

ESTOPPEL: A NEW JUSTIFICATION FOR INDIVIDUAL RIGHTS

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1. Introduction.

Add an “e” to the word “stop,” and dress it up a little, and you get “estoppel,” an interesting common-law concept. Estoppel is a principle of equity or justice which is invoked by a judge to prevent, or *estop*, a party from making a certain claim, if the party’s prior actions are in some sense inconsistent with making such a claim, and if another relied on such prior actions to his detriment. For example, suppose your neighbor hires a painter to paint his house, but the painter mistakenly comes to your house and starts painting it. You see him doing this, and realize the mistake the painter has made. But instead of stopping him and telling him of his mistake, you wave at the painter and allow him to finish, hoping to get a free paint job. Later the painter asks you to pay him. You refuse; he sues you for the price of the paint job. As a defense, you claim that you did not have a contract with the painter, which is true. At this point, however, the judge might say that you are estopped from making such a claim (that you did not have a contract), because it is inconsistent with your prior action (of letting the painter continue painting your house), and because the painter in good faith relied on your actions, to his detriment. You “will not be heard” to claim there was no contract. Since you are prevented, estopped, from urging that defense, you will lose

the lawsuit and have to pay the painter. Since you acted as if you did have a contract, you cannot be heard to deny this later on; you are estopped from denying it. 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."¹

This legal concept of estoppel has many other applications,² but the specifics are not relevant here. Although it has historically been used in a legal setting, it harbors some very important political and philosophical ideas, ideas which can be used to delimit and justify a libertarian theory of government.

The heart of the idea behind estoppel is the idea of *consistency*. In the case of legal estoppel, a man in court is told that he will not be heard to make a statement which is flatly inconsistent with his earlier behavior (and which another relied upon). This idea of insisting upon consistency has even more potency in a debate, discussion or argument where a person's claims, to be coherent, must be consistent. By using a philosophical, generalized version of the concept of estoppel, one can make a case for the free society. In general, I want to show how one can "estop" the state from justifying laws against non-aggressive behavior, and how one can estop individual aggressors from arguing against their imprisonment or punishment.

This is effectively equivalent to validating the *nonaggression principle*, which states that no person has the right to aggress against another, that any action whatsoever is permissible as long as it does not involve aggression against others. "Aggression" is defined as the *initiation* of the use or threat of physical violence against the person or property of anyone else."³

Applying estoppel proves:

1. If the state proportionally punishes an aggressor, *his* rights are not violated, and
2. If the state punishes a nonaggressor, his rights are violated; thus,
3. The nonaggression principle is a necessary (but not sufficient)⁴ condition for the validity of any law.

Let us see how.

2. Estoppel and Its Validity.

The estoppel principle is merely a convenient way to apply the requirement of consistency to arguers. Under this principle, a person is *estopped* from making certain claims, statements or arguments if the

claims urged are clearly inconsistent and contradictory. To say a person is estopped from making certain claims means that the claims cannot even possibly be right, because they are contradictory, and thus they should be disregarded; they should not be heard.

The core of the estoppel principle is consistency. Consistency is insisted upon in any argumentative claim, because an argument is an attempt to find the truth; if an arguer need not be consistent, the very activity of argumentation - of truth-finding - cannot even occur. For example, if Mark states that A is true and that not-A is also, *simultaneously*, true, we know immediately that Mark is wrong - that A and not-A cannot both be true. In short, it is impossible for a person to coherently, intelligibly assert, in a discussion or argument, that two contradictory statements are true; it is impossible for his claims 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.

(Rarely will an arguer state that both A and not-A are true. 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. He might be able to remove the inconsistency by dropping one of the claims; but this is not always possible. For example, Andrew might argue that argumentation is impossible; but since he is currently arguing, he must, necessarily, implicitly hold that he is arguing, and that therefore argumentation is possible. He would be estopped from urging these two contradictory claims, one explicit and one implicit, and he could not drop the second claim - that argumentation is possible - for he cannot help but hold this view while engaged in argumentation itself.)

