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Dialogical Estoppel, Erga Omnes Rights, and the Libertarian Theory of Punishment and Self-Defense

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ABSTRACT: The present paper seeks to address the question of whether Stephan Kinsella's theory of dialogical estoppel justifies punishment only when it is meted out by the victim and his agents or also when it is exacted by the third party. Analogously, the paper investigates the scope of the defensive and punitive force: Is the legitimate use of such force limited only to the victim and his agents, or does it also extend to third parties? This paper contends, following Uwe Steinhoff's "Look who's talking" argument, that the offender is estopped in his opposition against the punitive and defensive force not only vis-à-vis the victim and his agents but also vis-à-vis third parties. Since this fact entails—in accordance with the very logic of estoppel—that the offender has forfeited his rights not only in personam (vis-à-vis the victim) but also erga omnes (vis-à-vis third parties), then it also follows that the punitive and defensive force may be inflicted upon him by anybody. These findings might have interesting ramifications for the libertarian theory of punishment and self-defense.

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Stephan Kinsella (1992, 1996a, 1996b, 1997, 2020) famously proposed a rationalistic justification of rights when he argued that an aggressor cannot argumentatively oppose his punishment because such an opposition would enmesh him in a performative contradiction. After all, the aggressor would be verbally opposing an action that he himself had affirmed by his deeds while aggressing against his victim (i.e., an act of using physical force against another). For that reason, he should be estopped from even raising the issue. He cannot put forth a case against punishment without running thereby into practical contradiction. Accordingly, there is no point in even listening to him. His opposition is argumentatively futile, and so punishing him is vindicated. Now, if using force in response to the initiation of violence is justified, then the victim must have had a right not to be aggressed against in the first place. In this way, the existence of the victim's rights has just been demonstrated. This argument is known as "dialogical estoppel" or simply "estoppel."

This paper seeks to focus only on one aspect of the estoppel principle. More specifically, it departs from the major function of the estoppel argument (that is, a justification for the existence of rights) and focuses on the less important—but no less intriguing—question of whether the aggressor is estopped from objecting to his punishment only vis-à-vis the victim and his agents (only in personam) or also vis-à-vis other people (erga omnes). It might seem that the offender is estopped only vis-à-vis the victim. After all, he aggressed only against the victim, so why should he be estopped from opposing a third party's use of physical force against him? Kinsella does not focus much on the question of scope of the estoppel principle in his original presentation of the estoppel argument. In his papers on estoppel, he mostly speaks of the right of the victim (exercised by the victim himself or his representatives) to punish the perpetrator. For example, writes Kinsella (1997, 633): "As has been shown, a victim of aggression may inflict on the aggressor at least the same level or type of aggression previously inflicted by the aggressor," leaving aside the question of whether third parties could also inflict violence on the perpetrator. Only in some places does Kinsella seem to allow for the possibility that a third party (e.g., the state or society) could be the punisher, but even then, it is uncertain whether he is treating this third party as a representative of the victim. Moreover, none other than Murray Rothbard, whom Kinsella follows in many respects, famously paved the way for such a narrow interpretation of the

right of punishment and self-defense when he pointed out, inter alia, that "all rights of punishment derive from the victim's right of self-defense" (1998, 90) and that "in the libertarian society, there are, as we have said, only two parties to a dispute or action at law: the victim, or plaintiff, and the alleged criminal, or defendant" (1998, 85). Hence, the question which this paper addresses can be phrased in the following way: Is the offender estopped from opposing his punishment only in personam, or also erga omnes?

Against the interpretation that the offender is estopped only in personam, Kinsella's original reasoning from performative contradiction can also be extended to cases of erga omnes opposition. For this purpose, this paper employs a series of arguments originating with Uwe Steinhoff's "Look who's talking" account (Steinhoff 2020). As will be shown, the offender is estopped from complaining about the third party's using violence against him because his possible objection, "I did not attack you, so why are you attacking me?," misfires badly against the reply, "But your victim did not attack you either, and yet you attacked him nonetheless." From this and similar arguments will be derived implications that the erga omnes interpretation of the estoppel principle has for the libertarian theory of punishment and self-defense, particularly for its classical, Rothbardian variation. More specifically, when construing punishment and self-defense, the estoppel principle points to a different direction than does the traditional, victim-centered account offered by Rothbard.

The present paper is organized in the following order. First, it explains what the estoppel principle is and why it is not clear whether it applies only in personam or also erga omnes. Then, drawing on Steinhoff's arguments, it develops its main point; namely, that the offender is estopped from objecting to his punishment erga omnes and not only in personam. The paper then derives implications for the libertarian theory of punishment and self-defense, juxtaposing the estoppel principle with the Rothbardian account. Finally, it addresses a few possible objections to this proposal.

ESTOPPEL AND THE QUESTION OF SCOPE

The theory of dialogical estoppel presented by Kinsella refers to a widely used legal principle that blocks ("estops") a party to a legal dispute from presenting a position that conflicts with actions that he has undertaken in the past, particularly when the other

party to the dispute relied on such prior actions to his detriment. In other words, in justifying his actions, A must not invoke the principle *P* if his past actions have given B a legitimate reason to think that he does not believe in *P*. In Kinsella's example (1996a, 61–62), if a painter mistakenly begins to paint A's house instead of B's and A does not correct him but instead behaves as though he ordered his service (e.g., A offers him a beverage, asks him how the job is going and when he is going to finish), A cannot later evade paying him by claiming that he did not contract him to do the painting. While it is true that A did not order such a service from the painter, A deliberately acted as though he had, and he is therefore "estopped" from claiming that he has no obligations to him. The situation would be quite different if, upon seeing that the mistaken painter is starting his job, A immediately informed him that he has mixed up the houses and that he did not order his service. If the painter still carried on with his job, A would not be obligated to pay him, because he would not fall into a contradiction when arguing that he did not order the service.

