
ABSTRACT – In this essay I use the political theory of Hugo Grotius to present and discuss the pull and the problems of philosophical libertarianism. To this end I first identify the core principles of the political theory of Hugo Grotius and show how these are the same core principles as those of philosophical libertarianism. I then show how these principles lead to some practically absurd commitments. I therefore conclude that the costs of the problems of philosophical libertarianism outweigh the benefits of its virtues.

God created man αὐτεξούσιον, “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.¹ - Hugo Grotius

1. Introduction

There is, it seems, a steady rise in the number of persons who support libertarian values and ideas, even if they do not declare themselves to be libertarians.² This trend is understandable, not merely because of the widespread perception that the world is rapidly changing for the worse and that government is responsible for it, but also because libertarian ideas and values are prima facie attractive. My aim in this essay is twofold: first, to explain the attractions of libertarianism and, second, to argue that the attractions of libertarianism come at a very high price – a price higher than most (even most declared libertarians) would be willing to pay.

I will focus my discussion on philosophical libertarianism, by which I understand the position that affirms the following set of normative claims: first, that absent crime or contracts to the contrary, each person ought to be at liberty to decide what to do for herself. Second, because every person has this claim to liberty, the liberty of each is limited by the equal right to liberty of

¹ Commentary on the Law of Prize and Booty, 33.
² I don’t have much to support this statement of fact, but see D. Kirby and D. Boaz “The American Vote in the Age of Obama,” Policy Analysis, no. 658, January 2010.
each other. Third, persons can bind their wills through free consent in which case they acquire new rights and obligations. Fourth, the domain of justice is acts and the rights that can be violated by acts. Fifth, justice should be understood in terms of the absence of injustice, so that acts that do not violate the rights of others are just, and acts that violate someone’s rights are unjust.

It bears mention that philosophical libertarianism carries no commitment whatsoever to psychological egoism or similar contentious philosophical claims about human psychology, needs, or motivation. Philosophical libertarianism starts with normative premises: premises about the value and normative significance of free personal self-determination. The basic claim of philosophical libertarianism is that human beings ought to be at liberty to decide what to do for themselves, as long as what they decide to do is compatible with the like liberty of others. Very little metaphysical baggage is needed to defend this principle.

It also bears mention that philosophical libertarianism is different from institutional libertarianism. Philosophical libertarianism is defined by the set of basic principles outlined above. Philosophical libertarianism provides the resources for principled answers to questions of policy and so should not be confused with any particular set of policies. Philosophical libertarianism does not by itself entail any conclusions about what government should look like, what sorts of rights should delimit the sphere of privacy from the public sphere, what rate of taxes are just, or even how the institution of property should be designed. In this regard, philosophical liberta-

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3 Tellingly, the first sentence in Nozick’s *Anarchy State and Utopia* is: “individuals have rights, and there are things no person or group may do to them (without violating their rights).” *Anarchy State and Utopia* (New York: Basic Books, Inc. 1974), ix.

4 It is, accordingly, important not to confuse libertarianism with the philosophy defended by Ayn Rand. Ayn Rand may be defending a kind of libertarianism (though I’m even skeptical of that), but libertarianism is in no way committed to defending the view of human nature or human relations offered by her.

5 This distinction tracks one made by Scanlon in “Utilitarianism and Contractualism,” in *Utilitarianism and Beyond*, A. Sen & B. Williams eds. (Cambridge, UK: Cambridge University Press, 1982), pp. 103-126.

6 Which is why I do not in this essay touch upon Grotius’s theory of property. For some illuminating discussions of this interesting issue, see J. Salter “Hugo Grotius: Property and Consent,” *Political Theory*, vol. 29, 4, August 2001,
arianism is akin to philosophical utilitarianism – the position structured by the principle that we ought to design the basic structure of society so as to maximize happiness, broadly conceived. Like philosophical libertarianism, philosophical utilitarianism leaves questions about institutional design for a later stage of theorizing. Indeed, philosophical utilitarianism might argue for limited or minimal government as much as philosophical libertarianism might argue for it – though, of course, it would do so for very different reasons.⁷

Philosophical libertarianism is attractive. The simplicity and intuitive appeal of the basic principles of liberty are hard to resist. Yet, in this essay I show that philosophical libertarianism is beset with some practically absurd implications.

This leaves the libertarian with some options. She can reject one or more of the core principles. She can accept the principles and pay the price of allowing the unattractive commitments. Or, she can reject that the unattractive commitments are really implied by the core principles. Since the latter option gets all the benefits of philosophical libertarianism without paying the costs, I think this is the primary option, and I discuss how a libertarian might pursue it in the final section of this paper.

