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A Libertarian Theory of Punishment and Rights

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[I]t is easier to commit murder than to justify it.[1]

I. INTRODUCTION

Punishment serves many purposes. It can deter crime and prevent the offender from committing further crimes. It can even rehabilitate some criminals—except, of course, if it is capital punishment. It can satisfy a victim's longing for revenge or a relative's desire to avenge. Punishment can also be used as a lever to obtain restitution or recompense for some of the damage caused by the crime. For these reasons, the issue of punishment is and always has been a vital concern to civilized people. They want to know the effects of punishment and effective ways of carrying it out.[2]

Civilized people are also concerned about *justifying* punishment. They want to punish, but they also want to know that such punishment is justified. They want to be able to punish legitimately—hence the interest in punishment theories.

In conventional theories of punishment, concepts of restitution, deterrence,[3] retribution, and rehabilitation are often forwarded as justifications for punishment, even though they are really the effects or purposes of punishment.[4] This reversal of logic

1. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 30 n.2 (1962) (quoting Papinian (Aemilius Papinianus)). Papinian, a third-century Roman jurist, is considered by many to be the greatest of Roman jurists. "Papinian is said to have been put to death for refusing to compose a justification of Caracalla's murder of his brother and co-Emperor, Geta, declaring, so the story goes, that 'it is easier to commit murder than to justify it.'" *Id.* For further references and discussion of this story, see Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 452 & n.21 (1960).

2. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 73 (1968) (discussing various reasons why people engage in punishment).

3. This includes both prevention and incapacitation.

4. Rehabilitation is also sometimes referred to as reform. For discussion of various punishment-related theories, see ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS (Randy E. Barnett & John Hagel III eds., 1977) [hereinafter ASSESSING THE CRIMINAL]; Robert James Bidinotto, *Crime and Moral Retribution, in* CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 181-86 (Robert James Bidinotto ed., 1994) (discussing various utilitarian strategies of crime control and punishment); HART, *supra* note 2; PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (Gertrude Ezorsky ed., 1972) [hereinafter PHILOSOPHICAL PERSPECTIVES]; THEORIES OF PUNISHMENT (Stanley E. Grupp ed., 1971); Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97 (1994); and Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 308-31 (1990).

is not surprising given the consequentialist, result-oriented type of thinking that is so prevalent nowadays. Nevertheless, the effects of punishment or the uses to which it might be put do not justify punishment.

Take the analogous case of free speech rights as an example. Modern-day liberals and other consequentialists typically seek to justify the First Amendment right to free speech on the grounds that free speech promotes political discourse.[5] But, as libertarians—the most systematic and coherent school of modern political philosophy and the contemporary heirs of the classical, liberal Founding Fathers—have explained, there is a right to free speech simply because it does not involve aggression against others, not because it "promotes political discussion."[6]

This analogy highlights the fact that the purpose to which a right holder might put the right is not necessarily what justifies the right in the first place. Turning back to punishment, if individuals have a right to punish, the purpose for which a person exercises this right—for example, for revenge, for restitution, or for deterrence—and the consequences that flow from it may well be irrele-

5. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); Roth v. United States, 354 U.S. 476, 484 (1957) (stating that a purpose of the right to free speech is "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 112 (1980) (stating that the "central function" of the First Amendment is to "assur[e] an open political dialogue and process"); *see also* 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 20.6, 20.30 (2d ed. 1992) (discussing various defenses of freedom of speech and reasons for providing a lower standard of constitutional protection to "commercial speech" than to normal speech).

6. We do not even have a direct right to free speech. The right to free speech is merely shorthand for one positive result of the right to own private property: If I am situated on property I have a right to be on, for example in my home, I am entitled to do *anything* on that property that does not invade others' rights, whether it be skeet shooting, barbecuing, or communicating with others. Thus, the right to free speech is only indirect and does not in turn justify property rights, which are logically at the base of the right to free speech. *See* MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 113, 114-17 (1982) [hereinafter ROTHBARD, ETHICS]; MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO 42-44 (rev. ed. 1985) [hereinafter ROTHBARD, LIBERTY] (discussing the relation between free speech rights and property rights). In like manner, if there is a right to punish, there is only indirectly a "right" to deter crime, and any indirect right to deter, rehabilitate, or retaliate, which is based on the right to punish, can hardly justify or limit the logical prior right to punish.

vant to the question of whether the right exists.[7]

In this Article I will attempt to explain how and why punishment can be justified. I will develop a retributionist, or *lex talionis*, theory of punishment, including related principles of proportionality. I will not follow the order of some theorists who derive principles of punishment from a theory of rights or from some other ethical or utilitarian theory. Instead, I will follow the opposite approach in which justifying punishment itself defines and justifies our rights.

II. PUNISHMENT AND CONSENT

What does it mean to punish? Dictionary definitions are easy to come by, but in the sense that interests those of us who want to punish, punishment is the infliction of physical force on a person in response to something that the person has done or has failed to do.[8] Thus, punishment comprises physical violence committed against a person's body, against any property that a person legitimately owns, or against any rights that a person has.[9] Punishment is *for*, or *in response to*, some action, inaction, feature, or status of the person punished; otherwise, it is simply random violence, unconnected with some previous action or inaction of the one punished, which is not punishment.[10] When we punish a person, it is because we consider that person to be a wrongdoer of some sort.

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7. Others, of course, have recognized the distinction between the effects of punishment and the justification of the right to punish. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *7-19 (discussing in separate subsections (1) the right or power to punish; (2) the object or end of punishment, for example, rehabilitation, deterrence, or incapacitation; and (3) the degree, measure, or quantity of punishment); F.H. BRADLEY, ETHICAL STUDIES 26-27 (2d ed. 1927) ("Having once the right to punish, we may modify the punishment according to the useful and the pleasant."); HART, *supra* note 2, at 74 ("[W]e must distinguish two questions commonly confused. They are, first 'Why do men in fact punish?' This is a question of fact to which there may be many different answers .... The second question, to be carefully distinguished from the first, is 'What justifies men in punishing? Why is it morally good or morally permissible for them to punish?'").

8. *See, e.g.*, AMERICAN HERITAGE DICTIONARY 1469 (3d ed. 1992) (defining "punishment" as a "penalty imposed for wrongdoing: *'The severity of the punishment must . . . be in keeping with the kind of obligation which has been violated'* (Simone Weil)").

9. *See* BLACK'S LAW DICTIONARY 1234 (6th ed. 1990) (defining "punishment" as "[a]ny fine, penalty, or confinement inflicted upon a person .... [Or a] deprivation of property or some right").

10. *See id.* ("Punishment" is "inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law.").

We typically want to teach that person or others a lesson or exact vengeance or restitution for what that person has done.

If wrongdoers always consented to the infliction of punishment once convicted of a crime, we would not need to justify punishment. It would be justified by the very consent of the purported wrongdoer. As the Roman jurist Ulpian summarized this commonsense insight centuries ago, "there is no affront [or injustice] where the victim consents."[11] The need to justify punishment only arises when a person resists and refuses to consent to being punished. As philosopher John Hospers notes, the very thing that is troublesome about punishment "is that in punishing someone, we are forcibly *imposing* on him something against his will, and of which he may not approve."[12]

I will thus seek to justify punishment exactly where it needs to be justified: the point at which we attempt to inflict punishment upon people who oppose it. In short, I will argue that society may justly punish those who have initiated force in a manner proportionate to their initiation of force and to the consequences thereof because they cannot coherently object to such punishment. In brief, it makes no sense for them to object to punishment because this requires that they maintain that the infliction of force is wrong, which is contradictory because they intentionally initiated force themselves. Thus, they are dialogically *estopped* from using related legal terminology, denying the legitimacy of their being punished, and withholding their consent.[13]

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11. 4 THE DIGEST OF JUSTINIAN 771 (Theodor Mommsen et al. eds., 1985) (Ulpian, Edict 56) (*"nulla iniuria est, quae in uolentem fiat"*). As Richard Epstein explains:

> The case for the recognition of consent as a defense in case of the deliberate infliction of harm can also be made in simple and direct terms. The self-infliction of harm generates no cause of action, no matter why inflicted. There is no reason, then, why a person who may inflict harm upon himself should not, prima facie, be allowed to have someone else do it for him.

Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 411 (1975).

12. John Hospers, *Retribution: The Ethics of Punishment*, *in* ASSESSING THE CRIMINAL, *supra* note 4, at 190.

13. For an earlier presentation of ideas along these lines, see N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, 17 REASON PAPERS 61 (Fall 1992).

III. PUNISHMENT AND ESTOPPEL

A. Legal Estoppel

Estoppel is a well-known common law principle that prevents or precludes someone from making a legal claim that is inconsistent with prior conduct if some other person has changed position detrimentally in reliance on the prior conduct.[14] Estoppel thus denies a party the ability to assert a fact or right that the party otherwise could. Estoppel is a widely applicable legal principle that has countless manifestations.[15] Roman law and its modern heir, civil law, contain the similar doctrine "*venire contra proprium factum*," or "no one can contradict his own act."[16] Under this principle, "no one is allowed to ignore or deny his own acts, or the consequences thereof, and claim a right in opposition to such acts or consequences."[17] Estoppel may even be applied if a person's silent acquiescence in the face of a duty to speak amounts to a representation.[18] The principle behind estoppel can also be seen in common sayings such as "actions speak louder than words," "practice what you preach," and "put your money where your mouth is," all of which embody the idea that actions and assertions should be consistent.[19] As Lord Coke stated, the word "estoppel" is used "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."[20]

For legal estoppel to operate, there usually must have been detrimental reliance by the person seeking to estop another.[21]

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14. *See, e.g.*, Allen v. Hance, 161 Cal. 189, 196, 118 P. 527, 529 (1911); Highway Trailer Co. v. Donna Motor Lines, Inc., 217 A.2d 617, 621 (N.J. 1966); BLACK'S LAW DICTIONARY 551 (6th ed. 1990).

15. For example, there is estoppel by deed, equitable estoppel, promissory estoppel, and judicial estoppel. *See* 28 AM. JUR. 2D *Estoppel and Waiver* § 1 (1966).

16. Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 55 (1994).

17. Saúl Litvinoff, *Still Another Look at Cause*, 48 LA. L. REV. 3, 21 (1987).

18. *See, e.g.*, Duthu v. Allements' Roberson Mach. Works, Inc., 393 So. 2d 184, 186-87 (La. Ct. App. 1980); Blofsen v. Cutaiar, 333 A.2d 841, 843-44 (Pa. 1975).

19. Recall also the saying "'What you do speaks so loud I can't hear what you are saying.'" CLARENCE B. CARSON, FREE ENTERPRISE: THE ROAD TO PROSPERITY 3 (America's Future, Inc. 1985).

