

PUNISHMENT AND PROPORTIONALITY: THE ESTOPPEL APPROACH

*N. Stephan Kinsella**

It is easier to commit murder than to justify it.
—Papinian¹

I. Introduction

No doubt punishment serves many purposes. It can deter crime and prevent the offender from committing further crimes. Punishment can even rehabilitate some criminals, if it is not capital. It can satisfy a victim's longing for revenge, or his relatives' desire to avenge. Punishment can also be used as a lever to gain restitution, recompense for some of the damage caused by the crime. For these reasons, the issue of punishment is, and always has been, of vital concern to civilized people. They want to know the effects of punishment and effective ways of carrying it out.

People who are civilized are also concerned about *justifying* punishment. They want to punish, but they also want to know that such punishment is justified—they want to legitimately be able to punish.² Hence the interest in punishment theories. As pointed out by Murray Rothbard in his short but insightful discussion of punishment and proportionality, however, the theory of punishment has not been adequately developed, even by libertarians.³

* N. Stephan Kinsella practices computer software and hardware patent law with Schnader Harrison Segal & Lewis in Philadelphia. Internet: kinsella@shsl.com. In accordance with the author's request, the footnote and citation style used in this article is primarily consistent with law review format. The author would like to thank Professor Hans-Hermann Hoppe and Jack Criss for encouragement and for helpful comments on an earlier draft of this article.

¹ Papinian (Aemilius Papinianus), quoted in BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW (Oxford: Clarendon Press, 1962), p. 30 n.2. Papinian was a jurist in Rome in the third century A.D., and 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.* at 30 n.2.

² The distinction between the effects or utility of punishment and the reason we have a right to punish has long been recognized. See, e.g., IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *7-*13, §§7(a)-7(c); F.H. B RADLEY, ETHICAL STUDIES 26-27 (2d ed., London: Oxford University Press, 1927); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 73-74 (New York: Oxford University Press, 1968).

³ MURRAY N. ROTHBARD, *Punishment and Proportionality*, ch. 13 in THE ETHICS OF LIBERTY (Atlantic Highlands, N.J.: Humanities Press, 1982) [hereinafter, Rothbard, *Ethics*], at p. 85. This chapter appeared in substantially the same form in Rothbard, *Punishment and Proportionality*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS (Randy E. Barnett & John Hagel III, eds., Cambridge, Mass.: Ballinger, 1977), ch. 11, pp. 259-70. See also Rothbard's article *King on Punishment: A Comment*, 4 J. LIBERTARIAN STUD. 167 (1980) (commenting on J. Charles King, *A Rationale for Punishment*,

In this article I will attempt to explain how punishment can be justified. The right to punish discussed herein applies to property crimes such as theft and trespass as well as to bodily-invasive crimes such as assault, rape, and murder. As will be seen, a general retributionist/retaliatory, or *lex talionis*, theory of punishment is advocated, including related principles of proportionality. This theory of punishment is largely consistent with the libertarian-based *lex talionis* approach of Murray Rothbard.⁴

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 he has done or has failed to do. Punishment thus comprises physical violence committed against a person's body, or against any other property that a person legitimately owns, against any rights that a person has. Punishment is *for*, or *in response to*, some action, inaction, feature, or status of the person punished; otherwise, it is simply random violence, which is not usually considered to be punishment. Thus when we punish a person, it is because we consider him to be a wrongdoer of some sort. We typically want to teach him or others a lesson, or exact vengeance or restitution, for what he has done.

If wrongdoers always consented to the infliction of punishment once they were 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 great Roman jurist Ulpian hundreds of years ago summarized this common-sense insight, “there is no affront [or injustice] where the victim consents.”⁵ It is only when a person resists us, and refuses to consent to being punished, that the need to justify punishment arises. As John Hospers notes, what 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.”⁶

I will thus seek to justify punishment exactly where it needs to be justified:

⁴ J. LIBERTARIAN STUD. 151 (1980)). For additional discussion of various punishment-related theories, see CRIMINAL JUSTICE? THE LEGAL SYSTEM VS. INDIVIDUAL RESPONSIBILITY (Robert James Bidinotto, ed., Irvington-on-Hudson, New York: Foundation for Economic Education, Inc., 1994); PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (Gertrude Ezorsky, ed., Albany: State University of New York Press, 1972); THEORIES OF PUNISHMENT (Stanley E. Grupp, ed., Bloomington: Indiana University Press, 1971); and Hart, *supra* note 2.

⁵ Professors Barnett and Hagel state that Rothbard’s punishment theory, “with its emphasis on the victim’s rights, ... is a significant and provocative departure from traditional retribution theory which, perhaps, merits a new label.” Barnett and Hagel, *supra* note 3, at 179.

