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Frank Gilbert Slinkard

*College of William & Mary - Arts & Sciences*

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A CRITIQUE OF HUGO GROTIUS'S  
INTRODUCTION TO THE JURISPRUDENCE OF HOLLAND

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A Thesis

Presented to

The Faculty of the Department of Government  
The College of William and Mary in Virginia

In Partial Fulfillment

Of the Requirements for the Degree of  
Master of Arts

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by


Frank Gilbert Slinkard

1992

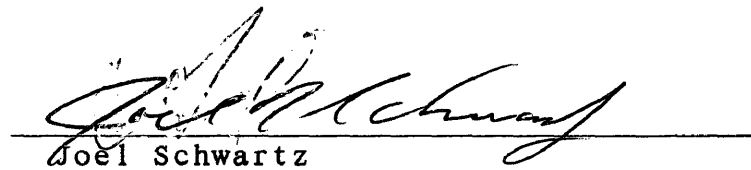
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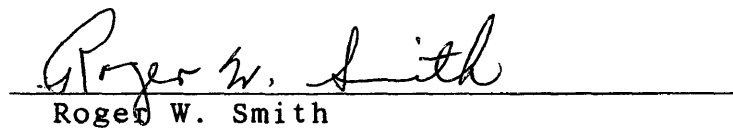
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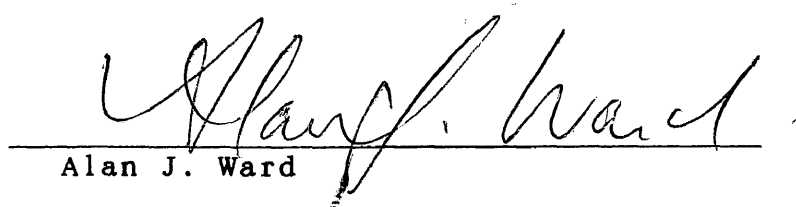
Master of Arts

  
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## ABSTRACT

This thesis presents a description and assessment of the natural rights theory Hugo Grotius set forth in the Introduction to the Jurisprudence of Holland. In the Introduction, Grotius described the laws of his native land in terms of both natural and positive rights.

Grotius set forth his theory of natural rights against a background of fifteenth century humanist skepticism concerning rights theory. A general and persistent criticism of natural rights is that they are, in fact, no more than illusory reflections of the duties that persons have toward one another. The implications of this criticism are that there can be no meaningful doctrine of natural rights, and that rights not only imply duties, but are essentially false descriptions of actual duties, which are imposed either by divine fiat or from the lawmaking authority of the state.

To bolster his theory of natural rights, and impart to rights doctrine independent moral significance, Grotius described natural and positive rights as a kind of property.

By describing rights as a kind of property, Grotius confronted the question of whether an individual's fundamental rights were alienable. Historically, the Introduction to the Jurisprudence of Holland has been described as part of a youthful, liberal period in Grotius's life, when he was unwilling to accept the voluntary alienation of basic rights.

Nevertheless, a review of the Introduction to the Jurisprudence of Holland reveals that Grotius, by 1620, acquiesced in the voluntary alienation of one's fundamental liberties. It is suggested that this acceptance of such voluntary alienation is a consequence of describing the individual's fundamental liberties as a type of property.

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A CRITIQUE OF HUGO GROTIUS'S  
INTRODUCTION TO THE JURISPRUDENCE OF HOLLAND

## INTRODUCTION

In the early part of the seventeenth century, the citizens of the small, commercial republic of Holland looked forward to a future of ever-increasing trade and prosperity. It was during those seemingly auspicious times that Hugo Grotius, a Dutch lawyer, produced an account of the laws of his native land, and the principles of justice that underlay them. Grotius's Introduction to the Jurisprudence of Holland (Inleidinghe tot de Hollandsche Rechts-gheleertheydt)<sup>1</sup> advanced the powerful claims that jurisprudence was fundamentally about rights, that rights were derived from the natural character of man, and that most rights were best explained as a type of property.

These claims were in contrast to a general skepticism as to whether rights had any independent justification, but rather were merely correlative with the duties placed on those with whom the holder of the right interacts. Paradoxically, Grotius's desire to impart an independent justification to rights by describing rights as property led to the possibility that a person could alienate such property, and thereby

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<sup>1</sup>Hugo Grotius, The Jurisprudence of Holland, trans. R. Lee (Oxford: Oxford University Press, 1926).



voluntarily relinquish his liberties. Grotius's seemingly libertarian rights theory contained a possible justification for absolutism. While Grotius became notorious later in his life for such a paradoxical position, this paradox is fully present even in Grotius's Introduction to the Jurisprudence of Holland, a treatise conventionally, and erroneously, considered among his more progressive works. Grotius's Introduction to the Jurisprudence of Holland, no less than his subsequent, conservative writings, attempted to bolster the control of the individual over his moral world by acquiescing in the possibility that one could voluntarily alienate one's rights, and in doing so ironically undermined the libertarian foundation of rights theory.

The following chapters describe, and assess the consequences, of this paradox. The first chapter presents a brief overview of Holland's history, and its intellectual climate, in the generation before Grotius's birth. Thereafter, the chapter includes a biography of Grotius, featuring a review of his writings prior to the Introduction. Chapter II sets forth Grotius's description in the Introduction of Dutch jurisprudence as a system of natural and positive rights. Grotius used the language of rights theory to describe the entire Dutch legal system. Chapter III shows how Grotius came to describe the natural and positive rights

that he ascribed to persons as property rights. The fourth chapter of the thesis explains how Grotius's theory of rights as a kind of property led to the conclusion, despite his occasional protestations to the contrary, that these property rights were as alienable as any kind of property rights involving material possessions in prosperous and mercantile Holland. Finally, the thesis concludes with an assessment of Grotius's rights theory, and the paradoxical tendency toward absolutism that his Introduction to the Jurisprudence of Holland reveals.

There are several concepts instrumental to an understanding of rights theory. The first is the famous characterization of rights as "active" or "passive."<sup>2</sup> David Lyons, originator of these terms, defined a passive rights theory as one in which a person's right represented merely a claim on another person. In effect, my right to eat an apple is really a claim against other people to permit me to eat the apple. My right to eat represents the obligation and duty of others to allow me to eat without hindrance. In fact, the so-called passive right may be a chimera. I may contend that I have the right to eat freely, but this passive right amounts to no more than the duty of others

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<sup>2</sup>David Lyons, "The Correlativity of Rights and Duties," Nous 4 (1970): 48.

to refrain from snatching the food from my mouth.

By contrast, an active right represents an independent moral entitlement, by which the holder of the right possesses the free liberty to act, without an entreaty to others to permit the act. Thus, the holder of an active right to eat an apple need not present this right as a claim on others to allow him to eat; the active right to eat exists as an independent entitlement of the rights-holder. There is, conceptually, deemed to be no need to consider whether others may be obligated to permit the holder of an active right to eat his apple. Under this distinction, a passive right is a request to others to be dutiful; an active right is an entitlement which involves no entreaty to others. These terms are now commonplace in describing rights theories.<sup>3</sup>

The distinction between active and passive rights theories points to a common criticism directed to rights theory generally. This problem is reflected in the classical utilitarian critique of one person's rights as merely the reflection of another person's duties. Lyons has produced an expression for this phenomenon, one he describes as the "correlativity of rights and duties."<sup>4</sup> If a passive right is a mere claim on another person,

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<sup>3</sup>Richard Tuck, Natural Rights Theories: Their Origin and Development (Cambridge: Cambridge University Press, 1979), 5.

<sup>4</sup>Lyons, 4.

with the expectation that the claim will be respected, then these rights are merely shadows of corresponding duties. If one says that a person has the (passive) right to walk in Central Park, then one could as easily have said that one has the duty to permit the rights-holder to walk in the park.

By contrast, active rights theories, by focusing on what the holder of the right may do, rather than on what others must allow him to do, profess to impart to the rights-holder an independent moral power, and individual authority not present in a passive rights theory. The doctrine of passive rights, so easily expressed as a doctrine of duties, seems to lack the moral gravity that an active rights theory has. Control over the desired object or action slips from the hands of one who asserts a passive right, and falls instead into the hands of others to respect, in the form of duties, that right.

Of course, the utilitarian critique of rights theories is that all descriptions of rights are essentially false, and that all so-called rights are merely reflections of duties. The distinction between active and passive rights is a mere chimera for those who would view all rights, ultimately, as passive rights. Yet, if rights are to have any merit as a justification for, and explanation of, human liberty, then even the most ardent rights critic would recognize that active rights theories are the only ones

that offer any hope of justifying rights theory as bestowing any independent control to a person over his moral world.

Grotius's Introduction to the Jurisprudence of Holland represented an attempt to describe an entire legal system as the product of active, natural rights, however unknown to Grotius the terms active rights and passive rights may have been. So committed was Grotius to an explanation of rights as entitlements of independent moral significance that he came to regard most rights as a type of property, within the possession, ownership, and legitimate control of the rights-holder.

A second fundamental distinction between rights is between those that are deemed natural, and those that are deemed positive. Natural rights conventionally suppose an entitlement prior to the existence of, or promulgation by, the state. One has natural rights regardless of whether one is a citizen of a particular state, or member of a particular nation. Whether these rights are conferred by God, or are a result of some inherent characteristic of humanity, they are deemed natural because their existence is assumed prior to the creation of any human institutions.

Positive rights, on the other hand, presuppose a legislator. For most rights, this legislator is the recognized political authority of the state. Civil

rights are positive rights; promulgated by the sovereign political authority of the state, they derive their force not from nature, but from the express authorization of those persons who exercise lawmaking authority.

The following chapters trace the efforts of Hugo Grotius, lawyer, scholar, and diplomat, to produce almost four centuries ago a theory of natural and positive rights sufficiently broad to describe the principles of an entire legal system. As we shall see, Grotius sought to describe rights in a way that imparted to rights theory the independent merit and libertarianism to which active rights theories lay claim. While Grotius did produce a rights theory in which the individual was possessor and owner of his rights, and thus in a certain respect master of his moral world, he did so in a way which surprisingly contained the justification for unrepresentative, absolutist rule. The character of Grotius's rights theory presented in the Introduction to the Jurisprudence of Holland, and its surprising consequences, are the focus of this thesis.