I will use the political philosophy of Hugo Grotius (1583-1645) to articulate the core principles of philosophical libertarianism. This approach, which may strike some readers as rather odd, is motivated by the following considerations. Grotius provides the first articulation of the core principles of philosophical libertarianism that I am acquainted with and he fearlessly embraces the commitments that follow these principles, so Grotius provides a clear presentation of the attractions and philosophical libertarianism. Moreover, I believe that these facts about

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⁷ As Samuel Freeman has shown, we should also distinguish libertarianism from classical or right wing liberalism – see “Illiberal Libertarians: Why Libertarianism Is Not a Liberal View,” in Philosophy and Public Affairs, 30, 2, 2002.
Grotius’s theory are somewhat overlooked and the importance of his philosophy is underestimated as a result. Because we haven’t paid enough attention to how Grotius’s theory is structured by the principles of liberty, we have also, I believe, to some extent misunderstood some of the responses to Grotius’s theory that were offered by his successors. Indeed, though I can’t defend this claim in the present essay, I think that Cumberland, Locke, Pufendorf, Rousseau, and Kant in different ways were trying to work out how one might accept the Grotian core of principles without incurring its high costs. So, though I could have used Nozick or other recent libertarians to discuss the attractions and problems of philosophical libertarianism, I think that we learn something about libertarianism, about Grotius, and even about the history of political thought after Grotius, by using his political theory to identify and articulate the core libertarian principles.

To summarize, let me clarify what I am and what I am not arguing in this essay. My main claim is that philosophical libertarianism, understood as the position structured by the core principles of liberty identified below, carries commitments so costly that they outweigh its attractions. I use Hugo Grotius to illustrate the attractions and costs of philosophical libertarianism, and I am of the opinion that my essay has interesting implications for how we can understand Grotius’s political philosophy, but my main claim is not about Grotius, and so, I am not arguing that we should interpret Grotius as a pure libertarian. While Grotius articulates the core principles of philosophical libertarianism with almost unparalleled clarity and fearlessness, there are other strands in Grotius’s political theory that runs counter to his affirmation of the core libertarian principles. Since the this paper primarily is about philosophical libertarianism, I say very little about these other strands of Grotius’s theory, and so the reading of Grotius I present in the following is not an attempt at providing an adequate interpretation of his political philosophy as
a whole.⁸ – All that I try to achieve as a matter of Grotius interpretation is to show that he articulates the core libertarian position, which, I believe, is an interesting and somewhat overlooked feature of his political theory.

2. Hugo Grotius and the core principles of philosophical libertarianism

Hugo Grotius’s De iure Belli ac Pacis (1625) is generally recognized as a founding text of the early modern natural law tradition.⁹ Though the topic of this work is just war theory, it presents a complete natural law theory, including a systematic account of the sources and limits of political authority. For, as Grotius defines it, the topic of ‘war’ concerns all questions regarding when, why, and what force persons legitimately can use against one another – where the concept of personhood includes all sorts of actors that might consider using force to protect their interests, be they natural persons, citizens, sovereigns, churches, provinces, or private corporations. Accordingly, Grotius’s basic question is when, if ever, a person may justifiably use or threaten force, whether the person and the target persons are natural persons, sovereigns, churches, or other.¹⁰

To approach this question Grotius notes two points of general agreement: first, that the use of force requires justification,¹¹ and, second, that all people allow three sorts of justifying reasons for the use of force: force may be used to prevent a wrong from being done, to seek repa-

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⁸ I have argued elsewhere that [***removed for review****] Here I disregard such complications and focus instead on Grotius’s affirmation of the principles of liberty.


¹⁰ On the plurality of agents of war and types of war, see The Rights of War and Peace, Book I, chapters 1 and 3.

¹¹ The Rights of War and Peace, 101, 391.
rations for a wrong done, and to punish a wrong-doer for his or her wrong-doing. The shared term of these three justifying reasons – prevention, repair, and punishment – is wrongdoing. And so, to understand when force is justified, we must understand what wrongdoing is.

The basic unit of Grotius’s theory is the act: a wrong is an act that is morally impermissible. Grotius further specifies the concepts of justice and injustice by introducing a distinction between right proper (variously called perfect right, expletive, corrective, or particular justice) and the sphere of morality that does not belong to right proper (variously called imperfect right, attributive, distributive, or universal justice). Right proper is the realm of rights. Imperfect right is the realm of norms that are not based on rights. Imperfect right concerns such virtues as gratitude, beneficence, charity, and so on. Violations of imperfect right are wrong – it is wrong to deny aid to those in need. But those in need do not have a claim on or right to aid, and so it is not wrong in the strict sense to deny it to them.

Because imperfect right does not concern rights, violations of imperfect right do not provide justifying reasons for the use of force: denying aid to those in need does not violate their claims and so is not, strictly speaking, an injustice and thus not a punishable wrong. The realm of perfect right, by contrast, is the realm of rights and it is in the violation of these that we find the types of wrongs that can provide just causes for the use of force. Force may be used, and may only be used, to prevent, repair, or exact punishment for rights violations; “when this is wanting, the War on that Account is unjust, as was that of the Romans against the King of Cyprus, for his Ingratitude.”