By engaging in argument, one is necessarily trying to arrive at the truth. Since consistency is a necessary condition of discovering truth, any arguer is implicitly accepting the consistency requirement, i.e., the estoppel principle, and would contradict himself if he denied its validity. If my opponent says that inconsistency in claims is not fatal to truth, then he could never claim that my opposing view (that consistency is necessary) is incorrect, because it is "merely" inconsistent with his; thus, he could not deny the truth of my view. But such a position is nonsensical, for my opponent would be claiming that his view (that consistency is unnecessary) and my view (that consistency is necessary) are both true, a blatant contradiction.⁵

Thus any arguer must also accept the validity of the estoppel principle, for it, as explained above, is merely a convenient way to apply the requirement of consistency, which any arguer does and must accept. In effect, any arguer is estopped from denying the validity of

estoppel, because to deny its validity is to deny the necessity of consistency to argumentation, which is itself an inconsistent position.

Estoppel is used in this paper against various types of arguers. It is used against an aggressor objecting to his punishment, and against the state objecting to a nonaggressive prisoner's assertion of his rights. It is also used, implicitly, against anyone who would argue against the validity of estoppel and the results of its application. The result of applying estoppel, as shown below, is the well-known libertarian non-aggression principle. The justification of this rule is significant, for it can be used to justify a libertarian form of government.

3. Applying Estoppel.

The conduct of individuals can be divided into two types: coercive or aggressive (i.e., involving the *initiation* of force) and non-coercive or nonaggressive. This division is purely descriptive. It is unobjectionable, because it does not assume that aggression is invalid, immoral or unjustifiable; it only assumes that (at least some) action can be objectively classified as either aggressive or nonaggressive.⁶

The government acts through the enforcement of laws. Laws are aimed at conduct, and thus can similarly be divided into two types of laws: those that proscribe aggressive behavior, and those that proscribe nonaggressive behavior. Both types of laws will be examined through the estoppel eyepiece.

A. Laws Restricting Aggressive Behavior.

Let us examine the effect of the estoppel principle on laws against aggression. The clearest and most severe instance of aggression is murder; how would an anti-murder law fare? Under such a law, the state uses force of some sort - execution, punishment, imprisonment, monetary fine, etc. against - an individual who has (been determined to have) murdered another. Suppose that John murders Ralph, and the state convicts and imprisons John. Now, if John objects to his punishment, he is claiming that the government should not, ought not, indeed, must not, treat him this way.⁷ By such normative talk John claims he has a *right*⁸ to not be treated this way; he claims that such aggression is *wrong*.⁹ However, this claim is blatantly inconsistent with what *must be* the defendant's other position: since he murdered Ralph, which is clearly an aggression, his actions have indicated that he (also) holds the view that "aggression is *not* wrong." (See section 3.B below for John's objections to imputing this view to him.)

John, by his earlier action and its necessary implications, is estop-

ped 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. If 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 (in section 3B.1, below), it is *impossible* for him to drop his claim that "aggression is proper."

To restate: If John does not claim that murder is wrong (he *cannot* claim this, for it contradicts his view that murder is *not* wrong, evidenced by his previous murder; he is estopped from asserting such inconsistent claims), then if the state attempts to kill him, he cannot complain about it, because he cannot now (be heard to) say that such a killing by the state is "wrong," "immoral" or "improper." And if he cannot complain if the state proposes to kill him, *a fortiori* he cannot complain if the state merely imprisons him.¹⁰

B. Necessary Claims and Their Proper Form.

1. Changes of Mind and Denunciation of Prior Action.

John could attempt to rebut this application of estoppel, however, 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 Ralph. He is attempting to use the simultaneity requirement, whereby an arguer is estopped from asserting that A is simultaneously true and not true. John is urging that he does not hold both contradictory ideas - aggression is proper; aggression is improper - now, that he is only asserting the latter, and thus is not estopped from objecting to his imprisonment.