Kinsella applies this idea of estoppel to the field of the libertarian theory of punishment and makes it the foundation for his two arguments (or accounts), a broader and a narrower one. Within the broader account, estoppel is a justification for individual rights. Here, Kinsella seeks to justify the existence of individuals' rights to their bodies and property by pointing out that somebody who initiates violence against another person cannot, without falling into performative contradiction, object to the symmetrical punishment meted out against him. In other words, he is estopped in his attempt to make such an objection. Since he cannot oppose the use of physical force against him, the justification for the use of such force does not encounter any obstacles. And since the legitimate possibility of using force in defense of one's own or another's property is a defining element of libertarian private property rights, this means that the victim of the attack has such rights. As Kinsella (1997, 613) points out:

> [The argument from estoppel] can be used to justify the libertarian conception of rights because of the reciprocity inherent in the libertarian tenet that force is legitimate only in response to force and because of the consistency that must apply to aggressors trying to argue why they should not be punished. The basic insight behind this theory of rights is that people who initiate force cannot consistently object to being punished. They are dialogically, so to speak,

> "estopped" from asserting the impropriety of the force used to punish them because of their own coercive behavior.

This paper, however, is interested solely in the narrower theory within which estoppel functions as a foundation of the libertarian theory of punishment. Here, the argument from estoppel is intended to provide a proper answer to the question of how one is allowed to punish a person who has violated another individual's rights to exercise full control over his own body and property. The narrower use of estoppel provides justification only for the thesis which had been previously put forward in the libertarian theory; namely, that an individual who violates the rights of another loses his own rights to the extent to which he has violated those of the other (Rothbard 1998, 85–91). Under this principle, the victim (or his representatives) has the right to do to the aggressor what the aggressor did to him: if the victim was beaten, he has the right to beat the aggressor; if he was murdered, his representatives have the right to kill the aggressor; etc. Estoppel theory provides a convincing justification for this principle, showing that the aggressor, who wishes to defend himself against such a response by pointing out that the victim has no right to inflict such punishment on him, can be estopped and his defense declared invalid. Because he himself has initiated violence against an innocent person, he cannot claim to recognize violent actions (i.e., those in which one exercises control over another person's body or property against his or her will) as unjust, immoral, or unjustifiable. In the case of the broader theory, Kinsella—using a few auxiliary assumptions taken mainly from Hans-Hermann Hoppe's work—attempts to show that because the aggressor is estopped from complaining about receiving symmetrical punishment for the aggression he has committed, the victim has both self-ownership and private property rights. This is different from the narrower theory, under which Kinsella argues that the victim has the right to punish the aggressor in a symmetrical way and neither the aggressor nor anybody else has the right to stop the victim from doing so.

But the idea that the aggressor loses his rights to the extent to which he violated the victim's rights seems underdefined, since it is not clear with respect to whom the aggressor loses these rights—whether only with respect to the victim and his representatives (that is, only in personam) or also with respect to other persons (that is, erga omnes). Rothbard favors the former solution. He

emphasizes repeatedly that the whole question of punishment is a matter between the aggressor and the victim, not between the aggressor, the victim, and the rest of the society. But there seems to be no clear justification for this position. Now estoppel may provide such a justification, but one must first ask how this theory addresses the question of the directedness of the rights forfeiture: Does estoppel apply only in personam or also erga omnes? Put another way, if the basic problem in the context of the libertarian forfeiture theory is whether the aggressor forfeits his rights in personam or erga omnes, then, in the context of estoppel, the problem is whether the aggressor is only estopped from arguing that the *victim* has no right to use symmetrical force against him or whether he is also estopped from arguing that *other persons* have no right to use force against him—of course to the extent that he has used aggression against the victim.

In his papers on estoppel, Kinsella does not focus much on this question. For the most part, when he speaks of punishment, he suggests that punishment is within the victim's control. For instance, two of his papers (1996a, 1997) contain a section entitled "The Victim's Options" devoted to the question of how the victim can punish the perpetrator if symmetrical punishment is suboptimal. This seems to suggest that the victim should be the dispenser of punishment, which would imply the in personam interpretation of estoppel. Nevertheless, it should be pointed out that in some places Kinsella uses language that allows for a different interpretation. For example, in one of his papers (1996a, 65), he writes that when a person has murdered somebody, "if *the state* attempts to kill him [the murderer], he cannot complain about it, because he cannot now . . . say that such a killing by the state is 'wrong,' 'immoral' or 'improper'" (emphasis added).

Elsewhere in the text (1996a, 62, 69–70), Kinsella also mentions *the state* or *government* in the context of punishment. In another paper (1997, 611), he uses this type of nonindividualistic language, writing about *society* as a punisher. Nevertheless, it seems that despite these locutions, Kinsella favors the in personam interpretation of estoppel. For example, in the context of the victim's options mentioned above, Kinsella (1996a, 72) writes: "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 strongly supports the in personam interpretation, for it assumes that the victim is the one who can "bargain away" punishment in return for compensation.