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12 *The Rights of War and Peace*, 395.
13 *The Rights of War and Peace*, 138-45. I’m simplifying Grotius’s distinctions and overlooking how he changed these over time; see Tuck’s *The Rights of War and Peace* for a more detailed treatment (esp. pp. 87-9 and 96-100).
14 *The Rights of War and Peace*, 1113, italics removed.
So, an injustice simply is a violation of the right of another and “justice simply consists in
respecting someone else’s rights.” An act that violates the right of a person is a crime that au-
thorizes the injured party to seek reparations and provides a general authorization to punish the
malefactor in proportion to his crime. Since the only just causes of the use of force are strict
wrongs, it follows that any use of force against another is an injustice except where they have
provided just cause for it by violating the right of some person.

What then decides what rights a person has? To answer this question, we need to take a
look at Grotius’s distinction between natural and acquired rights. All natural rights are derived
from a basic principle of original right: that absent acts to the contrary (crime or consent), any
person should be free to decide what to do for him or herself:

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. Moreover, this view is sanctioned by the common consent of all nations.
For what is that well-known concept, “natural liberty,” other than the power of the indi-
vidual to act in accordance with his own will? And liberty in regard to actions is equiva-
 lent to ownership in regard to property.

Since every person has this original right to liberty, it follows analytically from this principle of
original liberty that the original liberty of each is limited by the equal right to liberty of all other
persons. And though Grotius does not explicitly draw this inference, I believe that it is safe to
say that he affirms the principle of equal liberty that follows from the principle of original liberty
so that, absent acts to the contrary, each person has a right to the most extensive liberty compatible with the equal right to liberty of others.

The principle of equal liberty determines the realm of original right. The realm of acquired rights is the realm of rights as these can be generated from an initial situation of original right. There are three sources of acquired rights and obligations: generation, crime, and consent. Rights of generation are those that obtain between parents and children simply by virtue of their relation, or between humans and God. Rights of crime are the rights to seek reparation from, and exact punishment on, wrongdoers in proportion to their wrongdoings. These wrongdoings can, in turn, be violations of either original or acquired rights. Acquired rights based in crime are rights to do what is necessary to correct a departure from justice and last only until the wrong has been corrected. Consent, by contrast, is the power to change what is right and wrong by the interpersonal transfer of rights.

The power of consent is immense. Consent, whether given as promise, by contract, pledge, or oath, creates new rights and obligations, for “What each individual has indicated to be his will, that is law with respect to him.” Consent creates new rights and obligations whether through a contract of exchange of goods or services, or through a person’s consent to subject his or her will to the authority of another. In either case, consent transfers the rights of liberty within some sphere from one person to another; it converts rights into authority: “the Right which one acquires over Persons, by Vertue of a Subjection into which they enter by their own Consent.”

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19 *The Rights of War and Peace*, 508.
21 See especially *The Rights of War and Peace*, Book II, chapter 12.
22 *The Rights of War and Peace*, 555-63.
23 *The Rights of War and Peace*, 555.
With the consensual creation of new rights and obligations come also new possibilities for wrongdoing. And with these possibilities for wrongdoing come new just causes for the use of force. For, if a person by contract commits to some action or transfers authority to decide some matter that would otherwise be a matter at her own discretion, then she has alienated some part of her original liberty, and then the person to whom she has transferred said authority has the authority to decide on these matters.²⁴ So, if a person breaks her promise or contract, then that constitutes a violation of the rights of the other – it is an injustice and can be punished as such.²⁵

2.1 Liberty, Authority, and Justice

Seven related conclusions about liberty, authority, and justice follow from Grotius’s argument so far. First, absent contractually created obligations, no person has any entitlements on the wills of other persons as long as the other persons have not violated the rights of others. So, there are no original authority relations between mature persons; with one exception, all authority is acquired by crime or consent (the exception is authority over children²⁶).

Second, because the use of force is an injustice unless it is grounded in a wrong, and because each person has a right to decide what to do as long as she does not violate the rights of other persons, it is against natural right to compel another person for the sake of her own good, for such compulsion would violate his or her right to independence and self-determination: “I must not 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 them-

²⁴ The Rights of War and Peace, 701, 704-5.
²⁵ The Rights of War and Peace, 393-403.
²⁶ The Rights of War and Peace 508-11. The nature of authority grounded in generation was, of course, an important and at times troublesome issue for early modern political theory. Some, like Locke, refuted it as source of political authority, but nevertheless placed it in the center of the account of the authority of natural law (which both binds and concerns us as God’s created beings). Others, like Hobbes, tried to show how authority from generation was a species of authority from consent – the hypothetical consent that children would give to be subjected to the authority of their parents. The issue is so thorny, I believe, because, first, it is unclear why generation should create authority that is not grounded in the good the subjection to authority confers on the generated, but, second, early modern political theory (except, perhaps, Cumberland) is generally uncomfortable with forward-looking justifications of authority.
selves, unless some other Person has gained any Right over them.”\textsuperscript{27} No claim to authority can be justified by the advantages it brings to those subjected to it.