20. 28 AM. JUR. 2D *Estoppel and Waiver* § 1 (1966) (quoting Lord Coke). In the remainder of this Article, the expression "estoppel" or "dialogical estoppel" refers to the more general, philosophical estoppel theory developed herein, as opposed to the traditional theory of *legal* estoppel, which will be denoted "legal estoppel."

21. *See* Bellsouth Adver. & Publ'g Corp. v. Gassenberger, 565 So. 2d 1093, 1095 (La. Ct. App. 1990).

Proof of detrimental reliance is required because until a person has relied on another's prior action or representation, the action or representation has not caused any harm, and thus, there is no reason to estop the actor from asserting the truth or from rejecting the prior conduct.[22]

B. Dialogical Estoppel

As can be seen, the heart of the idea behind legal estoppel is consistency. A similar concept, "dialogical estoppel," can be used to justify the libertarian conception of rights because of the reciprocity inherent in the libertarian tenet that force is legitimate only in response to force and because of the consistency that must apply to aggressors trying to argue why they should not be punished.[23] The basic insight behind this theory of rights is that people who initiate force cannot consistently object to being punished. They are dialogically, so to speak, "estopped" from asserting the impropriety of the force used to punish them because of their own coercive behavior. This theory also establishes the validity of the libertarian conception of rights as being strictly negative rights against aggression.

The point at which punishment needs to be justified is when we attempt to inflict punishment upon a person who opposes it. Thus, using a philosophical, generalized version of dialogical estoppel, I want to justify punishment in just this situation by showing that an aggressor is estopped from objecting to punishment. Under the principle of dialogical estoppel, or simply "estoppel," a person is estopped from making certain claims during discourse if these claims are inconsistent and contradictory. To say that a person is estopped from making certain claims means that the claims cannot possibly be right because they are contradictory.

Applying estoppel in this manner perfectly complements the

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22. *See* Dickerson v. Colegrove, 100 U.S. 578, 580 (1879). For a recent example of estoppel, see *Zimmerman v. Zimmerman,* 447 N.Y.S.2d 675 (App. Div. 1982). The concept of "detrimental reliance" actually involves circular reasoning, however, for reliance on performance is not "reasonable" or justifiable unless one already knows that the promise is enforceable, which begs the question. *See* Randy E. Barnett, *A Consent Theory of Contract,* 86 COLUM. L. REV. 269, 274-76 (1986). However, the legitimacy of the traditional legal concept of detrimental reliance is irrelevant here.

23. As used herein, "'[a]ggression' is defined as the *initiation* of the use or threat of physical violence against the person or property of anyone else." ROTHBARD, LIBERTY, *supra* note 6, at 23 (emphasis added).

purpose of dialogue. Dialogue, discourse, or argument—terms that are used interchangeably herein—are by their nature activities aimed at finding truth. Anyone engaged in argument is necessarily endeavoring to discern the truth about some particular subject; otherwise, there is no dialogue occurring but mere babbling or even physical fighting. This cannot be denied. Any person arguing long enough to deny that truth is the goal of discourse contradicts this denial because that person is asserting or challenging the truth of a given proposition. Thus, asserting that something is true that cannot be true is incompatible with the purpose of discourse. Anything that clearly cannot be true is contrary to the truth-finding purpose of discourse and, consequently, is impermissible within the bounds of the discourse.

Contradictions are certainly the archetype of propositions that cannot be true. A and not-A cannot both be true simultaneously and in the same respect.[24] This is why participants in discourse must be consistent. If an arguer does not need to be consistent, truth-finding cannot occur. And just as the traditional legal theory of estoppel mandates a sort of consistency in a legal context, the more general use of estoppel can be used to require consistency in discourse. The theory of estoppel that I propose is nothing more than a convenient way to apply the requirement of consistency to arguers—those engaged in discourse, dialogue, debate, discussion, or argumentation. Because discourse is a truth-finding activity, any such contradictory claims should be disregarded since they cannot possibly be true. Dialogical estoppel is thus a rule of discourse that rejects any inconsistent, mutually contradictory claims because they are contrary to the very goal of discourse. This rule is based solely on the recognition that discourse is a truth-seeking

24. On the impossibility of denying the law of contradiction, see ARISTOTLE'S METAPHYSICS 68 (Richard Hope trans., Columbia University Press 1952) ("'It is impossible for the same thing at the same time to belong and not to belong to the same thing and in the same respect.'"); HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS 232 n.23 (1989) [hereinafter HOPPE, SOCIALISM & CAPITALISM]; TIBOR R. MACHAN, INDIVIDUALS AND THEIR RIGHTS 77 (1989); DOUGLAS B. RASMUSSEN & DOUGLAS J. DEN UYL, LIBERTY AND NATURE: AN ARISTOTELIAN DEFENSE OF LIBERAL ORDER 50 (1991) [hereinafter RASMUSSEN & DEN UYL]; LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 35 (3d rev. ed. 1966) [hereinafter VON MISES, HUMAN ACTION]; *see also* LEONARD PEIKOFF, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND 6-12, 118-21 (1991) (explaining the law of identity and its relevance to knowledge); AYN RAND, ATLAS SHRUGGED 942-43 (Signet 1992) (discussing identity, or "A is A," and the law of contradiction).

activity and that contradictions, which are necessarily untrue, are incompatible with discourse and thus should not be allowed.[25] The validity of this rule is undeniable because it is necessarily presupposed by any participant in discourse.

There are various ways that contradictions can arise in discourse. First, an arguer's position might be explicitly inconsistent. For example, if a person states that A is true and that not-A is also true, there is no doubt that the person is incorrect. After all, as Ayn Rand repeatedly emphasized, A is A; the law of identity is indeed valid and unchallengeable.[26] It is impossible for him[27] to coherently and intelligibly assert that two contradictory statements are true; it is impossible for these claims to both be true. Thus, he

25. Because discourse is a peaceful, cooperative, conflict-free activity, as well as an inquiry into truth, *coercion* itself is also incompatible with norms presupposed by all participants in discourse. Indeed, it is this realization that Professor Hoppe builds on in his brilliant "argumentation ethics" defense of individual rights. *See* HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY 180-86 (1993) [hereinafter HOPPE, ECONOMICS & ETHICS]; HOPPE, SOCIALISM & CAPITALISM, *supra* note 24, at 127-44 (chapter entitled "The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible"). For a detailed review of HOPPE, ECONOMICS & ETHICS, see N. Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 ST. MARY'S L.J. 1419 (1994). For other recent, though not necessarily libertarian, theories that bear some resemblance to Hoppe's discourse ethics methodology, see G.B. MADISON, THE LOGIC OF LIBERTY 263-72 (1986); Frank Van Dun, *On the Philosophy of Argument and the Logic of Common Morality*, *in* ARGUMENTATION: APPROACHES TO THEORY FORMATION 281 (E.M. Barth & J.L. Martens eds., 1982); Paul G. Chevigny, *The Dialogic Right of Free Expression: A Reply to Michael Martin*, 57 N.Y.U. L. REV. 920 (1982); Paul G. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157 (1980); Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059 (1992); G.B. Madison, *Philosophy Without Foundations*, 16 REASON PAPERS 15 (Fall 1991); Michael Martin, *On a New Argument for Freedom of Speech*, 57 N.Y.U. L. REV. 906 (1982); Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979); Frank Van Dun, *Economics and the Limits of Value-Free Science*, 11 REASON PAPERS 17 (Spring 1986); Roger Pilon, A Theory of Rights: Toward Limited Government (1979) (unpublished Ph.D. dissertation, University of Chicago) (on file with the *Loyola of Los Angeles Law Review*). For other interesting and related articles, see Tibor R. Machan, *Individualism and Political Dialogue*, 46 POZNAN STUD. IN PHIL. OF SCI. & HUMAN. 45 (1996); Douglas B. Rasmussen, *Political Legitimacy and Discourse Ethics*, 32 INT'L PHIL. Q. 17 (1992); Jeremy Shearmur, *From Dialogue Rights to Property Rights: Foundations for Hayek's Legal Theory*, 4 CRITICAL REV. 106 (1990); and Jeremy Shearmur, *Habermas: A Critical Approach*, 2 CRITICAL REV. 39 (1988) (discussing Jhrgen Habermas, one of Hoppe's intellectual predecessors). Many of these papers and theories are discussed in N. Stephan Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12 J. LIBERTARIAN STUD. (forthcoming 1996).

26. AYN RAND, ATLAS SHRUGGED 942-43 (Signet 1992).

27. It is the general policy of the *Loyola of Los Angeles Law Review* to use gender-neutral language. The author, however, has chosen not to conform to this policy.

is estopped from asserting them and is not heard to utter them because they cannot tend to establish the truth, which is the goal of all argumentation.[28] As Wittgenstein noted, "What we cannot speak about we must pass over in silence."[29]

An arguer's position can also be inconsistent without explicitly maintaining that A and not-A are true. Indeed, rarely will an arguer assert both A and not-A explicitly. However, whenever an arguer states that A is true, and also necessarily holds that not-A is true, the inconsistency is still there, and he is still estopped from explicitly claiming that A is true and implicitly claiming that not-A is true. The reason is the same as above: he cannot possibly be right that explicit A and implicit not-A are both true. Now he might, in some cases, be able to remove the inconsistency by dropping one of the claims. For example, suppose he asserts that the concept of gross national product is meaningful and a minute later states the exact opposite, apparently contradicting the earlier assertion.

To avoid inconsistency, he can disclaim the earlier statement, thereby necessarily maintaining that the previous statement was incorrect. But it is not always possible to drop one of the assertions if it is unavoidably presupposed as true by the arguer. For example, the speaker might argue that he never argues. However, since he is currently arguing, he must necessarily, at least implic-

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28. More than once, I have had the frustrating and bewildering experience of having someone actually assert that consistency is not necessary to truth, that mutually contradictory ideas can be held by a person and be true at the same time. When faced with such a clearly incorrect opponent, one can do little more than try to point out the absurdity of the opponent's position. Beyond this, though, a stubborn opponent must be viewed as having renounced reason and logic and is thus simply unable or unwilling to engage in meaningful discourse. *See* PEIKOFF, *supra* note 24, at 11-12 (discussing when to abandon attempts to communicate with stubbornly irrational individuals). The mere fact that individuals can choose to disregard reason and logic does not contradict the estoppel theory any more than a criminal who chooses to murder another thereby "proves" that the victim had no right to life. As R.M. Hare stated:

> Just as one cannot win a game of chess against an opponent who will not make any moves—and just as one cannot argue mathematically with a person who will not commit himself to any mathematical statements—so moral argument is impossible with a man who will make no moral judgements at all.... Such a person is not entering the arena of moral dispute, and therefore it is impossible to contest with him. *He is compelled also—and this is important—to abjure the protection of morality for his own interests.*

R.M. HARE, FREEDOM AND REASON § 6.6, at 101 (1963) (emphasis added).

29. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 151 (D.F. Pears & B.F. McGuinness trans., 1961) (1921).

itly, hold or recognize that he sometimes argues. We would not recognize the contradictory claims as permissible in the argument because contradictions are untrue. The speaker would be estopped from maintaining these two contradictory claims, one explicit and one implicit, and he could not drop the second claim—that he sometimes argues—for he cannot help but hold this view while engaged in argumentation itself. To maintain an arguable—that is, possibly true—position, he would have to renounce the first claim that he never argues.

Alternatively, if this person was so incoherent as to argue that he somehow does not believe or recognize that arguing is possible, despite engaging in it, he would still be estopped from asserting that argumentation is impossible. For even if he does not actually *realize* that argumentation is possible—or, what is more likely, does not actually admit it—it still cannot be the case that argumentation is impossible if someone is indeed arguing.

We know this to be true whether or not others admit or recognize this. Thus, if someone asserts that argumentation is impossible, this assertion contradicts the undeniable presupposition of argumentation—that argumentation *is* possible. This person's proposition is facially untrue. Again, the person would be estopped from asserting such a claim since it is not even possibly true; the assertion flies in the face of undeniably true facts of reality.

Thus, because dialogue is a truth-finding activity, participants are estopped from making explicitly contradictory assertions since they subvert the goal of truth-seeking by being necessarily false. For the same reason, arguers are estopped from asserting one thing if (1) it contradicts something else that they necessarily maintain to be true; (2) it contradicts something that is necessarily true because it is a presupposition of discourse; or (3) it is necessarily true as an undeniable feature of reality or human existence. Further, no one can disagree with these general conclusions without self-contradiction, for anyone disagreeing with anything is a participant in discourse and, therefore, necessarily values truth-finding and consistency.

C. Punishing Aggressive Behavior

The conduct of individuals can be divided into two types: (1) coercive or aggressive—that is, the initiation of force—and (2) noncoercive or nonaggressive. This division is purely descriptive

and does not presume that aggression is invalid, immoral, or unjustifiable. It only assumes that at least some human action can be objectively classified as either aggressive or nonaggressive.[30] Thus, there are two types of behavior for which we might attempt to punish a person: aggressive and nonaggressive.[31] I will examine each in turn to show that punishment of aggressive behavior is legitimate while punishment of nonaggressive behavior is illegitimate.

The clearest and most severe instance of aggression is murder, so let us take this as an example. In what follows I will assume that the victim *B*, or *B*'s agent, *C*, attempts to punish a purported wrongdoer *A*.[32] Suppose that *A* murders *B*, and *C* convicts and imprisons *A*. In order for *A* to object to his punishment, *A* must claim that *C* should not and must not treat him this way; that he has a *right*[33] to not be punished or, at least, that the use of force is

30. Other divisions could of course be proposed as well, but they do not result in interesting or useful results. For example, one could divide human conduct into jogging and not jogging, but to what end? Although such a division would be valid, it would produce uninteresting results, unlike the aggressive/nonaggressive division, which produces relevant results for a theory of punishment, which necessarily concerns the use of force. *See* LUDWIG VON MISES, EPISTEMOLOGICAL PROBLEMS OF ECONOMICS 14-16, 30-31, 87-88 (George Reisman trans., 1981); VON MISES, HUMAN ACTION, *supra* note 24, at 65-66; LUDWIG VON MISES, THE ULTIMATE FOUNDATION OF ECONOMIC SCIENCE: AN ESSAY ON METHOD 41 (2d ed. 1978) (explaining in all three works that experience can be referenced to develop interesting laws based on the fundamental axioms of praxeology, rather than irrelevant or uninteresting—though not invalid—laws). In any event, it is clear that some actions can objectively be characterized as aggressive. *See infra* Part III.D.1.

31. To be more precise, if society attempts to punish a person, it is either for aggressive behavior or for "not aggressive" behavior. "Not aggressive" behavior is a residual category that includes both nonaggressive behavior, such as speaking or writing, and also nonbehavioral categories such as status, race, age, nationality, skin color, and the like.

32. In principle, any right of a victim to punish the victimizer may be delegated to an heir or to a private agent such as a defense agency—or to the state, if government is valid, a question that does not concern us here.

33. On this subject, Alan Gewirth has noted:

> Now these strict "oughts" involve normative necessity; they state what, as of right, other persons *must* do. Such necessity is also involved in the frequently noted use of "due" and "entitlement" as synonyms or at least as components of the substantive use of "right." A person's rights are what belong to him as his due, what he is entitled to, hence what he can rightly demand of others.

Alan Gewirth, *The Basis and Content of Human Rights,* 13 GA. L. REV. 1143, 1150 (1979). For discussion of Alan Gewirth's justification of rights and its relation to estoppel, see Kinsella, *supra* note 13, at 71 n.9; *see also* HARE, *supra* note 28, § 2.5 (discussing usage of concepts "ought" and "wrong").

wrong so that *C* should, therefore, not punish him.[34] However, such a claim is blatantly inconsistent with what must be *A*'s other position: because *A* murdered *B*, which is clearly an act of aggression, his actions have indicated that he also holds the view that "aggression is *not* wrong."

Thus, because of his earlier actions, *A* is estopped from claiming that aggression is wrong.[35] He cannot assert contradictory claims and is estopped from doing so. The only way for *A* to maintain consistency is to drop one of his claims. If *A* retains only the claim "aggression is proper," then he is failing to object to his imprisonment; thus, the question of justifying the punishment does not arise. By claiming that aggression is proper, *A* consents to his punishment. If, on the other hand, *A* drops his claim that "aggression is proper" and retains only his claim that "aggression is wrong," he indeed could object to his imprisonment. As we shall see below, it is impossible for him to drop the claim that "aggression is proper" just as it would be impossible for him to avoid maintaining that he exists or that he can argue.

To restate, *A* cannot consistently claim that murder is wrong, for it contradicts his view that murder is *not* wrong, evidenced by or made manifest in his previous act of murder. *A* is estopped from asserting such inconsistent claims. Therefore, if *C* attempts to kill *A*, *A* has no grounds for objecting since he cannot now say that such a killing by *C* is "wrong," "immoral," or "improper" or that it would violate his "rights." And if *A* cannot complain if *C* proposes to kill him, then, *a fortiori*, he surely cannot complain if *C* merely imprisons him.[36] Thus, we can legitimately apply force to—

34. If a skeptic were to object to the use of moral concepts here—for example, wrong, should, etc.—it should be noted that it is the criminal, *A*, who introduces normative, rights-related terminology when *A* tries to object to *A*'s punishment. Randy Barnett makes a similar point in a different context. Professor Barnett argues that those who claim that the United Staets Constitution justifies certain government regulation of individuals are themselves making a normative claim, which may thus be examined or criticized from a moral point of view by others. *See* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 100-01 (1995); *see also* Randy E. Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853 (1993) (discussing the unavoidable connection between natural law and positive law in constitutional adjudication).

35. If *A* cannot even claim that aggression—the *initiation* of force—is wrong, then, *a fortiori*, *A* cannot make the subsidiary claim that retaliatory force is wrong.

36. Although *A* may not complain that his imminent execution by *C* would violate his rights, this does not necessarily mean that *C* may legitimately execute him. It only means that *A*'s complaint may not be heard and that *A*'s rights are not violated

punish—a murderer in response to the crime.

Because the essence of rights is their legitimate enforceability, this establishes a right to life—that is, to not be murdered. It is easy to see how this example may be extended to less severe forms of aggression, such as assault and battery, kidnapping, and rape.[37]

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by being executed. A third party *T*, however, may have another legitimate complaint about *A*'s execution, one which does not assert *A*'s rights but rather takes other factors, such as the special nature of the defense agency *C*, into account—especially if the defense agency is a government. For example, *T* may argue that the state, as an inherently dangerous and powerful entity, should not be allowed to kill even murderers because giving such power to the state is so inherently dangerous and threatening to innocent, non-estopped people, like *T*, that it amounts to an aggression and a violation of *T's* rights. Further, if the state deems itself to be *B*'s agent, *B*'s heir may conceivably object to the state's execution of *A*, claiming the sole right to execute or otherwise punish *A*. For lesser crimes, such as assault, where the victim *B* remains alive, *B* himself may object to the state's administering punishment to the aggressor.

Similarly, after applying estoppel solely to the relationship between the defense agency, *C*, and a defendant, *A*, the exclusionary rule—whereby a court may not use evidence if it is illegally obtained—would fall. If *A* actually committed the crime, it cannot violate his rights for the court to discover this fact, even if the evidence was illegally obtained; *A* would still be estopped from complaining about his punishment. However, a third party can conceivably argue that it is too dangerous for a defense agency, *C*, to have a system which gives it incentives to illegally search people and that the exclusionary rule is therefore a necessary procedural or prophylactic rule required in order to protect *innocent* people from *C*'s dangerousness—this is especially true if *C* is a *governmental* defense agency. In essence, the argument would be that prosecutions by the state or other defense agencies, without an exclusionary rule to temper the danger of such prosecutions, could amount to aggression or a standing threat against innocent third parties. For a related discussion, see *infra* note 43.

Whether such arguments of third parties could be fully developed is a separate question beyond the scope of this Article. I merely wish to point out that other complaints about certain government actions are not automatically barred just because the specific criminal cannot complain. Just because *C*'s imprisonment of *A* does not aggress against *A* does not necessarily show that such action does not aggress against others.

37. Others have previously recognized the justice of using force against one who has used force. *See, e.g.*, Crocker, *supra* note 25, at 1068 ("Suppose . . . that *A* and *B* are shipwrecked on a deserted island. *A* makes use of the only firearm salvaged from the wreck to force *B* to build him a shelter. If *B* gains control of the gun, it will not be unfair for *B* to use it to force *A* to return the favor."); Hospers, *supra* note 12, at 191 (stating that when an aggressor initiates force, "the victim is entitled to respond according to the rule ('*The use of force is permissible*') that the *aggressor himself* has implicitly laid down.") (emphasis added); *see also* HERBERT MORRIS, *Persons and Punishment*, *in* ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 52 (1976) (originally published in 52 MONIST 478 (1968)) (discussing right to bodily integrity and the waiver of this right). Morris states:

> If I say the magic words "take the watch for a couple of days" or "go ahead and slap me," have I waived my right not to have my property taken or a right not to be struck or have I, rather, in saying what I have, simply

> stepped into a relation in which the rights no longer apply with respect to a specified other person? These observations find support in the following considerations. The right is that which gives rise, when infringed, to a legitimate claim against another person. What this suggests is that the right is that sphere interference with which *entitles us to complain* or gives us a right to complain. From this it seems to follow that a right to bodily security should be more precisely described as "a right that others not interfere *without permission.*" And there is the corresponding duty not to interfere unless provided permission. Thus when we talk of waiving our rights or "giving up our rights" in such cases we are not waiving or giving up our right to property nor our right to bodily security, for we still, of course, possess the right not to have our watch taken without permission. *We have rather placed ourselves in a position where we do not possess the capacity*, sometimes called a right, *to complain* if the person takes the watch or slaps us.