## CHAPTER I.

### HISTORICAL AND INTELLECTUAL BACKGROUND TO GROTIUS'S INTRODUCTION TO THE JURISPRUDENCE OF HOLLAND

An overview of certain developments in rights theory before Grotius's Introduction to the Jurisprudence of Holland is necessary to assess properly the Introduction's contribution to rights theory. Three topics involving developments before Grotius's authorship of the Introduction deserve attention in order to evaluate the role of the Introduction to natural rights theory: a brief history of Holland up to the time of Grotius' birth, the state of rights theory in the late sixteenth century, during the period when Grotius was born, yet a generation before the Introduction, and finally a brief biography of Grotius.

The history of late sixteenth century Holland reveals much about the political and legal culture into which Grotius was born. In choosing Holland as the subject of his political and legal inquiry, Grotius chose not merely his native land, but also a country that was a curious mixture of the old and new. For centuries, the Netherlands nations of Holland, Belgium and Flanders had been under Spanish control. The

spread of Protestantism, however, forever changed the relationship between the Netherlands and Spain.<sup>5</sup> Throughout the 1560s and 1570s, the growing influence of Protestant theology was coupled with wholly secular demands for independence from Spain.<sup>6</sup> The efforts of the Spanish monarch, Philip II, to check these trends proved ineffectual. In 1579, William, prince of Orange, led the northern provinces, called estates, into a confederation known as the Union of Utrecht.<sup>7</sup>

The Union guaranteed the estates sovereignty in local affairs, and bound the signatories to a common foreign and defense policy.<sup>8</sup> The common foreign policy was to be administered through a new institution, the Estates-General. The Union of Utrecht, by producing a common policy of external relations, strengthened the position of the northern provinces, and doomed Spanish control over the region. Only two years later, in 1581, the signatory states proclaimed their independence from Spain.<sup>9</sup>

Grotius's Introduction to the Jurisprudence of Holland was, therefore, the study of political and legal arrangements simultaneously old and new. Since Holland

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<sup>5</sup>Simon Schama, The Embarrassment of Riches: An Interpretation of Dutch Culture in the Golden Age (Berkeley: University of California Press, 1988), 86.

<sup>6</sup>Ibid., 83-93.      <sup>7</sup>Ibid., 54.      <sup>8</sup>Ibid., 55.

<sup>9</sup>Ibid., 56.



had been accustomed to a fair degree of governance by provincial authorities under Spanish rule, Dutch legal arrangements took on a local character even before independence from Spain. The rapid spread of Protestantism through the Netherlands was proof of the limitations of Spanish control; had Catholic Spain possessed greater control over the region, Protestant theology would never have gained so great an influence, so quickly, over the Netherlands.

Grotius, himself, often referred to the laws of his native land with only the merest allusion to the fact that the country had once been under Spanish rule. Thus, in his discussion of marriage, Grotius remarked that

In old times marriage used to be contracted in these Provinces without much ado ... but as this caused many discontents and scandals, because some persons contracted marriage in breach of previous espousals, or with persons nearly related by blood or affinity ... for the prevention of all this, the States further ordained by the same enactment that all persons who wished to give themselves in marriage should be required to appear before the magistrates or the ministers of the Church ...<sup>10</sup>

From this passage, which plainly deals with the problem that Holland once experienced with incestuous marriages, Grotius gave no indication that the change in Holland's marriage laws was a result of the transition from the "old times" in the Provinces under Spain, to

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<sup>10</sup>Grotius, Jurisprudence of Holland, 27.

the institution of a republic under the States. There was no suggestion that the marriage laws became stricter because Holland became a republic; Grotius merely stated that the change in marriage came after the establishment of republican government. What is striking about the passage on marriage laws is how little effort Grotius required to move from the period of monarchical rule to the period of republican government.

There was, however, a way in which the Dutch experience following independence was entirely new. Independent from monarchical Spain, Holland entered the seventeenth century as a republic, and was a free and sovereign state until it fell under Napoleonic control in 1810.<sup>11</sup> Throughout the period of Grotius's lifetime, Holland's laws reflected the union between legal standards developed under monarchy and innovations developed under representative government. Nevertheless, there was no complete break with the past, but instead a steady transition from one form of government to another, in which substantial vestiges of the old order persisted.

For Grotius's native land, as well as for much of northern Europe, the prevailing political paradigm of the era into which Grotius was born has been described

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<sup>11</sup>Schama, 263.

as Protestant Aristotelianism.<sup>12</sup> Richard Tuck has described the Protestant Aristotelian position, and the humanist position generally, as one in which there was a "retreat from the position where the natural law and natural rights enjoyed primacy to one where the major concern was human law designed by men for the common utility either under their own initiative or under the command of God."<sup>13</sup> For the Protestant scholar, of course, law was a product of divine command. These beliefs were a marriage between newly emerging Protestant theology and ancient political teachings. As for the Protestant aspect of the paradigm, Protestant theology took as granted the assumption that God, by command, stipulated what was law. God's stipulation as to law was wholly discretionary, and thus this justification for the source of natural law came to be called "divine voluntarism."<sup>14</sup> As a student, Grotius was taught within this Protestant Aristotelian tradition.<sup>15</sup> Grotius, himself, provided a succinct statement of the Protestant, divine voluntarist tradition in one of his early works, the 1607 De Jure Praedae:

Where should we begin, if not at the very beginning?  
Accordingly, let us give first place and pre-eminent

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<sup>12</sup>Tuck, 45.      <sup>13</sup>Ibid., 44.      <sup>14</sup>Ibid., 59.

<sup>15</sup>Ibid., 58.

authority to the following: what God has shown to be his will, that is law.<sup>16</sup>

Law was the product of God's free dictate, and for the Protestant Aristotelian natural law took its character and content from God's stipulation. (Of course, the adherent to the divine voluntarist position held that while this definition of law's source made law the result of divine fiat, there was more than mere caprice behind God's declaration. Embedded into the very definition of a deity were notions of rationality and judiciousness that tempered an otherwise unrestrained divine authority.)

Melded to this Protestant account of the source of law was an interpretation, however selective, of the Greco-Roman view of the state as the source of legal entitlement. The humanists of the period looked back to classical sources to support their contention that the state was the principal means by which actions were deemed permissible or impermissible. The Protestant Aristotelians relied on the following passage from the Politics as a confirmation of their position:

He who is without a polis, by reason of his own nature, and not of some accident, is either a poor sort of being, or a being higher than man...<sup>17</sup>

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<sup>16</sup>Grotius, De Iure Praedae Commentarius, trans. G. L. Williams (Oxford: Oxford University Press, 1950), 8.

<sup>17</sup>Aristotle, Politics, trans. Ernest Barker (Oxford: Oxford University Press, 1980), 5.

While man entered the state for the satisfaction of mere life, it was there, as a member of a political community, that he found the full measure of the human potential. Law might have been stipulated through the will of God, but for the Protestant Aristotelian, the full content and mandate of that divine stipulation came only after the state. A pre-state existence offered little, and was not natural for a normal person.

These two tenets, divine voluntarism and the fruitfulness of civic life, were the cornerstones of Protestant Aristotelianism.

Huig de Groot, who later adopted the Latinized Hugo Grotius as his name, was born in 1583 to wealthy and socially respectable parents in Delft, in Holland.<sup>18</sup> Grotius's family had both literary and political ambitions, and his forefathers had held political office, off and on, in Holland for over a century before his birth.<sup>19</sup> (The insinuation of Grotius's family into political life during Spanish rule of Holland may explain his unwillingness to view the institution of republican government as a decisive alteration of the legal character of Holland.) While not among the European aristocracy of the late sixteenth century,

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<sup>18</sup>W. S. M. Knight, The Life and Works of Hugo Grotius (London: Sweet and Maxwell, 1925), 17.

<sup>19</sup>Ibid., 18.

Grotius could surely count himself among those born into the growing class of wealthy merchants of northern Europe. This was probably as auspicious a station as a young man in republican Holland could have wanted. No doubt, Grotius's commercial ties were especially useful for one who sought, as he did, a legal career; a mercantile republic required a constant supply of legal talent to settle disputes concerning its burgeoning commercial enterprises.

In 1594, at the not uncommon age of eleven, Grotius enrolled in the University of Leiden, where he entered the faculty of literature.<sup>20</sup> Grotius enjoyed family connections at the university (his father was one of Leiden's curators), and he completed his work in only three years, having pursued a traditional arts curriculum.<sup>21</sup>

It was not long after he was graduated from Leiden that Grotius began to put his interest in law and diplomacy to the test. In 1599, he participated in a Dutch mission to the French court of Henry IV. This mission was of considerable importance for Holland, as the Dutch sought to forestall closer diplomatic ties between France and Holland's former ruler, and inveterate enemy, Spain.<sup>22</sup> The mission proved to be a personal triumph for Grotius, so much so that the French

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<sup>20</sup>Ibid., 24.    <sup>21</sup>Ibid.    <sup>22</sup>Ibid., 32.

monarch referred to him as "the miracle of Holland."<sup>23</sup> This epithet remained with Grotius throughout his life, and revealed the striking impression that he was able to make on others, even at the age of sixteen. Unfortunately, Grotius's triumph was a singular one; the Dutch mission was unable to wring from France a promise to abstain from closer relations with Spain.<sup>24</sup>

Grotius's warm reception in France encouraged him to linger there after his fellow emissaries returned to Holland.<sup>25</sup> By the end of the year, he had earned a doctor of laws degree from the University of Orleans, and returned to Holland, where he was admitted to the Dutch bar.<sup>26</sup> Interestingly, for one who would become one of the leading jurists of his time, there is little evidence that Grotius completed any formal legal training to earn his law degree. Since he studied literature, rather than law, to receive his degree from Leiden, it seems that he received no designated legal training before his admittance to the bar.<sup>27</sup> (This may be the reason that, almost two decades later, in 1618, Grotius wrote to a close friend and requested copies of prominent medieval authors whom he had never read.<sup>28</sup>)

Grotius's first work of political philosophy,

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<sup>23</sup>Ibid.      <sup>24</sup>Ibid.      <sup>25</sup>Ibid.

