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ABSOLUTE FREEDOM OF CONTRACT:

GROTIAN LESSONS FOR LIBERTARIANISM

ABSTRACT: Libertarians often rely on the claim that liberty leads to prosperity. Relying on this claim, however, makes the value of liberty conditional: we should protect liberty only because and insofar as it leads to the desired outcome. In effect, positions defended by such arguments are not truly libertarian, but consequentialist. This invites the question of what a true libertarian theory of justice – one that takes liberty as primary concern – would look like. In this essay I show how Grotius’s political theory provides a template for such a libertarianism, but also that such a libertarianism carries uncomfortable commitments that can be avoided only by compromising with the principle of liberty.

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God created man ἀυτὲξούσιον, “free and sui iuris,” so that the actions of each individual and the use of his possessions were made subject not to another’s will but to his own.

—Hugo Grotius (c. 1609)

1 The quote is from the Commentary on the Law of Prize and Booty, which Grotius wrote in the first decade of the seventeenth century, but which was not published until long after Grotius died. A part of the Commentary was published as Mare Liberum in 1609.
Libertarianism is on the rise—not merely because of the widespread perception that the economy is changing for the worse and that big government is to blame, but also because many find the value of “liberty” inherently attractive. These two concerns are mirrored in the two traditional arguments for libertarianism (cf. Friedman, 1997): the argument that liberty is an efficient means of achieving economic prosperity and the argument that liberty is the primary concern of justice. However, these arguments can point in opposite directions: if the primary concern is economic prosperity, then liberty may be sacrificed as needed to pursue prosperity; if the primary concern is liberty, then economic prosperity may be sacrificed as needed to protect liberty.

If libertarianism is to offer an alternative to consequentialism (and to classical liberalism, which typically assumes a utilitarian framework [Freeman 2002 and 2011]), then it must take liberty as the basic concern of justice. The end of economic prosperity can provide only a conditional commitment to liberty, whereas libertarianism should defend an unconditional commitment to liberty. So, libertarians should abandon the argument that attempts to justify the importance of liberty by reference to economic prosperity.

The question, then, is whether and how one could establish liberty as the most basic or highest political value and what sort of theory of justice such an unconditional commitment to liberty implies. Perhaps surprisingly, I suggest that we should look to Hugo Grotius for an answer. On the foundation of liberty and consent, Grotius based not only private property, but a comprehensive theory of justice.

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2 For Grotius, all original acquisition must be justifiable to everyone; further transfers are then justified by the free consent of the parties to the transaction. For discussions of Grotius’s theory of property see Salter 2001 and Araujo 2009.
Grotius’s precise and fearless articulation of the principles of individual liberty may have no equal in the history of political philosophy. His theory thus offers a nearly ideal model of a libertarianism that gives primacy to liberty and escapes the entanglement of libertarian philosophy with belief in the beneficial consequences of free-markets. However, once libertarians see the commitments that follow such a true allegiance to liberty, they may find that they are better advised to renounce than to reconfigure libertarianism.

**Morality vs. Legality**

Grotius’s *De Iure Belli ac Pacis* ([1625] 2005a)—*On the Law of War and Peace*—is generally recognized as a founding text of the early-modern natural-law tradition. Grotius’s basic question is when war—or any other kind of force—is justified. To answer this question he presents a complete theory of natural law, including a systematic account of the sources and limits of interpersonal authority.

Grotius ([1625] 2005a, 101, 391) notes two points of agreement between common reason, Scripture, and philosophy: first, that the use of force requires justification; and, second, that force is justifiably used only to prevent a future wrong, to seek reparations for a past wrong, or to punish a wrongdoer (ibid., 395).

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3 I focus here on the libertarian strand in Grotius’s admittedly much more complex theory of justice. I have argued elsewhere (von Platz 2008) that Grotius in fact affirms a forward-looking conception of justice that conflicts with the libertarian strand.