Third, nor can authority be justified by its usefulness for realizing some objective good or end. Authority is never justified by reference to the good it can achieve (such as the common good or the happiness of those subjected to it). Authority is only created by crime or through the consent of the parties to the authority relation: “Consent is the Original of all Right to Government, unless where Subjection is inflicted as Punishment.”\textsuperscript{28}

Fourth, because any person has the right to choose what to do as long as he or she does not interfere with the rights of others, and because consent is an act by which a person alienates his or her rights, it follows that any person has the right to alienate his or her rights as long as she does not thereby violate the rights of others. And since there are no original entitlements on the wills of persons other than those implied by the principle of equal liberty, it follows that there are no original limits on what a person can consent to: persons are at liberty to decide what to do with their rights of liberty – including when to alienate them and why. Consent must be freely given, that is, consent based on fraud or given under threat of unjust coercion does not create real obligation, rights, or authority.\textsuperscript{29} But freely given consent binds, no matter why it is given: “to perform Promises is a Duty arising from the Nature of immutable justice.”\textsuperscript{30} And there are many reasons why a person might freely subject himself completely to another person. If, for example, an unfortunate person finds himself on the brink of starvation he may consent to just about any terms of subjection for a loaf of bread. Or, if a person is threatened with a just punishment of

\textsuperscript{27} The Rights of War and Peace, 1106.
\textsuperscript{28} The Rights of War and Peace, 1108. Though the scope here is “right of government” the quote may serve for the claim about authority in general. As mentioned, Grotius does not work with an in principle distinction between authority and political authority (i.e., between contracts of government versus social contracts). In short, since authority is created through the transfer of right, and since transfer of right happens by crime or consent (cf. 1633), crime or consent is the original of authority.
\textsuperscript{29} The Rights of War and Peace, 739, 787, 892. But see also 1626-7.
\textsuperscript{30} The Rights of War and Peace, 705. Likewise The Rights of War and Peace, 786.
death, she may agree to become a slave in return for mercy.\textsuperscript{31} For Grotius, there is nothing contrary to strict right in such contracts of complete subjection as long as the contract is willingly entered into by both parties:

[\textit{W}hen 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.\textsuperscript{32}

It follows from the preceding that, fifth, all questions about who has authority to do what must be answered exclusively by reference to the past wills of those party to the putative authority relations. The structure of the putative relation and its likely consequences matter only insofar as they are given significance by what past contracts the parties have or have not made.

Sixth, it follows that the justice of a situation or a relation between persons depends on what moves persons made in the past. If we think of a situation as a complete description of a point in space and time, then the justice of a situation is completely reducible to the justice of the moves and transactions that brought the situation about. What authority relations, rights, and obligations exist at any given point in time is a function of what moves were made from an initial situation of equal liberty. Moreover, if past moves were just – that is, if we got to the present situation from an initial situation of equal right by only just acts – then the present situation is just; \textit{no matter what else is true about it}. There is nothing inherently unjust about pain, suffering, hunger, inequality, or any other situational or relational property. For justice consists in the non-

\textsuperscript{31} Grotius entertains examples like these, e.g. \textit{The Rights of War and Peace}, 262, 564-5
\textsuperscript{32} \textit{The Rights of War and Peace}, 1105-6. Grotius repeatedly emphasizes the analogy between slavery and subjection – for example, he approvingly quotes Augustine (who he elsewhere calls the “supreme authority on piety and morals” [\textit{Commentary on the Law of Prize and Booty}, 13]): “Subjects should so bear with their Sovereigns, and Slaves with their Lords, that by suffering these temporal Evils with Patience, they may hope for eternal good things.” (\textit{The Rights of War and Peace}, 1371) See also \textit{The Rights of War and Peace}, 556-63, 1360.
violation of rights, injustice in the violation of rights, and what rights persons have depend exclusively on what just moves they and others have made that brought the current situation about from the initial situation of equal liberty. So, if there were no unjust moves, or if unjust moves have been repaired, then the current situation is just. While there may be imperfect duties of charity and beneficence that requires various actions depending on the situation, its circumstances, and future consequences, these are not required by justice.

Seventh, it finally follows that whether or not an action is just or not too depends on what happened in the past. Since all injustices are rights violations and since all rights are alienable by consent, it follows that there is no such thing as an inherently unjust act. Whether an act is unjust depends on whether or not it violates the right of the harmed person. If the person is harmed, but had alienated her right not to be harmed in this way, then there is no injustice in the harm. It might, of course, be that as a matter of imperfect right, it is morally wrong for the person inflicting the harm to do it. But it is not an injustice. Grotius, accordingly, can distinguish quite sharply between injustices, moral wrongs, and morally indifferent acts. An injustice is a rights violation by one person on another. A moral wrong is a violation of imperfect right, such as a just harm or a failure to aid those in need. A morally indifferent act is one where neither perfect nor imperfect right is at issue.