But John traps himself by this argument. If John now maintains that the initiation of force is improper, then, by his own current view, his earlier murder was improper, and John necessarily denounces his earlier actions, and is admitting the propriety of punishing him for these actions, which is enough to justify punishing him. (And of course it would also be inconsistent of him to deny what he admits, and he is thus estopped from doing so.) Furthermore, if John denounces his murder of Ralph, he is estopped from objecting to the punishment of that murderer, for to maintain that a murderer *should* not, must not, be punished is inconsistent with a claim that murder should not, must not, occur.¹¹

(Also, finally, John could argue 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, and thus he does not have to change his mind. But even in this case, John admits that murder is wrong, and that he murdered Ralph, 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.)¹²

Thus, whether John currently holds both views, or only one of them, he is still estopped from objecting to his imprisonment. This is why the requirement of simultaneity, which is part of the consistency rule, is satisfied even when a criminal is being punished for his *prior* actions (indeed, it is only for *prior* - or, at least, currently occurring - actions that a criminal *can* be punished). Either he still maintains his previous view (that aggression is not wrong), which is inconsistent with his objection to being punished; or he has changed his mind, in which case he is denouncing his prior actions which is again inconsistent with an objection to being punished and which is also an admission that punishment is proper. Thus, he can be deemed to hold both his current view (that aggression is improper) and his prior view (that aggression is proper) simultaneously, for the result is the same: his objection to being punished will not be heard.

2. The Requirement of Universalizability.

It could also be objected that the estoppel principle is being improperly applied, that John does not, in fact, hold inconsistent views, is not asserting inconsistent claims. Instead of having the contradictory views that "aggression is proper" and "aggression is improper," John could claim to instead hold the different, but not inconsistent, positions that "aggression *by me* is proper" and "aggression by the state, against me, is improper." However, we must recall that John, in objecting to the state's imprisonment of him, is engaging in argument. He is arguing that the state *should not* - for some reason - imprison him; the "should" there shows that he is speaking of a norm. As Hans-Hermann Hoppe states,

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.¹³

Thus the proper way to select the norm which 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, universalizable, and is thus the proper form for a norm.

When applying estoppel, then, the arguer's claims to be examined must be in a universalizable form. He cannot escape the application of estoppel by arbitrarily specializing his otherwise-inconsistent views with liberally-sprinkled "for me only's."¹⁴ Since he is engaged in arguing about norms, the norms asserted must be universalizable.

Thus we can see that applying the principle of estoppel would not hinder the prevention of violent crimes. For 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 new scheme as they are today. All forms of aggression - rape, theft, murder, assault, trespass and even fraud - would still be proper crimes. A rapist, e.g., could only complain about being imprisoned by saying that his rights are being violated by the aggressive imprisonment of him; 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. But should the punishment in some sense be proportional to the crime? This question is addressed in section 3D, after first considering limits on state action against nonaggressors.

C. Laws Restricting Nonaggressive Behavior.

Beside laws that restrict aggressive, coercive behavior, there are laws aimed at ostensibly peaceful behavior: minimum wage laws, anti-pornography laws, anti-drug laws, etc. How would estoppel affect (the validity of) these laws? It can be shown that the government is estopped from enforcing certain laws (more precisely, it is estopped from claiming that it has the right to use force against a given person). But note that, even if we can say that the government is estopped from imprisoning a certain person, say Susan, this of course does not mean that the state is prevented from doing so. The principle of estoppel could, at most, be used to show that the government's justification for imprisoning Susan is inadequate.

Let us take an example. Suppose Susan publishes a patently pornographic magazine in a jurisdiction with anti-pornography laws; the state convicts and imprisons her. Unless Susan wants to go to prison,

she will not consent; she will object. She will assert that the government is violating her rights, by its use of force against her; that the government should not do this.

Now the government may attempt to be clever and use the estoppel argument against her, to estop her from objecting to her imprisonment. However, Susan is not estopped from complaining about her confinement. She is complaining about the aggression against her. Her prior action in question was the publishing of a pornographic magazine. This action is in no way aggressive; thus, Susan has not engaged in any activity, nor necessarily made any claim, which would be inconsistent with her claiming that aggression is wrong. (Perhaps she could be estopped from complaining about other pornographers, but she is here complaining about her being kidnapped by the state.) Thus the state cannot use estoppel to prevent Susan from objecting to her imprisonment, as it may in the murder example above (in section 3A).

