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Why Is the Criterion of Estoppel Empty?

Introduction

Kinsella's dialogical estoppel,¹ in a narrow sense, constitutes a rather ingenious attempt at establishing whether there is a right to punish the offender, given his act. Even more, the ambition of the Kinsellian device is to determine how severe punitive measures the victim may employ vis-à-vis his offender, depending on what the latter did to the former. Just to illustrate the point, if person *A* breaks person *B*'s arm, then if, in his turn, *B* tries to break *A*'s arm, *A* is apparently estopped from complaining about the forthcoming action since it is *A* himself that already demonstrated the belief that breaking people's arms is per-

¹ We do remain aware that Kinsella's estoppel is significantly different from the mainstream understanding of the doctrine of estoppel. However, not to allow our prose to become tedious, in this essay, we are going to use the word "estoppel" or "dialogical estoppel" instead of the more cumbersome "Kinsella's dialogical estoppel" or "Kinsella's estoppel" for that matter.

missible. Therefore, if *A* were to complain about *B*'s breaking his arm, *A* would be caught up in a performative contradiction. Loosely speaking, there would appear a clash between the moral belief (i.e., that breaking people's arms is permissible) *A* demonstrated by his action and his complaint to the effect that *B* may not, in his turn, break *A*'s arm. Or, technically speaking, a relation of contradiction would hold between the moral belief evidenced by *A*'s prior act and his belief manifested in his subsequent complaint. To wit, were *A* to complain about *B*'s breaking his arm, this would commit him to holding a belief (i.e., that breaking people's arms is impermissible), the validity of which he himself denied by his prior act of breaking *B*'s arm.

Now, instead of putting the words in Kinsella's mouth, let us pick up a quote which straightforwardly represent his theory. For instance, says Kinsella:

(1) [A] nonaggressive use of force, such as retaliation against aggression, cannot justly be punished. If someone were to attempt to punish *B* for retaliating against *A*, an aggressor, *B* is *not* estopped from objecting, for there is nothing inconsistent or non-universalizable about maintaining both (1) use of force in response to the initiation of force, i.e. retaliatory force, is proper (the implicit claim involved in the retaliation against *A*); and (2) use of force not in response to the initiation of force is wrong (the basis for *B*'s objection to his own punishment).²

However, what is noteworthy at this point is that a diametrically different conclusion seems to follow equally well from the doctrine of dialogical estoppel. To prove it, let us provide the following variation (1') on the above-cited reasoning. Consider the following passage wherein the deviations from the excerpt from Kinsella cited above are marked in bold.

(1') **Aggressive** use of force cannot justly be punished. If someone were to attempt to punish *B* for retaliating against *A*, an aggressor, *B* is **not** estopped from objecting, for there is nothing inconsistent or non-universalizable about maintaining both (1) use of force in response to the initiation of force, i.e. retaliatory force, is **improper**; and (2) use of force **not** in response to the initiation of force is wrong (the basis for *B*'s objection to his own punishment).

Hence, it seems that the very logic of estoppel supports not only Kinsella's claim (1) to the effect that "the retaliation against aggression can-

² Stephan Kinsella, "Punishment and Proportionality: The Estoppel Approach", *Journal of Libertarian Studies* 12 (1996a): 62.

not justly be punished” but also a diametrically opposite claim (1’), that is the one having that aggressive use of force cannot justly be punished. And crucially, it must be noted that if what stems from the application of the doctrine of dialogical estoppel are two contradictory conclusions, then the criterion of dialogical estoppel should be jettisoned as empty. For if it were to transpire that dialogical estoppel predicts that for any action performed by the offender vis-à-vis his victim, (1) the victim may punish him accordingly just as well as that (2) he may not do so, then given the contradictory nature of (1) and (2), estoppel is powerless to ground the victim’s right to punish the offender. Estoppel would then fail to give us any decisive reason to punish rather than not to punish the offender. If so, estoppel could not even be ranked as an action-guiding principle. Even worse, if it indeed could easily predict two contradictory courses of action, it would itself be incoherent.