Hence, it seems that Kinsella tacitly assumes that estoppel can be used, along Rothbard's lines, only by the victim (or his representatives) and not by third parties. Thus, in his view, estoppel would entail that the aggressor loses his rights in personam, not erga omnes. Moreover, the logic of estoppel itself also seems to support this interpretation. For example, A has beaten up B. B has reported this to the police, because he wants the police to punish A on his behalf, by beating A up and obtaining damages from him. However, before the police have begun to pursue A, C has tracked A down and started beating him up. When A begins to protest that C has no right to beat him up, C claims that he refuses to take this protest into account because A falls into a contradiction: since by beating B up he has demonstrated his belief that aggression is the appropriate or legitimate method of action, he cannot argue—he is estopped in such an attempt—that he has a right not to be beaten up by C. Against this A could still argue—without running into contradiction—that C is not allowed to beat him up, for the only argument that would indeed enmesh him in a contradiction would be to argue that B has no right to beat him up. After all, it was B, not C, who has been beaten up by A. But since A argues that it is C, not B, who has no right to beat him up, it does not seem that he falls into any contradiction. Thus, it seems that the aggressor is estopped in his opposition to punishment only with respect to the victim or his representatives, not erga omnes. This, however, is true only *prima facie*.

ESTOPPEL AND ERGA OMNES RIGHTS

The burden of this section is to demonstrate that the very logic of estoppel allows for extending its applicability so that it should cover not only the cases wherein the aggressor is estopped from protesting his victim's (or the victim's agents') use of violence but also those cases wherein he is estopped from protesting any third party's defensive or punitive measures against him. If it can be shown that the offender indeed lacks a valid complaint about the third party's interference, then this could be generalized to the claim that the offender is estopped not only in personam but also erga omnes. From this, one can conclude that by violating his victim's rights, the offender forfeited his rights erga omnes and not

merely in personam—that is, that he became liable to everybody else and not only to his victim, even if the extent to which he became so liable corresponds only with the extent to which he invaded his victim's rights. After all, according to the logic of estoppel, if the offender cannot validly complain about the third party's use of punitive or defensive force, then such a force is deemed justified. If it is justified, then the third party must have a right to use it. But the third party cannot have such a right unless the offender has forfeited his own right against the third party's use of force. Thus, if the offender cannot validly complain (i.e., if he is dialogically estopped from complaining) about the third party's use of punitive or defensive force, then he must have forfeited his rights not only in personam but also erga omnes.

In other words, if the offender cannot argumentatively oppose the defensive or punitive force inflicted *exclusively* by his victim (or his victim's agents), then the former has forfeited his rights *only* with regard to his victim. More interestingly, however, if the offender is proven to be dialogically estopped from complaining about the infliction of defensive or punitive harm by *any* third party, then this would imply that he has forfeited his relevant rights erga omnes rather than merely in personam. Hence, were the offender to forfeit his relevant rights only in personam, he would not be liable to defensive or punitive measures employed by any other parties. Were any third party in such a case to inflict defensive or punitive harm on the aggressor, the former would thereby wrong the latter. By contrast, if the aggressor were to forfeit his relevant rights erga omnes, then any third party's inflicting corresponding defensive or punitive violence on him would not amount to wronging him. It is helpful also to express the same point with the language of liability. If the aggressor forfeits his relevant rights only in personam, he ipso facto becomes liable to defensive or punitive force inflicted *only* by his victim (or his victim's agents). If, on the other hand, the aggressor forfeits his rights erga omnes, then he becomes liable to defensive or punitive violence exerted by everybody, the victim included.

Still, before drawing *normative* conclusions as to the scope of the offender's right forfeiture, it is advisable to begin by probing the question of the range of persons against whose actions the aggressor can be dialogically estopped from protesting. A paradigm case of an aggressor's inflicting violence on the victim can aid in this analysis.

After the offender simply walks up to the victim and starts beating him up, the latter inflicts defensive violence on the former. The offender makes the following complaint: "Why are you defending yourself? Who are you to fight back?" An appropriate reply on the part of the victim would be: "It is *you* who demonstrated that you deemed acting on the maxim of inflicting violence on people right. Then, how can you complain when *I* am acting on the very same maxim?" Clearly, the offender is dialogically estopped vis-à-vis the victim. Technically speaking, the offender is by all means estopped in personam. That much is indeed acknowledged by Kinsella, who states that "a victim of aggression may inflict on the aggressor at least the same level or type of aggression previously inflicted by the aggressor" (1997, 633). After all, as established above, the aggressor could not argumentatively object to—at the very least—his *victim's* defending himself or punishing him accordingly. For, if the aggressor tried to claim that the victim's fighting back is wrong, what would thereby emerge is inconsistency between the aggressor's prior action (i.e., beating the victim up) and his present claim. Clearly, his present claim that the victim's actual employment of defensive measures is wrong does not cohere with his prior act of aggression. In other words, it is the offender's prior aggression which practically contradicts his present claim. Hence, were the offender to remain consistent, he would be forced to drop his present claim.

Quite incontrovertibly then, estoppel can easily serve to analyze the situations wherein the offender's violent act triggers the victim's defensive reaction. It is then that estoppel seems to yield an intuitively correct conclusion; namely, that the aggressor cannot argumentatively object to the victim's defensive measures. It appears as though, at the very least, the aggressor is estopped in personam. However, this paper submits that the logic of estoppel is applicable more broadly, such that it turns out that the aggressor is estopped not only in personam but also erga omnes. To this end, consider the following thought experiment by Steinhoff, in which he invites his readers to imagine two parties involved in a verbal exchange, with one party having antecedently tried to kill an innocent person and the other coming now to that person's rescue by trying to kill the aggressor. Writes Steinhoff (2020, 92):

> How could someone who tries to kill an Innocent person have a valid complaint . . . against a third person trying to kill him? What could he say: "How dare you kill me? Did I *try* to kill *you*?" The obvious reply of the third person would be: "No, you did not. But this guy you are

> attacking did not try to kill you either—yet, you tried to kill him anyway. So who are you to complain? You are a damn hypocrite." This reply seems entirely appropriate.