Id. (emphasis added); *see also* G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT § 100 (T.M. Knox trans., 1969), *reprinted in* PHILOSOPHICAL PERSPECTIVES, *supra* note 4, at 107.

> The injury [the penalty] which falls on the criminal is not merely *implicitly* just—as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right *established* within the criminal himself, i.e., in his objectively embodied will, in his action. The reason for this is that *his action* is the action of a rational being and this implies that *it is something universal* and that *by doing it the criminal has laid down a law which he has explicitly recognized in his action* and under which in consequence he should be brought as under his right.

Id. (emphasis in last sentence added; brackets in original).

Thus, under Hegel's philosophy, "when a criminal steals another person's property, he is not only denying that person's right to own that piece of property, he is denying the right to property *in itself.*" Pauley, *supra* note 4, at 140-41 (citing Peter J. Steinberger, *Hegel on Crime and Punishment*, 77 AM. POL. SCI. REV. 858, 860 (1983)); *see also* J. Charles King, *A Rationale for Punishment*, 4 J. LIBERTARIAN STUD. 151, 154 (1980) (discussing the moral acceptability of using force against force). King states that when another initiates force,

> [w]ith him we are returned to the first-stage state of nature and may use force against him. In so doing we do not violate his rights or in any other way violate the principle of right, because he has broken the *reciprocity* required for us to view such a principle [of rights] as binding. In this we find the philosophic grounding for the moral legitimacy of the practice of punishment. Punishment is just that practice which raises the price of violation of the principle of right so as to give us all good reason to accept that principle.

Id. (emphasis added); *see also* John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, *in* SOCIAL CONTRACT 7-9 (Oxford University Press 1947). John Locke stated:

> In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity . . . and so he becomes dangerous to mankind, . . . every man . . . by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that law, as may make him repent the doing of it . . . .
>
> . . . [A] criminal, who having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts, with whom men can have no society nor security . . . .

D. Potential Defenses by the Aggressor

A might assert several possible objections to this whole procedure. None of them bear scrutiny, however.

1. The concept of aggression

First, *A* might claim that the classification of actions as either aggressive or not aggressive is invalid. We might be smuggling in a norm or value judgment just by describing murder as "aggressive" rather than merely describing the murder without evaluative overtones. This smuggled norm might be what apparently justifies the legitimacy of punishing *A*, thus making the justification circular and, therefore, faulty. However, in order to object to our punishment of him, *A* must admit the validity of describing some actions as forceful—namely, his imminent punishment. If he denies that any actions can be objectively described as being coercive, he has no grounds to object to imprisonment. The moment he objects to this use of force, he cannot help admitting that at least some actions can be objectively classified as involving force. Thus, he is estopped from objecting on these grounds.

2. Universalizability

It could also be objected that the estoppel principle is being improperly applied and that *A* is not, in fact, asserting inconsistent claims. Instead of having the contradictory views that "aggression is proper" and "aggression is improper," *A* could claim to hold the consistent positions that "*aggression by me* is proper" and "aggression by others against me is improper." However, we must recall that *A*, in objecting to *C*'s imprisonment of him, is engaging in argument. He is arguing that *C should not*—for some good reason—imprison him, and so he is making normative assertions. But

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Id; see also MACHAN, *supra* note 24, at 176 ("[I]f someone attacks another, that act carries with it, as a matter of the logic of aggression, the implication that from a rational moral standpoint the victim may, and often should retaliate."); JAN NARVESON, THE LIBERTARIAN IDEA 210 (1988) ("[T]hose who do not want peace, or want it only for others in relation to themselves rather than vice versa, are on their own and may in principle be dealt with by any degree of violence we like."); RASMUSSEN & DEN UYL, *supra* note 24, at 85 ("[W]hen someone is punished for having violated others' rights, it is not the case that the criminal has alienated or otherwise lost his rights; rather, it is the case that the criminal's choice to live in a rights-violating way is being respected."); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, SOC. PHIL. & POL'Y, Autumn 1986, at 179, 186 (*citing* DIANE T. MEYERS, INALIENABLE RIGHTS: A DEFENSE 14 (1985)); *see also* NARVESON, at 146-47 (subsection entitled "Being Able to Complain").

as Professor Hans-Hermann Hoppe points out,

> Quite commonly it has been observed that argumentation implies that a proposition claims *universal* acceptability, or, should it be a norm proposal, that it is "universalizable." Applied to norm proposals, this is the idea, as formulated in the Golden Rule of ethics or in the Kantian Categorical Imperative, that only those norms can be justified that can be formulated as general principles which are valid for everyone without exception.[38]

This is so because propositions made during argumentation claim universal acceptability. "[I]t is implied in argumentation that everyone who can understand an argument must in principle be able to be convinced by it simply because of its argumentative force . . . ."[39] Thus, universalizability is a presupposition of normative discourse, and any arguer violating the principle of universalizability is maintaining inconsistent positions—that universalizability is required and that it is not—and is thus estopped from doing so. Only universalizable normative propositions are consistent with the principle of universalizability necessarily presupposed by the arguer in entering the discourse. As Hare points out,

> Offenses against the thesis of universalizability are logical, not moral. If a person says "I ought to act in a certain way, but nobody else ought to act in that way in relevantly similar circumstances," then . . . he is abusing the word "ought"; he is implicitly contradicting himself. . . . [A]ll [the thesis of universalizability] does is to force people to choose between judgements which cannot both be asserted without self-contradiction.[40]

The proper way, then, to select the norm that the arguer is asserting is to ensure that it is universalizable. The view that "aggression *by me* is proper" and "aggression by the state against me is improper" clearly does not pass this test. The view that "aggression is or is not proper" is, by contrast, perfectly universal-

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38. HOPPE, SOCIALISM & CAPITALISM, *supra* note 24, at 131 (footnote omitted). For further discussion of universalizability, see HARE, *supra* note 28, §§ 2.2, 2.7, 3.2, 6.2, 6.3, 6.8, 7.3, 11.6, *passim.*

39. HOPPE, ECONOMICS & ETHICS, *supra* note 25, at 182.

40. HARE, *supra* note 28, § 3.2; *see also id.* § 11.6 ("It is part of the meanings of . . . moral words that we are logically prohibited from making different moral judgements about two cases, when we cannot adduce any difference between the cases which is the ground for the difference in moral judgements.").

izable and is thus the proper form for a norm. An arguer cannot escape the application of estoppel by arbitrarily specializing otherwise inconsistent views with liberally sprinkled "for me only's."[41]

Furthermore, even if *A* denies the validity of the principle of universalizability and maintains that he can particularize norms, he cannot object if *C* does the same. If *A* admits that norms may be particularized, *C* may simply act on the particular norm that "It is permissible to punish *A*."

3. Time

A could also attempt to rebut this application of estoppel by claiming that he, in fact, *does* currently maintain that aggression is improper and that he has changed his mind since the time when *B* was murdered. Thus, there is no inconsistency or contradiction because he does not simultaneously hold both contradictory ideas and is not estopped from objecting to imprisonment.[42]

But this is a simple matter to overcome. First, *A* is implicitly claiming that the passage of time should be taken into account when determining what actions to impute to him. But then, if this is true, all *C* needs to do is administer the punishment and afterwards assert that all is in the past and that *C*, like *A*, now condemns its prior action. Since the impermissible action is "in the past," it can no longer be imputed to *C*. Indeed, if such an absurd simultaneity requirement is operative, at every successive moment of the punishment, any objection or defensive action by *A* is directed at actions in the immediate past and thus become immediately irrelevant and past-directed. Therefore, the irrelevance of the mere passage of time cannot be denied by *A*,[43] for in order to

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41. As Hoppe notes, particularistic rules,

> which specify different rights or obligations for different classes of people, have no chance of being accepted as fair by every potential participant in an argumentation for simply formal reasons. Unless the distinction made between different classes of people happens to be such that it is acceptable to both sides as grounded in the nature of things, such rules would not be acceptable because they would imply that one group is awarded legal privileges at the expense of complementary discriminations against another group. Some people, either those who are allowed to do something or those who are not, therefore could not agree that these were fair rules.

HOPPE, SOCIALISM & CAPITALISM, *supra* note 24, at 138 (footnote omitted).

42. *See* HARE, *supra* note 28, § 6.9 (discussing the simultaneity requirement with respect to contradictory statements).

43. This is not to say that the passage of time cannot be relevant for other reasons. Just as capital punishment does not violate the rights of the executed murderer, it can conceivably be objected to on the grounds of the danger posed by such a

effectively object to being punished, *A* must presume that the passage of time does not make a difference to imputing responsibility-incurring actions to individuals.[44]

Second, in objecting to punishment in the present, *A* necessarily maintains that force must not and should not occur. Even if he really does no longer believe that murder is proper, by his own current view, the earlier murder was still improper. He necessarily denounces his earlier actions and is estopped from objecting to his punishment imposed on that murderer—namely, himself. To maintain that a murderer should not be punished is inconsistent with a claim that murder should not and must not occur.

Third, even if *A* argues that he never held the view that "murder is not wrong" and that he murdered despite holding it to be wrong,[45] he still admits that murder is wrong and that he, in fact, did murder *B* and still ends up denouncing his earlier action. Thus, *A* is again estopped from objecting to the punishment as in the situation where he claims to have changed his mind. Finally, if *A* maintains that it is possible to administer force while simultaneously holding it to be wrong, the same applies to *C*. So even if *C* is

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practice to innocent people. *See supra* note 36. So punishment after a long period of time does not violate the rights of actually guilty criminals but may arguably constitute a threat to innocent people—because of the relative unreliability of stale evidence, faded memories, etc. But these are procedural or structural, not substantive, concerns, the discussion of which is beyond the scope of this Article. My focus here is the basic principles of rights that must underlie any general justification of punishment, even if other procedural or systemic features also need to be taken into account after a prima facie right to punish is established. Thus, this Article also does not consider such questions as the danger of being a judge in one's own case, as these are separate concerns. For discussion of the risks of individuals acting as judge, jury, and executioner, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 54-146 (1974). On the danger of being a judge in one's own case, see *The Theodosian Code*, *in* THE THEODOSIAN CODE AND NOVELS AND THE SIRMONDIAN CONSTITUTIONS § 2.2.1 (Clyde Pharr trans., 1952) (section entitled "No Person Shall Be Judge in His Own Cause (Ne In Sua Causa Quis Judicet)"); Locke, *supra* note 37, at 9 (When men are judges in their own cases, it can be objected that "self-love will make men partial to themselves and their friends: and on the other side, ill-nature, passion, and revenge will carry them too far in punishing others.").