The present paper proceeds as follows. Section 2 provides an exposition of Kinsella’s dialogical estoppel. Section 3 identifies the reason why estoppel is powerless to establish the victim’s right to punish the offender. The reason consists in the realization that the offender’s action may in principle exemplify infinitely many maxims or moral beliefs on which the offender can act. Section 4 considers a plethora of the offender’s maxims and shows that Kinsella’s requirement of universalization is able to exclude only some of them. Section 5 preempts three possible rejoinders, with the critical one having it that a description of a maxim may only contain the elements which are *morally relevant*. Section 6 concludes.

Kinsella’s dialogical estoppel

The dialogical estoppel theory proposed by Kinsella³ has two versions: a broad one and a narrow one. The purpose of the broad one is to justify libertarian rights *per se*, while the narrow version is designed with the aim of justifying the libertarian theory of punishment.

³ Stephan Kinsella, “Estoppel: A New Justification For Individual Rights”, *Reason Papers* 17 (1992): 61–94; Kinsella, “Punishment and Proportionality: The Estoppel Approach”: 51–73; Stephan Kinsella, “New Rationalist Directions in Libertarian Rights Theory”, *Journal of Libertarian Studies* 12 (1996): 313–326; Stephan Kinsella, “A Libertarian Theory of Punishment and Rights”, *Loyola of Los Angeles Law Review* 30 (1997): 607–645; Stephan Kinsella, “Dialogical Arguments for Libertarian Rights”, in: *The Dialectics of Liberty*, ed. Roger E. Bissell et al. (Lanham: Lexington Books, 2020), 91–106.

Both versions of the theory refer to a well-known legal principle of estoppel. This principle, in Kinsella's words: "prevents or precludes someone from making a legal claim that is inconsistent with prior conduct if some other person has changed position detrimentally in reliance on the prior conduct".⁴ In other words, in justifying his actions, *A* cannot (he is estopped from doing so) invoke the principle *X* if his past actions – the ones which are a matter of dispute – gave the other party a legitimate reason to think that he does not believe in *X*. Kinsella⁵ illustrates this problem with an example of a painter who, as a result of a mistake, started painting the wrong house. If the owner of that house, instead of correcting the painter for his mistake, had acted as if he had actually ordered the painting (e.g., asked him how the job was going, offered him a drink), he could not have later tried to evade paying the painter, arguing that, after all, he had not ordered the service. Although it is true, that he had not ordered the service, his behavior deliberately contributed to the painter's belief that the owner had ordered the service. Note that the situation would have been different if the homeowner had immediately informed the painter that he had not ordered the painting of the house. If, in that case, the painter had painted the house anyway, the owner would not have been obliged to pay him: for he would not have fallen into the contradiction claiming that he had not ordered any service.

Kinsella uses the principle of estoppel – the imperative of consistency between our actions and the principles we invoke to justify them – to justify libertarian theory of punishment on the one hand, and libertarian theory of rights on the other hand.

The libertarian theory of punishment posits that the victim of violence has the right to do to the perpetrator what the perpetrator did to him or her. This rule was proposed among others by Rothbard who suggested that an individual who violated the rights of another individual should lose their rights (in fact, he or she forfeits these rights himself/herself) to the extent that he/she violated them.⁶ But Rothbard never presented any rational argument for this *dictum*, apparently deeming it as self-evident. Kinsella's theory of dialogical estoppel offers an ingenious way of justifying this theory of punishment rule. By initiating violence against the victim, the perpetrator forfeits his right to be free from violence (to the extent that he has violated the victim's rights). This is because – accord-

⁴ Kinsella, "A Libertarian Theory of Punishment and Rights": 612.

⁵ Kinsella, "Punishment and Proportionality: The Estoppel Approach": 61–62.

⁶ Murray Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), 85, 88, 91.

ing to the doctrine of estoppel – the perpetrator would be falling into a contradiction if he claimed that the victim has no right to use violence against him. Since he initiated the violence himself (which means that he considers violence a proper method of dealing with human relations), how come he now protests when the victim wants to use violence against him? An aggressor who wishes to defend himself against punishment by arguing that the victim (or his representatives) have no right to inflict such punishment on him will be “estopped” from making such a claim and his argument will be considered invalid.