Clearly, the offender's behavior demonstrates that he believes that acting on the maxim of attacking persons who do not attack him is right. But if so, then the third person's reply is indeed "appropriate." For if the third party were to try to kill the offender, the former would be acting on the same maxim as did the latter (i.e., that the third party would be trying to kill a person who did not try to kill him in the first place). Therefore, the offender would be dialogically estopped from complaining about the force the third party attempted to employ against him. Or, to put the very same point in Kinsella's own terms, by issuing his claim ("How dare you kill me? Did I *try* to kill *you*?"), the offender is being *pragmatically inconsistent*. His prior action demonstrated that he finds attacking people who are not attacking him *right*. And yet, he presently claims that the other person attacking him is *wrong* simply because he has not attacked that person before. However, the offender undertook an action precisely of this sort to which he now objects. After all, he attacked a person who had not attacked him. Therefore, the only way for the offender to remain *consistent* is to drop his present claim against the third party's defending the victim.

Additionally, what must be taken heed of at this point is the fact that the third party's identity is irrelevant. Thus, if there is a pair of persons A and B such that A is inflicting violence on B, then it seems that A is dialogically estopped from protesting against literally any person coming to B's rescue, even if that person does not act as B's agent. After all, if the offender happens to complain as he did in the above Steinhoffian thought experiment (i.e., "How dare you kill me? Did I *try* to kill *you*?"), it holds true that for every x, x being a person, x may come up with the same retort: "Whoever *I* am, I am acting on the same maxim as you did. I am just trying to kill a person who has not tried to kill me." But if so, then apparently the offender is estopped in his complaint not only in personam against his victim or his agents but also erga omnes.

Having established that the offender is dialogically estopped erga omnes rather than merely in personam, it is time to determine what implications the above fact carries for the directedness of forfeiture of the offender's rights. To this end, it would be beneficial to recall what purpose the doctrine of estoppel serves in the first place.

Estoppel doctrine maintains that whether or not a complainant's right was violated must be considered when attempting to establish the validity or invalidity of a given complaint about the use of punitive or defensive force.

However, whether or not the complainant's right was violated ultimately depends on the directedness (i.e., either in personam or erga omnes) of his right forfeiture effectuated by his prior actions. In a simple example scenario, A beats B up, and B complains: "Why did you beat me? After all, I had not beaten you." If B's complaint is valid, this points to the fact that A has violated B's right against being beaten up. And this, in turn, implies that B did not forfeit his right against being beaten up—at the very least—with regard to A. After all, it is for that reason that A's beating B up counts as right violation. Just to illustrate this point further, suppose—contrary to fact—that in Steinhoff's thought experiment, the offender can *validly* complain about being beaten up by the third party. This would, in final analysis, mean that the offender has not forfeited his right against being treated so with regard to the third party. Or in other words, the offender would not be liable to the third party's defensive or punitive measures consisting in beating him up. For the third party to treat him so would be to wrong him. And conversely, if, as is indeed the case, the offender is estopped from opposing being beaten up by the third party, this means that the third party's beating the offender up does not violate the offender's right. And if so, then by beating up his victim, the offender must have forfeited his right against being beaten up not only with regard to the victim but also with regard to the third party.

The controversy concerning the scope of right forfeiture (i.e., to whom the aggressor forfeits his right) is indeed well captured by Stephen Kershnar (2001, 131–132), who distinguished between the so-called narrow account and the "wide account" of rights forfeiture. The former view holds that a person violating somebody else's rights forfeits his rights *only* against the person whose rights he has violated. Generally, if there is a pair of persons X and Y such that X violates Y's rights, then X forfeits his rights only with regard to Y. By contrast, the "wide account" holds that if X were to violate Y's rights, X would thereby forfeit his rights with regard to everybody. Just to illustrate the latter view, were X to beat up Y, X would thereby forfeit his right not to be beaten up with regard to everybody, which in turn means that then everybody would have

a right to beat X up defensively or punitively.[1] In other words, *nobody's* beating X up defensively or punitively would wrong X. This clearly contrasts with the "narrow account," according to which everybody's but Y's, with Y being X's victim, beating X up would constitute a wrongful act itself.

Now it should be clear that by beating his victim up, the offender violated a right that the victim held erga omnes. After all, it was one of the victim's self-ownership rights. The situation would be quite different if the "offender" reneged on a contract. Then he would violate a right that his creditor held only vis-à-vis him; that is, only in personam. It is yet assumed that the offender beat the victim up, not reneged on a contract, and so violated a right that the victim held erga omnes. However, in and of itself, this fact does not reveal much about the result of the offender's violation. For, as Kershnar points out, there are two conflicting accounts of what should happen as a result. According to the "narrow account," the offender forfeits his rights against defensive or punitive force only in personam, vis-à-vis his victim (and his victim's agents). The curious thing about this account is that even though the offender violated rights that his victim held erga omnes, he forfeits his rights only in personam.