<sup>26</sup>Hamilton Vreeland, Hugo Grotius: The Father of the Modern Science of International Law (Oxford: Oxford University Press, 1917), 34.

<sup>27</sup>Ibid., 42.      <sup>28</sup>Tuck, 58.

Parallelon Rerumpublicarum,<sup>29</sup> was an entirely traditional work of early seventeenth century political theory. In the work, written in 1602, Grotius compared the ethics of ancient Athens, Rome, and seventeenth century Holland.<sup>30</sup> (The inclusion of Holland was perhaps more than mere nativism; the extraordinary growth of Dutch commerce during this period, destined to grow greater still during the century, made Holland a power to be reckoned with.<sup>31</sup>)

In Parallelon Rerumpublicarum, Grotius concluded that the mixed politics of his three subject states was primarily responsible for preserving their liberties: a mixture of monarchy, aristocracy, and democracy was judged the best prescription for preserving freedom.<sup>32</sup> This assessment, from the nineteen-year old Grotius, did not challenge the prevailing Protestant Aristotelian assumptions. There was nothing in the work contrary to a belief in divine influence, and Grotius's thinking about a mixed constitutional order squared well with Aristotelian thinking about government.

Grotius prepared his next significant work of political theory within five years after his admission to the bar. With the increasing level of Dutch trade on the high seas, Holland's merchants found themselves

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<sup>29</sup>Tuck, 59.      <sup>30</sup>Knight, 85.

<sup>31</sup>Schama, 290-323.      <sup>32</sup>Tuck, 43.



facing difficult questions of international law and diplomacy. The Dutch seizure of a Portuguese ship's treasure in open waters created an international furor at the time, and the Dutch business establishment rushed to defend their country's behavior.<sup>33</sup> The task of producing a written justification for Dutch behavior fell to Grotius, and the result was De Iure Praedae (Law of the Prize).<sup>34</sup>

Although Grotius completed the manuscript for De Iure Praedae in 1604, it was never published, and remained undiscovered after Grotius's death, until 1864.<sup>35</sup> The most significant part of the work, concerning free use of the open oceans, was published separately under the Latin title Mare Liberum (Freedom of the Seas) as a defense of Dutch conduct in international commerce.<sup>36</sup>

Within ten years of his role as a defender of Dutch commercial interests, Grotius became involved in a religious conflict that led him to near catastrophe. Grotius was affiliated with the religious views of the Remonstrants, who advocated, among other things, the free will of man.<sup>37</sup> The Counter-Remonstrants espoused Calvinist positions, and notable among them was the

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<sup>33</sup>Vreeland, 42.      <sup>34</sup>Grotius, De Iure Praedae.

<sup>35</sup>Knight, 79.      <sup>36</sup>Tuck, 59.      <sup>37</sup>Vreeland, 68.

Counter-Remonstrant belief in pre-destination.<sup>38</sup>

Despite the seemingly libertarian character of their beliefs, Grotius's support for the Remonstrants revealed an absolutist tendency. The Remonstrants enjoyed the favor of state authorities during the course of their conflict with the Counter-Remonstrants.<sup>39</sup> For most of the conflict, Grotius reasonably assumed that the Remonstrant position was likely to prevail. He was not unreceptive to the use of state power to advance certain religious claims, and to discourage other forms of belief. Religious practice free from state interference was, apparently, not a significant concern for Grotius.

Grotius's willingness to support state interference in religious matters took a deadly turn when he suddenly found himself on the losing side of the conflict, abandoned by his government supporters, and sentenced to life in prison for his belief "in the free will of man," a sharp contrast to the pre-determinism of the Calvinist, Counter-Remonstrants.<sup>40</sup>

Grotius remained in prison for only two years, until in 1620 his wife engineered his famous escape from Lowenstein castle in a laundry basket.<sup>41</sup> Grotius's imprisonment was not unproductive: while confined, he produced both the Introduction to the Jurisprudence of Holland, and a work of religious criticism, De Veritate

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<sup>38</sup>Tuck, 59.      <sup>39</sup>Tuck, 65.      <sup>40</sup>Knight, 158.

<sup>41</sup>Vreeland, 148.

Religionis Christianae (Truth of the Christian Religion).<sup>42</sup> (This latter work was apparently intended to bolster the religious convictions of Dutch sailors visiting the lands of non-Christian traders.<sup>43</sup>) After his escape, Grotius left quickly for France, where twenty-one years earlier he had been proclaimed the "miracle of Holland," and now arrived as Holland's most notorious escaped convict.

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<sup>42</sup>Tuck, 72.      <sup>43</sup>Tuck, 66.

## CHAPTER II.

### THE INTRODUCTION TO THE JURISPRUDENCE OF HOLLAND AS A SYSTEM OF RIGHTS

During the period of his imprisonment, in 1620, Grotius wrote the Introduction to the Jurisprudence of Holland (Inleidinghe tot de Hollandsche Rechts-gheleertheydt). There is something unmistakably ironic about a man sentenced to life in prison preparing a comprehensive, and generally adulatory, account of the laws of the nation that condemned him. For the most part, Grotius's account of Holland's laws, written in his native Dutch, was straightforward, and the comparisons to foreign legal systems typically reflected favorably on Dutch institutions. This chapter sets forth Grotius's description of the central role that rights played in Dutch jurisprudence, and implicitly in all jurisprudence.

Grotius set forth his writings in a formal and analytical style, in which he proceeded from generals to particulars. Grotius's writings, and the Introduction to the Jurisprudence of Holland specifically, were organized as though they were a series of packages within packages, the opening of any one of which revealed a still smaller package contained within it.

General definitions and concepts are divided into their constituent terms, and in turn each of those terms was itself scrutinized and analyzed.

It is unsurprising that Grotius began his comprehensive discourse on the Dutch legal system with an overview of his general understanding of law.

Chapter II of the Introduction, entitled "Of different kinds of laws and their operation" set forth a concise definition of law:

Law (which is also sometimes called Right because it determines what is right) is a product of reason ordaining for the common good what is honorable, established and published by one who has authority over a community of men.<sup>44</sup>

There were both normative and procedural aspects to a definition of this kind. Law, as such, was to be directed toward the promotion of the general welfare, and the general welfare would best be promoted through those things that were honorable. In order for a law to be legitimate, Grotius's definition required that laws be made known to the community through a process of establishment and publication, by one who had been invested with the authority to promulgate law. Law was not merely about following directions, but was instead about following clearly revealed directions to the community that had been issued by a legitimate lawgiver.

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<sup>44</sup>Grotius, Jurisprudence of Holland, 5.

Grotius declared that laws could have three possible effects, which he termed "operations,"<sup>45</sup> on those bound by law. He noted that the first operation of law was an obligation, because "men must obey not from fear alone, but from conscience' sake."<sup>46</sup>

Grotius illustrated the importance of conscience as an operation of law with the observation that "laws which permit are also held to forbid, not with respect to the person to whom something is permitted, but with respect to all others who are not allowed to interfere with him."<sup>47</sup> In this regard, he made clear that an individual's legal right to act was more than a passive rights claim on another person, but was an active right that, by its very nature, rendered interference impermissible.

The second and third operations of law were more straightforward: punishment, and the annulment of all acts in conflict with the law.<sup>48</sup> Violation of the law brought the possibility of punishment, and the existence of law ruled out the possibility of acts in opposition to the law. The latter two operations of law were commonplace notions, involving the sensible understanding that punishment was often a consequence of legal violations, and that law should be respected generally.

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<sup>45</sup>Ibid.      <sup>46</sup>Ibid., 3.      <sup>47</sup>Ibid., 5.      <sup>48</sup>Ibid.

These descriptions of the operation of law revealed nothing about the source of the laws thus described. Grotius went on to classify law according to its source, and declared that "All law is natural or positive."<sup>49</sup> By affirming the existence of one kind of law as natural, he thereby opened the door to the possibility that rights were also natural, and prior to the existence of civil society.

Grotius defined natural law as "an intuitive judgement, making known what things from their own nature are honourable or dishonourable, involving a duty to follow the same, imposed by God."<sup>50</sup> He gave a brief account of how law was natural, and prior to the existence of civil society, by linking what he believed to be the human understanding of natural law with the desire of animals for self-preservation:

Not that unreasoning creatures, properly speaking, are subject to law, which applies only to reasonable beings; but because man by reason which is in him finds that it is right for him to do what other creatures do either by the force of nature only or also by a certain inclination and desire. For just as everything that seeks the common good, and therefore its own, particularly its self-preservation; and just as animals by union of male and female seek the propagation of their species and provide for their young; so it is that man, doing the same, is conscious of doing what is right.<sup>51</sup>

Grotius defined positive law as "law which is immediately derived from the will of the legislator."<sup>52</sup>

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<sup>49</sup>Ibid.      <sup>50</sup>Ibid.      <sup>51</sup>Ibid., 7.

<sup>52</sup>Ibid.

As distinguished from natural law, positive law required no "intuitive judgement," or personal reflection, to be understood. On the contrary, positive law was a stated command one received from a legislator, and however ambiguous the command might be, the existence of the command itself was not a questionable point.

Grotius subdivided the realm of positive law into two broad categories, depending on the person of the legislator: divine positive law and human positive law.<sup>53</sup> He proclaimed Christianity the only recognizable source of divine positive law.<sup>54</sup> (This declaration is unsurprising, not merely in light of the religious climate of Grotius's time, but also in light of his own religious writings.)