⁶ Ulpian (Domitius Ulpianus), *Edict, book 56*, 4 THE DIGEST OF JUSTINIAN (eds. Theodor Mommsen, Paul Krueger, & Alan Watson, Philadelphia: University of Pennsylvania Press, 1985), at Book 47, §10.1.5 (*nulla iniuria est, quae in volentem fiat*). As Richard Epstein explains, “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).

⁶ John Hospers, *Retribution: The Ethics of Punishment*, in Barnett & Hagel, eds., *supra* note 3, at 190.

at the point at which we attempt to inflict punishment upon a person who opposes the punishment. In short, we may punish one who has initiated force, in a manner proportionate to his initiation of force and to the consequences thereof, exactly because he cannot coherently object to such punishment. It makes no sense for him to object to punishment, because this requires that he maintain that the infliction of force is wrong, which is contradictory because he intentionally initiated force himself. Thus, he is *estopped*, to use related legal terminology, or precluded, from denying the legitimacy of his being punished, from withholding his consent.⁷ As shown below, this reasoning may be used to develop a theory of punishment.

III. Punishment and Estoppel

A. Legal Estoppel

Estoppel is a well-known common-law principle that prevents or precludes someone from making a claim in a lawsuit that is inconsistent with his prior conduct, if some other person has changed his position to his detriment in reliance on the prior conduct (referred to as “detrimental reliance”). Estoppel thus denies a party the ability to assert a fact or right that he otherwise could. Estoppel is a widely-applicable legal principle that has countless manifestations.⁸ The Roman law and today’s civil law contain the similar doctrine *venire contra factum proprium*, or “no one can contradict his own act.” 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.”⁹ The principle behind estoppel can also be seen in common sayings such as “actions speak louder than words,” “practice what you preach” or “put your money where your mouth is,” all of which embody the idea that actions and assertions should be consistent. 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.”¹⁰

For legal estoppel to operate, there usually must have been detrimental reliance by the person seeking to estop another.¹¹ A showing 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 to others and thus there is no reason to estop the actor from asserting the truth or from rejecting the prior conduct.¹²

As an example, in the recent case *Zimmerman v. Zimmerman*, a daughter

⁷ For an earlier presentation of ideas along these lines, see N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, REASON PAPERS No. 17 (Fall 1992), p. 61.

⁸ See, e.g., 28 AM. JUR. 2D, *Estoppel and Waiver*.

⁹ Saúl Litvinoff, *Still Another Look at Cause*, 48 LA. L. REV. 3, 21 (1987).

¹⁰ 2 LORD COKE, COMMENTARY UPON LITTLETON 352a (1628), quoted in 18 AM. JUR. 2D, *Estoppel and Waiver*, §1. In the remainder of this paper, 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.”

¹¹ *Bellsouth Advertising & Publishing Corporation v. Gassenberger*, 565 So.2d 1093, 1095 (La. App. 4th Cir. 1990).

¹² See *Dickerson v. Colegrove*, 100 U.S. 578, 586 (1879).

sued her father for tuition fee debts she had incurred during her second and third years at college.¹³ In this case, when the daughter was a senior in high school, the father promised to pay her tuition fees and related expenses if she attended a local college (Adelphi University). However, the promise was a “mere” promise, because it was not accompanied by the requisite legal formalities such as consideration, and therefore did not constitute a normally binding contract. Nevertheless, during her first year at college, her father paid her tuition for her, as he had promised. However, he failed to pay her tuition during the second and third years, although he repeatedly assured her during this time that he would pay the tuition fees when he had the money. This resulted in the daughter’s legal obligation to pay approximately \$6,700 to Adelphi. In this case, although the promise itself did not give rise to an enforceable contract (because of lack of legal formalities such as consideration), it was found that the father should have reasonably expected that his daughter would rely on his promise, and that she did in fact rely on the promise, taking substantial action to her detriment or disadvantage (namely, incurring a debt to Adelphi). Therefore, the daughter was awarded an amount sufficient to cover the unpaid tuition. The father was, in effect, estopped from denying that a contract was formed, even though one was not.¹⁴

B. Dialogical Estoppel

As can be seen, the heart of the idea behind legal estoppel is the idea of 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. The basic insight behind this theory of rights is that a person cannot consistently object to being punished if he has himself initiated force. He is (dialogically) “estopped” from asserting the impropriety of the force used to punish him, because of his own coercive behavior. This theory also establishes the validity of the libertarian conception of rights as being strictly negative rights against aggression, the initiation of force.¹⁵

The point where punishment needs to be justified is when we attempt to inflict punishment upon a person who opposes the punishment. 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 his punishment. Under the principle of dialogical estoppel, or simply estoppel for short, a person is estopped from making certain claims during discourse if these claims are inconsistent and contradictory. To say

¹³ *Zimmerman v. Zimmerman*, 86 A.D.2d 525, 447 N.Y.S. 2d 675 (Sup. Ct. 1982).