Kinsella also uses estoppel theory to argue for justification of libertarian rights *per se*. Since the essence of the libertarian right of self-ownership is the ability to justifiably use force to enforce this right, it follows that the victim of an attack has libertarian rights of self-ownership; since the victim has the right to punish the perpetrator of the aggression, this implies that the victim has the right to be free from aggression. Kinsella also extrapolates (drawing profusely from Herman-Hans Hoppe’s work) this argument to property rights over external resources, and, as a consequence, recognizes that individuals have both the right to freely manage their bodies and their property.⁷

In the case of the broad theory, Kinsella argues (more ambitiously, but less cogently) that because the aggressor is estopped from resisting symmetrical punishment for aggression, every individual has the right to be free from aggression; in the case of the narrow theory, Kinsella argues (quite convincingly at first glance) not that the victim has the right to be free from aggression, but that the victim has the right to punish the perpetrator symmetrically (neither the perpetrator nor anyone else has the right to stop the victim from inflicting such symmetrical punishment). In this text, we will be interested solely in the narrow theory, although all further findings also apply – *a fortiori* – to the broad theory.

Many-to-one relationship between maxims and a given act

Having presented the doctrine of estoppel, it is time to illuminate a decisive reason why estoppel is powerless to establish the victim’s right to punish the offender. The reason is that a relation holding between a given act and a maxim (or a moral belief) it exemplifies is of one-

⁷ For a recent critique of estoppel as a justification of libertarian rights see: Łukasz Dominiak, “Libertarianizm, uprawnienia naturalne i argument estopelu”, *Politeja* 5(92) (2024): 161–179.

to-many nature.⁸ Now, to illuminate why it is indeed so, consider the Parfitian⁹ imaginary scenario wherein a person performs a particular act of “wrongly steal[ing] some wallet from some woman dressed in white who is eating strawberries while reading the last page of Spinoza’s *Ethics*”. Let us now represent the thief as *A* and *A*’s victim, the lady dressed in white reading Spinoza, as *B*. Suppose that, having recovered her stolen property, the wallet, *B* tries to punish *A* by taking his wallet. However, *A* opposes: “How dare you take my wallet? When I stole your wallet, I was acting on the maxim that ‘stealing wallets from women is permissible’ and I am a man, so you do not have a right to punish me”. And indeed, why should *A* be estopped from opposing being punished if *B*’s punishment (i.e., taking a book from a *man* is permissible) were to exemplify a different maxim to the one apparently demonstrated by *A*’s prior action? Given this, would anything change if *A* were to be a woman rather than a man? If *A* were truly acting on the maxim ‘stealing wallets from women is permissible’, then *B*’s taking *A*’s book would indeed constitute a legitimate punitive measure. However, suppose that *A*, now a lady, were acting on the maxim ‘stealing wallets from women dressed in white is legitimate’. Therefore, it might be the case that if *B* tries to punish *A* by taking her wallet, *A* opposes: “I was acting on the

⁸ In truth, what stands on the ‘many’ side of the many-to-one relationship under consideration can be treated as a mere place-holder for such diverse entities as maxims, moral principles an agent is committed to or actions under intentional descriptions. It seems to us that our argument from many-to-one sort of relationship is damaging to estoppel, irrespective of what fills the relatum on the ‘many’ side. If a particular act-token performed by the offender falls into the category of an action under intentional description, then the offender would be estopped from complaining about the victim’s doing to him what the former *intended* to do. On the other hand, a given act might exemplify infinitely many moral beliefs. In fact, Kinsella (Kinsella, “Punishment and Proportionality: The Estoppel Approach”: 62) uses the word maxim, while apparently meaning a moral belief demonstrated by the agent’s prior act: “*B* can easily show that the maxim of his action is “the use of force against an aggressor is legitimate”, which does not contradict “the use of force against nonaggressors is illegitimate”.” It is for this reason that in the course of our argumentation, we would fill the ‘many’ relatum with maxims as understood by Kinsella. Incidentally, for the reading of maxims – in the Kantian context – as basically identified with actions under intentional description, see Derek Parfit, *On What Matters*, Vol. 1 (Oxford: Oxford University Press, 2011); Onora O’Neill, *Acting on Principle. An Essay on Kantian Ethics* (Cambridge: Cambridge University Press, 2013). On actions under intentional descriptions, see Donald Davidson, *Essays on Actions and Events* (Oxford: Clarendon Press, 1980).