[1] Of course, since the offender forfeited his rights only to the extent to which he violated rights of his victim, such legitimate defensive or punitive beating would have to stay within this limit. Thus, although the offender forfeited his rights against such beating erga omnes, it does not mean that he may be beaten up to this extent as many times as there are persons willing to beat him up. Now it is important to note—as perceptively noted by an anonymous referee of this journal—that this argument faces the following fork. It either predicts that (1) since the perpetrator forfeited his rights erga omnes, then disproportionate punishment could happen, as hundreds of people could punish him seriatim; or it entails, if proportionality functions as a cap on punishment, that (2) the third party who punishes the perpetrator first can deprive the victim of his right to punish or forgive the perpetrator. Since the authors do not wish to target the proportionality principle and otherwise concur with Rothbard that the perpetrator loses his rights—even if he loses them erga omnes—only to the extent that he deprives the victim of his rights, then the second prong of the referee's fork becomes the main problem for this argument, and so the authors address it extensively in the penultimate section. In this place, on the other hand, it is important to underline the point that the erga omnes interpretation does not per se commit its adherents to any disproportionality in punishment. From the fact that the perpetrator forfeited his right—to make the case as straightforward as possible, even if somehow artificial—to five years of freedom erga omnes (i.e., against indefinitely numerous people), it does not follow that he forfeited his right to five years of freedom indefinitely, so that he can now be imprisoned for five years by A, plus five years by B, plus five years by C, and so on and so forth. He can be imprisoned only for five years, and only by one person. On erga omnes rights as entitlements held against indefinitely numerous people, see Kramer (2000, 9–11).

On the other hand, on the "wide account," the match is better. The offender violated rights held erga omnes, and so he forfeits his rights erga omnes too. As argued above, the logic of estoppel supports the latter account. Now it is time to see what consequences this fact has for the libertarian theory of punishment and self-defense.

PUNISHMENT AND SELF-DEFENSE

Having illuminated the link between (1) being dialogically estopped from protesting being subjected to punitive or defensive force and (2) forfeiting a right not to be subjected to such treatment, this paper can now move to the question of whether Rothbardians who happen to subscribe to the logic of estoppel have a reason to revise their view on right forfeiture. Rothbard embraced the following view on right forfeiture (1998, 85):

> In the libertarian society, there are . . . only two parties to a dispute or action at law: the victim, or plaintiff, and the alleged criminal, or defendant. It is the plaintiff that presses charges in the courts against the wrongdoer. In a libertarian world, there would be no crimes against an ill-defined "society," and therefore no such person as a "district attorney" who decides on a charge and then presses those charges against an alleged criminal. The proportionality rule tells us *how much* punishment a plaintiff *may* exact from a convicted wrongdoer, and no more; it imposes the maximum limit on punishment that may be inflicted before the punisher himself becomes a criminal aggressor.

And elsewhere, Rothbard (1998, 85–86) says that

> In libertarian law, there would be no *compulsion* on the plaintiff, or his heirs, to exact this maximum penalty. If the plaintiff or his heir, for example, did not believe in capital punishment, for whatever reason, he could voluntarily forgive the victim [*sic*!] of part or all of his penalty. If he were a Tolstoyan, and was opposed to punishment altogether, he could simply forgive the criminal, and that would be that.

The above two citations provide the rationale behind Rothbard's belief in right forfeiture only in personam. For how could even a "Tolstoyan" effectively forgive the criminal of "part or all of his penalty"? Were the latter to forfeit his rights erga omnes, it would be everybody except for the Tolstoyan—who has by assumption waived his right to punish—that would still have a right to punish the said criminal. But if so, it would not be the case that upon the Tolstoyan's merciful act, "that would be that." Quite the contrary: the criminal would still remain liable to other people's punitive

measures. In other words, suppose that the extent to which the offender forfeited his rights due to invading his victim's rights rendered him liable to imprisonment for a term of five years. If the offender forfeited his rights against imprisonment erga omnes, then everybody would have a right to imprison him, provided that his overall imprisonment did not exceed five years. If in such a situation the victim forgave the offender, that would only mean that the victim waived his right to imprison the offender. By no means would it mean that the victim thereby extinguished other people's right to imprison the offender. Since the offender forfeited his rights erga omnes, he rendered himself liable to everybody. Thus, even if the victim forgave the offender, him being liable erga omnes as he was, other people would still have the right to imprison him. It is therefore clear that since he believes that if the victim were to forgive the criminal, "that would be that," Rothbard cannot coherently believe that the criminal ever forfeited his rights erga omnes. He must instead subscribe to the view that the offender becomes liable only to the victim or his agents. For then, and only then, could the victim indeed forgive the criminal, and "that would be that." Only then by forfeiting his rights exclusively vis-à-vis the victim (i.e., exclusively in personam), the offender would not at the same time be liable to other people, and the victim's mercy would do all the work required from it in Rothbard's judgment.

Having thus established that Rothbard believed in right forfeiture in personam (i.e., the "narrow account"), the investigation concludes by showing what by now should be obvious; namely, that the estoppel principle provides a reason for Rothbardians to reject the idea that the offender loses his right only in personam and instead to embrace the "wide account" of right forfeiture. In the scenario considered above, the offender was estopped from complaining about the force the third party had attempted to employ against him because his complaint—"How dare you kill me? Did I *try* to kill *you*?"—was met with the third party's proper response: "Whoever *I* am, I am acting on the same maxim as you did. I am just trying to kill a person who has not tried to kill me." From this, it followed that the offender did not at that time hold the right against the third party not to be killed, which, in final analysis, meant that the offender must have forfeited this right against the third party. Moreover, as this paper has already established, the identity of the third party does not matter; the offender's complaint would not work against *any* person acting as a third party in the scenario under consideration. And if so,

the offender must have forfeited his rights erga omnes. Therefore, it should seem a pretty straightforward implication of the estoppel principle that Rothbardians who are amenable to this doctrine now indeed have good reason to revise their view on right forfeiture, dropping the "narrow account" in favor of the "wide account."