2.2 Political authority, political legitimacy, and political obligation
Questions about political authority, legitimacy, and obligation are not, as Grotius paints the picture, different in kind from the general issue of authority and obligation. Political authority is simply authority created by a contract where many subject themselves to the authority of one or some persons to be commanded by these as their sovereign superiors, within the limits defined
by the contract that constituted them as superiors. Thus, Grotius does not, unlike later natural law thinkers, use a distinction between the social contract (whereby the people is constituted as a people) and the contract of government, by which the people subjects itself to a ruler.

Because there are no limits to what the terms of the contract can be, and since there can be good reasons for complete collective subjection, Grotius’s conception of legitimacy is compatible with, but does not require, complete collective subjection to an absolute sovereign:

It is lawful for any Man to engage himself as a Slave to whom he pleases ... Why should it not therefore be as lawful for a People that are at their own Disposal, to deliver up themselves to any one or more Persons, and transfer the Right of Governing them upon him or them, without reserving any Share of that Right to themselves? ... In vain do some alledge the inconveniences which arise from hence, or may arise; for you can frame no Form of Government in your Mind, which will be without inconveniences and Dangers. ... as there are several Ways of Living, some better than others, and every one may chuse which he pleases of all those Sorts; so a People may chuse what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will of those who conferred it upon him. ... There may be many Causes why a People should renounce all Sovereignty in themselves, and yield it to another. As when they are upon the Brink of Ruin, and they can find no other Means to save themselves; or being in great Want, they cannot otherwise be supported.

Since consent is either explicit or tacit, a sovereign can be established in five ways (references to The Rights of War and Peace in parenthesis): By a contract between a people and a person or assembly (e.g. 563), by tacitly accepted usurpation (330), by just conquest (272, 281), by tacitly accepted unjust conquest (503–4), and by acquisition from one or those who previously held sovereignty (289).


The Rights of War and Peace, 261-2.
Who holds what political authority depends exclusively on past contracts. And Grotius maintains that persons can authorize the subjection of future generations, so that a past collective subjection obligates the present people.\textsuperscript{36}

Once a sovereign authority is constituted, subjects may have irreversibly yielded their will: “the Will of the People may be such, either at the Time when they established the Sovereignty, or afterwards, that they may confer a Right which does not for the future depend on their Will.”\textsuperscript{37} And the sovereign is not bound by natural law to care about the interests of its subjects: Grotius rejects \textit{salus populi suprema lex}, since he rejects that sovereignty is established for the sake of the people rather than the sovereign: “there may be some Civil Governments established for the Benefit of the Sovereign, as the Kingdoms which a Prince acquires by the Right of Conquest; but are not therefore ... Tyrannical; for Tyranny ... implies Injustice.”\textsuperscript{38}

Tyranny implies injustice. And a sovereign acting within its mandate as defined in the contract of government cannot be unjust, for an injustice is the violation of the rights of another, and in the contract the subjects alienated their rights to the sovereign. On the other hand, resisting a sovereign acting within its mandate violates the terms of the contract and is therefore prohibited by natural law. If the sovereign violates the contract it can be resisted like other malefactors – not as sovereign, but as a private person violating the rights of others.\textsuperscript{39} But if the sovereign is constituted as absolute, as it may be, then it has unlimited mandate and, as such, cannot commit an injustice. An absolute sovereign could not, it follows, be tyrannical. Conversely, any disobedience or resistance to it would be unjust and punishable as such. As Grotius sees it, there

\textsuperscript{36} \textit{The Rights of War and Peace}, 565, 1377.
\textsuperscript{37} \textit{The Rights of War and Peace}, 503. Grotius likens the status of subjects to that of a woman who enters marriage: “as when a Woman chuses herself a Husband, whom she must from that Time always obey.”\textsuperscript{272} \textit{The Rights of War and Peace}, 272.
\textsuperscript{38} \textit{The Rights of War and Peace}, 273.
\textsuperscript{39} Thus Grotius distinguishes between sovereignty “the thing itself” and “the manner of holding it,” see \textit{The Rights of War and Peace} 279, 296-7, 305, 334, 375, 501-2, 563.
is nothing contrary to right in such a situation. Though his argument does not require subjection to an absolute sovereign, it permits it.40

3. The Grotian Core and its attractions

The core of Grotius’s political theory consists of five basic claims: a fundamental principle of original liberty and its correlate principle of equal liberty, a consent-thesis, and definitions of the domain and extension of justice that follow from the first three principles. The first and most basic principle is the principle of original liberty:

(1) The principle of original liberty. Absent crime or consent, each person ought to be at liberty to decide what to do for herself.

It is not immediately clear what the grounds of this first principle are, except that human beings are created free – they have a capacity to decide what to do for themselves and, with some bridge across the is-ought gap, each person therefore ought to be at liberty to decide what to do for themselves. A correlate of this principle is that every person ought to be at liberty to decide what to do for him- or herself, and thus the principle of original liberty implies a principle of equal liberty:

(2) The principle of equal liberty. Because every person has an equal claim to original liberty, the liberty of each is limited by the equal right to liberty of all others.