⁹ Parfit, *On What Matters*, 289.

maxim 'stealing wallets from women dressed in white is legitimate' and your taking of my wallet would be to take one from a woman dressed *in black*. I never demonstrated that taking wallets from women dressed in black is permissible, so why should you punish me now?" The point should be clear by now. At the extreme, *A* might claim that he was acting on a highly specific maxim 'stealing some wallet from some woman dressed in white who is eating strawberries while reading the last page of Spinoza's *Ethics* is permissible'. This would effectively block *A*'s victim's infliction of punishment, as it verges on the impossible that *B*'s punitive measures would reduce to taking some wallet from some woman dressed in white accompanied with all the details figuring in *A*'s highly specific maxim. Generalizing, it is clearly the case that *any* particular act instantiates infinitely many maxims, with the maxims varying from highly general to highly specific ones.

At this point, one possible objection should be addressed, for it might be argued that the agent's insistence that a maxim guiding his prior act was such and such is simply a mere exercise in opportunism. After all, it is precisely because any particular act-token can exemplify infinitely many maxims that the agent can tailor his apparent maxim in such a way as to avoid punishment.

However, as Parfit put it, "[w]hen we describe someone's maxim, [...], we should not include any details whose absence would have made no difference to this person's decision to do whatever he is doing".¹⁰ And O'Neill concurs, while identifying maxims with intentions. This author says:

A maxim is a principle which, [...], expresses a determination of the power of choice. To say that an agent's power of choice is determined is simply to say that he intends to do a specific sort of act or pursue a specific end in some situation. If an agent has a maxim 'To do A if B', then he intends to do A if B.¹¹

Therefore, coming back to the original Parfitian scenario, the thief, *A*, might *sincerely* claim that he was acting on, say, the maxim M_1 the content of which is 'stealing wallets from women dressed in white is permissible'. If so, then following O'Neill and Parfit, we should conclude that each element figuring in the description of maxim is such that its absence would make a difference to the agent's behavior. This, in turn, means

¹⁰ Parfit, *On What Matters*, 289–290.

¹¹ O'Neill, *Acting on Principle*, 106.

that if it was really M_1 that guided A 's action, then it is really the case that had A 's victim been dressed in any other color than white, A would not have been driven to theft. By the same token, if it were indeed M_1 that guided A 's action, A would have not committed a theft if his victim had been a man rather than a woman. Concluding, it is the truth of a series of *counterfactuals* that determine which maxim guided the agent's *actual* behavior rather than the agent's mere opportunistic assertion.¹²

Having thus illuminated the relationship between maxims and a particular act-token, let us consider a series of thought experiments, which will enable us to test whether Kinsella's estoppel even coupled with his universalizability requirement is able to take the sting out of our objection or not.

Testing Kinsella's estoppel

Suppose, person A beats person B up. Now, B tries to exact punishment by beating A in return. However, A opposes by saying: "Why should you beat me up? When I inflicted violence on you, I was acting on the maxim M_2 : 'Inflicting violence by *me* is permissible'. And this is coherent with me now opposing your attempt at punishing me". And indeed, if the *agent position* in a maxim were to be filled with indexicals such as *I* or *you* or with proper names, this would effectively rule out any punishment exacted by other parties than the agents identified by the said expressions. As we saw, the above-considered maxim was precisely the one that rendered the infliction of violence permissible for *one person only*; viz., for A who actually beat up B .