If the state imprisons or punishes Susan, it is an aggressor, an initiator of force. By application of the estoppel principle, it can be shown that the state has no right to engage in this activity. For suppose Susan asserts the right to use defensive force against the state, in order to escape her confinement, even though she lacks the ability to mount such an attack. The state could not assert that Susan has no right to use force against it, for it is currently, by its action of imprisoning Susan, "admitting" the validity of aggression.

So Susan may assert that she has a right to attack the government, and the government is estopped from denying her claim. Furthermore, any third party, say, a conservative who supports such anti-pornography legislation, is also estopped from denying her claim. For, by claiming that the government's aggression is valid, he, too, is estopped from denying Susan's assertion of her rights. It would be non-universalizable of him to assert that Susan has no right to attack the government and that the government has a right to attack Susan; it would be inconsistent for him to assert that aggression is wrong (Susan attacking the government) and that aggression is right (the government attacking Susan).

But once it is accepted (for it cannot be denied, by anyone) that Susan has such a *right* to defend herself, it is clear that the state's actions she has a right to defend herself against are thus necessarily rights-invasive. To establish that an action is rights-invasive necessarily implies that it is improper, wrong, immoral, that it *should* not, must not, occur - that the state has no *right* to engage in such activity.

To sum up: if the state imprisons Susan for a non-coercive act, Susan is not estopped from objecting. The state is estopped from denying Susan's (assertion of her) *right* (regardless of her might) to

retaliate, which implies that the state has no right to imprison her.

Thus it can be seen that any law restricting non-coercive behavior is invalid, null and void, and every person, and the state, is estopped from arguing for its legitimacy.¹⁵

D. Proportional Punishment.

The above analysis in section 3A, justifying the punishment of aggressors, does not mean that all concerns about proportionality may be dropped. Someone who commits a relatively minor coercive act is estopped from complaining about - what? Suppose the state attempts to execute a person whose only crime was the theft of a candy bar. He will complain that his right to life is about to be violated; is he estopped from making such a claim? No, because he has done nothing inconsistent with such a claim to justify so estopping him; he does not necessarily claim that aggressive killing is proper. The universalization requirement does not prevent him from reasonably narrowing his implicit claim to "minor aggression, namely candy bar theft, is not wrong" rather than the more severe "aggression is not wrong."

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. E.g., while it is true that the thief has stolen a bar of chocolate, he has not attempted to take a person's life; thus he has never necessarily claimed that "murder is not wrong," so that he is not estopped from asserting that murder is wrong. Since a candy bar thief is not estopped from complaining about his imminent execution, he can also assert his right to retaliate against the government (which is estopped from denying it), which implies that the government has no right to execute him.

If the nature of the punishment exceeds the nature of the aggression, the aggressor is no longer estopped from complaining (about the excess punishment), and is able to argue that he has a right to attack the state. The state is estopped from denying this because, to the extent of the excess punishment, it is itself an aggressor, which implies that the criminal has a right to not be disproportionately punished (following the analysis used in section 3C, above).¹⁶

4. Conclusion.

Principled application of the estoppel principle would result in a free society. For all coercive crimes could be punished (if not by the state,

then at least by victims or their agents or defenders); and all non-coercive "crimes" could not be enforced.

The estoppel principle has been used above both to justify certain types of government laws, and to invalidate others. First, a person who has initiated force is estopped from arguing against his (proportional) punishment, because this is inconsistent with other positions he necessarily holds or can be deemed to hold. Second, a person who has not initiated force may not validly be imprisoned by the state, because he will assert that this is a violation of his rights, which the state is estopped from denying because of its coercive imprisonment of him.