Moreover, a closer look at the scope of estoppel revealed another reason for which Rothbardians sympathetic to the doctrine of estoppel would be well advised to reconsider their forfeiture theory. Rothbard "advanced the view that the criminal loses his rights to *the extent* that he deprives another of his rights: the theory of proportionality" (1998, 85). Or still, in other words: "We must therefore fall back upon the view that the criterion must be: loss of rights by the criminal *to the same extent* as he has taken away" (1998, 88). However, as pointed out above, there is an oddity in the "narrow account" of rights forfeiture. When applied to Rothbard's theory of proportionality—the foundation of his theory of punishment and self-defense—this oddity plays out in the following way. If it is really the case, as Rothbard says it is, that the offender loses his rights to the extent that he has *taken away* or *deprived* another of his rights and the offender—as supported by the estoppel principle—deprives another of his rights erga omnes, then should the offender not also lose his rights erga omnes and not only in personam? Is there not something disproportionate about the offender being liable only to his victim? Does the logic of the Rothbardian theory of proportionality not really require that the offender, who has taken away the victim's erga omnes rights, also forfeit his own rights erga omnes? At any rate, if the above arguments count for something, it could indeed be worth reconsidering whether under libertarianism really only the victim and his agents may punish the offender and defend the victim against aggression.

VICTIMS, STANDING THREATS, AND CONTRACTS

Undoubtedly, there are problems and implications of this argument that this single paper cannot address. Nevertheless, some of the issues and ramifications might be more important than others. Three major topics should be at least cursorily discussed herein: (1) victims, (2) standing threats, and (3) contracts.[2]

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[2] The authors are grateful to an anonymous referee of this journal for drawing their attention to these problems.

Victims

Some may object to this argument on the grounds that it depreciates the role of victims in the process of serving justice. More specifically, it might be pointed out that if the third party who proportionately punishes the offender has exhausted the punishment that may be meted out to him, then he has deprived the victim of his right to punish or forgive the offender. This creates a problem for these libertarian thinkers who have so far assumed that the victim has a special status in the context of punishment (e.g., Rothbard 1998, 85–86).

However, as an old saying in philosophy has it, one person's *reductio ad absurdum* is another person's valid inference.[3] Indeed, instead of being remedied, it must be stressed that the interpretation presented in this paper attenuates the libertarian thesis granting the victim a special status in the context of punishing the perpetrator. Since the perpetrator has violated erga omnes rights, any person may punish him, rendering the victim no longer the sole dispenser of punishment. This means that the victim's decision to forgive the perpetrator does not affect whether others can still punish the perpetrator.

Rather than create a problem for this argument, the above prediction is exactly what makes it interesting. For one thing, it testifies to the fact that this paper's findings about estoppel are unobvious and thus informative, potentially changing the landscape of the libertarian theory of punishment. Since many libertarians believe that the victim has a special status in the context of punishment—and since estoppel offers an apodictic justification for punishment that is accepted by libertarians—then one might naturally hypothesize that estoppel should offer an apodictic justification for the victim's special status. And yet careful examination of its logic demonstrates, surprisingly, that estoppel justifies erga omnes forfeiture. This uncovers a hidden potential of this theory. Now, since estoppel logic is as robust as it was before, it should not be viewed merely as a problem that yields unobvious predictions such as the attenuation of the victim's status. Quite the contrary. If anything, it should be the other way around. Those libertarians who assume, sometimes without systematic support, that the

[3] Moore (2010, 26).

victim has a special status should perhaps rethink this assumption. Thus, it seems that if the libertarian theory of punishment wants to be based on a systematic justification such as estoppel—and not on unsystematic grounds such as mere intuitions—it should attenuate the special status of the victim. That is the unobvious conclusion of this paper's findings surrounding estoppel logic.

But it would be decidedly too dramatic to stop here. For it has to be emphasized that although the victim's special status as a dispenser of punishment is indeed attenuated by this argument, the victim's special status as the dispenser of restitution or compensation is completely intact. Although the perpetrator has violated the victim's erga omnes rights and should thus be held erga omnes liable to punishment, he has also taken, damaged, or destroyed something that was only the victim's property, be it his resources or body. This he must give back to its rightful owner and to its rightful owner only (i.e., the victim). After all, by stealing or damaging something, the perpetrator divested the victim of his property rights to the stolen thing. Granted, in the case of complete destruction, the victim's property rights might need transforming into liability interests, but they will stay the victim's rights nonetheless. In other words, the perpetrator must repair the wrong caused specifically to the victim by making restitution of his property or paying compensation for what cannot be recovered in its original form. Thus, the victim may meaningfully forgive the perpetrator for his act and also either resign from demanding restitution or compensation or demand a lesser amount of it. Hence, an erga omnes interpretation does not affect the question of restitution and compensation, nor does it render the victim's forgiveness inconsequential as far as this kind of redress is concerned.[4]

By the same token, the fact that the victim could not forgive the perpetrator his deserved punishment—only the restitution or

[4] It should be added that the right to forgive the wrongdoer and waive compensation is not something trivial. Imagine a situation in which a young person, as a result of a reckless act (for example, driving too fast), damages some property of a very wealthy person (for example, a well-maintained lawn or a beautiful old tree). The wealthy person's ability to forgive the wrongdoer and forgo compensation gives the victim a significant influence over the entire situation. By forgiving, for example, he or she may cause the wrongdoer not to have to drop out of college (which would be the case if he had to use the money he had set aside for tuition as compensation), or conversely, by not forgiving, he may cause the victim to suffer the consequences of his reckless actions even more painfully.

compensation—does not preclude an erga omnes interpretation from accommodating the victim's forgiveness at a different stage of the entire process of meting out punishment. For from the fact that the victim could not forgive the perpetrator his deserved punishment, it does not follow that the victim's forgiveness does not count when determining the punishment due. One could argue that exactly because the victim has forgiven the perpetrator, the punishment he deserves is smaller. But once his deserved punishment is settled—possibly taking into account the mitigating circumstance that the victim forgave him—the victim cannot (again) forgive his just deserts, for in this respect the perpetrator is liable erga omnes, not only to the victim.