44. For a similar argument by Hoppe regarding why any participant in argument contradicts himself if he *denies* the relevance of the passage of time in another context, specifically if he denies the validity of the "prior-later" distinction which distinguishes between prior homesteaders and later latecomers, see HOPPE, SOCIALISM & CAPITALISM, *supra* note 24, at 142-44. For a discussion of performative contradictions, see ROY A. SORENSEN, BLINDSPOTS (1988).

45. Whether someone can genuinely believe something is impermissible and yet do it anyway is questionable. As Hare has pointed out, "If a man does what he says he ought not to, . . . then there is something wrong with what he says, as well as with what he does." HARE, *supra* note 28, § 5.9.

convinced by *A*'s argument that it would be wrong to punish *A*, *C* may go ahead and do so despite this realization, just as *A* claims to have done.[46] Thus, whether *A* currently holds both views, or only one of them, he is still estopped from objecting to the imprisonment.

Thus, we can see that applying the principle of estoppel would not hinder the prevention and punishment of violent crimes. The above murder analysis can be applied to any sort of coercive, violent crime. All the classical violent crimes would still be as preventable under the proposed scheme as they are today. All forms of aggression—rape, theft, murder, assault, trespass—would still be legitimately punishable crimes. A rapist, for example, could only complain about being imprisoned by saying that his rights are being violated by the aggressive imprisonment, but he would be estopped from saying that aggression is wrong. In general, any aggressive act—one involving the initiation of violence—would cause an inconsistency with the actor later claiming that he should not be imprisoned or punished in some manner.

E. Punishing Nonaggressive Behavior

As seen above, punishment of aggression can be justified because the use of force in response to force cannot sensibly be condemned as a violation of the rights of the original aggressor. Is it ever legitimate to punish someone for *non*aggressive behavior? If not, then this means that rights can only be negative rights against the initiation of force. As argued below, no such punishment is ever justified because punishment is the application of force to which a person is not estopped from objecting unless that person has initiated force. Otherwise, there is no inconsistency. Thus, nonaggressive force, consented-to force, and actions not involving force may not be punished.

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46. Any other similar argument of *A*'s would also fail. For example, *A* could defend himself by asserting that there is no such thing as free will, so that he was determined to murder *B*, and thus cannot be blamed for doing so. However, note that the estoppel theory nowhere assumed the existence of free will, so such an argument is irrelevant. Moreover, if *A* is correct that there is no free will, then *C* is similarly predestined to do whatever he will, and if this includes punishing *A*, how can *C* be blamed? The logic of reciprocity is inescapable. R.P. Phillips has called such a type of axiom a "'boomerang principle . . . for even though we cast it away from us, it returns to us again.'" Murray N. Rothbard, *Beyond Is and Ought*, LIBERTY, Nov. 1988, at 44, 45 (quoting 2 R.P. PHILLIPS, MODERN THOMISTIC PHILOSOPHY 36-37 (1934-35)).

First, a nonaggressive use of force, such as retaliation against aggression, cannot be justly punished. If someone were to attempt to punish *B* for retaliating against aggressor *A*, *B* is *not* estopped from objecting. There is nothing inconsistent or nonuniversalizable about maintaining both that (1) the use of retaliatory force in response to the initiation of force is proper—the implicit claim involved in retaliation against *A*—and (2) the use of force not in response to the initiation of force is improper—the basis for *B*'s objection to his own punishment. In short, the initiation of force is different from retaliatory force; retaliation is not aggression. *B* can easily show that the maxim of his action is "the use of force against an aggressor is legitimate," which does not contradict "the use of force against nonaggressors is illegitimate." Rather than being a particularizable claim that does not pass the universalizability test, *B*'s position is tailored to the actual nature of his prior action. The universalizability principle prevents only arbitrary, biased statements not grounded in the nature of things.[47] Thus, the mere use of force is not enough to estop someone from complaining about being punished for the use of force. It is only aggression, for instance, *initiated* force, that estops a person from complaining about force used against that person.

Similarly, if *A* uses force against *B* with *B*'s permission, *A* is not an aggressor and thus may not be punished. *A* may consistently assert that "using force against someone is permissible if they have consented" and that "using force against someone is impermissible if they have not consented." For example, suppose that *A* slaps *B* after *B* has given consent. Is *A* estopped from objecting if *B* attempts to slap him back? Obviously, *A* is not estopped because he may consistently assert that "slapping someone is permissible if they have consented" and that "slapping someone is impermissible if they have not consented." These are not inconsistent statements, and neither is barred by the universalizability principle because it rests on the recognition that the nature of a consented-to act is different than one objected to. Thus, although uninvited physical force estops the initiator thereof from complaining of punishment, invited or consented-to physical force does not.

Other actions do not involve force or aggression at all, so there is no ground for punishing this behavior either. Suppose *P* publishes a patently pornographic magazine, and some entity, such

47. *See supra* Part III.D.2.

as the state, punishes him for this by conviction and imprisonment. Clearly, the state has committed naked aggression against him. Following the analysis of Part III.C, unless *P* is estopped from complaining about the punishment, the state itself may be punished, demonstrating that it has violated his rights.[48]

P has only published pornography, which is not aggression; he has not engaged in any activity nor necessarily made any claim that would be inconsistent with claiming that aggression is wrong. Thus, it is not inconsistent to simultaneously maintain that (1) it is legitimate to publish pornography and (2) it is illegitimate to aggress against a person. *P* is not estopped from complaining about his confinement.[49]

Unlike the case of retaliation against aggression, however, the state has not administered force in response to *P*'s initiation of force and is estopped from objecting to the proposed use of force against it. The state's punishment of *P* is, therefore, not legitimate. Thus, it can be seen that punishment of any nonaggressive behavior is illegitimate and unjustified, as are laws prohibiting such behavior, since laws are themselves backed by and manifestations of force.[50]

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48. *P* will usually not be able, in practice, to successfully retaliate or defend himself against the state, but might and right are independent concepts. Thus, this fact of the state's greater might is irrelevant in the same way that *B*'s murder does not "prove" that there is not a right to life. After all, there is a difference between *may* and *can*.

49. *P* could, perhaps, be dialogically estopped from complaining about other pornographers engaging in pornography, but here he is complaining about his being kidnapped by the state.

50. Lawrence Crocker discusses a similar use of "moral estoppel" in preventing a criminal from asserting the unfairness of being punished in certain situations. Crocker, *supra* note 25, at 1067. Crocker's theory, while interesting, is not developed along the same lines as the estoppel theory developed herein, nor does Crocker seem to realize the implications of estoppel for justifying only the libertarian conception of rights. Rather than focusing on the reciprocity between the force used in punishment and the force of an aggressive act by a wrongdoer, Crocker claims that a person who has "treated another person or the society at large in a fashion that the criminal law prohibits" is "morally estopped" from asserting that his punishment would be unfair. *Id.* However, Crocker's use of estoppel is too vague and imprecise, for just because one has violated a criminal law does not mean that one has committed the aggression which is necessary to estop him from complaining about punishment. The law must first be valid for Crocker's assumption to hold, but as the estoppel theory indicates, a law is valid only if it prohibits aggression. Thus, it is not the mere violating of a law that estops a lawbreaker from complaining about being punished—the law might be illegitimate—it is the initiation of force.

F. Property Rights

So far, the right to punish actors who initiate invasions of victims' bodies has been established, which corresponds to a right in one's own body, or self-ownership. Although there is not space here to provide a detailed justification for rights in scarce resources outside one's body—property rights—I will briefly outline such a justification in this section. Because rights in one's own body have been established, property rights may be established by building on this base. This may be done by pointing out that rights in one's body are meaningless without property rights and vice versa.[51]

For example, imagine that *A*, a thief, admits that there are rights to self-ownership but that there is no right to property. If this is true, we can easily punish him simply by depriving him of external property, namely food, air, or space in which to exist or move. Clearly, the denial of his property through the use of force can physically harm his body just as direct invasion of the borders of his body can. The physical, bodily damage can be done fairly directly, for example, by snatching every piece of food out of his hands until he dies—why not, if there are no property rights? Or it can be done somewhat more indirectly by infringing upon his ability to control and use the external world, which is essential to his survival. Such property deprivation could continue until his body is severely damaged—implying, since this is tantamount to physical retaliation in its effect on him, that physical retaliation in response to a property crime is permissible—or until he objected to such treatment, thereby granting the existence of property rights. Just as one can commit an act of aggression against another with one's body—for example, one's fist—or with external property—a club, gun, bomb, poison—so one's self-ownership rights can be aggressed against in a limitless variety of ways by affecting one's

51. This has been recognized even by the U.S. Supreme Court. As the Court recognized,

> [t]he right to enjoy property without unlawful deprivation ... is in truth a "personal" right .... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). But see the famous footnote 4 in *United States v. Carolene Products Co.*, which implies that economic and property rights are less fundamental than personal rights. 304 U.S. 144, 152 n.4 (1938).

property and external environment.

Professor Hoppe's "argumentation ethics" defense of individual rights also shows that the right to homestead is implied in the right to self-ownership. First, Hoppe establishes self-ownership by focusing on propositions that cannot be denied in discourse in general.[52] Anyone engaging in argumentation implicitly accepts the presupposed right of self-ownership of all listeners and even potential listeners. Otherwise, the listener would not be able to consider freely and accept or reject the proposed argument.

Second, because participants in argumentation indisputably need to use and control the scarce resources in the world to survive, and because their scarcity makes conflict over their use possible, norms are needed to determine the proper owner of these goods so as to avoid conflict. This necessity for norms to avoid conflicts in the use of scarce resources is itself undeniable by those engaged in argumentation—which is to say, undeniable—because anyone who is alive in the world and participating in the practical activity of argumentation cannot deny the value of being able to control scarce resources or the value of avoiding conflicts over such scarce resources. But there are only two fundamental alternatives for acquiring rights in unowned property: (1) by doing something with the property with which no one else had ever done before, such as the mixing of labor or homesteading; or (2) by mere verbal declaration or decree. The second alternative is arbitrary and cannot serve to avoid conflicts. Only the first alternative, that of Lockean homesteading, establishes an objective link between a particular person and a particular scarce resource; thus, no one can deny the Lockean right to homestead unowned resources.

