partial support to my argument that the apparent absolutism of the Hobbesian sovereign is undermined by the rights/liberties of the subjects. A similar point to that above, (that the subjects decide whether the sovereign can protect them and that this limits his authority) but in this case about initial authorization is made by Conal Condren.

Hobbes's critics have never been slow to point out that the sovereign's metarights of self-definition and self-legitimation effectively give it absolute power in a modern sense as well as in a seventeenth-century sense of being without legal limitation. The other side of the equation, however, is that it can never be given absolute authority, despite Hobbes's final theory of contractual authorization. We cannot authorize self-destruction – that contradicts the very reason for entering society in the first place. As he put it in *De cive*, we submit only for security and if that cannot be had, a man cannot be assumed to have submitted himself to anything (*De Cive*, 6.3; see also 2.18).<sup>43</sup>

Here again, we can make sense of the apparent problem with authorisation once we say that the authorisation is conditional upon the sovereign fulfilling his duties.

Edwin Curley also makes the point that we only owe the sovereign obedience if we are being protected and he argues that it is the subject's right to decide whether the protection being offered by the sovereign merits obedience or not. "If he [the sovereign] has the power (and the will) to protect us, we owe him obedience. If he doesn't, we don't."<sup>44</sup> And,

Hobbes contractarian methodology does lead, inevitably, to some limitations

on the subject's duty to obey, What makes the covenant binding for Hobbes is the rationality of the consent it involves, whether that consent is given in an initial ceremony of institution, or in daily acts of obedience to the powers that be. If there are certain things no one can rationally consent to, then the covenant must involve some limits on the subject's duty of obedience, however absolute it sometimes seems.<sup>45</sup>

He draws on Clarendon's<sup>46</sup> insight to push this point home. Those who think that Hobbes has given too much power to the sovereign shouldn't worry because "if they will have patience till he hath finished his scheme of sovereignty, he will enfeeble it again for them to that degree that no ambitious man would take it up, if he could have it for asking."<sup>47</sup> Curley also reminds us of the twenty first chapter of *Leviathan* where Hobbes outlines the liberty of the subject who may disobey the sovereign \_without injustice' under certain circumstances; such as commands to kill or wound himself, execute any dangerous or dishonourable office etc. "If the subject has discretion to determine when these conditions are satisfied, as Hobbes seems to think he would when his self-preservation is at stake... then his liberty might be very great indeed."<sup>48</sup>

Condren argues that Hobbes's use of the notion of \_representation' as the defining characteristic of the office of sovereign, means that the sovereign "assumes an office no less than the individuals who consent to become subjects. And it is in this pervasive sense of reciprocal office, not contract itself, that Hobbes provided the sense of limitation which seems to be lacking if we take his notions of alienation or authorization in isolation... an office for Hobbes and for all his contemporaries,... was a role or responsibility carrying rights only for the sake of fulfilling duties."<sup>49</sup>

Condren also draws different conclusions from mine on the rights of the subjects. He thinks that according to Hobbes "[w]e alienate our rights from the natural condition"<sup>50</sup> and despite granting that "whatever rights the sovereign has, its subjects cannot be taken to abandon a right to self preservation"<sup>51</sup> he thinks that we are mistaken if we see Hobbes as a liberal who advocates individual rights. "[W]e look in vain for what might be adequate guarantees of individual liberty against tyranny in Hobbes's state;"<sup>52</sup> I would argue however, that, given his acceptance that subjects cannot alienate the right to self-preservation

and that the sovereign has duties as well as rights, he has already granted me the important part of my argument. All I require in addition, is that the right to self-preservation is more extensive than a mere right to self-defence, that the sovereign's right to rule is conditional upon his carrying out the duties of his office, and that in order to exercise the right to selfpreservation, subjects must be the judges of when the sovereign is a threat, all of which I have argued, above. The judgements to be made as to when a sovereign is protecting such rights or liberties and when he is violating them, are complex and difficult. Maintaining peace in the commonwealth will require restricting the liberties of some (rebels/law breakers, etc.). Judgements about the balance between the liberties of subjects (citizens) and the security of the society as a whole are always difficult and the subject of profound disagreements, (no less so today perhaps, than in Hobbes's time), and cannot be gone into here. All I am maintaining (contrary to the views of most commentators) is that Hobbes's argument for government, in *Leviathan*, recognises the need for a balance and (deliberately) puts in place certain principles to protect the rights of the subjects and (possibly) to limit the power and authority of the sovereign. It is not possible to know for sure what Hobbes's intentions are regarding the strength of the individual rights he describes and the curb on sovereign power and authority that is implied by them when they are seen to be protected by the sovereign's duties as sovereign (leaving aside, as before, any moral duties the sovereign may have). In reconstructing Hobbes's argument in the way I have, however, there are interesting implications both for the tenor of Hobbes's political theory as a whole and for the strictly Hohfeldian way in which his description of individual rights has been analysed.