Since an arguer is estopped from denying the validity of estoppel in general, he must accept its validity - and he must also accept the validity of the results of its application. The above framework establishes the validity of the libertarian nonaggression principle, which has been shown by many others to justify a libertarian or at least a minimalist or night-watchman state.¹⁷ Thus, everyone "must" accept the validity of the free society; to urge otherwise is to argue for inconsistency, and to be inconsistent, and to necessarily be wrong.

1. 2 Coke, Littleton 352a, quoted in 28 Am Jur 2d Estoppel and Waiver, §1.

2. E.g., estoppel by deed, equitable estoppel, the "clean hands" rule, promissory estoppel, judicial estoppel, waiver, technical estoppel, estoppel by laches, and estoppel by misrepresentation. See 28 Am Jur 2d Estoppel and Waiver, §1 *et seq.* and 31 C.J.S. Estoppel §1 *et seq.*

In the remainder of this article, "estoppel" refers to the more general, philosophical version of estoppel, as opposed to the traditional theory of *legal* estoppel.

3. Murray N. Rothbard, *For a New Liberty* (New York: Libertarian Review Foundation, 1978), 23.

4. The nonaggression principle, with respect to the imprisoned aggressor, provides an incomplete justification for such laws because they are shown only to not violate the rights of the individual aggressor. But the legitimacy of the state might still be questioned, on other, unrelated grounds, concerning the effect of such laws on innocent third parties. Of course, if it could be shown that no such third parties were aggressed against by the state because of its actions against aggressors, the state, and its anti-aggression laws, *would* be justified. See n10.

5. On the impossibility of denying the law of contradiction, see IV Aristotle, *Metaphysics*, ch. 4 (where, for example, Aristotle states that "it is not possible at the same time to truly say of a thing that it is a man and that it is not a man."); Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Boston: Kluwer Academic Publishers, 1989), p.232 n23.

6. Aggression here is used neutrally and purely descriptively, with no moral connotations. I divide conduct into aggressive and nonaggressive in order to justify the nonaggression principle; but the purpose of my categorization is irrelevant to the validity of my argument. It cannot be a valid criticism of the argument that aggression was chosen to be a classifier of conduct, rather than some other criterion; all that need be

examined is the legitimacy of the argument itself, especially since the division used is morally neutral.

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, and attempt to apply estoppel to it, but to what end? In an attempt to justify some type of utilitarian-oriented welfare state, rather than the libertarian state justified by the nonaggression principle, one could instead divide human conduct into, say, "socially beneficial" and "not socially beneficial" behavior. And such a division in, admittedly, perfectly legitimate, in abstract. However, it is pointless, for estoppel cannot be applied to it, as it can to an aggression/nonaggression division, to result in any sort of useful rule.

For, in the estoppel theory argued below, an action is categorized, purely descriptively, as being either aggressive or not. Claims *about* action are then subjected to the universalization requirement (because claims occur during argumentation where universalization must be applied, as discussed in section 3.B.2, below), which forces such claims to be in a form such that the nonaggression principle results. However, categorizing action as "socially beneficial" or not is not merely descriptive, as is the aggressive/nonaggressive division. Action is aggressive if it is the initiation of force against another, e.g., murder, rape, and battery. But what is "socially beneficial"? A lengthy analysis must occur just to show that the conduct in question has been appropriately classified as "socially beneficial" or not. Indeed, such an analysis would amount to a full blown theory justifying a welfare state, obviating the need for use of the estoppel principle in the first place. But since the nonaggression principle, which rules out a welfare state, is justified by application of estoppel, it is impossible to justify such a welfare state theory. For if the nonaggression principle is justified, its contradiction cannot be true.

7. If John does not hold this view, then he is failing to deny the propriety of his imprisonment; he is effectively consenting to his incarceration, and we do not then need to justify the state's action of imprisoning him. I assume in this paper that an individual's consent justifies action against him.

8. 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." Gewirth, "The Basis and Content of Human Rights", 13 Ga.L.Rev. 1143, 1150 (1979).