Human positive law was, however, the more significant category for legal analysis, because it comprised the everyday rules by which most affairs were regulated. Grotius divided human positive law into two branches: "law common to all nations (jus gentium) or civil law (jus civile)."<sup>55</sup> He explained the division of human positive law into two categories as the result of population growth, by which men divided themselves into separate legal communities.<sup>56</sup> Implicit in this explanation is the assumption that humanity was originally united under a single legal community;

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<sup>53</sup>Ibid.

<sup>54</sup>Ibid.

<sup>55</sup>Ibid.

<sup>56</sup>Ibid.



nevertheless, it is unclear whether Grotius truly believed in the notion of such a pre-political community, or rather posited its existence merely to explain the division between the law of nations and civil law.

Grotius defined the law of nations as that which has "been accepted by the community of nations for the preservation of mankind," and included in this category "safe-conduct of ambassadors and many other rules concerning peace and war."<sup>57</sup> These were unwritten rules accepted by a sizable number of states, involving a practical advantage to those states that adhered to them.

Both the limitations, and irony, of this definition are readily apparent. His definition is limited in direct proportion to the number of cultures excluded from the community of mankind. For Grotius, the community of mankind, at bottom, meant the community of European nations. The irony of this definition of the law of nations is that it presupposed that rules concerning peace and war were readily understood by mankind. If this were so, Grotius's 1624 masterwork, De Iure Belli ac Pacis,<sup>58</sup> would hardly have been so celebrated.

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<sup>57</sup>Ibid.

<sup>58</sup>Grotius, De Iure Belli Ac Pacis, ed. J. Barbeyrac, trans. anon. (1738).

Grotius was aware of the apparent similarity between the law of nations and natural law. Both the positive law of nations and natural law concerned basic principles of conduct that were nearly unalterable. Nevertheless, this similarity was no more than a reflection of the permanency of both types of law. Although natural law required human reflection on those things that were either "honourable or dishonourable," the (positive) law of nations required that humanity accept certain standards of conduct as useful for preservation of all mankind. While an understanding of natural law could be achieved by a solitary person on a distant island, an understanding of the law of nations required an appreciation of social intercourse, and a practice among nations to adhere to certain standards of conduct.

The second form of human positive law, the jus civile, was closer to popular notions about law. Grotius succinctly remarked that civil law was "the law which is immediately derived from the will of the Sovereign of a civil community."<sup>59</sup> In this regard, civil law most nicely fit the general definition that Grotius expounded for positive law: rules established and published by one who has authority over men, i.e., a sovereign. Even if the civil laws of a nation were identical to those of another nation, they were within

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<sup>59</sup>Grotius, Jurisprudence of Holland, 7.

the province only of the nation whose sovereign authority propounded them. Since civil law was the product of a single sovereign authority, it could be changed by a single nation without the consent of any other.<sup>60</sup> All civil law was, as it were, local. Alterations to the civil law, so long as those alterations concerned matters within the bounds of civil law itself, were part of a nation's internal affairs.

In Holland's experience, civil law was of two types: either written or unwritten.<sup>61</sup> A curious aspect of Holland's civil law was the role of privilege as a component of civil law. The nature and role of a privilege in Holland's civil law deserves some explanation.

A privilege was a regulation "conferred by the States or provincial rulers from special considerations upon particular persons or communities."<sup>62</sup> Early seventeenth century Holland, situated somewhere between an earlier feudal order and the new capitalist one, was a place in which the granting of special rules regarding specific persons, to their benefit, was not uncommon. A problem arose, however, when the Dutch were confronted with the question whether a man's descendents were compelled to observe the privileges that he had conferred at an earlier date.<sup>63</sup> When did privileges

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<sup>60</sup>Ibid., 9.      <sup>61</sup>Ibid.      <sup>62</sup>Ibid.      <sup>63</sup>Ibid.

become obsolete? The answer to this question illustrates how the Dutch legal system at this time was an amalgam of tradition and innovation. Grotius observed that privileges granted by one person were obligatory on his descendants as well, but only because each provincial ruler took an oath to maintain and perpetuate the old privileges.<sup>64</sup> In this way, the prevailing notions of order and hereditary obligation were maintained, yet in a recognizably modern way, by which the local rulers voluntarily accepted and bound themselves to the enforcement of previously-granted privileges. The obligations carried over from monarchical Spanish rule were maintained through the contractual device of a young republic.

The question of whether privileges were ever obsolete illustrated a problem of civil law, generally: were there circumstances under which the civil law was no longer applicable? For just as the passage of time might make privileges seem obsolete and onerous to future generations, so there developed the risk that civil laws of a general character might seem unwieldy or inapposite to particular situations. Grotius understood this problem, and declared that the proper solution was to determine the reason for the civil law in question, and "if there was one notorious reason for the law, and this ceases entirely, then the law must be understood to

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<sup>64</sup>Ibid.

be dead."<sup>65</sup> This held true because "the legislator's will that it should have effect also ceased."<sup>66</sup> A civil law thus rendered obsolete by circumstances need not be formally repealed, but ceased because it was no longer relevant. In support of this position, Grotius set forth the notorious example of laws made solely for the prosecution of war being rendered obsolete by the return of the peace.<sup>67</sup>

This discussion revealed a fundamental difference between natural and civil law. Although civil laws could become obsolete because their specific legislative purposes had become irrelevant, natural law's more general scope made the obsolescence of natural law improbable. Natural law, addressing general standards of human conduct, was relatively permanent. This permanency was, perhaps, a double-edged sword. Just as sound principles of natural law would not be easily discarded, it might likewise prove a rare circumstance under which a harsh or onerous interpretation of natural law was abandoned. In any event, Grotius's account of natural law offered no suggestion of how natural law might be altered, or abrogated.

Grotius recognized a second circumstance in which the civil law was limited. There was a situation under which one would not be bound, in conscience, to obey the civil law: when the existence of a law presupposed a

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<sup>65</sup>Ibid.      <sup>66</sup>Ibid.      <sup>67</sup>Ibid.

fact that was known to be false.<sup>68</sup> Grotius offered the example of a man who was ordered to marry a woman because he had allegedly promised that he would marry her. If, in fact, he had made no such promise, Grotius declared that the man was not bound, by conscience, to marry her.<sup>69</sup> (Significantly, Grotius noted that the man was not bound to marry only with regard to his first operation of law, namely, by conscience. The other two operations of law -- punishment and annulment of conflicting acts -- would still have their sway: While the man would not be bound in conscience, he could still be punished for not marrying, and others would have to refrain from preventing the union.<sup>70</sup>)

As noted earlier, Grotius described natural law as "an intuitive judgement" concerning those things that were honorable or dishonorable. This judgment was to be made, implicitly, by each rational and reflective person. The assumption underlying this definition is that different persons, each undertaking this process of rational reflection, would produce a roughly similar account of natural laws.

The civil law, however, involved no such private, and independent, rational reflections. Accord between the understanding of different persons was not a question, because civil law was, by definition, a kind of positive law in which a legislator established and

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<sup>68</sup>Ibid., 13.      <sup>69</sup>Ibid.      <sup>70</sup>Ibid., 13.

published commands applicable to the community.

Despite these differences between civil and natural law, Grotius held that civil law took its shape from natural law. Grotius's account of the legal condition of persons included an example of his divination of certain principles of natural law. In fact, his natural law analysis involved a series of assumptions regarding human existence in which preservation of the species and the existing community were paramount. Grotius's account of the origin of government illustrated how his analysis operated. He contended first that

as the human race increased, and men came to live in great societies for mutual advantage, it was found that such large numbers of men could not conveniently come together for the discussion of matters of common interest and that the direction of such common interests could be more fittingly effected by chosen representatives.<sup>71</sup>

Yet, as Grotius acknowledged, government required laws and rules more detailed than those provided by the law of nature. He recognized that

Now, since the law of nature had given parents power over their children, and husbands power over their wives, but could not define how far this power should extend in every case that might arise; and since men come, some sooner, some later, to the use of understanding and ability to rule themselves, and the age of capacity could not be precisely fixed in each individual, and yet a general limit of age must which would apply if not in all, at all events in the majority of, cases;

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<sup>71</sup>Ibid., 17.

consequently all these matters, left undefined by the law of nature, have been defined by the civil law, and variously in various countries.<sup>72</sup>

In this way, the legal relations between persons were accidental, and shaped by the civil law. In turn, civil law was a result and consequence of natural law relationships, such as the relationships between men and women, or parents and children, which Grotius took to be the products of physical or environmental forces. The specific civil law filled the interstices of the more general natural law.

Grotius's description of civil law seemed to provide for a fair degree of personal discretion, and even suggested the possibility of civil disobedience. A law was rendered automatically nugatory when the purpose of a law, as divined from the will of its promulgator, ceased to apply. This was true whether or not the legislator abrogated the useless law. Furthermore, in those circumstances where the civil law rested on a false premise, those who were the objects of the law's regulatory effect were not bound by conscience's sake to obey. In this regard, Grotius's account of the civil law was one that was apparently generous toward those bound by law, and respectful to changing conditions.

Nevertheless, those who disobeyed the law might be subjected to punishment regardless of whether they had been falsely convicted. Furthermore, most prudent

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<sup>72</sup>Ibid., 19.



citizens would surely decline the invitation to disregard a law as obsolete on the grounds that the law no longer embodied the will of the legislator who promulgated it. As a practical matter, private citizens venture judgments as to the possible desuetude of a law only at their peril.

Grotius's final typology regarding civil law was based on the subject and purpose of the law. Once again, he divided law into one of two categories: law was either public or private.<sup>73</sup> Private law involved "things and the means of defending and pursuing the same."<sup>74</sup> It was public law, however, that Grotius found "of more importance and weight."<sup>75</sup> Public law involved

laws relating to religion, the conduct of peace and war, the supreme authority and territorial limits of the country, the power and process of making laws and granting privileges, the power to dispose of state property, the punishment of crime and offices relating thereto.<sup>76</sup>

Grotius's survey of law, both natural and positive, left entirely unstated the relationship between law and rights. No less than those who had addressed questions of law before him, and no less than those who would address those questions after him, Grotius faced a fundamental choice between whether law was to be understood in terms of duties and obligations, or whether in terms of rights. If law were to be understood in terms of rights, then Grotius would have

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<sup>73</sup>Ibid., 13.      <sup>74</sup>Ibid., 15.      <sup>75</sup>Ibid., 13.