#### K. Limitations of the Hohfeldian Analyses of Rights in Hobbes's Political Theory?

Discussion of Hobbesian rights in the last 50 years or so, has largely been conducted using the Hohfeldian terminology of liberty rights and claim rights.<sup>53</sup> As I have mentioned above, commentators argue that all the individual rights in Hobbes's theory are liberty rights, or bare freedoms; rights, that is, that do not entail any duties on the part of others. It can then be argued that because there are no claim rights, there are therefore no strong rights, no genuine political rights, in the theory.<sup>54</sup> This Hohfeldian analysis does not accurately reflect the rights that Hobbes describes, however. It fails to capture the

changes to certain rights that take place through the process he describes whereby individuals conform to the laws of nature and institute a sovereign. When individuals agree (under the second law of nature) to give up some of their liberties so that they can live together in peace and when they institute a sovereign who can protect them, their rights become protected, in the former case, by the duties of all other individuals not to attack or invade them<sup>55</sup> and, in the latter case, by the duties of the sovereign, as defined by the office of sovereign, to secure the peace and protect the people.

In this paper, I have been concerned only with the second set of duties; (those taken on by anyone accepting the office of sovereign) and with the right to full preservation, which I have argued is protected by those duties. The first problem with the Hohfeldian analysis, in relation to this set of duties and their relationship to the right to full preservation, is that it cannot account for any rights that are protected, other than by directly correlated duties owed to the right-holder. The second problem is that the Hohfeldian analysis does not allow for changes in rights, i.e. for one type of right to become another type of right or to change from, say, a simple liberty to a more complex right that also includes claims or entitlements. Of course, it is implicit in the Hohfeldian approach that rights are seen as simple and therefore, that apparently complex rights can always be broken down into the simple, atomic rights (claim rights, liberty rights etc.) that make them up,<sup>56</sup> My argument, however, is that the right to full preservation changes from being a simple (though aggregate) liberty, to a protected right, once it becomes protected (indirectly) by the duties of the office of sovereign, but that it does not change into a Hohfeldian claim right because it is not directly correlated with the sovereign's duties, nor does the right itself entail any such duties.

The right to full preservation starts out as a right of nature, an aggregate right that includes the right to self-defence and the right to resistance as well as rights to freedom of movement and to work. All these can be categorised as liberty rights or bare freedoms when they are held in the state of nature. They are not correlated with the obligations of others and are described by Hobbes as being of 'little use or benefit' to the right-holder<sup>57</sup> when they are held as bare freedoms by all individuals in a state of nature. And even if a Hohfeldian analysis were to allow that a liberty right in the state of nature could change to a claim right in a Hobbesian commonwealth, the problem would not be resolved because the right to full preservation does not become a genuine Hohfeldian claim right in the Hobbesian commonwealth.



Rather than pushing Hobbesian rights into categories they don't quite fit, it might be better to simply describe the rights as Hobbes describes them and try to discuss their implications without resorting to Hohfeldian terminology.<sup>58</sup> And so, for example, we might speak of protected rights rather than claim rights (as above). What starts out as a liberty or freedom can become protected (in this case indirectly) by the duties of others without, as it were, losing its status as a liberty/freedom. Rather, it has changed from an unprotected liberty to a protected liberty. This leaves for another time, the deeper question of whether the Hohfeldian analysis itself is flawed, when it is applied to political rights rather than legal rights.

#### L. Implications for Hobbes's Political Theory

If Hobbes does describe a right to full preservation, (rather than the narrow self-defence right that has been assumed by commentators) as an aggregate right that is carried into the commonwealth and if I am right in arguing that the sovereign takes on duties to protect the people, simply by accepting the role of sovereign; then with these sorts of (protected) rights for individuals living in a Hobbesian commonwealth, the relationship of sovereign to subject no longer looks like one of absolute power and authority. There is not the space here to develop these thoughts further and to argue that Hobbes didn't intend (at least in *Leviathan*) to argue for absolute sovereignty would require much more, as I have said, but we can say that Hobbes's political theory may, after all, include some form of substantive rights for subjects. And the sovereign's power and authority may have some theoretical limits. This would mean in turn that his theory is not as far removed from Locke's as has usually been assumed and that Hobbes's particular (and neglected) contribution to rights theory merits a closer look than it has been given in recent Hobbes scholarship.

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