Does such a maxim weigh significantly against Kinsella's estoppel? We can imagine that the objection against such maxims might be that they are merely apparent ones. That is, such "maxims" cannot be in fact ranked as maxims by definition. For a critic might claim that nothing can count as a maxim unless it specifies agents, at least *via* indefinite descriptions (i.e., agents with such and such properties) or *via* universal quantification (i.e., *all* agents). To this effect, let us now quote Kinsella:

¹² It might be retorted at this point that identifying the agent's action *under intentional description* is larger than life. However, this is precisely what law tries to achieve. After all, there are *specific intent crimes* such as, say, theft, larceny, or embezzlement. That is, the agent would not be accused of such crimes were he not to *intend* to take somebody else's property. Given that, it is the business of law to probe the intentional states of agents committing at least such crimes.

The proper way, [...], to select the norm that the arguer is asserting is to ensure that it is universalizable. The views that "aggression *by me* is proper" and "aggression by the state, against me, is improper" clearly do not pass this test. The view that "aggression is [or is not] proper" is, by contrast, perfectly universalizable, and is thus the proper form for a norm. An arguer cannot escape the application of estoppel by arbitrarily specializing his otherwise inconsistent views with liberally-sprinkled "for me only's".¹³

Clearly then, the dialogical estoppel coupled with universalizability, which Kinsella takes to be a formal requirement that a norm must meet to count as a norm in the first place, deals with M_2 . B would thus not be estopped from beating A back since A 's apparent maxim cannot even be ranked as a norm, as it fails to be universalizable.

Now, suppose person A hits person B on his head. As it happens, A 's initials are R.F., whereas his victim's are P.B. When B inflicts a similar sort of violence on A , A objects in the following fashion: "Why should you hit me in return? I was acting on the maxim M_3 , which has it that the infliction of violence is *only* permissible once people with R.F. initials do so. Your initials do not satisfy this condition, so leave me alone". Certainly, M_3 fares somehow better in terms of its universalizability. After all, M_3 picks the agents *via* an indefinite description rather than by a proper name or a pronoun, as in the case of M_1 . Formally, M_3 might be represented as follows:

M_3 : For *all* x 's, x a person, if x 's initials are R.F., then x 's are permitted to inflict violence on all y 's, y a person if y 's initials are other than R.F.

It is clear to see that M_3 makes use of an indefinite description of agents who are permitted to inflict violence. Namely, M_3 identifies agents within the scope of the maxim *via* the description "having initials R.F.". This indefinite description does not pick up a unique agent. Instead, it applies to Robert Franks, Robert Franken, Richard Fox *et al.* It is in this sense that M_3 avoids the Kinsellian charge of "for me only's". After all, were Richard Flynn to hit Rafael France on his head, while acting on M_3 , the former would be estopped from complaining were the latter to inflict retaliatory violence on the former. However, in response, Kinsella might claim that in a sense M_3 is as particularistic as M_2 , for it is just happenstance that there are other agents whose initials are R.F.¹⁴ It might

¹³ Kinsella, "Punishment and Proportionality: The Estoppel Approach": 59–60.

¹⁴ The objection to the effect that people's initials are morally irrelevant will be tackled in the next section.

well be the case that what is now an indefinite description (i.e., being truly predicated of more than one object) will turn out to be a definite one (i.e., it will pick a unique object). Moreover, Kinsella might say, as he does when citing Hoppe on “particularistic rules”,¹⁵ that even if we are guaranteed to have more than one agent whose initials are R.F., M_3 would assign different permissions to different classes of people. Although we shall argue in the next section that the charge referring to *particularism* of rules smuggles a yet unproved moral conclusion, let us even grant, *arguendo*, that the *only* valid norms are the ones that quantify *universally* over actors. For that reason, let us consider M_4 : ‘For all agents, it is permissible to hit people at high noon’. If A hit B , while acting on M_4 , and were B to try to punish A at 12:01, A would not be estopped from complaining against being hit. After all, there would be no inconsistency between claiming that ‘for all agents, it is permissible to hit people at high noon’, the maxim *ex hypothesi* demonstrated by A ’s prior action, and claiming that B ’s retaliatory violence is impermissible since it occurs at 12:01. Granted, M_4 is particularistic in its temporal dimension (i.e., certain permissions are conferred upon individuals only at 12:00). Yet, M_4 does not fail to quantify universally over agents: it is *all* the persons that are at liberty to hit others at 12:00.