Moreover, not granting the victim special status in the context of punishment seems to have unequivocally positive effects for the libertarian theory of punishment. Problems are solved which previously arose when assuming that the victim was the sole dispenser of punishment. A troubling corollary of the victim's right to forgiveness would be that certain obviously disturbing actions could go unpunished—and the libertarian community could not do much about it—because the victim, for some reason, chose to forgive the offender. In other words, justice can quite easily go unserved under the in personam interpretation, while on the erga omnes account, it is much better protected. Curiously, Rothbard himself, an adherent of the in personam account, even noticed this. As he pointed out (1998, 86): "A problem might arise in the case of murder—since a victim's heirs might prove less than diligent in pursuing the murderer, or be unduly inclined to let the murderer buy his way out of punishment." But why should the victim's heirs—who ex hypothesi inherited the victim's in personam right to punish—be viewed as *unduly* forgiving? After all, being exclusive holders of this right, they have a power of waiver. There should be nothing undue about exercising it. And yet there is, even for Rothbard. The erga omnes account deals with this problem pretty well because it makes room for the possibility of punishing the perpetrator independently of the victim's will or lack thereof.

There is still another reason why somebody might think that the victim should be a privileged, if not the only, dispenser of punishment. For in practice, the victim could always claim or "pretend" after the crime that he had consented to it, in order to induce the perpetrator to make a restitutory payment. If the victim

does it, who could gainsay it? The ability of the victim to state what his mental state and consent was at the time of the forceful interaction makes him uniquely suited to be the "only" one who can decide whether or not to punish the perpetrator.

The first problem with this objection is that it itself assumes that in such a case the victim's consent would be invalid due to its manifestation only after the crime has actually been committed. Thus, although it might indeed follow that because the victim could so pretend, he would therefore be uniquely suited to be the sole dispenser of punishment, it decidedly does not follow that he *should* be so positioned. Unless the ability to fake consent should determine the distribution of rights, it is key to avoid making this inference. Now the second problem with this objection is that it seems to beg the question against this paper's position. To see why, suppose that the perpetrator has lost his rights erga omnes. If the victim now faked his consent retroactively, he would thereby deceitfully deprive other people of their right to punish the perpetrator. Thus, if for anything, his fake consent should count for obstruction of justice or violation of those people's rights. Then it could hardly serve as an argument for the victim's right to decide about punishment. It can be presented as such an argument only if one assumes away the erga omnes account to start with.

Standing Threats

Critics may claim that some of the problems discussed in this paper may fall under the rubric of "standing threat," a situation in which third parties have the right to use violence against an offender because the offender's past criminal behavior gives them reason to fear being attacked by him in the future. The idea of "standing threat" appears, among others, in Barnett (1998) and Kinsella (1998–1999, 80), with the former pointing out that by violating another's rights, the offender communicates to people in general that he does not respect those rights, and thus people in general have a reason to perceive him as a present threat to which they have a right to respond as part of what Barnett terms "extended self-defense." Writes Barnett (1998, 214):

> The right of self-defense permits the use of force against those who threaten to violate the rights of another. Normal self-defense is permissible when the commission of a rights violation is imminent. Extended self-defense is permissible when a person has communicated,

> by prior rights violations or some other prior conduct proven to a high degree of certainty, a threat to violate rights in the future. Self-defense should be proportionate to the risk posed by the threat.

It is worth noting that the theory of extended self-defense solves the problem that was mentioned earlier, where a victim's forgiving a perpetrator may result in his deed going unpunished, which in turn makes third parties fear that they will fall victim to another attack from the perpetrator. For example, if the victim forgave the rapist, third parties might nevertheless imprison the rapist, believing that the fact that he raped one victim signals that he might want to rape another victim and thus constitutes a "standing threat." While it may be questionable to conclude that a person constitutes a "standing threat" on the grounds that he has violated the rights of others in the past, it is less questionable to conclude that a person constitutes such a threat on the grounds that he is currently violating such rights. For instance, if somebody has just rammed two people with a car, witnesses are warranted in thinking, as he drives away from the scene of the incident, that he may ram more people.

And indeed, the "standing threat" problem is an important issue for the libertarian theory, but it seems to be essentially independent of the problem of punishment. Note that those who would imprison a rapist who has been forgiven by the victim would be doing so as a matter of "extended self-defense"; the moral grounds that would enable them to do so would have nothing to do with punishment. This can be demonstrated by the fact that the same steps could be taken, for example, against a mentally disturbed person whose behavior would constitute a threat to those around him. A mentally ill person is certainly not blameworthy for what he did and so should not be punished, and yet others seem to have the right to defend themselves against his attacks. They can even preemptively limit his rights in certain cases (for example, by locking him up in a closed institution) under extended self-defense framework. In a word, although "standing threat" theory may solve some problems that erga omnes interpretation omits to solve, the two areas seem to be independent of each other: the former being about preventive incapacitation, the latter about punishment proper.