4 A claim that, of course, must be taken with a grain of salt. For discussions of the historical importance of Grotius see Edwards 1981 (141-48), Haakonssen 1985, Schneewind 1998 (66, 72-73), and Tuck 1982 and 2001 (ch. 3 and conclusion).

5 On the plurality of agents of war and types of war, see Grotius [1625] 2005a, book I, chs. 1 and 3.
What, then, constitutes a wrong? Grotius answers by distinguishing, in what has now become the familiar libertarian fashion, between two spheres of morality: the sphere of perfect right or justice (also referred to as expletive, corrective, or particular justice) and the sphere of imperfect right or virtue (variously called imperfect right, attributive justice, distributive justice, or universal justice). Perfect right is the realm of rights and rights-based obligations. Imperfect right is the realm of duties that are not based on rights. Imperfect right concerns such virtues as gratitude, beneficence, and charity.

Correlatively, Grotius draws a parallel (and equally familiar) distinction between injustice and immorality. Only violating the (perfect) rights of others constitutes an injustice, for “justice simply consists in respecting someone else’s rights” (Grotius 2005b, 1758; see also [1625] 2005a, 121, 185, 564). It is, of course, morally wrong to fail in one’s imperfect duties, but such failures do not constitute injustices and so do not warrant any use of force. It is, for example, morally wrong to not aid those in need, but those in need do not have a right to aid, and so it is not wrong in the strict sense to deny it to them. In the strict sense, a wrong is an act that violates the rights of another person. Accordingly, force may be used, and may only be used, to prevent, repair, or exact punishment for rights violations.

As in modern libertarianism, then, for Grotius, any use of force against you is unjust unless you have violated or are about to violate the rights of another person. The question of what counts as objectionably coercive, then, comes down to the question of rights.

The Principle of Liberty

Rights are of two kinds: natural (original) and acquired (Grotius [1625] 2005a, 147-59, 162).

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6 I am simplifying Grotius’s distinctions and overlooking how these changed these over time; see Tuck 1982 (87-89 and 96-100) for a more detailed treatment.
Natural rights are the rights that persons have prior to any legal deed (crime or consent) and secure persons from interference with their liberty, as long as they do not interfere with other people’s equal liberty:

For God created man αὐτεξούσιον [autexousion], “free and sui iuris,” so that the actions of each individual and the use of his possessions were made subject not to another’s will but to his own. . . . For what is that well-known concept, “natural liberty,” other than the power of the individual to act in accordance with his own will? And liberty in regard to actions is equivalent to ownership in regard to property. (Grotius [1604-05] 2006, 33-34)

Every individual will has original authority over his actions, just as the property owner is the sole authority who can choose what may be done with the property. Since all people have this original authority over themselves, the claim of natural liberty of each is limited by the equal liberty of others. Originally, then, each person has the complete authority to decide what to do himself, as long as he does not violate the equal right to liberty of others.

The authority of the individual is self-justifying and inviolate, regardless of the consequences. One thus cannot “compel a Man even to what is advantageous to him. For the Choice of what is profitable or not profitable, where People enjoy their Senses and their Reason, is to be left to themselves, unless some other Person has gained any Right over them” (Grotius [1625] 2005a, 1106). In matters of personal freedom, then, Grotius lays down principles that would op-
pose all paternalistic actions by which some persons or the government use force against a person for her own good.

The realm of acquired right is the realm of rights and obligations that arise out of the initial situation of equal natural liberty. Rights can be acquired by consent, generation, or crime (Grotius [1625] 2005a, 508). Rights of generation are between parents and children simply by virtue of their relationship, or between humans and God for the same reason. Rights of crime are the rights to seek reparation from, and exact punishment upon, people who have violated original or acquired rights. Rights of consent are rights acquired by interpersonal transfer of rights.