9. The fact that John here necessarily claims a right, in that the aggression against him is wrong and ought not occur, is a key difference between the estoppel-based justification of rights and Alan Gewirth's action-based attempt, set out most fully in his book *Reason and Morality* (Chicago: University of Chicago Press, 1978). Gewirth argues that all action is purposive and free, and that an agent (i.e., actor) thus necessarily values freedom and well-being, the prerequisites of successful action. The next step - upon which his entire theory depends - does not follow, however: that because an agent must hold that freedom and well-being are necessary goods to him, he "logically must also hold that he has rights to these . . . features and he implicitly makes a corresponding rights-claim." (*Reason and Morality*, p. 63.)

An agent does not necessarily claim a right to have goods just because he values them; and, furthermore, the requirement of universalizability does not apply to goods valued by an agent. However, when an agent is engaged in the special activity of argumentation, in making norms-claims, he is claiming rights, and the requirement of universalizability does apply. (See section 3B.2) (For criticism of this crucial step in Gewirth's argument, see A. MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981), pp.64-5; H. Veatch, *Human Rights: Fact or Fancy?* (Baton Rouge and London: Louisiana State University Press, 1985), pp.159-60;

H. Veatch's review of *Reason and Morality* in *Ethics* LXXXIX 401-14; and especially H. Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics* (Boston: Kluwer Academic Publishers, 1989), pp.130-4, 234, n6. Professor Hoppe's "argumentation ethic" (see n15 below) similarly is not subject to the criticisms of Gewirth's theory, because it focuses on argumentation, not just action in general.

Moreover, even if Gewirth were correct that actors do implicitly claim a right to certain necessary goods, Roger Pilon's interpretation of the Gewirthian theory, which results in a libertarian theory of government, makes more sense than Gewirth's working of it to yield a justification of the welfare state. See Pilon, "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To", 13 Ga.L.Rev. 1171 (1979). For a concise statement of Gewirth's theory, see Gewirth, "The Basis and Content of Human Rights", 13 Ga.L.Rev. 1143 (1979).

Now although an agent does not necessarily claim a right to have goods the he necessarily values, he *does* make a certain sort of claim when he engages in action. For example, if an actor argues, he is implicitly claiming, among other things, that argumentation is possible. Similarly, but more importantly, when an agent engages in an activity, he cannot also, simultaneously, claim such an action is *wrong* - that he should not and must not take such action - for, otherwise, he would not engage in action that he maintained he must not engage in. During the act of murder, a murderer must implicitly hold that (at least this) "murder is not wrong." (A murderer, objecting to his imprisonment, might claim that he has changed his mind, that he murdered even though he thought it was wrong at the time; but in either case he denounces the murder and thus can be deemed to have held and to still hold the view that "muder is not wrong," for the result is the same. See section 3B.1, below.)

It is when this claim is later brought into an argument, concerning the propriety of punishing the aggressor, that it can be subjected to the criterion of universalizability, *because* the special action of argumentation is now being engaged in. It is the event of an actor later arguing *about* his earlier action that provided the link between the *action*, on the one hand, and rights-claims concerning the action and the necessity of those claims being universalizable, on the other, that is missing in Gewirth's theory, which focuses solely on human action and not on the actor's subsequent arguments concerning it.

10. Although John may not complain that his imminent execution by the state would violate his rights, this does not necessarily mean that the government may execute people. It only means that John's complaint may not be heard. A third party, say, Rhonda, however, may have another legitimate complaint about John's execution, one which does not assert John's rights, one which rather takes other factors, such as the special nature of the state, into account. For example, Rhonda 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 Rhonda, that it amounts to an aggression and a violation of *Rhonda's* rights.

Similarly, after applying estoppel solely to the relationship between the state and a defendant, the exclusionary rule - whereby a court may not use evidence if it is illegally obtained - would fall. ("Evidence" includes illegally seized evidence, but not a torture-induced confession, which is not evidence at all because of its lack of probative value.) For if the defendant actually committed the crime, it cannot violate his rights for the court to discover this fact, even if the evidence was illegally obtained; the defendant would still be estopped from complaining about his punishment. However, a third party can claim that it is too dangerous for government to have a system which gives it incentives to illegally search people, and that the exclusionary rule is required in order to protect innocent people; because lack of an exclusionary rule could amount to an aggression against innocent third parties, the state might be estopped from claiming it has

the right to use illegally seized evidence in a conviction of a defendant.