¹⁴ 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, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUMIA L. REV. 269, 274-76 (1986). The legitimacy of the traditional legal concept of detrimental reliance is irrelevant here, however.

¹⁵ As used herein, “‘Aggression’ is defined as the *initiation* of the use or threat of physical violence against the person or property of anyone else.” MURRAY N. ROTHbard, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO 23 (rev’d ed’n, New York: Libertarian Review Foundation, 1985)

that a person is estopped from making certain claims means that the claims cannot even possibly be right, because they are contradictory. It is to recognize that his assertion is simply wrong because it is contradictory.

Applying estoppel in such a manner perfectly complements the very purpose of dialogue. Dialogue, discourse, or argument—terms which are used interchangeably herein—is by its nature an activity aimed at finding truth. Anyone engaged in argument is necessarily endeavoring to discern the truth about some particular subject; to the extent this is not the case, there is no dialogue occurring, but mere babbling or even physical fighting. Nor can this be denied. Anyone engaging in argument long enough to deny that truth is the goal of discourse contradicts himself, because he is himself asserting or challenging the truth of a given proposition. Thus, the assertion as true of anything that simply cannot be true is incompatible with the very purpose of discourse. Anything that cannot be true is contrary to the truth-finding purpose of discourse, and thus is not permissible within the bounds of the discourse.

And contradictions are certainly the archetype of propositions that cannot be true. A and not-A cannot both be true at the same time and in the same respect.¹⁶ This is why participants in discourse must be consistent. If an arguer need not 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, to those engaged in discourse, dialogue, debate, discussion, or argument. Because discourse is a truth-finding activity, any such contradictory claims should be disregarded, they should not be heard, since they cannot possibly be true. Dialogical estoppel is thus a rule of discourse that rules out of bounds 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 activity and that contradictions, which are necessarily untrue, are incompatible with discourse and thus should not be allowed.¹⁷ The validity of this rule is undeniable, because it is necessarily

¹⁶ On the impossibility of denying the law of contradiction, see IV ARISTOTLE, METAPHYSICS, 1005b19-21 ("The same thing cannot at the same time both belong and not belong to the same object and in the same respect."); HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS 232 n.23 (Boston: Kluwer Academic Publishers, 1989) [hereinafter Hoppe, *Socialism & Capitalism*]; and LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 35 *et seq.* (3rd rev'd ed., Chicago: Henry Regnery, 1966). See also Ayn Rand's discussion of identity, or "A is A," and the law of contradiction in ATLAS SHRUGGED 942-43 (New York: Signet, 1959); LEONARD PEIKOFF, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND 6-12, 118-21 (New York: Dutton, 1991); and Ronald E. Merrill, *Axioms: The Eightfold Way*, OBJECTIVITY, vol. 2, no. 2, 1995, p. 1.

¹⁷ Because discourse is a peaceful, cooperative, conflict-free activity, as well as an inquiry into truth, *coercion* 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 Hoppe, *Socialism & Capitalism*, *supra* note 16, at Chapter 7, "The Ethical Justification of Capitalism and Why Socialism is Morally Indefensible"; *idem*, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY 180-86 *et pass.* (Boston, Kluwer Academic Publishers, 1993) [hereinafter Hoppe, *Economics and Ethics*]. For a detailed review of *Economics and Ethics*, see

presupposed by any participant in discourse.

There are various ways that contradictions can arise in discourse. First, of course, 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 he is incorrect. A, after all, as Ayn Rand repeatedly emphasized, is A; the law of identity is indeed valid and unchallengeable. It is impossible for a person to coherently, intelligibly assert that two contradictory statements are true; it is impossible for these claims both to be true. Thus he is estopped from asserting them, he is not heard to utter them, because they cannot tend to establish the truth, which is the goal of all argumentation.¹⁸ As Wittgenstein noted, "Wherof one cannot speak, thereof one must be silent."¹⁹

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: the arguer cannot possibly be right that (explicit) A and (implicit) not-A are both true. He might be able to remove the inconsistency by dropping one of the claims. For example, suppose someone 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 his