The Principle of Consent

Throughout, then, Grotius equates justice with rights and rights (for adults vis-à-vis other adults) with freedom of choice (natural right) or freedom of contract (acquired right). In the absence of crime, and setting aside the special relationships between adults and children and God, therefore, consent is the basis of all interpersonal authority in the realm of acquired right. Free consent is the source of any rightful deviation from the absolute individual sovereignty that is observed in the realm of natural right. Since no adult has natural authority over another; any interpersonal authority must be based on consent.

Conversely, consent—whether by promise, contract, or pledge—creates a coercively enforceable obligation, for “what each individual has indicated to be his will, that is law with respect to him” (Grotius [1604-05] 2006, 34; cf. Grotius [1625] 2005a, 93, 705, 786, 1225-6). Agreements based on fraud or elicited by threat of unjust coercion do not create real obligations, rights, or authority (Grotius [1625] 2005a, 739, 787, 892, 1106, but compare 1626-27), since such agreements would not have been freely consented to. By contrast, obligations acquired
through free consent correspond to rights acquired by said consent and are thus legally enforceable. For example, someone who transfers the right to make a particular decision thus alienates to another some part of his original liberty (ibid., 701, 704-5). If he then breaks this contract, he violates the other party’s rights and his actions present a punishable wrong (ibid., 393-403).

**Grotius’s Improved Libertarianism**

It is hard to imagine a better monument to individual liberty than Grotius’s system. The realm of justice is the realm of enforceable obligations and these correspond to individual rights. Duties of assistance, beneficence, gratitude, and other “imperfect duties” do not correspond to rights and so are not matters of justice and do not present enforceable obligations. Only “perfect duties” are enforceable, and these correspond either to the natural rights of others or to the rights they have acquired by the free consent of the obligated person. The realm of justice is thus exhausted by the rights and obligations that are implied by, or acquired in accordance with, the principles of liberty and consent.

Also like libertarians, Grotius takes for granted the legitimacy of private property. But instead of basing it on dubious notions of “mixing one’s labor” with inanimate objects, as Locke does, Grotius treats private property, too, as a matter of tacit consent: “the Original of Property . . . resulted from a certain Compact and Agreement, either expressly . . . or else tacitly” (Grotius [1625] 2005a, 426-27). Thus presented, Grotius’s theory of justice can be built from liberty alone.

However, Grotius is not just a forerunner of libertarianism. He is a better libertarian than most modern libertarians are, for his commitment to individual freedom and consent are stronger than theirs. Grotius sees that if the individual should be free to do as he chooses (as long as he
does not violate others’ equal right to do as they choose), he may decide to give up any and all possessions or rights by free consent, and conversely to acquire any and all obligations by consent. Libertarians tend to allow people to consent only to impose on themselves enforceable promises of specific future acts or omissions, or contracts of exchange of goods or services; Grotius allows this as well (Grotius [1625] 2005a, book II, ch. 12). But in addition, Grotius allows people to subject their wills to the authority of another by consent. This is “the Right which one acquires over Persons, by Vertue of a Subjection into which they enter by their own Consent” (Grotius [1625] 2005a, 555).

To block such consensual agreements would be to interfere with people’s freedom of contract and would violate the principle of liberty. By this principle any person has the right to choose what to do as long as he or she does not interfere with the rights of others. Consent is an act by which a person alienates his or her rights in some respect. So the principle of liberty implies that any person can enter any consensual agreements that do not violate the rights of any other person. Yet, most libertarians would violate this freedom.