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 the government's imprisonment of John does not aggress against him does not show that such action does not aggress against others.

11. In an argument where norms - rules of conduct - are being searched for, an arguer cannot hope to convince others of a norm (something that must not occur) which carries absolutely no consequences for its violation. The search for norms would be purposeless otherwise. Visiting sanctions upon those who break such rules is what it means to say that the rule "must" not be broken. Such strict norms by their nature also contemplate sanctions for their violation. Thus if John admits that "murder must not occur" he implicitly admits that it is proper to apply appropriate sanctions to someone - even himself - who breaks that rule. See also the comments of Professor Gewirth in n8, above.

12. See n9, esp. paragraph. 4.

13. Hoppe, p. 131

14. "The rule cannot specify different rights or obligations for different categories of people . . . as such a 'particularistic' rule, naturally, could never, not even in principle, be accepted as a fair rule by everyone" (Hoppe, p. 5). Checked against the universalization principle, "all proposals for valid norms which would specify different rules for different classes of people could be shown to have no legitimate claim of being universally acceptable as fair norms, unless the distinction between different classes of people were such that it implied no discrimination, but could instead be accepted as founded in the nature of things again by everyone" (*Ibid*, 131-132). 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." (*Ibid*, 138)

15. I would like to mention here Hans-Hermann Hoppe's "argumentation ethics," which is similar in some respects to the estoppel theory, as developed most fully in his *A Theory of Socialism and Capitalism: Economics, Politics, and Ethics*, ch. 7 and *passim*. (For further elaboration on Hoppe's thesis, see also his, "The Ultimate Justification of the Private Property Ethic," *Liberty*, September 1988, p. 20; symposium, "Hans-Hermann Hoppe's Argumentation Ethics: Breakthrough or Buncombe?" *Liberty*, November 1988, 44, especially Murray Rothbard's contribution, "Beyond Is And Ought," and Hoppe's response, "Utilitarians and Randians vs. Reason"; D. Osterfeld, "Comment on Hoppe," and Hoppe's response, "Demonstrated Preference and Private Property: A Reply to Professor Osterfeld," *Austrian Economics Newsletter*, no.3 (1988); D. Conway's book review of *A Theory of Socialism and Capitalism*, and Hoppe's response, "On the Indefensibility of Welfare Rights: A Comment on Conway," *Austrian Economics Newsletter*, no. 1 (1990).

Hoppe's main argument is that any person who argues must accept certain principles which must be implicitly acknowledged by any person engaged in the activity of arguing. Hoppe shows that any arguer presupposes that both the arguer and the listeners, indeed all people, have a right to self-ownership, and the right to homestead property. He goes on to show that the necessary implication of the principle of homesteading is *laissez faire*.

I am arguing that the application of the estoppel principle results in the nonaggression

principle, and justifies it. Further, I am arguing that anyone engaging in argumentation must accept the principle of estoppel, and thus must accept this result. Hoppe's theory derives the same nonaggression principle, though in a different manner: he combines the requirement of universalizability with the fact of argumentation, to directly arrive at the nonaggression principle (Hoppe, pp. 131-3). I, on the other hand, use the phenomenon of argumentation to show the validity of estoppel; estoppel and the universalizability requirement are then used to demonstrate the validity of the nonaggression principle. The estoppel theory developed here in no way contradicts the validity of Hoppe's analysis; they are merely different ways of arriving at a similar result.

16. See Murray Rothbard's theory of proportional punishment, in his *The Ethics of Liberty* (Atlantic Highlands, New Jersey: Humanities Press, 1982), ch. 13.

17. For further development of the nonaggression principle and the corresponding individual right to noninterference into a full-blown political theory, see, e.g., Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974); Murray N. Rothbard, *For a New Liberty* (New York: Libertarian Review Foundation, 1978) and *The Ethics of Liberty* (Atlantic Highlands, New Jersey: Humanities Press, 1982).