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, *Philosophy without Foundations*, REASON PAPERS No. 16 (Fall 1991), p. 15; *idem*, THE LOGIC OF LIBERTY ch. 11, esp. pp. 263-72 (New York: Greenwood Press, 1986); Roger A. Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979); *idem*, A THEORY OF RIGHTS: TOWARD LIMITED GOVERNMENT (Ph.D. Dissertation, U. Chicago, 1979); Frank Van Dun, *Economics and the Limits of Value-Free Science*, REASON PAPERS No. 11 (Spring 1986), p. 17; *idem*, *On the Philosophy of Argument and the Logic of Common Morality*, in ARGUMENTATION: APPROACHES TO THEORY FORMATION 281 (Amsterdam: John Benjamins, 1982); Paul G. Chevigny, *Philosophy of Language and Free Expression*, 55 N. Y. U. L. REV. 157 (1980); Michael Martin, *On a New Argument for Freedom of Speech*, 57 N. Y. U. L. REV. 906 (1982); Paul G. Chevigny, *The Dialogic Right of Free Expression: A Reply to Michael Martin*, 57 N. Y. U. L. REV. 920 (1982); and Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L. J. 1059 (1992). For other interesting and related articles, see Tibor R. Machan, *Individualism and Political Dialogue*, POZNAN STUDIES IN PHIL. (forthcoming); Jeremy Shearmur, *Habermas: A Critical Approach*, 2 CRIT. REV. 39 (1988); *idem*, *From Dialogue Rights to Property Rights*, 4 CRIT REV. 106 (1990); and Douglas B. Rasmussen, *Political Legitimacy and Discourse Ethics*, 32 INT'L PHIL. Q. 17 (1992).

¹⁸ I have had more than once 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 an opponent, although he is clearly wrong, there is little one can do other than try to point out how absurd the opponent's position is. 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 16, at 11-12 (discussing when to abandon attempts to communicate with stubbornly irrational individuals).

¹⁹ LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 7.0 (D. Pears & B. McGuinness trans. 1961) (1921).

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 (or engages in discussion, discourse, and the like). However, since he is currently arguing, he must necessarily, implicitly hold that he sometimes argues. We would not recognize the contradictory claims as permissible in the argument, because contradictions are untrue. He 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 (i.e., possibly true) position, he would thus have to renounce his first claim, that he never argues.

Alternatively, if we were to argue with someone so incoherent as to claim that he does not believe that arguing is possible despite his 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 admit it), still, it cannot be the case that argumentation is impossible if someone is indeed arguing. Thus, if someone asserts that argumentation is impossible, this assertion contradicts the undeniable presupposition of argumentation—that argumentation *is* possible. His proposition is untrue on its face, for it contradicts the undeniably true presupposition of proposition-making as such. Again, then, he would be estopped from asserting such a claim, since it is not even possibly true.

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, an arguer is estopped from asserting one thing if it contradicts something else that he necessarily maintains to be true, or if it contradicts something that is necessarily true because it is a presupposition of discourse or, indeed, if it is necessarily true as an undeniable feature of reality. 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, therefore, consistency.

C. Punishing Aggressive Behavior

The conduct of individuals can be divided into two types: (1) coercive or aggressive (i.e., actions that are initiations of force) and (2) non-coercive 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 either as aggressive or nonaggressive.²⁰ Thus, there are two types of behavior for which we might

²⁰ 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 of necessity concerns the use of force. See LUDWIG VON MISES, THE ULTIMATE FOUNDATION OF ECONOMIC SCIENCE: AN ESSAY ON METHOD (Kansas City: Sheed, Andrews and McMeel, 1978), p. 41, *idem*, EPISTEMOLOGICAL PROBLEMS OF ECONOMICS (New York: New York University Press, trans. George Reisman 1981), pp. 87-88, and *idem, supra*

attempt to punish a person: aggressive and non-aggressive.²¹ I will examine each in turn to show that punishment of aggressive behavior is legitimate, and 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 himself (*B*), or his agent, *C*, attempts to punish a purported wrongdoer *A*. The specific identity or nature of the agent *C* is not relevant for our purposes here.²² Suppose that *A* murders *B*, and *B*'s agent *C* convicts and imprisons *A*. Now, if *A* objects to his punishment, he is claiming that *C* ought not treat him this way. Otherwise, he fails to object. The ought is a "strict" one, since *A* claims that *C* *must* not punish him. By such normative talk, *A* claims he has a *right*²³ to not be punished. In order to "object" to his punishment, *A* at the least must necessarily claim that the use of force is *wrong* (so that *C* should therefore not punish *A*).²⁴ However, this claim is blatantly inconsistent with what must be his other position: because he 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 *A*, because of his earlier action, is estopped from claiming that aggression is wrong. (And if he cannot even claim that aggression—the *initiation* of force—is wrong, then he cannot make the subsidiary claim that retaliatory force is wrong.) He cannot assert contradictory claims; he is estopped from doing so. The only way to maintain consistency is to drop one of his claims. If he retains (only) the claim "aggression is proper," then he is failing to object to his imprisonment, and thus the question of justifying the punishment does not arise. By claiming that aggression is proper, he consents

note 16, at Ch. II, §10, pp. 65-66 (explaining that experience can be referred to 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 Part III.D.1, *infra*.