<sup>76</sup>Ibid.

to decide whether those rights conveyed an active moral entitlement to the individual, or merely presented claims on others. As the following paragraphs illustrate, Grotius chose to describe the law in terms of active rights.

Grotius began the Introduction to the Jurisprudence of Holland with the declaration that rights were the fundamental subject matter of justice. Grotius first set forth three propositions:

1. Jurisprudence is the art of living according to Justice.
2. Justice is a virtuous disposition of the will to do that which is just.
3. Justice is what corresponds with right.<sup>77</sup>

In this way, Grotius began his description of the Dutch legal system with the forthright contention that rights were the constituent elements of justice. In describing justice in terms of rights, Grotius made clear the extent to which seventeenth century political theory had departed from classical notions of justice.

Yet, Grotius's chosen title for the Introduction revealed an intention to examine more than the Dutch legal system. By entitling his work an Introduction to the Jurisprudence of Holland, Grotius set out not only to catalogue the laws of a prosperous commercial republic, but to examine the "art of living according to

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<sup>77</sup>Ibid., 3.

Justice," as understood by a free society only two generations removed from the control of monarchical Spain. In this respect, the Introduction was a universal work, involving an examination of standards unrestricted by national boundaries.

A definition of justice as right, left on the simple level of Grotius's third premise, would have little practical meaning. The declaration that justice is what corresponds with right provides no guidance for how one should arrange one's affairs, or conduct oneself. If there is little guidance for an individual, there is similarly little by which one person can evaluate the propriety of another's conduct. The standards by which an individual may regulate his conduct, and evaluate the conduct of others, are a fundamental purpose of law. It was to a discussion of laws and their operation to which Grotius turned in the second chapter of the Introduction.

After setting forth three fundamental premises, Grotius went on to distinguish between a general, and a more specific, way in which the concept of right could be defined. Grotius stated that "Right widely understood is the correspondence of the act of a reasonable being with reason, in so far as another person is interested in such act."<sup>78</sup> Grotius gave a fuller account of this first sense of right when he

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<sup>78</sup>Ibid.

observed that scholars sometimes referred to justice founded upon this general sense of the word right as "universal justice," because this broad sense of right "comprises virtuous acts of every kind...so far as the same serve to maintain any society of men."<sup>79</sup>

Grotius remarked that the general sense of justice as right was also called "legal justice," because its extent is coincident with law, and it takes from the laws its measure and norm."<sup>80</sup>

It is Grotius's second, narrower definition of justice as a system of rights that formed the basis for the discussion of rights that followed in the Introduction. He held that "Right, narrowly understood, is the relationship that exists between a reasonable being and something appropriate to him by merit or property."<sup>81</sup> Merit was simply "the fitness of any reasonable being for any object of desire."<sup>82</sup> Grotius noted that the narrow definition of right that took account of merit was commonly called "distributive justice."<sup>83</sup> Merit involved neither possession nor ownership, but rather but rather a nature or character sufficiently elevated to warrant possession or ownership of a desirable object. Grotius remarked that justice involving a definition of right as a kind of property

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<sup>79</sup>Ibid.      <sup>80</sup>Ibid.      <sup>81</sup>Ibid.      <sup>82</sup>Ibid.

<sup>83</sup>Ibid.

was traditionally referred to as "commutative justice."<sup>84</sup> As Richard Tuck has noted, Grotius's narrow definition of right ingeniously linked Aristotelian categories of distributive and commutative justice as components of a single rights theory.<sup>85</sup> Nevertheless, it was Grotius's definition of fundamental rights as property relationships that formed the basis of his rights theory, and it is to that aspect of Grotius's theory to which we now turn in the following chapter.

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<sup>84</sup>Ibid.      <sup>85</sup>Tuck, 67.

### CHAPTER III.

#### GROTIUS'S DESCRIPTION OF RIGHTS AS PROPERTY.

There was a second way in which the narrow definition of right could be described. It was Grotius's second type of right, narrowly understood, that revealed the boldness of his rights doctrine. This second type of right involved the fitness of a reasonable being for an object of desire because it was his property, where property meant "something that is called ours: it consists, as will be seen, in real rights (jus reale) and in personal rights (jus personale)."<sup>86</sup>

Grotius's subsequent discussion of rights revealed the extent to which he had come to see rights as a type of property. Grotius noted that there were two types of rights as property, and he described those two kinds of rights:

We speak here not of right in the wide sense of the word, nor of the right which proceeds from merit and is the subject of public law ... but of the right, which is termed property, by virtue of which, as said above, a thing is said to be ours: property, thus understood, we have divided

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<sup>86</sup>Grotius, Jurisprudence of Holland, p. 3.

into real rights and personal rights.<sup>87</sup>

Grotius defined a real right as "a right of property existing between a person and a thing without necessary relation to another person."<sup>88</sup> The second category of rights as property involved personal rights that, by contrast, were "a right of property which one person has against another entitling the first to receive from the second some thing or act."<sup>89</sup>

Real rights, which Grotius defined as property rights, could take one of two forms: the right of possession, or the right of ownership.<sup>90</sup> Grotius described each of these types of real rights in turn. While all real rights were, themselves, a type of property, Grotius saw a fundamental distinction between whether the real rights were asserted on the basis of possession or ownership. Possession was the first of the two ways in which one might assert a real right. He defined possession as "the actual holding of a thing accompanied by the intention to hold it for oneself and not for another."<sup>91</sup> For this reason, those who were merely holding or renting property were not possessors under this definition. The Right of Possession was a consequence of possession.<sup>92</sup> While possession seemed to imply the intentional holding of physical objects only,

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<sup>87</sup>Ibid., 75.

<sup>88</sup>Ibid.

<sup>89</sup>Ibid.

<sup>90</sup>Ibid.

<sup>91</sup>Ibid., 75.

<sup>92</sup>Ibid.

Grotius observed that "the law has introduced a possession of incorporeal things, as of inheritance..."<sup>93</sup> Implicit in Grotius's definition of possession was that possession was a natural act, requiring only the intentional and continued holding of an object. Grotius's declaration that the civil law simply expanded, but did not create, the definition of possession to include incorporeal things revealed that he considered possession a natural act, prior to the state.

He stated that the natural character of possession brought, as a consequence, certain rights to the possessor, and he noted that the "rights flowing from possession are that every one may keep what he possesses, and resist any one who would deprive him."<sup>94</sup> The possessor had an entitlement to retain his possessions, and this entitlement could be abridged only after "another has made good his title by legal process."<sup>95</sup> Grotius noted that the Dutch civil authorities sometimes overstepped their bounds regarding the rights to possession of their fellow citizens, and as a precaution were required to promise not to put anyone out of possession except by law.<sup>96</sup>

Thus, he defined the real property right of possession as deriving from a natural act, from which

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<sup>93</sup>Ibid.      <sup>94</sup>Ibid.      <sup>95</sup>Ibid.      <sup>96</sup>Ibid., 77.



derived implicit natural rights. These rights could be asserted against all others, subject only to civil law determinations that the possession was illegitimate. For Grotius, the relationship between property and possession was one in which possession was one of the ways in which a property right could be asserted.

Grotius defined the second type of right involving real property as ownership. Unlike possession, which involved the intentional holding of a thing, he wrote that "ownership is the property in a thing whereby a person who has not the possession may acquire the same by legal process."<sup>97</sup> Grotius confronted a fundamental problem with his definition:

Since it is a proverbial saying that by the law of nature all things are common, and we have said above that the law of nature is unchangeable, one might doubt whether the ownership of things is justifiable or not.<sup>98</sup>

To address the question of whether the right of ownership was permitted by the law of nature, Grotius considered why some things were common property. He concluded that "of created things some are of such a nature that they are for the use of all men, as sun, moon, stars, and sky, and to some extent also air and sky; others are not sufficient, namely such things as cannot be enjoyed equally by all."<sup>99</sup> Grotius acknowledged that some things could not remain common property because they were perishable, or because they

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<sup>97</sup>Ibid., 79.

<sup>98</sup>Ibid.

<sup>99</sup>Ibid.

were consumable only by a single person. In this category Grotius placed food, clothing, and shelter.<sup>100</sup>

Yet, Grotius went farther in his contention that ownership was natural, and concluded that the means by which consumable and perishable things were produced must also be owned individually, because a kind of division of labor based on talent would soon develop.<sup>101</sup> As humanity increased in numbers, the natural bounty of the land would prove inadequate to support the entire community, and survival would come to depend on the natural talents of a few industrious persons. For that talent to flourish, and consequently increase the entire community's standard of living, those talented individuals would have to be given control over their property, so that they would be assured of the profitability of their undertakings. Ownership -- a legal construct -- was necessary in order to provide the industrious with the confidence to exercise their talents.

The productive efforts of society's gifted and industrious were essential to the survival of all the community as its numbers surpassed the level at which natural provisions alone were sufficient. In this way, ownership was the necessary response to the natural increase in population. For this reason, Grotius declared ownership itself a product of natural law:

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<sup>100</sup>Ibid.      <sup>101</sup>Ibid., 81.

though the law of nature left everything undivided, since division could not take place except by act of man, yet the law of nature did not forbid division, but in a sense was the cause of it...<sup>102</sup>

Rights in property were, therefore, a necessary consequence of natural law, and rights to possession and ownership of property were implicitly natural.

Grotius next addressed the second category of property rights, involving personal rights. Grotius noted that property as a personal right involved was an "obligation, which we have described as being the right of property which one man has over another to obtain from him some thing or act."<sup>103</sup> Grotius considered, in turn, the sources of this personal right under natural law, and thereafter, under positive law.