For example, all libertarians argue that the liberty of the poor to work in sweatshops should not be violated. If people think that they can improve their lives by taking such employment, they should be free to do so. However, Grotius would add that someone in such dire straits should also be free to consent to a contract of slavery—something few libertarians would countenance. Here Grotius is taking individual liberty much more seriously than they do. Nothing could be a more important decision than one that allows an individual to escape death. Yet libertarians arbitrarily limit the ability of those in dire straits to escape death (say, by starvation) only to situations in which there happens to be a nearby sweatshop offering subsistence wages or higher. But what if the would-be sweatshop worker is not so lucky as to be able to find work in a
sweatshop? What if she is hopelessly disabled, by birth or by other circumstances, from getting any work at all, and what if other people choose not to give this unfortunate person charity? Should someone come along and offer to save his life in exchange for a contract of servitude, why should libertarians interfere? Where libertarians typically oppose such contracts; Grotius ([1625] 2005a, 262, 564-65), on the grounds of individual liberty, does not:

When Men are said to be by Nature in a State of Freedom, by Nature is to be understood the Right of Nature, as it is antecedent to all human Acts to the contrary; and the Freedom there meant, is an Exemption from Slavery, and not an absolute Incompatibility with Slavery, that is, no Man naturally is a Slave, but no Man has a Right never to become such. . . . It is every Man’s apparent Duty, who is reduced to a State of Servitude, either civil or personal, to be content with his own Condition. (Ibid., 1105-6)

To see the fit of this position with libertarian convictions, one might note that Grotius’s principles of liberty and consent tells us to determine enforceable authority relationships, rights, and obligations by retracing the legal deeds by which the current situation has evolved out of the original position of equal liberty. Justice is determined, then, not by the perceived equity of the current state of affairs, but by the justice of the voluntary, consensual actions that have led up to the present. All questions about justice and authority must be answered exclusively in historical terms, by referring to the past deeds (e.g., contracts) of the parties to the putative authority relation.
The parallel to Nozick’s “historical” view of justice, as opposed to “patterned” or “end-state” views, is obvious. Later I will point to Nozick as the rare libertarian who would countenance contracts of slavery, and he is unrepresentative, too, in pointing out the absurdities in Locke’s theory of property acquisition. But in his rejection of “social justice,” Nozick is in line with most libertarian theorists (the recent development of “bleeding-heart libertarianism” offer exceptions). Hayek (1976, 147), for example, spent a book arguing against the very idea of social justice, which he called “an atavism, a vain attempt which, if it prevails, must not only destroy the Great Society but would also greatly threaten the survival of the large numbers to which some three hundred years of a market order have enabled mankind to grow.” Grotius explains why the idea of social justice is a mistake. Since the realm of justice is exhausted by the rights and obligations that are implied by or acquired in accordance with the principles of liberty, pain, suffering, hunger, poverty, inequality, and any other situational or relational property is “just” if it is not the product of a rights violation—just as libertarians believe. For the same reason there is no such thing as an inherently unjust act, since only rights violations are unjust and the current distribution of rights and obligations is a function of past deeds—just as libertarians believe. It is thus possible to harm someone wantonly but without injustice, as long as he had no right not to be harmed in this way—just as libertarians believe. Grotius would, of course, say that as a matter of imperfect duty, we ought not to harm anyone wantonly, but if we do, we are not committing an injustice, strictly speaking—just as libertarians believe.

Libertarians also affirm the principle of consent and believe that contractual agreements should be enforceable. This means that a person by free consent can bind her future will in exchange for something she desires. Grotius believed this, too, and could, therefore, object to libertarians’ paternalistic notion that this ability should be limited only to the types of contracts that
libertarians approve of—while slavery or other contracts that libertarians happen to abhor should be prohibited.

Nozick (1974, 163) famously objected to restrictions on “capitalist acts between consenting adults.” What is less well remembered is that Nozick (ibid., 331) declared that voluntary contracts of slavery are permissible. Nozick does not explain why this is the case, but Grotius does. Adults who are free to bind their wills by agreeing to a contract to provide goods or services should also be free to bind their wills by subjecting them to that of another. By prohibiting contracts of slavery or other contracts that we find uncomfortable, we are interfering with an individual’s sovereign authority to do as he wills.