This principle of equal liberty also supplies an account of the crimes that can defeat original liberty: as an initial definition, crimes are acts that violate the right to liberty of some person.

Moreover, persons are capable of creating obligations through the power of consent:

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40 Richard Tuck has argued that Grotius’s theory “is Janus-faced, and its two mouths speak the language of both absolutism and liberty,” and therefore left the double legacy of natural rights and absolutism (in Natural Rights Theories: Their Origin and Development [Cambridge: Cambridge University Press, 1979], 79). But while Grotius argues that absolutism is permissible, his theory does not immediately favor absolutism against other systems of government. Absolutism is merely one of the permissible types of government.
(3) *The consent thesis.* Persons can alienate their original rights of liberty through the power of freely given consent.

The consent thesis explains how rights and obligations can be acquired by just moves. The power of free consent provides the vehicle for just moves that go from the initial situation, where no person has any obligations of justice other than the duty to not violate the equal right to liberty of other persons, to situations where there are acquired obligations.

These three claims ground two other definitive features of Grotius’s political theory. First the definition of the domain of justice:

(4) *The domain of justice is acts.* Justice is the theory of what persons may and may not justifiably do to one another, including when and why they may use force or threats thereof; justice is a property of actions. So, institutions, situations, and relations are not just or unjust simply as such, but are just or unjust only insofar as they are the products or expressions of unjust acts.

Second, because the domain of justice is acts, and because persons ought to be free to do whatever they like, as long as they do not violate the rights of any other person, justice concerns rights and rights-based obligations. So, we are supplied with the following definition of justice and injustice:

(5) *Definition of just and unjust (perfect right).* The requirements of justice proper (perfect right) concerns only original and acquired personal rights and rights-based obligations. An act that does not violate any rights is just; an injustice is an act that violates the right of some person.

Other issues of moral relevance, such as the duties we might owe to those in need, the gratitude we owe to benefactors, or like issues, are issues of imperfect right. Imperfect right does not impose strict obligations and so violations of imperfect right may be blameworthy, but force cannot
be used to secure compliance with imperfect right, nor to punish those who fail to comply with
the demands of imperfect right.

These five elements – original liberty, equal liberty, the consent thesis, that acts are the
domain of justice, and the definition of justice as acts that do not violate anyone’s rights – are the
core of Grotius’s political theory.

This Grotian core is attractive and powerful. The principle that persons should be at liber-
ty to decide what to do for themselves is almost irresistible – especially when it is stated in the
form of the principle of equal liberty. The consent thesis is a cornerstone of Western political
theory. The idea that the basic unit of right is acts and that the basic sort of wrong is right-
violations makes the position immune to a host of criticisms and disagreements about institution-
al and distributive justice, and the attendant distinction between perfect and imperfect right sure-
ly tracks a real distinction – the distinction that also underlies our intuitive stance on the differ-
ence between the crimes that violate the rights of persons and the failure to give to charity. Most
attractive, I think, is how sparse and simple these basic normative claims are compared to the
vast explanatory and normative power that they provide. These few claims taken together do,
indeed, provide a complete theory of right.

But it’s dangerous to focus only on these attractions of the Grotian core. Several conclu-
sions follow from these core claims, and some of these conclusions are, I suggest, unbearable.
And so, the cost of accepting this Grotian core is too high.

4. The Grotian Core, its price

The main problem with the Grotian core is what it allows. For one thing, it allows extreme in-
equalities of bargaining power between the contracting parties. If a person is starving to death,

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41 As is well explained by H.L.A Hart in “Are There any Natural Rights?” The Philosophical Review, vol. 64, 2,
April 1955, pp. 175-191.
another person may charge a lot for a loaf of bread. For another, it allows that the outcome of the contract is one of complete subjection. So, the person with the loaf of bread may ask for complete subjection in exchange for it. If the starving person consents, he is now validly the slave of the other. Moreover, once he has received the promised bread, there are no longer any obligations on the master of the relationship. This means that the subjects have no rights relative to the master. Which, given the definition of injustice as the violation of the rights of another, means that the master could not possibly violate the rights of the enslaved. Conversely, the enslaved has a complete obligation to the master and thus can legitimately be coerced at the first sign of disobedience (- preventing the wrong about to be done).

Of course, any person is morally required to care for the welfare of other persons. So, a person with lots of bread faced with another person starving to death has a duty of charity to give him some of her bread without expecting anything but gratitude in return. But, of course, all this can be said only as a matter of imperfect right, not as a matter of justice. As a matter of perfect right or justice, the aspiring master commits no injustice by charging complete subjection for food – nor would she commit an injustice by allowing the person to starve to death should he reject the contract of complete subjection she offers in exchange for food.