As Hoppe points out, since one's body is itself a scarce resource, it is "the *prototype* of a scarce good for the use of which property rights, i.e. rights of exclusive ownership, somehow have to be established, in order to avoid clashes."[53] Thus, the right to homestead external scarce resources is implied in the fact of self-ownership since "the specifications of the nonaggression principle, conceived of as a special property norm referring to a specific kind of good, must in fact already contain those of a *general* theory of property."[54] For these reasons, whether self-ownership is established by Hoppe's argumentation ethics or by the estoppel the-

52. For further details see *supra* note 25.
53. HOPPE, SOCIALISM & CAPITALISM, *supra* note 24, at 9.
54. *Id.* at 134.

ory—both theories that focus on the dynamics of discourse—such rights imply the Lockean right to homestead, which no aggressor could deny any more than he could deny that self-ownership rights exist.

I will, for the remainder of this Article, place property rights and rights in one's body on the same level, both warranting punishment for their invasion. Thus, under the estoppel theory one who aggresses against another's body or against another's external property is an aggressor, plain and simple, who may be treated as such.

IV. TYPES OF PUNISHMENTS AND THE BURDEN OF PROOF

A. Proportional Punishment

Just because aggressors can legitimately be punished does not necessarily mean that all concerns about proportionality may be dropped. At first blush, if we focus only on the initiation of force itself, it would seem that a victim could make a prima facie case that since the aggressor initiated force—no matter how trivial—the victim is entitled to use force against the aggressor, even including execution of the aggressor. Suppose *A* uninvitedly slaps *B* lightly on the cheek for a rude remark. Is *B* entitled to execute *A* in return? *A*, it is true, has initiated force, so how can he complain if force is to be used against him? But *A* is not estopped from objecting to being killed. *A* may perfectly and consistently object to being killed since he may maintain that it is wrong to kill. This in itself is not inconsistent with *A*'s implicit view that it is legitimate to lightly slap others. By sanctioning slapping, *A* does not necessarily claim that killing is proper because usually—as in this example—there is nothing about slapping that rises to the level of killing.

It is proper to focus on the consequences of aggression in determining to what extent an aggressor is estopped because the very reason people object to aggression, or wish to punish aggressors for it, is just because it has certain consequences.[55] Aggressive action, by physically interfering with the victim's person, is undesir-

55. Analogously, this is why scarcity is the defining characteristic of property. Taking another's good has the effect of depriving the owner of it because it is scarce; if goods were infinitely abundant then it would not be possible to "take" them because the taking would have no consequence at all, and thus, the concepts of property and scarcity would not arise.

able because, among other reasons, it can (1) cause pain or injury; (2) interfere with the pursuit of goals in life; or (3) simply create a risky, dangerous situation in which pain, injury, or violence are more likely to result. Aggression interferes with one's physical control over one's life, that is, over one's own body and external property.

Killing someone obviously brings about the most undesirable level of these consequences. Merely slapping someone, by contrast, does not in normal circumstances. A slap has relatively insignificant consequences in all these respects. Thus, *A* does not necessarily claim that aggressive killing is proper just because he slaps *B*. The universalization requirement does not prevent him from reasonably narrowing his implicit claim from the more severe "aggression is not wrong" to the less severe "minor aggression, such as slapping someone, is not wrong." Thus, *B* would be justified in slapping *A* back but not in murdering *A*. I do not mean that *B* is justified *only* in slapping *A* and no more, but certainly *B* is justified at least in slapping *A* and is not justified in killing him. These outside boundaries, at least, we know.

In general, while the universalization principle prevents arbitrary particularization of claims—for example, adding "for me only's"—it does not rule out an objective, reasonable statement of the implicit claims of the aggressor tailored to the actual nature of the aggression and its necessary consequences and implications. For example, while it is true that *A* has slapped *B*, he has not attempted to take *B*'s life; thus, he has never necessarily claimed that "murder is not wrong," so he is not estopped from asserting that murder is wrong. Since a mere slapper is not estopped from complaining about his imminent execution, he can consistently object to being executed, which implies that *B* would become a murderer if he were to kill *A*.

In this way, we can see a requirement of proportionality—or, more properly, of reciprocity along the lines of the *lex talionis* or the law of retaliation[56]—accompanies any legitimate punishment of an aggressor. "As the injury inflicted, so must be the injury suf-

56. The classic formula of the *lex talionis* is "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe." *Exodus* 21:23-25; *see also Deuteronomy* 19:21 (calling for "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot"); *Leviticus* 24:17-21 (calling for "broken limb for broken limb, eye for eye, tooth for tooth").

fered."[57] There are, thus, limitations to the amount of punishment the victim may administer to the aggressor, related to the extent of the aggression committed by the aggressor, because it is the nature of the particular act of aggression that determines the extent of the estoppel working against the aggressor. The more serious the aggression and the consequences that flow from it, the more the aggressor is estopped from objecting to punishment. Consequently, a greater level of punishment may legitimately be applied.

B. The Victim's Options

At this point, we have established the basic right to one's body and to property homesteaded or acquired from a homesteader, as well as the contours of the basic requirement of proportionality in punishment. This Article now presents a further consideration of the various types of punishment that can be justly administered.

As has been shown, a victim of aggression may inflict on the aggressor at least the same level or type of aggression previously inflicted by the aggressor. In determining the maximum amount and type of punishment that may be applied, the distinction between victim and victimizer must be kept in mind, and we must recognize that, for most victims—those who are not masochists or sadists—punishing the wrongdoer does not genuinely make the victim whole and does not directly benefit the victim very much, if at all. A victim who has been shot in the arm by a robber and who consequently loses his arm is clearly entitled, if he wishes, to amputate the robber's own arm. But this, of course, does not restore the victim's arm; it does not make him whole. Perfect restitution is always an unreachable goal, for crimes cannot be undone.

This is not to say that the right to punish is therefore useless, but we must recognize that the victim remains a victim even after retaliating against the wrongdoer. No punishment can undo the harm done. For this reason, the victim's range of punishment options should not be artificially or easily restricted. This would further victimize him. The victim did not choose to be made a victim and did not choose to be placed in a situation where he has only one narrow punishment option—namely, eye-for-an-eye retaliation. On the contrary, the responsibility for this situation is entirely that of the aggressor who by his action has damaged the victim. Because the aggressor has placed the victim in a no-win

57. *Leviticus* 24:20.

situation where being restricted to one narrow type of remedy may recompense the victim even less than other remedies, the aggressor is estopped from complaining if the victim chooses among varying types of punishment.

In practice this means that, for example, the victim of assault and battery need not be restricted to only having the aggressor beaten—or even killed. The victim may abhor violence, and might choose to forego any punishment at all if his only option was to either beat or punish the aggressor. The victim may prefer, instead, to simply be compensated monetarily out of any—current or future—property of the wrongdoer. Or, if the victim believes he will gain more satisfaction from using force against the aggressor in a way different than the manner in which the aggressor violated the victim's rights—for example, taking property of an aggressor who has beaten the victim—the aggressor is estopped from complaining about this as long as proportionality is satisfied.

The nonequivalence of most violent crimes makes this conclusion clearer. Suppose that *A*, a man, rapes *B*, a woman. *B* would be entitled to rape *A* in retaliation or to have *A* raped by a professional, private punishing company. But the last thing in the world that a rape victim might want is to be involved in further sexual violence, and this alone would give her a right to insist on other forms of punishment. To limit her remedy to having *A* raped would be to inflict further damage on her. *B* can never be made whole, but at least her best remedy—in her opinion—of a variety of imperfect remedies need not be denied her. She has done nothing to justify denying her such options.

And in this case there simply is no equivalent. The only remotely similar equivalent is the forcible anal rape of *A*, but even this is vastly different from the rape of a woman. If nothing else, a woman might reasonably consider rape much more of a violation than would a man "similarly" treated, for these acts give rise to different consequences for the victim, a point that we need not belabor. Thus, if there is no possibility of exact "eye-for-an-eye" style retaliation for a given act of aggression, such as is the case with rape, then our conclusion must be either that (1) *B* may not punish *A*, or (2) *B* may punish *A* in another manner. Clearly, the latter alternative is the correct one, for a rapist is estopped from denying the right of his victim to punish him and is also estopped from claiming a benefit because there is no equivalent punishment. Furthermore, the absence of an equivalent punishment is a direct re-

sult of *A*'s aggression. If *B* acts to mitigate the damage done to her by *A*—which includes not only the rape, but placing *B* in a situation where her remedies will all be inadequate and where there is not even an equivalent punishment possible—*A* is estopped from objecting. Thus, for example, *B* may choose, instead, to have *A*'s penis amputated or even his arm or leg. Or *B* may choose instead to have *A* publicly flogged, displayed, and imprisoned for some length of time or even enslaved for a time and put to work earning money for *B*. Alternatively, *B* may threaten *A* with the most severe punishment she has the right to inflict and allow *A* to buy his way out of the punishment—or reduce its severity—with as much money as he is able or willing to offer.[58]

Further, even if such rape of a man is somewhat equivalent to the rape of a woman, the rape of an *innocent* person, *B*, is typically much more of an offense than is a similar violation of a criminal, *A*, who evidently does not abhor aggression as much. *A*, the rapist, may even be a masochist and enjoy being beaten or sodomized, so a more or less equal amount of physical punishment of *A* would not really damage or truly punish *A* as badly as *A* has damaged *B*. Because *A* is a criminal, he is also likely accustomed to a lifestyle where force is used more routinely so that "equal" punishment of *A* would not damage *A* to the extent it would damage *B*, who is unused to such violence. For these reasons, *B* is entitled to inflict a greater amount of punishment on *A* than *A* inflicted on *B*, if only to more or less equalize the actual level of damage inflicted.[59]

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58. For discussion of Jefferson's attempts at devising proportional punishments, see Walter Kaufman, *Retribution and the Ethics of Punishment, in* ASSESSING THE CRIMINAL, *supra* note 4, at 223. For recent examples of judges' attempts at creative punishment to "fit the crime," see Judy Farah, *Crime and Creative Punishment*, WALL ST. J., Mar. 15, 1995, at A15; Andrea Gerlin, *Quirky Sentences Make Bad Guys Squirm*, WALL ST. J., Aug. 4, 1994, at B1, B12; *see also* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1212 (1985) (discussing different ways to vary the severity of punishment).