Similarly, we might think of a maxim which equally well quantifies universally over agents but fails to do so over circumstances. To wit, the maxims thereby meant will assume the following logical form: for all x ’s, x an agent, and for all t ’s, t a time, there will be only *some* c ’s, c circumstances, that x will be permitted to inflict violence at t . Less technically, there will be only some special circumstances under which *all* agents and at *all* times would be permitted to inflict violence. Consider M_5 : It is permissible for *all* agents to *always* hit people as long as this sort of violence occurs under an oak tree. Just as M_4 , M_5 quantifies universally over agents and over time. However, it fails to quantify in the same manner over circumstances. That is, it claims that some sort of violence is permissible for everybody and forever but only under highly special circumstances. Given this, wouldn’t Kinsella run into a problem if A were to hit B under an oak tree, whereas B would try to employ similar punitive measures under a larch? First, M_5 , without a doubt, is doubly universal in its form; that is, it binds all the persons and holds

¹⁵ On particularistic rules, see Kinsella, “Punishment and Proportionality: The Estoppel Approach”: 60; Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism: Economics, Politics and Ethics* (Boston: Kluwer Academic Publishers, 1989).

at all times. Second, given that *A* indeed acted on M_5 , the very logic of estoppel does not preclude *A*'s complaint about being hit under a larch. In conclusion, as a last resort, Kinsella could at this point object that neither M_4 nor M_5 count against his theory since neither of them is *fully universal*; namely, each of the two maxims fail to quantify universally under one variable: M_4 quantifies existentially over times, whereas M_5 quantifies existentially over circumstances. Is it possible then to satisfy this requirement of complete universalization and still come up with the maxims that the Kinsellian approach could not handle?

Consider M_6 : It is permissible to use non-punitive violence. First of all, note that M_6 passes the muster formally. When unraveled, M_6 clearly quantifies universally over agents, times and circumstances. Rendered formally, it says:

For all x 's, x a person, and for all t 's, t a time, and for all c 's, c a circumstances, it is permissible for x to inflict non-punitive violence at t under c .

Now suppose *A* kicks *B*, while acting on M_6 . It seems that *A* would not then be estopped from complaining were *B* to kick him in return. After all, *ex hypothesi*, *A* believes that it is only non-punitive violence that is permissible. Had *B* happened to kick *A* first, then, according to *A*, it would have been *A himself* that would have been denied punitive measures. However, as things stand, *A* may argumentatively oppose *B*'s kicking him. The same seems to apply to M_7 : It is permissible to initiate violence but impermissible to retaliate. M_7 is also formally impeccable. It stipulates that for any pair of people, P_1 and P_2 , if P_1 inflicts violence on P_2 first, this act is permissible; yet, if P_2 were to inflict retaliatory violence on P_1 , this would be impermissible. Hence, P_1 having hit P_2 first, would *not* be estopped from opposing the forthcoming violence by P_2 . And this holds for *any* pair of people, any times and any circumstances. We claim that Kinsella's estoppel, even when coupled with his requirement of universalizability, cannot handle M_6 or M_7 .¹⁶

¹⁶ There is another interesting maxim that may effectively bar the victim's punishing the offender. If the victim happens to be a retributivist, then the offender's maxim M_8 : 'Inflict violence only when it brings good consequences on balance' might effectively block the victim's exacting punishment. After all, retributivism is not motivated by good consequences. It is backward-looking as it finds a reason to punish in an antecedent culpable wrongdoing. Given this, the offender, having acted on M_8 , may indeed *consistently* oppose his being punished *retributively*.