The problem is even clearer in Grotius’s conception of political authority. Assume that a collective of persons are starving to death or threatened by dangerous pirates, and so they turn to a neighboring power for food or protection. Then that collective could soon face the choice between death and slavery. There is nothing unjust about the choice; nothing unjust about the death or the slavery. There might, of course, be an injustice in the making if pirates are coming – the one the pirates are about to commit. But, since there is no strict obligation to prevent a crime,
this injustice does not affect the justice of the acts of the putative sovereign or the terms of the contract he can validly offer.\footnote{Gro
tius does, especially in his earlier works, talk about an obligation to prevent and correct wrongs. In general, some of the claims I make in this section are not true as claims about what Grotius wrote, but about what he is committed to in light of what he wrote. Even Grotius wasn’t too fond of all the implications of his core principles.}

Examples like these illustrate that there is something most unpleasant hidden in the idea that the justice of situations and relations depends on the acts that brought the situations and relations into existence. Initially, the idea looks plausible and appealing: what matters is what we do to one another. If a situation was brought about by only just moves, that is, if a situation is brought about without anyone violating the rights of other persons (or all past rights violations have been repaired), then the situation is the product of the free transactions of mature individuals and no one can complain that their situation was the product of the wrongdoings of other persons. So, justice is satisfied. Yet, at a closer look, this conclusion has some rather absurd consequences. It is, for example, conceptually and nomologically possible that an absolute world sovereign could come about by just moves. If that happens nothing such a person might do could be unjust. Or, if one person or corporation has the legal right to the medicine needed to fight a pandemic and decides to charge universal slavery in exchange for life. Then some become slaves, others die. There is no injustice in the demand, the slavery, or the deaths, for the situation came about by just moves. The problem, then, is that it seems fairly clear that some situations and relations are unjust \textit{independently} of whether they came about by just moves or not.

A libertarian that fancies the Grotian core might object that these scenarios are too unlikely to take seriously – as a matter of fact, such situations would never happen. This objection, however, is as inadequate as the like utilitarian answer to the objection that utilitarians would allow (and even require) the slavery of one person for the small pleasure of many persons. The answer that such a situation will never occur fails to address the objection. The objection isn’t
that when this occurs, a person will be tortured. The objection is that the utilitarian approaches the question of whether it would be right to torture the person or not as the question of whether it would maximize happiness to torture, and, so the objection goes, this is simply the wrong sort of reason for deciding the question at hand. Likewise, the libertarian response that a world dictator or monopoly on medicine is unlikely fails, because the question doesn’t concern what will happen, but the principles of justice in light of which the libertarian has to judge the justice of such an exchange of slavery for medicine or not assisting those in need. The Grotian core appears to offer the wrong set of principles for these questions.

5. What gives?

My argument is that, if libertarians are committed to the claims of the Grotian core, then they are also committed to some practically absurd conclusions that follow from these claims, for example, that the justice of slavery, dictatorship, and suffering depend on whether or not the situation or relation came about or could have come about by just moves from an initial situation of equal liberty.

At this point, the libertarian has several options. The logically easiest option is to just deny the antecedent and reject any commitment to the set of claims that is the Grotian core. That, however, also means yielding the claims that provide the philosophical pull of libertarianism. Alternatively, since there are no problems of logic in maintaining the Grotian core, the libertarian might just bite the bullet and accept the conclusions that follow from it. I find the price of the Grotian core too high, but others might not.

There is, however, a third option that might allow the libertarian to have his cake and eat it too; to get the benefits of the Grotian core without the costs. To pursue this third option, we need a way to deny that the practically absurd conclusions really follow from the Grotian core.
And, at least logically speaking, this is possible. For the practically absurd conclusions are not, strictly speaking, implied by the Grotian core. The problems are problems of permission, not requirement: the Grotian core does not require slavery, dictatorship, or such, it merely permits such situations, and it is this permission that is practically absurd. Accordingly, all the libertarian has to do is to add some principles that block the permission. She can then answer the question of this section: nothing gives.

What, then, might such additional principles be? First, it deserves emphasis that, tempting as it might be, the libertarian cannot just change the domain of justice. The problems I pointed to above are to a large extent problems with having acts as the domain of justice. So, it is tempting to try to widen the domain of justice to include also situations and relations. That, however, is not the sort of option I have in mind. That the domain of justice is acts is a core claim of libertarianism. So this option is a variety of the first option mentioned above: it amounts to rejecting commitment to the Grotian core. Moreover, if Grotius is correct, then the claim that the domain of justice is acts follows from the principles of original and equal liberty and the attendant notion that justice is about interpersonal rights and obligations. In addition, if the claim that the domain of justice is acts is discarded, the distinction between perfect and imperfect right must be revised as well. So, the claim that the domain of justice is acts cannot be discarded without changing the other claims in the Grotian core as well.