²¹ To be more precise, if we attempt 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 non-aggressive *behavior*, such as speaking or writing, and also non-behavioral categories such as status, race, age, nationality, skin color, and the like.

²² 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 defence agency—or to the state, if government is valid, which need not concern us here.

²³ 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 7, at n9.

²⁴ If a skeptic were to object to the use of moral concepts here (e.g. wrong, should, etc.), it should be noted that it is the criminal, *A*, himself who introduces normative, rights-related terminology when he tries to object to his punishment. A similar point is made by Randy Barnett in a different context. Professor Barnett argues that those who claim that the U.S. 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. Randy E. Barnett, *Getting Normative, the Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMM. 93, 100 (1995). See also *idem*, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. R. 853 (1993).

to his punishment. If, on the other hand, he drops his claim that “aggression is proper” and retains (only) the claim “aggression is wrong,” he indeed could object to his imprisonment; but, as we shall see below, it is impossible for him to drop his 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, evidence by or made manifest in his previous murder. He is estopped from asserting such inconsistent claims. Therefore, if *C* attempts to kill him, he has no grounds for objecting since he cannot now (be heard to say) that such a killing by *C* is “wrong,” “immoral” or “improper.” And if he cannot complain if *C* proposed to kill him, he surely cannot complain if *C* merely imprisons him.²⁵

Thus, we may legitimately apply force to, i.e. punish, a murderer, in response to his crime. Because the essence of rights is their legitimate enforceability, this establishes a right to life, i.e. 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.

D. Potential Defenses by the Aggressor

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

1. *The Concept of Aggression.* First, *A* might claim that our classification of actions as either aggressive or not is invalid. We might be smuggling in a norm or value judgment in 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, which is just the use of force against him, *A* must himself 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 his punishment, for he cannot even be certain what constitutes punishment, and we may proceed to punish him. The moment he objects to this use of force, however, 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, 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 instead 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

²⁵ Although *A* himself may not complain that his imminent execution by *C* would violate his rights, this does not necessarily mean that *C* may legitimately execute murderers, since it is possible that certain procedures or institutes of *C* could arguably endanger and thus violate the rights of innocent third parties. For further discussion, see Kinsella, *supra* note 7, at n10.

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 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.²⁶

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 ”²⁷ Universalizability is thus 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 norm propositions are consistent with the principle of universalizability necessarily presupposed by the arguer in entering the discourse.

The proper way, then, to select the norm that the arguer is asserting is to ensure that it is universalizable. The views that “aggression *by me* is proper” and “aggression by the state, against me, is improper” clearly do not pass this test. The view that “aggression is [or is not] proper” is, by contrast, perfectly universalizable, and is thus the proper form for a norm. An arguer cannot escape the application of estoppel by arbitrarily specializing his otherwise-inconsistent views with liberally-sprinkled “for me only’s.”²⁸

Furthermore, even if *A* denies the validity of the principle of universalizability and maintains that he can particularize his norms, he cannot object if *C* does the same. If he admits that norms may be particularized, *C* may simply act on the particular norm “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; that he has changed his mind since the time when he murdered *B*. Thus, there is no inconsistency, no contradiction, because he does not simultaneously hold both contradictory ideas, and is not estopped from objecting to his imprisonment.

But this is a simple matter to overcome. First, *A* is implicitly claiming that

²⁶ Hoppe, *Socialism & Capitalism*, *supra* note 16, at 131.

²⁷ Hoppe, *Economics & Ethics*, *supra* note 17, at 182.

²⁸ 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 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 16, at 138.

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* need do is administer the punishment, and afterwards assert that all is in the past, that *C*, like *A*, now condemns its prior action, but since it 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. Thus it is that the irrelevance of the mere passage of time cannot be denied by *A*.²⁹ For in order to effectively object to being punished, he must presume that the passage of time does not make a difference to imputing responsibility-incurring actions to individuals.³⁰

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

Third, even if *A* argues that he never did hold the view that “murder is not wrong,” that he murdered despite the fact that he held it to be wrong, *A* still admits that murder is wrong, and that he murdered *B*, and still ends up denouncing his earlier action. Thus he is again estopped from objecting to his 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 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* himself claims to have done.³¹

²⁹ 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 murderer executed, but can conceivably be objected to on the grounds of the danger posed by such a practice to innocent people (*see supra* note 25), 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 and 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 which 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, in this article I also do not consider such questions as the danger of being a judge in one’s own case, as these are separate concerns.