Obviating three possible rejoinders

Having made our case, let us consider three possible objections to our criticism. First, it might be claimed that the maxims that, according to us, counted decisively against Kinsella's theory contained *morally irrelevant* elements. For instance, in M_5 : It is permissible for *all* agents to *always* hit people as long as this sort of violence occurs under an oak tree, the *circumstantial* element (i.e., under an oak tree) appears to be morally arbitrary. After all, one might wonder what is so important about oak trees that they should make a moral difference. However, it must be remembered that it is the job of estoppel to establish what is morally relevant or not. After all, by resorting to what the offender is estopped from complaining about, it tries to fix permissible punitive measures employed by his victim. If, on the other hand, we were to know what are morally relevant descriptions of acts, we would not need estoppel in the first place. For example, if we independently knew that the presence of oak trees cannot make a moral difference, whereas the offender's inflicting violence on his victim does, then we would already deem the offender liable to punitive measures of such and such proportions. In other words, to have a morally relevant description of actions is to know which natural properties matter morally and which do not. Therefore, if we could come up with morally relevant descriptions of people's actions, we would be in no need for estoppel in the first place. Moreover, it might be the case that the objection of moral irrelevance appears to be the stronger, the less universalized maxims are. For example, M_6 and M_7 do not seem, at least at first glance, to contain any morally irrelevant elements. As said above, first and foremost, the reason for that might be the fact that both M_6 and M_7 quantify universally over agents, times, and circumstances. In other words, neither of the two maxims make any agents, times, or circumstances special. Perhaps, the only thing that M_7 makes special is the violence that takes precedence in time. That is, for any given pair of persons, it is the *first* occurrence of violence that is privileged, whereas the retaliatory violence is banned. Still, if there is something troubling about the *first* infliction of violence being permitted, why is *first* occupancy a morally relevant fact, that is such a fact that gives rise to a property title in a given resource?¹⁷ In conclusion, the objection resorting to apparent moral irrelevance of some elements

¹⁷ Stephan Kinsella, "Against Intellectual Property", *Journal of Libertarian Studies* 15 (2001).

figuring in the description of maxims misfires as it presupposes what estoppel was designed to establish in the first place.

Let us now consider one more rejoinder to our position. The rejoinder in question tries to salvage the spirit of estoppel. The response we are about to consider readily concedes our point that the relationship between maxims and a given act is indeed of many-to-one nature. However, there is one escape route open to our critic. For he might claim that establishing the real maxim on which the offender was acting is irrelevant. According to the idea in question, the offender would be simply estopped from complaining about the victim's performance of an act of *the type* under which the offender's act was also subsumable. For instance, let us consider our agent *A* beating *B* up, while acting on the maxim M_5 : It is permissible for *all* agents to *always* hit people as long as this sort of violence occurs under an oak tree. Now, when *B* tries to exact punishment, *A* predictably opposes by saying: "Why on earth should you punish me under those circumstances. When I was beating you up, the presence of an oak tree was a relevant factor. That is, in its absence, I would not beat you up at all". However, *B* replies: "Among other things, your act instantiated the *type* of act which is beating up a person. Now, I am going to perform the same *type* of act on you". Granted, this response carries some force. However, as we are about to show, it is double-edged.

Suppose, person *A* trespasses on *B*'s house. Unbeknownst to *B*, who is fast asleep, *A*, for whatever reason, opens *B*'s fridge. Now, *B* suddenly wakes up and notices the intruder. Moreover, he suddenly feels cold and realizes that the feeling is caused by the open fridge. *B* grabs his knife and tries to stab *A* with it. If *A* opposes that his act was merely an act of the unconsented opening of the fridge, *B* might plausibly retort as follows: "Granted, but your act *also* fell into the type of changing the temperature of another person's body. And this is precisely what I am going to do with your body now by stabbing you". However, if this reply is absurd, then so is the whole objection, for there seems to be no principled way of determining which *types* of acts a given act-token falls into are relevant and which are not. If there is no decisive reason why we should prefer one way of describing an act to another, then *B*'s response comes with vengeance. That is, unless one is shown which descriptions of actions (which types of act accommodating a given act-token) are morally relevant, the above reply on the part of *B* retains its force. However, as demonstrated time and time again, estoppel in and of itself – despite its ambitions – is powerless to establish which aspects of the maxims individuals act upon are morally relevant and which are not. On the other hand, our critic might argue at this point yet again that, after all, morally relevant descriptions

of actions might be provided *externally*; viz., we may simply *intuit* which elements of the maxims acted on make a moral difference and which do not. However, such intuitive moral knowledge – if possible – would drain estoppel of its significance and would effectively make it wholly redundant, another unwelcome outcome.