**Libertarian Defenses Against Grotian Libertarianism**

Nozick has few followers among libertarians. Perhaps one reason is that he had the courage to entertain unpalatable conclusions such as slavery. The popularizers of libertarianism, such as Murray Rothbard (1982, 41, 135), lack this courage. While they celebrate employment contracts that may be driven by dire necessity, they deny that slavery is acceptable. Unlike them, however, Grotius does not draw artificial limits on the overarching principle of liberty that motivates the libertarian celebration of capitalism. If someone can be expected to fulfill an employment contract signed because otherwise she would have starved; a Grotian would defend her further freedom to sign away her liberty as well as the right of others to offer a contract of subjection in exchange for food.\(^7\) By the same token, libertarians would allow a corporation that has a medicine that could stop a pandemic to charge a prince’s ransom for the right to use it; a Grotian would

\(^7\) Especially in his earlier works, Grotius does talk about an obligation to prevent and correct wrongs. In general, the claims I make in this section do not reflect what Grotius wrote, but what follows from what he wrote. Thus I speak of “Grotian” rather than Grotius.
also defend the corporation’s freedom to charge the price of universal slavery. Libertarians see nothing wrong with sex work; a Grotian would allow one to consent, as well, to have pain inflicted and bodily integrity violated.

A libertarian might object that these scenarios should not call into question an entire theory of justice, which need not work well in every conceivable situation. However, the examples of contracts born out of extreme need, where the problems are failures of moral duties of charity or easy rescue, are meant to convey not the likelihood of such circumstances arising but, instead, to illustrate the commitments acquired by taking liberty as sole concern of justice.

Libertarians might reply that everyone is morally obligated to aid the needy, offer fair terms of contract, and never wantonly harm others. Grotius believed this too, under the rubric of imperfect duty. He also shared with libertarians, however, an overriding insistence on a bright line between moral and legal obligations, such that the former cannot be enforced unless one contracts to subject oneself to them. It seems evident that libertarians are violating their overarching commitment to individual liberty, which justifies this bright line, if they refuse to countenance contracts of slavery, or restrict the right of corporations to set the terms of sale, or prohibit contracts that allow one person to violate another’s bodily integrity.

A libertarian might object that contracts of subjection or contracts that endanger bodily integrity are unjust, because one’s present self has no right to violate one’s future self’s rights. Rothbard (1982, 40) enunciates such a claim in voluntarist terms: A contract of slavery “would mean that [one’s] future will over his own person was being surrendered in advance.” However, since by the principle of liberty a person can do what she wants as long as she does not violate the rights of others, this objection only really works if one’s future ”will” truly is that of another person in some meaningful sense. Here the libertarian might refer to theories of personal identity
such as that of Derek Parfit (1984), who argues that there is a radical discontinuity of the self over time. Yet the paradoxical nature of the idea that my future self is not my-self should at least invite libertarians’ caution. Moreover, if one’s future self really is another person, then no contract is valid: by the principle of liberty, no person is authorized to consent on behalf of another person, except where this authority was created by past consent, so no person could be authorized to consent on behalf of her future self. But if one’s present self cannot bind one’s future self, then consent is meaningless and contract impossible. This would render capitalism impossible, since capitalism depends upon enforceable contracts.

Nothing I have said, however, entails the abandonment of philosophical libertarianism as it is generally conceived. Libertarians might simply bite the bullet and accept what Grotius teaches: that the legal enforcement of contracts of slavery, etc., is the logical outcome of a strict commitment to individual liberty. (This, as we have seen, appears to have been Nozick’s position.) Thus, for example, while I believe that there are good utilitarian and Kantian reasons to reject any theory of justice that sanctions absolute subjection based on extreme need, the libertarian, qua libertarian, cannot accept these reasons. The libertarian might agree that there is something discomfiting, even morally troublesome, about allowing contracts of subjection based on extreme need, but if she is to remain a libertarian, she must conclude that our discomfort with such contracts is a fair price to pay, since the alternatives involve coercing people who have violated no rights. If we were to prohibit contracts of subjection based on extreme need, we would limit people’s right to exchange goods and services freely and thereby violate their right to do what they want as long as they do not violate the rights of others. Similarly, were we to force people or corporations to help others in need, we would subject them to our authority, violating their right to decide what to do for themselves. I have been using Grotius’s theory of justice to
suggest that exclusive reliance on liberty and consent leads to a practical *reductio ad absurdum* of libertarianism. But Grotius did not find slavery absurd, and libertarians might simply recognize that in all consistency, they should become Grotians and embrace the absolute freedom of contract that the principles of liberty and consent imply.