The law of nature itself recognized two kinds of personal rights: contract and inequality.<sup>104</sup> Grotius defined contract as "a voluntary act of a man whereby he promises something to another with the intention that such other shall accept it and thereby acquire a right against the promisor."<sup>105</sup> It is clear why Grotius considered contract to be a consequence of natural law. Under Grotius's definition, a contract required merely an agreement between two people, and did not depend on an external framework. One simply had to obligate oneself with the intention to be bound. The civil law

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<sup>102</sup>Ibid.      <sup>103</sup>Ibid., 293.      <sup>104</sup>Ibid., 295.

<sup>105</sup>Ibid.

was not needed to frame this sort of relationship.

The second type of personal right derived from a position of inequality, where one person profited by his inequality in relation to another person. In fact, this inequality was a type of indebtedness, which "binds the person profited to make compensation, without regard to the way in which he came by the profit."<sup>106</sup> Grotius observed that this obligation could result either as an obligation under the law of nature, or a more specific obligation under the civil law.<sup>107</sup> Nevertheless, as was true with his account of real rights, personal rights derived naturally, and were only made more elaborate by the civil law.

Grotius set forth a natural rights theory in which these rights over persons and property were derived from natural law. At the same time, he described the rights themselves as a kind of property. Two fundamental questions arose regarding a theory of this kind. First, from what source do these natural rights, as property, derive? Second, to what extent may persons alienate their natural rights? If rights were property, then could they be treated as many other, conventional forms of property that were commonly sold or exchanged?

Grotius's theory of natural rights as property went far to satisfy questions concerning the independent, moral significance of rights theory. An

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<sup>106</sup>Ibid., 297

<sup>107</sup>Ibid., 299.

active rights doctrine held that rights were fully within the control of the individual, and granted the possessor of the right the entitlement to act in a certain way, and to compel others to comply. The contention that one had property in one's rights placed Grotius squarely in the active rights category.

This position led to the question of the ultimate source of an individual's rights. It was clear that Grotius recognized natural law as the source from which the most basic and fundamental rights derived. Nevertheless, this presented the question of the source of natural law itself. In addressing this question, Grotius produced an answer that both bolstered his active rights theory, and simultaneously revolutionized rights theory.

Grotius noted that natural law was based on "an intuitive judgement" concerning what was "honourable or dishonourable" and requiring a duty to follow the same as imposed by God. This was a complete departure from the Protestant Aristotelian position in which Grotius was educated. For Protestant jurists, natural law was a result of God's dictate, and established by divine fiat. Grotius's description of natural law as the product of the human character was a repudiation of the prevailing opinion of his contemporaries. They reacted bitterly to this innovative shift regarding the source

of natural law.<sup>108</sup>

Historically, Grotius's decision to shift natural law from its former position as an instrument of divine will to a description of human nature has been celebrated as a milestone in the history of jurisprudence.<sup>109</sup> Grotius's decision to relocate the source of natural law was significant for two reasons. First, Grotius's account of natural law as the result of human character made natural law less remote and alien than it had previously been. Locating the source of natural law as God's command produced a clear distance between the omniscient and omnipotent being that promulgated the law, and those who received it. No matter how supposedly just, or how insightful into the human character, God's promulgation of law was, in fact, a remote and distant promulgation, from an entity fundamentally different from those who were the recipients of the law. The decision to locate the source of natural law within the human character made natural law less remote.

The second reason Grotius's decision was significant was because it afforded natural law, at the very least, the appearance of an empirical and practical quality. Where natural law as a product of divine

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<sup>108</sup>Tuck, 59.

<sup>109</sup>Julian Marias, History of Philosophy. (New York: Dover Publications, 1967), 278.

dictate was subject to numerous differences regarding the divine character, professing that natural law was the product of human nature gave natural law a seemingly more discernible character. Of course, it may be that determinations of the nature of the human character are as difficult as any assessment of the divine disposition. Nevertheless, the decision to describe natural law untheistically, and to locate the source of natural law within the human character, helped to give natural law a more tangible form.

The reason for Grotius's shift has been less carefully considered. In fact, the reasons that underlay Grotius's decision to describe rights as a type of property also justified a shift from divine will to human nature as a source of natural law. The decision to describe rights as a type of property gave individuals greater control over those rights. Grotius's description as rights as a type of property was an attempt to set forth an active rights theory, in which rights were more than claims on other persons, and were instead independent entitlements. The decision to locate the source of natural law within the human character, rather than natural within the confines of divine dictate, increased mankind's (and implicitly the individual's) control over the moral world. Far from being simply an attempt to reduce the theistic strain

within Protestant Aristotelianism natural law doctrine (and by doing so make natural law doctrine, ultimately, less Protestant), Grotius's relocation of the source of natural law should be seen as part of an attempt to strengthen natural rights through a description of those rights as active rights.



CHAPTER IV.  
THE ALIENABILITY OF RIGHTS.

Having described rights as a type of property, Grotius faced the question of whether rights as property were freely alienable by those who held such rights. His answer to this question determined not only the type of rights theory that he advanced, but also the type and form of government under which one might live. The paradox of Grotius's choice is that he described a rights theory so generous to notions of alienability that an individual might freely sacrifice most of those rights to the state.

The conventional view of Grotius's Introduction to the Jurisprudence of Holland regards the Introduction, written in 1620, as a part of Grotius's earlier, liberal period.<sup>110</sup> Richard Tuck, thorough and accurate in his description of so much of the history of natural rights theory, stubbornly refuses to acknowledge the possibility that Grotius saw rights as generally alienable at the time that Grotius wrote the Introduction. This is perhaps the reason for Tuck's charitable description of Grotius's natural rights doctrine as a "Janus-faced"<sup>111</sup> theory, in which

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<sup>110</sup>Tuck, 80.

<sup>111</sup>Tuck, 79.

conservative and liberal elements are mixed. Tuck has assigned the Introduction to Grotius's more youthful, supposedly liberal period, in which he was allegedly unwilling to abandon the Protestant aversion to the complete alienation of rights, and the resulting voluntary renunciation of liberty such a complete alienation implied.

In fact, as the following paragraphs reveal, a careful reading of Grotius's Introduction to the Jurisprudence of Holland demonstrates that Grotius had effectually accepted the idea of the free alienation of an individual's fundamental rights by the time he completed the Introduction in 1620. (Ironically, Grotius completed the Introduction, in which he came to contend that rights could be freely traded, while serving a life sentence for his voluntary participation in a religious dispute.) The following paragraphs illustrate the way in which Grotius accepted the idea of the free alienation of one's rights, and the consequences of that position.

Significantly, the description of rights as a type of property begs the question of the alienability of those rights, in large measure because alienability of property is a central tenet of free, commercial societies. Nevertheless, the answer to the question of alienability also presents profound consequences for

the foundations of those very free and commercial societies for whom alienability is a cardinal principle. We have already seen that Grotius recognized most rights as a type of property. A fundamental aspect of most property concerns the circumstances under which one might dispose of that property. This question was no less present when rights were, themselves, described as a type of property. On the contrary, Grotius's description of natural law and the rights derived from them as a product of the human character made the question of alienability more pressing: if natural rights were derived from human nature, then questions concerning the alienability of that property were questions presumably within the province of human determination.

Of course, it is reasonable to conclude that rights differ in their significance, depending on what the right entails. It is fair to say that the right to purchase a certain plot of land is less significant, morally, than the more fundamental right to life. This would be true even if the value of the land were extremely high, and if the social contribution of the given individual were slight. The right to life is, as a right, categorically higher than the right to purchase a given piece of property.

This is a principal feature of rights theories: they place certain entitlements on a level categorically

higher than other entitlements. Some rights are, simply, deemed to be more significant than others. This is in contrast to the calculus of a utilitarian, for whom comparisons between the social costs of different actions, no matter how disparate in nature those actions may be, is legitimate in order to determine the greater social utility between the objects of comparison. The utilitarian by nature seeks comparison between different actions; the rights theorist often refuses to accept such comparisons, on the grounds that some entitlements are so fundamental that they must not be, except in the most extreme cases, subjected to such comparisons.

Nevertheless, the rights theorist would not hold all rights equally significant, nor equally inviolable. Some rights are so slight and trivial that they surely may be sacrificed at little or no moral loss, and perhaps even with a great deal of gain for the individual and society. One might say that one has the right (in the form of an option) to purchase so many bushels of wheat. Nevertheless, the sale, or alienation, of this right would hardly be seen as a violation of a basic moral principle. On the contrary, the voluntary alienation of the right would most likely be seen as an affirmation of sound commercial instincts. It is not the alienation of one's rights, but the alienation of one's fundamental rights, that is a questionable point.

To address the question of the alienability of one's rights, including one's basic rights, Grotius declared that "things belonging to individuals are by nature are alienable or inalienable."<sup>112</sup> Grotius affirmed his notion of rights as "incorporeal things ... which are not perceived with the senses, as the right to go over such a piece of land."<sup>113</sup> He proclaimed that "inalienable things are things which belong so essentially to one man that they could not belong to another, as a man's life, body, freedom, honour."<sup>114</sup> On its on terms, this declaration suggested that Grotius saw a category involving those things that were inalienable. This would be in agreement with the Protestant Aristotelian notions of Grotius's immediate environment, and would seem to affirm Tuck's notion that Grotius did not accept the alienation of fundamental rights in the Introduction.

A careful review of each of these four fundamental rights demonstrates, however, that Grotius had, by 1620, accepted the notion of the effectual alienation even of one's basic rights.

With regard to a person's life, Grotius declared the extent to which the individual had control over his rights by stating that "a man's life is so far his own

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<sup>112</sup>Grotius, Jurisprudence of Holland, 71.

<sup>113</sup>Ibid., 65.      <sup>114</sup>Ibid., 71.

that he may defend it even at the cost of injury to an aggressor; may forfeit it for a crime; may sacrifice it at the service of his country."<sup>115</sup>

This description of one's natural right to life was entirely in line with the notion that one's rights were one's own, and that they were alienable. The individual was deemed to be the possessor and owner of his life. There was nothing in this description to suggest that the right to life was, in fact, inalienable at all.