So, what principles might we add to the Grotian core to block the practically absurd implications? I think the most promising route is to reject that all rights are alienable. That is, if we add a principle to the effect that some rights are inalienable, then we can include on the list of inalienable rights whatever rights are necessary for blocking the absurdly permissible situations. This would restrict the absolute freedom of contract that is otherwise implied by the consent the-
sis part of the Grotian core. Contracts that require alienation of inalienable rights could not validly be made. Adding an appropriate list of inalienable rights would, accordingly, block the permissibility of slavery, dictatorship, and so on, for such situations could not come about by just moves.

We might, while we’re at it, add positive rights and corresponding obligations. We might include a right to have access to the necessary means to make use of our freedom. This would make it a strict wrong for those who have much to deny giving some of it to those who do not have enough to use their freedom (- note, this would not be an egalitarian principle: it’s not the relative difference that matters, but the relation of absolute need and abundance, so no normative weight is given to the value of equality to secure this distributive principle of charity). With these rights, the neighboring sovereign of the city at the brink of starvation or threatened by pirates could not validly reject them the necessary aid and assistance.

Of course, our list of inalienable rights can’t be completely ad hoc, so we’ll need some philosophical principle for what rights to include and what rights to exclude from the list. Here the history of political philosophy offers a variety of suggestions for where we can find such a principle. Locke finds his principle in the idea that we’re God’s created property. Hobbes suggests that we cannot alienate any rights the alienation of which undermines the purpose of contracting. Cumberland suggests that some rights are necessary for peaceful and prosperous society and that these, therefore, cannot be alienated. Kant argues that we cannot alienate any right that is constitutive of our capacity for free and responsible self-determination. So, there are plenty of places to look for this principle.

Yet, here’s the rub: once we supply such a principle, we’ll no longer be working from the basic idea that persons ought to be free to decide what to do as long as they don’t violate the
freedom of others – for persons are not free to decide what to do with their rights. So, instead we’ll be working from a more basic principle that defines what persons are free to decide to do and why. And so we’ve switched from the framework provided by the Grotian core to another framework in which something like the Grotian core has a place. This framework might be liberal (Locke and Kant), rational choice (Hobbes), or utilitarian (Cumberland). It is not, however, the framework of philosophical libertarianism.

I cannot, of course, go through all possible principles that might be added to the Grotian core to deflect its problems. But my strategy would be the same for other suggestions: the Grotian core defines pure philosophical libertarianism: the set of principles that define the position structured around one basic normative claim: that persons ought to be at liberty to choose for themselves, as long as they don’t violate the rights of others. The principles we might add to the Grotian core would be foreign to this core in the sense that they’d have to find a basis other than this principle of liberty itself, a basis they might find in a view of human nature and the human good, the intrinsic value of happiness, or a thick normative concept of human freedom. Whatever the principle, the resulting position will no longer be pure philosophical libertarianism, but some compromise between philosophical libertarianism and the other traditions of moral philosophy.

6. Conclusion

I have tried to show three things: first, how Grotius’s political theory is structured by a very simple, attractive, and powerful core set of claims, second, that philosophical libertarianism is structured by this same Grotian core, and, third, how any position structured by this core has some problems that outweigh its attractions.

My conclusion is, however, limited in two ways. First, I have only provided an argument against positions that affirm the claims of the Grotian core. I have also indicated that any philos-
ophy that takes personal liberty as its sole and central term is committed to the claims of the Grotian core, but I cannot really claim to have established this conclusion beyond dispute. So, libertarians are free to reject one or more of claims of the Grotian core. That they have to do so is, I think, in itself an interesting conclusion. Yet, the second limit of my argument dulls even this conclusion. For the road is still open for philosophical libertarianism to deflect the critique I raised by adding more principles to the position. I have indicated that this move will be hard to make without driving philosophical libertarianism in the direction of liberalism or utilitarianism, but, again, I cannot claim to have shown so beyond dispute.

So, what my argument shows is that the sort of pure philosophical libertarianism that consists of all and only the principles of the Grotian core leads to practical absurdities.

Limited as this conclusion may seem, I believe that it’s important. If true, it destroys one of the few remaining pure positions. Pure perfectionism fell together with the Aristotelian worldview. Pure utilitarianism fell once its commitments were clarified by Bentham.

Liberalism was never a pure theory. Liberalism is, I think, the position that we arrive at when we seek a position that has the attractions of perfectionism, libertarianism, and utilitarianism without the costs of their pure forms. Liberalism is, in this sense, anti-puritan. Indeed, I hope this paper has indicated how we can understand the history of liberalism as an attempt to solve some of the problems of Hugo Grotius’s political theory without giving up on its core claim: that persons ought to be at liberty to decide for themselves, as long as they do not violate the like liberty of others. Cumberland, Locke, Pufendorf, Rousseau, Kant, Fichte, and Hegel – all tried to find a way to affirm this principle and its implications, but all added additional principles to avoid the problems with the Grotian core I outlined in this essay. In this manner, my essay provides a new argument for treating Grotius as a founder of modern political theory. Even more
than Hobbes, he defined the position that others had to work from and against. And so, though I think my argument defeats pure philosophical libertarianism, at least it can claim that it was the first of the truly modern political theories.