A final libertarian escape route, however, might be to reject the assumption that one’s rights are alienable. This would restrict the absolute freedom of contract that is otherwise implied by the principles of liberty and consent, for such contracts involve the alienation of “inalienable” rights.

For this strategy to work, however, the libertarian has to offer a principled way to distinguish between alienable and inalienable rights while respecting the right of individuals to do as they please (including alienating their rights). It is hard to see how this strategy avoids ad-hocery. Hobbes suggests that we cannot alienate any right the alienation of which would undermine the purpose of contracting. Kant argues that we cannot alienate any right that is constitutive of our capacity for free and responsible self-determination. Cumberland suggests that the rights that are necessary for a peaceful and prosperous society cannot be alienated. One can see the slippery slope toward consequentialism here, where if one right is declared inalienable because we do not like the consequences of its alienability, all rights may eventually be subjected to the same consequentialist test. Moreover, if ad-hoc restrictions on liberty and consent are allowable, why should we stop at the creation of “inalienable” rights? Why not also add a right of access to the necessary means to satisfy basic needs?

It should be noted that Grotius himself trumps the principle of liberty by the principle of self-preservation *in extremis*. He allows ([1625] 2005a, 433-5) one to use or take someone else’s property if that property is necessary for survival. We might go further and add positive rights
and corresponding obligations, such that it would be legally wrong to withhold aid to the needy. However, Grotius’s concession to survival needs conflicts with the libertarian essence of his doctrine by introducing a consequentialist element. If we were to evaluate the appropriateness of each individual choice on the basis of the desirability of its consequences, no principle could stop us from adding not only need-based but paternalist restrictions on liberty, and no principle could stop the definition of “need” from expanding beyond life-and-death necessity to, say, health insurance, loans for higher education, agricultural subsidies to needy farmers, and so on. We would no longer be following the libertarian practice of using the basic principle of liberty (that people ought to be free to decide what to do as long as they do not violate the rights of others) as a trump card against welfarist and paternalist legislation; instead, welfarist and paternalist considerations would trump the presumption of liberty, which is precisely what happens now in every Western society. If we endorse this political status quo, we are no longer philosophical libertarians, but are instead seeking some compromise between libertarianism and Rawlsian liberalism, utilitarianism, or perfectionism.

The history of liberalism can be seen as an ongoing attempt to achieve just such compromises. Cumberland, Locke, Pufendorf, Rousseau, Kant, Fichte, Hegel, Mill, and Rawls all affirmed varieties of the principle of liberty, but each of them formulated the principle in such a way as to block its undesirable consequences, or added additional principles that did so. Like Grotius, these philosophers were unwilling to completely blind themselves to everything but individual liberty of choice and consent.

I ask whether libertarians are willing to out-Grotius Grotius. If so, they can repudiate Grotius’s concession to consequences and can construct, on the basis of the rest of his philosophy, a new, pure libertarianism unconditionally committed to liberty. To its credit, this libertari-
anism would not rely on claims about the desirable effects of liberty. By the same token, no consequentialist limits on liberty would be allowed. With the undiluted and unrestrained principles of liberty and consent in place, however, libertarians would have to accept that voluntary slavery and other undesirable contracts are part and parcel of their apotheosis of the sovereign individual.

REFERENCES