³⁰ For a similar argument by Hoppe regarding why any participant in argument contradicts himself if he denies the validity of the “prior-later” distinction which distinguishes between (prior) homesteaders and (later) latecomers, see Hoppe, *Socialism & Capitalism*, *supra* note 16, at 142-44.

³¹ 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 it will, and if this includes punishing *A*, how can it be blamed? The logic of reciprocity is inescapable. As Rothbard has

Thus, whether *A* currently holds both views, or only one of them, he is still estopped from objecting to his imprisonment.

E. Punishing Nonaggressive Behavior

As seen above, it is punishment of aggression that can be justified, basically because the use of force in response to force cannot sensibly be condemned. Is it ever legitimate to punish someone for nonaggressive 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 he, too, has used force. There is no inconsistency otherwise.

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 *A*, an aggressor, *B* is *not* estopped from objecting, for there is nothing inconsistent or non-universalizable about maintaining both (1) use of force in response to the initiation of force, i.e. retaliatory force, is proper (the implicit claim involved in retaliation against *A*); and (2) use of force not in response to the initiation of force is wrong (the basis for *B*'s objection to his own punishment). *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.³² 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, i.e. *initiatory* force, that estops someone from complaining about force used against him.

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.” These are not inconsistent statements, and the former statement is not 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. Other actions, such as the publishing of a book or pornography, do not involve force or aggression at all, and thus there is no ground for punishing this behavior either, as such a non-aggressor may consistently object to punishment.

F. Property Rights

pointed out, the Thomist philosopher 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” R.P. P HILLIPS, MODERN THOMISTIC PHILOSOPHY (2 vols., Westminster, Md.: Newman Bookshop, 1934-35), II, 36-37, quoted in Rothbard, *Beyond Is and Ought*, LIBERTY, Nov. 1988, p. 44, at p. 45.

³² See Part III.D.2, *supra*.

Thus far the right to punish for initiatory invasions of victims' bodies has been established, which entails 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. 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. This can be illustrated by the following example. Imagine that *A*, a thief, admits that there are rights to self-ownership, but that there is no right to property. But if this is true, we can easily execute *A* simply by depriving him of external property, namely food, air, and/or space in which to exist or move. Clearly, the denial of a person's 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 a person's hands (why not, if there are no property rights?) until he dies. Or it can be done somewhat more indirectly, by infringing upon a person's ability to control and use the external world, which is essential to survival. Such property-deprivation could continue until *A*'s body is severely damaged, implying that physical retaliation in response to a property crime is permissible, or until *A* objected to such treatment, thereby granting the existence of property rights (for this can be the only grounds for his objection to being denied property). Just as one can aggress against another with one's body (e.g., one's fist) or external property (a club or gun), so one's self-ownership rights can be aggressed against by affecting his 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.³³ Anyone engaging in argumentation implicitly accepts the presupposed right of self-ownership of all listeners and even potential listeners, for 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, 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 and 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 things with which no one else had ever done anything before, i.e. the mixing of labor or homesteading; or (2) simply by 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

³³ For further details see the sources cited in note 17, *supra*.

scarce resource, and 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."³⁴ 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."³⁵ For these reasons, whether self-ownership is established by Hoppe's argumentation ethics or by the estoppel theory—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 paper, place property rights and rights in one's body on the same level. Thus it is that 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 Punishment 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 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 (and 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. Aggressive action, by physically interfering with the victim's person, is undesirable because, among other reasons, it can cause pain, or injury, or can interfere with the pursuit of goals in life, or because it simply creates a risky, dangerous situation in which pain or injury or violence is more likely to result. Aggression interferes with one's physical control over one's life, i.e. over one's own body and external property.

Killing someone brings about the most undesirable level of these

³⁴ Hoppe, *Socialism & Capitalism*, *supra* note 16, at 9.

³⁵ *Id.* at 134.

consequences. Merely slapping someone, by contrast, does not, in normal circumstances. A slap has relatively insignificant consequences in all these respects, and 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.

In general, while the universalization principle prevents arbitrary particularization of claims—e.g., 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 a person’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*, the law of retaliation, of eye-for-an-eye³⁶—accompanies any legitimate punishment of an aggressor. “As the injury inflicted, so must be the injury suffered.”³⁷ 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, and consequently the greater the level of punishment that 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. We now further consider 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, although proportionality imposes some limits on the permissible level of retaliation. 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

³⁶ 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, stroke for stroke.” *Exodus* 21:23-25, in THE JERUSALEM BIBLE: READER’S EDITION (Garden City, New York: Doubleday & Company, Inc., 1968). See also *Deuteronomy* 19:21; *Leviticus* 24:17-21.