Nevertheless, Grotius placed certain apparent restrictions on the alienation of one's right to life with the declaration that "no one has an unlimited right over his life: therefore, in Holland punishment has always attached to persons who deliberately made away with themselves."<sup>116</sup>

This defense of the inalienability of the right to life revealed unmistakably the extent to which Grotius's claims of inalienability were hollow. Curiously, he attempted to defend the inalienability of one's supposedly natural right to life on the basis of Holland's civil law restrictions. Rather than contend that restrictions on alienation of the right to life were natural restrictions, Grotius instead sought to interpose a civil law obstacle to the alienation of

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<sup>115</sup>Ibid.      <sup>116</sup>Ibid.

one's natural right to life.

His decision to use mere civil law restrictions to make inalienable the fundamental right to life contrasted sharply with the other means by which Grotius might have posited the inalienability of the right to life. He might have declared that the natural right to life was inalienable on the basis of natural law, and thereby taken the matter out of the control of the individual. As an alternative, Grotius might have declared that the right to life was inalienable on the basis of the jus gentium, the conventionally-accepted positive law of nations, and thereby made the right to life virtually inalienable.

Instead, Grotius's use of a civil law restriction to make the right to life inalienable belied the very position that the right to life was inalienable. The use of a civil law standard to prevent the alienation of a right suggests that the right is not, inherently, inalienable at all. By his own definition, the civil law required the positive declaration of a human legislator to be effective, and such legislative declarations were readily changeable.

Grotius's second supposedly inalienable right was the right to control over one's body.<sup>117</sup> However, he made clear that bodily integrity was a right that could be sacrificed to avoid punishment, when he observed that "to save his life, a man may allow some portion of his

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<sup>117</sup>Ibid., 73.

body to be removed: however, this usually takes place with knowledge of Court, which hears what the nearest of kin may have to say in the matter."<sup>118</sup> Three reasons demonstrate that this was hardly an inalienable right. First, Grotius expressly stated that the right to bodily integrity could be sacrificed, albeit to avoid a more severe punishment. The sacrifice of the right, even as a result of necessarily inauspicious circumstances, was still an alienation of the right. Second, his decision to make the alienation of the right to body integrity contingent on judicial approval in no way obscured the fact that the right could, ultimately, be sacrificed. Third, Grotius's decision to permit family members a voice in what was ostensibly the individual's decision revealed that this was not only the individual's decision. Although the family might condone the person's decision, their role vitiated the claim that the right to bodily integrity was inalienable, and also the claim that right to bodily integrity was a purely individual right.

Grotius's claim that honor was among the four inalienable rights of individuals was the least persuasive of his four supposedly inalienable entitlements. He declared that "a man's honour belongs to him," yet he noted that "a man may renounce something

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<sup>118</sup>Ibid.



that belongs to him as a part of his honour."<sup>119</sup>

Of all the supposedly inalienable rights Grotius set forth in the Introduction, the right to honor is perhaps the least persuasive to the modern mind. Furthermore, there is something about the allegedly inalienable right to honor that makes this right patently alienable under any conditions. By its very nature, the good reputation that is the heart of the right to honor is a product of other people's attitudes, and thus outside the moral and ethical control of the individual. Far from being an active individual right, the right to honor resembled a passive right, in which the individual's right was really no more than a claim on others to respect one's entitlement. The right to honor represented the entreaty to others to view the individual in a favorable way. If this right was the least convincing, it was perhaps also because as a practical matter this right was the most easily lost, the most transitory, and uncontrollable of Grotius's four supposedly inalienable rights.

Finally, Grotius's definition of the right to liberty demonstrated that the right to one's freedom was alienable, for although "no one may entirely dispose of his freedom by contract ... a man may well bind himself

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<sup>119</sup>Ibid.

to certain defined acts."<sup>120</sup> Grotius gave no account of those "certain defined acts" that permitted alienation of one's freedom. Nevertheless, as the discussion below suggests, Grotius's was willing to acquiesce in the possibility that those certain defined acts might include the acceptance of undemocratic government.

In fact, Grotius's description of rights as a kind of property made claims that those rights were inalienable increasingly untenable. The entire structure of property relationships, especially in the highly commercial Dutch republic, depended on the free exchange of property for financial gain. The use of property as a metaphor for an individual's rights was inconsistent with the claim that these rights were inalienable. It was within the nature of property in a mercantile society to be freely alienable. The entire process of commerce depended on the exchange of property, and restrictions on alienation, whatever moral justification they may have had, certainly inhibited the distribution of a commodity based on its price as a function of the supply of, and demand for, that commodity. There may be ethical justifications for restricting certain exchanges, but those ethical restrictions stand apart from the underlying economic rationality of allowing individuals to buy and sell

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<sup>120</sup> Ibid.

voluntarily on terms of their own devising.

Grotius's decision to define natural and positive rights as entitlements within the possession and ownership, and therefore as the property, of the individual was a dangerous bargain. To be more than corresponding duties, rights theories must establish that rights are entitlements of independent significance. Those rights, if they are to hold any meaning, must present, as it were, a free-standing justification, and must not be contingent on notions of duty or obligation. The decision to describe rights as an individual's property certainly established as well as any rights theory could that the individual retained control over his moral world. Whatever questions a rights theory presents, a theory that describes rights as a type of property is a strong, active rights theory, and presents a robust effort to depict rights as entitlements that offer a type of empowerment to the rights-holder.

Nevertheless, Grotius's decision to describe rights as property was, at best, a kind of Faustian bargain. Grotius may have succeeded in setting forth a strong rights theory, but at a price that rendered dubious the entire effort. In his discussion of the rights that persons have against one another, Grotius betrayed the implications of his description of rights as a kind of property:

for just as the power that a man has over his own property, whether in complete or incomplete ownership, enables him by delivery or sufferance to make another person owner ... so too a man may make over to another to another who accepts the same, a portion, or rather a consequence, of his own freedom, so that the other acquires a right over it, which right is termed a personal right, or ius in personam.<sup>121</sup>

The power to relinquish one's personal rights to another involved significant political, as well as private, consequences. Grotius made clear that individuals had considerable freedom of choice regarding the form of government under which they would live. This choice was so wide that it involved an individual's right to select a form of government in which the individual would be unable to participate. On the contrary, Grotius observed that

since peoples everywhere had not everywhere the same disposition or aims, it came about that in some places the community entrusted matter of less importance to a representative, retaining most matters in its own hands, from which came democracy; in other places commercial communities, not caring to be troubled with government, have left it to men pre-eminent in understanding and wealth; hence aristocracy (or oligarchy): finally, in many places for the avoidance of dissention and other difficulties, power has been made over to one man; and this is the origin of monarchy or kingship. <sup>122</sup>

This willingness to acquiesce in aristocracy, oligarchy, or monarchy illustrated the extent to which Grotius would permit individuals to alienate their rights. The supposedly fundamental and inalienable

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<sup>121</sup>Ibid., 295.      <sup>122</sup>Ibid., 19.

rights to life, freedom, bodily integrity and honor that Grotius professed to hold dear were as easily administered by an autocrat or oligarch as they were by any free assembly. Ultimately, these fundamental rights were as exchangeable as any other type of property, and as easily sacrificed. There is no question that by 1624, with the publication of his most celebrated work, De Iure Belli ac Pacis, Grotius recognized the possibility of so-called "voluntary slavery."<sup>123</sup> As Richard Tuck and others have noted, this position was common among other strong rights theorists of the era, who felt that the voluntary alienation of one's most basic rights was permissible.<sup>124</sup>

Significantly, Grotius had already effectually accepted such a view, as early as 1620, in the Introduction. Thus, Rousseau's condemnation of Grotius's willingness to acquiesce in despotism is as true of the Introduction as it is of any of Grotius's works. Rousseau observed the implications of Grotius's theory when he noted that "if a private individual, says Grotius, can alienate his freedom, and enslave himself to a master, why can't a whole people alienate its freedom and subject itself to a king?"<sup>125</sup> Rousseau understood the implications of this sort of theory, when

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<sup>123</sup>Tuck, 71.      <sup>124</sup>Ibid., 77.

<sup>125</sup>Jean-Jacques Rousseau, On the Social Contract, trans. Judith R. Masters, (New York: St. Martin's Press, 1978), 49.

he remarked that

There are many equivocal words in this that need explaining, but let us limit ourselves to the word *alienate*. To alienate is to give or to sell. Now a man who makes himself another's slave does not give himself, he sells himself, at the least for his subsistence. But why does a people sell itself? Far from furnishing the subsistence of his subjects, a king derives his own only from them, and according to Rabelais a king does not live cheaply. Do the subjects give their persons, then, on the condition that their goods will be taken too? I do not see what remains for them to preserve.<sup>126</sup>

Rousseau's criticism of the alienation of rights applies to Grotius's Introduction. It is surely true that a rights theory in which the individual is the possessor of alienable rights is, in a certain respect, a libertarian theory. An active rights theory in which rights are alienable grants the individual the greatest freedom to act, and to decide the extent to which he will exercise those entitlements he holds. Nevertheless, rights once alienated may never be recovered. In this regard, Rousseau is entirely correct about Grotius's theory: its emphasis on alienation admits of the possibility of autocracy. Such a possibility reveals a paradox in which free individuals may sacrifice their freedom to enslave not merely themselves, but also future generations. The description of rights as a kind of property, and property that is ultimately alienable, is less a defense

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<sup>126</sup>Ibid.

of individual rights than it is an invitation to despotism. Grotius's decision in the Introduction to advance a theory of active rights as property made the essential alienability of those rights a reasonable conclusion, no matter how carefully Grotius expressed nominal fidelity to notions of inalienability. To hold property is to confront the question of alienability, and to alienate one's rights is to sacrifice, perhaps permanently, the very possibility of those rights in the future. Grotius's effort to bolster rights theory by describing rights as property invited not a rights theory, but the possibility of the sacrifice of all rights. Grotius's Introduction to the Jurisprudence of Holland, so firm in its ostensibly libertarian description of rights as property, produced a rights theory whose implications undermined the continuing exercise of the very rights the theory professed to advance.