Finally, we would like to pre-empt a possible rejoinder of a rather general nature. It seems to us that our critic might contend that our position is a futile exercise in sweeping skepticism. For our criticism apparently applies not only to Kinsella's estoppel but to *all* ethical theories. Then, indeed, there would be nothing *specific* to Kinsella's estoppel that would merit our special critical scrutiny. However, we submit that such an objection misses the point, as our critical remarks target *a priori* rationalist and formally oriented ethical theories exclusively. And it is only insofar as Kinsella's estoppel shares the properties of the said formal theories *qua* formal theories that the former is problematic. In particular, it is the *a priori* ethical systems based on maxims (or Kantian principles) that suffer from the problem of indeterminacy and thus fall short of being action-guiding, the point acknowledged by Anscombe.¹⁸ Hence, our criticism, far from being an indiscriminate attack against literally all ethical positions, targets *only* those theories which purport to derive substantive moral judgements *via* formal *a priori* reasoning.

Conclusion

The aim of this paper was to demonstrate that Kinsella's estoppel cannot fulfill the task it aspires to fulfill. To wit, it cannot – contrary to its pretenses – establish the victim's right to punish the offender. The reason for our claim is that since Kinsella's estoppel rests on the notion of a *maxim* and since a given act instantiates possibly infinitely many maxims, the offender's particular act always underdetermines the maxim she acted upon. But if so, then the same indeterminacy applies to what the victim, in her turn, is permitted to do to the offender in regard to punishment. Moreover, we showed that Kinsella cannot appeal to external moral intuitions for morally relevant descriptions of maxims, as it is precisely his estoppel that is designed to establish morally relevant elements of the maxims acted upon. Finally, we demonstrated that ours is not a crude and sweeping criticism which would rule out *any* ethical position. After

¹⁸ Gertrude E. M. Anscombe, "Modern Moral Philosophy", *Philosophy* 33 (1958).

all, we do have law and morality. People over generations worked out a large body of law, including – among other things – contract law, tort law, criminal law or what have you. The same applies to morality. Although we have competing moral theories, such as, say, deontology and consequentialism, they often reach the same verdicts as to what we *ought* to do in the end.¹⁹ However, these cited facts cannot serve as *modus tollens* against our position. For we do not claim that there are no reasons (or no theories) that can justify the particular verdicts of substantive morality or particular prohibitions, duties, or permissions of law. Quite the contrary, we do believe that the latter can indeed be grounded in some moral or legal theories. Rather, we submit, that our criticism targets *rationalist a priori* moral theories and since Kinsella's estoppel happens to be one of them, our criticism cannot fail to apply to Kinsella.

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¹⁹ See, e.g., Parfit, *On What Matters*.

Summary

This paper argues – *pace* Kinsella – that dialogical estoppel, the task of which is to justify rights to punish, is an empty criterion. What is the most damaging to the employment of estoppel is that the relation between a given act and a moral belief it demonstrates is one-to-many. That is, a given act might exemplify infinitely many moral principles an agent might be committed to. It is, we posit, this very fact that renders the estoppel criterion empty, for it always remains underdetermined on which moral principle an agent acts. But if so, then we can never know *what* it is that an agent is estopped from complaining. Moreover, we submit that any appeal to *morally* relevant description of the offender's action either begs the question or invokes external moral reasons, which only shows that estoppel in and of itself – notwithstanding Kinsella's pretenses to the contrary – is unable to perform its task.

Keywords: estoppel, indeterminacy, Kinsella, maxims