But that is hardly everything. The use of force against somebody due to his being perceived as a standing threat is problematic in that this sort of justification runs counter to the one offered by the doctrine of dialogical estoppel. Consider the situation of person A,

who had once molested a minor, only to commit the same crime later on. Both instances of this crime were adequately punished. Although now A is free, having just served his prison terms, he is saddled with the status of a recidivist. A, who has indeed demonstrated through his prior criminal acts that he deems the use of violence permissible, is therefore considered a standing threat. Suppose further that, given A's status of a standing threat, a law enforcer, B, comes up to A and tries to drag him into prison to detain him further. A opposes, but B argues: "How dare you oppose my use of force against you? Your prior criminal acts adequately demonstrate that you believe the use of violence to be permissible." However, note that, by assumption, A's prior acts of aggression are something for which he already received his just deserts. Hence, it is only A's *status* of a standing threat that seems to count, by B's understanding, as a reason for imprisoning A further. Therefore, it appears as though A may legitimately oppose B by saying: "Fair enough, I did commit the crimes for which I was aptly punished. But now I am a mere *standing* threat, and not a threat *proper*. You, on the other hand, are posing a direct and imminent threat to me. By contrast, I am just a standing threat. There is no imminence or directedness to standing threats at all, so get your hands off me." This reply is conclusive. A would not be estopped from complaining about B's force used against him, for A's being a mere standing threat implies that A is not directly or imminently threatening anybody. On the other hand, B's attempt to imprison A is precisely an instance of a threat proper, with the conditions of imminence and directedness being both satisfied. For all these reasons, the problems discussed in the present paper could not conveniently be subsumed under the standing threat category, and the erga omnes interpretation has not been confused with the standing threat argument.

Contracts

Finally, and most interestingly, the anonymous referee of the journal posed a challenge by suggesting that an erga omnes forfeiture analysis should in principle also work in the context of rights held in personam; that is, basically in the realm of contracts. Specifically, the referee contended that if A breaches a contract with B, then C can breach his contract with A by claiming: "After all, A, you have conceded the point that breaching contracts is permissible, so you are estopped from complaining if I breach my contract with you."

The authors found this challenge leveled at their position simply brilliant. The inference that C can breach his contract with A seems to follow as naturally as the permissibility of other defense for which this paper argued while building on the Steinhoffian thought experiment. Remarking on how close the analogy is, it is helpful to recall that in the original thought experiment by Steinhoff, A, who was beating up B, was estopped from complaining about C's coming to B's rescue, since C's defensively beating up A would amount to doing to A precisely what A was doing to B himself. To wit, by defending B by means of beating up A, C would in effect beat up a person who did not beat him up before. However, this description applies to A's action as well. After all, *ex exemplo*, it is A who inflicted initiatory violence on B. Analogously, it can be shown that the referee's conclusion that C can breach his contract with A is supported by the very logic of estoppel. To demonstrate this logic, one can resort to the dialectical exchange along the original Steinhoffian lines. As stipulated, A breaches a contract with B, and then it is C who breaches his contract with A. Suppose now that A complains: "How dare you breach a contract with me? Did I breach a contract with you?" Here, A seems to be making a fair point. However, C might reply: "Granted, you did not breach a contract with me, but B did not breach a contract with you either, whereas you breached a contract with him. So who are you to complain?" Therefore, seemingly, just as the argument from dialogical estoppel justifies the other defense, so does it justify C's breaching the contract with A.

It seems that there are two mutually nonexclusive replies available to this challenge. The first one is simply to embrace it. That is a brilliant point in its own right, another unobvious prediction of the estoppel theory. It also shows something distinctively libertarian about contracts; namely, that they are a serious thing indeed. For is it not intuitive that even if the debtor, A, paid compensation to the creditor, B, for defaulting on their contract, some sort of punitive measures should befall him anyway? After all, did he not do something wrong? Did he not violate B's right, and does it not go beyond simply making B square afterwards? If now C breaches a similar contract with A, would it not be reasonable to say that A deserved it? Maybe it will teach him a lesson. At any rate, this prediction of estoppel seems to be in accordance with a general libertarian trend to think about contractual rights as being close to property rights and about contractual defaults as being close to torts.

The second reply is in turn to point to a crucial disanalogy here. For it seems that in the contract scenario there is nothing resembling erga omnes forfeiture on the part of the defaulting debtor. After all, it is clear that it is only C, who has entered a contract with A, who may breach this contract. Most crucially, D or E, who do not have contracts with A, quite clearly cannot breach any contract with A. Therefore, by breaching the contract with B, A did not forfeit his right erga omnes—for example, vis-à-vis D or E—but instead did so only with regard to his contractor, C. Thus, it is only C who can do to A precisely what A did to B (i.e., breach a contract with him). By contrast, D or E cannot do so, which follows from the fact that neither D nor E is a contractor of A's. Hence, even though the referee's remark is correct and should be embraced in its own right, it does not directly affect an erga omnes interpretation, or at least so it seems.

CONCLUSIONS

This paper has addressed the scope of the estoppel principle and its implications for the libertarian theory of punishment and self-defense. It argued that the logic of estoppel can be extended to third parties. More specifically, it submitted, following Uwe Steinhoff's arguments, that it is not only against the victim and his agents but also against a third party that the offender is estopped in his complaints about the use of the punitive or defensive force; therefore, the offender forfeits his rights not only vis-à-vis the victim (i.e., in personam) but also erga omnes. After all, if the offender cannot validly complain about the third party's use of force, this party must have a right to use force against him. But the third party can have such a right only if the offender has forfeited his right against this party's use of force. Hence, by violating the victim's rights, the offender must have forfeited his rights not only vis-à-vis the victim but also vis-à-vis the third party (i.e., erga omnes). From this fact, this paper then tried to derive consequences for the libertarian theory of punishment and self-defense. A proper estimation of the scope of the estoppel principle provides a valid reason to extend the forfeiture account underpinning the libertarian theory of punishment and self-defense from its narrow reading to the wide one. If so applied, the wide account would of course lead to a significant reformulation of the libertarian theory of punishment and self-defense, for now it would not only be the victim and his agents but also the third party who could legitimately punish the offender and defend the victim against aggression.

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