59. Of course, values are subjective, so damage can never be exactly equated. On the subjective theory of value, see 1 MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES 14-17 (1962); ALEXANDER H. SHAND, THE CAPITALIST ALTERNATIVE: AN INTRODUCTION TO NEO-AUSTRIAN ECONOMICS (1984); VON MISES, EPISTEMOLOGICAL PROBLEMS OF ECONOMICS, *supra* note 30, at 89; VON MISES, HUMAN ACTION, *supra* note 24, at 94-97, 200-06, 331-33. But again this is not the *victim*'s fault, and if her only option is to attempt to measure or balance a difficult-to-balance equation—for example, by trying to equate somewhat quantifiable physical aspects of force, such as the magnitude and type of force and the physical consequences thereof—she cannot be blamed and the aggressor may not complain. For an illustrative theory proposing to attribute fault and liability according to objective factors such as force and momentum in a situation such as an

Thus, if *A* permanently damages *B*'s arm, *B* may be entitled to damage both of *A*'s arms or even all of *A*'s limbs.[60]

Alternatively, a victim is entitled to take by force a certain amount or portion of the aggressor's property if this type of response to aggression would better satisfy the victim or if the victim prefers this remedy for any reason at all, including greed, malice, or sadism—the victim's motivation is not the aggressor's rightful concern. Of course, a mixture would be permissible as well. A woman might, in response to being raped by a man, seize all of the ravisher's $10,000 estate and have him publicly beaten and enslaved for some number of years until his forced labor earns her $100,000 more—assuming that this overall level of punishment is roughly equivalent to the rape.

Along the same lines, a property aggressor, such as a thief, may be dealt with any number of ways. The victim may satisfy himself solely out of the aggressor's property, if this is possible, or through corporal punishment of the aggressor, if this better satisfies the victim—as discussed in further detail below. In short, any rights or combinations of rights of an aggressor may be ignored by a victim in punishing the aggressor—implying that the aggressor actually does not have these purported "rights"—as long as general bounds of proportionality are considered.

C. Enhancing Punishment Due to Other Factors

Other factors may be considered that increase the amount of punishment that may be inflicted on the aggressor over and above the type of damage initially inflicted by the aggressor. As explained above with regard to rape, aggression against an innocent, peaceful person may cause more psychic damage to the victim

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automobile collision, see the sections on causation and causal defenses, respectively, in RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY: TOWARD A REFORMATION OF TORT LAW 15-49 (Cato Institute 1980) [hereinafter EPSTEIN, A THEORY OF STRICT LIABILITY]; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 174-85 (1974). Further, if the aggressor *A* were seriously to maintain that force against *A* and force against *B* were wholly incommensurable, he could never meaningfully object to being punished—for to object to punishment, *A* must maintain that such force is unjust and that some level and type of force could be justly used to prevent his punishment. But this implies at least some commensurability. If *A* really maintains incommensurability, *B* may take him at his word and posit that *B*'s punishment of *A* justifies *no* retaliatory force on *A*'s part—which means that *A* is not effectively claiming that he has a right to not be punished because rights are legitimately enforceable.

60. Just how much greater the punishment may be than the original aggression, and how this is determined, is discussed in further detail *infra* Part IV.G.

than would an equivalent action against the aggressor. Also, as Rothbard explains, a criminal, such as thief *A*, has not only stolen something from victim *B*, but he has "also put *B* into a state of fear and uncertainty, of uncertainty as to the extent that *B*'s deprivation would go. But the penalty levied on *A* is fixed and certain in advance, thus putting *A* in far better shape than was his original victim."[61] The criminal has also imposed other damages, such as interest, and even general costs of crime prevention—for who can such costs be blamed on and recouped from if not criminals when they are caught? As Kant pointed out, "whoever steals anything makes the property of all insecure."[62]

General bounds of proportionality are also satisfied when the consequences and potential consequences to the victim that are caused by the aggression are taken into account. Thus, some crimes may be punished capitally if their consequences are serious enough—for example, stealing a man's horse when his survival depends on it, which was capitally punished in the frontier West for the same reason.[63]

D. Graduated Scale of Punishment

Some would object to the use of the severe penalty of capital punishment for crimes other than the most serious or heinous, such as murder, mass-murder, or genocide. Many thus favor a scale of punishment having more severe punishments for the most serious crimes with capital punishment reserved for murderers or serial-killers and the like.[64] Perhaps it is felt that a mass murderer, serial

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61. ROTHBARD, ETHICS, *supra* note 6, at 85, 88. The chapter entitled "Punishment and Proportionality" appeared in substantially the same form as *Punishment and Proportionality, in* ASSESSING THE CRIMINAL, *supra* note 4, at 259-70; *see also* Murray N. Rothbard, *King on Punishment: A Comment*, 4 J. LIBERTARIAN STUD. 167 (1980) (commenting on King, *supra* note 37). Rothbard, who died in January 1995, was one of the most influential and productive libertarian philosophers and economists.

62. IMMANUEL KANT, THE PHILOSOPHY OF LAW 197 (W. Hasti trans., 1887).

63. *See* People v. Borja, 22 Cal. Rptr. 2d 307, 309 (Ct. App. 1993), *superseded* by 860 P.2d 1182, 24 Cal. Rptr. 2d 236 (1993); Guido v. Koopman, 1 Cal. App. 4th 837, 842, 2 Cal. Rptr. 2d 437, 439 (Ct. App. 1991) (discussing the critical importance of horses for transportation and survival in the old West). This brings to mind the reported exchange "many years ago between the Chief Justice of Texas and an Illinois lawyer visiting that state. 'Why is it,' the visiting lawyer asked, 'that you routinely hang horse thieves in Texas but oftentimes let murderers go free?' 'Because,' replied the Chief Justice, 'there never was a horse that needed stealing!'" People v. Skiles, 450 N.E.2d 1212, 1220 (Ill. App. Ct. 1983).

64. *See, e.g.*, Letter from Ayn Rand to John Hospers (Apr. 29, 1961), *in* LETTERS

killer, child killer, or cop killer should be punished more harshly than a more typical murderer of one adult and that if capital punishment is "wasted" on more mundane murderers or criminals, there will be nothing more severe left to impose on the really bad guys; there will be no deterrent effect left to deter extra acts of aggression committed by those who have already placed themselves in the category of deserving the death penalty. Of course, even if such a scale with gradations of punishment would provide a "better" deterrent effect, this does not mean that one does not have the right to punish a given criminal in a certain way. Such utilitarian reasoning is beside the point. If we had to save the more severe punishments for, say, mass murderers, this in effect incorrectly attributes a right to life to other murderers who simply do not have such a right.

Also, it should be realized that punishment of murderers is always an imperfect remedy since the victim remains murdered, so that whether the murderer remains underpunished even after being executed—like a regular murderer—or *very* underpunished—like a mass murderer—this is an unfortunate but simply irrelevant and inescapable fact. Furthermore, punishment actually *can* be made more and more severe, practically without limit, for greater and greater crimes. Death after torture is worse punishment than mere death, and a longer period or greater amount of physical pain being inflicted is more severe punishment than a shorter period or lesser amount. The severity of punishment can be varied, then, by varying the length of imprisonment, by inflicting more or less physical pain, and by many other methods. For example, for prison inmates, the severity of punishment can be adjusted by varying the size of the prison cell, temperature, and quality of food.[65]

E. Property Crimes

Aggression can also take the form of a property crime. For example, where *A* has stolen $10,000 from *B*, *B* is entitled to recoup $10,000 of *A*'s property. However, the recapture of $10,000 is not *punishment* of *A* but merely the recapture by *B* of his own

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OF AYN RAND, at 544, 559 (Michael S. Berliner ed., 1995) (arguing for "a proportionately scaled series of punishments," and that "the punishment deserved by armed robbery would depend on its place in the scale which begins with the lightest misdemeanor and ends with murder").

65. *See* Posner, *supra* note 58, at 1212 (discussing different ways to vary the severity of punishment).

property. *B* then has the right to take another $10,000 of *A*'s property, or even a higher amount if the $10,000 stolen from *B* was worth much more to *B* than to *A*—for example, if *A* has a higher time preference or less significant plans to use the money than *B*, which is likely, or if *A* has more money than *B*, which is unlikely.[66] This amount may also be enhanced to take into account other damages, such as interest, general costs of crime prevention, and compensation for putting the victim into a state of fear and uncertainty.[67] It may also be enhanced to account for the uncertainty as to what the exact amount of retaliation or restitution ought to be, as this uncertainty is *A*'s fault, not *B*'s. Alternatively, at the victim's option, corporal punishment may be administered by *B instead* of taking back his own $10,000—indeed, this may be the only option where the thief is penniless or the stolen property is spent or destroyed.

F. Why Assault and Threats Are Aggression

This method of analyzing whether a proposed punishment is proper also makes it clear just why the threat of violence or assault is properly treated as an aggressive crime. Assault is defined as putting someone in fear of receiving a battery—physical beat-

66. However, where the thief is poorer than the victim, as is usually the case, this does not mean that the victim is not entitled to recoup the entire $10,000. For example, if the $10,000 stolen is only 1% of the victim's estate and the thief's estate is only $10,000 total—after the victim has retaken his own $10,000 from the thief—it is not the case that the victim is limited to 1% of $10,000—$100. Because it is the thief who caused the harm, the victim should have the option of selecting the higher of (a) the amount that was stolen, or (b) a higher amount that is equivalent in terms of damage done. For further suggestions along these lines, such as Stephen Schafer's view that punishment "'should . . . be equally burdensome and just for all criminals, irrespective of their means, whether they be millionaires or labourers,'" see Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, *in* ASSESSING THE CRIMINAL, *supra* note 4, at 349, 363-64 (quoting STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 127 (2d ed. 1970)).

Further, suppose that *A*, the victim, was about to use the $10,000 to save his own or another's life: for example, as a ransom for his daughter's kidnapper or to pay for a medical procedure to save his daughter's life. Theft of the $10,000 from a sufficiently poor person, or at a crucial time, could very well lead to death—the kidnapper murders the daughter because he was not paid. In this case it is very possible that execution of the thief could be justified since the consequences of this theft were even more severe than normal, especially in the case where the thief was aware of the potentially life-endangering consequences of the theft. For the principle that a criminal or tortfeasor "takes his victim as he finds him," see *infra* note 73 and accompanying text.

67. *See supra* note 61 and accompanying text.

ing.[68] Suppose *A* assaults *B*, such as by pointing a gun at him or threatening to beat him. Clearly *B* is entitled to do to *A* what *A* has done to *B*—*A* is estopped from objecting to the propriety of being threatened or assaulted. But what does this mean? To assault is to manifest an intent to cause harm and to apprise *B* of this so that he *believes A* will inflict this harm—otherwise it is something like a joke or acting, and *B* is not actually in apprehension of being coerced. Now *A* was able to actually put *B* in a state of fear—of receiving a battery—by threatening *B*. But because of the nature of assault, the only way *B* can really make *A* fear a retaliatory act by *B* is if *B really means it* and is able to convince *A* of this fact. Thus, *B* must actually be—or be capable of being—willing to carry out the threatened coercion of *A*, not just mouth the words, otherwise *A* will know *B* is merely engaged in idle threats, merely bluffing. Indeed, *B* can legitimately go forward with the threatened action if only to make *A* believe it. Although *A* need not actually use force to assault *B*, because of the nature of retaliation, there is simply no way for *B* to assault *A* in return without actually having the right to use force against *A*. Because the very situation is caused by *A*'s action, he is estopped from objecting to the necessity of *B* using force against him.[69]

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68. *See* Mason v. Cohn, 438 N.Y.S.2d 462, 464 (N.Y. Sup. Ct. 1981) (defining assault); BLACK'S LAW DICTIONARY 114 (6th ed. 1990) (defining assault). The Louisiana Criminal Code defines assault as "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." LA. REV. STAT. ANN. § 14:36 (West 1986). A battery is defined as "the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another." *Id.* § 14:33. Assault can thus also include an attempted battery, which need not put the victim in a state of apprehension of receiving a battery—for example, the victim may be asleep and be unaware that another has just swung a club at his head, but missed. This second definition of assault is ignored for our present purposes.