## CHAPTER V.

### THE CONSEQUENCES OF ALIENABLE RIGHTS.

Grotius's Introduction to the Jurisprudence of Holland was an attempt to present a meaningful rights theory that described the natural and positive rights of persons, in a way that made these rights entitlements of independent significance. The rights that Grotius described were both natural and positive, and each was best understood, by his account, as a kind of property. There can be no question that this was, at least superficially, a convincing effort to describe rights as things of independent meaning. To describe oneself as holding property in a certain object conveys an active right to the object.

To have property in an object is more than a mere passive claim on others to respect that property right. On the contrary, an active right implies that others have no moral role to play in determining whether to acquiesce in that property right. The Introduction advanced a theory of rights as property, and in so doing imparted to the individual considerable control over the exercise of his rights.

Grotius's Introduction presents the question of



the extent to which a person can, or should, dispose of his rights. Regardless of any protestations to the contrary, Grotius's theory in the Introduction produced a circumstance in which even fundamental rights were alienable. The rights to life, bodily integrity, honor, and freedom could be sacrificed, under conditions that did less to limit such sacrifices than Grotius might have imagined. The effectual alienation of one's fundamental rights is a striking consequence of the Introduction's rights theory. This presents the question of the whether those who are committed to libertarian rights theory should permit the exercise of those rights in a way that leads to absolutism.

There is, at least, the appearance of nobility in the declaration that the free exercise of liberty should be respected even to the extent that those liberties might be voluntarily relinquished. An unalloyed commitment to personal liberty manifests a seeming altruism; far from lacking principle, those who would acquiesce in the sacrifice of personal liberties seem to be the very model of unflinching fidelity to their libertarian convictions, regardless of the consequences for themselves or their community.

There are, nevertheless, three reasons that demonstrate that the libertarian need not acquiesce in the possibility of absolutism in order to maintain

fidelity to his or her principles of the free exercise of one's rights. The first reason the libertarian need not, and should not, accept absolutism as a result of free choice is because the libertarian must not be blind to the results of human choices. In fact, it is precisely this blindness to consequences that is a central feature of the views of those who would allow the free alienation of fundamental human liberties. For the extreme libertarian, the right to trade, barter, or sacrifice one's liberties becomes an entitlement so significant that questions concerning the consequences of exercising that new-found entitlement are shunted aside, or deemed mere matters of preference.

The rights that the libertarian recognizes as fundamental are rights for all persons, and not merely significant for a given individual. While the libertarian believes that any given person should be accorded wide freedom of action, these freedoms must be limited to the extent that the equal rights of other persons might otherwise be impaired. An individual may have a fundamental right to vote for his representatives, but selling one's vote, or voting several times in the same election, is prohibited precisely because those actions would debase the electoral process, or dilute the fundamental voting rights of other citizens. The harmful effects of some actions justify limitations on the basic right to take

those actions.

Grotius's own slight regard for the difference between forms of government illustrated a certain blindness to the consequences of the exercise of personal liberties. His discussion of the different types of regime that a people might select passed gracefully from democracy to aristocracy to monarchy without any consideration that one type of regime might be morally preferable to another. On the contrary, Grotius noted that a principal reason for choosing one regime over another was that citizens might not care to be "troubled with government,"<sup>127</sup> as though participation in political life were merely bothersome.

Grotius's willingness to treat wholly disparate forms of government as equally permissible illustrated how his fidelity to the right to alienate one's rights overshadowed his commitment to the preservation of liberty. Those who were free to select from among monarchies, aristocracies, oligarchies, and democracies were, without question, exercising the power to choose. The consequences of this choice, however, differ so greatly depending on the form of government chosen that the act of choosing loses much of its meaning. Ultimately, some choices are better avoided, and to elevate the power to choose over the consequences of choosing ignores the significance of decisions that

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<sup>127</sup>Grotius, Jurisprudence of Holland, 295.

are nearly irreversible.

The first reply to those who would allow absolutism as a free choice is that the consequences of some choices are so debasing and harmful that they vitiate the morality of making those choices in the first place. A doctrine without regard to the consequences of those actions it permits, but instead representing a glorification of action itself, should be held suspect.

This apparent indifference to the consequences of the free alienation of one's rights points to the curious difference between the extreme libertarian and the extreme utilitarian. For the extreme libertarian, the unfettered power of choice is of fundamental importance. It is the power to choose between all available options that animates the libertarian's philosophy. The means, the power to choose, are the objects of the libertarian's concern.

For the extreme utilitarian, however, the consequences of a given action, in the form of an increase in human happiness, are the principal concern. It is not merely the power to choose, but a choice that produces a desirable result, that is of greatest concern to the utilitarian.

There is a second reason for the libertarian to reject the notion that he must accept the possibility of absolutism as part of a community's right to choose its

form of government. Ultimately, the contention that one who is committed to the free exercise of human liberty must accept the possibility of the voluntary renunciation of that liberty ignores the distinction between the exercise of a fundamental right and its sacrifice. The basic liberties of life, freedom, and bodily integrity are specific entitlements, and not merely small segments of an undifferentiated chain of rights. The right to bodily integrity, for example, does not necessarily imply the right to sacrifice that right to physical safety. The extreme libertarian conflates the power to alienate his rights with those very fundamental rights, so that the basic rights to life, liberty, and bodily integrity become mere companions of an all-encompassing entitlement to alienate all other rights. Under this reasoning, if one has the power to exercise a right, or to refrain from exercising that right, then surely one must have the power to alienate the right, as well. In this way, the extreme libertarian makes a narcotic of the right to make choices, and refuses to recognize the limitations that others would place on the exercise of individual rights.

If it is an error to believe that the right to protect one's life, or the right to choose one's political representatives, necessarily implies the right

alienate those, and all other, fundamental rights, then the description of rights as property makes the error easier to understand. Certainly, Grotius never intended that any choice, no matter how harmful, should be applauded because it was freely made. Grotius need not have chosen to describe rights as property. Yet, having made that choice, the question of the alienability of rights, while not conclusively answered, was principally decided in favor of the free alienation of one's rights. To exercise ownership of one's basic rights implies not merely the right to defend, but also the right to sacrifice, one's rights. Grotius might have made greater efforts to hold certain fundamental rights inalienable, but even in his description of those four rights that were supposedly inalienable, he acknowledged the circumstances under which those rights could be sacrificed. This admission was, in fact, a reasonable acknowledgment of the power, and consequences, of a theory of rights as property, and the extent to which such a theory tended toward accepting the alienation of one's rights.

Once rights are described as property, it becomes easier to treat them as commodities. The fundamental essence of the right, its content, is subsumed by the form through which the right is described. Although successful in presenting a description of active rights, the description of rights as property takes the holder

of fundamental rights and makes him a potential broker of his own liberties.

The third reason for the libertarian to reject the complete alienation of fundamental liberties is a reason that Grotius recognized, but did not fully address, in the Introduction. It was Grotius who made the innovative claim, as noted above, that natural law and the rights derived therefrom were the product of human nature, and not divine dictate. This innovation freed natural rights from their previous theistic foundation. The decision to describe fundamental rights as products of human nature gave Grotius the opportunity to assert that those rights, as an indelible part of the human character and disposition, were inalienable. If basic rights derive from the very essence of what it means to be human, then it becomes difficult to describe those rights as something that can be easily alienated.

Grotius, desirous of a rights theory in which persons had full disposition of their rights, chose the description of rights as property to bolster his position that individuals were, so to speak, rulers of their ethical environment. For Grotius, describing natural law and rights as deriving from human nature was consistent with the notion that persons, and not a divine benefactor, were responsible for the exercise and disposition of their fundamental rights. Locating

natural law and rights within the human character was merely another way of asserting human control over ethical decisions.

In another respect, however, Grotius's decision to describe natural law and rights as the product of human nature should be seen as a justification for limiting, rather than endorsing, the alienation of rights. If it is from human nature, generally, that rights derive, then it is not the individual's mere preferences, idiosyncratic as they may be, but the nature of humanity generally that determines the shape and nature of the natural rights that one exercises. Ultimately, it may be easier to discard a gift, no matter how precious, than to renounce an entitlement that one believes derives from one's very essence.

Fundamental human rights are preferable not merely because they grant to individuals the power to act, but because they involve specific actions that, presumably, satisfy certain needs and potential of the human character.

For all the criticism of rights as mere chimeras, as nothing more than shadowy reflections of the duties incumbent on one's fellow citizens, the language of rights is the principal means of contemporary political and legal discourse. It is indisputable that the overwhelming majority of American citizens would consider themselves the possessors of certain



fundamental rights. No matter how difficult they might find the precise description and enumeration of those rights, the belief that they were the holders of these rights would remain unaltered.

The critic of rights theory would undoubtedly contend that the rights his fellow citizens thought were theirs were, in fact, merely positive rights, and as such little more than grants from the sovereign authority of the state. It is true that Constitutional and civil rights are positive rights, depending as they do on the authorization of the state for their authority.

Grotius's Introduction to the Jurisprudence of Holland set forth a rights theory in terms that ostensibly advanced the power of individuals to make fundamental decisions, by holding that they were the possessors of both natural and civil rights. In effect, Grotius acknowledged that these decisions included the right to alienate one's basic entitlements. The unfortunate consequences of that freedom to choose, for the liberty of the individual and his fellow citizens, mattered less than the right to make such choices. In this regard, the individual in Grotius's scheme, granted the power to do with his fundamental rights whatever he wished, ran the risk of discovering that, as Paine noted a century and a half after the Introduction, "calamity

is heightened by reflecting that we furnish the means by  
which we suffer."<sup>128</sup>

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<sup>128</sup>Thomas Paine, Common Sense. (Indianapolis:  
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