³⁷ *Leviticus* 24:20, *supra* note 36.

recognize that, for most victims (i.e. those who are not masochists), 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 has thus lost 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 should not be artificially or easily restricted in his range of punishment options, because this would be to further victimize him. The victim did not choose to be made a victim, 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 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, subject to the proportionality requirement.

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. If the victim 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 (e.g. taking property of an aggressor who has beat the victim), the aggressor is clearly estopped from complaining about this, as long as proportionality is satisfied.

The non-equivalence of most violent crimes makes this conclusion clearer. Suppose that *A*, a man, rapes *B*, a woman. *B* would be entitled at least to rape *A* back, 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 thus this alone would give her a right to insist on other forms of punishment. To limit her remedy to having *A* raped would thus 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 addition, in this case there simply is no equivalent. The only remotely similar equivalent is forcible anal rape of *A*, but even this is vastly different from 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 give rise to different consequences for the victim. 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 either (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 due to there being no equivalent punishment, because this lack of the availability of an equivalent punishment is a direct result 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.³⁸

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* may even be a masochist and enjoy being beaten or sodomized, so a literally equal amount of punishment of *A* would not damage *A* as badly as *A* damaged *B*. *A* is also likely used 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. Thus *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.³⁹ 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. (Just how much greater the punishment may be than the original aggression, and how this is

³⁸ For discussion of Jefferson's attempts at devising proportional punishments, see Walter Kaufman, *Retribution and the Ethics of Punishment*, in Barnett & Hagel, eds., *supra* note 3, at 223. For recent examples of judges' attempts at creative punishment to "fit the crime," see Judy Farah, *Crime and Creative Punishment*, WALL STREET J., March 15, 1995, A15; and Andrea Gerlin, *Quirky Sentences Make Bad Guys Squirm*, WALL STREET J., Aug. 4, 1994, 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.

³⁹ Of course, values are subjective, so damage can never be exactly equated. (On the subjective theory of value, see Mises, *Human Action*, *supra* note 16, at 94-97, 200-206, 331-33 *et passim*; MURRAY N. ROTHbard, *1 MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES* (Los Angeles: Nash Publishing, 1962) (2 vols.), pp. 14-17 (ch.I, §5.A).) 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—e.g. 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 automobile collision, see the sections on causation and causal defenses, respectively, in Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973), *Defenses and Subsequent Please in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (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 (force used against *A*) *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 him justifies *no* retaliatory force on his part—which means that *A* is not effectively claiming that he has a right to not be punished (for rights are legitimately enforceable).

determined, is discussed in further detail in Part IV.C, below.)

Similarly, a victim is entitled instead forcibly to take a certain amount or portion of the aggressor's property, if the punishment this would inflict on the aggressor would better satisfy the victim, or if the victim prefers this remedy for any reason at all, including greed, malice, or sadism. Of course, a mixture would be permissible as well. In response to rape, the victim might seize all of the ravisher's \$10,000 estate, 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.

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 than would an equivalent action against the aggressor. Also, as Rothbard explains, a criminal, such as a thief *A*, has not only stolen something from the victim *B*, 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."⁴⁰ 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 caught?). As Kant pointed out, "whoever steals anything makes the property of all insecure."⁴¹

This method of analyzing whether a proposed punishment is proper also makes it clear just why 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 beating).⁴² 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

⁴⁰ Rothbard, *supra* note 15, at 88.

⁴¹ Immanuel Kant, in Ezorsky, ed., *supra* note 3, at 105 (from IMMANUEL KANT, THE PHILOSOPHY OF LAW (trans. W. Hastie, Edinburgh: T.T. Clark, 1887), Part II, pp. 194-98).

⁴² LA. CRIM. CODE §36; B LACK'S LAW DICTIONARY (6th ed. 1990) p. 114 (defining assault); *Mason v. Cohn*, 108 Misc.2d 674, 675, 438 N.Y.S.2d 462, 464 (Sup. Ct. 1981) (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." 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.* at §33. Assault can thus also include an attempted battery (which need not put the victim in a state of apprehension of receiving a battery—e.g. 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.

done to *B*—*A* is estopped from objecting to the propriety of being threatened, i.e. 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* (otherwise it is something like a joke or acting, and *B* is not actually in apprehension of being coerced). *A* was able to put *B* in a state of fear 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 (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, so that he is actually assaulted. Although *A* need not actually use force to assault *B*, there is simply no way for *B* to assault *A* in return without actually having the right to use force against *A*. Because the whole situation is caused by *A*'s action, he is estopped from objecting to the necessity of *B* using force against him.⁴³