69. Recently, the propriety of classifying fraud as a rights-violation under libertarianism's fundamental principles has come under attack. *See* James W. Child, *Can Libertarianism Sustain a Fraud Standard?*, 104 ETHICS 722 (1994). Child is incorrect and, in consonance with the principles developed herein, fraud is indeed a species of theft, although treatment of this topic involves contract law, detailed discussion of which is beyond the scope of this paper. In brief, if property rights are seen as rights to tangible—for instance, corporeal—property external to one's body, then one has a right to relinquish ownership over selected pieces of property. If such a release of ownership of a first item of property is made conditional upon a transfer by another of a second item, as is the case in an exchange or sale, then if the second transfer does not occur as promised—for example, if because of fraud by the second party the second item is not as promised or is not delivered as promised—then the ownership of the first item does not transfer, and failure to return the property is tantamount to theft. Moreover, the second party's very taking of possession of the first item is tan-

G. The Burden of Proof

As seen in the preceding discussion, the victim of a violent crime has the right to select different mixtures and types of punishments. The actual extent or severity of punishment that may be permissibly inflicted, consistent with principles of proportionality and the burden of proof in this regard, is discussed in this section.

Theories of punishment are concerned with justifying punishment, with offering decent people who are reluctant to act immorally a reason why they may punish others. This is useful, of course, for offering moral people guidance and assurance that they may properly deal with those who seek to harm them. We have established so far a prima facie case for the right to proportionately punish an aggressor in response to acts of violence, actions which invade the borders of others' bodies or legitimately acquired property. Once this burden is carried, however, it is just to place the burden of proof on the aggressor to show why a proposed punishment of him is disproportionate or otherwise unjustified. The justice of this point is again implied by the logic of estoppel. The aggressor was not put in the position of justifying how much force he could use against the victim before he used such force; similarly, the victim should not be put in the position of justifying how much force is the appropriate level of retaliatory force to use against the aggressor before retaliating.

As pointed out above, because it is the aggressor who has put the victim into a situation where the victim has a limited variety and range of remedies, the aggressor is estopped from complaining if the victim uses a type of force against the aggressor that is different from the aggressor's use of force. The burden of proof and argument is therefore on the aggressor to show why any proposed, creative punishment is *not* justified by the aggressor's aggression. Otherwise, an additional burden is being placed on the victim in addition to the harm already done him. If the victim wants to avoid shouldering this additional burden, the aggressor is estopped from objecting because it was the aggressor who placed the victim in the position of having the burden in the first place. If there is a gray area, the aggressor ought not be allowed to throw his hands up in mock perplexity and escape liability; rather, the line ought to come down on the side of the gray that most favors the victim un-

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tamount to theft since permission to take such possession may also be presumed to be conditional upon certain facts, such as that the second party is not defrauding the first.

less the aggressor can further narrow the gray area with convincing theories and arguments, for the aggressor is the one who brings the gray into existence.

This is similar to the issue of proportionality itself. Although proportionality or reciprocity is a requirement in general, if a prima facie case for punishment can be established—as it can be whenever force is initiated—the burden of proof lies with the aggressor to demonstrate that *any* proposed use of force, even including execution, mutilation, or enslavement, exceeds bounds of proportionality. As mentioned above, in practice there are several clear areas: murder justifies execution; minor, nonarmed, nonviolent theft does not.[70] Exceeding known appropriate levels of retaliation makes the retaliator an aggressor to the extent of the excess amount of force used. But there are indeed gray areas in which it is difficult, if not impossible, to precisely delimit the exact amount of maximum permissible punishment. However, this uncertain situation, this grayness, is caused by the aggressor. The victim is placed in a quandary and might underpunish, or underutilize his right to punish, if he has to justify how much force he can use. Or he might have to expend extra resources in terms of time or money—for example, to hire a philosopher or lawyer to figure out exactly how much punishment is warranted—which would impermissibly increase the total harm done to the victim.

It is indeed difficult to determine the bounds of proportionality in many cases. But we do know one thing: force has been initiated against the victim, and thus force, in general, may be used against the victimizer. Other than for easy or established cases, any ambiguity or doubt must be resolved in favor of the victim unless the aggressor bears his burden of argument to explain why the proposed punishment exceeds his own initial aggression.[71]

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70. *See supra* Part IV.A.

71. Many crimes would have established or generally accepted levels or at least ranges of permissible punishment—for example, as worked out by a private justice system of a free society or by specialists writing treatises on the subject. For further discussion of the role of judges or other decentralized law-finding fora, and of legislatures, in the development of law, see N. Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*, 11 J. LIBERTARIAN STUD. 132 (1995). No doubt litigants in court or equivalent forums, especially the defendant, would hire lawyers to present the best arguments possible in favor of punishment and its permissible bounds. In a society that respects the general libertarian theory of rights and punishment developed herein, one could even expect lawyers to specialize in arguing whether a defendant is estopped from asserting a particular defense, whether a given defense is capable of being made universal or particular when the burden of proof

Unless the maximum permissible level of retaliation is clearly established or persuasively argued by the aggressor, there should be no limitations on the victim's right to retaliate. Further, suppose the aggressor is not able to show why the victim may not execute him, even for a nonkilling act of aggression, and thus the aggressor is executed. If the aggressor's heirs should later successfully show that the type of aggression perpetrated by the aggressor did not, in fact, warrant capital punishment, still the victim has committed no aggression. To so hold would be to require victims to err on the side of underpunishing in cases of doubt in order to avoid potential liability in the future if it turns out that the aggressor could have made a better defensive argument. For the fact that there is a doubtful question is the aggressor's fault, and if he does not resolve it—either because of laziness, incompetence, bad luck, or tactics designed to make the victim unsure of how much he may punish—the victim should not be further harmed by this fact, which he would be if he were forced to take the risk that he might underpunish when punishing in the gray area.

Thus, several factors may be taken into account in coming up with an appropriate punishment. Suppose that an aggressor kidnaps and cuts off the hand of the victim. The victim is clearly entitled to do the same to the aggressor. But if the victim wishes to cut off the aggressor's foot instead—for some reason—he is, prima facie, entitled to do this. The victim would also be entitled to cut off both of the aggressor's hands unless the aggressor could explain why this is a higher amount of coercion than his own.[72] Merely cutting off one of the aggressor's hands might actually not be as extreme as was the aggressor's own action. For example, the victim may have been a painter. Thus, the consequence of the ag-

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for each side has been satisfied, and the like.

With regard to the concept of making a prima facie case and switching the burden of proof from the plaintiff to the defendant, Richard Epstein has set forth a promising theory of pleadings and presumptions whereby one party who wishes to upset the initial balance must establish a prima facie case that may be countered by a defense, which may be met with a second round of prima facie arguments, and so on. *See* Richard A. Epstein, *Pleading and Presumptions*, 40 U. CHI. L. REV. 556 (1973). For its application to the fields of torts and intentional harms, see EPSTEIN, A THEORY OF STRICT LIABILITY, *supra* note 59; Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, *supra* note 59; and Epstein, *Intentional Harms*, *supra* note 11.

72. Admittedly, it is difficult to know how this argument would proceed or even what would qualify as a good argument. But such concerns are the aggressor's worry, not the victim's. And there is an easy way to avoid being placed in this position: do not initiate force against your fellow man.

gressive violence might be that, in addition to endangering the victim's very life and causing pain, the victim suffers a huge amount of mental and financial damage. It might take cutting off all four of the aggressor's limbs or even decapitating him to inflict that much damage on him. We know that it is permissible to employ violence against an aggressor. How much? Let the aggressor bear the burden of figuring this out.

As mentioned above with respect to rape, the victim may be squeamish about violence itself and thus recoil at the idea of eye-for-an-eye. If that is the victim's nature, the victim should not be penalized further by being forced to administer *lex talionis*. The aggressor must take his victim as he finds him[73] and is estopped from complaining because he placed the victim in the situation where the victim's special preferences can only be satisfied by a nonreciprocal punishment. Thus, the victim may instead choose to seize a certain portion of the aggressor's property. The amount of the award that is "equal" to the damage done is of course difficult to determine, but, if nothing else, similar principles could be used as are used in today's tort and criminal justice system. If the amount of damages is uncertain or seems "too high," it must be recalled that the aggressor himself originated this state of uncertainty, and thus he cannot now be heard to complain about it.

Alternatively, a more objective damage award could be determined by the victim bargaining away his right to inflict corporal punishment against the aggressor in return for some or all of the aggressor's property. This might be an especially attractive—or the least unattractive—alternative for a person victimized by a very rich aggressor. The established award for chopping someone's hand off might normally be, say, $1 million. However, this would mean that a billionaire could commit such crimes with impunity. Under the estoppel view of punishment, the victim, instead of taking $1 million of the aggressor's money, could kidnap the aggressor and threaten to exercise his right to, say, chop off both of the aggressor's arms, slowly, and with pain. A billionaire

73. This is an ancient principle of justice.

> It is well settled in our jurisprudence that a defendant *takes his victim as he finds him* and is responsible for all natural and probable consequences of his tortious conduct. Where defendant's negligent action aggravates a pre-existing injury or condition, he must compensate the victim for the full extent of his aggravation.

American Motorist Ins. Co. v. American Rent-All, Inc., 579 So. 2d 429, 433 (La. 1991) (emphasis added) (citation omitted).

may be willing to trade half, or even all, his wealth to escape this punishment.

For poor aggressors, there is no property to take as restitution, and the mere infliction of pain on the aggressor may not satisfy some victims. They would be entitled to enslave the aggressor or sell him into slavery or for medical testing to yield the best profit possible.

V. CONCLUSION

The ways in which punishment can be administered are rich and various, but all the typically-cited goals of punishment could be accommodated under the view of punishment set forth above. Criminals could be incapacitated and deterred, even rehabilitated, perhaps, according to the victim's choice. Restitution could be obtained in a variety of ways, or, if the victim so chooses, retribution or revenge. Though it is difficult to precisely determine the boundaries of proportionality, justice requires that the aggressor be held responsible for the dilemma he has created as well as for the aggression he has committed.