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, as was done in the frontier West for the same reason.⁴⁴ (This is one point on which I disagree with Rothbard, however, who argues that "it should be quite clear that, under libertarian law, capital punishment would have to be confined strictly to the crime of murder. For a criminal would only lose his right to life if he had first deprived some victim of that same right. It would not be permissible, then, for a merchant whose bubble-gum had been stolen, to execute the convicted bubble-gum thief."⁴⁵ For one could imagine rare situations where theft of bubble-gum could legitimately be punished by execution, if the theft endangered the life of its owner.⁴⁶)

Aggression can also be in 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 the first \$10,000 is not *punishment* of *A*, but merely the recapture by *B* of his own property. *B* then has the right to take another \$10,000 of *A*'s property, or even a higher amount if the \$10,000

⁴³ Recently the propriety of classifying fraud as a rights-violation under libertarianism's fundamental principles has come under attack. James W. Child, *Can Libertarianism Sustain a Fraud Standard?*, 104 ETHICS 722 (1994). I believe Child is incorrect and, in consonance with the principles developed herein, fraud is indeed a species of theft, although there is not space here to permit treatment of this topic.

⁴⁴ See *People v. Borja*, 32 Cal.App.4th 1390, 1394, 22 Cal.Rptr.2d 307, 309 (1993); *Guido v. Koopman*, 1 Cal.App.4th 837, 842, 2 Cal.Reptr.2d 437, 439 (1992) (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!'" Story told in *People v. Skiles*, 115 Ill.App.3d 816, 827, 450 N.E.2d 1212, 1220 (1983).

⁴⁵ Rothbard, *Ethics*, *supra* note 3, at 85.

⁴⁶ However, it is a separate question (and beyond the scope of this paper) whether the merchant would have a right to kill the bubble-gum thief who, caught in the act, refused to abandon his attempt at theft.

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).⁴⁷ This amount may also be enhanced to take into account other damages such as interest, general costs of crime prevention, and also for putting the victim into a state of fear and uncertainty.⁴⁸ It may also be enhanced to account for the uncertainty of knowing 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 in instances where the thief is penniless, the stolen property spent or destroyed.

Thus, 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 the following section.

C. The Burden of Proof

Theories of punishment are concerned with justifying punishment, with offering decent men who are reluctant to act immorally a reason why they may punish others. This is useful, of course, for offering moral men 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.

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.

⁴⁷ 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. E.g., 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 (\$150). 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 which 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 Barnett & Hagel, eds., *supra* note 3, at 363-64 (quoting STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 127 (2d ed. cnl., Montclair, New Jersey: Patterson Smith Publishing Corp., 1970)). It should be noted that Rothbard's view of restitution and retribution is slightly different from the principles discussed above. See Rothbard, *Ethics*, *supra* note 3, at 86.

⁴⁸ See *supra* note 39 and accompanying text.

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, unless 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.

Similarly with 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, non-armed, non-violent theft does not. But there are indeed gray areas in which it is difficult, if not impossible, to precisely delimit the exact amount of maximum permissible punishment. But again, 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 (e.g. 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.⁴⁹

⁴⁹ 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, and/or by specialists writing treatises on the subject, and the like. 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 (Summer 1995). No doubt litigants in court or equivalent forum, especially the defendant, would hire lawyers to present the best arguments possible in favor of punishment and its permissible bounds. In a society that respected 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 universalizable or particularizable, when the burden of proof 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, which may be countered by a defense, which may be met with a second round of *prima facie* arguments, etc. 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 (crimes), see his articles *A Theory of Strict Liability*, and *Defenses and Subsequent Please in a System of Strict Liability*, *supra* note 39; and *Intentional Harms*, *supra*

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. (I admit 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.) 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 aggressive 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, he should not be penalized further by being forced to administer *lex talionis*. The aggressor must take his victim as he finds him,⁵⁰ 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 non-reciprocal 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

note 5.

⁵⁰ 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 the defendant's negligent action aggravates a preexisting injury or condition, he must compensate the victim for the full extent of his aggravation." *American Motorist Insurance Company v. American Rent-All, Inc.*, 579 So. 2d 429, 433 (La. 1991) (emphasis added).

billionaire 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.

Clearly the ways in which punishment can be administered are rich and various, but all the typically-cited goals of punishment could be accommodated under this view of punishment. 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 proportionately, justice requires that the aggressor be held responsible for the dilemma he has created as well as for the aggression he has committed.

